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# Opening the Barnyard Door: Transparency and the Resurgence of Ag-Gag & Veggie Libel Laws

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# Opening the Barnyard Door: Transparency and the Resurgence of Ag-Gag & Veggie Libel Laws

Nicole E. Negowetti\*

## I. INTRODUCTION

Over the past several decades, as the agricultural system became increasingly industrialized and the steps from farm to plate multiplied,<sup>1</sup> consumers became farther removed from the sources of their food.<sup>2</sup> Until recently, most consumers in America were content to eat their processed, cheap, and filling foods without giving a second thought to how these foods were produced. The tides are changing. Increasingly, consumers are calling for more transparency in the food system.<sup>3</sup> Repulsed by images of animal cruelty and shocked by unsavory food production practices, consumers want the food industry's veil lifted and are demanding changes in food production. The booming success of restaurants such as Chipotle, "the food industry's fastest-rising star,"<sup>4</sup> which serves "naturally-raised" meats and is committed to sourcing "Food with Integrity,"<sup>5</sup> is evidence of this consumer demand for higher quality food.

Undercover activists and outspoken food system critics can be credited with inciting this food revolution. The agricultural industry is waging war on two fronts in response—one aimed at the market and public opinion, and the other at the legislature. In response to falling earnings,

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1. See generally Martha Dragich, *Do You Know What's on Your Plate: The Importance of Regulating the Processes of Food Production*, 28 J. ENVTL. L. & LITIG. 385 (2013).

2. See Susan A. Schneider, *Reconnecting Consumers and Producers: On the Path Toward a Sustainable Food and Agriculture Policy*, 14 DRAKE J. AGRIC. L. 75, 78 (2010).

3. See Elizabeth S. Mitchell, *Honesty Really is the Best Policy: Consumer Demand for Transparency Reaches New Heights*, ADWEEK (Oct. 21, 2013), <http://www.adweek.com/prnewser/honesty-really-is-the-best-policy-consumer-demand-for-transparency-and-honesty-reaches-new-heights/76340>.

4. Sam Frizell, *CMO: Chipotle's Successful Because It's Been 'Very Consistent'*, TIME (July 22, 2014), <http://time.com/3020462/chipotle-earnings-cmo/>.

5. Joe Satran, *Steve Ells, Chipotle Founder, Reflects on McDonald's, GMOs and the First 20 Years of His Chain*, HUFFINGTON POST (July 12, 2013, 5:03 PM), [http://www.huffingtonpost.com/2013/07/12/steve-ells-chipotle-20th-anniversary\\_n\\_3583927.html](http://www.huffingtonpost.com/2013/07/12/steve-ells-chipotle-20th-anniversary_n_3583927.html).

evidence of consumer distrust of “large” companies, and consumer preferences for “natural” foods, “Big-Ag” is attempting to rebrand itself through campaigns which pull back the curtain on the reality of its food production. For example, Alliance for Ranchers and McDonald’s have launched transparency campaigns to “open the dialogue” between consumers and producers.<sup>6</sup> On the other front, there are efforts to silence those exposing the truth behind the industrial food system and “seeking to raise legitimate questions about the safety of our nation’s food supply.”<sup>7</sup> As consumers increasingly call for more information about where their food comes from and how it is produced, there has been a resurgence of “ag-gag” and “veggie libel” laws, which raise significant First Amendment concerns.

Since the 1990s, the agricultural industry has used various pieces of state-level legislation such as “farm protection” and “agriculture disparagement” laws to limit media. Farm protection, or “ag-gag,” laws are crafted to limit access to agriculture facilities, and specifically restrict the use of audio and video recording of working agriculture operations.<sup>8</sup> Agriculture disparagement, or “veggie libel,” laws are designed to limit what media and individuals can say about agriculture products and production practices.<sup>9</sup> Nine states have passed ag-gag laws and thirteen states have veggie libel statutes.<sup>10</sup>

In 1998, Professor Bederman wrote:

Food libel and agricultural disparagement statutes represent a legal attempt to insulate an economic sector from criticism . . . In this respect, they may be strikingly successful in chilling the speech of anyone concerned about the food we eat. . . Scientists and consumer advocates must be able to express their legitimate, even if unproven, concerns. Food libel quells just that type of speech. At bottom, any restriction on speech about the quality and safety of our food is dangerous, unconstitutional, and undemocratic.<sup>11</sup>

Decades later, veggie libel laws are still on the books in several states,<sup>12</sup> and one has recently been invoked in a high-profile lawsuit.<sup>13</sup>

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6. See *infra* Part VII.

7. Michele Simon, *Veggie Libelous: Free Speech at Stake in Oprah Winfrey Trial*, KNIGHT RIDDER NEWSPAPERS (Jan. 1998), available at [http://www.appetiteforprofit.com/docs/veggie\\_libelous.html](http://www.appetiteforprofit.com/docs/veggie_libelous.html).

8. See *infra* Part II.A.

9. See *infra* Part II.B.

10. See *infra* Part II.A–B.

11. David J. Bederman, *Food Libel: Litigating Scientific Uncertainty in a Constitutional Twilight Zone*, 10 DEPAUL BUS. L.J. 191, 231 (1998).

12. See *infra* Part II.B.

In 2011, the *New York Times* editorial board expressed similarly strong opposition to ag-gag laws: “The legislation has only one purpose: to hide factory-farming conditions from a public that is beginning to think seriously about animal rights and the way food is produced. . . . We need to know more about what goes on behind those closed doors, not less.”<sup>14</sup> Since that criticism was written, five states passed ag-gag laws and five bills were introduced in 2015.<sup>15</sup>

This Article discusses the increased call for transparency of the food system by consumers and the resulting resurgence of “ag-gag” and “veggie libel” laws aimed at silencing critics. This Article evaluates the legal measures (enactment of ag-gag and veggie libel laws) and non-legal efforts (marketing and advertising campaigns) in response to those seeking greater transparency in the food system. Although promoting and protecting agriculture is a worthy goal, the means by which the laws attempt to do so violate the First Amendment, which recognizes a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . .”<sup>16</sup> This Article concludes that the controversy surrounding food production is evidence of the significant public interest in “allowing vigorous and open debate about the industry’s practices.”<sup>17</sup> As Professor Ronald K.L. Collins has argued:

As with political expression, public discourse about food needs to be robust in order that diverse and challenging forms of information—from skeptical opinions to “hard science”—may find expression in the marketplace. This model of communication, so vital to our culture, cannot co-exist with laws designed to silence public criticism of food in order to secure a particular industry’s monetary goals. The marketplace of ideas principle malfunctions insofar as the free speech liberties of a community succumb to isolated economic interests.<sup>18</sup>

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13. See Complaint and Jury Demand, *Beef Prods., Inc. v. Am. Broad. Cos., Inc.*, No. CIV12292, 2012 WL 4017340 (S.D. Cir. Ct. Sept. 13, 2012) [hereinafter BPI Complaint].

14. Editorial, *Hiding the Truth About Factory Farms*, N.Y. TIMES (Apr. 26, 2011), [http://www.nytimes.com/2011/04/27/opinion/27wed3.html?\\_r=0](http://www.nytimes.com/2011/04/27/opinion/27wed3.html?_r=0).

15. *Ag Gag: Safeguarding Industry Secrets by Punishing the Messenger*, FOOD INTEGRITY CAMPAIGN, <http://www.foodwhistleblower.org/campaign/ag-gag/> (last visited Feb. 20, 2015). This Article reflects developments through February 20, 2015.

16. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

17. Motion for Summary Judgment at 15, *Animal Legal Defense Fund v. Otter*, No. 1:14-cv-00104 (D. Idaho Nov. 18, 2014) [hereinafter Idaho MSJ].

18. Ronald K.L. Collins, *Free Speech, Food Libel, & the First Amendment . . . in Ohio*, 26 OHIO N.U. L. REV. 1, 1 (2000).

Part II provides an overview of farm protection, or “ag-gag,” and food disparagement, or “veggie libel,” laws. Part III explains that although trespass and fraud are already crimes, and the majority of states have enacted defamation and product disparagement statutes, these laws have been “re-tooled” as “farm protection” or “food disparagement” laws, which operate uniquely in the context of agricultural production. Part IV discusses the purposes of the laws to evaluate the question of whether the agricultural industry requires special protection. Part V presents recent data regarding consumers’ demand for transparency. Part VI evaluates the food industry’s efforts to protect its public image through ag-gag and veggie libel laws. This Part summarizes the extensive legal commentary, which overwhelmingly concludes that these laws cannot pass constitutional muster. Finally, Part VII examines the industry’s re-branding and transparency efforts and concludes that greater, not less, information about food production is necessary to improve the food system, ensure humane treatment of farm animals, meet consumer demand, and truly protect the agriculture industry.

## II. PROTECTING THE AG INDUSTRY: AGRICULTURAL PROTECTION & DISPARAGEMENT ACTS

### A. Ag-Gag Laws

#### 1. Overview of Ag-Gag Laws

In response to break-ins at animal research facilities, the first animal enterprise interference laws were passed in the early 1990s.<sup>19</sup> Approximately twenty-eight states have enacted such laws to protect animal facilities from animal welfare activists.<sup>20</sup> These state animal enterprise interference laws, along with the federal Animal Enterprise Terrorism Act (AETA) of 2006,<sup>21</sup> target physical damage at animal facilities and provide heightened penalties for fraud, trespass, and damage at animal enterprise facilities.<sup>22</sup> The animal enterprise statutes in Kansas,<sup>23</sup> Mon-

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19. Cynthia F. Hodges, *Detailed Discussion of State Animal “Terrorism”/Animal Enterprise Interference Laws*, ANIMAL LEGAL & HIST. CENTER (2011), <https://www.animallaw.info/article/detailed-discussion-state-animal-terrorismanimal-enterprise-interference-laws>.

20. *Id.*

21. *Id.* AETA criminalizes the intentional loss of real or personal property of an animal enterprise. Animal Enterprise Terrorism Act, Pub. L. No. 109-374, 120 Stat. 2652 (2006) (codified at 18 U.S.C. § 43 (2006)).

22. Hodges, *supra* note 19. These statutes typically define animal enterprise facilities to include at least both livestock farms and animal testing facilities. *Id.*

23. KAN. STAT. ANN. § 47-1827 (West, Westlaw through 2015 ch.1).

tana,<sup>24</sup> and North Dakota<sup>25</sup> also criminalized unauthorized filming at animal facilities, thus targeting undercover investigations on agricultural operations. Kansas's statute bans taking photographs or video at an animal facility "with the intent to damage the enterprise conducted at the animal facility."<sup>26</sup> Montana's statute similarly bans photo or video recording in an animal facility with the intent to damage the enterprise and the "intent to commit criminal defamation."<sup>27</sup> In comparison, North Dakota's statute imposes liability for unauthorized use of recording equipment at an animal facility regardless of intent or damages.<sup>28</sup>

Since these laws were passed in the 1990s, "almost thirty states have introduced bills banning or restricting undercover investigations surrounding the abuse of farmed animals."<sup>29</sup> These "ag-gag" statutes, so called for their purpose and effect,<sup>30</sup> have passed in nine states including Missouri,<sup>31</sup> Iowa,<sup>32</sup> Tennessee,<sup>33</sup> Utah,<sup>34</sup> Idaho,<sup>35</sup> and Wyoming.<sup>36</sup> In January 2015, similar bills were introduced in five states.<sup>37</sup>

While all the ag-gag laws are intended to restrict undercover investigations, they take different forms. Generally, the most recent statutes are drafted to include one or more of the following provisions<sup>38</sup>: the ban

24. MONT. CODE ANN. § 81-30-103 (West, Westlaw through 2015 Regular Sess.).

25. N.D. CENT. CODE ANN. § 12.1-21.1-02 (West, Westlaw through 2013 Regular Sess.).

26. KAN. STAT. ANN. § 47-1827(c)(4) (West, Westlaw through 2015 ch.1).

27. MONT. CODE ANN. § 81-30-103(2)(e) (West, Westlaw through 2015 Regular Sess.).

28. N.D. CENT. CODE ANN. § 12.1-21.1-02(6) (West, Westlaw through 2013 Regular Sess.).

29. Michael McFadden, *Exposing Ag-Gag*, FARM FORWARD (Nov. 7, 2014), <http://farmforward.com/2014/11/07/exposing-ag-gag/>. The Idaho Dairymen's Association states that "Idaho may have created a blueprint that could be duplicated in other states and provided momentum for agricultural producers across the country to work towards protecting themselves as well." *2014 Idaho Legislative Update*, IDAHO DAIRYMEN'S ASS'N, <http://www.idahodairymens.org/2014-idaho-legislative-update/> (last visited May 2, 2015).

30. See Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES, Apr. 27, 2011, at A27, *available at* <http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals>.

31. MO. ANN. STAT. § 578.013 (West, Westlaw through 2014 Second Regular Sess.).

32. IOWA CODE ANN. § 717A.3A (West, Westlaw through 2015 Regular Sess.).

33. "[Tennessee] [i]ntroduced legislation in 2013, which was passed by Legislature but vetoed by Governor. [Tennessee] [i]ntroduced legislation again in 2014, which failed." *Ag-Gag Bills at the State Level*, ASPCA, <https://www.aspc.org/fight-cruelty/advocacy-center/ag-gag-whistleblower-suppression-legislation/ag-gag-bills-state-level> (last visited Apr. 1, 2015) [hereinafter *Ag-Gag Bills at the State Level*].

34. UTAH CODE ANN. § 76-6-112(2) (West, Westlaw through 2014 Legis. Sess.).

35. IDAHO CODE ANN. § 18-7042 (West, Westlaw through 2015 ch. 58).

36. Act of Mar. 5, 2015, 2015 Wyo. Sess. Laws Ch. 146 (S.F. 12).

37. Those states include Colorado, Missouri, Montana, Washington, and Wyoming. As of March 2015, Wyoming has passed an ag-gag law. Act of Mar. 5, 2015, 2015 Wyo. Sess. Laws Ch. 146 (S.F. 12). See *Ag Gag: Safeguarding Industry Secrets by Punishing the Messenger*, FOOD INTEGRITY CAMPAIGN, <http://www.foodwhistleblower.org/campaign/ag-gag/> (last visited May 2, 2015); *Ag-Gag Bills at the State Level*, *supra* note 33.

38. *Ag-Gag Bills at the State Level*, *supra* note 33.

of photography/video filming on facility premises (often called bans on “agricultural interference”); the criminalization of securing an agricultural job under fraudulent or false pretenses (“agricultural production facility fraud”);<sup>39</sup> and mandatory reporting of documented abuse within a short time frame.<sup>40</sup>

The influx of ag-gag law proposals across the country has coincided with increased media attention surrounding farming practices exposed by undercover investigations. Undercover investigators and activists often gain access to these facilities by obtaining employment at an agricultural production facility to record and document conditions inside animal farms.<sup>41</sup> Since 1998, animal activists have conducted at least seventy-six undercover investigations at egg, pork, chicken, beef, dairy, deer, duck, turkey, and fish farms across the nation.<sup>42</sup> In Iowa alone, activists have conducted ten such investigations.<sup>42</sup> Just as Upton Sinclair’s vivid imagery of conditions at Chicago slaughterhouses brought food production to the forefront of a national conversation,<sup>43</sup> so too have reports and videos of animal abuse and unsanitary food practices. The aim of these animal protection groups is to reveal and publicize illegal or inhumane treatment towards farm animals and gain public support for more humane practices.<sup>44</sup> Their investigations have revealed major violations of food safety and humane farming practices, prompting action by both the United

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39. IOWA CODE ANN. § 717A.3A (West, Westlaw through 2015 Regular Sess.).

40. MO. ANN. STAT. § 578.013 (West, Westlaw through 2014 Second Regular Sess.) (requiring employees of animal agricultural operations that videotape what they suspect is animal abuse to provide the recording to a law enforcement agency within twenty-four hours).

41. See, e.g., Eliza Barclay, *States Crack Down on Animal Welfare Activists and Their Undercover Videos*, NPR (Mar. 1, 2012, 1:17 PM), <http://www.npr.org/blogs/thesalt/2012/02/29/147651002/states-crack-down-on-animal-welfare-activists-and-their-undercover-videos>.

42. *Ag-Gag Laws and Factory Farm Investigations Mapped: 2014*, ANIMAL VISUALS, <http://www.animalvisuals.org/projects/data/investigations#lawlist> (last visited Mar. 24, 2015) (documenting farm animal rights undercover investigations since 1998).

43. See UPTON SINCLAIR, *THE JUNGLE* (1906); *FDA History—Part I*, U.S. FOOD & DRUG ADMIN, <http://www.fda.gov/AboutFDA/WhatWeDo/History/Origin/ucm054819.htm> (last updated June 18, 2009).

44. Larissa U. Liebmann, *Fraud and First Amendment Protections of False Speech: How United States v. Alvarez Impacts Constitutional Challenges to Ag-Gag Laws*, 31 PACE ENVTL. L. REV. 566, 567–68 (2014). See, e.g., *Undercover Investigations: Exposing Animal Abuse*, MERCY FOR ANIMALS, <http://www.mercyforanimals.org/investigations.aspx> (last visited May 2, 2015) (describing recent undercover investigations undertaken by Mercy for Animals). See also GLYNN T. TONSOR & NICOLE J. OLYNK, U.S. MEAT DEMAND: THE INFLUENCE OF ANIMAL WELFARE MEDIA COVERAGE (2010), available at <http://www.agmanager.info/livestock/marketing/animalwelfare/MF2951.pdf> (finding that media attention to animal welfare issues has reduced demand for pork and poultry).

States Department of Agriculture and by companies that purchase products from the facilities investigated.<sup>45</sup>

For example, a 2007 Humane Society of the United States investigation at a slaughterhouse in Chino, California that revealed abuse of downer cows spurred action across several fronts. The investigation resulted in criminal charges,<sup>46</sup> the largest meat recall in U.S. history,<sup>47</sup> and a California ballot initiative banning intense farm confinement practices.<sup>48</sup> Additionally, a subsequent False Claims Act lawsuit related to fraudulent representations regarding treatment of animals in the facility settled for \$155 million in reimbursements to the federal government.<sup>49</sup>

In 2010, undercover investigators and federal inspectors separately investigated several of Iowa's egg-producing farms.<sup>50</sup> Similar farms in Idaho were involved in a *Salmonella* outbreak that led to the largest egg recall in United States history.<sup>51</sup> In 2012, an undercover investigator working at Bettencourt Dairies' Dry Creek Dairy in Idaho, captured audiovisual recordings of horrific abuse of dairy cows, including workers beating, kicking, and dragging cows.<sup>52</sup> The video, released by an animal rights organization, led to widespread public outrage, loss of business, and negative publicity.<sup>53</sup>

Due to the economic impact of these investigations, agricultural corporations in states such as Iowa, Utah, and Idaho have aggressively lobbied for greater protection in the form of ag-gag laws.<sup>54</sup> Iowa's ag-gag

45. See, e.g., David Zahniser, *Central Valley Slaughterhouse Reopens After Animal Abuse Claims*, L.A. TIMES (Aug. 27, 2012, 8:36 AM), <http://latimesblogs.latimes.com/lanow/2012/08/central-valley-slaughterhouse-reopens.html>.

46. Victoria Kim, *Charges of Meat Plant Cruelty Filed*, L.A. TIMES (Feb. 16, 2008), <http://articles.latimes.com/2008/feb/16/local/me-beef16>.

47. United States *ex rel.* Humane Soc'y U.S. v. Hallmark Meat Packing Co., No. 08-0221, 2013 WL 4713557 (C.D. Cal. Apr. 20, 2013).

48. Jonathan R. Lovvorn & Nancy V. Perry, *California Proposition 2: A Watershed Moment for Animal Law*, 15 ANIMAL L. 149, 156 (2009).

49. *Owners of Infamous Calif. Slaughterhouse Pay Millions to Settle Government Fraud Case*, HUMANE SOC'Y U.S. (Nov. 27, 2013), [http://www.humanesociety.org/news/press\\_releases/2013/11/Hallmark\\_settlement\\_112713.html](http://www.humanesociety.org/news/press_releases/2013/11/Hallmark_settlement_112713.html).

50. Lewis Bollard, Note, *Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10960, 10974-75 (2012).

51. *Largest Egg Recall in U.S. History Brings Renewed Attention to Dangers of Industrial Farming*, DEMOCRACY NOW! (Aug. 24, 2010), [http://www.democracynow.org/2010/8/24/largest\\_egg\\_recall\\_in\\_us\\_history](http://www.democracynow.org/2010/8/24/largest_egg_recall_in_us_history).

52. *Idaho Workers Charged with Animal Cruelty at Bettencourt Dairies' Dry Creek Dairy*, N.Y. DAILY NEWS (Oct. 11, 2012, 1:28 AM), <http://www.nydailynews.com/news/national/watch-animal-cruelty-filmed-idaho-dairy-article-1.1180094>.

53. See, e.g., Anna Almendrala, *In-N-Out Responds to Animal Abuse Allegations Directed at Idaho Dairy Farm*, HUFFINGTON POST (Oct. 11, 2012), [http://www.huffingtonpost.com/2012/10/11/in-n-out-animal-abuse\\_n\\_1958505.html](http://www.huffingtonpost.com/2012/10/11/in-n-out-animal-abuse_n_1958505.html).

54. See *infra* Part IV.A.

bill, passed in March 2012, created the crime of “agricultural production facility fraud,” which occurs when a person enters a facility under false pretenses or makes a false representation to obtain employment at a facility with “intent to commit an act not authorized by the owner” of the facility.<sup>55</sup>

Utah’s law directly restricts unauthorized recordings at animal facilities by creating a new crime called “agricultural operation interference.”<sup>56</sup> A person is guilty of this crime if she: (a) “knowingly or intentionally” and without consent records images or sound at the agricultural operation by leaving a recording device there; (b) “obtains access to an agricultural operation under false pretenses”; (c) records images or sound at an agricultural operation, if she applied for employment at the operation with the intent to record there, and knew at the time of accepting employment that the owner prohibited such recordings; or (d) willfully records images of sound at an agricultural operation without consent while committing criminal trespass.<sup>57</sup>

Idaho’s “Ag Security” law was easily “the most controversial agriculture bill” during the 2014 session.<sup>58</sup> Drafted in response to the 2012 Dry Creek Dairy incident, this law was pushed by the Idaho Dairymen’s Association, which represents every dairy farmer and dairy producer in the state.<sup>59</sup> The law represents the most sweeping ag-gag legislation,<sup>60</sup> criminalizing employment-based investigations where employment is obtained through misrepresentation or omission, and investigations that involve any unauthorized videography at an animal agricultural facility.<sup>61</sup>

## 2. Effect of the Ag-Gag Laws

Regardless of the specific prohibitions included in an ag-gag statute, this type of legislation presents significant concerns to advocacy groups involved in issues such as civil liberties, public health, food safety, animal welfare, environmental protection, and workers’ rights.<sup>62</sup> Animal rights activists, such as Mercy for Animals, which investigated egg

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55. IOWA CODE ANN. § 717A.3A(1)(b) (West, Westlaw through 2015 Regular Sess.).

56. UTAH CODE ANN. § 76-6-112 (West, Westlaw through 2014 Legis. Sess.).

57. *Id.* § 76-6-112(2)(a)–(d).

58. 2014 Idaho Legislative Update, *supra* note 29.

59. *Id.*

60. Idaho MSJ, *supra* note 17.

61. IDAHO CODE ANN. § 18-7042(1)(a)–(d) (West, Westlaw through 2015 ch. 58).

62. See *Statement of Opposition to Proposed “Ag-Gag” Laws from Broad Spectrum of Interest Groups*, ASPCA, <http://www.aspc.org/fight-cruelty/advocacy-center/ag-gag-whistleblower-suppression-legislation/statement-opposition> (last visited Mar. 24, 2015).

farms in 2011, have indicated that the ag-gag laws have forced them to limit their activism in states that have enacted the laws.<sup>63</sup>

Ag-gag laws have thus far been enforced against five animal activists.<sup>64</sup> In February 2013, animal rights advocate Amy Meyer was the first to be charged under Utah's law.<sup>65</sup> While standing on public property adjacent to a slaughterhouse, Meyer was arrested after she videotaped a sick cow being pushed by a track loader.<sup>66</sup> Meyer's case was later dismissed by Utah prosecutors after journalist Will Potter broke the story of "the first prosecution in the country" under an ag-gag law.<sup>67</sup> In September 2014, four activists were arrested after taking photos of a pig farm in Utah, although charges were later dropped.<sup>68</sup> As will be discussed in Part VI, these ag-gag laws are unconstitutional, raise food safety concerns, and are also ineffective.

## B. Veggie Libel Laws

### 1. Overview of Veggie Libel Laws

The first veggie libel laws were enacted into state law in the 1990s. Although they have been broadly criticized as unconstitutional free speech constraints since their enactment,<sup>69</sup> thirteen states—Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, North Dakota, Ohio, Oklahoma, South Dakota, and Texas—have adopted some form of these laws.<sup>70</sup> Of these, only Colorado criminalizes food disparagement.<sup>71</sup>

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63. Richard A. Oppel Jr., *Taping of Farm Cruelty Is Becoming the Crime*, N.Y. TIMES (Apr. 6, 2013), <http://www.nytimes.com/2013/04/07/us/taping-of-farm-cruelty-is-becoming-the-crime.html>.

64. Lindsay Whitehurst, *4 Charged Under Utah's Controversial 'Ag-Gag' Law*, WASH. TIMES (Jan. 8, 2015), <http://www.washingtontimes.com/news/2015/jan/8/4-charged-under-utahs-controversial-ag-gag-law/>.

65. 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/>.

66. *Id.*

67. *Id.*; Will Potter, *Amy Meyer's Ag-Gag Charges Have Been Dropped!*, GREEN IS THE NEW RED (Apr. 30, 2013), <http://www.greenisthenewred.com/blog/amy-meyer-charges-dropped/6998/>.

68. Libby Blanchard, *Op-Ed: Get Rid of Utah's Unconstitutional 'Ag-Gag' Law*, SALT LAKE TRIB. (Jan. 16, 2015, 4:45 AM), <http://www.sltrib.com/opinion/2059454-155/op-ed-get-rid-of-utahs-unconstitutional>.

69. *See infra* Part VI.

70. Louisiana was the first state to pass its veggie libel statute, in 1991. *See* LA. REV. STAT. ANN. §§ 3:4501–04 (Westlaw through 2014 Regular Sess.). Idaho passed its law in 1992; Alabama and Georgia in 1993. IDAHO CODE ANN. §§ 6-2001 to -2003 (West, Westlaw through 2015 ch. 58); ALA. CODE §§ 6-5-620 to -25 (Westlaw through 2015 Act 2015-16); GA. CODE ANN. §§ 2-16-1 to -4 (West, Westlaw through 2015 Acts 2–8, 10). In 1994, Colorado, Florida, Mississippi, and South Dakota passed their veggie libel laws. *See* COLO. REV. STAT. §§ 35-31-101, 104 (West, Westlaw

The origins of veggie libel laws are well documented. Most scholars attribute the Alar incident of 1989 as the catalyst for the laws.<sup>72</sup> In 1989, CBS aired a *60 Minutes* episode “‘A’ is for Apple,” which exposed the dangers of Daminozide, or “Alar,” a chemical sprayed on apples to enhance their growth and color.<sup>73</sup> The episode was based on a report from the Natural Resources Defense Council (NRDC) finding that Alar was a dangerous carcinogen, and that children were particularly at risk of developing cancer later in life because they generally eat more fruit and retain more of what they eat in comparison to adults.<sup>74</sup> The episode led to a public outcry against Alar and the apple industry, resulting in the loss of millions of dollars.<sup>75</sup>

In response to the impact on apple sales, Washington State apple growers sued CBS in 1990 alleging false disparagement of their products.<sup>76</sup> The growers claimed that warnings regarding the carcinogenic effects of Alar were false because studies had only confirmed the carcinogenic effect on animals.<sup>77</sup> Under defamation law, the growers as plaintiffs were unable to prove falsity; therefore, the lower court granted CBS’s motion for summary judgment.<sup>78</sup> The decision was affirmed on appeal.<sup>79</sup>

As a result of its defeat in court, the agricultural industry argued that current libel and product disparagement laws were inadequate to address the vulnerable nature of its products.<sup>80</sup> In response, the American Feed Industry Association (AFIA), a lobbying group for the cattle feed

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through 2015 ch. 2); FLA. STAT. ANN. § 865.065 (West, Westlaw through 2015 First Regular Sess.); MISS. CODE ANN. §§ 69-1-251, 253, 255, 257 (West, Westlaw through 2014 Legis. Sess.); S.D. CODIFIED LAWS §§ 20-10A-1 to -4 (Westlaw through 2014 Regular Sess.). Arizona, Oklahoma, and Texas followed in 1995. See ARIZ. REV. STAT. ANN. § 3-113 (Westlaw through 2015 First Regular Sess.); OKLA. STAT. ANN. tit. 2, §§ 5-100–102 (West, Westlaw through 2014 Second Sess.); TEX. CIV. PRAC. & REM. CODE ANN. §§ 96.001–004 (West, Westlaw 2013 Third Called Sess.). Ohio enacted its statute in 1996. See OHIO REV. CODE ANN. § 2307.81 (West, Westlaw through 2015 File 1). North Dakota passed its law in 1997. See N.D. CENT. CODE ANN. § 32-44-01 to -04 (West, Westlaw through 2013 Legis. Sess.).

71. COLO. REV. STAT. ANN. § 35-31-104 (West, Westlaw through 2015 ch. 2).

72. See, e.g., Bederman, *supra* note 11, at 192.

73. *60 Minutes: ‘A’ is for Apple* (CBS television broadcast Feb. 26, 1989). For a transcript of the broadcast, see *Auvil v. CBS “60 Minutes” (Auvil I)*, 800 F. Supp. 928, 937 (E.D. Wash. 1992).

74. *Auvil v. CBS “60 Minutes” (Auvil III)*, 67 F.3d 816, 818 (9th Cir. 1995), *cert. denied*, 517 U.S. 1167 (1996).

75. *Id.* at 819.

76. *Id.*

77. *Id.* at 821.

78. *Auvil v. CBS “60 Minutes” (Auvil II)*, 836 F. Supp. 740, 743 (E.D. Wash. 1993).

79. *Auvil III*, 67 F.3d at 818.

80. David J. Bederman et al., *Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes*, 34 HARV. J. ON LEGIS. 135, 144 (1997).

and pet food industries, hired a Washington, D.C. law firm to draft model legislation to better protect the industry's economic interests.<sup>81</sup> The agricultural industry successfully argued for a "tailor-made cause of action for agricultural disparagement."<sup>82</sup>

Although each of the laws differ slightly,<sup>83</sup> the veggie libel statutes generally provide standing to sue to a "producer" of the allegedly disparaged perishable food who has suffered damages from the libel.<sup>84</sup> Some states, such as Ohio, broadly define "producer" as "a person who grows, raises, produces, distributes, or sells a perishable agricultural or aquacultural food product."<sup>85</sup> Georgia provides a cause of action to "the entire chain from grower to consumer."<sup>86</sup>

The veggie libel statutes generally provide liability for compensatory damages and other "appropriate" relief<sup>87</sup> if a person disseminates to the public statements that either include false information or are considered to be "disparaging" regarding the safety of an agricultural food product for consumption.<sup>88</sup> To be liable in Louisiana, Mississippi, Ohio, South Dakota, and Texas, the disseminator must either have had actual knowledge, or must have "know[n] or should have known" that false information was disseminated to the public "stat[ing] or impl[y]ing that a perishable agricultural or aquacultural food product" is unsafe for human

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81. Simon, *supra* note 7.

82. Bederman et al., *supra* note 80, at 144.

83. See Rita Marie Cain, *Food, Inglorious Food: Food Safety, Food Libel and Free Speech*, 49 AM. BUS. L.J. 275, 323 (2012) (Appendix B provides an outline of each statutory provision). See also John Margiotta, *The Movement Begins: The Model Bill for Agricultural Disparagement Statutes*, in 1998 LIBEL DEFENSE RESOURCE CENTER, LDRC BULLETIN, AGRICULTURAL DISPARAGEMENT LAWS 2, at 17, 22–25 (for a state-by-state analysis of agricultural disparagement statutes).

84. FLA. STAT. ANN. § 865.065(3) (West, Westlaw through 2015 First Regular Sess.); IDAHO CODE ANN. § 6-2003(1) (West, Westlaw through 2015 ch. 58); LA. REV. STAT. ANN. § 3:4503 (Westlaw through 2014 Regular Sess.); MISS. CODE ANN. § 69-1-255 (West, Westlaw through 2014 Legis. Sess.); N.D. CENT. CODE § 32-44-02 (West, Westlaw through 2013 Legis. Sess.); OKLA. STAT. ANN. tit. 2, § 5-102(A) (West, Westlaw through 2014 Second Sess.); S.D. CODIFIED LAWS § 20-10A-2 (West, Westlaw through 2014 Regular Sess.); TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(b) (West, Westlaw 2013 Third Called Sess.).

85. OHIO REV. CODE ANN. § 2307.81(B)(4) (West, Westlaw through 2015 File 1).

86. GA. CODE ANN. § 2-16-2(3) (West, Westlaw through 2015 Acts 2–8, 10).

87. ALA. CODE § 6-5-622 (Westlaw through 2015 Act 2015–16); ARIZ. REV. STAT. ANN. § 3-113(A) (Westlaw through 2015 First Regular Sess.); FLA. STAT. ANN. § 865.065(3) (West, Westlaw through 2015 First Regular Sess.); GA. CODE ANN. § 2-16-3 (West, Westlaw through 2015 Acts 2–8, 10); LA. REV. STAT. ANN. § 3:4503 (Westlaw through 2014 Regular Sess.); MISS. CODE ANN. § 69-1-255 (West, Westlaw through 2014 Legis. Sess.); OHIO REV. CODE ANN. § 2307.81(C) (West, Westlaw through 2015 File 1); OKLA. STAT. ANN. tit. 2, § 5-102(A) (West, Westlaw through 2014 Second Sess.); S.D. CODIFIED LAWS § 20-10A-2 (Westlaw through 2014 Regular Sess.); TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(b) (West, Westlaw 2013 Third Called Sess.).

88. Bederman et al., *supra* note 80, at 146.

consumption.<sup>89</sup> In contrast, Alabama and Oklahoma require no knowledge or awareness to make a statement actionable if the “false information” regarding the safety of a perishable food product for human consumption is disseminated to the public.<sup>90</sup> Arizona, Georgia, and Florida require that the dissemination to the public of false information regarding the safety of a perishable food product be done in a “willful or malicious” manner.<sup>91</sup>

Several state food libel statutes seem to place the burden of proving the truth of a disparaging statement on the defendant.<sup>92</sup> Nine food libel statutes define falsity based on the speaker’s lack of scientific basis for a statement; however, these laws fail to define “scientific inquiry, facts, or data.”<sup>93</sup> In other words, after a plaintiff alleges that a statement was disparaging and false, the burden shifts to the defendant to prove it was based on scientific evidence, and therefore not false.<sup>94</sup> In Louisiana, there is a presumption of falsity if a statement is not based on “reasonable and reliable scientific inquiry, facts, or data.”<sup>95</sup> Texas requires that “the trier of fact shall consider whether the information was based on reasonable and reliable scientific inquiry, facts, or data.”<sup>96</sup>

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89. LA. REV. STAT. ANN. § 3:4502(1) (Westlaw through 2014 Regular Sess.); *see also* MISS. CODE ANN. § 69-1-253 (West, Westlaw through 2014 Legis. Sess.); OHIO REV. CODE ANN. § 2307.81(C) (West, Westlaw through 2015 File 1); S.D. CODIFIED LAWS § 20-10A-1(2) (Westlaw through 2014 Regular Sess.); TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(a) (West, Westlaw 2013 Third Called Sess.).

90. ALA. CODE § 6-5-621(1) (Westlaw through 2015 Act 2015–16); *see also* OKLA. STAT. ANN. tit. 2, § 5-101 (West, Westlaw through 2014 Second Sess.).

91. GA. CODE ANN. § 2-16-2(1) (West, Westlaw through 2015 Acts 2–8, 10). *See also* ARIZ. REV. STAT. ANN. § 3-113(A) (Westlaw through 2015 First Regular Sess.); FLA. STAT. ANN. § 865.065(2)(a) (West, Westlaw through 2015 First Regular Sess.).

92. Cain, *supra* note 83, at 281.

93. *See* ALA. CODE § 6-5-621(1) (Westlaw through 2015 Act 2015–16) (defining “disparagement” as the “dissemination to the public in any manner of false information that a perishable food product or commodity is not safe for human consumption” and deeming as false information that is “not based upon reasonable and reliable scientific inquiry, facts, or data”); ARIZ. REV. STAT. ANN. § 3-113(E)(1) (Westlaw through 2015 First Regular Sess.); FLA. STAT. ANN. § 865.065(2)(a) (West, Westlaw through 2015 First Regular Sess.); GA. CODE ANN. § 2-16-2(1) (West, Westlaw through 2015 Acts 2–8, 10); LA. REV. STAT. ANN. § 3:4502(1) (Westlaw through 2014 Regular Sess.); MISS. CODE ANN. § 69-1-253(a) (West, Westlaw through 2014 Legis. Sess.); OHIO REV. CODE ANN. § 2307.81(B)(2) (West, Westlaw through 2015 File 1); OKLA. STAT. ANN. tit. 2, § 5-102(A) (West, Westlaw through 2014 Second Sess.); TEX. CIV. PRAC. & REM. CODE ANN. § 96.003 (West, Westlaw 2013 Third Called Sess.). Statutes in Idaho, North Dakota, and South Dakota do not define falsity as a lack of scientific evidence. *See* IDAHO CODE ANN. § 6-2002(1) (West, Westlaw through 2015 ch. 58); N.D. CENT. CODE § 32-44-02 (West, Westlaw through 2013 Legis. Sess.); S.D. CODIFIED LAWS §§ 20-10A-1 to -4 (Westlaw through 2014 Regular Sess.).

94. Cain, *supra* note 83, at 281.

95. LA. REV. STAT. ANN. § 3:4502(1) (Westlaw through 2014 Regular Sess.).

96. TEX. CIV. PRAC. & REM. CODE ANN. § 96.003 (West, Westlaw 2013 Third Called Sess.).

The Texas version of an agricultural disparagement statute gave rise to the first, and arguably the most famous, case involving agricultural product disparagement. In 1996, Texas beef producers sued Oprah Winfrey, her production company, and one of her guests, Howard Lyman, for comments made during an episode dealing with dangerous foods; specifically, claims were made that a large portion of American cattle herds were at risk for infection by bovine spongiform encephalopathy (BSE, more commonly known as mad cow disease).<sup>97</sup> During the show, Winfrey remarked that the possibility of contracting mad cow disease made her afraid of eating beef, and that she was “stopped cold from eating another burger.”<sup>98</sup> The cattlemen challenged Lyman’s assertion that the effects of “‘Mad Cow Disease’ could make AIDS look like the common cold.”<sup>99</sup> Beef producers also challenged Lyman’s accusation that the United States was “treating BSE as a public relations issue . . . and failing to take any ‘substantial’ measures to prevent a BSE outbreak in this country.”<sup>100</sup> Lyman’s second statement relied on the continued practice of ruminant-to-ruminant feeding in the United States, which caused the BSE outbreak in Britain.<sup>101</sup> As a result of the show, sales of beef in Texas dropped drastically.<sup>102</sup>

Under the Texas agricultural disparagement statute, the plaintiff must prove that the defendant: (1) disseminated false information to the public about perishable food products; (2) stated or implied that the food product was not safe for human consumption; (3) knew that the information was false; and (4) caused damage to the plaintiffs.<sup>103</sup> The court ultimately held that live cattle were not “perishable” as defined by the statute and that the plaintiff failed to prove the remarks were in fact false.<sup>104</sup> In reaching these conclusions, Judge Robinson of the Northern District of Texas noted:

[The statements made on the Oprah Winfrey show] dealt with a matter of public concern. Statements of fact and opinion on the issue of whether the feeding practices of American cattlemen on or before April 16, 1996, contributed to a danger that BSE or the deadly and incurable new variant CJD could occur in the United States,

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97. *Tex. Beef Grp. v. Winfrey*, 201 F.3d 680, 682–85 (5th Cir. 2000).

98. *Id.* at 688 (internal quotations omitted).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 684.

103. TEX. CIV. PRAC. & REM. CODE ANN. §§ 96.002–004 (West, Westlaw 2013 Third Called Sess.).

104. *Tex. Beef Grp. v. Winfrey*, 11 F. Supp. 2d 858, 862 (N.D. Tex. 1998).

cannot be considered as anything other than a matter of legitimate public concern. It would be difficult to conceive of any topic of discussion that could be of greater concern and interest to all Americans than the safety of the food that they eat.<sup>105</sup>

On appeal, the Fifth Circuit affirmed on the grounds that the plaintiffs did not knowingly disseminate false information about beef.<sup>106</sup> Despite this holding that the plaintiff failed to prove feeding practices contributed to the spread of mad cow disease, the FDA banned the use of ruminant-to-ruminant feed supplements just months after the show aired.<sup>107</sup>

In *AgriGeneral Co. v. Ohio Public Interest Research Group*, a veggie libel lawsuit filed soon after *Winfrey*, Ohio Public Interest Research Group (Ohio PIRG) and its director, Amy Simpson, alerted the public about the dangers of Buckeye Egg Farm's practice of repacking and re-dating eggs for sale to consumers.<sup>108</sup> Unlike *Winfrey*, the truthfulness of those statements was not in dispute.<sup>109</sup> At issue in the litigation were Simpson's statements at a press conference: "To this date, we have no idea how many, if any, consumers have been made ill by consuming these eggs."<sup>110</sup> Allegedly harmed by this statement, Buckeye sued Ohio PIRG and Simpson for compensatory and punitive damages, court costs, and attorneys' fees.<sup>111</sup> This caused an outrage among free speech advocates.<sup>112</sup> Due to public pressure, Buckeye Egg dropped its lawsuit a year later.<sup>113</sup>

The applicability of South Dakota's agricultural disparagement law is now at issue in a \$1.2 billion high-profile lawsuit following reports of the meat industry's use of "pink slime," or Lean Finely Textured Beef

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105. *Id.*

106. *Tex. Beef Grp.*, 201 F.3d at 688-89.

107. *Id.* at 688.

108. *AgriGeneral Co. v. Ohio Pub. Interest Research Grp.*, No. 397CV7262 (N.D. Ohio Mar. 25, 1997); see Collins, *supra* note 18, at 5.

109. Collins, *supra* note 18, at 5.

110. *Id.*

111. *Id.*

112. *Id.* In a letter to Andy Hansen, president of Buckeye Egg Company, "Ralph Nader, Ira Glasser of the American Civil Liberties Union and Michael Jacobson, executive director of the Center for Science in the Public Interest," urged the company "to unconditionally drop this action immediately." Ronald K.L. Collins, *Veggie Libel: Agribusiness Seeks to Stifle Speech*, MULTINATIONAL MONITOR (May 1998), <http://www.multinationalmonitor.org/mm1998/051998/collins.html> [hereinafter Collins, *Veggie Libel*]. The letter further stated: "If you disagree with Ms. Simpson, debate her. If you feel strongly about the matter, use your resources to respond to her. But do not try to intimidate her by forcing her into impoverishment defending a lawsuit which you cannot ultimately win. This is not the American way." *Id.*

113. Collins, *supra* note 18, at 5-6.

(LFTB). LFTB is a meat product allegedly made of low-grade meat, scraps, and waste, which is then exposed to ammonium hydroxide to kill contaminants such as *E. coli*.<sup>114</sup> The term was first used in 2002 by United States Department of Agriculture (USDA) microbiologist Gerald Zirnstein in a private e-mail to a colleague.<sup>115</sup> In September 2012, Beef Products, Inc. (BPI), a meat processor headquartered in South Dakota, sued American Broadcasting Companies, Inc. (ABC) and others for defamation over their coverage of this practice.<sup>116</sup> On March 7, 2012, ABC broadcasted a segment on its evening news program about LFTB and followed the segment with eleven additional reports and numerous online communications concerning LFTB and BPI.<sup>117</sup> In these reports, ABC personalities repeatedly referred to LFTB as “pink slime.”<sup>118</sup>

The public’s response against BPI “was immediate and intense.”<sup>119</sup> As blogger and plaintiff Bettina Elias Siegel explained, “[T]he use of LFTB in ground beef is ‘one of those practices that can thrive only in obscurity.’”<sup>120</sup> In just twenty-eight days, BPI lost eighty percent of its sales and was forced to close three of its four plants.<sup>121</sup> To make matters worse, several supermarkets announced that they would stop selling LFTB,<sup>122</sup> and all but three states participating in the USDA National School Lunch Program opted to order ground beef that did not contain

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114. See Rita-Marie Cain Reid, *You Say “Lean Finely Textured Beef,” I Say “Pink Slime”*, 69 FOOD & DRUG L.J. 625, 625 (2014). South Dakota defines food “disparagement” as: “dissemination in any manner to the public of any information that the disseminator knows to be false and that states or implies that an agricultural food product is not safe for consumption by the public or that generally accepted agricultural and management practices make agricultural food products unsafe for consumption by the public.” S.D. CODIFIED LAWS § 20-10A-1(2) (Westlaw through 2014 Regular Sess.).

115. See 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/>.

116. BPI Complaint, *supra* note 13, ¶ 1.

117. *Id.* ¶ 7; see also *Pink Slime Videos*, ABC NEWS, <http://abcnews.go.com/topics/news/pink-slime.htm?mediatype=Video> (last visited May 2, 2015).

118. Sanburn, *supra* note 115.

119. Reid, *supra* note 114, at 626. See Helena Bottemiller, *BPI Sues ABC News, Former USDA Officials for ‘Pink Slime’ Defamation*, FOOD SAFETY NEWS (Sept. 13, 2012), <http://www.foodsafetynews.com/2012/09/bpi-sues-abc-news-former-usda-officials-for-pink-slime-defamation>.

120. Bettina Elias Siegel, *BPI Makes Accusation of Libel in WSJ Ad, Suspends Some Operations—My Response*, THE LUNCH TRAY (Mar. 26, 2012), <http://www.thelunchtray.com/bpi-makes-accusation-of-libel-in-wsj-ad-suspends-some-operations-my-response/>.

121. See Daniel P. Finney, *Beef Products Inc. Sues ABC for Defamation Over ‘Pink Slime’*, DES MOINES REG. (Sept. 14, 2012), <http://www.public.iastate.edu/~nscentral/mr/12/0914/slime.html>.

122. See Ryan Jaslow, *More Grocery Store Chains Drop “Pink Slime” from Shelves: What About Walmart?*, CBS NEWS (Mar. 23, 2012), <http://www.cbsnews.com/news/more-grocery-chains-drop-pink-slime-from-shelves-what-about-wal-mart/>.

LFTB.<sup>123</sup> In response to consumer demand, Congress introduced the Requiring Easy and Accurate Labeling of Beef Act (REAL Beef Act) in March 2012, which would require labeling of beef products containing LFTB.<sup>124</sup> Although this bill was not enacted into law, in April 2012, the “USDA agree[d] to approve requests by ground beef producers who wished to label their products containing LFTB.”<sup>125</sup>

In September 2012, as a result of this public backlash against their product, BPI sued ABC, its on-air personalities, and the USDA employees featured in the ABC broadcasts in South Dakota state court for statutory and common law product disparagement, defamation, and tortious interference.<sup>126</sup> BPI contends that the defendants’ false statements implied LFTB was not safe for consumption and/or impugned the safety of LFTB.<sup>127</sup> BPI alleges that the defendants effectively renamed LFTB in an effort “to incite and inflame consumers against BPI and LFTB.”<sup>128</sup> The defendants’ motion to dismiss is pending.<sup>129</sup>

## 2. Chilling Effect of the Veggie Libel Laws

Although no plaintiff has yet won a judgment pursuant to a veggie libel statute,<sup>130</sup> these statutes have the purpose and effect of chilling speech.<sup>131</sup> The *Winfrey*, *Buckeye Egg*, and *BPI* lawsuits highlight the considerable risk and expense at stake in criticizing food production.<sup>132</sup>

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123. See Finney, *supra* note 121. The states that continued to order the product for school lunches were Iowa, Nebraska, and South Dakota. BPI plants are located in each of these states. *Id.*

124. James Andrews, *BPI and ‘Pink Slime’: A Timeline*, FOOD SAFETY NEWS (Apr. 9, 2012), <http://www.foodsafetynews.com/2012/04/bpi-and-pink-slime-a-timeline>. LFTB was not labeled differently from traditional ground beef. Sanburn, *supra* note 115.

125. Andrews, *supra* note 124 (citing USDA action of Apr. 2, 2012). Unlike most other foods that are regulated by the FDA, meat products regulated by USDA are subject to a pre-approval requirement for all labels. See 21 U.S.C. § 607 (2012). Cargill, for example, has begun labeling some of its ground beef. *Cargill Rolls Out Labels for Some Finely Textured Beef Products*, FOOD SAFETY NEWS (Feb. 4, 2014), <http://www.foodsafetynews.com/2014/02/cargill-rolls-out-labels-for-some-finely-textured-beef-products/#.VRBj6vnF-HQ>.

126. See BPI Complaint, *supra* note 13.

127. *Id.* ¶¶ 675–91.

128. *Id.* ¶ 8.

129. *Beef Prods., Inc. v. Am. Broad. Cos.*, No. CIV12292, 2014 WL 1245307, at \*30 (S.D. Cir. Ct. Mar. 27, 2014).

130. Cain, *supra* note 83, at 308.

131. As stated by Professor Bederman: “Stories get spiked every week. The evil of these laws is that they do precisely what they were intended to do, which is to chill speech.” Simon, *supra* note 7. See Sara Lunsford Kohen, *What Ever Happened to Veggie Libel?: Why Plaintiffs Are Not Using Agricultural Product Disparagement Statutes*, 16 DRAKE J. AGRIC. L. 261 (2011).

132. Stephanie Houston Grey, *A Famine of Words: Changing the Rules of Expression in the Food Debates*, 48 FIRST AMENDMENT STUDIES 5, 16, 18 (2014). See also Collins, *supra* note 18, at 5.

Even if the speaker prevails in court, he or she must still bear the litigation costs.<sup>133</sup> For organizations or individuals without the finances to defend themselves against potential lawsuits, silence may be the most cost-effective option.<sup>134</sup> Consumer advocate Ralph Nader stated: “The realistic objective of the frivolous ‘veggie-libel’ statutes and lawsuits is not money . . . . It is to send a chilling message to millions of people that they better keep their opinions to themselves.”<sup>135</sup> Although only thirteen states have enacted veggie libel laws, there is a danger of national impact from “runaway liability”<sup>136</sup> as Internet users, authors, and national book publishers who post statements about food may be subject to litigation in any or all of the states with veggie libel laws.<sup>137</sup>

The chilling effect of veggie libel laws is not only theoretical.<sup>138</sup> Floyd Abrams, a First Amendment expert, confirmed that many of his small media clients fear being sued and “do not want to be part of some test case.”<sup>139</sup> For example, in 1998, one publisher cancelled a book, which had already begun printing, after receiving a letter from Monsanto’s attorney saying “he believed the manuscript, which he had not seen, included false statements that would disparage” Monsanto’s herbicide, Roundup.<sup>140</sup> The book’s coauthor stated that the publisher’s lawyer already had approved the book, but later changed his mind because of concerns about being sued under veggie libel laws.<sup>141</sup> Similarly, Alec Baldwin claims that in the late-1990s, the Discovery Channel denied his proposal for a documentary about “pesticides, herbicides, and some disputed practices used to raise beef” because it feared a veggie libel lawsuit.<sup>142</sup> In addition, people who have been outspoken about food safety issues have indicated their reluctance to continue their work.<sup>143</sup> For example, one Sierra Club volunteer in Ohio worried: “When I give speeches [about genetically modified foods (GMOs)] . . . I’m even afraid to say, ‘This

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133. Grey, *supra* note 132, at 16.

134. *Id.* See also Collins, *Veggie Libel*, *supra* note 112.

135. Collins, *Veggie Libel*, *supra* note 112.

136. *Id.*

137. *Id.*

138. See Eileen Gay Jones, *Forbidden Fruit: Talking About Pesticides and Food Safety in the Era of Agricultural Product Disparagement Laws*, 66 BROOK. L. REV. 823, 858 (2001) (discussing many examples of the veggie laws’ chilling effects).

139. Melody Petersen, *Farmers’ Right to Sue Grows, Raising Debate on Food Safety*, N.Y. TIMES, June 1, 1999, at C11, available at <http://www.nytimes.com/1999/06/01/business/farmers-right-to-sue-grows-raising-debate-on-food-safety.html>.

140. *Id.*

141. *Id.*

142. *Id.* The Discovery Channel disputes this claim. *Id.*

143. *Id.*

might be unsafe, . . . because I'm fearful I could get sued."<sup>144</sup> The National Fisheries Institute also warned activists involved in a campaign to protect swordfish of potential veggie libel liability.<sup>145</sup>

There is also evidence that the agricultural industry has used the laws to threaten critics.<sup>146</sup> In 1997, the United Fresh Fruit and Vegetable Association demanded that the environmental group Food and Water cease its distribution of reports questioning the safety of irradiated fruits and vegetables.<sup>147</sup> The Association indicated that it would be "closely scrutiniz[ing]" Food and Water's actions in light of veggie libel laws.<sup>148</sup> These are just some of the reported instances of veggie libel laws' chilling effects on free speech. These anecdotes suggest that veggie libel laws "are used almost exclusively by the powerful to silence their critics."<sup>149</sup> They also demonstrate that the laws are achieving their ultimate objective of limiting public debate about food safety.<sup>150</sup>

### III. HOW AG-GAG AND VEGGIE LIBEL WERE RE-TOOLED: AN OVERVIEW OF EXISTING LAWS

The ag-gag and veggie libel laws discussed above were enacted in response to shortcomings of existing laws, such as fraud, trespass, defamation, and product disparagement. This Part provides an overview of those existing laws, which were re-tooled as ag-gag laws, restricting access to information about agricultural operations, and veggie libel laws, limiting dissemination of such information. The following discussion will illuminate the analysis in Part IV of policy justifications for these tailor-made laws.

#### *A. Ag-Gag: Re-tooling Fraud and Trespass*

As the new generation of ag-gag laws in Iowa, Utah, and Idaho are currently written, an undercover agent commits a crime if she enters an agricultural operation by "force, threat, misrepresentation or trespass."<sup>151</sup> As discussed more thoroughly in Part IV.A, proponents of the ag-gag laws have asserted the need to protect the agricultural industry against fraud and trespass. However, these new crimes created by the ag-gag

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144. *Id.*

145. Jones, *supra* note 138, at 858.

146. *Id.*

147. *Id.*

148. *Id.*

149. Collins, *Veggie Libel*, *supra* note 112.

150. See Jones, *supra* note 138, at 859.

151. See IDAHO CODE ANN. § 18-7042(a) (West, Westlaw through 2015 ch. 58).

laws are redundant because such actions are already punishable under existing laws.<sup>152</sup> For example, entering property without consent of the owner is trespass.<sup>153</sup> In addition, the federal Animal Enterprise Terrorism Act already criminalizes damage to operations at an agriculture production facility.<sup>154</sup> As the following discussion demonstrates, the ag-gag laws that criminalize the misrepresentation of information to gain entrance into an agricultural facility are not actually targeting fraud or trespass. Their true aim is “to limit the scrutiny of the agriculture industry.”<sup>155</sup>

Although the laws purport to target “trespass,” case law does not support the idea that misrepresenting oneself on an employment application to obtain access to a facility constitutes a criminal trespass.<sup>156</sup> Generally, trespass is committed when a person enters upon land of another without consent.<sup>157</sup> Therefore, consent is a defense to a trespass claim.<sup>158</sup> Courts have recognized that even consent gained by misrepresentation may be sufficient.<sup>159</sup> Although consent to enter is vitiated “if a wrongful act is done in excess of and in abuse of authorized entry,”<sup>160</sup> there is no case law “suggesting that consent based on a resume misrepresentation turns a successful job applicant into a trespasser the moment she enters the employer’s premises to begin work.”<sup>161</sup> Furthermore, if a court “turned successful resume fraud into trespass, [it] would not be protecting the interest underlying the tort of trespass—the ownership and peaceable possession of land.”<sup>162</sup> Therefore, by preventing misrepresentation

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152. Andrew Cohen, *The Law That Makes It Illegal to Report on Animal Cruelty*, THE ATLANTIC (Mar. 19, 2014), <http://www.theatlantic.com/business/archive/2014/03/the-law-that-makes-it-illegal-to-report-on-animal-cruelty/284485/>. See also Idaho MSJ, *supra* note 17, at 17.

153. See, e.g., IDAHO CODE ANN. §§ 18-7008, 18-7011 (West, Westlaw through 2015 ch. 58).

154. 18 U.S.C. § 43(a) (2012) (making it a federal crime to intentionally harm the property of an animal enterprise).

155. Cohen, *supra* note 152.

156. Liebmann, *supra* note 44, at 586; *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 517 (4th Cir. 1999).

157. *Food Lion*, 194 F.3d at 517.

158. *Id.*

159. See *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1351–53 (7th Cir. 1995) (ABC agents with concealed cameras who obtained consent to enter an ophthalmic clinic by pretending to be patients were not trespassers because, among other things, they “entered offices open to anyone”); *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 757 (N.D. Cal. 1993) (“[W]here consent was fraudulently induced, but consent was nonetheless given, plaintiff has no claim for trespass.”); *Martin v. Fidelity & Cas. Co. of N.Y.*, 421 So. 2d 109, 111 (Ala. 1982) (consent to enter is valid “even though consent may have been given under a mistake of facts, or procured [sic] by fraud” (quoting *Alexander v. Letson*, 242 Ala. 488 (1942)) (internal quotation marks omitted)).

160. *Food Lion*, 194 F.3d at 517.

161. *Id.*

162. *Id.*

on an employment application, the ag-gag laws are not preventing trespass of an agricultural facility.<sup>163</sup>

Similarly, the current ag-gag laws do not prevent “fraud.” To prevail on a common law fraud claim, a plaintiff must prove that a misrepresentation or concealment of a material fact was reasonably calculated to deceive, was made with the intent to deceive, and succeeded in deceiving the victim, who suffered a resulting injury.<sup>164</sup> False speech, which may be protected under the First Amendment in certain circumstances, will constitute fraud, which is not protected speech, only if there is a potential for harm.<sup>165</sup> As the Supreme Court asserted in analyzing whether a statute falls under the First Amendment’s fraud exception, “There must be a direct causal link between the restriction imposed and the injury to be prevented.”<sup>166</sup> If the harm to be prevented by the ag-gag statutes is the impact of eventual publications of undercover videos, then this harm lacks proximate cause to the misrepresentation made on an employment application.<sup>167</sup> Furthermore, existing libel laws could provide a remedy against the distribution of videos that are misleading or untruthful.<sup>168</sup> However, if the recordings accurately portray operations at the facility, any detrimental effects, such as loss of profits, would stem directly from those activities, not from the misrepresentation of the employee on the employment application.<sup>169</sup> Therefore, because the laws only purport to—but do not actually—target fraud, the ag-gag laws are not subject to the fraud exception to the First Amendment’s protection of false speech.<sup>170</sup> Thus, these new laws do not pass constitutional muster.<sup>171</sup>

### *B. Veggie Libel: Re-tooling Defamation and Product Disparagement*

As discussed in Part II.B, veggie libel statutes were passed in response to the perceived failing of the common law torts of defamation and product disparagement.<sup>172</sup> Both torts arise from the defendant publishing a false, negative statement.<sup>173</sup> The difference is that defamation

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163. Liebmann, *supra* note 44, at 586.

164. See RESTATEMENT (SECOND) OF TORTS § 525 (1977). See *Dier v. Peters*, 815 N.W.2d 1, 7 (Iowa 2012) (stating elements of a fraud claim in Iowa).

165. Liebmann, *supra* note 44, at 580.

166. *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012).

167. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956, 962–63 (M.D.N.C. 1997), *aff’d*, 194 F.3d 505 (4th Cir. 1999).

168. See discussion *infra* Part VII.

169. Liebmann, *supra* note 44, at 586.

170. *Id.* at 587; see *Alvarez*, 132 S. Ct. 2537.

171. See discussion *infra* Part VI.B.

172. *Bederman et al.*, *supra* note 80, at 135.

173. See *Auvil v. CBS “60 Minutes”*, 800 F. Supp. 928, 932–33 (E.D. Wash. 1992).

involves a statement that damages the plaintiff's reputation,<sup>174</sup> whereas disparagement relates to a statement about the plaintiff's products or services.<sup>175</sup> Veggie libel laws more closely resemble the common law cause of action for product disparagement.<sup>176</sup> Most states have adopted the Restatement (Second) of Torts's approach for product disparagement,<sup>177</sup> which makes the defendant liable for the plaintiff's pecuniary loss<sup>178</sup> if the plaintiff proves that the defendant: (1) intentionally (2) caused pecuniary loss to the plaintiff by (3) falsely stating a fact (4) to a third person, (5) knowing that the statement was false or recklessly disregarding its truth or falsity.<sup>179</sup> "[P]ublication of an injurious falsehood is a legal cause of pecuniary loss if . . . it is a substantial factor in bringing about the loss . . . ."<sup>180</sup>

Because of the high value we place on First Amendment rights, common law product disparagement lawsuits are difficult to sustain. A plaintiff has to meet the difficult burden of showing that the alleged disparaging statement was false and that its publication caused actual damages to the plaintiff.<sup>181</sup> This standard was fatal to the Washington apple growers' disparagement claims because CBS's report disclosed the results of scientific investigations that raised a concern that Alar was harmful.<sup>182</sup> The court, in rejecting the suit, reasoned that CBS's report could not properly be construed as disparaging as it was based on scientific data.<sup>183</sup> "Because a broadcast could be interpreted in numerous, nuanced

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174. A defamatory communication is defined as one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1977). Under Ohio law, a cause of action for defamation consists of: "(1) a false and defamatory statement, (2) about [the] plaintiff, (3) published without privilege to a third party, (4) with fault of at least negligence on the part of the defendant, and (5) that was either defamatory *per se* or caused special harm to the plaintiff." *Gosden v. Louis*, 687 N.E.2d 481, 488 (Ohio App. 1996). Libel is written defamation; slander is spoken. *Id.*

175. Such actions usually involve business competitors.

176. Product disparagement is also known as "trade libel" and is one form of injurious falsehood, which also includes disparagement of land, personal property, and intangible things. *See* RESTATEMENT (SECOND) OF TORTS § 623A cmt. a (1977).

177. 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:99 (4th ed. 2014).

178. *See* RESTATEMENT (SECOND) OF TORTS § 633(1) (2011) ("The pecuniary loss for which a publisher of injurious falsehood is subject to liability is restricted to (a) the pecuniary loss that results directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value caused by disparagement, and (b) the expense of measures reasonably necessary to counteract the publication, including litigation to remove the doubt cast upon vendibility or value by disparagement.").

179. *Id.* § 623A.

180. *Id.* § 632.

181. *Bederman et al.*, *supra* note 80, at 141.

182. *Auvil v. CBS "60 Minutes"*, 67 F.3d 816, 820–22 (9th Cir. 1995).

183. *Id.* at 822.

ways,” the court wrote, “a great deal of uncertainty would arise as to the message conveyed by the broadcast.”<sup>184</sup> The court recognized that allowing the growers’ suit to go forward would risk chilling journalistic speech and make it difficult for reporters to predict when their work will subject them to tort liability.<sup>185</sup>

Common law defamation is strictly constrained by First Amendment limitations.<sup>186</sup> Although the Supreme Court has not decided the extent to which First Amendment protections apply to product disparagement,<sup>187</sup> the Court accepted, without deciding on, a district court’s application of the First Amendment’s actual malice requirement for defamation claims by public figures to a disparagement claim.<sup>188</sup> Lower federal courts and state supreme courts have also applied the First Amendment limitations on liability for defamation to disparagement.<sup>189</sup> Therefore, a plaintiff likely would need to prove actual malice—that the defendant knew of the falsity of the statement or had a reckless disregard for its truth.<sup>190</sup> The difficult burdens faced under the common law were reason for the agricultural industry to fashion a new tort—agricultural disparagement.<sup>191</sup>

As will be discussed in more detail in Part VI.B, veggie libel laws modified the common law tort of product disparagement by relaxing or omitting several stringent constitutional requirements established to protect debate about matters of public concern.<sup>192</sup> The laws allow recovery

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184. *Id.*

185. *Id.*

186. *See* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759–60 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). *See generally* *Gitlow v. New York*, 268 U.S. 652 (1925) (the First Amendment’s protection of speech applies to the states through the Fourteenth Amendment).

187. *See* RESTATEMENT (SECOND) OF TORTS § 623A cmt. c (1977) (“In the absence of any indications from the Supreme Court on the extent, if any, to which the elements of the tort of injurious falsehood will be affected by the free-speech and free-press provisions of the First Amendment, it is not presently feasible to make predictions with assurance.”).

188. *See* *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513 (1984); *Bose Corp. v. Consumers Union of U.S., Inc.*, 508 F. Supp. 1249, 1270–71 (D. Mass. 1981). Actual malice means the defendant either knew the statement was false or acted in reckless disregard of its truth or falsity. *Sullivan*, 376 U.S. at 279–80. All other plaintiffs need only prove the defendant was negligent, or worse, whether the statement was true. *Gertz*, 418 U.S. at 350.

189. *See, e.g.*, *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1133 (9th Cir. 2003) (stating the actual malice standard applies to disparagement claims); *A & B–Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 651 N.E.2d 1283, 1295 (Ohio 1995) (requiring plaintiffs to show actual malice in disparagement cases based on statements that are qualifiedly privileged under defamation law).

190. *Bederman et al.*, *supra* note 80, at 141.

191. *Bederman*, *supra* note 11, at 194.

192. *See infra* Part VI.B.

of actual and punitive damages for the dissemination of “false information” not based upon “reliable” scientific facts and data “which the disseminator knows or should have known to be false, and which casts doubt upon the safety of any perishable agricultural food product.”<sup>193</sup> Therefore, the laws that make a speaker liable for disseminating information she “knew or should have known” was false, replace the traditional malice standard with the lower negligence standard.<sup>194</sup> Many of the laws also lack a provision that the false statement be “of and concerning” a particular plaintiff’s product, which can result in potentially limitless liability, thereby stifling public debate.<sup>195</sup>

#### IV. PURPOSES OF THE ACTS: JUSTIFYING SPECIAL PROTECTION FOR THE AGRICULTURAL INDUSTRY

The previous Part discussed the shortcomings of common law causes of action to protect against undercover investigations and commentary on agricultural products that allegedly wreak havoc on the market. The agricultural industry has successfully convinced legislatures to enact tailor-made torts and crimes to protect its unique interests.<sup>196</sup> Such special protection conferred to the agricultural industry begs the question of whether ag-gag and veggie libel laws are warranted. As the *Washington Post* editorial board stated, the public should question “why an industry that claims it has nothing to hide demands protections afforded to no other.”<sup>197</sup> In general, the agricultural industry argues that such laws are justified due to the extreme volatility of food markets.<sup>198</sup> When consumers become disgusted by or afraid of their food, the thinking goes, corporate profits can plummet more precipitously than with any other product or resource in the marketplace. Ag-gag and veggie libel laws are designed to enforce calm in the market and to ensure a steady stream of profits by quelling critical speech and activists’ exposés. This Part explores the agricultural industry’s justification for each of its tailor-made laws.

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193. Letter from Margaret R. Hughes, Deputy Attorney General of Idaho, to the Honorable Herb Carlson, regarding House Bill 593: Product Disparagement (Feb. 28, 1992) (on file with the Center for Science in the Public Interest), available at <http://www.cspinet.org/foodspeak/laws/idago.htm>.

194. *Id.*

195. *Id.*

196. *See id.*

197. Editorial, *Cruelty To Farm Animals Demands Exposure*, WASH. POST (Apr. 26, 2013), [http://www.washingtonpost.com/opinions/cruelty-to-farm-animals-demands-exposure/2013/04/26/9a972c8e-a6bf-11e2-a8e2-5b98cb59187f\\_story.html](http://www.washingtonpost.com/opinions/cruelty-to-farm-animals-demands-exposure/2013/04/26/9a972c8e-a6bf-11e2-a8e2-5b98cb59187f_story.html).

198. Grey, *supra* note 132, at 15.

*A. Ag-Gag: Protecting Agricultural Operations*

Supporters of ag-gag laws argue that the legislation is necessary to protect agricultural producers from media persecution, dangerous activists, and harm to their property and livelihood. Bill Meierling, spokesman for the American Legislative Exchange Council (ALEC), drafted a model ag-gag law<sup>199</sup> and explained, “At the end of the day it’s about personal property rights or the individual right to privacy.”<sup>200</sup> State Senator and veterinarian Joe Seng, who sponsored Iowa’s Senate bill, stated that that law’s intent was to protect the agricultural industry against “subversive acts” that could “bring down the industry.”<sup>201</sup> Iowa Governor Terry Branstad argued, “[F]armers should not be subjected to people doing illegal, inappropriate things and being involved in fraud and deception in order to try to disrupt agricultural operations.”<sup>202</sup>

Supporters of the ag-gag laws also imply that the laws protect the public interest by protecting the animals at the agricultural facilities from exposure to disease and other problems that may arise from unauthorized access to agricultural production facilities.<sup>203</sup> A representative of the Utah Farm Bureau stated that undercover farm investigations “have done more of a disservice than anything positive.”<sup>204</sup>

Many proponents of the law indicated the law’s focus was on animal activists. For example, Iowa Senator Joe Seng stated that the law’s goal is to protect agriculture from “extremist vegans.”<sup>205</sup> Utah State Representative John Mathis voiced similar concerns, stating that the laws are needed because “national propaganda groups” are using the footage from undercover investigations “as part of their larger agenda of shutting

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199. See Will Potter, “Ag Gag” Bills and Supporters Have Close Ties to ALEC, GREEN IS THE NEW RED (Apr. 26, 2012), <http://www.greenisthenewred.com/blog/ag-gag-american-legislative-exchange-council/5947>.

200. Associated Press, *State Bills Seek End to Farm Animal Abuse Videos*, FOX NEWS (Mar. 17, 2013), <http://www.foxnews.com/politics/2013/03/17/state-bills-seek-end-to-farm-animal-abuse-videos/#ixzz2Qn96AWv1>.

201. “Ag Gag” Bill Passes Iowa Legislature, IOWA PUB. TELEVISION (Mar. 2, 2012), [http://www.iptv.org/mtom/story.cfm/feature/9179/mtom\\_20120302\\_3727\\_feature](http://www.iptv.org/mtom/story.cfm/feature/9179/mtom_20120302_3727_feature).

202. See Ken Anderson, “Ag Facility Fraud” Is Now Illegal in Iowa, BROWNFIELD AG NEWS (Mar. 6, 2012), <http://brownfieldagnews.com/2012/03/06/ag-facility-fraud-is-now-illegal-in-iowa/>.

203. *Protecting Agricultural Producers from Fraud*, IOWA SENATE DEMOCRATS (Mar. 2, 2012), <http://www.senate.iowa.gov/democrats/protecting-agricultural-producers-from-fraud/>; see Kai Ryssdal, *Iowa’s “Ag Gag” Sponsor Defends Bill*, MARKETPLACE FOR AM. PUB. MEDIA (Mar. 1, 2012), <http://www.marketplace.org/topics/life/iowas-ag-gag-sponsor-defends-bill>.

204. Complaint at 19, Animal Legal Def. Fund v. Herbert, No. 2:13-CV-00679 (D. Utah July 22, 2013), ECF No. 2 [hereinafter Utah Complaint].

205. *Iowa Approves First Ag Protection Law*, NAT’L HOG FARMER (Mar. 2, 2012), <http://nationalhogfarmer.com/business/iowa-approves-first-ag-protection-law>.

down the operations.”<sup>206</sup> Mike Kohler, speaking on behalf of dairy farmers, spoke in support of Utah’s law, explaining that it “will be a good tool to . . . stop some of the conduct nationally that has been causing a problem” for the industry.<sup>207</sup> In Utah, State Senator David Hinkins described the ag-gag law as “a trespassing bill,” intended to prevent people from entering an agricultural operation “who have no reason to be there except espionage, to spy on the operation.”<sup>208</sup> He also explained that the law is targeted at “the vegetarian people,” who are “trying to kill the animal industry.”<sup>209</sup>

According to the Animal Agriculture Alliance (AAA), ag-gag bills are “farm protection legislation”<sup>210</sup> necessary to hold activists “accountable for their actions to undermine farmers, ranchers and meat processors through use of videos depicting alleged mistreatment of animals for the purposes of gaining media attention and fundraising—all in an effort to drive their vegan agenda.”<sup>211</sup> The AAA further alleges that videos released from undercover investigations are “highly edited” and “attempt to use emotional images and scare tactics to discourage Americans from eating meat, milk[,] and eggs because they do not believe that we have that right.”<sup>212</sup> This view is held by other ag-gag supporters. Senator Jim Rice, a sponsor of the Idaho Senate bill “has been very vocal in expressing his opinion that Mercy For Animals orchestrated the video on the Idaho dairy operation.”<sup>213</sup> Other ag-gag supporters have claimed that the videos released are heavily edited and, in some instances, it is actually the undercover investigators contributing to the animal abuse captured on film.<sup>214</sup> Therefore, supporters argue that ag-gag laws are intended to stifle

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206. Josh Loftin, *Filming on Farms Could Be Banned in Utah*, FOOD MANUFACTURING (Feb. 27, 2012), <http://www.foodmanufacturing.com/news/2012/02/filming-farms-could-be-banned-utah>.

207. Utah Complaint, *supra* note 204, at 20.

208. Marjorie Cortez, *Bill on Interfering with Agricultural Operations Gets Preliminary Nod in Senate*, DESERET NEWS (Mar. 6, 2012), <http://politicalnotebook.blogs.deseretnews.com/2012/03/06/bill-on-interfering-with-agricultural-operations-gets-preliminary-nod-in-senate/>.

209. *Id.*

210. *Debate: After Activists Covertly Expose Animal Cruelty, Should They Be Targeted with “Ag-Gag” Laws?*, DEMOCRACY NOW! (Apr. 9, 2013), [http://www.democracynow.org/2013/4/9/debate\\_after\\_activists\\_covertly\\_expose\\_animal](http://www.democracynow.org/2013/4/9/debate_after_activists_covertly_expose_animal).

211. *Alliance Applauds Introduction of Bill to Protect Farmers from Undercover Extremists*, ANIMAL AGRIC. ALLIANCE (Mar. 2, 2011), <http://us1.campaign-archive2.com/?u=69c4e87210c5554923516496c&id=d1dd7fe219>.

212. Animal Agric. Alliance, *Deceptive Videos Unfairly Attack Farmers*, FARMS.COM (Dec. 15, 2010), <http://www.farms.com/farmspages/commentary/detailedcommentary/tabid/192/default.aspx?newsid=36655>.

213. *2014 Idaho Legislative Update*, *supra* note 29.

214. See Amanda Radke, *Do You Support Ag Gag Laws?*, BEEF DAILY (Mar. 14, 2012), <http://beefmagazine.com/blog/do-you-support-ag-gag-laws> (“I also know that PETA and HSUS supporters are usually behind these terrible videos depicting animal abuse. And, if they aren’t behind

these allegedly misleading and damaging investigations, limiting the likelihood that such films are made and distributed.

Based on these statements from ag-gag sponsors and supporters, the goals behind the ag-gag laws are intended to protect property from trespass, prevent any disruptions to the facility as a result of unauthorized access, and to protect the agricultural industry from the reputational harm caused by the allegedly misleading videos produced by undercover investigations.<sup>215</sup> As discussed in Part III, these interests are already protected by trespass, fraud, and defamation causes of action.<sup>216</sup> However, these statements also clearly reflect a desire to achieve what cannot be accomplished by existing law—the stifling of efforts by animal rights groups to expose industry practices through undercover investigations.<sup>217</sup> In other words, the agricultural industry is protecting its interests by stifling protected free speech about how food is produced.

#### *B. Veggie Libel: Protecting Agricultural Economy*

The stated legislative purpose of disparagement statutes is virtually identical in all thirteen states. The language used reflects a protectionist concern for the agricultural and aquacultural industries because “agriculture . . . [is] significant [to] . . . the state economy.”<sup>218</sup> This concern is used to justify the creation of a cause of action to protect producers from disparaging statements or dissemination of false information about the safety of the consumption of food products.<sup>219</sup> The Texas and North Dakota statutes do not expressly state their purpose.<sup>220</sup> However, supporters of the Texas laws explained that the law was necessary because, under

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the camera catching the action, they are usually the ones initiating the abuse. And, these organizations strategically release these videos to wreak havoc on the agriculture industry, which usually results in litigation, loss of jobs and a direct shot at the markets.”). *See also* Bittman, *supra* note 30.

215. *See* Liebmann, *supra* note 44, at 586.

216. *See supra* Part III.

217. *Id.*

218. *See, e.g.*, ALA. CODE § 6-5-620 (Westlaw through 2015 Act 2015–16).

219. In eight of the thirteen statutes, the purpose is repeated nearly verbatim: “[T]o protect . . . the agricultural and aquacultural economy . . . by providing a cause of action for producers to recover damages for the disparagement of any perishable product or commodity.” *Id.*; *see also* ARIZ. REV. STAT. ANN. § 3-113(A) (Westlaw through 2015 First Regular Sess.); GA. CODE ANN. § 2-16-1 (West, Westlaw through 2015 Acts 2–8, 10); LA. REV. STAT. ANN. § 3:4501 (Westlaw through 2014 Regular Sess.); MISS. CODE ANN. § 69-1-251 (West, Westlaw through 2014 Legis. Sess.); OHIO REV. CODE ANN. § 2307.81(A) (West, Westlaw through 2015 File 1); S.D. CODIFIED LAWS § 20-10A-2 (Westlaw through 2014 Regular Sess.). Two states limit the purpose to the protection of agricultural products. IDAHO CODE § 6-2001 (West, Westlaw through 2015 ch. 58); OKLA. STAT. ANN. tit. 2, §§ 5-100–02 (West, Westlaw through 2014 Second Sess.).

220. TEX. CIV. PRAC. & REM. CODE ANN. §§ 96.001–004 (West, Westlaw 2013 Third Called Sess.); N.D. CENT. CODE ANN. § 32-44-01 to -04 (West, Westlaw through 2013 Legis. Sess.).

traditional product disparagement law, “it can be difficult to recover damages for disparaged crops that have not been harvested.”<sup>221</sup> The house bill committee report noted that food producers in Texas are vulnerable to the malicious use of false or misleading information especially “considering the short amount of time available to harvest and market perishable agricultural . . . food products.”<sup>222</sup> Ohio’s food disparagement statute also indicates a concern for “the welfare of the consuming public.”<sup>223</sup> It states that its veggie libel law will “benefit all the citizens of this state”<sup>224</sup> who could be threatened by “false information about the safety of Ohio’s food supply.”<sup>225</sup>

Although the lawsuits involving apples, beef, and LFTB<sup>226</sup> evidence the actual damage that can result from communications about food production, it is unclear why special statutory protection is denied to other industries whose economic welfare could similarly be severely harmed by disparaging statements affecting nonagricultural products.<sup>227</sup> The justification for agriculture’s special status is tenuous. If impact on the economy is the test for whether to pass protectionist legislation, the safety of other commercial products, such as automobiles or fuel, could be shielded from public scrutiny and debate.<sup>228</sup> The law of product disparagement already protects manufacturers from false statements that damage the reputation of a product.<sup>229</sup> However, similar to ag-gag laws, “[i]t cannot seriously be doubted that the food disparagement statutes are designed to snuff out debate on the important public issue of food safety.”<sup>230</sup> As stated by a representative of the American Feed Industry Association: “I think that to the degree that the mere presence of these laws has caused activists to think twice, then these laws have already accom-

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221. Kevin A. 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, 252 (1998) (quoting House Research Organization, Bill Analysis of CSHB 722, at 17).

222. *Id.* (quoting Full History - HB 722, Bill Analysis, Committee Report).

223. OHIO REV. CODE ANN. § 2307.81(A) (West, Westlaw through 2015 File 1).

224. *Id.*

225. *Id.*

226. Prior to defendants’ news broadcasting, BPI sold nearly five million pounds of LFTB per week, ran four processing facilities, and had over 1,300 employees. Reid, *supra* note 114, at 636. Afterwards, BPI’s sales declined to less than two million pounds per week, BPI was forced to close three of its processing facilities, and BPI had to let go over 700 employees. BPI is losing more than \$20 million in revenue every month. BPI Complaint, *supra* note 13, ¶ 1.

227. Collins, *supra* note 18, at 23; Jones, *supra* note 138, at 846.

228. Jones, *supra* note 138, at 846.

229. See RESTATEMENT (SECOND) OF TORTS § 623A cmt. a (1977).

230. Bruce E.H. Johnson & Eric M. Stahl, *Food Disparagement Laws: An Overview of the Constitutional Issues*, LIBEL DEF. RES. CTR. BULLETIN: AGRIC. DISPARAGEMENT LAWS 31, 31 (1998).

plished what we set out to do.”<sup>231</sup> As discussed in Part VI, such laws that make critics and advocates “think twice” before speaking out on matters of public concern, such as food safety, violate the First Amendment.<sup>232</sup>

### C. Special Protection for the Agricultural Industry Is Unwarranted

Supporters of ag-gag and veggie libel laws tout the importance of the agricultural industry to the state to justify the need for protections against that which threatens the economy. Proponents of veggie libel laws argue that even if they could afford to counter negative reports about agricultural products, it may either be too late or unhelpful given the public’s lack of understanding about science.<sup>233</sup> Similarly, ag-gag supporters argue that farming practices may seem unsavory or offensive to consumers who are not educated enough to understand generally accepted husbandry animal practices.<sup>234</sup> However, these arguments cannot justify the restrictions on speech posed by the ag-gag and veggie libel laws. Public discourse about controversial issues is important to a free market economy, regardless of the economic ramifications.<sup>235</sup> Although the public interest is cited as a purpose for each of the laws, by limiting the amount and type of information the public can receive about food and food safety, the laws have the opposite effect.<sup>236</sup>

## V. CONSUMER DEMAND FOR FOOD SYSTEM TRANSPARENCY

Undercover investigations and public information campaigns revealing food safety scandals, animal abuse, and the effects of eating processed foods have contributed to consumers’ demand for “truth, trust, and transparency in their food.”<sup>237</sup> Upon learning how their food is produced, consumers are seeking even more information about their food

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231. *Id.*

232. *Id.*

233. Jones, *supra* note 138, at 847.

234. See generally Radke, *supra* note 214.

235. See Jones, *supra* note 138, at 847.

236. Collins, *supra* note 18, at 24.

237. Naomi Starkman, *What McDonald’s New ‘Transparency’ Campaign Is Hiding*, TIME (Oct. 13, 2014), <http://time.com/3501921/mcdonalds-transparency-campaign/>. See also CONE COMM’NS, THREE-QUARTERS OF AMERICANS SAY SUSTAINABILITY IS A PRIORITY WHEN MAKING FOOD PURCHASING DECISIONS, ACCORDING TO NEW CONE COMMUNICATIONS RESEARCH (Mar. 13, 2014), available at [http://www.conecomm.com/stuff/contentmgr/files/0/a8d3e04edc7ffebee79eda7100e765f0/files/2014\\_cone\\_communications\\_food\\_issues\\_trend\\_tracker\\_press\\_release\\_and\\_fact\\_sheet\\_.pdf](http://www.conecomm.com/stuff/contentmgr/files/0/a8d3e04edc7ffebee79eda7100e765f0/files/2014_cone_communications_food_issues_trend_tracker_press_release_and_fact_sheet_.pdf) (discussing a 2014 study finding that seventy-four percent of consumers want companies to explain how their food purchasing decisions impact the environment).

and are looking to change the system that produces it.<sup>238</sup> According to Phil Lambert, known as the “Supermarket Guru,”

More shoppers are interested in knowing not only where their foods are coming from, but also want to know about the people making their foods and are learning about their stories. . . . Shoppers are spending the time and reading more food packages as they shop the aisles in the supermarkets. . . . Food transparency is here to stay.<sup>239</sup>

Research commissioned by the food industry confirms that consumers are demanding more transparency at every level of food production. A 2013 consumer study conducted by the Center for Food Integrity (CFI) Food System<sup>240</sup> reveals the public’s distrust of “big food.”<sup>241</sup> As the CFI research demonstrated, consumers do not believe that today’s food system is transparent.<sup>242</sup> Furthermore, consumers believe that large companies are likely to put profit ahead of public interest.<sup>243</sup> Similarly, in the Transparency and Consumer Trust Survey, conducted by the U.S. Farmers and Ranchers Alliance (USFRA), when consumers were asked the level of trust they had in the food industry to “protect their health,” responses indicated that twenty-eight percent of consumers trusted the food regulatory organizations, twenty-nine percent trusted farmers and ranchers, and eleven percent trusted food packagers and manufactur-

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238. See Dragich, *supra* note 1, at 402–03, 405 (using, as an example, how consumer anger prompted industry action in a controversy involving the use of Bisphenol A (BPA), an endocrine-disrupting chemical, in food containers, baby bottles, and cups). See also Michele Simon, *BPA Is FDA’s Latest Gift to Food Industry*, FOOD SAFETY NEWS (Apr. 5, 2012), <http://www.foodsafetynews.com/2012/04/bpa-is-fdas-latest-gift-to-food-industry>. In response to reports linking BPA to cancer and other diseases, consumers stopped purchasing baby products containing BPA. *Id.* The American Chemistry Council (ACC) subsequently petitioned the FDA to ban the use of BPA in baby products. Gretchen Goetz, *BPA Banned from Baby Bottles, Sippy Cups*, FOOD SAFETY NEWS (July 18, 2012), <http://www.foodsafetynews.com/2012/07/bpa-banned-from-baby-bottles-sippy-cups>. The FDA implemented the ban “not because BPA is unsafe when used in these products, but because the substance simply isn’t ‘used’ in [baby bottles or cups] anymore.” *Id.*

239. Phil Lempert, *The Lempert Report: Top Ten Food Trends 2013 (Trends #6–10)*, SUPERMARKET GURU (Dec. 12, 2012), <http://www.supermarketguru.com/articles/top-ten-food-trends-2013-%28trends-6-10%29.html>.

240. See *Overview*, CENTER FOR FOOD INTEGRITY, <http://www.foodintegrity.org/membership> (last visited Apr. 6, 2015).

241. CTR. FOR FOOD INTEGRITY, 2013 CONSUMER TRUST IN THE FOOD SYSTEM RESEARCH 8–11 (2013) [hereinafter 2013 CONSUMER TRUST].

242. See *Consumer Trust Research 2013: Seven Steps to Trust-Building Transparency and Defining Social Outrage & Video: Consumers Weigh In: “Is the Food System Transparent?”*, CENTER FOR FOOD INTEGRITY (Oct. 29, 2013), <http://www.foodintegrity.org/research>.

243. 2013 CONSUMER TRUST, *supra* note 241, at 8.

ers.<sup>244</sup> The USFRA survey also found that nearly sixty percent of consumers think it is “extremely important” for grocery stores and restaurants to provide information about how their food is produced.<sup>245</sup>

While the term “transparency” has become a rallying cry for Americans demanding that large-scale agriculture “draw back the curtain” on its food production practices,<sup>246</sup> the term is rarely defined in the popular discourse.<sup>247</sup> According to the authors of a European Commission study of transparency in the food chain, the goal of transparency is to allow “informed decisions” on an objective basis.<sup>248</sup> Transparency is being reached if all stakeholders in the food system (consumers, policymakers, and enterprises that provide food)<sup>249</sup> understand the relevant aspects of products, production, and processes, allowing them to make informed decisions.<sup>250</sup> Defining transparency in this way illuminates the discussion of how and why ag-gag and veggie libel laws are contrary to the public interest.

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244. Liz Koehler, *Survey Shows Transparency Is Important to Consumers*, FARM WEEK NOW (Aug. 9, 2013), <http://farmweeknow.com/story-survey-shows-transparency-important-consumers-0-101157>.

245. *Id.*; see also *The Food Dialogues: Chicago. Integrity in Food Marketing 2014*, U.S. FARMERS & RANCHERS ALLIANCE, <http://www.fooddialogues.com/events/fd-chicago> (last visited Apr. 6, 2015).

246. See Nancy Huehnergarth, *Big Food and Big Ag Thwart Your “Right to Know” Anything About Your Food*, FOOD SAFETY NEWS (Sept. 24, 2012), [http://www.foodsafetynews.com/2012/09/big-food-and-big-ag-thwart-your-right-to-know-anything-about-your-food/#.VNJdR53F8\\_Z](http://www.foodsafetynews.com/2012/09/big-food-and-big-ag-thwart-your-right-to-know-anything-about-your-food/#.VNJdR53F8_Z). For example, consumers overwhelmingly favor labeling of genetically engineered food products. Ethan A. Huff, *MSNBC Poll: Nearly Everyone Supports Mandatory GMO Labeling*, NATURALNEWS (Mar. 3, 2011), [http://www.naturalnews.com/z031569\\_GMO\\_GMOS\\_food.html](http://www.naturalnews.com/z031569_GMO_GMOS_food.html) (noting that nearly ninety percent of respondents to an MSNBC poll favored labeling, ninety-three percent of respondents in an ABC poll favored mandatory labeling, and eighty-seven percent of respondents in a CBS/New York Times poll supported GMO labeling). See also Dragich, *supra* note 1, at 405.

247. “Everybody knows what transparency is, until asked to give a definition. Then it seems nobody knows.” European Comm’n, *Transparency*, TRANSPARENT FOOD, <http://www.transparentfood.eu/transparency.html>, (quoting RICHARD OLIVER, SATISFACTION: A BEHAVIORAL PERSPECTIVE ON THE CUSTOMER (1997)).

248. See GERHARD SCHIEFER & JIVKA DEITERS, *TRANSPARENCY IN THE FOOD CHAIN* (2013), available at [http://www.transparentfood.eu/data/TFBookDeliv\\_TransparencyFoodChain\\_22July2013.pdf](http://www.transparentfood.eu/data/TFBookDeliv_TransparencyFoodChain_22July2013.pdf).

249. *Id.* at 22.

250. *Id.* at 22, 24.

## VI. LEGAL TOOLS TO PROTECT BIG-AG: CONSTITUTIONAL CHALLENGES TO THE LAWS

*A. The (Un)Constitutionality of Ag-Gag Lawsuits*

Because the statutory schemes of ag-gag laws vary,<sup>251</sup> some such laws, enacted or proposed, could withstand a constitutional challenge.<sup>252</sup> However, the majority of newly enacted statutes are likely unconstitutional because they criminalize all employment-based undercover investigations and investigative journalism, whistleblowing by employees, or other expository efforts that entail images or sounds.<sup>253</sup> The constitutionality of agriculture protection acts in Utah and Idaho has been challenged in pending lawsuits brought by animal protection, civil liberties, and consumer advocacy groups, activists, and journalists.<sup>254</sup>

In an Idaho suit challenging the constitutionality of that state's ag-gag law, Judge B. Lynn Winmill allowed the plaintiffs' case to proceed because the law "is a content-based restriction" to which strict scrutiny applies.<sup>255</sup> This type of restriction occurs "if either the underlying pur-

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251. See discussion *supra* Part II.

252. See generally Jessalee Landfried, Note, *Bound & Gagged: Potential First Amendment Challenges to "Ag-Gag" Laws*, 23 DUKE ENVTL. L. & POL'Y F. 377 (2013) (summarizing potential First Amendment challenges to ag-gag laws).

253. See, e.g., Complaint ¶ 14, Animal Legal Def. Fund v. Otter, No. 1:14-cv-00104 (D. Idaho Mar. 16, 2014). See generally *United States v. Stevens*, 559 U.S. 460 (2010) (holding federal statute criminalizing the commercial creation, sale, or possession of depictions of animal cruelty to be substantially overbroad); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("Audio and audiovisual recording are media of expression commonly used for the preservation and dissemination of information and ideas and thus are 'included within the free speech and free press guaranty of the First and Fourteenth Amendments.'" (quoting *Burstyn v. Wilson*, 343 U.S. 495, 502 (1952))); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing the "First Amendment right to film matters of public interest").

254. The other plaintiffs include nonprofit organizations People for the Ethical Treatment of Animals, American Civil Liberties Union of Idaho, Center for Food Safety, Farm Sanctuary, River's Wish Animal Sanctuary, Western Watersheds Project, Sandpoint Vegetarians, Idaho Concerned Area Residents for the Environment, Idaho Hispanic Caucus Institute for Research & Education, and Farm Forward; the news journal CounterPunch; author and journalist Will Potter; animal agriculture scholar and historian James McWilliams; investigator Monte Hickman; freelance journalist Blair Koch; and agricultural investigations expert Daniel Hauff. Utah Complaint, *supra* note 204; Complaint, Animal Legal Def. Fund v. Otter, No. 1:14-cv-00104 (D. Idaho Mar 16, 2014). In response to the lawsuit challenging the constitutionality of the Idaho law, the Idaho Dairymen's Association stated: "Frankly, we see the expedient nature in which their suit was filed as a compliment to the security this new law grants Idaho agricultural producers." 2014 *Idaho Legislative Update*, *supra* note 29. Both lawsuits have survived motions to dismiss. *Animal Legal Def. Fund v. Herbert*, Docket No. 2:13-cv-00679-RJS, doc. 53, (D. Utah Aug. 8, 2014). The plaintiffs in Idaho have filed a motion for summary judgment. Idaho MSJ, *supra* note 17.

255. Order on Motion to Dismiss/Lack of Jurisdiction at 23–24, Animal Legal Def. Fund v. Otter, No. 1:14-cv-00104 (D. Idaho Sept. 4, 2014) [hereinafter Idaho Order]. See Liebmann, *supra* note 44, at 594 (analyzing the impact of *United States v. Alvarez* on ag-gag laws and explaining why

pose of the regulation is to suppress particular ideas or if the regulation, by its very terms, singles out particular content for differential treatment.”<sup>256</sup> Judge Winmill explained that the Idaho ag-gag statute is content-based because it “targets one type of speech—speech concerning ‘the conduct of an agricultural production facility’s operations’”—but leaves unburdened other types of speech at an agricultural production facility.<sup>257</sup>

Similarly, the court ruling in a case challenging Utah’s ag-gag statute declared that the statute “limits the production and distribution of politically salient speech regarding industrial agriculture”<sup>258</sup> by prohibiting the recording of activities at agricultural operations.<sup>259</sup> The plaintiffs successfully argued that by silencing animal activists and journalists, the law makes available “[o]nly one side of the debate regarding food safety, animal welfare, and labor practices”<sup>260</sup>—that is, the perspective of the industrial agriculture industry. Accordingly, these ag-gag laws target certain speech, including the particular speakers’ videos critical of animal agriculture, and are both content-based and viewpoint-discriminatory.<sup>261</sup> As evidenced by the intent of the bills’ sponsors, the purposes of the laws are to prevent harms such as lost profits, lost goodwill, and economic disruption that arise from undercover videos with critical viewpoints.<sup>262</sup>

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“Ag-Gag laws are not in fact statutes targeting fraud, and therefore do not fall within the exceptions requiring a lesser level of scrutiny.”)

256. Idaho Order, *supra* note 255, at 23 (quoting *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (en banc) (citation omitted)) (internal quotation marks omitted). See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994) (“As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.”). See also *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (noting that content-based restrictions on speech may distort the marketplace and drive ideas or viewpoints from the marketplace).

257. Idaho Order, *supra* note 255, at 22 (quoting IDAHO CODE ANN. § 18-7042 (West, Westlaw through 2015 ch. 58)). For example: “An employee who films, without the owner’s consent, animals being abused on a farm may be prosecuted and fined for violating section 18-7042; but an employee who films, without consent, the farm owner’s children (presuming the children are only visiting the facility and not working), may not.” Idaho Order, *supra* note 255, at 23.

258. Utah Complaint, *supra* note 204, at 5.

259. *Id.* at 36.

260. *Id.* at 5. Plaintiff argued that the Utah Department of Agriculture, through its website video series, speaks one-sidedly in support of industrial agriculture, for example, by depicting the egg industry as safe and humane. *Id.* at 23–29 (discussing content on the website touting the benefits of industrial agriculture). Therefore, “[f]or the government to speak in favor of one side of an issue of significant public concern, while at the same time passing legislation to silence the other side of the debate, violates the core principles that animate the First Amendment.” *Id.* at 29.

261. See Idaho MSJ, *supra* note 17, at 10.

262. Ballard, *supra* note 50, at 10972. For example, sponsors and supporters of Idaho’s law expressed an overriding concern about the ability of investigators and whistleblowers to “publicly crucify a company” in the media. Idaho MSJ, *supra* note 17, at 13.

Under strict scrutiny of speech-restricting laws, the government must prove that a law “furthers a compelling interest and is narrowly tailored to achieve that interest.”<sup>263</sup> As the Court has recently explained: “That is a demanding standard. ‘It is rare that a regulation restricting speech because of its content will ever be permissible.’”<sup>264</sup>

### 1. Ag-Gag Laws Do Not Serve a Compelling State Interest

Courts have stated that a compelling interest is one of the “highest order.”<sup>265</sup> Notwithstanding any “legitimate, or reasonable, or even praiseworthy” goals of the law, “[t]here must be some pressing public necessity, some essential value that has to be preserved; and even then the law must restrict as little speech as possible to serve the goal.”<sup>266</sup> Shielding agricultural production facilities from the impact of undercover investigations does not meet this test.<sup>267</sup> Rather, most compelling is the public’s interest in receiving information discovered by these investigations. Ag-gag laws, which reduce transparency of agricultural production, are contrary to public interest because of the detrimental effects that unsafe agricultural practices have on public health.<sup>268</sup>

The importance of undercover investigations and whistleblowers to monitoring food safety and other issues has been widely recognized.<sup>269</sup> As the U.S. House of Representatives Judiciary Committee has stated: “Regulators, humane societies, and labor unions rely on whistleblowers and legitimate undercover investigations to police conditions at food and fiber processing facilities and determine compliance with animal welfare and labor laws.”<sup>270</sup> Thus, as ag-gag laws criminalize undercover investigations, the public must rely only on government inspections and whistleblowing by non-undercover employees to discover animal cruelty and

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263. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (quoting *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)) (internal quotation marks omitted).

264. *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2738 (2011) (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818 (2000)).

265. *See Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

266. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 680 (1994).

267. *Liebmann*, *supra* note 44, at 590.

268. *Id.* at 591.

269. *See id.* (arguing that whistleblower protection laws, such as 5 U.S.C. § 2302(b)(13) (2012), demonstrate that “[i]nsulating agricultural production facilities from outside scrutiny is not a compelling governmental interest”).

270. *Bollard*, *supra* note 50, at 10962 (citing H.R. REP. NO. 102-498(II), at 4 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 816).

food safety issues.<sup>271</sup> Considerable evidence proves the ineffectiveness of these methods.<sup>272</sup> Preventing the public from obtaining this information precludes the dissemination of much needed safety-related information; this cannot be a compelling state interest.

When federal agencies fail to fulfill their responsibilities,<sup>273</sup> private undercover investigations like those banned by ag-gag laws can be the only way to expose food safety violations.<sup>274</sup> For example, in 2007, an investigator for the Humane Society of the United States documented “egregious” violations of federal regulations at the Westland/Hallmark Meat Company slaughtering plant based in Chino, California.<sup>275</sup> The investigator filmed downer cows, which are too weak or sick to stand on their own, being pushed with heavy machinery, electrically shocked, and finally dragged to slaughter.<sup>276</sup> Two days after the release of the video, the plant voluntarily suspended operations.<sup>277</sup> Three days later, the USDA officially suspended inspections of the plant, forcing a complete halt of production.<sup>278</sup> This egregious event also resulted in the recall of 143 million pounds of beef—the largest beef recall in U.S. history.<sup>279</sup>

Alarming, the USDA had inspectors present at the slaughtering plant “continuously,” allowing the plant to pass “17 separate food safety and humane handling audits in 2007.”<sup>280</sup> Two of these audits occurred

271. See *Protect Animals From Corporate Greed*, ANIMAL LEGAL DEF. FUND, <http://protectyourfood.org/the-law/> (last visited May 3, 2015) (“Under the guise of property rights, ag gag bills are intended to prevent consumers from ever seeing the horrors of animal abuse, contaminated crops, illegal working conditions, and risky food safety practices—the sort that result in massive food safety recalls and all too frequently lead to outbreaks of food-borne illness.”) [hereinafter ANIMAL LEGAL DEF. FUND].

272. Larissa Wilson, *Ag-Gag Laws: A Shift in the Wrong Direction for Animal Welfare on Farms*, 44 GOLDEN GATE U. L. REV. 311, 329 (2014).

273. See Dragich, *supra* note 1, at 423 (“[T]he FDA and the USDA responses to significant food production controversies have often been delay, inaction, and avoidance of regulatory responsibility.”).

274. See Paige M. Tomaselli, “Ag-Gag” Laws: Why Animal Welfare is a Food Safety Concern, CENTER FOR FOOD SAFETY (Apr. 7, 2014), <http://www.centerforfoodsafety.org/blog/3049/ag-gag-laws-why-animal-welfare-is-a-food-safety-concern>.

275. *Id.*

276. *Id.*

277. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF AGRIC., AUDIT REPORT: EVALUATION OF FSIS MANAGEMENT CONTROLS OVER PRE-SLAUGHTER ACTIVITIES, at i (2008), available at <http://www.usda.gov/oig/webdocs/24601-07-KC.pdf>.

278. *Id.*

279. Andrew Martin, *Largest Recall of Ground Beef Is Ordered*, N.Y. TIMES (Feb. 18, 2008), [http://www.nytimes.com/2008/02/18/business/18recall.html?adxnnl=1&adxnnlx=1303404634-53bv9+eAwR0szsFZUDf0zA&\\_r=0](http://www.nytimes.com/2008/02/18/business/18recall.html?adxnnl=1&adxnnlx=1303404634-53bv9+eAwR0szsFZUDf0zA&_r=0).

280. MICHAEL MCFADDEN, A FARM FORWARD REPORT: EXPOSING AG-GAG 2 (2012), available at <http://farmforward.com/wp-content/uploads/2015/01/Ag-Gag-White-Paper.pdf> (stating “the USDA has called [downer cattle] ‘unfit for human food’”).

“during or very shortly after” the undercover video was recorded.<sup>281</sup> One of the audit reports, dated February 1, 2008, states:

I have reviewed the records and programs you have at your plant [which] are the best I have ever seen in any plant. . . . Your plant has passed numerous audits on humane handling of animals in this plant in the year of 2007 and has no failures, which you should to be [sic] very proud of.<sup>282</sup>

Recent criticism of the USDA’s Food Safety and Inspection Service (FSIS) mismanagement is mounting.<sup>283</sup> In a July 2014 letter sent to USDA Secretary Tom Vilsack, Food & Water Watch detailed examples of meat and poultry plants not receiving food safety inspections because of shortages in inspection personnel.<sup>284</sup> The FSIS policy beginning in 2012 to hire “temporary inspectors” and freeze the hiring of permanent inspectors caused a large number of vacancies, putting a strain on the agency’s ability to meet its statutory and regulatory responsibilities of inspecting every meat and poultry plant in America.<sup>285</sup> As a result, since 2012, there have been fifteen recalls of products that were not inspected.<sup>286</sup>

In February 2015, four USDA meat inspectors provided affidavits to the whistleblower protection organization Government Accountability Project to criticize the USDA’s policy.<sup>287</sup> As one inspector stated, the production lines under the pilot program, which moved more than twenty percent more rapidly than a standard plant, were “running so fast it is

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281. *Id.*

282. *Id.*

283. *See, e.g.*, U.S. GOV’T OFFICE OF ACCOUNTABILITY, USDA NEEDS TO STRENGTHEN ITS APPROACH TO PROTECTING HUMAN HEALTH FROM PATHOGENS IN POULTRY PRODUCTS, GAO-14-744 (2014), available at <http://www.gao.gov/products/GAO-14-744> (recommending that USDA develop additional performance measures for *Salmonella* and *Campylobacter* contamination in poultry products and ensure future guidelines for controlling *Salmonella* and *Campylobacter* on farms).

284. Jeremy Gerrard, *Consumer Rights Group Says Inadequate USDA Inspection Leaves Consumers At Risk*, FOOD ENGINEERING (July 16, 2014), <http://www.foodengineeringmag.com/articles/92524-consumer-rights-group-says-inadequate-usda-inspection-leaves-consumers-at-risk>. *See also* Letter from Food & Water Watch to Tom Vilsack, USDA Sec’y (July 14, 2014) [hereinafter Letter from Food & Water Watch], available at [http://documents.foodandwaterwatch.org/doc/Vilsack\\_letter\\_July\\_2014.pdf#\\_ga=1.57129068.715828342.1400295150](http://documents.foodandwaterwatch.org/doc/Vilsack_letter_July_2014.pdf#_ga=1.57129068.715828342.1400295150).

285. Letter from Food & Water Watch, *supra* note 284, at 1.

286. *Id.*

287. *See WTF Hormel?!*, FOOD INTEGRITY CAMPAIGN, <http://www.foodwhistleblower.org/campaign/hormel-hogs> (last visited Apr. 6, 2015).

impossible to see anything on the carcass.”<sup>288</sup> Another inspector went further, stating, “I can say without a doubt that this plant is not meeting and certainly is not exceeding [the USDA’s standards for food safety and quality]. . . . The only way this plant could possibly be meeting these standards is by manipulating employees, USDA inspectors, and their own records and processes. I have personally witnessed all three.”<sup>289</sup>

Although these whistleblowers are legitimate employees, and are thus not subject to ag-gag laws, relying solely on such employees to report violations of safety or animal welfare standards is ineffective.<sup>290</sup> Whistleblowers often face harassment and other adverse employment consequences.<sup>291</sup> Such concerns are particularly great among the majority of farmworkers who are not authorized to work in the United States.<sup>292</sup> The broad implications of ag-gag laws are illustrated by a hypothetical example presented by Amanda Hitt of the Government Accountability Project: a low-wage factory employee whose only intent in applying for work there was to earn a living, but who nonetheless discovers inhumane animal-handling situations that the employee feels compelled to record and report.<sup>293</sup> Hitt asks: how can that employee prove that he did not obtain employment with the intent to record and report the factory’s operation?<sup>294</sup>

The American public cannot rely solely on government inspections or legitimate employee whistleblowers to enforce anticruelty and food safety laws.<sup>295</sup> Restrictions or prohibitions on undercover investigations decrease opportunities for the public to learn of food safety violations, thereby increasing the risk that consumers contract illnesses from the

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288. Ted Genoways, *Whistleblower USDA Food Inspectors on Hormel’s Pork Plants: It’s “Just Nuts”*, NEW REPUBLIC (Feb. 5, 2015), <http://www.newrepublic.com/article/120982/hormels-usda-food-inspector-scandal-reveals-lax-conditions>.

289. *Id.*

290. Wilson, *supra* note 272, at 329.

291. A 1999 survey of approximately 800 whistleblowers in the United States found that sixty-nine percent of them were criticized or avoided by coworkers. Kim R. Sawyer, Jackie Johnson & Mark Holub, *The Necessary Illegitimacy of the Whistleblower 4* (2006) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=917316](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917316).

292. See DANIEL CARROLL ET AL., U.S. DEP’T OF LABOR, *A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARM WORKERS 3* (2005), available at [http://www.doleta.gov/agworker/report9/naws\\_rpt9.pdf](http://www.doleta.gov/agworker/report9/naws_rpt9.pdf).

293. Kristen Rasmussen, *Efforts to Restrict Recordings of Animal Abuse Could Impede News-gathering*, NEWS MEDIA & L., Spring 2012, at 4, available at <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2012/efforts-restrict-recordings#sthash.ChLbC1uV.dpuf>

294. *Id.*

295. See Bittman, *supra* note 30 (“[O]rganizations . . . need to be allowed to do the work that the federal and state governments are not: documenting the kind of behavior most of us abhor. Indeed, the independent investigators should be supported.”).

consumption of unsafe food products.<sup>296</sup> Therefore, preventing the public from receiving information obtained from undercover investigations cannot be a compelling government interest.

## 2. Ag-Gag Laws Are Not Narrowly Tailored

A content-based speech restriction must be “the least restrictive means among available, effective alternatives.”<sup>297</sup> To satisfy the narrow tailoring requirement, “the Government . . . bears the burden of showing that the remedy it has adopted does not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’”<sup>298</sup> Yet ag-gag laws are not narrowly tailored to address the harm that the government seeks to address.<sup>299</sup> Alternative means exist by which to accomplish the goal of protecting the reputation of agricultural production facilities that do not involve restrictions on speech.<sup>300</sup> In *United States v. Alvarez*,<sup>301</sup> in which the Supreme Court held that the Stolen Valor Act, which made it a crime to lie about receiving the Congressional Medal of Honor, was unconstitutional, the Court found that the government had not shown why “counterspeech” was insufficient to combat the harms that the statute at issue sought to address.<sup>302</sup> In recognizing this, the Court declared: “The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth.”<sup>303</sup> Therefore, when a harm can be mitigated by greater transparency, more speech is the preferred alternative means.<sup>304</sup> If undercover activists’ reports and depictions of agricultural operations are misleading, as the Supreme Court indicated, “counterspeech” is more effective than passing laws restricting speech.<sup>305</sup>

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296. See ANIMAL LEGAL DEF. FUND, *supra* note 271.

297. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004).

298. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

299. See Idaho MSJ, *supra* note 17, at 18 (“Narrow tailoring requires legislators take a scalpel to excise a precise evil, but the Idaho General Assembly instead took a hatchet to the First Amendment rights of whistleblowers in the agricultural industry.”).

300. Liebmann, *supra* note 44, at 594.

301. See *generally* *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

302. *Id.* at 2549.

303. *Id.* at 2550 (citations omitted).

304. Liebmann, *supra* note 44, at 594.

305. *Id.*

Furthermore, as discussed previously, fraud, trespass, and defamation laws<sup>306</sup> already exist to protect legitimate governmental interests.<sup>307</sup> Particularly in Idaho, where the ag-gag law “criminalizes *all* misrepresentations to gain access for any reason and *all* audiovisual recordings of *any* agricultural activity,”<sup>308</sup> such law is not narrowly tailored and restricts significantly more speech than is necessary. Therefore, because the ag-gag laws do not serve a compelling interest and are not narrowly tailored, they cannot survive scrutiny.

### B. *The (Un)Constitutionality of Veggie Libel Laws*

Although courts have not addressed the constitutionality of veggie libel laws,<sup>309</sup> legal scholarship has extensively explored the arguments regarding the constitutionality of this type of legislation. The overwhelming scholarly opinion is that these laws do not pass constitutional muster<sup>310</sup> “precisely because the goal is to deter speech that enjoys First

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306. Under the Idaho ag-gag statute, agricultural operations may collect the same damages as in a libel action (double the loss, including “direct out-of-pocket losses or expenses”) without satisfying the constitutional defamation standard. Idaho Order, *supra* note 255 at 30.

307. *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 637 (1980) (“The Village’s legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly.”).

308. See Idaho MSJ, *supra* note 17, at 17.

309. An early effort to challenge Georgia’s statute failed. *Bederman*, *supra* note 11, at 216. Action for A Clean Environment and Parents for Pesticide Alternatives sought a declaratory judgment as to the constitutionality of the Georgia law, alleging that their speech was being chilled by the prohibition on content-based speech about “perishable food products or commodities.” *Id.* Because the plaintiffs were unsure of the limits imposed on their constitutional right to free speech, they sought a declaratory judgment to clarify those rights. *Id.* The Georgia Court of Appeals affirmed the dismissal of a constitutional challenge and held there was no justiciable controversy because the state did not have any interest adverse to the plaintiffs and had not denied them any right. *Action for a Clean Env’t v. State*, 457 S.E.2d 273, 273–74 (Ga. Ct. App. 1995); see GA. CODE ANN. §§ 2-16-1 to 4 (West, Westlaw through 2015 Acts 2–8, 10).

310. See, e.g., *Bederman*, *supra* note 11; *Bederman et al.*, *supra* note 80; *Cain*, *supra* note 83; *Collins*, *supra* note 18; *Melanie M. Ghaw, Animal Farm Reality: The First Amendment Struggle to Reveal the Frightening Truth Behind Industrial Farm Animal Production*, 20 BUFF. ENVTL. L.J. 33 (2013); *Julie K. Harders, The Unconstitutionality of Iowa’s Proposed Agricultural Food Products Act and Similar Veggie Libel Laws*, 3 DRAKE J. AGRIC. L. 251, 270–71 (1998); *Jones*, *supra* note 138; *Sara Lunsford Kohen, What Ever Happened to Veggie Libel?: Why Plaintiffs Are Not Using Agricultural Product Disparagement Statutes*, 16 DRAKE J. AGRIC. L. 261 (2011); *Jennifer J. Mattson, North Dakota Jumps on the Agricultural Disparagement Law Bandwagon by Enacting Legislation to Meet a Concern Already Actionable Under State Defamation Law and Failing to Heed Constitutionality Concerns*, 74 N.D. L. REV. 89, 115 (1998); *Reid*, *supra* note 114; *Megan W. Semple, Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Law*, 15 VA. ENVTL. L.J. 403, 411 (1996); *Harold M. Wasserman, Two Degrees of Speech Protection: Free Speech Through the Prism of Agricultural Disparagement Laws*, 8 WM. & MARY BILL RTS. J. 323, 334 (2000); *Lisa Dobson Gould, Comment, Mad Cows, Offended Emus, and Old Eggs:*

Amendment protection.”<sup>311</sup> As a result, the reasons to challenge the statutes are plentiful.<sup>312</sup> The statutes violate fundamental First Amendment principles by making actionable protected speech regarding matters of serious public concern.<sup>313</sup> These statutes are also impermissible content-based regulations.<sup>314</sup> Many of the laws fail to include the constitutional “fault” requirement,<sup>315</sup> as well as the “of and concerning” element.<sup>316</sup> The burden of proof and provision of punitive damages in many of the statutes violates constitutional principles.<sup>317</sup> Furthermore, to the extent that the statutes limit or prohibit speech in advance, they may be classified as unconstitutional “prior restraints” on free speech,<sup>318</sup> and thus, they are unconstitutional.<sup>319</sup>

The majority of these arguments are derived from well-established principles developed since the United States Supreme Court constitutionalized defamation law in *New York Times Co. v. Sullivan*.<sup>320</sup> Since that seminal case, although the Supreme Court has not directly stated that First Amendment principles apply to disparagement, several cases suggest that where the alleged injury is the damaging effect of speech, First Amendment protections still apply, regardless of the cause of action.<sup>321</sup> This issue was addressed squarely by the California Supreme Court:

Although the limitations that define the First Amendment’s zone of protection for the press were established in defamation actions, they are not peculiar to such actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement: “that con-

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*Perishable Product Disparagement Laws and Free Speech*, 73 WASH. L. REV. 1019, 1019 (1998); Julie J. Srochi, Note, *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, 1223 (1996).

311. Johnson & Stahl, *supra* note 230, at 31. See Bederman, *supra* note 11, at 201–02 (arguing an agriculture disparagement statute violates the First Amendment because it “heavily regulate[s] the marketplace of ideas”).

312. Kohen, *supra* note 310, at 270–71 (summarizing the constitutional arguments).

313. Bederman et al., *supra* note 80, at 137.

314. Bederman, *supra* note 11, at 208.

315. Bederman et al., *supra* note 80, at 150.

316. Bederman, *supra* note 11, at 215.

317. Jones, *supra* note 138, at 834; Kohen, *supra* note 310, at 270–71.

318. See *Neb. Press Ass’n v. Stuart*, 427 U.S. 539 (1976).

319. Amy B. Gimensky & Kathy E. Ochroch, *Damages*, in 1998 LIBEL DEF. RES. CTR., LDRC BULLETIN, AGRICULTURAL DISPARAGEMENT LAWS 2, at 61, 64; Kohen, *supra* note 310 at 283–84.

320. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

321. See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), in which the Court accepted, without deciding on, a district court holding that *Sullivan*’s “actual malice” requirement applied to a disparagement claim; *In re Am. Cont’l/Lincoln Savs. & Loan Sec. Litig.*, 884 F. Supp. 1388, 1396 (D. Ariz. 1995) (“[C]laims for tortious interference and commercial disparagement ‘are subject to the same first amendment requirements that govern actions for defamation.’” (quoting *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057–58 (9th Cir.1990))).

stitutional protection does not depend on the label given the stated cause of action,” and no cause of action can “claim . . . talismanic immunity from constitutional limitations.”<sup>322</sup>

The court further stated that “it is immaterial for First Amendment purposes whether the statement in question relates to the plaintiff himself or merely to his property broadly defined.”<sup>323</sup> Thus, because agricultural disparagement laws involve the same state interest in protecting reputation and preventing economic harm, the constitutional limitations on defamation law also apply to agriculture disparagement.<sup>324</sup>

### 1. Food as a Matter of Public Concern

Discourse about food raises issues “of grave public concern.”<sup>325</sup> Such discussion

may be overtly political (e.g., talk of FDA regulations), family related (e.g., children and nutrition), religiously oriented (e.g., keeping kosher), communal (e.g., local food co-ops), economically focused (e.g., escalating food prices), environmentally centered (e.g., organic foods, or impact of toxins on food), or it may be health-related (e.g., cholesterol and heart disease).<sup>326</sup>

Issues regarding food safety, consumer protection, and the environment are of public concern because they can be “fairly considered as relating to any matter of political, social, or other concern to the community.”<sup>327</sup> As Judge Mary Lou Robinson stated in *Texas Beef Group v. Winfrey*: “It would be difficult to conceive of any topic of discussion that could be of greater concern and interest to all Americans than the safety of the food that they eat.”<sup>328</sup>

As the Supreme Court in *New York Times Co. v. Sullivan* established,<sup>329</sup> a state’s regulation of alleged defamation regarding matters of public concern is limited; a standard of “intentional falsity or reckless disregard for the truth” protects speech concerning issues of public con-

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322. *Blatty v. N.Y. Times Co.*, 728 P.2d 1177, 1182–83 (Cal. 1986) (internal citations omitted).

323. *Id.* at 1183.

324. *See Collins*, *supra* note 18, at 14; *see also Flotech, Inc. v. E.I. Du Pont de Nemours & Co.*, 814 F.2d 775, 777 n.1 (1st Cir. 1987) (“This Court has applied principles of defamation law to product disparagement claims.”).

325. *Bederman*, *supra* note 11, at 203.

326. *Collins*, *supra* note 18, at 7.

327. *Connick v. Myers*, 461 U.S. 138, 146 (1983).

328. *Tex. Beef Grp. v. Winfrey*, 11 F. Supp. 2d 858, 862 (N.D. Tex. 1998).

329. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 288–91 (1964).

cern.<sup>330</sup> In *Sullivan*, the Supreme Court held that a public official must demonstrate “that the injurious statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>331</sup>

In New Jersey, courts have expressly extended First Amendment protections to food safety issues in the media.<sup>332</sup> *Dairy Stores, Inc. v. Sentinel Publishing Co.* concerned a food store’s suit against a newspaper that had published an article stating that a product the store sold was not “natural spring water” because lab tests had revealed high concentrations of chlorine.<sup>333</sup> The court in that case held that “news stories about the quality or contents of products and services . . . should receive the same protection as those dealing with public officials and public figures.”<sup>334</sup> All veggie libel statutes regulate speech concerning the quality and safety of food. Thus, in all cases, the constitutional protections mandated by *New York Times Co. v. Sullivan* should apply to consumer discourse about agricultural and aquacultural products.<sup>335</sup>

## 2. Agriculture Disparagement Laws as Content-Based Regulations

Veggie libel statutes are fundamentally flawed because they violate the principle that “the government may not regulate speech based on its substantive content or the message it conveys.”<sup>336</sup> By regulating a particular type of product (agricultural), creating a particular definition of injury, and providing a special remedy, the disparagement statutes “protect[] the agricultural and aquacultural industries like [they] protect[] no others; [they] grant these industries a special and higher level of immunity from criticism by allowing for civil cause of action unavailable to any other producers of products.”<sup>337</sup> These laws are contrary to the First Amendment premise that “[c]ontent-based regulations are presumptively invalid.”<sup>338</sup> Such an unconstitutional posture reflects an impermissible “hostility—or favoritism—towards the underlying message.”<sup>339</sup> Their provisions “prohibit[] otherwise permitted speech solely on the basis of the

330. Collins, *supra* note 18, at 9.

331. *Id.* at 279–80.

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

333. *Dairy Stores, Inc.*, 465 A.2d at 955.

334. *Id.* at 960.

335. Bederman, *supra* note 11, at 204; Collins, *supra* note 18, at 10.

336. *Rosenberger v. Rector*, 515 U.S. 819, 828 (1995).

337. Collins, *supra* note 18, at 22.

338. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd.*, 502 U.S. 105, 115 (1991).

339. *R.A.V.*, 505 U.S. at 386.

subjects the speech addresses.”<sup>340</sup> The effect of such preferential treatment to the agricultural sector is to impermissibly “drive certain ideas or viewpoints from the marketplace.”<sup>341</sup>

### 3. Fault Standards & Constitutional Requirements

The fault standards in defamation cases are well established. In *New York Times Co. v. Sullivan*,<sup>342</sup> the United States Supreme Court considered state defamation laws in the context of the First Amendment right to free speech and held that a public official must demonstrate “that the [defamatory] statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>343</sup> The Supreme Court later extended this standard beyond public officials to all “public figures” who sought recovery for libel.<sup>344</sup> A lower standard is permissible if the plaintiff is not a public figure. In *Gertz v. Robert Welch, Inc.*, the Supreme Court held that “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”<sup>345</sup> However, *Gertz* also established that a private plaintiff must prove actual malice to recover presumed and punitive damages, even though such a plaintiff can recover compensatory damages without proving actual malice.<sup>346</sup>

The veggio libel statutes include a variety of fault standards, many of which violate the principles summarized above. For example, Louisiana, Ohio, and Oklahoma establish liability for a disparaging statement that the speaker “knows or should have known” was false.<sup>347</sup> “Should have known” is a negligence standard.<sup>348</sup> Similarly, Alabama law states: “It is no defense under this article that the actor did not intend, or was unaware of, the act charged.”<sup>349</sup> A negligent defendant could therefore be found liable under Alabama’s disparagement law. According to *Gertz*,

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340. *Id.* at 381.

341. *Id.* at 387 (quoting *Simon & Schuster*, 502 U.S. at 116).

342. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

343. *Id.* at 279–80.

344. *See* *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 162–64 (1967).

345. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (footnote omitted).

346. *Id.* at 350. *See also* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (modifying the rule from *Gertz* to allow a private plaintiff to recover punitive damages without showing malice, when the false statement was not about a public concern).

347. LA. REV. STAT. ANN. § 3:4502(1) (Westlaw through 2014 Regular Sess.); OHIO REV. CODE ANN. § 2307.81(C) (West, Westlaw through 2015 File 1); OKLA. STAT. ANN. tit. 2, § 5-101(1) (West, Westlaw through 2014 Second Sess.).

348. Cain, *supra* note 83, at 291.

349. ALA. CODE ANN. § 6-5-623 (Westlaw through 2015 Act 2015–16).

negligence is a permissible standard of proof only if a food libel plaintiff is not a public figure.<sup>350</sup> High-profile corporate food producers that could be deemed public figures must prove malice.<sup>351</sup> Although *Gertz* also prohibits private plaintiffs from recovering punitive damages under these statutes without a showing of actual malice,<sup>352</sup> Alabama and Ohio expressly allow for the award of punitive damages,<sup>353</sup> and Louisiana and Oklahoma provide for “other appropriate relief” in addition to punitive damages.<sup>354</sup>

If corporate agricultural operations suing for disparagement are considered public figures, or if they seek punitive damages, Supreme Court precedent requires that the operations would have to prove malice.<sup>355</sup> By allowing recovery based on a negligence standard, many veggie libel statutes apply a lower fault standard, which is unconstitutional.<sup>356</sup>

#### 4. The “Of and Concerning” Element

The veggie libel statutes also lack the “of and concerning” element set forth in *Sullivan*, which requires that the alleged defamatory statement was about a defendant or a specific product.<sup>357</sup> In *Sullivan*, an advertisement appeared in the *New York Times* that did not fully identify the plaintiff by name.<sup>358</sup> The Court held that “the evidence was constitutionally defective in . . . [that] it was incapable of supporting the jury’s finding that the allegedly libelous statements were made ‘of and concerning’ respondent.”<sup>359</sup> Under most of the veggie libel laws, anyone involved in the “chain from grower to consumer”<sup>360</sup> can sue. Such “impersonal attack[s]” on speech about large groups could result in potentially limitless liability, which in turn could stifle public debate in a manner

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350. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

351. Cain, *supra* note 83, at 291.

352. *Id.* at 292. See also *Johnson & Stahl*, *supra* note 230, at 34 (citing *Gertz*, 418 U.S. at 349–50).

353. ALA. CODE § 6-5-622 (Westlaw through 2015 Act 2015–16); OHIO REV. CODE ANN. § 2307.81(C) (West, Westlaw through 2015 File 1).

354. LA. REV. STAT. ANN. § 3:4503 (Westlaw through 2014 Regular Sess.); OKLA. STAT. ANN. tit. 2, § 5-102(A) (West, Westlaw through 2014 Second Sess.).

355. Cain, *supra* note 83, at 293.

356. *Id.*

357. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964).

358. *Id.* at 288–91.

359. *Id.* at 288; see also *Rosenblatt v. Baer*, 383 U.S. 75, 79–80 (1966) (confirming the necessity of the “of and concerning” element).

360. *Bederman*, *supra* note 11, at 215.

intolerable under the First Amendment.<sup>361</sup> Therefore, the veggie libel statutes that lack an “of and concerning” clause are constitutionally deficient.<sup>362</sup>

##### 5. Burden of Proof: Requiring Defendants to Prove “Truth”

Plaintiffs have the burden of proof in defamation cases involving matters of public concern.<sup>363</sup> In *Philadelphia Newspapers v. Hepps*, the Supreme Court ruled that a plaintiff suing a media outlet for defamation must prove falsity when the alleged falsity is a matter of public concern.<sup>364</sup> “We believe that the common law’s rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.”<sup>365</sup> However, many veggie libel statutes appear to unconstitutionally place the burden of proof on the speaker.<sup>366</sup> These states define falsity based on the speaker’s lack of “reasonable and reliable scientific inquiry, facts, or data”<sup>367</sup> forming the basis of their speech. Rather than requiring the plaintiff to prove the falsity of a statement, these statutes require the speaker to prove the scientific basis for a statement—in other words, the truth.<sup>368</sup> Several scholars have discussed the difficulty of evaluating scientific data. To illustrate: “Health dangers that may not be acknowledged at one time, may be universally accepted later. Think about lead, bendectin,

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361. Johnson & Stahl, *supra* note 230, at 34.

362. Bederman, *supra* note 11, at 215. Idaho’s approach avoids an issue regarding the “of or concerning” element. The law states: “The disparaging factual statement must be clearly directed at a particular plaintiff’s product. A factual statement regarding a generic group of products, as opposed to a specific producer’s product, shall not serve as the basis for a cause of action.” IDAHO CODE ANN. § 6-2003(4) (West, Westlaw through 2015 ch. 58).

363. Johnson & Stahl, *supra* note 230, at 35–36.

364. *Phila. Newspapers v. Hepps*, 475 U.S. 767, 776–77 (1986) (“To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.”).

365. *Id.* at 776.

366. See ALA. CODE § 6-5-621(1) (Westlaw through 2015 Act 2015–16); ARIZ. REV. STAT. ANN. § 3-113(E)(1) (Westlaw through 2015 First Regular Sess.); FLA. STAT. ANN. § 865.065(2)(a) (West, Westlaw through 2015 First Regular Sess.); GA. CODE ANN. § 2-16-2(1) (West, Westlaw through 2015 Acts 2–8, 10); LA. REV. STAT. ANN. § 3:4502(1) (Westlaw through 2014 Regular Sess.); MISS. CODE ANN. § 69-1-253(a) (West, Westlaw through 2014 Legis. Sess.); OHIO REV. CODE ANN. § 2307.81(B)(2) (West, Westlaw through 2015 File 1); OKLA. STAT. ANN. tit. 2, § 5-102(A) (West, Westlaw through 2014 Second Sess.); TEX. CIV. PRAC. & REM. CODE ANN. § 96.003 (West, Westlaw 2013 Third Called Sess.).

367. ALA. CODE § 6-5-621(1) (Westlaw through 2015 Act 2015–16).

368. Reid, *supra* note 114, at 638.

DES, PCBs, and, yes, tobacco.”<sup>369</sup> Regulating speech pertaining to public health or safety does “not allow[] time and the advance of human knowledge to take its course.”<sup>370</sup> In other words, the statutes fail to “provide the necessary breathing space for the testing of hypothesis [sic] necessary to safeguard diverse forms of scientific inquiry whenever they contradict established scientific facts or data.”<sup>371</sup>

### *C. Ag-Gag & Veggie Libel Laws Are Unsound Policy*

In addition to the constitutional and public policy arguments against the laws, ag-gag and veggie libel laws are unlikely to protect the agricultural industry from reputational harms. To the contrary, “ag-gag laws guarantee one thing for certain: increased distrust of American farmers and our food supply in general.”<sup>372</sup> An informal poll on an industry blog may suggest that agricultural lobbyists are out of touch with farmers’ beliefs about the legal measures for which they are advocating. For example, in response to the question of whether “ag gag laws [are] a good idea for the livestock industry to pursue,” sixty-three percent of animal farmers answered: “No, livestock ag has nothing to hide and such laws give the impression that we do.”<sup>373</sup> In contrast, thirty-five percent are in favor of the legislative measures.<sup>374</sup> The laws are also out of touch with the overwhelming majority of Americans. In a 2011 poll in Iowa, only twenty-one percent of voters indicated their support of Iowa’s ag-gag bill.<sup>375</sup> A national poll commissioned by the ASPCA revealed that seventy-one percent of Americans support undercover investigative efforts by animal welfare organizations to expose animal abuse on industrial farms, including fifty-four percent who strongly support the efforts.<sup>376</sup> Accord-

369. Bederman, *supra* note 11, at 231.

370. *Id.*

371. Collins, *supra* note 18, at 19. The current debate regarding genetically modified (GM) foods illustrates the need for robust debate. Although some organizations claim that GM foods pose significant health risks, the food industry asserts that “[o]verwhelming scientific consensus tells us that genetically modified foods are safe.” 2014 Research, CENTER FOR FOOD INTEGRITY, <http://www.foodintegrity.org/research/2014-research> (last visited Apr. 6, 2015). See also *GMO Dangers*, INST. FOR RESPONSIBLE TECH., <http://www.responsibletechnology.org/gmo-dangers> (last visited Apr. 6, 2015).

372. Editorial, *Eating with Our Eyes Closed*, N.Y. TIMES (Apr. 9, 2013), [http://www.nytimes.com/2013/04/10/opinion/eating-with-our-eyes-closed.html?\\_r=1&](http://www.nytimes.com/2013/04/10/opinion/eating-with-our-eyes-closed.html?_r=1&).

373. Radke, *supra* note 214.

374. *Id.*

375. Jennifer Jacobs, *Survey Finds Iowa Voters Oppose Prohibiting Secret Animal-Abuse Videos* (Mar. 22, 2011), <http://blogs.desmoinesregister.com/dmr/index.php/2011/03/22/survey-finds-iowa-voters-oppose-prohibiting-secret-animal-abuse-videos>.

376. *ASPCA Research Shows Americans Overwhelmingly Support Investigations to Expose Animal Abuse on Industrial Farms*, AM. SOC’Y FOR THE PREVENTION OF CRUELTY TO ANIMALS

ingly, almost two-thirds (sixty-four percent) of Americans oppose making undercover investigations of animal abuse on industrial farms illegal, with half of all Americans strongly opposing ag-gag laws.<sup>377</sup>

As one writer for the agricultural industry explained: “Slamming the barn door shut when the public is asking for the transparency of a screen door sends the wrong message and plays into the hands of activists who will say to a suddenly more receptive audience, ‘They must have something truly awful to hide if they have to pass laws like that.’”<sup>378</sup> In light of consumers’ growing distrust of Big-Ag, resisting transparency by enacting and enforcing laws such as ag-gag and veggie libel laws are likely to harm, rather than protect, the industry.

## VII. NON-LEGAL TOOLS: OPENING THE BARNYARD DOOR

Food producers, distributors, and providers, from grocers and restaurants to industry organizations, are responding to the calls for transparency. Rather than stifling speech, the following discussion provides an overview of the market functioning as it should—changing in response to consumer demand. Rather than stifling the conversation about food production, certain initiatives by the industry attempt to appropriately further the dialogue in the “marketplace of ideas,” as the First Amendment intended.

### A. Retailers

Grocers and retailers as diverse as Whole Foods and Walmart are making efforts to “[s]how[] consumers where food comes from.”<sup>379</sup> Whole Foods is the first national grocery chain to set a deadline for full genetically modified organism (GMO) transparency and has committed to labeling all food products in U.S. and Canadian stores to indicate whether they contain GMOs by 2018.<sup>380</sup> They have also developed standards and a rating system, such as color-coded animal welfare stand-

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(Feb. 17, 2012), <https://www.aspc.org/about-us/press-releases/aspca-research-shows-americans-overwhelmingly-support-investigations-expose>.

<sup>377</sup> *Id.*

<sup>378</sup> Chuck Jolley, *Jolley: About that Iowa “Ag-Gag” Bill*, DROVERS (Mar. 8, 2012), <http://www.cattlenetwork.com/cattle-news/Jolley-About-that-Iowa-ag-gag-bill-141964863.html>.

<sup>379</sup> *Walmart Announces New Commitment to a Sustainable Food System at Global Milestone Meeting*, WALMART (Oct. 6, 2014), <http://news.walmart.com/news-archive/2014/10/06/walmart-announces-new-commitment-to-a-sustainable-food-system-at-global-milestone-meeting> [hereinafter WALMART].

<sup>380</sup> *GMO: Your Right To Know*, WHOLE FOODS MKT., <http://www.wholefoodsmarket.com/gmo-your-right-know> (last visited Apr. 6, 2015).

ards for meat,<sup>381</sup> sustainability standards for seafood,<sup>382</sup> and most recently, “Responsibly Grown” ratings for produce and flowers<sup>383</sup> that measure soil health, air quality, waste reduction, farmworker welfare, water conservation and protection, ecosystems and biodiversity, and pest management practices.<sup>384</sup> Whole Foods has adopted Global Animal Partnership’s 5-Step Animal Welfare Rating program, which outlines specific husbandry and management practices that promote farm animal welfare. For example, Step 1 prohibits the use of cages, crates, or crowding.<sup>385</sup> Whole Foods claims: “Before we do any purchasing, we know exactly how the animal was raised, what it ate and where it came from. And, we’ve done the research to give you the most responsibly raised selection of meat and poultry around.”<sup>386</sup>

In October 2014, Walmart announced its commitment to create a more sustainable food system and identified its goal of meeting “an increasing consumer demand for greater food transparency.”<sup>387</sup> The company launched its “Safe and Transparent” campaign, recognizing that “[a] transparent food chain fosters improved food safety, worker safety, and animal welfare.”<sup>388</sup> In its announcement, Walmart indicated that it “will work to provide more information and transparency about the products on its shelves so customers can see where an item came from, how it was made, and decode the ingredient label.”<sup>389</sup> The company’s initiative includes the creation of a database that tracks water use, green-

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381. *5 Step Animal Welfare Rating*, WHOLE FOODS MKT., <http://www.wholefoodsmarket.com/mission-values/animal-welfare/5-step-animal-welfare-rating> (last visited Apr. 6, 2015); *Animal Welfare*, WHOLE FOODS MKT. (Aug. 2012), <http://www.wholefoodsmarket.com/sites/default/files/media/Global/PDFs/5-step-meat-brochure.pdf>.

382. Regarding seafood: “We’re the only national retailer with full traceability from fishery or farm to store. We own and operate processing and distribution facilities that allow us to monitor and distribute our seafood with close oversight.” *Seafood Quality Standards*, WHOLE FOODS MKT., <http://www.wholefoodsmarket.com/seafood-quality-standards> (last visited Apr. 6, 2015).

383. To earn a “Good” rating, a farm must take major steps to protect human health and the environment; a “Better” rating indicates advanced performance; and a “Best” rating indicates exceptional, industry-leading performance. *How Our Produce Rating System Stacks Up*, WHOLE FOODS MKT., <http://www.wholefoodsmarket.com/responsibly-grown/produce-rating-system> (last visited Apr. 6, 2015).

384. *What Do We Measure?*, WHOLE FOODS MKT., <http://www.wholefoodsmarket.com/responsibly-grown/what-we-measure> (last visited Apr. 6, 2015).

385. *Animal Welfare Basics*, WHOLE FOODS MKT., <http://www.wholefoodsmarket.com/mission-values/animal-welfare/animal-welfare-basics> (last visited Apr. 6, 2015).

386. WALMART, *supra* note 379.

387. *Id.*

388. *Id.*

389. *Id.*

house gas emissions, and solid waste production, which can be used to form an index of a product's lifecycle impact.<sup>390</sup>

### B. Restaurants

The fast food industry is also undergoing changes in response to market pressures. In October 2014, McDonald's launched the "Your Questions, Our Food" transparency campaign.<sup>391</sup> Recognizing that consumers question the sources and preparation of its food, Kevin Newell, executive vice president and chief brand and strategy officer at McDonald's USA, explained that the campaign is "our move to ensure we engage people in a two-way dialogue about our food and answer the questions and address their comments."<sup>392</sup> On its website, for example, McDonald's discloses the ingredients in its french fries,<sup>393</sup> and answers customers' questions, such as: "How do you care for the animals within your supply chain?"<sup>394</sup> McDonald's even tackled the question: "Have you ever used so-called 'pink slime' in your burgers?"<sup>395</sup>

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390. Ben Block, *Wal-Mart Scrutinizes Supply-Chain Sustainability*, EYE ON EARTH, <http://www.worldwatch.org/node/6200> (last visited Apr. 6, 2015). Wal-Mart committed to improving its environmental track record in 2005 after its public image began to erode amid criticism from environmentalists and labor unions about the company's practices. *Id.*

391. *Your Questions, Our Food*, MCDONALD'S, [http://www.mcdonalds.com/content/us/en/your\\_questions/our\\_food.html](http://www.mcdonalds.com/content/us/en/your_questions/our_food.html) (last visited Apr. 6, 2015).

392. BurgerBusiness, *McDonald's, "MythBuster" Launch Food Q&A*, HUFFINGTON POST (Oct. 13, 2014), [http://www.huffingtonpost.com/burgerbusiness/mcdonalds-mythbuster-laun\\_b\\_5976250.html](http://www.huffingtonpost.com/burgerbusiness/mcdonalds-mythbuster-laun_b_5976250.html).

393. Ingredients include: "Potatoes, Vegetable Oil (Canola Oil, Soybean Oil, Hydrogenated Soybean Oil, Natural Beef Flavor [Wheat and Milk Derivatives]\*, Citric Acid [Preservative]), Dextrose, Sodium Acid Pyrophosphate (Maintain Color), Salt. Prepared in Vegetable Oil: Canola Oil, Corn Oil, Soybean Oil, Hydrogenated Soybean Oil with TBHQ and Citric Acid added to preserve freshness. Dimethylpolysiloxane added as an antifoaming agent." *World Famous Fries*, MCDONALD'S, [http://www.mcdonalds.com/us/en/food/product\\_nutrition.snackssides.6050.small-french-fries.html](http://www.mcdonalds.com/us/en/food/product_nutrition.snackssides.6050.small-french-fries.html) (last visited Apr. 6, 2015).

394. McDonald's responded: "In 2000, we acted as a leader in the industry, specifically in regards to eggs, when we established our laying hen animal welfare program for cage systems. What does that mean? Well, we worked to make sure the hens our suppliers worked with were properly cared for by increasing the space around them and ensuring there wasn't any forced molting. We also monitored that area to make sure all waste was disposed of properly." *Your Questions, Our Food*, MCDONALD'S, [http://www.mcdonalds.com/us/en/your\\_questions/our\\_food/how-do-you-care-for-the-animals-within-your-supply-chain.html](http://www.mcdonalds.com/us/en/your_questions/our_food/how-do-you-care-for-the-animals-within-your-supply-chain.html) (last visited Apr. 6, 2015). The company also stated its commitment to "working with [its] pork suppliers to phase out the practice of housing pregnant sows in gestation stalls by the end of 2022." *Id.*

395. McDonald's admitted that it used LFTB between 2004 and 2011, but stated that it does not currently use it. *Your Questions, Our Food*, MCDONALD'S, [http://www.mcdonalds.com/us/en/your\\_questions/our\\_food/have-you-ever-used-pink-slime-in-your-burgers.html](http://www.mcdonalds.com/us/en/your_questions/our_food/have-you-ever-used-pink-slime-in-your-burgers.html) (last visited Apr. 6, 2015). See *supra* Part II.B.

### C. Industry Organizations

Recognizing that Big-Ag's image needed a makeover, the biggest players in the food industry have launched a series of campaigns to respond to negative publicity due to animal abuse incidents captured by undercover videos.<sup>396</sup> The Center for Food Integrity (CFI), a not-for-profit organization representing farmers, ranchers, universities, food processors, restaurants, retailers, and food companies, was established in 2007 to "build consumer trust and confidence in today's food system."<sup>397</sup> CFI acknowledged the industry's need for a new approach in response to litigation, pressure on food companies, and legislation initiated by opponents of "today's food system."<sup>398</sup> The industry's response to such opposition and pressure to change has historically been to "attack[] the attackers and [use] science alone to justify current practices."<sup>399</sup> CFI's 2013 Consumer Trust in the Food System Research report concluded that "[n]ot only are these approaches ineffective in building stakeholder trust and support, they increase suspicion and skepticism that the food industry is worthy of public trust."<sup>400</sup> The calls for transparency have thus been successful in forcing the food industry to recognize that "[a]s consumer values change, the food system needs to evaluate and potentially

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396. See *Farm & PR Groups Wrestle with National 'Ag Image' Campaign*, AGRI-PULSE (Sept. 8, 2010), an industry report that discusses the use of media to successfully rebrand agriculture, such as the Corn Refiners Association's multimedia advertising campaign's TV, newspaper, magazine, and online ads, "which use humor to drive home the message that HFCS 'is made from corn, it's natural, and like sugar, it's fine in moderation.'" According to the report, the media campaign was to be a "preemptive strike" against "a long list of new regulations and restrictions coming out of the Environmental Protection Agency, the U.S. Department of Agriculture, and the Food & Drug Administration, ranging from tighter rules on pesticide applications to a potential ban of routine, preventative use of animal antibiotics." *Id.*

397. *Who Are We?*, CENTER FOR FOOD INTEGRITY, <http://www.foodintegrity.org/about-us> (last visited Apr. 6, 2015). Members of CFI include the American Farm Bureau Federation, ConAgra Foods, Grocery Manufacturers Association, McDonald's Corporation, Nestle, Cargill, Coca-Cola Company, Monsanto, Walmart, Smithfield Foods, and Tyson Foods, Inc., among many others. *Overview*, CENTER FOR FOOD INTEGRITY, <http://www.foodintegrity.org/membership> (last visited Apr. 6, 2015). Missing from the membership list, however, are organic farmers. "This represents everything we are working against," said Bill Deusing, head of the Northeast Organic Farming Association. Julia Moskin, *In Debate About Food, a Monied New Player*, N.Y. TIMES (Sept. 27, 2011), [http://www.nytimes.com/2011/09/28/dining/in-debate-about-food-a-monied-new-player.html?\\_r=2&adxnnl=1&pagewanted=1&adxnnlx=1422814492-iRfY/gBY3fCrBpKpfoYA0Q](http://www.nytimes.com/2011/09/28/dining/in-debate-about-food-a-monied-new-player.html?_r=2&adxnnl=1&pagewanted=1&adxnnlx=1422814492-iRfY/gBY3fCrBpKpfoYA0Q). Myra Goodman, a founder of the organic collective Earthbound Farms, is among the large-scale growers who have so far declined to join the Alliance: "If in practice it turns out to be a forum for honest, inclusive, productive discussions about the state of our food system, it could be good," but "[i]f it turns out to be all about protecting the status quo, then it won't be so productive." *Id.*

398. 2013 CONSUMER TRUST, *supra* note 241, at 5.

399. *Id.*

400. *Id.*

modify current practices and fundamentally change the way it communicates in order to maintain consumer trust.”<sup>401</sup>

In response to the surveys revealing prevalent “big food is bad”<sup>402</sup> attitudes among consumers, CFI, in partnership with Iowa State University, created a novel “research-based consumer trust model” to build trust in the food system.<sup>403</sup> The research demonstrates, “It’s not just about giving consumers more science, more research, more information. It’s about demonstrating that you share their values when it comes to topics they care about most—safe food, quality nutrition, appropriate animal care, environmental stewardship and others.”<sup>404</sup> CFI launched the “A New Conversation About Food” campaign “[t]o better address consumer questions and create a new platform for public engagement.”<sup>405</sup> According to Charlie Arnot, CFI’s CEO, “[t]he current discussion about food is resulting in more polarization, and at times, less informed decision-making. . . . A fresh approach is needed to successfully create a new conversation based on authentic transparency and increased engagement to better align with consumer values and expectations and increase consumer trust.”<sup>406</sup> CFI’s Project Public Voice initiative provides resources such as messaging and training to farmers and food producers to help them respond to consumer concerns about the food system.<sup>407</sup>

In direct response to undercover campaigns which “have heightened public attention on animal care issues,”<sup>408</sup> CFI created the Animal Care Review Panel “to provide a balanced analysis of undercover video investigations,”<sup>409</sup> “foster a more balanced conversation and to provide credible feedback to promote continuous improvement in farm animal care.”<sup>410</sup> The Panel, comprised of animal care specialists, veterinarians,

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401. *Id.*

402. *What Consumers Think*, CENTER FOR FOOD INTEGRITY, [http://www.foodintegrity.org/research/what\\_consumers\\_think](http://www.foodintegrity.org/research/what_consumers_think) (last visited Apr. 6, 2015).

403. *Cracking the Code on Food Issues: Insights from Moms, Millennials and Foodies*, CENTER FOR FOOD INTEGRITY, <http://www.foodintegrity.org/research/2014-research> (last visited Apr. 6, 2015).

404. *Id.*

405. *CFI Launches a New Conversation About Food*, CENTER FOR FOOD INTEGRITY, <http://www.foodintegrity.org/programs/newconversation> (last visited Apr. 6, 2015).

406. *Id.*

407. *Programs: Project Public Voice*, CENTER FOR FOOD INTEGRITY, <http://www.foodintegrity.org/programs/public-voice> (last visited Apr. 6, 2015).

408. *Expert Panel Addresses New Hidden Camera Investigation*, CENTER FOR FOOD INTEGRITY (July 17, 2012), [http://www.foodintegrity.org/document\\_center/download/News\\_section/ACRPstatement7-17-12FINAL.pdf](http://www.foodintegrity.org/document_center/download/News_section/ACRPstatement7-17-12FINAL.pdf).

409. *Programs: Pork Panel*, CENTER FOR FOOD INTEGRITY, <http://www.foodintegrity.org/programs/pork-panel> (last visited Apr. 6, 2015).

410. *Expert Panel Addresses New Hidden Camera Investigation*, *supra* note 408.

animal scientists, and ethicists, examines video and provides its expertise for food retailers; the pork, dairy, and poultry industries; and the media.<sup>411</sup> The Panel operates independently and its assessments are not submitted to the industry for review or approval prior to publication.<sup>412</sup>

The Panel of farm animal care specialists analyzed a four-minute undercover video posted on the Internet on July 16, 2012, by Mercy for Animals.<sup>413</sup> Although Panel members generally agreed that “some conditions and practices seen in the video could be improved,” they concluded that “most of what is shown does not indicate animals were abused or neglected.”<sup>414</sup> One Panel member summarized the situation: “Overall, these animals were well taken care of. There were no signs of animal cruelty, abuse or neglect. The sows were clean, free of lesions, calm[,] and in good condition.”<sup>415</sup> Another Panel member stated that the video’s claim “that gestation stalls are cruel” was not supported by the footage.<sup>416</sup> Another Panel member notes that images of sows “laying with legs and udders partially extending into adjacent stalls” were “troublesome” because “this could raise issues of comfort and safety.”<sup>417</sup> Regarding the footage of employees euthanizing piglets by striking their heads against the concrete floor, the panel members noted that “this use of blunt force trauma, while controversial, is accepted by the American Veterinary Medical Association and the American Association of Swine Veterinarians (AASV).”<sup>418</sup>

To reach a larger audience and answer the public’s questions regarding controversial issues surrounding food production, such as animal welfare, antibiotics, food safety, GMOs, hormones, and growth tools, USFRA, consisting of more than eighty farmer-led and rancher-led organizations and agricultural partners, launched a “Food Dialogues” initiative in 2011.<sup>419</sup> USFRA held a series of panel discussions “to engage in

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411. *Programs: Pork Panel*, *supra* note 409.

412. *Expert Panel Addresses New Hidden Camera Investigation*, *supra* note 408.

413. The Panel that examined the recent video was comprised of Dr. Janeen Salak-Johnson, University of Illinois; Dr. Candace Croney, Purdue University; and Dr. John Deen, University of Minnesota. *Id.* CFI reports that Mercy For Animals did not respond to its request for unedited video so that the panel could review the farm practices in better context. *Id.*

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.*

419. U.S. Farmers & Ranchers Alliance, *FoodSource: Answers to Questions About How Food is Grown and Raised*, FOOD DIALOGUES, <http://www.fooddialogues.com/foodsource> (last visited Apr. 6, 2015). Video segments of the Dialogues are available on the USFRA website. *Id.* See U.S. Farmers & Ranchers Alliance, *Food Dialogues: Chicago. Integrity In Food Marketing 2014*, FOOD DIALOGUES, <http://www.fooddialogues.com/events/fd-chicago> (last visited Apr. 6, 2015). Comment-

dialogue with consumers who have questions about how today's food is grown and raised."<sup>420</sup> In a 2014 Integrity in Food Marketing Dialogue, panelists addressed the question of whether consumers are "satisfied with how farmers take care of their livestock."<sup>421</sup> Robin R. Ganzert, president and CEO of the animal protection organization American Humane Association (AHA), explained that there is a disconnect between agricultural practices and consumers' knowledge and education about the food supply.<sup>422</sup> She explained that consumers' lack of trust in the food industry can be solved through dialogue and education.<sup>423</sup> The most recent Dialogue in January 2015 was comprised of food industry and animal care experts who discussed animal health and food safety issues relevant to the dairy industry.<sup>424</sup>

In addition to engaging the public in "dialogues" to counter negative messages about the agricultural industry, CFI is also addressing the issue of animal abuse through its *See it? Stop it!* national initiative.<sup>425</sup> This program, launched in 2013, provides educational materials regarding animal protection and "encourages and empowers its employees" to report instances of animal abuse, neglect, harm, or mishandling.<sup>426</sup> To participate in the program, farm owners and managers agree to investi-

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ing on the impact and true motives of these efforts is beyond the scope of this Article, but see Alli Condra, *A Rose by Any Other Name: The Food 'Dialogues'*, FOOD SAFETY NEWS (Oct. 4, 2011), [http://www.foodsafetynews.com/2011/10/a-rose-by-any-other-name-the-food-dialogues/#.VM5t9WjF\\_eJ](http://www.foodsafetynews.com/2011/10/a-rose-by-any-other-name-the-food-dialogues/#.VM5t9WjF_eJ) (criticizing the Food Dialogues for being a "marketing campaign in a dialogue's clothes"); and Anna Lappé, *Who's Behind the U.S. Farmers & Ranchers Alliance and Why It Matters*, CIVIL EATS (Sept. 23, 2011), <http://civileats.com/2011/09/23/who%E2%80%99s-behind-the-united-states-farmers-and-ranchers-alliance-and-why-it-matters/#sthash.onU98kKv.dpuf> (questioning the motives of the initiative). "Most of us are in the dark when it comes to the story of our food. And, farmers and ranchers—the people working hard every day to bring us our food—are nearly invisible in mainstream media. But dig into the Alliance's membership, and its impetus for forming, and you start to wonder whether it truly represents the voices of grassroots food producers or whether this well-funded media campaign is agribusinesses latest attempt to push back against well-documented and well-publicized concerns about the environmental and health consequences of industrial agriculture." *Id.*

420. U.S. Farmers & Ranchers Alliance, *About USFRA*, FOOD DIALOGUES, <http://www.fooddialogues.com/about-usfra> (last visited Apr. 6, 2015).

421. U.S. Farmers & Ranchers Alliance, *Food Dialogues: Chicago. Integrity In Food Marketing 2014*, FOOD DIALOGUES, <http://www.fooddialogues.com/events/fd-chicago> (last visited Apr. 6, 2015).

422. *Id.*

423. *Id.*

424. U.S. Farmers & Ranchers Alliance, *Food Dialogues: Dairy Forum: Animal Care and Consumers' Emerging Expectations*, FOOD DIALOGUES, <http://www.fooddialogues.com/events/fd-dairy> (last visited Apr. 6, 2015).

425. *See SEE IT? STOP IT!*, <http://www.seeitstopit.org> (last visited Apr. 6, 2015).

426. *Consumers, SEE IT? STOP IT!*, <http://www.seeitstopit.org/consumers-section/> (last visited Apr. 6, 2015).

gate each employee report and take full action to correct any such instances.<sup>427</sup> As Roxi Beck of the Center for Food Integrity explained: “Those in agriculture are understandably frustrated by undercover videos. The actions of a few captured on video can taint public perception of the entire livestock community. Taking action to stop abuse demonstrates a genuine commitment to do what’s right for the animals on farms.”<sup>428</sup> Although a list of participating farms will not be published, farmers are encouraged to promote their participation in the initiative.<sup>429</sup> The initiative has been endorsed by the AHA.<sup>430</sup> According to Kathi Brock, National Director of the Farm Animal Program for AHA, the *See it? Stop it!* program provides the tools to set clear expectations of zero tolerance for animal mistreatment and establish a system for reporting abuse that assures proper care of farm animals.<sup>431</sup>

Evaluating the motives and merits of these newly formed industry organizations and initiatives is beyond the scope of this Article; however, they demonstrate the possibility of alternative means of industry protection from negative information. Just as the First Amendment intended, counterspeech, not suppression of speech, should be the means to dispute allegedly misleading information. Food production practices, along with their effects on animal and human health and the environment, are critical matters of public concern that should be thoroughly debated in the public sphere.

#### VIII. CONCLUSION

Ag-gag and veggie libel laws “have created a new right—the right to produce a consumer good without public discourse about its safety and healthfulness.”<sup>432</sup> However, because “food safety is a matter of grave public concern,”<sup>433</sup> such speech “is at the heart of the First Amendment’s protection”<sup>434</sup> and should thus be vigorously protected. Not only are these laws constitutionally suspect, they reflect poor public policy. Information revealed through undercover investigations and by outspoken

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427. *FAQ, SEE IT? STOP IT!*, <http://www.seeitstopit.org/faq/> (last visited Apr. 6, 2015).

428. *NMPF Launches See It? Stop It! Initiative to Empower Farm Workers*, NAT’L MILK PRODUCERS FED’N (Mar. 27, 2013), <http://www.nmpf.org/latest-news/press-releases/mar-2013/nmpf-launches-see-it-stop-it-initiative-empower-farm-workers>.

429. *Id.*

430. *Id.*

431. *Id.*

432. Jones, *supra* note 138, at 845.

433. Bederman et al., *supra* note 80, at 151.

434. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 472 U.S. 749, 756, 759 (1985) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)).

critics “[is] vital to citizens in a complex society who cannot begin to understand, let alone evaluate, every product on the market.”<sup>435</sup> The agricultural industry pledged its commitment to helping consumers make informed decisions about food.<sup>436</sup> Rendering better-informed judgments requires a free flow of information<sup>437</sup> that the ag-gag and veggie libel laws seek to suppress.

The laws are also unlikely to have their intended effect—to protect the status quo. Rather, they are likely to inspire further distrust of the current industrial food system. While these laws and their deterrent effects may protect products and prevent economic hardship for industry, they may also be viewed as undue government and corporate interference on the free exchange of information that can contribute to greater understanding of the food system by Americans.<sup>438</sup>

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435. *Dairy Stores, Inc. v. Sentinel Publ’g Co.*, 516 A.2d 220, 239 (N.J. 1986).

436. *2014 Research*, CENTER FOR FOOD INTEGRITY, <http://www.foodintegrity.org/research/2014-research> (last visited Apr. 6, 2015).

437. See Collins, *supra* note 18, at 1.

438. Grey, *supra* note 132, at 18.