Shooting the Messenger:
A Common-Sense Analysis of State “Ag-Gag” Legislation
Under the First Amendment

“As children, my brothers and I enjoyed a level of freedom that might make a modern parent gasp, and sometimes we exercised that freedom in the kitchen, where we fed one another weird concoctions that tended toward the unhealthy . . . .

The only time I ever refused to sample my brothers’ culinary creations was when asked to close my eyes during its preparation. I may have been a child, and one with a sense of humor, but I wasn’t an idiot.”

I. INTRODUCTION

Leslie Hatfield’s quote raises a simple question—what did her brother have to hide? As one of the most powerful industries in the United States, factory farming has become the dominant source of food production in modern America. Despite its major role in providing food to the public, the factory-farming industry has landed in the crosshairs of animal-rights and environmental activists seeking to expose the public-health, environmental, and

2. See Hatfield, supra note 1 (analogizing childhood experience with barring videotaping inside of factory farms).

The simple trust I extended to my siblings is not unlike the average consumer’s trust in the modern food system. Though some may murmur about yucky practices in food production, for the most part, we eat up. We also place trust in lawmakers and government agencies. Surely the threat of punishment keeps the food producers honest. Right?

For the record, the eight-year old girl who refused to taste her brothers’ secret concoctions probably wouldn’t have wanted to peer into a CAFO [concentrated animal feeding operation], but she wouldn’t have trusted someone who refused to let her look.

Id.
animal-rights violations of commercialized farming facilities. 4 To date, the most common means of exposing these concerns is through undercover investigations—activists pose as employees to obtain footage of animal abuse, health-code violations, and pollution. 5 These investigations have exposed unsavory conditions on factory farms, generated considerable media attention, and created substantial financial consequences for those facilities that have been exposed. 6 In response to the increase of undercover investigations, state legislatures, with the support of factory-farming lobbyists, have passed legislation that will criminalize undercover photography and videotaping on farms, and many other states are attempting to pass similar laws. 7


6. See MFA Investigations, supra note 5 (discussing undercover investigations); see also, e.g., Press Release, Humane Soc’y, Undercover Video Documents Abuse of Pigs at Okla. Factory Farms (Jan. 31, 2012), http://www.humanesociety.org/news/press_releases/2012/01/pig_gestation_investigation_013112.html (exposing abuse of pigs). For example, these undercover investigations exposed disturbing findings such as:

Female breeding pigs were crammed inside “gestation crates” so small the animals could barely move for virtually their entire lives. The animals engaged in stereotypic behaviors such as biting the bars of crates, indicating poor well-being in the extreme confinement conditions. Some had bitten their bars so incessantly that blood from their mouths coated the fronts of their crates. The breeding pigs also suffered injuries from sharp crate protrusions and open pressure sores that developed from their unyielding confinement.


7. See Doris Lin, What Are Ag-Gag Laws and Why Are They Dangerous?, About.com (Mar. 8, 2012), http://animalrights.about.com/od/animallaw/a/What-Are-Ag-Gag-Laws-And-Why-Are-They-Dangerous.htm (providing informal overview of proposed “ag-gag” legislation); see also Kathleen Masterson, Ag-Gag Law Blows Animal Activists’ Cover, NPR (Mar. 10, 2012), http://www.npr.org/2012/03/10/148363509/ag-gag-law-blows-animal-activists-cover (“The so-called ‘Ag-Gag’ law targets undercover animal rights activists who secretly take videos. Farmers say they need the legal protection to block those trying to take down agriculture, but critics ask what the industry may be hiding.”).
Critics of the proposed legislation have commonly referred to the statutes as “whistleblower suppression” laws, while supporters have referred to them as “animal interference” laws, but it was Mark Bittman, of the New York Times, who coined the most popular term—“ag-gag” laws. As of the publication of this Note, five states have “ag-gag” laws on the books, while eight other states are either considering or have recently rejected similar legislation. “Ag-gag” laws take aim at varying levels of conduct, but the behavior targeted by each statute generally falls within one of three categories: (1) dishonesty in the job-application process, when the applicant has the intention of infiltrating the facility to investigate; (2) the act of photographing or videotaping on agricultural facilities; and (3) the act of photographing or videotaping, as well as the possession or distribution of such videos.

This Note will focus primarily on the second and third categories of “ag-gag” legislation, analyzing the constitutionality of proposed and existing laws under the First Amendment. Specifically, this Note will address whether photography and videotaping, in the context of undercover farming investigations, should be considered protected speech, and if so, whether “ag-gag” laws amount to impermissible, content-based restrictions on speech. Additionally, this Note will consider whether “ag-gag” laws that place restrictions on the distribution of undercover footage are prior restraints on speech and thus barred under the First Amendment.

Part II.A of this Note will discuss the First Amendment, focusing specifically on content-based restrictions on speech and the prior-restraint doctrine. Next, Part II.B.1 will provide an overview of the factory-farming process, discussing some of the most notable concerns raised by the operation of these large facilities. Part II.B.2 will provide examples of four specific

8. See Mark Bittman, Who Protects the Animals?, N.Y. TIMES (Apr. 26, 2011), http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/ (describing proposed legislation as “ag-gag” laws). Bittman opposed the “ag-gag” laws, stating, “We can’t know. What we can know is that organizations . . . 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.” Id.

9. See Lin, supra note 7 (providing overview of state laws); see also infra Part II.C.1.a (reviewing Kansas, Montana, and North Dakota’s “ag-gag” laws); Part II.C.1.b.i-ii (reviewing Iowa and Utah’s recently approved “ag-gag” laws); Part II.C.1.b.iii (reviewing pending or recently rejected “ag-gag” legislation in eight states).

10. These categories were established by this author and will be reviewed in detail in Part II.C.1 and Part III.A.

11. See infra Part II.A (providing history of right to photograph, prior-restraint doctrine, and restrictions on speech).

12. See infra Part II.A.1 (reviewing applicable First Amendment framework); Part III.A.1 (analyzing constitutionality of “ag-gag” laws under First Amendment as content-based restrictions on speech).

13. See infra Part II.A.2 (reviewing applicable First Amendment framework); Part III.A.2 (analyzing constitutionality of “ag-gag” laws under First Amendment as prior restraints on protected speech).

14. See infra Part II.A (establishing background information regarding First Amendment needed to analyze constitutionality of “ag-gag” legislation).

15. See infra Part II.B.1 (establishing main concerns with factory farming: animal abuse, pollution,
undercover investigations that have exposed animal-abuse and food-safety concerns. Next, Part II.C will discuss existing and proposed “ag-gag” legislation before moving on to a brief description of the Animal Enterprise Terrorism Act (AETA), a federal law that punishes animal interference. Part III.A will then analyze “ag-gag” legislation under the First Amendment, applying the principles outlined in Part II.A to the current landscape of “ag-gag” legislation. Lastly, Part III.B will discuss whether “ag-gag” legislation is even effective, or whether farm owners would be better served pursuing punishment under currently existing modes of criminal and civil law. Part IV will conclude that current “ag-gag” legislation is either unconstitutional or ineffective, and that existing laws—trespass, wiretapping laws, and libel—would be a more appropriate means of punishing the inappropriate conduct of undercover investigators. Pursuing legal recourse under existing laws, as opposed to passing legislation that bars photography and videotaping on factory farms, will be similarly effective in deterring illegal investigatory tactics while avoiding the question raised by Leslie Hatfield—what do factory farms have to hide?

II. HISTORY

A. The First Amendment

The First Amendment of the United States Constitution declares, “Congress shall make no law . . . abridging the freedom of speech, or of the press.” Such economic effects, health effects).

16. See infra Part II.B.2 (discussing four Mercy for Animals investigations exposing animal abuse). This section will provide a brief overview of four investigations: Hallmark Meat Packing Company, in California; Quality Eggs of New England, in Maine; Sparboe Farms, in Iowa, Minnesota, and Colorado; and the E6 Cattle Company, in Texas. See infra Part II.B.2.a-d.

17. See infra Part II.C.1 (reviewing state “ag-gag” laws); Part II.C.2 (reviewing AETA and numerous constitutional issues regarding its application to animal-rights activists).

18. See infra Part III.A (analyzing “ag-gag” legislation under First Amendment). This author concludes that most “ag-gag” laws are content-based restrictions on speech and thus unconstitutional. See infra Part III.A.1. Also, this author concludes “ag-gag” laws that bar the distribution of acquired footage are impermissible prior restraints on speech, and therefore such laws—discussed as those falling within the third category of legislation—are unconstitutional. See infra Part III.A.2.

19. See infra Part III.B (analyzing practical application of “ag-gag” laws, in light of First Amendment concerns). This author concludes that most “ag-gag” laws will either be unconstitutional or ineffective. See infra Part III.B.1. Because most laws have been rejected as felony-level offenses, and because most language regarding the distribution of films has been removed, the laws are unlikely to deter the targeted behavior. Part III.B.1. Additionally, existing statutory and common-law principles—trespass, wiretapping laws, and libel—are likely to address most alleged behavior. See infra Part III.B.2.

20. See infra Part IV (concluding “ag-gag” laws are likely to be unconstitutional or ineffective).

constitutional guarantees of free speech prevent the government from restraining or prohibiting protected speech or expressive conduct, while protecting the citizenry from governmental suppression of ideas by allowing issues to be openly and vigorously discussed. Although the First Amendment applies to the federal government, the Fourteenth Amendment imposes the same restraints on the states; the First Amendment operates as a check on governmental powers, and it imposes the same limitations on speech restrictions on the states as it does the federal government. Underlying the First Amendment is the core principle that government, be it state or federal, cannot prohibit speech or expression simply because some may consider it offensive or disagreeable. But this only raises the question—what, exactly, is considered speech? The reference to “speech” in the First Amendment may appear, at first glance, to apply only to spoken words or verbal communications. But for purposes of First Amendment protection, speech has been defined simply as “expressive conduct” or “communication.” For example, one person may
speak out against the government by making a billboard or publishing an article in the newspaper, while another may publicly burn the American flag. Both approaches, although different modes of conveying a similar message, constitute expressive conduct and are considered speech under the First Amendment. As such, an activity need not necessarily embody a narrow message, but the court must find, at a minimum, the intent to convey a particularized message along with a strong likelihood that those viewing it will understand the message. Because the government cannot abridge the freedom of speech, First Amendment analysis is often less about what a person can or cannot do or say, and more about whether the government has the power to employ a law that bars that speech. This section will first analyze, specifically, whether photography or videotaping falls within this broad definition of protected speech, before moving on to address what type of speech the government can or cannot restrict under the prior-restraint doctrine and the well-established “time, place, manner” restrictions.

1. Right to Photograph and Videotape

To date, the United States Supreme Court has yet to directly define a photographer or videographer’s rights with respect to the First Amendment, raising a predictable question—is there a First Amendment right to photograph or videotape? Quite simply, it depends. Instead of directly addressing whether there is a right to photograph or videotape, the courts have generally

unconstitutional [sic] to punish someone who publishes a book that persuades people to resist the draft, even though the book also interferes with the draft.

Volokh, supra note 25, at 1284.


29. See infra Part II.A.1-3 (addressing right to photograph and videotape, prior-restraint doctrine, and governmental restraints on free speech).

taken a case-by-case approach, determining “whether the conduct possesses sufficient communicative elements to bring the First Amendment into play.”

In *Texas v. Johnson*, the Supreme Court analyzed photography as a means of communication worthy of protection under the First Amendment, applying a two-prong test to determine if conduct possesses sufficient communicative elements. Under *Johnson*, a person’s conduct must be intended to convey a particularized message, and there must be a great likelihood that those who view it will understand that message. In 1995, the Court applied this same test in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, again requiring the plaintiff to demonstrate that he possessed a message to be communicated and an audience to receive that message, regardless of the medium in which the message is to be expressed.

Therefore, in analyzing whether photography or videotaping is protected as speech under the First Amendment, the key issue is whether the conduct—taking a photo or shooting a video—satisfies both prongs of a sufficient communicative effort. In *Porat v. Lincoln Towers Community Association*, the plaintiff, Porat, was photographing the Lincoln Towers, when a security guard approached and asked him what he was doing—the Lincoln Towers had

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31. See *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (stressing need for “communicative elements” to warrant First Amendment protection); see also Andrew N. Ireland Moore, *Caging Animal Advocates’ Political Freedoms: The Unconstitutionality of the Animal and Ecological Terrorism Act*, 11 Animal L. 255, 265 (2005) (“[T]he Court [in *Johnson*] pointed out that the statute distinguished between people who burned the flag because of ideas like the defendant’s and people who burn flags to dispose of them. People who burn flags to dispose of them were not subject to the flag desecration legislation. Thus, Johnson’s political expression was restricted due to the content of his message.”).


33. See *id.* at 404 (requiring intent to convey message to audience capable of understanding). The Court went on to state that communicative conduct requires “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.” *Id.* at 404 (alteration in original) (quoting Spence v. Wash., 418 U.S. 405, 410-11 (1968)) (internal quotations omitted). See generally Randolph Marshall Collins, *The Constitutionality of Flag Burning: Can Neutral Values Protect First Amendment Principles?*, 28 Am. Crim. L. Rev. 887 (1991) (addressing communicative conduct as speech).

34. See *Johnson*, 491 U.S. at 404. “[T]he Court must consider ‘the context in which it occurred,’ therefore, because the State conceded that Johnson’s actions constituted expressive conduct, it acknowledged the overtly political nature of the conduct as both intentional and overwhelmingly apparent due to the very symbolic nature of the flag.” Keith A. Darling, *Flag Burning: Johnson, Eichman and Beyond*, 3 Appalachian J.L. 101, 104 (2004).


38. 464 F.3d 274 (2d Cir. 2006).
a management policy that barred nonresidents from photographing the building. Porat responded that he was taking photographs for recreational use. After being detained by the security guards and issued a ticket by the police for trespass, Porat filed suit in the Federal District Court for the Southern District of New York, claiming his First Amendment rights were violated when he was issued a ticket in retaliation for exercising conduct protected by the First Amendment. The district court found that although “communicative photography is well-protected by the First Amendment,” Porat had clearly denied having any communicative interest in the photography. As such, Porat failed to meet either element of First Amendment-protected, communicative speech—his photography was not intended to be communicative, and there was no audience to view it. Quite simply, the decision in Porat demonstrates that not all photography or videotaping is communicative, and that such conduct, when intended solely for personal use, falls outside of First Amendment protection.

In contrast, the Ninth Circuit’s decision in Cuvello v. City of Oakland provides an example of photography and videotaping in a communicative context. In Cuvello, a group of animal-rights activists were attempting to use an access ramp to photograph and videotape the treatment of circus animals in a publicly owned facility. The facility had a policy that only allowed those

40. Id. at *1-2. Porat was a “photo hobbyist” and was taking photographs of the Lincoln Towers, a group of residential buildings between 66th and 70th Streets. Id.
41. Id. at *6. Porat told the guard “he was taking pictures for aesthetic and recreational reasons.” Id. at *1.
42. Id. at *5. “He effectively disclaims any communicative property of his photography as well as any intended audience by describing himself as a ‘photo hobbyist,’ and alleging that the photographs were only intended for ‘aesthetic and recreational’ purposes.” Id. (internal citations omitted); see also Tunick v. Safir, 228 F.3d 135, 135-39 (2d Cir. 2000) (holding artistic filming sufficiently communicative); Bery v. City of New York, 97 F.3d 689, 689-90 (2d Cir. 1996) (holding communicative photography protected under First Amendment).
43. Porat, 2005 WL 646093, at *5 (holding purely private recreational, noncommunicative photography not protected under First Amendment). Porat relied on numerous cases that stood for the proposition that photography is considered speech under the First Amendment. Id. But the court responded by stating, “These cases all concerned protected First Amendment conduct not because the plaintiffs used cameras, but because the cameras were used as a means of engaging in protected expressive conduct. They do not, as Plaintiff suggests, stand for the proposition that the taking of photographs, without more, is protected by the First Amendment.” Id.
44. Id. at *6 (photography for personal use not sufficiently communicative); see Farber, supra note 25, at 22-26; see also Kreimer, supra note 30, at 370-71 (reviewing images and messages as speech). Kreimer states: “In determining whether an isolated act is protectable ‘symbolic speech,’ opinions of the Court often give weight to the presence or absence of a ‘message conveyed.’ Kreimer, supra note 30, at 371.
47. 2007 U.S. Dist. LEXIS 59833, at *2-4.
who purchased tickets to use the ramp. The activists effectively argued that they were engaging in constitutionally protected speech—they were communicating the treatment of animals to the public, and the public was interested in this communication. The district court found, and the Ninth Circuit later affirmed, that the photography and videotaping were protected speech and that the activists must be allowed to access the ramp.

Lambert v. Polk County provides another example of the courts treating videotaping as a protected form of speech. Additionally, the Lambert decision reaffirms the proposition that a person’s right to display and disseminate photographs or videos also constitutes protected speech. In Lambert, the plaintiff was videotaping an area of downtown Des Moines, Iowa in an attempt to record and sell any newsworthy video he captured. Eventually, he ended up recording a physical altercation between two people that resulted in homicide. The police obtained the videotape, but would not return it to the plaintiff. The plaintiff filed suit, claiming the police conduct violated his First Amendment right to gather and broadcast news. The court agreed, finding that taking the tape “clearly violated his First Amendment right to display the tape and disseminate it any way he wishes.” 

Porat, Cuvieillo, and Lambert provide the general framework for a First Amendment analysis of photography or videotaping: The conduct must be communicative, there must be an audience to communicate that idea to, and First Amendment protection will extend to the production and dissemination of photographs or video.

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48. Id.

49. Id.

50. See id. at *9-15; see also, e.g., Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995); Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (recognizing videotaping in communicative manner as speech).


52. See id. at 131.

53. See id. (“It is not just news organizations, such as WHO–TV, who have First Amendment rights to make and display videotapes of events—all of us, including Lambert, have that right.”).

54. Id. Lambert was recording in downtown Des Moines, Iowa. Id. He was recording a high-crime area with the intent to sell video footage to news stations. Id.

55. Lambert, 723 F. Supp. at 131 (outlining facts related to video recording). Lambert videotaped a street fight between two men, one of whom later died from injuries sustained in the altercation. Id.

56. Id. (describing police taking videotape from Lambert). After the fight ended, police arrived, and Lambert explained that he had the event on videotape. Id. After the victim passed away, the police contacted Lambert to view the footage. Id. It is unclear if the police took the film or if Lambert volunteered it, but the tape was not returned to Lambert, and repeated attempts to reacquire the video were denied. Id.


58. See id. at 133 (“From such a finding it would also follow that the taking was a taking of Lambert’s property without due process of law and that it also clearly violated his First Amendment right to display the tape and disseminate it in any way he wishes.”).

2. Prior-Restraint Doctrine

Discussion of the Lambert case, and the right to make, display, or distribute a photograph or video provides a natural segue into the prior-restraint doctrine. Imagine, for a moment, the Iowa legislature passed a statute barring dissemination of violent videos, such as the one that the plaintiff recorded in Lambert. When would Lambert be punished? Could Iowa punish him immediately, or must it wait until he actually distributed copies of the video? Most would assume that the state would have to wait until the video is actually distributed before it could punish him for doing so. In the same light, the prior-restraint doctrine targets governmental regulations that prohibit or limit future dissemination of protected speech. In other words, speech that may result in criminal or civil liability cannot be regulated in advance of the offense. A prior restraint, for example, would occur if a government attempted to limit the publication of materials or information possessed by the media.

Although prior restraints on speech or press are not unconstitutional per se, the Supreme Court has stated that such restraints are presumptively unconstitutional. In Nebraska Press Ass’n v. Stuart, the Court stated: “The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First


61. See Thomas I. Emerson, The Doctrine of Prior Restraint, 20 LAW & CONTEMP. PROBS. 648, 648-50 (1955) (“The concept of prior restraint, roughly speaking, deals with official restrictions imposed upon speech or other forms of expression in advance of actual publication. Prior restraint is thus distinguished from subsequent punishment, which is a penalty imposed after the communication has been made as a punishment for having made it.”); see also Thomas R. Litwack, The Doctrine of Prior Restraint, 12 HARV. C.R.-C.L. L. REV. 519, 520 (1977) (“A prior restraint has traditionally been defined as a formal prohibition on speech, imposed in advance of utterance or publication.”). For a historical review of the prior-restraint doctrine, see John Lofton, Justice and the Press 71-110 (1966).


63. See Emerson, supra note 61, at 648-50 (providing principles of prior-restraint doctrine).

64. See Bantam Books, 372 U.S. 70 (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”); see also, e.g., Pittsburgh Press v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 377 (1973) (addressing presumption of prior restraints unconstitutional); N.Y. Times Co., 403 U.S. at 714; Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Carroll v. President and Comm’r’s of Princess Anne, 393 U.S. 175, 176-77 (1968); Freedman v. Maryland, 380 U.S. 51, 85 (1965).

65. 427 U.S. 539.
Amendment rights. There are very few exceptions to the prior-restraint doctrine. Justice Hughes, in Near v. Minnesota, stated:

No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.

As Justice Hughes noted, prior restraints on speech are permitted only in rare instances: to guarantee a fair trial, to preserve national security, or to bar obscenities.

In 1931, the Supreme Court examined a state regulation that restrained speech before it occurred, as opposed to punishing subsequent conduct, in Near v. Minnesota. The Court, in Near, reviewed a Minnesota statute that prevented the distribution of obscene or defamatory publications—the statute was intended to prevent disruptions stemming from the release of false information. The Court held that the Minnesota statute was an unconstitutional limit on speech under the prior-restraint doctrine because, before the conduct or speech had even occurred, it punished the conduct and suppressed free speech. Responding to the state’s goal of targeting possible

66. See id. at 559.
67. See Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975) (“In order to be held lawful, [a prior restraint], first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints.”); see also Taucher v. Rainer, 237 F. Supp. 2d 7, 12-13 (D.D.C. 2002) (noting heavy presumption of constitutional invalidity).
68. See Near v. Minnesota, 283 U.S. 697, 716 (1931) (internal citations omitted); see also Thomas Emerson, The System of Freedom of Expression 401-06 (1970). Restrictions on prior restraint are rare because, as Emerson stated:

A system of prior restraints is in many ways more inhibiting than a system of subsequent punishment: it is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than that suppression through criminal process; the procedures do not require attention to safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows.

69. See id. at 697-99; see also Emerson, supra note 61, at 525 (addressing treatment of prior-restraint doctrine after Near).
70. See Near, 283 U.S. at 715-16 (noting limited circumstances warranting prior restraint).
disruptions in response to publication, the Court stated that “even a more serious evil would be caused by [allowing the government] to prevent publication.”

The dispute over prior restraint continued in *Cantwell v. Connecticut*, with the Court considering a statute punishing door-to-door solicitations made in exchange for religious pamphlets. Much like Minnesota, in the *Near* case, Connecticut believed it had a legitimate purpose for targeting such behavior—avoiding fraudulent activity occurring “under the cloak of religion.” Despite the state’s argument, the Court held that the statute was unconstitutional as a prior restraint on the communication of ideas. Although the *Cantwell* decision regarding prior restraint was noteworthy, the Court’s language regarding restraints on speech is often cited for the proposition that governments can restrain speech through nondiscriminatory legislation that regulates the time, place, and manner of such speech:

> It is . . . clear that a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.

After *Cantwell*, courts began to consider the prior-restraint doctrine, along with time, place, and manner restrictions, when government restricted speech or press to protect the well-being of the public.

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74. 310 U.S. 296 (1940).

75. See id. at 302.

76. See id. at 304.


78. See *Cantwell*, 310 U.S. at 304.

As previously noted, viewpoint restrictions on speech are generally impermissible.\textsuperscript{80} The most notable case on content-based restrictions is \textit{Texas v. Johnson}.\textsuperscript{81} In \textit{Johnson}, the Court addressed a state statute that prohibited defacing, damaging, or physically mistreating an American flag “in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.”\textsuperscript{82} The Court reversed the defendant’s conviction for burning an American flag, holding that the statute was unconstitutional because it punished the act for antigovernment purposes, while allowing the same activity for patriotic purposes.\textsuperscript{83} Because the statute would allow government to authorize the use of the flag for patriotic purposes only, it exhibited a restriction on speech based solely on content.\textsuperscript{84} Subsequent cases have further demonstrated that content-based restrictions on speech will face strict-scrutiny review and likely be deemed unconstitutional.\textsuperscript{85}

In contrast, government restrictions on content-neutral speech are far more likely to receive favorable treatment by the courts.\textsuperscript{86} The Supreme Court’s

\textsuperscript{80} See, \textit{e.g.}, \textit{City of Cincinnati v. Discovery Network}, 507 U.S. 410 (1993) (striking down ordinance prohibiting commercial-publication news racks); \textit{Police Dep’t of Chi. v. Mosely}, 408 U.S. 92 (1972) (striking down ordinance banning picketing near schools); \textit{see also Stone, supra note 28, at 81-82 (“Content-based restrictions, on the other hand, restrict communication because of the message conveyed. . . . In its interpretation of the first amendment, the Supreme Court has been especially wary of government action that restricts speech because of its content.”).\textsuperscript{81} \textit{Id.} at 397 (1989).\textsuperscript{82} \textit{Id.} at 402 n.1 (outlining language in statute).\textsuperscript{83} \textit{Id.} at 406. “The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct because it has expressive elements.” \textit{Id.} (internal citations omitted); \textit{see also Ute Kridewagen, Political Symbols in Two Constitutional Orders: The Flag Desecration Decisions of the United States Supreme Court and the German Federal Constitutional Court}, 19 \textit{Ariz. J. Int’l & Comp. L.} 679, 687-92 (2002) (outlining holding in \textit{Johnson} regarding flag burning as speech).\textsuperscript{84} \textit{See Johnson}, 491 U.S. at 411 (“Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values.”); \textit{see also Boos v. Barry}, 485 U.S. 312, 318 (1988).


\textsuperscript{86} \textit{See Farber, supra note 25, at 24 (“The court takes a far more relaxed attitude toward content-neutral regulations.”); see also Michael R. Manley, Note, Ward v. Rock Against Racism: \textit{How Time, Place and Manner Further Restrict the Public Forum}, 1 \textit{Fordham Ent. Media & Intell. Prop. L.F.} 151, 152 (1991) (“Classical time, place and manner restrictions, in forums public and nonpublic, restrict access to the forum based on the time when the speech is to be delivered, the place where speech is to be heard, or the manner of expression involved.”). “The essence of time, place or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals.” Consol. Edison Co. v. Pub. Serv. Comm’n, 447 U.S. 530, 536 (1980).
decision, in United States v. O’Brien, provides the courts with the basic framework for analyzing a content-neutral restriction under the First Amendment. In O’Brien, the Court considered a statute that banned the burning of draft cards. The Court upheld the content-neutral restriction, and, in its opinion, Chief Justice Warren stated:

[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

In sum, the O’Brien decision applied an intermediate-scrutiny analysis to determine if the content-neutral restriction was no greater than what was essential to further a significant government interest. The test was restated—with a slight modification regarding alternative channels for communication—in Ward v. Rock Against Racism, where the Court upheld a statute restricting sound equipment to be used in public concerts (note, the statute did not target any specific type of music). After reviewing O’Brien and Ward, it is apparent that government can restrict content-neutral speech, so long as three requirements are met: The restriction must be justified without reference to the content of the speech; the restriction must be narrowly tailored to serve a significant government interest; and the restriction must permit alternative channels for the communication of the information.

After a brief review of content-based and content-neutral restrictions, it is

88. Id. at 376-78; see also Stephen E. Gottlieb, The Speech Clause and the Limits of Neutrality, 51 ALB. L. REV. 19, 43-48 (1986) (criticizing application of content-neutral restrictions on speech).
89. See O’Brien, 391 U.S. at 369-72.
90. See id. at 377. Justice Harlan, in his concurrence, offered a third requirement: the restriction should not “entirely prevent[] a ‘speaker’ from reaching a significant audience with whom he could not otherwise lawfully communicate.” Id. at 388-89 (Harlan, J., concurring).
91. See id. at 376-77; see also Erwin Chemerinsky, Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court’s Application, 74 S. CAL. L. REV. 49, 55 (2000) (“T]he general rule is that content-based restrictions on speech must meet strict scrutiny, while content-neutral regulations only need meet intermediate scrutiny.”).
93. See id. at 792-93 (including “communication” language from Justice Harlan’s concurrence in O’Brien).
94. See generally Ashutosh Bhagwat, The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence, 2007 U. ILL. L. REV. 783 (2007) (providing overview of intermediate-scrutiny review under First Amendment). “The First Amendment “intermediate scrutiny” tier was born as a product of the merger of several distinct and narrow branches of the Supreme Court’s jurisprudence and, over the years, has attained central importance in the overall structure of free speech law.” Id. at 783.
relatively clear that, under the First Amendment, the government has little power to restrict speech based on its message, subject matter, or content. But while the content of speech enjoys ample protection, such protected speech may be subject to reasonable governmental restrictions on the time, place, and manner in which it is made. Specifically, content-neutral restrictions on the time, place, and manner of speech will be permissible—the restriction imposing specific sound equipment in Ward provides a clear example of content-neutral, “time, place, manner” regulation of speech and intermediate-scrutiny review. As such, these restrictions need not be the least-intrusive means of serving the government’s interest, but instead, the restriction must be narrowly tailored to address a significant government interest. For example, a time restriction may limit excessive noise during times when school is in session; a place restriction might prohibit certain activity in one location, such as a library, that is permitted in another, such as a park; and a manner restriction may control the “sound amplification of otherwise protected expression,” such as the conduct in Ward. In each of these examples, there may be less restrictive alternatives to restrict speech, but each restriction must only be narrowly tailored to serve the government’s interest.

95. See Farber, supra note 25, at 20 (“Government regulations linked to the content of speech receive severe judicial scrutiny.”); see also Chemerinsky, supra note 91, at 55 (discussing applicable standards of review); Chad Davidson, Recent Decision, Government Must Demonstrate That There Is Not a Less Restrictive Alternative Before a Content-Based Restriction of Protected Speech Can Survive Strict Scrutiny, 70 Miss. L.J. 457, 458 (2000) (“Content-based regulations receive strict scrutiny because they directly regulate the substance of speech.”).

96. See Clark v. Cnty. for Creative Non-Violence, 468 U.S. 288, 293 (1984); see also Robert Post, Recuperating First Amendment Doctrine, 47 Stan. L. Rev. 1249, 1261 (1995). “[T]ime, place, or manner restrictions are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.” Post, supra, at 1261 (internal quotations omitted).

97. See Ward, 491 U.S. at 792. In Ward, the Court concluded that restrictions on sound equipment were reasonable and content-neutral, stating: “The principal justification for the sound-amplification guideline is the city’s desire to control noise levels . . . and to avoid undue intrusion into residential areas and other areas of the park. This justification for the guideline ‘has nothing to do with content,’ and it satisfies the requirement that time, place, or manner regulations be content neutral.” Id. (quoting Boos v. Barry, 485 U.S. 312, 320 (1988)).

98. See Clark, 468 U.S. at 293; see also Chemerinsky, supra note 91, at 55; Timothy Zick, Speech and Spatial Tactics, 84 Tex. L. Rev. 581, 606 (2006) (“Content-neutral regulations are acceptable so long as they purport to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.”).

99. See Whorf, supra note 79, at 6 (providing helpful, simple examples of time, place, manner restrictions).

100. Hill v. Colorado, 530 U.S. 703, 726 (2000) (“[W]hen a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal.”); Ward v. Rock Against Racism, 491 U.S. 781, 798-99 (1989) (“[I]t need not be the least restrictive or least intrusive means of doing so.”); see also Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 217 (1997) (stating less-burdensome alternative does not
B. Factory Farming in the United States

1. Factory Farming and the Public Concerns

Family-owned farms are essentially things of the past. With the growth in population and industry consolidation over the past fifty years, farming in the United States has shifted from traditional, individualized operations to large-scale, industrialized facilities, often referred to as “factory farms” or concentrated animal feeding operations (CAFOs). Factory farms house and raise hundreds of thousands of animals—cows, pigs, chickens, and turkeys—in extreme confinement, as a means of producing large quantities of meat at a low price. Responsible for over ninety-five percent of the country’s chicken, eggs, turkey, and pork and over seventy-five percent of beef cattle, factory farming has become the dominant means of producing food for the American consumer. But in exchange for increased productivity and reduced food costs comes a litany of significant public and consumer-safety concerns: animal abuse, air and water pollution, economic impact on the farming industry, and health and food-safety issues.

101. See Melanie J. Wender, Comment, Goodbye Family Farms and Hello Agribusiness: The Story of How Agricultural Policy Is Destroying the Family Farm and the Environment, 22 VILL. ENVTL. L.J. 141, 144-48 (2011) (outlining significant impact of government subsidies to large, commercialized-farming operations). “United States farm production has shifted to larger operations, usually referred to as agribusiness. Agribusinesses are industrial farming operations that are much bigger and produce significantly more products than smaller, family farms.” Id. at 141. Wender believes that this decrease in family farming is tied to the subsidies provided for by the Farm Act. Id. at 143-44; see also Jodi Soyars Windham, Putting Your Money Where Your Mouth Is: Perverse Food Subsidies, Social Responsibility & America’s 2007 Farm Bill, 31 ENVIRONS ENVTL. L. & POL’Y J. 1, 1-4 (2007) (connecting pricing with increased subsidies). See generally DEBORAH KAY FITZGERALD, EVERY FARM A FACTORY: THE INDUSTRIAL IDEAL IN AMERICAN AGRICULTURE (2003) (addressing emergence of large, industrialized agricultural operations).


104. See JONATHON SAFRAN FOER, EATING ANIMALS 271 (2009) (generating consumption figures from “census inventory and EPA regulations”).

105. See R. Jason Richards & Erica L. Richards, Cheap Meat: How Factory Farming Is Harming Our Health, the Environment, and the Economy, 4 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 31, 31 (2012) (“At the same time, few consumers know or understand the origin of their meat, how it is processed, or how it is transported to their local grocery store or restaurant. Even fewer people understand the broad, negative effects of mass-produced meat.”); see also MIYUN PARK, GRISTLE: FROM FACTORY FARMS TO FOOD SAFETY 5, 15, 33, 53, 77 (outlining numerous issues resulting from large factory-farming facilities).
a. Animal Abuse

Today’s factory-farming systems are designed to produce animals of marketable weight in the shortest period of time possible. To achieve this goal, hundreds of thousands of animals are confined to small crates, battery cages, and other systems that stifle movement and deny animals the ability to engage in any forms of natural behavior. Additionally, animals are typically placed on unnaturally restrictive diets, designed to increase their weight, despite the well-known, negative health ramifications of such unnatural diet systems. Animals stored in confinement are also physically altered without anesthesia. For example, hogs’ tails are “docked” to avoid tail biting by other closely confined hogs; chickens have their spurs, toenails, and beaks “clipped”; and cows have their horns and tails removed. Proponents of the factory-farming system claim that physical alterations are necessary to avoid injuries to the animals, and that confinement conditions are common practice in the industry. But despite this common-practice argument, undercover


107. See Matheny & Leahy, supra note 106, at 329 (describing welfare conditions on farms).

The changes in farm animal production have created a number of welfare problems on the farm, during transport, and during slaughter. Contrary to the image of Old MacDonald’s Farm, ninety-nine percent of U.S. farm animals never spend time outdoors; they spend their entire lives overcrowded with tens of thousands of other animals, living in their own manure, in barren sheds. Most farm animals cannot engage in natural behaviors such as foraging, perching, nesting, rooting, and mating, and many are not even able to turn around or fully stretch their limbs. 


110. See Frank, supra note 4, at 425-34 (outlining specific treatment of chickens, pigs, and cows on factory farms); see also Holly Cheever, Concentrated Animal Feeding Permit Operations: The Bigger Picture, 5 ALB. L. ENVTL. OUTLOOK 43, 45-46 (2000) (outlining physical alterations made to animals on factory farms).

111. See Why Industrial Livestock Factories Want to Silence Whistleblowers, SIERRA CLUB IOWA CHAPTER, http://iowa.sierr club.org/CAFOs/CAFOWhistleblowersSilenceRule.pdf (last visited Sept. 18, 2012) (outlining behavior captured by undercover investigations in Iowa); MFA Investigations, supra note 5 (detailing numerous animal-abuse investigations); see also Paul Waldau, ANIMAL RIGHTS: WHAT EVERYONE NEEDS TO KNOW 32 (2011) (detailing use of undercover investigations to expose animal abuse in number of
research operations have exposed, at certain times, living conditions and abusive treatment that exceed routine practice and cross into the realm of extreme animal abuse. And although state and federal laws have been designed to curb animal abuse, there are significant exceptions for “farm animals,” creating legislative loopholes that permit the otherwise unacceptable conduct that occurs on factory farms.

b. Pollution

With such a large number of animals in a confined area, factory farming has created serious waste problems. As such, the industry has sparked the attention of environmentalists nationwide. Because the growth of factory farming post-dates the enactment of many U.S. environmental laws, the industry has been able to avoid a number of emissions-related regulations; specifically, the Federal Clean Air Act (CAA) and Clean Water Act (CWA). The Food and Agriculture Organization of the United Nations has reviewed the environmental effects of animal agriculture and concluded that “[t]he livestock sector emerges as one of the top two or three most significant contributors to the most serious environmental problems.” Although environmentalists have

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113. See David J. Wolfson, Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production, 2 ANIMAL L. 123, 123-24 (1996) (critiquing state laws creating animal-abuse exceptions for customary farming practices); see also Frank, supra note 4, at 434-49 (discussing historical treatment of farm animals in animal-abuse legislation).

114. See Warren A. Braunig, Note, Reflexive Law Solutions for Factory Farm Pollution, 80 N.Y.U. L. REV. 1505, 1506, 1508-10 (2005) (addressing waste production of large farming operations). “These confined animal feeding operations (CAFOs), or ‘factory farms,’ produce staggering amounts of animal waste. The waste not only releases noxious odors, making life miserable for nearby residents, but also pollutes downstream air and water, threatening the health of millions.” Id. at 1506. Braunig addresses the growth of the factory-farming industry, stating: “The consolidation of so many animals in so few facilities has created a serious waste problem. CAFOs generate a staggering amount of animal waste (estimated at upward of 500 million tons per year, at least three times more than all the human waste generated in America).” Id. at 1509. See generally DEBORAH KAY FITZGERALD, EVERY FARM A FACTORY: THE INDUSTRIAL IDEAL IN AMERICAN AGRICULTURE (2003) (discussing waste production on factory farms).


116. See Braunig, supra note 114, at 1505 (“Because the widespread existence of factory farms post-dates our nation’s environmental laws, they remain largely exempt from emissions regulation.”).

linked factory farming to issues of global warming, the major environmental-impact arguments have focused specifically on water and air pollution.\footnote{118}{For a discussion of factory farming and the CWA, see Hannah Connor, Comprehensive Regulatory Review: Concentrated Animal Feeding Operations Under the Clean Water Act from 1972 to the Present, 12 VT. J. ENVTL. L. 275, 279 (2011) (“[U]nlike human sanitary waste, which is required by the Clean Water Act to be treated before release, CAFO waste along with process-wastewater is generally collected and stored in a waste pit or pile where it is subject to minimal or no treatment before it is spread or sprayed onto land as ‘fertilizer,’ a process called ‘land application.’”); Danielle J. Diamond, Illinois’ Failure to Regulate Concentrated Animal Feeding Operations in Accordance with the Federal Clean Water Act, 11 DRAKE J. AGRIC. L. 185, 199 (2006) (discussing factory farming and CWA); David Drelich, Restoring the Cornerstone of the Clean Water Act, 34 COLUM. J. ENVTL. L. 267, 315 (2009) (addressing factory farming and CWA implications). For a discussion of factory farming and the CAA, see Cecilia Isaacs-Blundin, Why Manure May Be the Farm Animal Advocate’s Best Friend: Using Environmental Statutes to Access Factory Farms, 2 J. ANIMAL L. & ETH. 173, 182 (2007) (analyzing CAA in connection with farm-produced air pollution); see also Braunig, supra note 114, at 1514 (discussing waste production and CAA); Susan S. Schiffman et al., The Effect of Environmental Odors Emanating from Commercial Swine Operations on the Mood of Nearby Residents, 37 BRAIN RES. BULL. 369, 371 (1995) (reviewing health concerns related to air pollution on factory farms).}

Factories-farm pollution poses a major threat to local water sources and air quality. Animal waste from large, industrialized farms runs into local streams, rivers, and ponds, prompting a spike in unnatural algae growth that affects local species of fish.\footnote{119}{See Windham, supra note 101, at 15-20 (describing effect of pollution runoff); see also Braunig, supra note 114, at 1510.} Additionally, such waste, which contains large amounts of phosphorous and sulfur, may seep into the soil and pollute ground water—a particularly disastrous result for local drinking-water supplies.\footnote{120}{For a discussion of factory farming and the CAA, see Braunig, supra note 114, at 1510-13 (“workers and nearby residents face the greatest environmental and human health risks, factory farm pollution threatens millions of Americans by contaminating urban drinking water supplies’’); see also Sarah C. Wilson, Comment, Hogwash! Why Industrial Animal Agriculture Is Not Beyond the Scope of Clean Air Act Regulation, 24 PACE ENVTL. L. REV. 439, 439-40 (2007) (“Replacing the family farm is an entirely new breed of farming—industrial agriculture—which has become a substantial source of air pollution across the country.’’); supra note 118 (providing supporting sources for water-pollution discussion).}

Recent studies have also revealed that factory farming significantly affects air quality.\footnote{121}{See Braunig, supra note 114, at 1510-13 (“Scientific research has begun to confirm health effects from the air emissions themselves. Studies have found hydrogen sulfide, ammonia, volatile organic compounds, and particulate matter concentrations at unsafe levels in and around CAFOs. CAFO workers and neighbors exposed to this mix of gases suffer conditions ranging from breathing trouble and nausea to nervous system impairment and chronic lung irritation.’’); see also supra note 118 (providing supporting sources for air-pollution discussion).}

The waste created by these farms—feces, urine, and animal hair—creates high concentrations of hydrogen sulfide, ammonia, and other volatile organic compounds, which pose significant health risks for employees and nearby residents.\footnote{122}{See Braunig, supra note 114, at 1510-13.}

c. Economic Effects

Factory farms have also wreaked havoc on the economic climate in the
farming community. As the matter stands, factory farms produce approximately ninety-eight percent of the food in the United States. Quite simply, these enormous facilities have effectively eliminated small-farm owners from the competitive agricultural market. These small-farm owners argue that governmental support, in the form of influential lobbyist groups and specific legislation, such as the Farm Bill, clearly favor consolidated operations and high-production-low-cost facilities. Additionally, governmental subsidies are paid to those farms that produce the greatest quantity at the lowest cost—small farms simply cannot compete with the larger factory farms. These subsidy programs have prompted large farms, often owned by corporations, to consolidate all aspects of their farming operation—production, processing, and marketing—thus reducing the need to outsource aspects of the farming process. Small-farm owners argue that this type of consolidation, often referred to as “vertical integration,” provides factory farms with the leverage needed to self-define “common practice,” as well as force small farms out of the market.

123. See Wender, supra note 101, at 141-44 (providing overview of elimination of small farms resulting from subsidy programs for larger farms).
125. See Brehm, supra note 115, at 798 (“Various pressures combined to effect the relatively rapid shift from the traditional to the confinement model of livestock production, but the strongest pressure came from the vertical integration of food production.”).
126. See Wender, supra note 101, at 143-44 (addressing subsidies for large, factory-farming operations). Wender states that the decrease in small farming operations is the result of the Farm Bill, which subsidizes farms that produce specific crops. Id. “This subsidy program has ‘snowballed into a legislative package of subsidized commodities that increasingly benefit[] the largest of agricultural producers.’” Id. at 144 (quoting William S. Eubanks II, The Sustainable Farm Bill: A Proposal for Environmental Change, 39 ENVTL. L. REP. NEWS & ANALYSIS 10493, 10495 (2009)). “As a result, family farmers receive little or no assistance in the form of subsidies and are forced to struggle to survive.” Wender, supra note 101, at 144.
127. See David Hosansky, Farm Subsidies: Do They Favor Large Farming Operations? 435 (2002); Windham, supra note 101, at 14 (“While the bulk of the money goes to enormous, politically savvy and powerful agricultural operations, sixty percent of all farmers receive no aid at all.”); see also Brehm, supra note 115, at 840-41; William S. Eubanks II, A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation’s Tax Dollars, 28 STAN. ENVTL. L.J. 213, 229 (2009).
129. See Brehm, supra note 115, at 800-08 (describing impact of integration of farming process).

However, although the retail price of food is one factor in evaluating the impact of production contracts, countervailing factors may outweigh any perceived benefit. In an efficient economic system, food prices reflect their true costs, including costs of the pollution that results when insufficient land is available for disposal of animal waste. In addition, imbalances in information and bargaining power between the parties may lead to inefficient results from the contracts themselves.
d. Health Effects

Another consequence of the high-production-low-cost approach to farming is the possibility of disease, in both animals and humans. As a result of extreme confinement, enormous amounts of waste, and unsanitary living conditions, factory-farm animals are susceptible to a range of illnesses. To avoid infection, and thus ensure that food products are suitable for human consumption, animals are treated with high levels of antibiotics.

The increased use of antibiotics has arguably led to the widespread growth of drug-resistant bacteria that can be passed on to consumers. Louise Slaughter, a congresswoman and microbiologist, said that factory farms are “misusing antibiotics in an attempt to cover up filthy unsanitary living conditions among animals,” and that “[a]s they feed antibiotics to them to keep them healthy, they are making our families sicker by spreading these deadly strains of bacteria.”

In addition to antibiotics, some farm animals are treated with growth hormones in an effort to increase the animals’ size and weight or facilitate higher production levels. Increased animal size and production lead to

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Id at 807.

130. See Betsy Tao, Note, A Stitch in Time: Addressing the Environmental, Health, and Animal Welfare Effects of China’s Expanding Meat Industry, 15 GEO. INT’L ENVTL. L. REV. 321, 336 (2003) (providing overview of health concerns related to factory farming); see also James I. Pearce, Note, A Brave New Jungle: Factory Farming and Advocacy in the Twenty-First Century, 21 DUKE ENVTL. L. & POL’Y F. 433, 451 (2011) (“[I]ndeed, it is precisely because there is so much interest on public health issues—understood here to refer to non-nutritional health risks associated with the factory farming system—and questions of nutrition that this final set of arguments is presented as the most likely to capture the larger public’s attention.”).

131. See Mallon, supra note 3, at 391-98 (discussing susceptibility of farm animals to certain types of disease).


133. Id. at 43-47; see also George G. Khachatourians, Agricultural Use of Antibiotics and the Evolution and Transfer of Antibiotic-Resistant Bacteria, 159 CANADIAN MED. ASS’N J. 1129, 1129-30 (1998), available at http://www.canadianmedicaljournal.ca/content/159/9/1129.full.pdf (“Intensive animal production involves giving livestock animals large quantities of antibiotics to promote growth and prevent infection. These uses promote the selection of antibiotic resistance in bacterial populations. The resistant bacteria from agricultural environments may be transmitted to humans, in whom they cause disease that cannot be treated by conventional antibiotics.”).

What is bad for animals is ultimately bad for people, regardless of how one feels about animal welfare. . . . [C]ramming thousands of animals into small, dark spaces not only creates unsuitable and inhumane living conditions for the animals, it also facilitates the need for antibiotics to fight the residual disease and bacteria which necessarily accompany such confined environments.

Richards & Richards, supra note 105, at 32.

134. See Nicholas D. Kristof, When Food Kills, N.Y. TIMES (June 11, 2011), http://www.nytimes.com/2011/06/12/opinion/12kristof.html (addressing concerns regarding rampant use of antibiotics in factory farming). “80 percent of antibiotics in the United States go to livestock, not humans. And 90 percent of the livestock antibiotics are administered in their food or water, typically to healthy animals to keep them from getting sick when they are confined in squalid and crowded conditions.” Id.

135. See, e.g., Mallon, supra note 3, at 430 (describing unnatural diet for cows); see also Matheny & Lehay, supra note 106, at 328 (describing unnatural diets for factory-farm animals).
increased profits, but in exchange, the use of growth hormones also opens the doors to additional human-health concerns. Specifically, studies have revealed that the use of hormones may increase the risk of cancer in human consumers. Moreover, the consumption of meat containing high levels of growth hormones disrupts human hormone balances, causing significant developmental and reproductive problems. In response to the apparent health concerns stemming from factory-farm-produced animals, the European Union has barred the use of growth hormones in domestic cattle, as well as in meat and dairy products imported from the United States.

Despite compelling public-health concerns, consumers continue to choose less-expensive, mass-produced food products, which some have argued may be tied to rising medical concerns, such as evolving strains of bacteria and an increased risk of cancer. In 1950, Americans spent approximately 4.5% of their income on healthcare and 19% on food. Now, Americans spend 18% of their income on healthcare and only 8% on food. Although these statistics are susceptible to a number of analytical criticisms, the simple fact remains—unhealthy animals, raised in poor living conditions, pose a significant threat to the health of American consumers.

2. Exposure of Factory Farms Through Undercover Operations

Likely considered the most well-recognized expose on the factory-farming industry, Food, Inc., Robert Kenner’s 2009 documentary, chronicled the

136. See Khachatourians, supra note 133, at 1130 (“Antibiotic-resistant bacteria arising from agricultural practices enter human environments and move about with people and goods, thus creating transborder resistance.”).


140. See Richards & Richards, supra note 105, at 31 (“[F]ew consumers know or understand the origin of their meat, how it is processed, or how it is transported to their local grocery store or restaurant. Even fewer people understand the broad, negative effects of mass-produced meat.”); see also Khachatourians, supra note 133, at 1129-30 (discussing health concerns).


142. See Richards & Richards, supra note 105, at 53 (citing Pagani, supra note 141).

leniency of the United States’ agricultural regulations and exposed numerous animal-rights, environmental, and health-safety concerns present in the country’s farming industry.\textsuperscript{144} Although the film caught the attention of the general public, the day-to-day task of informing the public of these concerns still falls primarily on the shoulders of animal-rights advocate groups.\textsuperscript{145} These animal-rights groups, such as Mercy for Animals (MFA) and the Humane Society of the United States (HSUS), have aggressively investigated the unsavory conditions of large agricultural facilities.\textsuperscript{146} Most often, these investigations take the form of undercover video-surveillance operations—activists use concealed cameras to document animal abuse, health-code violations, and environmental concerns.\textsuperscript{147} Despite growing media attention and the knowledge that such groups are constantly attempting to infiltrate facilities, the farming industry continues to leave itself exposed to recurring investigations that continue to reveal flagrant animal abuse and health-code violations.\textsuperscript{148} This section will briefly discuss four of the most notable undercover investigations and outline the subsequent public and governmental responses to the release of the undercover footage.\textsuperscript{149}

\textbf{a. Hallmark Meat Packing Company—California}

In 2007, HSUS conducted a six-week investigation of the Hallmark Meat Packing Company (Hallmark) in Chino, California.\textsuperscript{150} Hallmark supplies beef to the Westland Meat Company, the second-largest supplier of beef to the USDA’s Commodity Procurement Branch.\textsuperscript{151} From there, Hallmark’s beef is

\textsuperscript{144} See \textit{Food, Inc.} (Magnolia Pictures 2009); see also \textit{Food, Inc.}, \textit{TAKE PART} (last visited Apr. 11, 2012), http://www.takepart.com/foodinc/film (“[F]ilmmaker Robert Kenner lifts the veil on our nation’s food industry, exposing the highly mechanized underbelly that has been hidden from the American consumer.”).


\textsuperscript{146} See MFA Investigations, supra note 5 (providing results of numerous undercover investigations).

\textsuperscript{147} See generally Michael Hill, Comment, \textit{The Animal Enterprise Terrorism Act: The Need for a Whistleblower Exception}, 61 CASE W. RES. L. REV. 651 (2010) (stating undercover investigations used to expose animal abuse and health-code violations); see also MFA Investigations, supra note 5 (providing examples of typical undercover investigations).

\textsuperscript{148} See MFA Investigations, supra note 5 (revealing animal abuse through undercover investigations); see also A.G. Sulzberger, States Look to Ban Efforts to Reveal Farm Abuse, \textit{N.Y. TIMES} (Apr. 13, 2011), http://www.nytimes.com/2011/04/14/us/14video.html (“Undercover videos showing grainy, sometimes shocking images of sick or injured livestock have become a favorite tool of animal rights organizations to expose what they consider illegal or inhumane treatment of animals.”).

\textsuperscript{149} See infra Part II.B.2.a-d (outlining examples of four undercover investigations exposing animal abuse).


\textsuperscript{151} See id. “Hallmark’s Chino, Calif., slaughter plant supplies the Westland Meat Co., which processes
distributed to “needy families, the elderly and also to schools through the National School Lunch Program.”

Although Hallmark is a federally inspected plant, HSUS’s investigation exposed Hallmark employees forcing “downed” cows—those that are too sick to walk or stand up—back to their feet by “ramming them with blades of a forklift, jabbing them in the eyes, applying painful electric shocks, and even torturing them with a hose and water in attempts to force sick or injured animals to walk to slaughter.” After sharing the footage with the USDA, the Food Safety and Inspection Service determined that the beef produced at the Hallmark facility was not fit for human consumption because the cattle had not received proper inspection.

On February 17, 2008, Hallmark recalled over 143 million pounds of beef—considered, at the time, to be the largest meat recall in United States history. Additionally, criminal charges were filed against two of the Hallmark employees involved in the animal abuse.

b. Quality Eggs of New England—Maine

In 2009, MFA’s undercover investigators targeted Quality Eggs of New England (Quality Eggs) in Turner, Maine, the largest egg farm in New England. Quality Eggs, much like other factory poultry farms, confined thousands of hens in battery cages, minimizing the birds’ ability to walk or spread their wings. Although battery caging, on its own, is standard practice the carcasses. The facility is the second-largest supplier of beef to USDA’s Commodity Procurement Branch, which distributes the beef to needy families, the elderly and also to schools through the National School Lunch Program.”

152. See id.

153. See id. (outlining types of abuse recorded); see also Ethan A. Huff, Iowa Passes Outrageous Law Demanding Total Secrecy Over Factory Meat Filth and Cruelty Practices, INFO WARS (Mar. 4, 2012), http://www.infowars.com/iowa-passes-outrageous-law-demanding-total-secrecy-over-factory-meat-filth-and-cruelty-practices/ (“California-based meat packing facility where extreme and highly-disturbing animal abuse was taking place on a regular basis. The company, which was eventually shut down thanks to undercover video footage . . . had been supplying tainted meat to public school lunchrooms across the U.S.”).

154. See Hallmark Investigation, supra note 150 (describing decision to recall meat produced at Hallmark facility).

155. Id. (outlining recall of meat produced at Hallmark facility); see also Victoria Kim & Mitchell Landsberg, Huge Beef Recall Issued, L.A. TIMES (Feb. 18, 2008), http://www.latimes.com/news/local/la-me-beef18feb18,0,4428760.story (“The U.S. Department of Agriculture announced the largest beef recall in its history Sunday, calling for the destruction of 143 million pounds of raw and frozen beef produced by a Chino slaughterhouse that has been accused of inhumane practices.”). Although the beef was recalled, the U.S. Department of Agriculture (USDA) stated the vast majority of the meat was already consumed, with over 37 million pounds having been sent directly to schools. See Kim & Landsberg, supra.


157. See MFA Investigations, supra note 5 (providing summary of Quality Eggs investigation).

158. Id. (outlining abuse on Quality Eggs farm); see also Grocers Urged to Reject Eggs from Farm, PORTLAND PRESS HERALD, Mar. 11, 2010, [hereinafter Reject Eggs] available at http://www.pressherald.com/archive/grocers-urged-to-reject-eggs-from-farm_2009-04-02.html (“equipped with a video camera, got footage
for poultry farms, MFA’s investigation revealed “birds trapped in the wire of their cages and workers throwing live birds into trash bins and breaking their necks.” In response to the reported abuse, the Maine Department of Agriculture raided the farm, and local supermarkets terminated existing business relationships with Quality Eggs. In addition to pleading guilty on ten counts of animal abuse, Quality Eggs agreed to pay over $130,000 in fines and restitution and to allow the state of Maine to conduct unannounced inspections for five years—a particularly significant punishment, in comparison to other undercover farming investigations.

c. Sparboe Farms—Iowa, Minnesota, and Colorado

In 2011, MFA launched an investigation into the Sparboe Farms (Sparboe) poultry facilities, located in Iowa, Minnesota, and Colorado. Sparboe was the fifth-largest producer of eggs in the United States and, at the time of the investigation, was supplying McDonald’s, Target, Sam’s Club, Supervalu, and Hy-Vee, with a significant portion of their eggs purchased for resale. Undercover MFA members gained entry into the facility as “employees,” and their investigation “revealed hens crammed into filthy battery cages and dead hens left to rot alongside birds still laying eggs for human consumption. . . . [It] also documented workers burning off the beaks of chicks without painkillers, sadistically and maliciously torturing animals, and throwing live birds into plastic bags and leaving them to suffocate.” Additionally, a follow-up investigation revealed an intracompany warning that was circulated regarding the ongoing issue of unsanitary farming conditions: insects, rodents, and large numbers of dead birds, all of which have traditionally been linked to salmonella. The release of the undercover footage sparked a significant
public response, with over 2000 media outlets, including *Good Morning America, World News Tonight with Diane Sawyer*, and 20/20, covering the story.\(^{166}\) In response to MFA’s investigation, McDonald’s, Target, Sam’s Club, and Supervalu terminated their business relationships with Sparboe.\(^{167}\) MFA, unsatisfied with Sparboe’s response to the investigation, followed up the investigation with a consumer-fraud complaint to the Federal Trade Commission, alleging that Sparboe’s statements regarding its treatment of animals were unlawfully false and misleading.\(^{168}\)

d. *E6 Cattle Company—Texas*

In 2011, MFA continued their undercover investigations of factory farms, this time infiltrating the E6 Cattle Company (E6 Ranch) of Castro County, Texas.\(^{169}\) The E6 Ranch was responsible for raising over 10,000 calves for use in the dairy industry.\(^{170}\) The MFA conducted a two-week investigation beginning in March 2011.\(^{171}\) The undercover “employee” reported:

> On the Sparboe Farms website, the “Animal Care Code of Conduct” states that the company’s hens won’t suffer from hunger, thirst or pain. It also says that Sparboe hens have “freedom to express normal behavior” and “freedom from fear and distress.”

> In the FTC complaint, Mercy for Animals calls these claims “blatantly false” and points to the hidden camera video taken by an undercover operative in the company’s egg farms over a three-month period. The video, which showed animal abuse and unsanitary conditions at facilities in three states, first aired as part of the ABC News investigation. After learning of the results of the ABC News investigation, major Sparboe customers, including McDonald’s and Target, severed their ties with the egg producer.

Id.

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169. See MFA Investigations, supra note 5 (detailing E6 Ranch investigation); see also No Mercy: *Calf Farm Cruelty Exposed*, MERCY FOR ANIMALS, http://www.mercyforanimals.org/calves/ (last visited Apr. 9, 2011) [hereinafter No Mercy] (“E6 Cattle rears calves for use on dairy farms, confining approximately 10,000 calves and subjecting them to lives of prolonged neglect and misery. For over two weeks in March of 2011, an MFA undercover investigator documented the operation’s deplorable conditions and brutal mistreatment of animals.”).

170. See No Mercy, supra note 169 (discussing production of E6 facility); see also MFA Investigations, supra note 5.

- Beaten calves, still alive and conscious, thrown onto piles to slowly suffer and die.
- Calves confined to squalid hutch penned, thick with manure and urine buildup, barely large enough for the calves to turn around or fully extend their legs.
- Gruesome injuries, including open sores, swollen joints and severed hooves.\(^{172}\)

Again, the investigation garnered national attention.\(^{173}\) In the wake of the investigation, stock prices dropped, and other dairy farmers began to speak out against the E6 Ranch’s treatment of animals.\(^{174}\) Ironically enough, it may have been the E6 Ranch investigation’s impact on the stock market that provided traction for factory farming’s whistleblower-suppression-legislation campaign, targeting undercover animal-rights activists seeking to expose the sordid practices of the agricultural industry.\(^{175}\)

C. Whistleblower-Suppression Laws

Undercover investigations of factory farms, such as those discussed in Part II.B.2, drastically affect the profitability of large agricultural facilities.\(^{176}\)

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172. Id. (detailing reported abuse); see also MFA Investigations, supra note 5; Mercy For Animals Announces Felony Animal Cruelty Warrants Issued, BEEF (May 26, 2011), http://beefmagazine.com/organizations/0530-mfa-animal-cruelty-felony (reviewing abuse on E6 facility).


175. See Bittman, supra note 8 (discussing impact on farming industry prompting push for “ag-gag” legislation).


In recent years, undercover investigators have successfully exposed horrific cruelty in the animal agriculture industry, documenting abuse on video and in photos. Mainstream news outlets have aired the footage of graphic violence and miserable conditions farm animals endure daily in commercial animal agriculture. Viewing this appalling treatment of farm animals can make even a strong stomach turn and with each new investigation it becomes clear that the callousness is widespread; misery is the industry standard, not just a few rotten egg facilities. Yet, instead of improving conditions for animals and workers, big agribusiness is trying to draw a curtain to shield their inhumane operations from public accountability.

Id.
Undercover investigations have unearthed rampant animal abuse, unsafe working conditions, and environmental problems, the exposure of which has "wreaked havoc on the agricultural industry." Proponents of factory farming claim that the investigations are dishonest attempts to sabotage the agricultural industry, generate unnecessary and extensive litigation, prompt the loss of factory jobs, and negatively affect the financial stability of the agricultural market. In response, the industry has supported, and lobbied for, legislation that would criminalize the act of producing or distributing photographs or videotape obtained on agricultural facilities. This section will outline the current landscape of state "ag-gag" laws, before moving on to briefly address the Animal Enterprise Terrorism Act, which many have argued operates as a federal whistleblower-suppression statute.

177. Amanda Radke, Do You Support Ag Gag Laws?, BEEF DAILY (Mar. 14, 2012), http://beefmagazine.com/blog/do-you-support-ag-gag-laws (stating impact of undercover investigations on farming industry). Radke claims that the videos inappropriately target the agricultural industry, and that animal abuse may actually be encouraged by investigators, whom are looking to secure video evidence of abuse:

What’s more, I also know that PETA and HSUS supporters are usually behind these terrible videos depicting animal abuse. And, if they aren’t behind 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.

178. See Radke, supra note 177; see also Douglas Doneson, New York Ag-Gag Legislation, ANIMAL BLAWG (June 10, 2011), http://animalblawg.wordpress.com/2011/06/10/new-york-ag-gag-legislation/ (restating argument supporting legislation). Doneson provides, before later criticizing, New York’s justification for the proposed legislation, focusing specifically on improving security weaknesses:

New York’s family farms have become increasingly concerned with the focus on livestock agriculture. While working with the Departments of Homeland Security as well as local law enforcement, it has become clear from several recent instances of animal and facility tampering (the unlawful injection of cattle with antibiotics in Western New York, and the increasing theft of anhydrous ammonia fertilizer, utilized by meth addicts to make illegal substances) that the tools for law enforcement and for farmers to help secure their premises are not always accurate. The Department of Homeland Security, working with the FDA and others, have indicated that farmers need to be more aware of where there [sic] security weaknesses are, and to work on improving means to discourage trespass and tampering which may weaken the safety of our food supply.


I. State “Ag-Gag” Laws

With industry support, numerous states have recently proposed “ag-gag” legislation, taking aim at undercover investigators. The language of these proposed bills varies from state to state, but the common thrust of the legislation has been to criminalize photography and videotaping on factory farms, the possession or distribution of such videos, and gaining employment at agricultural facilities under false pretenses. Although “ag-gag” legislation is a current trend, and has recently sparked media attention, this general idea is not a new concept. In the early 1990s, Kansas, Montana, and North Dakota were the first to pass “ag-gag” laws designed to protect agricultural facilities. Now, over twenty years later, a score of states are in the process of proposing or passing similar legislation. With the recent passage of “ag-gag” laws in Iowa and Utah, there are now five states with statutes in place and numerous states—Florida, Illinois, Indiana, Minnesota, Missouri, Nebraska, New York, and Tennessee—with legislation still in the pipeline.
a. Existing “Ag-Gag” Laws

i. Kansas

In 1990, Kansas was the first state to pass an “ag-gag” law. The Kansas statute, titled the Farm Animal and Field Crop and Research Facilities Protection Act (Kansas Act), criminalizes “enter[ing] an animal facility to take pictures by photograph, video camera or by any other means . . . without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility.” If the property damage is $25,000 or more, violation of the statute is a nonperson felony. Additionally, illegal entry that involves taking pictures or video is a class A, nonperson misdemeanor. The Kansas legislature designed the act to protect research facilities from activist groups seeking to disrupt or destroy such facilities.

ii. Montana

Shortly after Kansas passed its “ag-gag” statute, in 1991, Montana followed suit. The Montana statute, titled the Farm Animal and Research Facilities Protection Act (Montana Act), strays from the language found in the Kansas law in a number of respects. The Montana Act criminalizes “enter[ing] an animal facility to take pictures by photograph, video camera, or other means with the intent to commit criminal defamation . . . [and without] the effective consent of the owner [with the intent] to damage the enterprise conducted at an animal facility.” The key distinction that exists in the Montana Act is its “criminal defamation” requirement, which requires a more specific act and allows for a narrower definition of punishable conduct than the Kansas Act. A person damaged by a violation of the Montana Act may sue to recover “an amount equal to three times all actual and consequential damages,” as well as court costs and reasonable attorney fees. Additionally, the Montana Act provides for criminal punishment, based on the severity of the offense, of up to $50,000 and ten years in prison.

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187. See KAN. STAT. ANN. § 47-1827 (2012); see also Lin, supra note 183 (outlining Kansas “ag-gag” law).
188. KAN. STAT. ANN. § 47-1827(c) (2012).
189. Id. § 47-1827(g)(1).
190. Id.
191. See Lin, supra note 183 (discussing goal of Kansas “ag-gag” law).
197. Id. § 81-30-105(3) (providing harshest penalty for violation with damages over $500).
iii. North Dakota

In 1991, North Dakota passed its own “ag-gag” law, titled the Animal Research Facility Damage Act (North Dakota Act). The North Dakota Act criminalizes “[e]nter[ing] an animal facility and us[ing] or attempt[ing] to use a camera, video recorder, or any other video or audio recording equipment” without the owner’s consent. This language is broader than both Kansas’s and Montana’s Acts: Kansas requires intent to damage the enterprise; Montana requires the intent to damage the enterprise, as well the intent to commit criminal defamation; and North Dakota omits any language regarding intent. Therefore, the North Dakota Act is likely to criminalize a broader scope of conduct than the Kansas and Montana Acts. Under the North Dakota Act, a violation is a class B felony if damage is $10,000 or more, a class C felony if the damage is at least $500 to under $10,000, and a class A misdemeanor if damage is less than $500. Entering an animal facility and using or attempting to use a camera, video recorder, or any other video or audio recording equipment is a class B misdemeanor.

b. Pending or Recently Passed “Ag-Gag” Legislation

“Ag-gag” legislation has recently passed in Iowa and Utah. Both states, as well as the numerous states still considering “ag-gag” legislation—Florida, Illinois, Indiana, Minnesota, Missouri, Nebraska, New York, and Tennessee—are targeting investigative journalists and animal-rights advocates who take entry-level jobs at factory farms in order to document inappropriate behavior inside the facilities. Although all of the proposed legislation is designed to

199. Id. § 12.1-21.1-02.
201. See supra note 200 and accompanying text (comparing conduct covered under each statute).
203. Id.
address similar behavior, the language of each bill has varied from state to state, primarily because each state has faced significant pressure regarding the constitutionality of such legislation. This section will analyze the Iowa and Utah laws, provide an overview of proposed or pending state “ag-gag” legislation, and discuss whether each bill falls within the categorized criteria defined in Part I of this Note.

i. Iowa’s Recently Approved “Ag-Gag” Law

Iowa’s “ag-gag” law, House File 589 (Iowa bill), which was signed into law in March 2012, targets agricultural-operation interference. After some extensive revisions, the final version of the bill focuses specifically on misleading statements made during the factory-farm hiring process, as opposed to the traditional objectives of “ag-gag” laws, which limit photography and videotaping at factory farms. The Iowa bill penalizes those who make false statements to gain access to a facility, or who misrepresent themselves on an employment application to hide their intended misconduct or purpose. Additionally, the bill penalizes organizations or persons who aid and abet those who misrepresent themselves to gain access to a facility. The severity of the punishment increases for each subsequent offense—the first conviction is a serious misdemeanor and the second offense is an aggravated misdemeanor.

Passage of the Iowa bill has raised considerable concern, with over sixty-five percent of Iowans disapproving of its passage in a recent poll.
Specifically, those who opposed the legislation claimed that Iowa would be singled out as state with something to hide:

While some farmers might not like the idea of photos of their farms or undercover videos being taken, this heavy handed attempt to shelter the worst abusers only exposes the truth of industrial livestock production to millions of Americans who would have blissfully gobbled up chicken nuggets and pork chops not knowing or caring about the conditions in which those animals were raised. Now it looks like they have reason to be concerned.214

But supporters of the legislation, such as the Iowa Farm Bureau Federation (IFBF), have celebrated the legislature’s decision, claiming the bill supports local farms and ensures that food sources are secure in a post-9/11 United States.215 IFBF president, Craig Hill, said: “It’s about misrepresentation of character. . . . In a post 9/11 world, transparency is important for farmers and consumers alike. Responsible farmers take good care of their land and livestock and want to employ honest, hardworking people that have the welfare of their livestock as their top priority.”216 Despite conflicting views, the Iowa bill was signed into law in April 2012.217 Although Iowa joins Kansas, Montana, North Dakota, and now Utah, as one of the five states with “ag-gag” legislation, the language of the bill is significantly less restrictive than some of the other states’ laws.218 Focusing instead on dishonesty in the job-application process, the Iowa bill does not specifically target the production or distribution of photography or videotapes, which is the primary focus of a constitutional attack under the First Amendment.219
ii. Utah’s Recently Approved “Ag-Gag” Law

Shortly after Iowa passed its “ag-gag” law, Utah followed suit by passing House Bill 187 (Utah bill), which was signed into law on March 20, 2012.220 The Utah bill, unlike its Iowa counterpart, specifically targets photography and videotaping, punishing those who, “without consent from the owner of the operation, or the owner’s agent, knowingly or intentionally record[,] an image of, or sound from, the [agicultural] operation” either by entering the property or “by leaving a recording device on the property where the agricultural operation is located.”221 With respect to punishment, the Utah bill also staggers sentencing based on subsequent offenses, much like the Iowa bill: Anyone who “commits agricultural operation interference is guilty of: (a) for a first offense, a class A misdemeanor; or (b) for a subsequent offense, a felony of the third degree.”222

Those who oppose the legislation claim that the Utah bill endangers the public’s health because individuals, including employees who witness gross wrongdoing and food safety violations, would not be able to document health violations or animal abuse.223 Specifically, critics of the bill claim that the Utah bill will stifle whistleblowing by depriving employees of their primary investigative tool—videotape.224 Without videotaping, whistleblowers may be dissuaded from reporting wrongdoings on the farm, out of fear that their claims will not be as persuasive and could be more susceptible to criticism or even retaliation.225 Additionally, opponents of the bill argue that it will have “a
chilling effect on whistleblowers” because of the increased threat of criminal prosecution.226 In response, proponents of the legislation have focused on farmers’ property rights, claiming that the benefits of undercover investigations could be accomplished without trespassing on private property.227 Utah State Senator David Hinkins, a cosponsor of Utah’s agricultural operation interference law, focused on the issue of trespass: “There are authorities they can contact. They don’t need to be detectives or the Pink Panther sneaking around. . . . In any other country, you could get shot for going on someone’s property like that.”228

iii. Pending “Ag-Gag” Legislation

In addition to Iowa and Utah’s new laws, “ag-gag” legislation is either being considered by, or has recently been rejected in, eight states: Florida, Illinois, Indiana, Minnesota, Missouri, Nebraska, New York, and Tennessee.229 Although the language of each state’s proposed bill varies, the thrust of the legislation remains consistent—banning undercover investigators from applying for employment with factory farms under false pretenses with the
intent to record and disclose footage of farm practices and conditions.\textsuperscript{230} Of the states considering “ag-gag” laws, Florida, Illinois, and Indiana have recently rejected the proposed legislation.\textsuperscript{231} But, much like Iowa, state legislators are likely to reintroduce new versions of the bill—oftentimes removing some of the language that has given rise to First Amendment attacks—in the upcoming term.\textsuperscript{232} Each state’s proposed legislation falls into one of the three categories described in Part I: (1) criminalizing dishonesty in the job-application process, when the applicant has the intention of infiltrating the facility to investigate; (2) criminalizing the act of photographing or videotaping on agricultural facilities; and (3) criminalizing the act of photographing or videotaping, as well as the possession or distribution of such videos.

Of the proposed legislation, Illinois House Bill 5143 (Illinois bill) and Minnesota House File 1369 (Minnesota bill) both fall within the third category, targeting not only photography and videotaping but also the possession and distribution of such materials.\textsuperscript{233} Although the Illinois bill was recently tabled, the Minnesota bill is still being considered.\textsuperscript{234} Similarly, Florida Senate Bill 1184 (Florida bill) and Indiana Senate Bill 184 (Indiana bill) fall within the second category of “ag-gag” legislation, specifically limiting photographing and videotaping on the facilities without express permission, but electing not to criminalize the subsequent possession or distribution of such materials.\textsuperscript{235} Both the Florida and Indiana legislatures recently failed to pass bills.\textsuperscript{236} But this is
Florida’s second attempt at proposing “ag-gag” legislation, and many believe the bill will again be modified and proposed in the following term.\[237\] New York Senate Bill 5172 (New York bill) also appears to fall within the second category, by focusing on behavior that constitutes “tampering,” which is defined as “any interference with a farm animal of a farm through . . . the unauthorized feeding or unauthorized video, audio recording, or photography done without the farm owner’s consent.”\[238\] Missouri Senate Bill 695 (Missouri bill) and Nebraska Legislative Bill 915 (Nebraska bill) both introduce the idea of “mandatory reporting”—any evidence of animal abuse must be reported within a statutorily defined period of time, and failing to do so will carry criminal penalties.\[239\] Additionally, the Nebraska bill falls within the first category, charging those who obtain employment at a facility “with the intent to disrupt the normal operations” with a Class IV felony—a particularly harsh sentence compared to other existing “ag-gag” laws.\[240\] Similarly, Tennessee Senate Bill 3460 (Tennessee bill) also fits into the first category, targeting those who apply for employment with the intent to videotape and distribute activities inside of the facilities.\[241\] The Tennessee bill also allows for the destruction of any video that is obtained in violation of the statute.\[242\]

2. Animal Enterprise Terrorism Act

In 1992, after numerous attempts to pass federal legislation designed to protect commercial agricultural enterprises from domestic terrorism, Congress enacted the Animal Enterprise Protection Act (AEPA), making it a federal crime to cause “physical disruption” to the functioning of an animal enterprise by means of interstate commerce.\[243\] Although whistleblowers were not the original target of the statute, it soon became apparent the term “physical disruption” was unclear and allowed for considerable interpretive discrepancies.\[244\] Accordingly, Congress expressly defined “physical

\[hereinafter Press Release, Bill Fails in Indiana] (“The bill died in committee when it was denied a hearing. Citizens had raised concerns over the bill’s threats to First Amendment rights, food safety, animal welfare and workers’ rights.”).

237. See Alicia Graef, Florida’s Ag Gag Bill Reintroduced, CARE2.COM (Dec. 20, 2011), http://www.care2.com/causes/floridas-ag-gag-bill-reintroduced.html (“Sen. Norman has reintroduced this legislation by sneaking similar language into a larger agricultural bill (SB 1184), which will make it a first-degree misdemeanor to take photos, audio recordings or video of a farm or farm operation without previous written consent.”). This is the second time Florida has introduced “ag-gag” legislation. See id.


242. Id.


244. See Hill, supra note 147, at 653-54 (outlining changes to AEPA leading to AETA); see also Kimberly
disruption” to exclude “lawful disruptions” in an attempt to avoid the possibility that the statute would be used to punish whistleblowers.\(^{245}\) Despite its efforts to redefine the term, Congress failed to detail what type of conduct constituted a “lawful disruption” under the AEPA, thus leaving open the possibility that certain whistleblowing conduct could fall within the purview of the statute.\(^{246}\)

The Animal Enterprise Terrorism Act (AETA), an amendment to the original AEPA, was passed in 2006.\(^{247}\) While retaining its broad definition of an “animal enterprise,” the AETA expanded the original AEPA in three fundamental ways.\(^{248}\) First, the AETA replaced the previously addressed “physical disruption” language with the term “interfering”—a significantly broader definition of punishable conduct.\(^{249}\) Second, it increased the scope of who and what is protected under the statute, expanding it to cover any real or personal property owned by those with a relevant connection to an animal enterprise.\(^{250}\) Lastly, the AETA created an independent source of liability for anyone who, while interfering with an animal enterprise, places another in reasonable fear of death or injury.\(^{251}\)

The AETA has been the subject of extreme criticism, primarily because of its disproportionally harsh penalties for conduct that falls outside of what most

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245. See Hill, supra note 147, at 653-54 (outlining changes to AEPA leading to AETA); see also Oscar A. Morales Lugo & Isabelle C. Oria Calaf, “Don’t Shoot the Messenger!” First Amendment Implications of the Animal Enterprise Terrorism Act, 42 REV. JUR. U. INTER. P.R. 407, 413-14 (2008) (referring to “significant change to the previous existing law” regarding “physical disruption”).

246. See Hill, supra note 147, at 653-54 (describing existing confusion regarding “lawful disruption” language). Hill points out that Congress’ change does not necessarily clarify anything:

The definition provided only that “the term ‘physical disruption’ does not include any lawful disruption that results from lawful public, governmental, or animal enterprise employee reaction to the disclosure of information about an animal enterprise.” Congress, however, did not include any illustration of what constituted a “lawful disruption.” Thus, the definition failed to provide the necessary clarity, and concerns about the statute’s scope remained.

Id. at 654.


248. See Hill, supra note 147, at 654 (“AETA is a controversial amendment that expands AEPA in three fundamental ways.”); see also McCoy, supra note 244, at 56-60 (describing key differences in AETA).


250. See Hill, supra note 147, at 654 (“[I]t increases the number of entities covered by AETA to include not only the animal enterprise itself but also ‘any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise.’” (quoting 18 U.S.C. § 43(a)(2)(A) (2006))). This is a significant distinction because it extends the statute to protect even those who simply “connected” to the facility. Hill, supra note 147, at 654.

would consider “terrorism.” For example, six animal-rights activists—known collectively as the “SHAC 7”—were convicted of conspiring to violate the AETA and sentenced to four to six years in federal prison for operating a website that was used to organize undercover animal-rights investigations. Furthermore, critics have argued the AETA chills free speech, inappropriately labels activists as terrorists, wastes government resources that could be used to battle legitimate terrorist threats, and targets behavior that is already criminal in nature.

In addition to the arguments above, the AETA has faced numerous arguments on constitutional grounds. Most notably, critics of the AETA have contended that the statute is unconstitutionally vague. Specifically, they have argued that the term “interfere” is not clearly defined, and therefore it is difficult for a reasonable person to understand what type of conduct is prohibited under the AETA. These same critics also allege that the AETA prohibits protected conduct that the government cannot regulate—expression, under the First and Fourteenth Amendments—and therefore the statute is overly broad. This argument is not without merit. The term “interference” is commonly defined as “the act of meddling in another’s affairs; an obstruction or hindrance.”

252. See generally Lugo & Calaf, supra note 245; McCoy, supra note 244 (criticizing use of phrase “terrorist”). Rebecca Smith states that the use of the phrase “terrorist” is inappropriate “because it diminishes the true meaning of the word terrorism, stifles political dissent, and is being used as a pretext to ensure the protection of private economic gains at the expense of efforts to protect the environment.” Rebecca K. Smith, Comment, “Ecoterrorism”? A Critical Analysis of the Vilification of Radical Environmental Activists as Terrorists, 38 ENVTL. L. 537, 537 (2008).

253. See Will Potter, The Green Scare, 33 VT. L. REV. 671, 676 (2009) (describing “SHAC 7” case and prosecution of “running a controversial website” under AETA). See generally THE SHAC 7, http://www.shac7.com/case.htm (last visited Apr. 9, 2012). Originally, seven individuals and the organization Stop Huntingdon Animal Cruelty USA Inc. (SHAC) were indicted and charged—thus, SHAC 7. See id. One defendant, John McGee, was dropped from the case and six individuals were convicted. Id.


255. See Hill, supra note 147, at 60-62 (discussing vagueness doctrine and its application to AETA); see also Jared S. Goodman, Notes and Comments, Shielding Corporate Interests from Public Dissent: An Examination of the Undesirability and Unconstitutionality of “Eco-Terrorism” Legislation, 16 J.L. & POL’Y 823, 853-65 (2008) (attacking AETA on First Amendment grounds).

256. See McCoy, supra note 244, at 60-65 (2007) (outlining constitutional attacks on AETA). The vagueness of the AETA “creates an opportunity for arbitrary and discriminatory enforcement.” Id. at 62.

257. See McCoy, supra note 244, at 60-61 (analyzing term “interfere” under vagueness argument).

258. See McCoy, supra note 244, at 62 (“Under the overbreadth doctrine, if a statute forbids the sort of expression that may not legally be regulated—expression protected by the First and Fourteenth Amendments of the United States Constitution, such as civil disobedience—it is considered overbroad and, thus, void.”).

259. BLACK’S LAW DICTIONARY 831 (8th ed. 2004).
considered hindering, obstructing, or impeding to an agricultural faculty; thus, it is possible that the AETA’s severe criminal sanctions may discourage such constitutionally protected speech.  

III. ANALYSIS

The current push for “ag-gag” legislation has prompted the public to ask for a simple answer to a seemingly complicated question—what does the agricultural business have to hide? With “ag-gag” laws established in five states, as well as legislation pending in a host of others, supporters and detractors have clashed over the main issues, such as animal rights, pollution, and public health. But despite increased media attention, two main questions remain unanswered: Are these statutes constitutional? If so, do they even make sense?

As stated in Parts I and II, most “ag-gag” legislation fits into one of three categories: (1) criminalizing dishonesty in the job-application process, when the applicant has the intention of infiltrating the facility to investigate; (2) criminalizing the act of photographing or videotaping on agricultural facilities; and (3) criminalizing the act of photographing or videotaping, as well as the possession or distribution of such videos. This section will first analyze the constitutionality of these three categories of “ag-gag” legislation under the First Amendment, focusing specifically on content-based restrictions on speech and the prior-restraint doctrine. This section will then address these three categories of “ag-gag” legislation to determine if the laws—as they are written, after significant modifications in an attempt to meet First Amendment requirements—are even effective, or if such conduct could simply be punished under existing legal mechanisms.

A. The First Amendment:

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260. See McCoy, supra note 244, at 63 (“The answer to this question is simple: the AETA was specifically designed to target and suppress the viewpoints of animal advocates. There is no better way to stifle dissent and drive a viewpoint from the marketplace than to brand its proponents as terrorists.”).


262. See supra note 10 and accompanying text (outlining this author’s three categories for evaluating “ag-gag” legislation).

263. See infra Part III.A.1-2.

264. See infra Part III.B.1-2.
Content-Based Restrictions and Prior-Restraint Doctrine

1. “Ag-Gag” Laws Are Content-Based Restrictions on Speech

Before analyzing whether “ag-gag” laws are content-based restrictions on speech, we must first determine if photographing or videotaping, in the undercover-investigation context, is likely to be considered speech, and thus deserving of First Amendment protection. The Court, in Porat and Cuviello, provided the necessary framework for a First Amendment analysis of photography or videotaping: the conduct must be communicative, and there must be an audience to whom that idea is being communicated.

With respect to the undercover investigations targeted by “ag-gag” laws, the investigators’ conduct is surely an attempt to communicate a message to others—the videos are intended to document animal abuse, pollution, and health-code violations on factory farms. Much like the conduct addressed in Cuviello, investigators are attempting to gather newsworthy information that will be provided to the public as a means of exposing unacceptable conditions and behavior on factory farms. Moreover, footage from these investigations is not being gathered for personal use, as it was in Porat—quite the opposite, actually.

The goal of securing undercover photography or videotape is to provide that information to the public. And the public is seemingly interested in the message, as evidenced by the widespread media attention and public outcry stemming from undercover investigations, such as those outlined in Part II.B.2. Therefore, under the standard established in Porat and Cuviello, it is

265. See Farber, supra note 25, at 39 (discussing conduct sufficiently communicative as speech); see also Volokh, supra note 25, at 1283-85 (comparing conduct with speech).


267. See Spence v. State of Wash., 418 U.S. 405, 409-10 (1974) (“But the nature of appellant’s activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression.”); see also Texas v. Johnson, 491 U.S. 397, 404 (1989). The undercover investigators are capturing video with the intent to communicate that message to the public. See Spence, 418 U.S. at 409-10; see also Zalewska v. County of Sullivan, New York, 316 F.3d 314, 319-20 (2d Cir. 2003) (requiring both elements to determine sufficiently communicative conduct). See generally Baker, supra note 27 (discussing two prongs of communicative conduct under First Amendment).


269. See Porat, 2005 WL 646093, at *1-2 (providing example of photography for personal use). In Porat, the “speaker” was a photo hobbyist who admitted to taking the photos for personal use. Id. Undercover investigators are not “taking pictures for aesthetic and recreational purposes.” Id. at *1.

270. See Stallwood, supra note 145, at 69-71, 137-40 (discussing undercover investigations to expose animal abuse and environmental violations); see also MFA Investigations, supra note 5 (providing example of intended use of acquired footage).

271. See, e.g., Aldrich, supra note 174 (providing Wall Street Journal review of impact related to
likely that undercover photography or videotaping of conditions on factory farms would be sufficiently communicative to be considered speech worthy of First Amendment protection, assuming investigators are on the property legally.272

Although the government can enforce reasonable restrictions on the time, place, and manner of content-neutral speech, purely content-based restrictions are considered impermissible and subject to strict-scrutiny review.273 How would the Supreme Court categorize “ag-gag” laws? Are they a simple “place” restriction on content-neutral speech, such as the behavior outlined in Ward, or do they target a group’s viewpoint, ideas, or message, as the statute did in Johnson?274

The answer is likely the latter. “Ag-gag” laws are not intended to reprimand a mother and father taking a photograph of their son or daughter at the farm; although, such conduct may actually be punishable. Instead, they are specifically designed to target the speech of undercover animal-rights activists, whose views are in direct conflict with those of the legislature.275 With the exception of laws that target untruthful behavior at the hiring stage, “ag-gag” laws will punish undercover animal activists for taking photographs or video on factory farms, instead of punishing anyone who records on private property without permission.276 Such a distinction is sufficient to establish a strong argument that the legislature is attempting to restrict content-based, protected speech.277 If “ag-gag” laws are determined to be content-based, they will face strict-scrutiny review and likely be deemed unconstitutional.278

undercover investigation exposing rampant animal abuse); Sulzburger, supra note 179 (providing New York Times overview of undercover investigations); Velez-Mitchell, supra note 173 (providing example of CNN news coverage of undercover investigations).


273. See Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (permitting government to “regulate the times, the places, and the manner” of speech in reasonable and nondiscriminatory way).


275. See Bittman, supra note 8 (addressing likelihood “ag-gag” law would punish innocent behavior). Bittman discusses a conversation with Nathan Runkle, of Mercy for Animals, who states “ag-gag” laws are so sweeping and broad “that if you took a picture of a dog at a pet shop and texted it to someone, that could be a crime.” Id. To which Bittman responds with, “Unconstitutional? Probably, but there it is.” Id.; see also Murphy, supra note 210 (outlining behavior targeted by “ag-gag” legislation).

276. See Brubaker, supra note 227 (discussing inequitable treatment of animal-rights investigators).

277. See id. (“Under First Amendment law, making sound or image recordings is widely considered to be freedom of speech, he explained. And courts have long held that that government may not restrict speech by singling it out according to its content—in this case, how animals are being treated on farms.”).

278. See United States v. O’Brien, 391 U.S. 367, 376-77 (1968); Chemerinsky, supra note 91, at 55 (2000) (“[T]he general rule is that content-based restrictions on speech must meet strict scrutiny, while content-neutral regulations only need meet intermediate scrutiny.”); see also, e.g., City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993) (striking down ordinance prohibiting commercial-publication news racks); Police Dep’t of
2. Some “Ag-Gag” Laws Are Prior Restraints on Speech

In *Near*, the Court stressed that prior restraints on speech are presumptively unconstitutional under the First Amendment. As Chief Justice Hughes stated, “it has been generally, if not universally, considered that it is the chief purpose of the guaranty [of free speech and press] to prevent previous restraints upon publication.” Simply stated, the government cannot punish or discourage speech before it has occurred.

The prior-restraint doctrine provides an appropriate constitutional attack on specific “ag-gag” laws. For instance, under a number of “ag-gag” laws, such as those proposed in Illinois and Minnesota, investigators are barred from possessing or distributing video footage obtained on a factory farm. More drastically, Tennessee’s proposed law mandates the destruction of any film that is acquired without permission of the landowner. Limiting the possession and distribution of undercover films, in advance of their actual publication, is exactly the type of restriction that the Court has deemed impermissible under the prior-restraint doctrine. To avoid a prior-restraint argument, “ag-gag” laws would have to provide for a subsequent-punishment provision regarding the distribution of photographs or videotape inappropriately obtained on a farming facility. Barring the possession and distribution of materials related

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Chicago v. Mosely, 408 U.S. 92 (1972) (striking down ordinance banning picketing near schools); see also Stone, supra note 28, at 81-82 (“Content-based restrictions, on the other hand, restrict communication because of the message conveyed. . . . In its interpretation of the first amendment, the Supreme Court has been especially wary of government action that restricts speech because of its content.”).

279. *Near* v. Minnesota, 283 U.S. 697, 714 (1931); see also Emerson, supra note 61, at 648-50 (discussing advance restrictions on speech); Litwack, supra note 61, at 52.


281. See Blasi, supra note 60, at 11-12 (discussing prior restraint); Emerson, supra note 61, at 648-50 (outlining principles of prior-restraint doctrine); see also Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975) (“In order to be held lawful, [a prior restraint], first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints.”); Taucher v. Rainer, 237 F. Supp. 2d 7, 12-13 (D.D.C. 2002) (noting heavy presumption of constitutional invalidity).

282. See Emerson, supra note 61, 648-50 (providing applicable prior-restraint framework needed to evaluate “ag-gag” laws). Numerous cases stand for the proposition that the government cannot restrain speech, as opposed to providing for subsequent punishment. See, e.g., Shuttlesworth v. Birmingham, 394 U.S. 147, 159 (1969) (applying prior restraint doctrine); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 506 (1952); Kunz v. New York, 340 U.S. 290, 295 (1951); Niemotko v. Maryland, 340 U.S. 268, 273 (1951); Saia v. New York, 334 U.S. 558, 562 (1948); Lovell v. City of Griffin, 303 U.S. 444, 450-52 (1938); see also Brubaker, supra note 227 (addressing constitutional attacks); Laskawy, supra note 68 (“That bill ran into constitutional hurdles, particularly in its attempt to enforce prior restraint—stopping someone from doing something illegal rather than punishing them for violating the law—a problem the current bill’s focus on employment violations tries to avoid.”).


285. See supra note 282 (discussing applicable prior-restraint framework and application); see also Mayton, supra note 62, at 253 (providing principles of prior-restraint doctrine); Redish, supra note 60, at 54; supra note 68.

286. See Brubaker, supra note 227 (providing analysis from University of Utah constitutional law
to undercover investigations does not punish behavior; rather, it “prevent[s] future evils by a series of restrictions and qualifications that seriously jeopardize freedom of expression.”\footnote{287} Additionally, the dissemination of protected speech has been worthy of First Amendment protection. As stated in \textit{Lambert}: “It is not just news organizations . . . who have First Amendment rights to make and display videotapes of events—all of us . . . have that right.”\footnote{288} Therefore, it could be argued that barring the \textit{distribution} of the undercover footage is also an unconstitutional limit on content-based speech.\footnote{289}

“Ag-gag” legislation, which limits photography and videotaping, as well as the possession and distribution of these materials in some instances, is arguably a content-based restriction of protected speech.\footnote{290} Additionally, it violates the well-established doctrine of prior restraint—ultimately, the states must wait for the film to be distributed, and then punish the parties for such distribution.\footnote{291} Attempting to punish the distribution of undercover videos, before the investigator even attempts to distribute the footage, is likely a governmental bluff—the legislature is attempting to chill free speech by threatening criminal prosecution, as opposed to passing legitimate legislation, prosecuting those who violate such laws, and allowing for the judicial process to run its course.

\textbf{B. Ineffectiveness of “Ag-Gag” Legislation}

\textit{While some farmers might not like the idea of photos of their farms or undercover videos being taken, this heavy handed attempt to shelter the worst abusers only exposes the truth of industrial livestock production . . . . Now it looks like they have reason to be concerned.}\footnote{292}

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professor Michael Teeter). Teeter believed that had “ag-gag” laws outlawed making any kind of recordings on private property without permission, it would be less susceptible to a constitutional attack, stating “I think there are some aspects of it that could pose some (constitutional) problems.” \textit{Id.}
\footnote{287. See Emerson, supra note 61, at 649 (stressing importance of limiting governments’ ability to limit expression instead of punishing conduct).}
\footnote{288. \textit{Lambert v. Polk County}, 723 F. Supp. 128, 133 (S.D. Iowa 1989).}
\footnote{289. See \textit{Laskawy}, supra note 68 (arguing same proposition); \textit{see also Blasi, supra note 60, at 11-12; Emerson, supra note 61, at 648-50; Litwack, supra note 61.}}
\footnote{290. See \textit{supra} notes 80-98 and accompanying text (outlining unconstitutionality of content-based restrictions on protected speech); \textit{see also FARBER, supra note 25, at 20 (“Government regulations linked to the content of speech receive severe judicial scrutiny.”); Chemerinsky, supra note 91, at 55; Davidson, supra note 95, at 458 (“Content-based regulations receive strict scrutiny because they directly regulate the substance of speech.”); Stone, supra note 28, at 81-82 (“Content-based restrictions, on the other hand, restrict communication because of the message conveyed. . . . In its interpretation of the first amendment, the Supreme Court has been especially wary of government action that restricts speech because of its content.”).}
\footnote{291. See \textit{supra} notes 60-68 and accompanying text (outlining steps necessary to avoid prior-restraint doctrine); \textit{see also Blasi, supra note 60, at 49-54; Emerson, supra note 61, at 648-50.}
\footnote{292. \textit{Murphy, supra note 210; see also Emerson, supra note 61, at 648-49. “Prior restraint is thus distinguished from subsequent punishment . . . . [A] system of prior restraint would prevent communication from occurring at all; a system of subsequent punishment allows the communication but imposes a penalty after the event.” Emerson, supra note 61, at 648.}}
1. Proposed Legislation Is Either Unconstitutional or Toothless

Supporters of “ag-gag” legislation have stressed that the underlying goal of the laws is to prevent animal-rights activists from infiltrating facilities to capture footage that they will then present in a manner that is untruthful and harmful to the farming industry. Farmers 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. Therefore, “ag-gag” laws are intended to stifle these allegedly untruthful investigations, limiting the likelihood that such films are made and distributed. But will these laws, as they are written, effectively limit the targeted behavior?

Many proposed “ag-gag” bills have not become law because of significant First Amendment concerns and disproportionately harsh penalties. Accordingly, some state legislatures, in an attempt to gain support for passage, have modified the bills, often removing language regarding distribution and possession of footage, in accordance with the thrust of the prior-restraint argument proposed in Part III.A. Additionally, the majority of proposed laws had originally included much harsher penalties, treating most violations as felonies. Such harsh penalties led many critics to ask whether the act of exposing animal abuse should carry a harsher penalty than the actual abusive behavior. In response, the vast majority of “ag-gag” legislation includes

293. See supra note 178 (discussing support for “ag-gag” legislation); see also Johns, supra note 215 (addressing Farmers support of “ag-gag” legislation).

294. See supra note 177.

295. See Bittman, supra note 8 (“[‘Ag-gag’ bills] would seek to punish not only photographers and videographers but those who distribute their work . . . .”).


297. Press Release, HSUS Praises Florida, supra note 236 (detailing removal of “ag-gag” language from bill); Press Release, Bill Fails in Indiana, supra note 236 (“The bill died in committee when it was denied a hearing. Citizens had raised concerns over the bill’s threats to First Amendment rights, food safety, animal welfare and workers’ rights.”); see also Press Release, ASPCA, supra note 296 (discussing Florida bill and removal of language stifling speech).

298. See The Ag Gag Laws: Hiding Factory Farm Abuses From Public Scrutiny, supra note 182; Lin, supra note 7 outlining “ag-gag” laws with felony penalties).

299. See Sayres, supra note 205 (“[I]nstead, the bills would punish the whistleblowers, the people who dare to lift the veil on these oft-hidden cruelties. The language in the bills varies somewhat state to state, but in many cases the penalties for exposing cruelty may be harsher than those for the actual commission of cruelty.”); see also Gunther, supra note 208 (discussing penalties associated with original version of Iowa “ag-gag” bill).

The “Ag Gag” bill, which was openly backed by the industrial farming lobby, was promoted on the basis that it would help to improve animal welfare and protect family farms. But the stark reality is that this law has absolutely nothing to do with animal welfare and is nothing more than Big Ag protecting its interests again—stealthily promoting legislation that would effectively make it a felony to expose the horrific practices that are going on behind the doors of industrial farms.
only misdemeanor-level punishment for first-time offenders.  

The result has been laws void of the original language barring distribution and possession, which carry only misdemeanor-level punishment. These statutes are unlikely to limit the behavior that was targeted by the originally proposed legislation. Practically speaking, animal-rights activists will continue to infiltrate farms to conduct investigations because the punishment is simply not harsh enough to be considered an effective deterrent. Moreover, once footage is acquired, the subsequent distribution and release will not be punishable behavior. Viewed in their entirety, “ag-gag” laws that do not punish distribution, and that carry misdemeanor-level punishments, simply mean that animal-rights investigators will only risk being charged with a misdemeanor offense—most likely, receiving a fine without any jail time—in exchange for footage that will cause significant damage to the factory-farming industry. Therefore, the creation of “ag-gag” legislation is unlikely to limit undercover investigations. Instead, the laws will discourage legitimate employees from taking on a whistleblower role because they will be afraid to gather footage of punishable behavior. As such, most “ag-gag” laws will be either ineffective or unconstitutional; they will provide minimal punishment and permit distribution, or they will be deemed unconstitutional prior restraints on free speech.

Gunther, supra note 208.


301. See supra note 300 (outlining misdemeanor-level offenses for most bills).

302. See Rutmanis, supra note 179 (arguing low-level punishments for ecoterrorism ineffective).

Rutmanis discusses the deterrent effect of low-level penalties for ecoterrorism, stating “offenders often face small penalties, making the statutes an ineffective deterrent.” “Ag-gag” penalties may be considered similarly “small” and thus an “ineffective deterrent.” See id.

303. See supra Part II.C.1 (discussing penalties in each state “ag-gag” bill or existing law).


306. See Hitt, supra note 223 (discussing impact of “ag-gag” legislation on legitimate whistleblowing activity); see also Damian, supra note 226 (stating “ag-gag” bill would have “chilling effect” on whistleblowers).

307. See supra Part III.B.1 (discussing constitutionality and effectiveness of laws). Arguably, these laws would be content-based restrictions on speech and thus unconstitutional. Id. In the alternative, those laws that limit distribution would be unconstitutional prior restraints on protected speech. Id. Lastly, these laws without
2. Conduct Is Already Punishable Under Existing Laws

The ineffectiveness of proposed “ag-gag” laws raises this final point: the behavior that “ag-gag” legislation is targeting is already punishable under existing laws. As it stands, infiltrating a private facility to record undercover footage is likely to be considered statutory or common-law trespass and may directly conflict with state and federal wiretapping laws. Additionally, the splicing and creative editing that leads to the production and distribution of untruthful videos is likely to be considered libel. Lastly, deceiving an employer in the application process would likely be a willful misrepresentation or fraud. Each of these offenses carries an equal, if not greater, deterrent effect than the punishments outlined in the proposed “ag-gag” laws, while providing both civil and criminal remedies.

More importantly, punishing this behavior under existing laws avoids the public outrage over barring videotaping on farms. Clearly, the public is concerned about the treatment of farm animals, the growing use of steroids and antibiotics in their food supply, the health conditions of farms, and increasing pollution. But passing laws that bar whistleblowers from exposing these high-risk concerns, in exchange for punishing the small number of undercover investigators whose behavior is already punishable under existing law, is simply creating a solution for a problem that does not exist. “Ag-gag” laws punishing possession or distribution, will only carry misdemeanor-level penalties, which is unlikely to deter the targeted behavior.  

308. See Jolley, supra note 177 (“So, should those animal rights crazies be singled out and prosecuted for trying to expose egregious cases of animal abuse with a law aimed at their activities? No. Should they be slapped hard to the fullest extent of the existing laws covering libel, slander and willful misrepresentation? I’ll volunteer to serve on that jury . . . .”).


310. See Jolley, supra note 177 (arguing libel, slander, and willful misrepresentation will serve same purpose).

311. See id. (“I’m sure Iowa already has laws against willful misrepresentation on employment applications and fraud.”).

312. See Rutmanis, supra note 179 (arguing low-level punishments ineffective).

313. See supra note 271.

314. See Richards & Richards, supra note 105, at 43-47 (discussing use of antibiotics); Khachatourians, supra note 133; see also PARK, supra note 105, at 5, 15, 33, 53, 77 (outlining numerous issues resulting from large factory-farming facilities).

315. See Murphy, supra note 210 (stating “ag-gag” laws unnecessary). Murphy seems to hit the nail on the head, stating “ag-gag” laws are:

so Orwellian and over the top that it invents a solution to a problem that doesn’t really exist. Sure, there are a number of videos on the Internet that show horrendous abuse at meat slaughtering plants and livestock production facilities, but it’s not like hundreds of thousands of people are moving to Iowa or other ag states to film these undercover videos. In fact, the videos are rather rare events and most people are so shocked by the abuse that they see they tend to go numb and move on to the next Internet distraction. Most who do view these shocking videos keep eating meat on a daily basis
likely only serve to increase the public’s critical view of the factory-farming industry.\textsuperscript{316} At a time when the public is concerned about the safety of its food supply, factory farms should make every effort to be as transparent as possible.\textsuperscript{317} If the concern is undercover investigators infiltrating farming facilities to expose animal abuse and unhealthy conditions, the industry should, quite simply, make a concerted effort to limit animal abuse and address farm pollution, while focusing on its prosecution of unlawful participants under the existing framework of the law.\textsuperscript{318}

IV. CONCLUSION

“Ag-gag” laws are a thinly veiled attempt to discourage potential undercover investigators, chill free speech, and protect the agricultural industry from the financial implications of well-publicized investigations. Many states have realized, or will soon realize, that to pass a constitutional “ag-gag” law, the state must remove the most effective elements of the legislation—a realization seen firsthand in Iowa. What is left is a toothless law that provides for more lenient punishments than existing laws that are designed to punish the same conduct. In exchange for barring photography and videotaping on factory farms, states forfeit the ability to assure the public that the conditions of local farms are in conformity with regulations and thus their food is safe to consume. The burden simply outweighs the benefit. Instead of supporting laws that bar photography or videotaping on farms, state legislatures and the agricultural industry should make a concerted effort to explain common practices to the public, supplanting secrecy with transparency and thus shifting the critical focus from the messenger to the message.

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