UIC Law Review

Volume 50 | Issue 3 Article 8

Spring 2017

Principles Limiting Recovery Against Undercover Investigators in Ag-Gag States: Law, Policy and Logic, 50 J. Marshall L. Rev. 649 (2017)

Sarah Hanneken

PRINCIPLES LIMITING RECOVERY AGAINST UNDERCOVER INVESTIGATORS IN AG-GAG STATES: LAW, POLICY, AND LOGIC

SARAH HANNEKEN

I. INTRODUCTION

"Great is truth, but still greater, from a practical point of view, is silence about truth."[1] The shrewd observations of *Brave New World* author Aldous Huxley ring ever true today. Huxley

1. ALDOUS HUXLEY, BRAVE NEW WORLD xv (Chatto & Windus 1946).

recognized that the greatest triumphs of propaganda have been achieved not by a carefully crafted message or infectious slogan but by silence: active concealment of the facts that political bosses deem undesirable.[2] And so, we relish in a state of artificial bliss, made possible by deliberately inflicted ignorance.

In this age of politics dominated by corporate special interests, ignorance-perpetuating laws are injected into our statutory codes while whistleblowing activity is criminalized and truth-speakers are sued into silence.[3] As a result, our food safety becomes compromised.[4] Sentient creatures confined in the name of animal husbandry are subjected to ever-devolving conditions while their captors' profits soar.[5] Factory walls become more opaque.[6] Concern for the public interest falls into obsolescence.[7]

No legislative trend better illustrates this alarming decline than so-called "ag-gag" laws.[8] The term refers to legislation passed at the behest of the animal agriculture ("ag") industry in an attempt

---

2. *Id.*

3. This Comment focuses on one particular variety of such ignorance-perpetuating laws, colloquially referred to as "ag-gag" (short for "agricultural gag") laws. *See generally infra* notes 69–107 and accompanying text (describing the purpose, history, and varieties of ag-gag laws). These laws represent efforts to outlaw the type of investigative activities that lead to damning exposés of animal agriculture operations. *Id.*

4. *See, e.g.*, *infra* notes 44, 63, 226–228 and accompanying text (providing examples of severe ongoing food-safety violations in various industries, brought to light only by private whistleblowers).

5. *See, e.g.*, John J. McGlone, *Alternative Sow Housing Systems: Driven by Legislation, Regulation, Free Trade and Free Market Systems (but Not Science)*, PORK INDUS. INST., TEX. TECH. UNIV. 1 (Jan. 2001), www.depts.ttu.edu/animalwelfare/research/sowhousing/documents/SowhousingManitoba.pdf (paper presented at the annual meeting of the Manitoba Pork Producers, Winnipeg, Manitoba, Canada). McGlone explained that the pork industry's preference for housing breeding sows in hyper-confinement systems is the direct result of economic pressures favoring increased efficiency and decreased animal welfare. *Id.*; P.L. van Horne, *Production and Economic Results of Commercial Flocks with White Layers in Aviary Systems and Battery Cages*, 37 BRITISH POULTRY SCIENCE 225 (1996) (reporting greater economic efficiency of battery-cage housing systems for egg-laying hens despite higher mortality rate).

6. *See* First Amended Complaint at 1, People for the Ethical Treatment of Animals v. Cooper, No. 16-cv-25 (M.D.N.C. Feb. 25, 2016) (characterizing laws designed to deter employee whistleblowing as "Anti-Sunshine" laws due to their effect of reducing workplace transparency, particularly in factory farms).

7. *See* Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPECTIVES ON POLITICS 564, 564 (2014) (reporting that economic elites and business-interest groups have a substantial impact on U.S. government policy, while average citizens and public interest groups have little to none).

8. Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES (Apr. 27, 2011), http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/ (coining the term "ag-gag" and describing the laws' effect); *see also infra* Part II–B–2 (describing in more detail the purpose, history, and effect of ag-gag legislation).

to silence ("gag") whistleblowers who observe illegal or abusive practices.[9] Ag-gag laws accomplish their industry-protective effect by making it illegal to photograph, record video, or otherwise conduct an investigation at a factory farm or slaughterhouse.[10]

This Comment explores the history and purpose of ag-gag legislation as well as its constitutional shortcomings, particularly with regard to damages. Using North Carolina's recent ag-gag efforts to silence whistleblowers as an effective case study, this Comment explains how free-speech protections, public policy, and causation principles all limit the monetary damages recoverable against undercover investigators. It begins in Part II with a history of undercover investigations and their role in confronting systemic exploitation within various industries. It then describes how these industries have responded to the unwanted attention by turning to the courts and legislatures for redress. It is in this section that ag-gag legislation is introduced and described in greater detail. Part III begins by examining common-law limitations on tort liability, particularly in cases concerning breach of employee duty of loyalty. It describes how these legal and practical limitations have driven ag-industry lobbyists to seek legislative favors to more effectively deter undercover investigations. The Comment then describes how their statutory solution (ag-gag laws) are effectively emasculated by First Amendment free-speech protections. Part III concludes with a brief look at another liability-limiting concept, known as "proximate causation," which applies principles of policy and logic to shield investigators from monetary damages sustained by exposed industries.

In Part IV, I call upon litigators and lawmakers to tackle the unconstitutional civil-damage provisions found in roughly half of the ag-gag statutes currently in effect, and caution other states against enactment of such provisions. I implore courts tasked with applying these laws to respect the constitutional protections and public-policy considerations limiting the amount of damages they may award. I then point out some practical reasons why a company that finds itself the target of an exposé should refrain from suing the undercover investigator who infiltrated them. Finally, I encourage activist groups to continue in their constitutionally protected efforts to expose abuse and wrongdoing in the animal agriculture industry. Part V concludes this Comment.

---

9. *Id.*

10. *Id.*; *see generally infra* notes 89–107, 121 and accompanying text (describing in detail the various types of ag-gag laws that exist and the specific types of conduct they prohibit).

II. BACKGROUND

A. Undercover Investigations of Animal Industries

Undercover investigations are "the only meaningful way" for American consumers to find out how animals are treated in today's agriculture and entertainment industries.[11] It is the only available window into our nation's research laboratories or the multi-billion-dollar pet trade.[12] Investigations tell a far different story than the pre-arranged, perfunctory "inspections" by regulatory agencies.[13] Undercover investigations reveal institutionalized cruelty to animals and serve as an indispensable method of evidence-gathering for civil litigation and the prosecution of abuse.[14] Perhaps most importantly, these investigations help consumers make more informed choices—from entertainment to food.[15] Given all that

11. *Debate: After Activists Covertly Expose Animal Cruelty, Should They Be Targeted With "Ag-Gag" Laws?*, DEMOCRACY NOW! (Apr. 9, 2013), www.democracynow.org/2013/4/9/debate_after_activists_covertly_expose_animal [hereinafter *Ag-Gage Debate*] (quoting independent journalist Will Potter); *see also The Captive Animals Protection Society*, SAVE A SCREAM, www.saveascream.com/caps.htm (last visited Aug. 21, 2017) (calling undercover investigations "the only way of obtaining evidence" of animal abuse in the circus trade); Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1468 (2015) (explaining "there is no viable alternative to an undercover investigation of the commercial agricultural industry.").

12. *See, e.g.*, Lisa Fletcher & Arash Ghadishah, *Exclusive: Ex-Employees Claim 'Horrific' Treatment of Primates at Lab*, ABC NEWS (Mar. 4, 2009), www.abcnews.go.com/Nightline/story?id=6997869 (describing results of undercover investigation at New Iberia Research Center and conveying sentiment that going undercover is "the only way" to get the truth); Allen St. John, *Where *Not* to Buy a Dog: The Pet Store Connection to the Business of Puppy Mills*, FORBES (Feb. 22, 2012, 12:10 PM), www.forbes.com/sites/allenstjohn/2012/02/22/where-not-to-buy-a-dog-the-pet-store-connection-to-the-business-of-puppy-mills/ (interviewing Andrew Nibley, creator of HBO documentary exposing connection between the pet retail industry and puppy mills).

13. *Undercover Investigations*, CITIZENS FOR ALTERNATIVES TO ANIMAL RESEARCH AND EXPERIMENTATION, www.caareusa.org/undercover_investigations (last visited Aug. 21, 2017).

14. Steve Wells, Executive Director, Animal Legal Defense Fund, Address at the University of Denver Sturm College of Law, ALDF Meet & Greet (Sept. 21, 2015); *Behind Closed Doors: Going Undercover to Expose Animal Abuse*, SATYA MAGAZINE (Aug. 2003), www.satyamag.com/aug03/rossell.html (explaining, "Without undercover investigations, it often comes down to a 'he said, she said' situation; but video doesn't lie. Of course, the animal industries try to deny it anyway, but when shown the evidence, the public can see right through their false claims.").

15. Justin Marceau, Professor, University of Denver Sturm College of Law, ALDF Meet & Greet Cocktail Hour (Sept. 21, 2015); *see also* Jennifer Molidor, *Undercover Investigations Help Protect Farmed Animals*, ANIMAL LEGAL DEFENSE FUND (Mar. 31, 2015), http://aldf.org/blog/undercover-investigations-help-protect-farmed-animals/ (explaining that these investigations "are central

undercover investigations can accomplish, it is easy to see why those who profit from animal exploitation would push to outlaw such truth-seeking tactics.

1. History of Investigations

Undercover investigations have a long and storied history in American news journalism, particularly when it has come to exposing institutionalized abuses, corporate wrongdoing, and the exploitation of vulnerable populations.[16] One of the first undercover investigations into the American food-production industry is also the most iconic: Celebrated muckraker Upton Sinclair disguised himself as a worker to gain access to the Chicago meatpacking industry.[17] While undercover, Sinclair wandered about the stockyards, documenting what he saw.[18] His investigation ultimately served as the source and inspiration for the acclaimed 1906 novel *The Jungle*.[19] Like the undercover work of modern-day animal rights and labor activists, Sinclair's work was critical to exposing the unsavory practices of a powerful industry to public scrutiny.[20]

One of the earliest undercover investigations conducted by an animal-rights group took place in 1981, when PETA activists exposed the suffering of laboratory monkeys at a Maryland research facility.[21] Since these first undercover stings by animal activists in

---

to building cases against animal abusers and those who profit from the exploitation of animals.").

16. Brooke Kroeger, *Journalists Go Undercover to Report on Slavery*, SCHUSTER INSTITUTE FOR INVESTIGATIVE JOURNALISM, www.schusterinstitute investigations.org/undercover-reporting-on-slaver (last visited Aug. 21, 2017). Even before the animal-protection and food-safety movements gained steam, undercover newsgathering tactics were being used by American abolitionists in the mid-1800s, who traveled to states like Georgia and Louisiana posing as slave buyers in order to document the treatment and conditions of enslaved Black persons. *Id.* One such journalist, Mortimer Thomson, used his stealth position as a slave buyer to interview both slaves and slave owners at a large auction in Savannah, Georgia, taking notes undetected on the inside pages of a slave sale catalogue, all without raising any suspicion. *Id.* His documentation was published regularly in the *New York Tribune* and provided the substance for his 1863 book *What Became of the Slaves? Id.*

17. WILLIAM A. BLOODWORTH, JR., UPTON SINCLAIR 45–48 (1977).

18. Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1457 (2015) (citing UPTON SINCLAIR, THE AUTOBIOGRAPHY OF UPTON SINCLAIR 109 (1962), and ANTHONY ARTHUR, RADICAL INNOCENT: UPTON SINCLAIR 49 (2006)).

19. UPTON SINCLAIR, THE JUNGLE (1906).

20. Chen & Marceau, *supra* note 18, at 1457.

21. *PETA's Milestones*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS (PETA), www.peta.org/about-peta/milestones/ (last visited Aug. 21, 2017).

the 1980s, the targets of investigations have expanded to include slaughterhouses,[22] factory farms,[23] laboratories,[24] roadside zoos,[25]

22. *See, e.g.*, *ALDF Investigation Exposes Tyson Cruelty*, ANIMAL LEGAL DEFENSE FUND, http://web.archive.org/web/20150918102439/http://aldf.org:80/about-us/programs/undercover-investigations-program/tyson-cruelty/ (last visited Aug. 27, 2017) (exposing animal abuse and worker-safety violations at Tyson chicken slaughterhouse); *Abused Calves at Vermont Slaughter Plant*, HUMANE SOC'Y OF THE U.S. (Oct. 30, 2009), www.humanesociety.org/news/news/2009/10/calf_investigation_103009.html (documenting workers kicking, slapping, and repeatedly shocking day-old dairy calves at veal-industry slaughterhouse); *PETA Reveals Extreme Cruelty at Kosher Slaughterhouses*, PETA, www.peta.org/features/agriprocessors/ (last visited Aug. 21, 2017) (uncovering violations of federal humane slaughter laws and Jewish religious law at "the world's largest glatt kosher slaughterhouse"); *Butterball's House of Horrors: A PETA Undercover Investigation*, PETA, www.peta.org/features/butterball-peta-investigation/ (last visited Aug. 21, 2017) (exposing extreme abuse suffered by turkeys at Arkansas slaughter plant).

23. *See, e.g.*, *Calif. Police Probe Foster Farms After Video Shows Apparent Animal Cruelty*, CBS NEWS (June 17, 2015, 9:46 AM), www.cbsnews.com/news/foster-farms-investigated-by-california-police-after-undercover-video-shows-apparent-animal-cruelty/ (describing Mercy For Animals' undercover investigation at major poultry producer); *Undercover Exposé: Inhumane Treatment of Animals, Food Safety Concerns at Costco Egg Supplier*, HUMANE SOC'Y OF THE U.S. (June 9, 2015), www.humanesociety.org/news/press_releases/2015/06/inhumane-treatment-costco-egg-supplier-060915.html (revealing deplorable conditions of hens at Costco egg supplier); Mike Hughlett, *Video Shot in Minn. Spotlights How Pigs Are Treated*, STAR TRIBUNE (July 18, 2012, 11:52 AM), www.startribune.com/video-shot-in-minn-spotlights-how-pigs-are-treated/162790086/ (documenting extreme confinement of pregnant sows at hog producer's factory farm); *Buried Alive: COK Investigation Uncovers Shocking Cruelty to Chickens at NC Factory Farm*, COMPASSION OVER KILLING, http://cok.net/inv/pilgrims/ (last visited Aug. 21, 2017) (documenting workers callously mishandling sick and injured birds); *Hudson Valley Foie Gras Factory Farm Investigation*, COMPASSION OVER KILLING, http://cok.net/inv/hudson-valley/ (last visited Aug. 21, 2017) (detailing treatment of ducks at major foie gras producer).

24. *See, e.g.*, *Undercover Investigation Reveals Dogs Suffering in Dental Experimentation*, HUMANE SOC'Y OF THE U.S. (Nov. 30, 2013), www.humanesociety.org/news/press_releases/2013/11/georgia-regents-university-dogs-112013.html (revealing the killing of dogs in unnecessary dental-implant experiments at Georgia Regents University); *Columbia University Cruelty*, PETA, www.peta.org/features/columbia-university-cruelty-deadly-animal-experimentation/ (last visited Aug. 21, 2017) (uncovering "crude experiments" and neglect inflicted upon monkeys and baboons in research laboratory).

25. *See, e.g.*, *Undercover Investigations Reveal Abuse of Tiger Cubs at Roadside Zoos*, HUMANE SOC'Y OF THE U.S. (Jan. 22, 2015), www.humanesociety.org/news/press_releases/2015/01/ok-va-exotics-investigation-012215.html .

livestock auctions,[26] animal training facilities,[27] pet suppliers,[28] livestock transport,[29] and numerous others.[30]

Activists utilize a variety of methods to investigate institutionalized animal exploitation.[31] The particular method best suited for a particular case will depend on the nature of the target and where it is located.[32] Tactics vary from paying admission, to

---

26. *See, e.g.*, Gillian Flaccus, *Ontario Livestock Sales Workers Allegedly Mistreat Animals in Undercover Video*, HUFFINGTON POST (July 30, 2012, 5:12 AM), www.huffingtonpost.com/2012/05/30/ontario-livestock-sales_n_154884.html. (depicting workers "kicking, hitting and tossing" animals as they were readied for sale at California livestock auction); *PETA Undercover Investigation: Juvenile Racehorses Forced to Run in Deadly Speed Tests*, PETA, www.peta.org/action/action-alerts/undercover-investigation-juvenile-racehorses-forced-to-run-in-deadly-speed-tests/ (last visited Aug. 21, 2017) (documenting "catastrophic breakdowns" and "life-ending" injuries sustained by yearlings at horse auction).

27. *See, e.g.*, *Detailed Undercover Investigation Reveals Tennessee Walking Horse Abuse at Top Training Barn, with Big-Name, Previously Cited Trainers Continuing Their Illegal Conduct*, HUMANE SOC'Y OF THE U.S. (Aug. 25, 2015), www.humanesociety.org/news/press_releases/2015/08/tn-walking-horse-investigation-082515.html (documenting use of caustic chemicals on horses' lower legs, causing them "extreme pain" in order to achieve the exaggerated gait considered desirable at showcase events); Christina Boyle, *PETA Video Shows Ringling Bros. Circus Handlers Beating Elephants*, N.Y. DAILY NEWS (July 22, 2009, 12:37 AM), www.nydailynews.com/news/peta-video-shows-ringling-bros-circus-handlers-beating-elephants-article-1.169174 (documenting "routine" use of bullhooks and whips on elephants backstage).

28. *See, e.g.*, *Puppy Mill Prison*, PETA, www.peta.org/features/puppy-mill-prison/ (last visited Aug. 21, 2017) (revealing untreated wounds, inadequate shelter, and evidence of psychological trauma at commercial dog breeding operation); *Undercover at National Retailers' Frog and Miniature-Aquarium Supplier*, PETA, www.peta.org/videos/undercover-at-national-retailers-frog-and-miniature-aquarium-supplier/ (last visited Aug. 21, 2017) (exposing "rampant neglect and mishandling of frogs" at Wild Creations, the supplier for Brookstone's Frog-O-Spheres).

29. *See, e.g.*, *36 Hours to Hell*, PETA, www.peta.org/videos/36-hours-to-hell/ (last visited Aug. 21, 2017) (publishing undercover video taken aboard truck transporting unwanted horses to slaughter).

30. *See, e.g.*, *New Undercover Investigation Reveals Tame and Drugged Animals Shot for Trophies at Captive Hunts*, HUMANE SOC'Y OF THE U.S. (June 21, 2011), www.humanesociety.org/news/press_releases/2011/06/captive_hunt_undercover_investigation_animal_planet_062111.html (describing investigations of captive-hunting ranches in Texas and New York); *Investigation Exposes Pigeon-Racing Cruelty*, PETA, www.peta.org/features/pigeon-racing-investigation/ (last visited Aug. 21, 2017) (exposing "rampant killing" and "abusive training methods" in "multimillion-dollar illegal gambling industry").

31. Interview with TJ Tumasse, Manager of Investigations, Animal Legal Defense Fund, in Chicago, Ill. (Oct. 4, 2015) (on file with author).

32. *Id.* Aside from ag-gag laws, investigators must also be conscious of state laws related to trespass, invasion of privacy, eavesdropping, etc. *Id.* Variations in these laws from state to state dictate which investigative methods are on or off the table for a particular case. *Id.*

gaining employment, to using new technologies like drones.[33] But no matter the particular strategy employed, all investigations involve some kind of recording device.[34] Sometimes the camera is small and hidden, as in undercover scenarios, and sometimes it is blatantly obvious, mounted to a noisy drone, or strung around the investigator's neck.[35] But when it comes to exposing patterns of abuse in private industries, the employment-based undercover investigation is the go-to method.[36]

Investigators working undercover as employees often have to get creative to conceal their recording devices in a way that still allows them to perform their agricultural duties.[37] These investigators are not there to lurk in the shadows; they have to actually do the job they're hired to do, whether it is live-hanging chickens for slaughter, castrating piglets on a hog farm, cleaning cages at a research laboratory, or any other task assigned by their employer.[38] That is the only way to fly under the radar.[39]

The exposed industry often tries to claim that the video only shows the "worst of the worst" and is not an accurate representation of the industry's practices.[40] Yet, according to one former undercover investigator, quite the opposite is true: "At these facilities, you see more cruelty than you can ever document. There's no need to string together bits of pieces of footage to fabricate a narrative of abuse. It's right there, before your eyes, at every turn."[41]

---

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* "It doesn't matter what type of facility it is or what the security measures are; we are smart enough to hide a camera and get it into that place. We are more creative, more educated, and more adaptable than anybody who's trying to stop us." *Id.*

38. *Id.* And that, according to Tumasse, is the hardest part: "When working undercover, you're often taking part in the confinement and torture of the very beings you're trying to protect. That's what makes undercover investigations so emotionally difficult." *Id.*

39. *Id.*

40. *See, e.g.*, *Ag-Gag Debate*, *supra* note 11 (quoting Emily Meredith, communications director for the Animal Agriculture Alliance, who claims animal activists are "mistreating" video and splicing together old footage to create "a false narrative."); *Behind Closed Doors*, *supra* note 14 (quoting former undercover investigator Matt Rossell, explaining, "[T]he animal industries try to deny it . . . but when shown the evidence, the public can see right through their false claims.").

41. Interview with TJ Tumasse, *supra* note 31.

2. Outcomes of Investigations

At the end of the day, undercover investigations are effective.[42] Evidence obtained from these investigations has led to criminal convictions,[43] massive food recalls,[44] lawsuits,[45] stronger animal-protection laws,[46] and even changes in corporate policy.[47] Undercover exposés have even had a measurable impact on consumers' buying habits.[48] A study published by the Kansas State

---

42. *The HSUS: Driving Transformational Change for Animals Since 1954: Exposing Animal Cruelty Through Undercover Investigations*, HUMANE SOC'Y OF THE U.S., www.humanesociety.org/about/hsus-transformational-change.html (last visited Aug. 21, 2017).

43. *See, e.g.*, Complaint at 22, Animal Legal Defense Fund v. Herbert, No. 2:13-cv-00679-RJS (D. Utah July 22, 2013) (presenting litany of animal-cruelty convictions founded on evidence obtained during undercover investigations by animal-rights groups); *see also Investigation of North Carolina Pig Farm Results in Historic Felony Cruelty Convictions*, PETA (Apr. 2000), www.peta.org/about-peta/victories/investigation-north-carolina-pig-farm-results-historic-felony-cruelty-convictions/ (last visited Aug. 21, 2017) (announcing first-ever felony convictions for cruelty to livestock after undercover video revealed hog-farm workers beating pregnant sows with a wrench and iron pole, skinning pigs alive, and even sawing off a conscious animal's limbs).

44. *See, e.g.*, Andrew Martin, *Largest Recall of Ground Beef Is Ordered*, N.Y. TIMES (Feb. 18, 2008), www.nytimes.com/2008/02/18/business/18recall.html (reporting on largest beef recall in history—143 million pounds of beef produced by Hallmark/Westland Meat Company, following an undercover investigation by the Humane Society of the United States that revealed workers on forklifts forcing "downer" cows into slaughter, a severe violation of food safety laws); *see also* Dan Flynn, *Iowa Approves Nation's First 'Ag-Gag' Law*, FOOD SAFETY NEWS (Mar. 1, 2012), www.foodsafetynews.com/2012/03/iowa-approves-nations-first-ag-gag-law (noting that California meat processors Hallmark/Westland were forced out of business following HSUS's undercover sting).

45. *See, e.g.*, *HSUS Lawsuit Against Hallmark/Westland Moves Forward*, DAIRY HERD MGMT. (Jan. 17, 2011, 1:07 PM), www.dairyherd.com/dairy-news/latest/hsus-lawsuit-against-hallmarkwestland-moves-forward-1139781009.html (announcing U.S. Dept. of Justice's intent to intervene in civil lawsuit against Hallmark/Westland for violations of the False Claims Act).

46. *See, e.g.*, *Utah Ends Mandatory Pound Seizure Following PETA's Investigation*, PETA (Jan. 2010), www.peta.org/about-peta/victories/utah-ends-mandatory-pound-seizure-following-petas-investigation/ (last visited Aug. 21, 2017) (announcing passage of Utah legislation to end the compelled sale of homeless dogs and cats from government-run shelters to laboratories for use in experiments).

47. *See, e.g.*, Matt Rice, *Progress: Walmart Announces Sweeping Animal Welfare Policy*, MFA BLOG (May 22, 2015), www.mfablog.org/progress-walmart-announces-sweeping-animal (announcing Walmart's stated commitment to improving farmed animal welfare across its entire global supply chain following a string of undercover investigations revealing egregious abuse among its pork suppliers); *MasterCard Cancels Controversial Sponsorship of Ringling Bros. and Barnum & Bailey Circus*, PETA (Jan. 2004), www.peta.org/about-peta/victories/mastercard-cancels-controversial-sponsorship-ringling-bros-barnum-bailey-circus/ (last visited Aug. 21, 2017).

48. Glynn T. Tonsor and Nicole J. Olynk, *U.S. Meat Demand: The Influence of Animal Welfare Media Coverage*, KAN. ST. UNIV. (Sept. 2010), www.agmana

University Department of Agricultural Economics concluded that "media attention to animal welfare has significant, negative effects on U.S. meat demand."[49] It is not surprising, then, that the animal-agriculture industry has chosen to take aim at these undercover investigations in an attempt to confound their effect.

B. Industry Response to Investigations

Since the 1990s, industry players have turned to both litigation and legislation in search of redress for the harms allegedly befallen them at the hands of undercover activists.[50] To those contemplating litigation however, it quickly became apparent that traditional laws could not provide the industry with the vindication it sought.[51] So the meat, dairy, and egg lobbies[52] got to work in state legislatures encouraging lawmakers to enact the types of laws the industry had previously lacked use of in court.[53] And thus, "ag-gag" laws were born: legislation specifically designed to stop undercover investigators from documenting abuse at animal agricultural operations.[54]

---

ger.info/livestock/marketing/animalwelfare/MF2951.pdf.

49. *Id.*

50. Food Lion, Inc. v. Capital Cities/ABC, Inc. (*Food Lion II*), 194 F.3d 505 (4th Cir. 1999) (bringing claims for fraud, trespass, and breach of employee duty of loyalty); Desnick v. Am. Broad. Companies, Inc., 44 F.3d 1345 (7th Cir. 1995) (alleging trespass, infringement of right of privacy, illegal wiretapping, and promissory fraud); *see also infra* Part II–B–2 (describing legislative efforts).

51. *See Food Lion II*, 194 F.3d at 524 (awarding plaintiff only nominal damages for breach of duty of loyalty and trespass where defendants did not cause any actual harm).

52. In 2014, the meat, dairy, egg, and livestock industries spent a combined total of $20.6 million lobbying Congress. *Dairy*, OPEN SECRETS, www.opensecrets.org/industries/totals.php?cycle=2016&ind=A04 (last visited Jan. 26, 2018) ($3.5 millon); *Livestock*, OPEN SECRETS, www.opensecrets.org/industries/totals.php?cycle=2016&ind=A06 (last visited Jan. 26, 2018) ($9 million); *Meat Processing & Products*, OPEN SECRETS, www.opensecrets.org/industries/totals.php?ind=G2300 (last visited Jan. 26, 2018) ($1.8 million); *Poultry & Eggs*, OPEN SECRETS, www.opensecrets.org/industries/totals.php?ind=A05++ (last visited Jan. 26, 2018) ($6.3 million). By comparison, vegetable, fruit, and nut producers spent a total of just $2.3 million. *Vegetables & Fruits*, OPEN SECRETS, www.opensecrets.org/industries/totals.php?ind=A1400 (last visited Jan. 26, 2018).

53. *See infra* note 70 and accompanying text (describing ALEC origins of legislative model).

54. *See generally infra* notes 69–107 and accompanying text.

This section will provide an overview of the animal-agriculture industry's litigation and legislative efforts over the past two decades, focusing particularly on one state—North Carolina—in whose courtrooms and legislative chambers the food industry has raged a long and storied battle against undercover investigators. The particularly active battleground in that state makes for a rich case study, with lessons applicable in all fifty states.

1. Litigation

The first case to examine the availability of legal remedies to the target of an employment-based undercover investigation was brought in the U.S. District Court for the Middle District of North Carolina in the mid-1990s (*Food Lion, Inc. v. Capital Cities/ABC, Inc.*).[55] The court was tasked with applying North Carolina law against an undercover reporter who surreptitiously filmed behind the scenes at a Food Lion grocery store while working as a meat wrapper.[56] *Food Lion* was litigated for the better part of a decade and remains one of the foremost cases on questions of First Amendment protections for those who expose damning truths about powerful industries.[57]

In 1992, a report came across the desk of ABC's *PrimeTime Live* news program alleging various unsanitary meat-handling practices taking place at Food Lion grocery stores.[58] The two ABC reporters assigned to investigate the story determined they would have a better chance of witnessing the unsanitary meat practices if they became Food Lion employees themselves.[59] So, with the approval of their superiors at the network, the reporters applied for jobs with the grocery chain using false identities, fake references, and fictitious local addresses on their employment applications.[60] To further avoid raising suspicion, the reporters misrepresented their educational backgrounds and omitted any mention of their concurrent employment with ABC.[61] Using this tactic, the reporters secured deli jobs at separate Food Lion stores, including one in North Carolina.[62] As they went about their assigned deli tasks for Food Lion, the reporters concealed cameras and microphones on

55. Food Lion, Inc. v. Capital Cities/ABC, Inc. (*Food Lion I*), 964 F. Supp. 956 (M.D.N.C. 1997), *aff'd on other grounds*, 194 F.3d 505 (4th Cir. 1999).

56. *Food Lion II*, 194 F.3d at 510.

57. *See, e.g.*, Chen & Marceau, *supra* note 18, at 1498 (calling *Food Lion* the "leading circuit court decision" illustrating the point that "a lie that enables a journalist to obtain paid employment and thus causes the employer to experience [financial injury] is not a legally cognizable harm.").

58. *Food Lion II*, 194 F.3d at 510.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

their bodies to secretly record Food Lion employees mishandling and mislabeling meat and fish.[63] Some of the footage was eventually used in a *PrimeTime Live* broadcast.[64]

Shortly after the exposé aired, Food Lion filed suit against the two reporters who went undercover for the program.[65] It asserted claims of fraud, breach of employee duty of loyalty, trespass, and unfair trade practices, seeking millions in compensatory damages.[66] Despite ultimately winning on its duty of loyalty and trespass claims against the reporters, Food Lion walked away with a total award of two dollars.[67] A classic example of "sometimes when you win, you really lose."[68]

Given the striking triviality of this award (and considering what they must have spent on attorneys' fees and court costs), Food Lion did not come out ahead at all. As the grocery chain learned, the common law simply does not offer much redress for the types of injury most devastating to targets of undercover investigations: harm to reputation. To cure this deficiency, industry lobbyists have been busy doing their part in the state legislatures.

2. Legislation: "Ag-Gag" Laws

The term "ag-gag" was coined by *New York Times* columnist Mark Bittman to describe legislative efforts to outlaw, or at least stymie, undercover investigations of agricultural operations.[69] These laws are based on model legislation originally drafted in 2004 by the conservative American Legislative Exchange Council (ALEC).[70] At the behest of agribusiness groups, lawmakers have

---

63. *Id.*

64. *Id.* at 511.

65. *Id.* In addition to the two reporters, Food Lion also named as defendants Capital Cities/ABC, Inc., American Broadcasting Companies, Inc., and two *PrimeTime Live* producers. *Id.*

66. *Id.* See Cooper Indus. v. Leatherman Tool, 532 U.S. 424, 432 (2001) (explaining compensatory damages are intended to redress concrete losses a plaintiff has suffered as a result of defendant's wrongful conduct); RESTATEMENT (SECOND) OF TORTS § 906 (1979) (disallowing compensatory damages for alleged harm to a plaintiff's earning potential without sufficient proof of pecuniary loss).

67. *Food Lion II*, 194 F.3d at 524. The court determined Food Lion had sustained no injury for which it could be compensated. *Id.* at 523–24. Thus, the only available "remedy" was $2 in nominal damages. *See generally* RESTATEMENT (SECOND) OF TORTS § 907 (1979) (defining nominal damages).

68. WHITE MEN CAN'T JUMP (20th Century Fox 1992).

69. Bittman, *supra* note 8.

70. THE ANIMAL AND ECOLOGICAL TERRORISM ACT (AETA) § 3(A)(2) (2004), www.alec.org/model-legislation/the-animal-and-ecological-terrorism-act-aeta/; Deron Lee, *"Ag-Gag" Reflex*, COLUMBIA JOURNALISM REV. (Aug. 6, 2013), www.cjr.org/united_states_project/state_legislatures_are_pushing_ag-gag_bills_and_news_associations_are_fighting_back.php; Will Potter, *"Ag Gag" Bills and Supporters Have Close Ties to ALEC*, GREEN IS THE NEW RED (Apr. 26, 2012),

introduced several varieties of these laws in state legislatures across the country.[71] To date, ag-gag legislation has been introduced in over twenty states and passed in nine.[72]

a. Purpose

The success of recent undercover whistleblowing investigations provided the impetus for the current ag-gag trend.[73] After PETA released a video in 2008 depicting Iowa farmworkers using brutal methods to kill pigs, agriculture lobbyists nationwide began advocating for legislation to criminalize undercover reporting on animal-agriculture operations.[74] The result was Iowa House File 589, which established the crime of "agricultural production facility

---

www.greenisthenewred.com/blog/ag-gag-american-legislative-exchange-council/5947/ ("Ag Gag bills parallel other national efforts by ALEC, such as 'Stand Your Ground' legislation, in that they have been promulgated through model legislation, carefully coordinated task forces, and the ability to mobilize ALEC members for key votes."); *see also* Leighton Akio Woodhouse, *Charged with the Crime of Filming a Slaughterhouse*, THE NATION (July 31, 2013), www.thenation.com/article/charged-crime-filming-slaughterhouse/ (describing ALEC's model bill, the Animal and Ecological Terrorism Act, which proposed criminalizing activities such as "entering an animal or research facility to take pictures by photograph, video camera, or other means.").

71. Lee, *supra* note 70.

72. *See* Mark Middleton, *Ag-Gag Laws and Factory Farm Investigations Mapped*, ANIMAL VISUALS (last updated Aug. 9, 2015), www.animalvisuals.org/projects/data/investigations (mapping undercover investigations and the progress of ag-gag laws in the U.S. since 2011). The nine ag-gag laws that have been passed to date are codified at KAN. STAT. ANN. §§ 47-1825 to 47-1828 (2017) (Kansas Farm Animal and Field Crop and Research Facilities Protection Act); N.D. CENT. CODE §§ 12.1-21.1-01 to 12.1-21.1-05 (2017) (North Dakota "Animal Research Facility Damage" statute); MONT. CODE ANN. §§ 81-30-101 to 81-30-105 (2017) (Montana Farm Animal and Research Facilities Protection Act); IOWA CODE § 717A.3A (2017) (establishing crime of "agricultural production facility fraud."); UTAH CODE ANN. § 76-6-112 (LexisNexis 2017) (establishing crime of "agricultural operation interference"), *held unconstitutional by* Animal Legal Defense Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017); IDAHO CODE § 18-7042 (2014) (establishing crime of "interference with agricultural production."), *held unconstitutional in part by* Animal Legal Defense Fund v. Wasden, No. 15-35960, 2018 WL 280905 (9th Cir. Jan. 4, 2018); MO. REV. STAT. § 578.013 (2017) (establishing duty to submit video or other digital recording of suspected animal abuse to law enforcement within twenty-four hours of making the recording); N.C. GEN. STAT. § 99A-2 (2015) (North Carolina Property Protection Act); ARK. CODE ANN. § 16-118-113 (2017).

73. Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317, 1344 (2015) (commenting on state legislatures' defensive reactions to "shocking exposés," some of which have led to massive food recalls).

74. Justin Worland, *An Undercover Investigation Alleges Major Mistreatment of Egg-Laying Hens*, TIME MAGAZINE (June 9, 2015), http://time.com/3914696/cage-free-chicken-investigation/ (harking back to the industry's response to the national outcry that stemmed from PETA's undercover exposé of an Iowa pig farm).

fraud."[75] Backers of the Iowa bill included large-scale farming interests such as the Iowa Poultry Association, who claimed that their industry "need[ed] to be protected from 'fraud' committed by animal welfare groups."[76] In Idaho, the dairy industry responded in kind after a 2012 undercover investigation at a local dairy farm drew national attention and public scorn for the horrific abuses revealed on tape.[77] Idaho lawmakers subsequently sprung to action—not to improve the treatment of dairy cows, but to criminalize the conduct that exposed it.[78]

Independent journalist Will Potter, one of ag-gag's most outspoken critics, refers to the legislation as "a concerted effort by corporations to silence their opposition," an effort "bankrolled by some of the most powerful industries on the planet."[79] The animal-agriculture industry defends these laws under the rhetoric of private property rights,[80] responding to a need to protect their businesses from "systematic attacks by terrorists"[81] and to "keep

---

75. H.F. 589, 84th Gen. Assembly, 2d Reg. Sess. (Iowa 2012) (codified at IOWA CODE § 717A.3A).

76. Penny Tilton, *SF 431, HF 589 Just Another Number or Letter to You? Not for Animals*, EXAMINER (Jan. 14, 2012, 11:55 PM), www.examiner.com/article/sf-431-hf-589-just-another-number-or-letter-to-you-not-for-animals.

77. *See* Animal Legal Defense Fund v. Otter, 118 F. Supp. 3d 1195, 1199 (D. Idaho 2015), *aff'd in part, rev'd in part sub nom.* Animal Legal Def. Fund v. Wasden, No. 15-35960, 2018 WL 280905 (9th Cir. Jan. 4, 2018) (explaining the events that led to the introduction and enactment of Idaho's ag-gag law).

78. *Id.*

79. *Ag-Gag Debate*, *supra* note 11 (quoting ag-gag opponent and journalist Will Potter).

80. *See, e.g.*, *Property Protection Act: Hearing on H.B. 405 Before the H. Comm. on the Judiciary II*, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015) [hereinafter *Hearings on H.B. 405*] (statement of N.C. Rep. John Szoka, Sponsor, Apr. 21, 2015) (purporting the need to "safeguard business property"); Animal Legal Defense Fund v. Herbert, 263 F. Supp. 3d 1193, 1208 (D. Utah 2017) (noting State's contention that "private property rights extinguish . . . First Amendment rights"); *contra* Marceau, *supra* note 73, at 1344 (explaining that, contrary to industry pretext, ag-gag laws and related litigation "are about insulating bad actors from whistleblowing and accountability for their bad acts" and *not* about protecting property rights) (emphasis added).

81. Marceau, *supra* note 73, at 1344 (quoting Tony VanderHulst, president of the Idaho Dairyman's Association, describing the purpose of the proposed ag-gag bill). Justin Marceau, lead attorney for the plaintiffs in *Otter*, explained:

> Not surprisingly, legislators who advocate for these new Ag Gag laws strategically avoid discussing animal cruelty, food safety, sanitation, and environmental problems and instead redirect the debate toward protecting people whose livelihoods depend on the agriculture industry. In fact, a substantial number of legislators who favor Ag Gag laws center their arguments around the falsity of undercover videos and prey on the common fears of families and small businesses of being misrepresented and put out of work by extreme activists. In states like Idaho, where a large portion of the population is involved in the agriculture industry, these arguments proved convincing.

evidence of the unflattering, and sometimes criminal, practices of farms and slaughterhouses from public view."[82] They are tired of being "persecute[d] in the court of public opinion."[83] Emily Meredith, director of communications for Animal Agriculture Alliance, explained that the "staunch opposition" the industry faces from animal-rights activists makes these types of laws necessary.[84] "This is about exposing the real agenda of these radical groups that are engaging in farm terrorism," added Tony Vanderhulst, president of the Idaho Dairymen's Association.[85] Comparing animal-rights activists to "terrorists, persecutors, vigilantes, blackmailers, and invading marauders," ag-gag proponents view undercover investigations as the greatest threat facing livestock farmers today.[86] One dairy industry lobbyist characterized "extremist groups . . . masquerad[ing] as employees" as the "most extreme" threat to Idaho dairymen and other farmers in the state.[87] The "overwhelming evidence gleaned from the legislative history" of these laws makes clear their purpose is "to silence animal welfare activists, or other whistleblowers, who seek to publish speech critical of the animal agriculture industry."[88]

b. Varieties of Ag-Gag Legislation

The first wave of ag-gag legislation focused primarily on curbing intentional property damage and non-consensual entry (in other words, *vandalism* and *trespass*—two activities that were already criminal).[89] Kansas became the first state to pass an ag-gag

---

Id. at 1336.

82. Matthew Shea, *Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-Gag Laws*, 48 COLUM. J.L. SOC. PROBS. 337, 338 (2015); *see also Herbert*, 263 F. Supp. 3d at 1212 (noting that Utah's ag-gag law was expressly designed "to address harm caused by 'national propaganda groups,' and by 'the vegetarian people'").

83. *See* Animal Legal Defense Fund v. Otter, 118 F. Supp. 3d 1195, 1200 (D. Idaho 2015), *aff'd in part, rev'd in part sub nom*. Animal Legal Def. Fund v. Wasden, No. 15-35960, 2018 WL 280905 (9th Cir. Jan. 4, 2018) (describing Idaho legislators' given reasons for supporting the proposed ag-gag bill). One representative described undercover investigators as "extreme activists who want to contrive issues simply to bring in the donations," while another bemoaned activists "taking the dairy industry hostage." *Id.*

84. *Ag-Gag Debate*, *supra* note 11.

85. *See Otter*, 118 F. Supp. 3d at 1201 (quoting a supporter of ag-gag legislation who used the term "terrorists" to describe undercover activists).

86. *See id.* at 1200, 1210 (summarizing claims made by Idaho legislators in support of the state's 2012 ag-gag bill).

87. *Id.* at 1200.

88. *Id.* at 1210.

89. *See* Marceau, *supra* note 73, at 1332–39 (introducing the "ag gag law era" and distinguishing ag-gag statutes from earlier legislative attempts to deter whistleblowing by animal activists).

law of this early variety,[90] and Montana and North Dakota passed similar laws the following year.[91] To date, these three states' laws remain unused by prosecutors.[92]

Two decades after the enactment of these early-edition ag-gags, state legislatures decided to revisit the effort, marking the beginning of the second wave of this controversial legislation.[93] The result of this renewed effort has been the laws we typically think of when we hear the term "ag-gag": laws specifically enacted to criminalize undercover investigations of animal factories in an unabashed attempt to silence (i.e., "gag") the industries' critics.[94] These laws go further than their predecessors in protecting agricultural operations by criminalizing a wider range of conduct—conduct that has traditionally been protected under the First Amendment, such as the making of photographs and audiovisual recordings.[95] This new generation of ag-gag provides animal agriculture with "an unprecedented layer of secrecy."[96] Iowa spearheaded this new wave of ag-gag legislation in 2012 when it established the crime of "agriculture production facility fraud," criminalizing the making of a "false statement or representation" on an application for employment at an agriculture production facility.[97] Utah passed a similar law that same year, which, in addition to criminalizing the use of false pretenses to gain access, also made it a crime to "record an image of, or sound from, [an]

90. Kansas Farm Animal and Field Crop and Research Facilities Protection Act (codified at KAN. STAT. ANN. §§ 47-1825); *see also* Marceau, *supra* note 73, at 1333 (describing Kansas's ag-gag statute as "illustrative" of the legislative effort's early iterations).

91. Montana Farm Animal and Research Facilities Protection Act, H.B. 120, 1991 Leg., Reg. Sess. (Mont. 1991) (codified at MONT. CODE §§ 81-30-101 (2015)); H.B. 1338, 52d Leg. Assemb., Reg. Sess. (N.D. 1991) (codified at N.D. CENT. CODE §§ 12.1-21.1-01 (2013); *see also* Marceau, *supra* note 73, at 1334 (describing Montana's ag-gag law as directed toward defamation yet doing nothing to expand upon existing criminal liability for the spreading of mistruths).

92. *See* Marceau, *supra* note 73, at 1333 (expressing no surprise that the Kansas, Montana, and North Dakota ag-gag laws remain unused, since they "did not really do anything new"; they simply "criminalized activity that was already criminal").

93. *See id.* at 1335–39 (describing the second, more restrictive wave of ag-gag legislation, enacted over 20 years after the initial version of these laws hit the books).

94. *Id.*

95. *Id.*

96. *Id.* Whereas "[a]ll industries are protected against trespass and the theft of trade secrets . . . no other single industry has specific laws protecting it from all whistleblowing, regardless of whether trade secrets or intellectual property is threatened." *Id.*

97. H.F. 589, 84th Gen. Assemb., 2d Reg. Sess. (Iowa 2012) (codified at IOWA CODE § 717A.3A) (2013)) (creating the crime of "agriculture production facility fraud," a serious misdemeanor). Somewhat redundantly, this law likewise criminalizes the use of "false pretenses" to gain access to such a facility. *Id.*

agricultural operation by leaving a recording device on the agricultural operation."[98] Idaho followed this legislative trend in 2014 when it criminalized all employment-based investigations of agriculture facilities.[99]

As the agenda behind the 2012–2015 ag-gag laws becomes increasingly transparent, ag-gag advocates will have to find alternative ways to effectuate their legislative goals.[100] Lobbyists in Missouri accomplished this by passing a quick-report law.[101] Similar to child-abuse mandatory-reporting laws,[102] Missouri Senate Bill 631 obligates "any farm animal professional" to submit to law enforcement any recording he or she has made that depicts farm animal abuse within twenty-four hours of the recording's creation.[103] Such a law accomplishes the very same result as the more overtly pro-agriculture laws of Iowa, Utah, and Idaho, yet does so in a way that appears to be *helping* animals rather than covering up their abuse.[104] The effect, however, is very much the same as the more overtly anti-whistleblower variety: "[I]f every act of cruelty requires an immediate outing of the undercover investigator, then showing patterns of abuse or complicity on the part of management is impossible."[105] These laws are designed to prevent undercover reporters from gathering enough evidence to build a solid case, thereby "making it impossible to expose what is actually going on inside factory farms."[106] Because these quick-report laws produce the desired effect (the stifling of damaging exposés) without

98. H.B. 187, 59th Leg., Gen. Sess. (Utah 2012) (codified at UTAH CODE ANN. § 76-6-112) (2012), *held unconstitutional by* Animal Legal Defense Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017)).

99. S.B. 1337, 62d Leg., 2d Reg. Sess. (Idaho 2014) (codified at IDAHO CODE § 18-7042) (2014), *held unconstitutional in part by* Animal Legal Defense Fund v. Wasden, No. 15-35960, 2018 WL 280905 (9th Cir. Jan. 4, 2018)); *see also* Marceau, *supra* note 73, at 1336 (describing creation of the crime of "interference with agricultural production").

100. *See* Marceau, *supra* note 73, at 1340 (explaining how Colorado and Missouri have begun to "pave a new road" for enacting a new brand of ag-gag laws).

101. *See id.* (describing Missouri's seemingly innocuous, even *honorable*, legislation to mandate quick reporting of animal abuse). Sponsors portray these bills as "aids for animal welfare," but "[i]n intent and effect these laws impede journalistic and other undercover investigations of food producing facilities." *Id.*

102. *Id.* (comparing animal-abuse quick-report laws with those that mandate reporting of child abuse); *but see* Shea, *supra* note 82, at 364 (pointing out that, unlike the recently popular quick-report ag-gag laws, other mandatory reporting laws have "easily discernible" public policy rationales and "impose a duty to report, but not a duty to report *rapidly*") (emphasis added).

103. S.B. 631, 96th Gen. Assembly, 2d Reg. Sess. (Mo. 2012) (codified at MO. REV. STAT. § 578.013) (2012)).

104. *See* Marceau, *supra* note 73, at 1340–41 (explaining how these quick-report laws "effectively accomplish the agriculture industry's purpose of making it impossible to expose what is actually going on inside factory farms").

105. *Id.* at 1341.

106. *Id.* at 1340.

creating the appearance of impropriety on behalf of industry-friendly legislators, some commentators have called these rapid-reporting laws the "future" of ag-gag.[107]

3. Ag-Gag Evolved

One need only look at North Carolina to observe the shifting tactics of industry lobbyists at work. In 2013, that state introduced an anti-whistleblower measure that was more patently ag-gag.[108] This bill followed on the heels of a major undercover exposé at a North Carolina turkey slaughterhouse, which led to five criminal convictions for cruelty to animals and the ousting of a top state agriculture official on obstruction of justice.[109] In response to this painful exposé, the North Carolina General Assembly introduced the Commerce Protection Act—legislation which, despite its application to a wide range of industries, was "clearly directed at animal rights activists who threaten the profitability of factory farms and slaughterhouses."[110]

A statement issued by the North Carolina Chamber of Commerce claimed S.B. 648 was "not an 'ag-gag' bill."[111] Yet the statement made clear the bill's primary effect was to protect North Carolina businesses from damning media exposés, emphasizing that activist groups and journalists are not the proper authorities to investigate unlawful activity.[112] The statement asserted that "[l]aw enforcement is in the best position to make sure the abuse, theft or other illegal activity is ended in a timely manner and the individuals involved are prosecuted to the fullest."[113] But this justification did not pass muster. Twenty-five groups representing a broad spectrum of public interests joined together to formally

---

107. *See id.* (noting "there is a certain superficial appeal to the idea that refusing to report abuse is tantamount to abuse itself" and criticizing the agriculture industry for its disingenuous attempts to sell these quick-reporting laws as legislation "designed to protect animals").

108. S.B. 648, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013).

109. Will Potter, *New Ag-Gag Bill Introduced in North Carolina on Same Day Butterball Worker Pleads Guilty to Cruelty*, GREEN IS THE NEW RED (Apr. 8, 2013), www.greenisthenewred.com/blog/north-carolina-ag-gag-whistleblower-law/6851/; *see also Ag-Gag Debate*, *supra* note 11 (describing the temporal connection between the Butterball investigation and the introduction of the 2013 North Carolina ag-gag bill).

110. Leighton Akio Woodhouse, *Charged with the Crime of Filming a Slaughterhouse*, THE NATION (July 31, 2013), www.thenation.com/article/charged-crime-filming-slaughterhouse/.

111. Dan Flynn, *'Ag-Gag' Battle Moves On to North Carolina*, FOOD SAFETY NEWS (May 29, 2013), www.foodsafetynews.com/2013/05/ag-gag-battle-moves-on-to-north-carolina/.

112. *Id.*

113. *Id.*

voice their opposition to Senate Bill 648.[114] The joint letter sent to the bill's sponsor was signed by the American Civil Liberties Union, the American Society for the Prevention of Cruelty to Animals (ASPCA), Amnesty International, the Center for Constitutional Rights, the Animal Legal Defense Fund, and even the National Association of Prosecuting Attorneys, among others.[115] North Carolina Senate Bill 648 was ultimately reworked in committee to completely get rid of the ag-gag provisions.[116]

But animal agriculture is a formidable force in North Carolina politics, with "an influential, aggressive lobbying presence."[117] Not surprisingly then, ag-gag proponents did not give up after their 2013 effort fell short. In the spring of 2015, we saw the latest ag-gag *flavor du jour* surface in the North Carolina legislature.[118] North Carolina House Bill 405 (the Property Protection Act) embraced a new strategy designed to sidestep the constitutional pitfalls miring its predecessors.[119] Rather than establish criminal

---

114. ACLU of North Carolina, *ACLU-NC & Other Groups Announce Opposition to North Carolina's "Ag-Gag"/Anti-Whistleblower Legislation*, ALCU OF N.C. BLOG (May 31, 2013), www.acluofnorthcarolina.org/blog/aclu-nc-other-groups-announce-opposition-to-north-carolina-s-ag-gag-anti-whistleblower-legislation.html.

115. *Id.* The letter read in part:

> SB 648 would prevent transparency across all industries. . . . We hope that you will choose to protect the safety of North Carolina's residents despite pressure from groups like the Chamber of Commerce which, in its support for this bill, misses the fact that a loss of transparency is ultimately bad for business, dangerous for consumers and a violation of this country's values.

Id.

116. *Compare* S.B. 648, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013) (as filed Apr. 2, 2013), www.ncleg.net/Sessions/2013/Bills/Senate/HTML/S648v0.html, *with* Sen. Judiciary II Comm. Substitute, S.B. 648, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013) (adopted June 11, 2013), www.ncleg.net/Applications/BillLookUp/LoadBillDocument.aspx?SessionCode=2013&DocNum=8732&SeqNum=0.

117. Lindsay Abrams, *North Carolina's Chilling New Twist on "Ag-Gag"*, SALON (June 4, 2015), www.salon.com/2015/06/04/north_carolinas_chilling_new_twist_on_ag_gag/. "The bill's most prominent backer, the North Carolina Chamber of Commerce, represents industry giants like Tyson, Smithfield Foods, Pilgrim's and Cargill, to name a few." *Id.*

118. N.C. GEN. STAT. § 99A-2 (2015).

119. *See Animal Law Podcast #3 – Ag Gag With Justin Marceau*, OUR HEN HOUSE (Aug. 26, 2015), www.ourhenhouse.org/2015/08/animal-law-podcast-3-ag-gag-with-justin-marceau/ (opining, "It seems clear that the industry kind of knew it had stepped over the line in Idaho and has tried to reformulate ag gag and take different approaches, for example the recent North Carolina law . . . ."); Animal Legal Defense Fund v. Otter, 118 F. Supp. 3d 1195, 1202 (D. Idaho 2015), *aff'd in part, rev'd in part sub nom.* Animal Legal Def. Fund v. Wasden, No. 15-35960, 2018 WL 280905 (9th Cir. Jan. 4, 2018) (holding IDAHO CODE § 18-7042 violates the First Amendment right to freedom of speech as well as the Equal Protection Clause of the Fourteenth Amendment, since the law "was motivated in substantial part by animus towards animal welfare

liability for protected speech acts, the bill drafters chose to create a *civil* cause of action for any private employer, regardless of industry, who finds itself the target of an undercover employment-based investigation.[120] In this way, the Property Protection Act "hands the power directly to the industry" to go after activist moles rather than rely on the prosecutorial discretion of local law enforcement to file charges under a criminal ag-gag statute.[121] The State of Arkansas enacted a nearly identical law in March 2017.[122]

Instead of criminal penalties, these new ag-gag laws authorize extensive monetary damages (up to $5000 per day plus attorney's fees and court costs) for the hapless surveilled company.[123] In this way, civil ag-gag legislation takes aim at the bread and (vegan) butter of animal activism: the employment-based undercover investigation. It allows employers to pursue civil charges against an employee who takes photographs, shoots video, or commits several other forms of "disloyal" conduct, holding them responsible for "any damages incurred"—presumably including damages caused by publication of the abuse.[124] However, these publication damages are

---

groups, and because it impinges on free speech, a fundamental right."); Animal Legal Defense Fund v. Herbert, 263 F. Supp. 3d 1193, 1211–13 (D. Utah 2017) (striking down Utah's ag-gag law on First Amendment grounds due to its content-based provisions and the state's utter failure to demonstrate a compelling government interest).

120. *Debate During Second Reading of H.B. 405 in the Senate*, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015) (statement of N.C. Sen. Brent Jackson, May 18, 2015) (declaring, "House Bill 405 basically codifies and strengthens our North Carolina case laws to better protect property owners; it does not create a criminal penalty."); *see supra* Part II–A (explaining undercover employment-based investigations).

121. Abrams, *supra* note 117.

122. ARK. CODE ANN. § 16-118-113 (West 2017).

123. N.C. GEN. STAT. § 99A-2(d) (2015); ARK. CODE ANN. § 16-118-113(e)(4). *But cf.* KAN. STAT. ANN. § 47-1828(a) (2015) (authorizing recovery "equal to three times all actual and consequential damages" plus attorney's fees and court costs); MONT. CODE ANN. § 81-30-104(1) (2015) (same); IDAHO CODE § 18-7042(4) (2014) (mandating restitution be paid "in an amount equal to twice the value of the damage resulting from the violation."), *held unconstitutional in part by* Animal Legal Defense Fund v. Wasden, No. 15-35960, 2018 WL 280905 (9th Cir. Jan. 4, 2018). The civil recovery provisions in other states' ag-gag statutes do not provide for separate exemplary damages but rather calculate punitive damages by doubling or tripling the amount of *actual* damages sustained; thus, without actual damages, the ag-gag statutes of Kansas, Montana, and Idaho disallow any civil recovery. *Id.*

As a further point of comparison, contrast North Carolina's civil damages provision with the maximum fines imposed by *criminal* ag-gag laws, ranging from $500 to $2500 per offense. MONT. CODE ANN. § 81-30-105(2) (establishing maximum fine of $500); KAN. STAT. ANN. § 47-1827(g)(3) (establishing ag-gag offense as class A nonperson misdemeanor); KAN. STAT. ANN. § 21-6611(b)(1) (stating maximum fine for class A misdemeanor shall not exceed $2500).

124. Abrams, *supra* note 117.

precisely the type of compensatory award disallowed in *Food Lion* as a violation of free speech.[125]

III. ANALYSIS

This section analyzes the various ways in which constitutional protections, public policy, and causation principles operate to shield undercover investigators from liability for monetary damages. I begin by examining common-law limitations on tort liability, using the very apposite case *Food Lion* to demonstrate these principles at work. I then hone in on the concept of employee duty of loyalty—a recurring theme in discussions of investigator liability—and explore the public-policy exceptions that have evolved out of this doctrine to protect whistleblowers from retaliation. I also explain why traditional channels of reporting for whistleblowers are not viable options for employees in the animal-agriculture industry, thus creating the need for undercover investigations. Finally, I conclude by bringing these various concepts together in a detailed analysis of the mechanisms limiting recovery under civil ag-gag provisions. Specifically, I describe the applicable principles of free-speech protection under the First Amendment and finish with a careful consideration of the fascinating liability-limiting doctrine of proximate causation.

A. Inbred Irony: Ag-Gag Proponents Celebrate Statutes' Common-Law Heritage Despite Perceived Shortcomings of Traditional Tort Liability

Limitations on common-law tort liability insulate the surreptitious newsgatherer and truthful broadcaster from responsibility for reputational harms sustained by the target of an undercover exposé.[126] Even where the target establishes a prima facie case against the investigator, monetary damages will often be unavailable.[127] *Food Lion* neatly demonstrates this concept.[128] The grocery chain sued for reputational harm after ABC aired undercover footage showing Food Lion employees engaging in

125. Food Lion, Inc. v. Capital Cities/ABC, Inc. (*Food Lion II*), 194 F.3d 505, 522 (4th Cir. 1999); *cf.* Rep. Jordan, Sen. Commerce Committee (May 14, 2015) (explaining that H.B. 405 specifically attempts to codify the principles set forth in *Food Lion II*).

126. *See generally infra* Part III–C (describing at length how free-speech and proximate-causation principles have been applied to limit recovery against undercover whistleblowers).

127. *See Food Lion II*, 194 F.3d at 510–11 (denying recovery of damages where investigators' undercover work was not the proximate cause of company's loss).

128. *Id.*

unsanitary food-handling practices.[129] Rather than refute the authenticity of the footage and sue for defamation, Food Lion focused its claims on *how* the reporters obtained the footage.[130] It premised its case on theories of fraud, trespass, unfair trade practices, and breach of employee duty of loyalty—seeking millions in compensatory damages.[131] Yet the district court held, and the appellate court affirmed, that publication damages[132] were not recoverable (for reasons discussed in Part III–C below).[133]

Food Lion came up empty-handed even though the district and appellate courts agreed that the defendants had engaged in tortious conduct.[134] The Fourth Circuit found the reporters liable for breach of duty of loyalty and trespass.[135] By actively pursuing their investigation for ABC while working as Food Lion employees, the reporters breached their duty of loyalty to the supermarket plaintiff and thereby committed a trespass.[136] In other words, the Fourth Circuit affirmed the jury's trespass verdict by piggybacking trespass liability on the defendants' disloyal conduct.[137] "Food Lion's

---

129. *Id.* at 510–11.

130. *Id.* "Food Lion's suit focused not on the broadcast, as a defamation suit would, but on the methods ABC used to obtain the video footage." *Id.* at 511.

131. *Id.* at 511.

132. The term "publication damages" refers to any injury that flows from dissemination of information. *See* Susan M. Gilles, *Food Lion As Reform or Revolution: "Publication Damages" and First Amendment Scrutiny*, 23 U. ARK. LITTLE ROCK L. REV. 37, 62 (2000) (defining "publication damages" as those damages which would not have occurred but for the publication of certain information). Examples of publication damages include noneconomic injuries, such as reputational harm and diminished consumer confidence, as well as monetary damages (lost profits, diminished stock value, and the like) that flow from a company's marred reputation. *Id.*

133. Food Lion, Inc. v. Capital Cities/ABC, Inc. (*Food Lion I*), 964 F. Supp. 956, 963 (M.D.N.C. 1997), *aff'd on other grounds*, 194 F.3d 505 (4th Cir. 1999); *Food Lion II*, 194 F.3d at 522.

134. *Food Lion II*, 194 F.3d at 516.

135. *Id.*

136. *Id.* at 518. In other words, their breach automatically transformed the reporters' presence on Food Lion's premises into a civil trespass. *Id.*

137. *Id.* at 516. At trial, the jury found the reporters liable for both breach of duty of loyalty and trespass, "because they entered Food Lion's premises as employees with consent given because of the misrepresentations in their job applications." *Id.* at 518. On appeal, the Fourth Circuit considered whether Food Lion's consent to the defendants' presence in the non-public areas of its property was "void from the outset" due to their misrepresentations. *Id.* at 517. The court offered, "Consent to an entry is often given legal effect even though it was obtained by misrepresentation or concealed intentions. . . . [I]f we turned successful resume fraud into trespass, we would not be protecting the interest underlying the tort of trespass—the ownership and peaceable possession of land." *Id.* (internal quotation marks and citations omitted). Accordingly, the appellate court held that misrepresenting oneself on a job application does not itself nullify the consent given to enter an employer's premises. *Id.* at 517–18. In other words, consent existed at the time employment began; in fact, consent *to enter* was never vitiated. Yet the Fourth Circuit affirmed the jury's finding of

consent for them to be on its property was nullified when they tortiously breached their duty of loyalty to Food Lion," resulting in a trespass.[138] The court explained:

> They went into areas of the stores that were not open to the public and secretly videotaped, an act that was directly adverse to the interests of . . . Food Lion [their employer]. Thus, they breached the duty of loyalty, thereby committing a wrongful act in abuse of their authority to be on Food Lion's property.[139]

That language should sound familiar to anyone who tracked North Carolina's ag-gag law through the state legislature.[140] During legislative hearings and debate on North Carolina House Bill 405, the bill's sponsors borrowed heavily from the Fourth Circuit's opinion in defense of their bill.[141] Even the language of the Act itself closely tracks this portion of the *Food Lion* holding.[142]

In drafting House Bill 405, the bill's sponsors expressly sought to codify the common-law principles set forth in the Fourth Circuit's *Food Lion* analysis.[143] The sponsors agreed with the federal appellate court's interpretation of North Carolina common law regarding breach of employee duty of loyalty as an independent tort.[144] But disloyal conduct by an employee has rarely been

---

trespass because, "the breach of duty of loyalty—triggered by the filming in non-public areas, which was adverse to Food Lion—was a wrongful act in excess of [the reporters'] authority to enter Food Lion's premises as employees." *Id.* at 518 (citing Blackwood v. Cates, 254 S.E.2d 7, 9 (N.C. 1979), in which the North Carolina Supreme Court found defendants liable for trespass when their activity on plaintiff's property exceeded the scope of consent to enter). In other words, the ABC reporters' trespass was not trespass *ab initio*; their presence on Food Lion's property did not become trespassory until they began recording. *Id.*

138. *Id.* at 519.

139. *Id.* "As a matter of agency law, an employee owes a duty of loyalty to her employer. . . . In North Carolina 'the law implies a promise on the part of every employee to serve [her] employer faithfully.'" *Id.* at 515 (quoting McKnight v. Simpson's Beauty Supply, Inc., 358 S.E.2d 107, 109 (N.C. Ct. App. 1987). *But see* Dalton v. Camp, 548 S.E.2d 704 (N.C. 2001) (holding breach of an employee's duty of loyalty is *not* actionable as an independent tort).

140. N.C. Gen. Stat. § 99A-2 (2015).

141. *Hearings on H.B. 405*, *supra* note 80 (statement of N.C. Rep. Jonathan Jordan, Sponsor, May 14, 2015) (explaining, "[A] lot of this proposed legislation does codify from that case [*Food Lion*] specifically.").

142. N.C. GEN. STAT. § 99A-2(b)(1)-(2) (creating a cause of action against an employee who "engages in an act that exceeds the person's authority to enter . . . the nonpublic areas of an employer's premises."); *id.* § 99A-2(b) (identifying certain acts that amount to a breach of employee duty of loyalty as acts that exceed the employee's authority to enter).

143. *See Hearings on H.B. 405*, *supra* note 80 (statement of N.C. Rep. Jonathan Jordan, Sponsor, May 14, 2015); *see also supra* text accompanying note 141.

144. *Id.* ("[W]e are agreeing with the Fourth Circuit and saying we agree that our courts would rule that way."); *contra Dalton*, 548 S.E.2d at 707–09 (expressly rejecting the Fourth Circuit's interpretation of North Carolina's duty-of-loyalty law). The sponsors of H.B. 405 clearly were not familiar with

considered tortious in North Carolina,[145] and even the state's highest court has held that breach of duty of loyalty is simply not actionable as an independent tort.[146] Nevertheless, the drafters of House Bill 405 chose to predicate liability on employee disloyalty.[147]

B. A Closer Look at an Unproductive Tort—Employee Duty of Loyalty

Employee duty of loyalty is a dynamic concept, acutely intertwined with societal norms.[148] In earlier years, the concept of employee loyalty was characterized by a regime in which employees were under "a duty of virtually unquestioning loyalty to protect and preserve the employers' interest and business."[149] Yet, as economic

Dalton—a decision handed down by their own state's highest court in 2001. *Id.*

145. Food Lion, Inc. v. Capital Cities/ABC, Inc. (*Food Lion II*), 194 F.3d 505, 515 (4th Cir. 1999) (acknowledging "employee loyalty issues are usually dealt with in the context of the employment contract; unfaithful employees are simply discharged, disciplined, or reprimanded."); *cf*. Long v. Verticle Techs., Inc., 439 S.E.2d 797, 802 (N.C. Ct. App. 1994) (explaining that, in North Carolina, an employee may be discharged for disloyalty when he "deliberately acquires an interest adverse to his employer").

146. *Dalton*, 548 S.E.2d at 707–09 (expressly rejecting the Fourth Circuit's interpretation of North Carolina tort law in *Food Lion*, to the extent that holding could be read to sanction an independent action for breach of duty of loyalty, and explaining that evidence of such a breach instead "serves only as a justification for a defendant-employer in a wrongful termination action by an employee").

147. *See Hearings on H.B. 405*, *supra* note 80. Perhaps the sponsors' disregard of *Dalton* was just an oversight, and it is ultimately irrelevant since state legislatures may codify tort law concepts as specific statutory causes of action. *See, e.g.*, Kansas Uniform Partnership Act, KAN. STAT. ANN. § 56a-404 (2017) (codifying fiduciary duty of loyalty and care owed by a partner to the partnership and to other partners); Illinois Uniform Deceptive Trade Practices Act, 815 ILL. COMP. STAT. 510/2 (2017) (codifying common-law tort of commercial disparagement under Illinois law); CAL. CIV. CODE § 43 (West 2017) (codifying causes of action for common-law torts of assault, battery, and invasion of privacy); Dragonetti Act, 42 PA. CONS. STAT. § 8351 (2017) (codifying common-law cause of action for wrongful use of civil proceedings); GA. CODE ANN. § 51-9-1 (2017) (codifying cause of action for common-law trespass). Nevertheless, the bill sponsors' complete inattention to *Dalton* is curious.

148. Benjamin Aaron, *Employees' Duty of Loyalty: Introduction and Overview*, 20 COMP. LAB. L. & POL'Y J. 143, 144 (1999).

149. *Id.* "Present laws governing the duty of employee loyalty all date back to earlier historical periods when economic and social conditions were much different." *Id.*; *accord.* Phillip I. Blumberg, *Corporate Responsibility and the Employee's Duty of Loyalty and Obedience*, 24 OKLA. L. REV. 279, 288 (1979) (describing mid-twentieth century sociopolitical underpinnings of duty-of-loyalty principles). Bear in mind that the common law conceptualizes an employee's duty of loyalty "in terms of economic activity, economic motivation, and economic advantage" and is concerned with preventing an employee's own economic interests from "impairing his judgment, zeal, or single-minded devotion to the furtherance of his principal's economic interests." *Id.*

pressures and notions of corporate responsibility have evolved, the doctrine of employee loyalty has become increasingly qualified by overriding concerns of public policy.[150]

1. Overview

Section 387 of the 1958 Restatement (Second) of Agency sets forth the general principle that "an agent is subject to a duty to his principle to act solely for the benefit of the principal in all matters connected with his agency."[151] To that end, an agent is under a duty "not to act or speak disloyally . . . *except in the protection of his own interests or those of others*."[152] Thus, even the drafters of the mid-century Restatement recognized that the duty of loyalty has important limitations.[153]

Over the last sixty years, this recognition has grown in acceptance.[154] The changing sociopolitical landscape brought with it a departure from mid-twentieth century Restatement principles,[155] as evidenced by divergent language in the recently drafted 2015 Restatement of Employment Law.[156] This Restatement of Employment Law fleshes out the nuances of employee duty of loyalty and reflects changes in public policy.[157] It insinuates a proportional relationship between the level of loyalty owed and the employee's position within the company.[158] "As a general matter, the duty of loyalty . . . has little practical application to the employer's 'rank-and-file' employees, i.e., employees who are subject to the employer's close oversight or supervision, or who are not granted substantial discretion in carrying out their work

150. Aaron, *supra* note 148, at 144, 153.

151. RESTATEMENT (SECOND) OF AGENCY § 387 (1958).

152. *Id.* at § 387 cmt. b (1968) (emphasis added); *accord.* Town of Plainville, 77 Lab. Arb. Rep. (BNA) 161, 166 (1981) (Sacks, Arb.) (noting, "[A]gents are privileged to reveal information in the protection of a superior interest of some third person.").

153. *See* Blumberg, *supra* note 149, at 289 (explaining, "[T]hese duties, as the RESTATEMENT itself recognizes, have limitations.").

154. *See generally infra* notes 155–166 and accompanying text (describing growing recognition that an employee's duty of loyalty has important public-policy limitations).

155. Blumberg, *supra* note 149, at 280 (explaining the "new view" on traditional concepts of employee duties of loyalty which recognizes an employee's right to take action adverse to his employer's interests where the employee observes his corporate employer deviating from its proper social responsibility).

156. RESTATEMENT OF EMP'T LAW § 8.01 (2015).

157. *Id.* at § 8.01(a).

158. *Id.*; RESTATEMENT OF EMP'T LAW (Tentative Draft No. 4), Reporters' Memorandum (Apr. 11, 2011). For example, a heightened duty applies to corporate executives and other agents in a position of trust and confidence, whereas low-level employees in high-turnover positions owe a duty that is considerably more basic (e.g., a duty not to steal). *Id.*

responsibilities."[159] Of course, even low-level employees who are not in a position of trust and confidence (and who, therefore, do not owe a *fiduciary* duty to the employer) may nevertheless owe an "implied contractual duty of loyalty . . . in matters related to their employment."[160] Indeed, "it is hard to conceive of an efficient, harmonious enterprise" without at least *some* expectation of employee loyalty.[161] Even so, the law now recognizes that this duty must be interpreted in a manner consistent with employee rights and public policy.[162]

To the drafters of the 2015 Restatement, this meant whittling down the duty of loyalty to three narrow areas: (1) trade secrets; (2) direct competition; and (3) theft or self-dealing.[163]

According to the Restatement drafters, breach of this duty does not amount to an independent tort.[164] "Employees who owe an implied contractual duty of loyalty are subject only to *contract remedies* for breach . . . ."[165] Even the *Food Lion* court acknowledged that employee loyalty issues are generally dealt with in the context of the employment contract: disloyal employees are simply terminated or internally reprimanded.[166]

Thus, the clear trend has been toward a relaxation of loyalty standards in light of other policy considerations—namely, whistleblowing.[167] Yet the sponsors of North Carolina's civil ag-gag

---

159. RESTATEMENT OF EMP'T LAW § 8.01 cmt. a (2015); *accord.* Interview with TJ Tumasse, *supra* note 31 (explaining undercover investigators conducting an employment-based investigation generally apply for the lowest-level positions at the target facility); Food Lion, Inc. v. Capital Cities/ABC, Inc. (*Food Lion II*), 194 F.3d 505, 514 (4th Cir. 1999) (characterizing reporters' deli jobs "entry level" positions).

160. RESTATEMENT OF EMP'T LAW § 8.01(a); *cf.* Animal Legal Defense Fund v. Wasden, No. 15-35960, 2018 WL 280905, at *12 (9th Cir. Jan. 4, 2018) (citing Jenkins v. Boise Cascade Corp., 141 Idaho 233 (2005)) (noting that an employee who accepts a job with "an intent to harm" the employer breaches "the covenant of good faith and fair dealing that is implied in all employment agreements in Idaho," yet failing to define "harm").

161. Blumberg, *supra* note 149, at 298.

162. RESTATEMENT OF EMP'T LAW § 8.01(c); *cf.* Animal Legal Defense Fund v. Herbert, 263 F. Supp. 3d 1193, 1205 (D. Utah 2017) (noting, in dicta, that the point at which "an invited guest become[s] a trespasser as a result of making misrepresentations to the property owner" is an issue "mired in competing policy considerations").

163. RESTATEMENT OF EMP'T LAW § 8.01(b); *see also id.* at § 8.01 cmt. b (detailing the "three principal aspects" of an employee's duty of loyalty).

164. *Id.* at § 8.01 cmt. e; *see also* Dalton v. Camp, 548 S.E.2d 704, 707–09 (N.C. 2001); *supra* text accompanying note 146 (describing N.C. Supreme Court decision which held breach of duty of loyalty is not actionable as an independent tort). This was the view taken by the North Carolina Supreme Court in *Dalton*. *Id.*

165. RESTATEMENT OF EMP'T LAW § 8.01 cmt. e (emphasis added).

166. Food Lion, Inc. v. Capital Cities/ABC, Inc. (*Food Lion II*), 194 F.3d 505, 515 (4th Cir. 1999).

167. *See infra* Part III–B–2.

law went entirely against this trend in enacting the Property Protection Act, creating a statutory cause of action against certain disloyal employees.[168] The North Carolina sponsors' activity disregarded the well-known admonition of U.S. Supreme Court Justice Felix Frankfurter: "To say that an agent has duties of loyalty and obedience only begins [the] analysis . . . . One must inquire more deeply and ascertain the outer perimeters of the agent's obligations by balancing the conflicting considerations."[169] When it comes to exposing employer practices that run contrary to the public interest, an employee's moral obligations outweigh any legal obligation she owes to her employer.

2. Whistleblowing in the Workplace: Socially Acceptable Disloyalty

An employee who reports employer wrongdoing is commonly said to have "blown the whistle" on her employer.[170] Whistleblowing in the employment context necessarily involves conduct that is adverse to the employer's interests: Companies that engage in legal or moral wrongs generally do so as a means of increasing profits; once exposed, the company must swap these advantageous practices for more costly ones, inevitably impacting its bottom line.[171] In addition, the company may experience fallout in the form of diminished consumer confidence, lost sales, lawsuits, or even criminal charges.[172] Considering these repercussions, an employee's outing of his employer's misdeeds may be described as "disloyal" in common parlance. However, the whole doctrine of loyalty rests on "a policy of protecting the economic position of the principal against impairment by reason of an agent's effort to achieve economic gain."[173] These policy concerns are simply not applicable to the employee who releases damning information about his employer "without intent to obtain economic advantage for himself . . . ."[174] When an employee's conduct is "motivated by a desire to promote

168. N.C. GEN. STAT. § 99A-2(b)(1)–(2) (2015). The Arkansas legislature followed suit in 2017, creating a nearly identical cause of action premised on the notion of employee disloyalty. ARK. CODE ANN. § 16-118-113 (2017) (creating a civil cause of action against any employee who uses surreptitiously collected information "in a manner that damages the employer").

169. SEC v. Chenery Corp., 318 U.S. 80, 85–86 (1943).

170. *Whistleblower*, ONLINE ETYMOLOGY DICTIONARY, www.etymonline.com/index.php?term=whistleblower (last visited Jan. 26, 2018).

171. Blumberg, *supra* note 149, at 297.

172. *See, e.g.*, Food Lion, Inc. v. Capital Cities/ABC, Inc. (*Food Lion II*), 194 F.3d 505, 511 (4th Cir. 1999).

173. Blumberg, *supra* note 149, at 289.

174. *Id.*

"the public good," public policy dictates that employee ought to be protected against disloyalty claims.[175]

Whistleblower protections recognize the gatekeeper function of employees when it comes to safeguarding public health and consumer interests.[176] "[A]n employee's duty of loyalty is effectively overridden by this gatekeeper role and the public's interest in learning of matters related to public health and safety."[177] To that end, the act of blowing the whistle may be conceptualized as either a *privileged* breach of employee duty of loyalty (i.e., the conduct was disloyal yet not actionable) or as *no breach at all* (i.e., the duty of loyalty simply does not extend to matters of employer wrongdoing).[178]

Despite their merits, whistleblower protections are not without controversy. Public-interest groups seeking to facilitate public-safety disclosures are pitted against conservative groups seeking to protect the economic interests of employers.[179] The crux of the public-safety disclosure proposal essentially states that "ethics should take precedence over loyalty to employers when the public interest is at stake."[180] This sentiment is reflected in the U.S. Supreme Court's decision in *Pickering v. Board of Education*,[181] "encouraging citizens interested in working for a better society to place their interests as citizens above the interests of their employer."[182] Proponents of this view urge employees to disclose corporate wrongdoing to a public interest organization so that the

---

175. *Id.*; *accord.* Terry Morehead Dworkin & Elletta Sangrey Callahan, *Employee Disclosures to the Media: When Is a "Source" a "Sourcerer"?*, 15 HASTINGS COMM. & ENT. L. J. 357, 387 n.196 (1993) (explaining Blumberg's definition of "whistleblower").

176. CONFLICTS OF INTEREST IN BUSINESS & PROFESSIONS § 17:4 (2015).

177. *Id.*

178. Morehead & Callahan, *supra* note 175, at 388 ("[A]n employee whistleblower *does not violate* his or her duty of loyalty by disclosing such information."); *see, e.g.*, Marsh v. Delta Air Lines, Inc., 952 F. Supp. 1458, 1460–63 (D. Colo. 1997). In *Marsh*, a disgruntled airline employee wrote a letter to the editor of a local newspaper criticizing his employer, Delta Air Lines, Inc. *Marsh*, 952 F. Supp. at 1460. In the letter, the employee "vented his frustrations" about his employer and "strongly criticized" Delta for its personnel/staffing decisions. *Id.* Delta fired the employee as a result of his writing the article. *Id.* at 1461. The employee then sued for wrongful discharge. *Id.* The court dismissed the lawsuit, finding the employee had breached his duty of loyalty to Delta and, as a result, his termination was not wrongful. *Id.* at 1463. The court noted, however, that had the employee's critical remarks made public some aspect of Delta's conduct that was *undermining passenger safety*, then "the implied duty of loyalty would be inapplicable to Plaintiff's actions." *Id.* Publicly airing merely personal grievances, on the other hand, *was* a disloyal act unworthy of whistleblower protection. *Id.*

179. Blumberg, *supra* note 149, at 280–81, 297.

180. *Id.* at 280.

181. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

182. Blumberg, *supra* note 149, at 303 (citing *Pickering*, 391 U.S. 563).

issue may be campaigned "in the public arena" rather than swept under the rug by corporate higher-ups or apathetic law enforcement.[183]

Industry protectionists counter that employers "will undoubtedly incur economic loss" as a result of employees blowing the whistle.[184] They portend "a loss of human values within the organization" as well as "a general impairment of group identification, group loyalty, and morale" as invidious consequences of whistleblowing.[185] These critics further insinuate that an employee's decision to disclose information, while sometimes selfless, may occasionally involve "improper motivation," such as a desire to injure the employer or promote a political agenda.[186] One commentator, Phillip Blumberg, lamented, "Once the duty of loyalty yields to the primacy of what the individual in question regards as the 'public interest,' the door is open to widespread abuse."[187] To ameliorate the detrimental effects of employee whistleblowing (which are often amplified by media exposure), Blumberg suggested imposing "statutory and administrative requirements of disclosure" to limit an employee's reporting of abuses to public enforcement agencies only.[188] Enforcement by public agencies, he noted, "would serve the basic object without the serious disadvantages [of public exposure]. . . . Private vigilante efforts should not be essential to achieve effective administration."[189]

---

183. *Id.* at 281; *but cf. Debate in the House on Motion to Override Governor's Veto of H.B. 405*, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015) (statement of N.C. Rep. John Szoka, Sponsor, June 3, 2015) (asserting that allegations of employer wrongdoing ought to be disclosed to "proper authorities," i.e., "law enforcement and state and federal regulatory agencies . . . *not* the media, and *not* private special-interest organizations"); Animal Legal Defense Fund v. Otter, 118 F. Supp. 3d 1195, 1200 (D. Idaho 2015), *aff'd in part, rev'd in part sub nom.* Animal Legal Def. Fund v. Wasden, No. 15-35960, 2018 WL 280905 (9th Cir. Jan. 4, 2018) (describing the expressed desire of Dan Steenson, drafter of Idaho's ag-gag legislation, "to shield Idaho dairymen and other farmers from undercover investigators and whistleblowers who expose the agricultural industry to 'the court of public opinion.'").

184. Blumberg, *supra* note 149, at 297.

185. *Id.*

186. *Id.* at 298; *see also Hearings on H.B. 405*, *supra* note 80 (statement of N.C. Rep. Jonathan Jordan, Sponsor, May 14, 2015) (calling an employee's intentions "the crux of the issue"); *cf.* Animal Legal Defense Fund v. Wasden, No. 15-35960, 2018 WL 280905, at *12 (9th Cir. Jan. 4, 2018) (noting "intent to injure" is a requisite element for conviction under IDAHO CODE § 18–7042(1)(c) but failing to explain what *type* of injury must be intended). One could argue that it is this "improper motivation" that the North Carolina legislature was trying to isolate in its statute. *Hearings on H.B. 405*, *supra* note 80 (statement of N.C. Rep. Jonathan Jordan, Sponsor, May 14, 2015). However, an employee's motivation arguably ought to be irrelevant if the result is a more informed public on matters of great public importance.

187. Blumberg, *supra* note 149, at 314.

188. *Id.* at 315.

189. *Id.*

A decade or two after Blumberg published his industry-protective admonitions, commentators and arbiters began to acknowledge the inevitable need for media disclosure in many cases of corporate wrongdoing.[190] Where an employee reasonably believes his superiors will do a poor or dishonest job investigating the matter, that employee may be privileged to bypass internal channels and go directly to third parties.[191] In such cases, the employer would not have just cause to penalize the employee who blew the whistle to the media.[192]

In addition, practical considerations provide employees with a certain amount of de facto protection. An employer's ability to seek redress against an employee who disloyally blows the whistle is limited as a practical matter, "at least in those cases where public sympathy is squarely behind the employee."[193] Even where the law condemns an employee's unauthorized conduct, the employer's freedom of action against that employee "will be severely restricted by the climate of public opinion which may well have been significantly influenced by the publicity attending the affair."[194] Whether or not an employee's disclosure violates traditional norms embedded in the law of agency, the modern public's pervasive concern with corporate social responsibility places the presumption of wrongdoing squarely against the employer.[195] Aggrieved employers will hardly feel free to resort to legal or equitable remedies for redress where the employee's unauthorized disclosures expose corporate misconduct and do not reflect economic motivation on behalf of the employee in exposing it.[196]

---

190. Morehead & Callahan, *supra* note 175, at 378; *see also* Town of Plainville, 77 Lab. Arb. Rep. (BNA) 161, 167 (1981) (Sacks, Arb.) (agreeing with employee for not first using internal channels to resolve allegations against his employer where employee reasonably felt his claims would be met with distain by upper management).

191. *Town of Plainville*, 77 Lab. Arb. Rep. (BNA) at 167 (insinuating, however, that public authorities still ought to be consulted before turning to news outlets); *cf. Debate in the House on Motion to Override Governor's Veto of H.B. 405*, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015) (statement of N.C. Rep. Pat McElraft, June 3, 2015) ("[W]e should get law enforcement involved and not cameras involved, because cameras can lie. They pick one little thing that's happening somewhere, and then they throw it out there in the public to think that that's what all slaughterhouses are doing, et cetera.").

192. Morehead & Callahan, *supra* note 175, at 378.

193. Blumberg, *supra* note 149, at 312.

194. *Id.* "Unless the corporation can prevail in the battle for public opinion on the merits of the conduct in issue, it must yield to public clamor or face the consequences of unfavorable public reaction." *Id.*

195. *Id.* at 313.

196. *Id.*; *see also Hearings on H.B. 405*, *supra* note 80 (statement of N.C. Rep. Jonathan Jordan, Sponsor, May 14, 2015) (deploring the greedy employee who takes footage of employer wrongdoing and "run[s] out to a news outlet to sell it for a lot of money").

The company that is guilty of animal abuse, worker-safety violations, unethical practices, or other corner-cutting designed to line its pockets at the expense of public safety and morals would do well not to compound its conduct by instituting action against the employee who brought the abuse to light.[197] To do so would be to "assure even greater adverse publicity."[198] This is precisely the reaction we saw in response to charges against animal activists in at least two different scenarios. In 2013, when news that an activist in Utah had been charged under that state's ag-gag law for filming the abuse of sick and injured dairy cows, the prosecutor's office was hit with a flood of outrage from all over the country.[199] National media outlets soon picked up the story, bringing precisely the kind of public attention to the industry that ag-gag legislation was designed to prevent.[200] Within twenty-four hours, the ag-gag charges were dropped.[201] In 2014, undercover investigator Taylor Radig was charged with animal cruelty after turning over footage she recorded at Quanah Cattle Co., a veal calf-rearing facility near Kersey, Colorado.[202] The footage led to criminal animal abuse charges against three of the Quanah workers.[203] So why was Radig charged? She had "waited too long" to turn over the footage to law enforcement.[204] After vehement public outcry and nearly 200,000 petition signatures, the charges against Taylor were dropped.[205] In a brief statement, the county prosecutor simply said the charges

197. Blumberg, *supra* note 149, at 313.

198. *Id.*

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

200. Woodhouse, *supra* note 110.

201. Potter, *supra* note 199; Jim Dalrymple, *Utah Prosecutor Dismisses Suddenly High-Profile 'Ag Gag' Case*, THE SALT LAKE TRIBUNE (May 1, 2013, 7:39 AM), http://archive.sltrib.com/story.php?ref=/sltrib/news/56240592-78/case-meyer-law-gag.html.csp. Of course, the prosecutor claimed the media attention "did not have bearing on his decision to dismiss the case." *Id.* Instead he simply stated, "I determined that in [the] interest of justice I wouldn't pursue the matter." *Id.*

202. Dan Flynn, *Prosecutor Dismisses Charge of Animal Cruelty Against Undercover Investigator*, FOOD SAFETY NEWS (Jan. 13, 2014), www.foodsafetynews.com/2014/01/charge-of-animal-cruelty-against-undercover-investigator-dismissed-by-prosecutor/.

203. *Id.*

204. *Id.* Animal welfare groups investigating institutionalized cruelty need time to show a pattern of abuse, which is not possible if the investigator is required to blow her cover by reporting the first abuse she sees. *Id.*

205. Will Potter, *Charges Dropped Against Investigator Who Filmed Animal Cruelty*, GREEN IS THE NEW RED (Jan. 11, 2014), www.greenisthenewred.com/blog/taylor-radig-charges-dropped/7492/*;* Abby Spiwak, *Drop Animal Cruelty Charge Against Undercover Investigator in Colorado*, CHANGE.ORG, www.change.org/p/drop-animal-cruelty-charge-against-undercover-investigator-in-colorado (last visited Aug. 21, 2017).

could not be proven beyond a reasonable doubt and were therefore dismissed.[206]

Back in Utah, a more recent incident suggests that some industry members are actually beginning to acknowledge the practical limitations on the use of anti-whistleblower legislation.[207] After four activists were charged with "agricultural operation interference"[208] for photographing a hog farm in Iron County, Utah, the charges were promptly dropped *at the hog producer's request*.[209] Yet the foresight of a handful of livestock producers has not been enough to stem the tide of ag-gag legislation in this country.[210] In addition to the 2015 law that passed in North Carolina, anti-whistleblower legislation tailored specifically to protect animal agriculture was introduced in Arkansas,[211] Kentucky[212] and Washington,[213] and ag-gag legislation of the quick-reporting

206. Press Release, Weld County District Attorney's Office, Charges Dismissed Against Woman Who Filmed Calf Abuse (Jan. 10, 2014), www.co.weld.co.us/assets/6b43d37dAA7AA6074752.pdf.

207. Dan Flynn, *Utah Prosecutor Drops 'Ag-Gag' Charges Against Vegan Activists*, FOOD SAFETY NEWS (Jan. 13, 2015), www.foodsafetynews.com/2015/01/charges-against-four-vegan-activists-under-utah-ag-gag-dropped/.

208. UTAH CODE ANN. § 76-6-112 (LexisNexis 2017), *held unconstitutional by* Animal Legal Defense Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017). "Agricultural operation interference" is the fancy name for the offense created under Utah's ag-gag law. *Id.*

209. Flynn, *supra* note 207. The producer whose property was photographed, Circle Four Farms, has been owned since 2013 by Smithfield Foods, Inc., the world's largest pork producer. *Id.*

210. *See generally infra* notes 211–218 and accompanying text (describing ag-gag laws considered in various states' legislatures in 2015).

211. H.B. 1774, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); *see also* Last Chance for Animals, *A Triumph for LCA as Arkansas Gag Bill Fails*, LCA BLOG (Apr. 3, 2015), www.lcanimal.org/index.php/blog/entry/a-triumph-for-lca-as-arkansas-gag-bill-fails (describing scope of H.B. 1774, which would have severely restricted undercover investigations by prohibiting the recording of conversations between coworkers in an employment setting unless all parties had knowingly consented to the recording).

212. H.B. 177, amend. 5, 2015 Leg., Reg. Sess. (Ky. 2015).

213. H.B. 1104, 64th Leg., Reg. Sess. (Wash. 2015); *see also* Leah Sottile, *'Ag-Gag' Proposal Meets Torrent of Opposition in Washington State*, ALJAZEERA (Jan. 22, 2015, 5:00 AM), http://america.aljazeera.com/articles/2015/1/22/Ag-gag-bill-angers-animal-rights-supporters-in-Washington-state.html (describing Wash. Rep. Joe Schmick's proposed law that mirrors Idaho's now-defunct ag-gag statute, criminalizing audio or visual recording on the premises of an agricultural facility).

variety[214] was also considered in Colorado,[215] Montana,[216] New Mexico[217] and Wisconsin[218] that same year. The State of Arkansas is the most recent state to enact an ag-gag statute, adopting the text of North Carolina's law nearly verbatim.[219]

---

214. *See generally supra* notes 101–107 and accompanying text (describing quick-reporting ag-gag laws); *see also* Shea, *supra* note 82 (presenting quick-reporting laws as the future of ag-gag legislation).

215. S.B. 15-042, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015); *see also* Justin Marceau & Nancy Leong, *Proposed Bill Will Lead to More Animal Abuse, Not Less*, DENVER POST (Jan. 23, 2015), www.denverpost.com/ci_27381708/proposed-bill-will-lead-more-animal-abuse-not (explaining adverse effects of Colorado Senate Bill 42, which would have required reporting of animal abuse within 48 hours); *Ag-Gag Bills Continue to Flourish in 2015*, NAT'L ANTI-VIVISECTION SOC'Y (Aug. 3, 2015), www.navs.org/news/ag-gag-bills-continue-to-flourish-in-2015 (announcing S.B. 15-042 was postponed indefinitely shortly after its introduction and died in committee at the end of the legislative session).

216. S.B. 285, 64th Leg., Reg. Sess. (Mont. 2015); *see also* Troy Carter, *Bill Criminalizes Not Reporting Animal Cruelty*, BOZEMAN DAILY CHRONICLE (Feb. 17, 2015), www.bozemandailychronicle.com/news/mtleg/bill-criminalizes-not-reporting-animal-cruelty/article_8145f262-0129-5b02-bf44-509b00613594.html (quoting the bill's sponsor, Mont. Sen. Eric Moore, explaining the bill's purpose was to "make[] sure that someone who witnesses [and records] animal abuse isn't able to use it for political purposes").

217. S.B. 221, 52d Leg., 1st Sess. (N.M. 2015); *but see New Mexico Legislature Lets Partial 'Ag-Gag' Bill Languish*, FOOD SAFETY NEWS (Mar. 19, 2015), www.foodsafetynews.com/2015/03/new-mexico-legislature-lets-partial-ag-gag-bill-languish-in-committee/ (announcing New Mexico's quick-report ag-gag bill "is almost certainly dead" after languishing in the state Senate Judiciary Committee).

218. *See* Rob Schultz, *Legislator Wants to Introduce Controversial 'Ag-Gag' Bill*, WIS. ST. J. (Feb. 9, 2015), http://host.madison.com/wsj/news/local/legislator-wants-to-introduce-controversial-ag-gag-bill/article_6eb375b3-3b2e-5d6f-881c-2d3e8f25e9b0.html (announcing Wis. Rep. Lee Nerison's intent to introduce a quick-reporting ag-gag bill "at the behest of farmers and others who told him their reputations have been put on the line by undercover investigators."); *but see Rep. Lee Nerison*, WIS. ST. LEG., http://docs.legis.wisconsin.gov/2015/legislators/assembly/1329 (last visited Jan. 28, 2018) (showing that, ultimately, for reasons that are unclear, Rep. Nerison's bill was not introduced that session).

219. ARK. CODE ANN. § 16-118-113 (2017).

3. Whistleblowing in the Animal Agriculture Industry: Why Traditional Channels for Reporting Are Not an Option

Ag-gag proponents claim that reporting animal and worker abuse to law enforcement is the proper,[220] ethical,[221] and most effective[222] means of stopping animal abuse. Experience, however, suggests the contrary. Regulatory authorities frequently shirk their enforcement duties;[223] district attorneys routinely refuse to prosecute abusers even when presented with clear evidence;[224] and egregious violations escape with nothing more than a slap on the wrist.[225]

The country received a serious wake-up call in 2008 when an undercover investigation revealed outrageous violations of food-safety laws at a cattle processing plant in Chino, California.[226] USDA inspectors stationed at the plant—the very "authorities" in whom industry protectionists place so much faith—consistently turned a blind eye as ill and injured cattle entered the U.S. food supply, destined for the National School Lunch Program.[227] As one exasperated reporter wrote, "The U.S. Department of Agriculture has 7800 pairs of eyes scrutinizing 6200 slaughterhouses and food

220. *See Debate in the House on Motion to Override Governor's Veto of H.B. 405*, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015) (statement of N.C. Rep. John Szoka, Sponsor, June 3, 2015) (asserting that *law enforcement* and *government agencies*, as opposed to activist groups or the media, are the "proper authorities" to whom allegations of employer wrongdoing ought to be disclosed); *see also* Dan Flynn, *'Ag-Gag' Battle Moves On to North Carolina*, FOOD SAFETY NEWS (May 29, 2013), www.foodsafetynews.com/2013/05/ag-gag-battle-moves-on-to-north-carolina/ (describing industry's position that law enforcement is the "proper authority" to investigate such allegations).

221. Governor's Veto Message, H.B. 405, 2015 Leg., Reg. Sess. (N.C. 2015) (May 29, 2015), http://ncleg.net/Sessions/2015/h405Veto/letter.pdf (claiming reporting illegal activity to law enforcement is the proper alternative to "unethical" undercover investigations).

222. Flynn, *supra* note 220 ("[L]aw enforcement officials are in the *best position* to make sure the abuse, theft or other illegal activity is ended in a timely manner . . . .") (emphasis added).

223. *See generally infra* notes 226–231 and accompanying text.

224. *See generally infra* notes 233–247 and accompanying text.

225. *See, e.g.*, Ted Genoways, *"Hurt That Bitch": What Undercover Investigators Saw Inside a Factory Farm*, MOTHER JONES (Oct. 16, 2014, 5:10 AM), www.motherjones.com/environment/2014/10/hog-hell-inside-story-peta-investigation-mowmar-farms?page=2 (describing conduct by MowMar Farm workers Alan Rettig and Richard Ralston, which included hitting, kicking, and anally penetrating sows with gate rods and herding canes); Michael J. Crumb, *Four in Iowa sentenced to probation for abusing pigs*, TIMES-REPUBLICAN (June 28, 2009), www.timesrepublican.com/page/content.detail/id/517629/Four-in-Iowa-sentenced-to-probation-for-abusing-pigs.html (reporting that Ralston and Rettig were each sentenced to two years' probation with no jail time).

226. Victoria Kim, *Questions Raised on Meat Safety*, L.A. TIMES (Feb. 7, 2008), http://articles.latimes.com/2008/feb/07/local/me-usda7.

227. *Id.*

processors across the nation. But in the end, it took an undercover operation by an animal rights group to reveal that beef from ill and abused cattle had entered the human food supply."[228]

As it turns out, this is terribly common, at least among USDA inspectors. Former undercover investigator TJ Tumasse recalls frequently seeing USDA inspectors sitting around on their cell phones, flirting with female workers, texting friends, and not watching for contaminated carcasses or abusive handling practices at all.[229] "They didn't want to be there, and it showed."[230] Dean Cliver, a food safety expert who had previously served in advisory roles at both the FDA and USDA, likewise lamented, "USDA has to read about this stuff in the newspaper before they take action."[231]

Inaction by authorities is not limited to regulatory agencies. Prosecutors have also repeatedly failed to bring charges when presented with evidence of animal abuse.[232] A 2015 investigation of a Minnesota hog farm revealed graphic mistreatment of piglets that the facility's own manager called "disturbing."[233] The video showed sows bleeding from open sores, lame from swollen legs, and suffering from other injuries, including untreated prolapses and protruding organs.[234] It also showed one worker repeatedly jabbing a lame sow with a pen in an attempt to get her to move, leaving wounds on her back.[235] The group Last Chance for Animals, which coordinated the investigation, said it had "recorded numerous instances of sick and severely injured sows being left to suffer for weeks."[236] Despite this inculpatory footage, the county prosecutor declared he would not file animal cruelty charges against the workers since the methods used at the facility were "within industry standards."[237]

---

228. *Id.*

229. Interview with TJ Tumasse, *supra* note 31.

230. *Id.*

231. Kim, *supra* note 226. Cliver continued, "We rely on a system, and the system dropped the ball." *Id.*

232. *See generally infra* notes 233–249 and accompanying text (describing numerous examples in which prosecutors declined to bring charges despite unequivocal evidence of animal abuse and torture).

233. Steve Karnowski, *Minnesota Prosecutor Won't Charge Hog Farm Workers in Undercover Video*, ST. PAUL PIONEER PRESS (Oct. 10, 2015, 9:12 AM), www.twincities.com/crime/ci_28947366/prosecutor-wont-charge-minnesota-hog-farm-workers.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* The prosecutor further justified his office's inaction by criticizing the videos as "highly edited and filtered to enhance [LCA's] position . . ." *Id.* However, when LCA offered to turn over "full unedited copies of its original recordings," the prosecutor still showed no interest. *Id.* Adam Wilson, LCA's director of investigations, called the decision not to prosecute "a political one"—that the local prosecutor did not want "to go after a very large corporate farming operation that's a Minnesota company." *Id.*

Prosecutors' obsession with "industry standards" has been a repeating theme. After the animal-rights group Mercy For Animals (MFA) conducted an investigation of West Coast Farms—an Oklahoma business that supplies pork products to Tyson Foods—assistant district attorney for Okfuskee County said she "wanted to learn more about industry standards" before deciding whether criminal charges were warranted.[238] MFA's footage captured workers hitting, kicking, throwing, and striking animals, "sticking fingers in their eyes, and leaving piglets to die slowly after they were slammed into the ground 'in failed euthanasia attempts.'"[239] The workers were never charged.[240]

A year later, another Mercy For Animals investigation landed on the desk of yet another unenthusiastic prosecutor, this time in Shawano County, Wisconsin.[241] The target of the investigation was Andrus Dairy.[242] After gaining employment at Andrus as a farmhand, the undercover investigator documented his coworkers violently kicking and punching cows, even violently swinging and hitting one animal with a metal rod.[243] The video shows workers "drag a cow across a barn with a four-wheeler."[244] At the conclusion of its investigation, Mercy For Animals turned the video over to authorities.[245] After reviewing the footage, the Dairy State prosecutor for Shawano County "said that nothing in the video warrants criminal charges."[246]

An investigation revealing severe abuse and neglect at New York's largest dairy farm was received by state law enforcement

---

238. Anna Schecter, Monica Alba, & Lindsay Perez, *Tyson Foods Dumps Pig Farm After NBC Shows Company Video of Alleged Abuse*, NBC NEWS (Nov. 20, 2013, 6:12 AM), www.nbcnews.com/news/other/tyson-foods-dumps-pig-farm-after-nbc-shows-company-video-f2D11627571.

239. *Id.*

240. Martha Rosenberg, *Pig Cruelty in Oklahoma*, COUNTERPUNCH (Oct. 31, 2014), www.counterpunch.org/2014/10/31/pig-cruelty-in-oklahoma/.

241. Scott Falkner, *'Horrific Cruelty' to Cows Caught on Video – District Attorney Refuses to Press Charges*, INQUISITR (Nov. 13, 2014), www.inquisitr.com/1606522/horrific-cruelty-to-cows-caught-on-video-district-attorney-refuses-to-press-charges/.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*; *The State of Wisconsin*, NETSTATE (last updated July 28, 2017), www.netstate.com/states/intro/wi_intro.htm (describing the origin of Wisconsin's nickname, "The Dairy State"). An assistant district attorney for the county added, "[T]he actions of the employees caught on video do not amount to a situation where criminal charges are warranted based upon the review of state and local vets." *Local District Attorney Decides Not to Prosecute over Latest Mercy for Animals Video*, FOOD SAFETY NETWORK (Nov. 13, 2014), www.foodsafetynews.com/2014/11/local-district-attorney-decides-not-to-prosecute-over-latest-mercy-video/.

with similar apathy.[247] The footage showed cows with open sores and prolapses, animals so weak they could move only their eyes, and even an employee bragging about "stomping" animals, "braining" a cow with a two-by-four, and "cracking animals' skulls with wrenches."[248] Reacting to the footage, Assistant District Attorney Diane Adsit of the Cayuga County prosecutor's office purportedly exclaimed, "Who cares."[249]

In light of these and numerous other instances of law enforcement dragging its feet when presented with clear-cut cases of animal abuse at commercial livestock operations, proponents of ag-gag laws are left with little ground to stand on. Their claim that law enforcement and regulatory agencies are the "proper authorities" to whom whistleblowers ought to report abuse is clearly flawed. Legislators and industry lobbyists who want to limit the channels through which whistleblowers may report abuse clearly do not have the animals' best interests in mind. Their concern lies solely in protecting livestock producers from the economic backlash that inevitably occurs when consumers get a glimpse of the goings-on behind factory farm doors and take their business elsewhere.[250]

4. Civil Recovery Under Ag-Gag: Damages Dosed with Growth Hormones Bear No Resemblance to Common-Law Tradition

The North Carolina and Arkansas ag-gag laws accomplish their industry-protective goal by authorizing extensive damages against the employment-based undercover investigator who reveals wrongdoing on company premises.[251] Both states' statutes authorize courts to award compensatory damages, as well as exemplary (punitive) damages "in the amount of $5,000 for each day" that an employee acts in breach of his duty of loyalty (e.g., by surreptitiously recording their employer's illegal or unethical

247. Martha Rosenberg, *No Charges Filed Yet in Dairy Atrocity Seen on Nightline*, ALTERNET (Mar. 30, 2010), www.alternet.org/speakeasy/2010/03/30/no-charges-filed-yet-in-dairy-atrocity-seen-on-nightline.

248. *Id.*

249. *Id.*

250. *See generally supra* notes 73–84, 131 and accompanying text (describing successful results of undercover exposés).

251. N.C. GEN. STAT. § 99A-2(d) (2015); ARK. CODE ANN. § 16-118-113(e) (2017).

practices).[252] The statutes also provide for attorneys' fees and court costs.[253]

The provision of punitive damages in the North Carolina law is a significant departure from the sponsors' stated intention to codify the Fourth Circuit's decision in *Food Lion*.[254] In that case, the grocery chain sued to recover administrative costs of hiring and wages paid to the allegedly unfaithful reporters, as well as "publication damages" in compensation for its noticeable drop in retail sales and diminished stock value in the wake of ABC's broadcast. The appellate court denied Food Lion any and all compensatory damages for the reporters' conduct, awarding the company a grand total of two dollars in nominal damages for its trespass and breach of loyalty claims.[255] In doing so, the Fourth Circuit reversed the lower court's award of punitive damages as well.[256]

---

252. N.C. GEN. STAT. § 99A-2(d)(4); ARK. CODE ANN. § 16-118-113(e); *see also Hearings on H.B. 405*, *supra* note 80 (statement of N.C. Rep. Paul Stam, Vice Chairman, Apr. 21, 2015) (explaining, "Exemplary damages are really punitive damages."); RESTATEMENT (SECOND) OF TORTS § 908, cmt. a (1979) (describing purpose of awarding punitive, also known as "exemplary," damages). Even in states where breach of an employee's duty of loyalty is actionable as an independent tort, punitive damages for breach of an employee's duty of loyalty have been found appropriate only where the breach amounted to a diversion of the employer's business or other corporate opportunity (Chapes v. Pro-Pac, Inc., 473 B.R. 295 (E.D. Wis. 2012); Central Sec. & Alarm Co. v. Mehler, 121 N.M. 840, 918 P.2d 1340 (1996)), misappropriation of employer property (Abbey Med./Abbey Rents, Inc. v. Mignacca, 471 A.2d 189 (R.I. 1984)) such as proprietary consumer lists (Phoenix Fin. Corp. v. Radford, 44 Va. Cir. 445 (1998) (establishing a "willful and malicious" standard for mens rea)), or misappropriation of employer's business model, customers, and confidential or commercially sensitive documents in order to open a competing business (Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC, 813 F. Supp. 2d 489 (S.D.N.Y. 2011)). Employers suing for breach of duty of loyalty have been denied punitive damages where breach took the form of poaching other employees for a competitor (Farm Bureau Life Ins. Co. v. Am. Nat'l Ins. Co., 408 F. App'x 162 (10th Cir. 2011)) or promoting the award of a business contract to a company in direct competition with his employer (Design Strategies, Inc. v. Davis, 384 F. Supp. 2d 649 (S.D.N.Y. 2005), *aff'd sub nom.* Design Strategy, Inc. v. Davis, 469 F.3d 284 (2d Cir. 2006)).

253. N.C. GEN. STAT. § 99A-2(d)(3); ARK. CODE ANN. § 16-118-113(e)(3); *see also* Judith L. White, C*ritical Reappraisal of Punitive Damages Encompassing Attorneys' Fees: Normative Analysis and Pragmatic Concerns*, 42 BAYLOR L. REV. 737, 747 (1990) (explaining that many courts authorize the recovery of attorneys' fees and court costs for punitive purposes).

254. *See Hearings on H.B. 405*, *supra* note 80 (statement of N.C. Rep. Jonathan Jordan, Sponsor, May 14, 2015); *see also supra* notes 141, 144, and accompanying text.

255. Food Lion, Inc. v. Capital Cities/ABC, Inc. (*Food Lion II*), 194 F.3d 505, 524 (4th Cir. 1999).

256. *Id.* Even at the trial court level, the jury refused to award punitive damages against the undercover reporters; its initial multimillion-dollar award was directed against the network and its producers only. *Id.* at 511.

In light of this, it is rather peculiar that the North Carolina legislature chose to defend its bill as a mere codification of *Food Lion*.[257] Quite unlike the outcome in *Food Lion*, North Carolina's ag-gag law authorizes extensive punitive damages.[258] In this way, the North Carolina statute is more accurately characterized as a codification of the jury award in the earlier case of *Food Lion I*—which, bear in mind, the trial court subsequently remitted, and the appellate court reversed entirely.[259] As one commentator noted, the size of the initial $5.5-million punitive damage award in *Food Lion* suggests the jury "may to some degree have unconsciously factored the publication effects into the punitive damage award," even though it was supposed to exclude publication damages from the compensatory damage award.[260] Even where courts explicitly instruct juries to separate damages caused by newsgathering activities from damages caused by publication, "there is still a risk that the jury will conflate the two and award excessive compensatory or punitive damages."[261] This risk is equally prevalent in the damages provision of the current civil ag-gag statutes.[262]

Awarding publication damages against protected speech is clearly contrary to established First Amendment principles.[263] Opponents of the North Carolina ag-gag bill expressed similar concerns regarding the bill's damages provisions.[264] One North

257. *See Hearings on H.B. 405*, *supra* note 80 (statement of N.C. Rep. Jonathan Jordan, Sponsor, May 14, 2015); *see also supra* notes 141, 144, and accompanying text.

258. N.C. GEN. STAT. § 99A-2(d)(4).

259. *Food Lion II*, 194 F.3d at 524.

260. Andrew B. Sims, *Food for the Lions: Excessive Damages for Newsgathering Torts and the Limitations of Current First Amendment Doctrines*, 78 B.U. L. REV. 507, 512 (1998); *see also* Floyd Abrams, *"Food Lion" Endangers Muckrakers*, NAT'L L.J. A15 (Feb. 17, 1997) (expressing view that constitutional principles are "plainly implicated" in any punitive damages award of the magnitude observed at the trial court level in *Food Lion*, and that the 4000-to-1 ratio of punitive-to-actual damages is "facially inconsistent" with the Supreme Court's recent ruling in *BMW of North America, Inc. v. Gore*); Sims, *supra*, at 548 (explaining that, even where punitive damages are not so excessive as to offend due process under *BMW v. Gore*, "they may still be of such a magnitude as to burden First Amendment rights.").

261. Sims, *supra* note 260, at 544. Sims suggests that "jurors often circumvent common law and constitutional limitations on publication torts when they award reputational damages against the media for newsgathering torts. This can occur because newsgathering torts and publication torts may be difficult to segregate conceptually." *Id.* This phenomenon is precisely what North Carolina livestock companies and their political sympathizers are hoping for.

262. N.C. GEN. STAT. § 99A-2(d); ARK. CODE ANN. § 16-118-113(e) (2017).

263. *See* Sims, *supra* note 260, at 562 (noting First Amendment protections would be "directly undermined" if publication damages were recoverable for predicate torts).

264. *See, e.g.*, *Debate During Second Reading of H.B. 405 in the Senate*, 2015

Carolina senator opposed the legislation on the ground that it created an opportunity for employers to recover "outrageously excessive" punitive damages and attorneys' fees for relatively minor torts.[265]

As one author noted, "[T]he significant First Amendment issue regarding newsgathering torts is not that of media liability, but rather, of excessive damages."[266] To ameliorate this constitutional concern while still offering employers protection from the most self-serving forms of disloyal employee conduct,[267] that author proposed a punitive-damages theory of immunity to be applied in cases of newsgathering torts.[268] "[P]rudence dictates that such immunity be granted so as not to discourage media investigations that are designed to produce substantially truthful speech on matters of public concern."[269]

Applying this punitive-damages theory of immunity to the civil ag-gag laws of Arkansas and North Carolina would insulate undercover activists in employment-based investigations from the statutes' crippling $5000-per-day damages provision.[270] The practical effect would be to ameliorate the laws' constitutional defects and bring their causal premise more in line with both policy and logic.

C. Principles Limiting Recovery Under Ag-Gag Statutes

Multiple layers of legal doctrine insulate undercover investigators from liability for the reputational harm that befalls the targets of their exposés. First Amendment free-speech protections and the concept of proximate causation are "the

---

Gen. Assemb., Reg. Sess. (N.C. 2015) (statement of N.C. Sen. Floyd McKissick, Jr., May 18, 2015) (expressing concerns over the opportunity for excessive damages).

265. *Id.*

266. Sims, *supra* note 260, at 562.

267. *See supra* text accompanying note 252 (describing duty-of-loyalty breaches for which punitive damages were deemed appropriate, such as traditional theft or misappropriation of employer trade secrets).

268. Sims, *supra* note 260, at 560.

269. *Id.* Sims continues as follows:

> [T]he strong societal interest in investigatory journalism and its frequent production of substantially truthful publications on matters of significant public concern . . . can be accommodated by recognizing a limited and conditional First Amendment immunity for the media from punitive and excessive compensatory damages for newsgathering torts, broadly analogous to the damage limitation model created in constitutionalized defamation under the rule of *Gertz v. Robert Welch*.

Id. at 562.

270. N.C. GEN. STAT. § 99A-2(d)(4) (2015); ARK. CODE ANN. § 16-118-113(e)(4) (2017).

principal issues" relevant to limiting damages.[271] The district and appellate court decisions in *Food Lion* nicely illustrate these constitutional, logical, and policy-based principles, limiting civil recovery for both common-law and statutory causes of action.

In *Food Lion*, the district court determined that the alleged reputational harms (lost sales, loss of consumer goodwill, decreased stock value) suffered by Food Lion "were the direct result of diminished consumer confidence in the store[,]" and that "it was [Food Lion's] food handling practices themselves—not the method by which they were recorded or published—which caused the loss of consumer confidence."[272] The court therefore concluded that Food Lion's lost sales and loss of goodwill were not *proximately caused* by the undercover ABC reporters' tortious conduct (e.g., fraud and trespass).[273] The fact that those torts enabled access to nonpublic areas of the store—where the reporters could film Food Lion workers, equipment, and events from a perspective unavailable to the ordinary shopper—was irrelevant to the court's causation analysis.[274] Food Lion appealed, and the Fourth Circuit affirmed, albeit on different grounds.[275] The appellate court chose not to reach the matter of proximate cause because the issue of publication damages could be resolved by applying settled First Amendment principles.[276]

1. First Amendment

The U.S. Supreme Court has expressed a "profound national commitment" to maintaining free and open debate on matters of public concern.[277] It is devoted to the principle that "debate on public issues should be uninhibited, robust and wide-open."[278] To avoid chilling political discourse, the Court in *New York Times Co.*

---

271. Nathan Siegel, *Publication Damages in Newsgathering Cases*, 19 COMM. LAW., Summer 2001, at 11, 16.

272. Food Lion, Inc. v. Capital Cities/ABC, Inc. (*Food Lion I*), 964 F. Supp. 956, 963 (M.D.N.C. 1997), *aff'd on other grounds*, 194 F.3d 505 (4th Cir. 1999) (explaining that the reporters' filming of plaintiff's employees mishandling food did not cause or set in motion those unsanitary practices, nor were Food Lion's losses "the probable consequence" of the reporters' fraud and trespass).

273. *Id.*

274. *Id.* (holding that even if defendants foresaw, or could have foreseen, the ultimate consequences of ABC's intended broadcast, Food Lion's own unsanitary practices had "interrupted any causal connection" that otherwise existed between the reporters' trespass, thereby "render[ing] that tortious activity remote from the ultimate loss of profits and sales.").

275. Food Lion, Inc. v. Capital Cities/ABC, Inc. (*Food Lion II*), 194 F.3d 505, 522 (4th Cir. 1999).

276. *Id.*

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

278. *Id.*

v. Sullivan[279] established a heightened standard of proof in defamation cases brought by public figures.[280] In order to prevail under the *New York Times* standard, a defamation plaintiff must prove by clear and convincing evidence that the defendant's statement was made with "actual malice"—an exceedingly high burden.[281] Even where the plaintiff is not a public official, proof of actual malice is often prerequisite to the recovery of punitive damages.[282] And in any event, the plaintiff always must prove the defendant's statement was in fact *false*.[283]

Many lawsuits brought by targets of undercover exposés can be characterized as attempts to settle the score for the reputational harm they experienced in the wake of the publication.[284] These "victims" desire the vindication of a defamation lawsuit without the burden of proving falsity or malice.[285] In *Food Lion*, for instance, the plaintiff "attempted to avoid the First Amendment limitations on defamation claims by seeking publication damages under non-reputational tort claims, while holding to the normal state law proof standards for these torts."[286] This desire is understandable; the resentment that naturally follows from the realization that one has been duped tends to instill an insatiable urge for a reckoning.[287]

Yet the approach attempted by Food Lion is strictly disallowed by the Supreme Court's ruling in *Hustler Magazine v. Falwell*.[288] *Hustler* confirms that a plaintiff seeking damages for speech covered by the First Amendment must satisfy the proof standard of *New York Times Co. v. Sullivan*.[289] Notwithstanding the nature of the defendant's underlying act (i.e., tortious or not), the *Hustler*

279. *Id.*

280. *Id.* at 270, 279–80, 285–86.

281. *Id.*; Chen & Marceau, *supra* note 18, at 1449. "Actual malice" is characterized by a defendant's knowledge of the statement's falsity, or at least his reckless disregard for its accuracy. *Id.*

282. *See, e.g.*, Stewart v. Nation-Wide Check Corp., 182 S.E.2d 410, 416 (N.C. 1971) (denying plaintiff's request for punitive damages without proof of actual malice).

283. Renwick v. News & Observer Pub. Co., 312 S.E.2d 405, 410 (N.C. 1984); *see also* Griffin v. Holden, 636 S.E.2d 298, 302 (N.C. Ct. App. 2006) (explaining that *plaintiff* has the burden of proving the defendant's statements about her are false).

284. Sims, *supra* note 260, at 521. *See also* Food Lion, Inc. v. Capital Cities/ABC, Inc. (*Food Lion II*), 194 F.3d 505, 511 (4th Cir. 1999). As in *Food Lion*, such lawsuits commonly sound in contract or tort rather than defamation, because the truth of the broadcast is often not at issue. *Id.*

285. *Food Lion II*, 194 F.3d at 522.

286. *Id.*

287. *See* Sims, *supra* note 260, at 521 (characterizing lawsuits for newsgathering torts as an effort by the plaintiff to "settle accounts" for damage to its reputation).

288. *See Food Lion II*, 194 F.3d at 522 (citing Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988)).

289. *Id.*

Court held that satisfying *New York Times v. Sullivan* is "a prerequisite to the recovery of publication damages."[290] For this reason, the Fourth Circuit in *Food Lion* denied the plaintiff's request for publication damages, rebuffing its attempt to bypass the high *New York Times* actual-malice standard.[291]

Permitting recovery of publication damages for newsgathering torts such as fraud or trespass has been criticized by some scholars as a "target-protective viewpoint."[292] By referring reputational damages back to the underlying non-reputational torts, a court or jury unconstitutionally inflates compensatory damages and/or punitive damages, thus chilling protected speech.[293] It is precisely for this reason that First Amendment scholars have advocated for a punitive-damages immunity theory insulating plaintiffs from this target-protective approach to damage assessment.[294]

> Substantially truthful speech of public concern—the usual end-product of media undercover investigations—should not have to seek protection in the theoretical back-waters of doctrines specifically designed to protect defamatory speech. It would be more effective, logical, and jurisprudentially sound for speech that is both substantially truthful and of public concern to find shelter under the high-tier protection afforded by the [First Amendment].[295]

In line with this reasoning, free-speech protections may operate alongside policy considerations to shield the employment-based undercover investigator from damages for breaching her duty of loyalty to the target employer.[296] The First Amendment principles set forth in *Pickering* support the view that "traditional

---

290. *Id.* at 522 (citing *Hustler*, 485 U.S. at 56). The Supreme Court called this result "necessary" in order to give protected expression adequate breathing room. *Id.* at 524.

291. *Id.* at 522.

292. *See* Sims, *supra* note 260, at 516, 522 (describing this target-protective approach and the seminal case implementing it, Dietemann v. Time, Inc., 449 F.2d 245, 250 (9th Cir. 1971)); Chen & Marceau, *supra* note 18, at 1502 n.353 (explaining that the target-protective approach in *Dietemann* has been "rightly and roundly criticized" in the forty years since it came down); Jacqueline A. Egr, *Closing the Back Door on Damages: Extending the Actual Malice Standard to Publication-Related Damages Resulting from Newsgathering Torts*, 49 U. KAN. L. REV. 693, 712–13 (2001) (claiming the *Dietemann* court erred by relying solely on the common law without considering First Amendment principles); Nathan Siegel, *Publication Damages in Newsgathering Cases*, 19 COMM. LAW., Summer 2001, at 11, 16 (explaining that *Dietemann* was decided without considering proximate causation and before much of the First Amendment jurisprudence on publication damages was developed).

293. Sims, *supra* note 260, at 522.

294. *Id.* at 557.

295. *Id.*

296. *Id.* at 559 (arguing that the First Amendment requires publication-based claims to be treated as separate from newsgathering-based claims in order to avoid the effect of inflated compensatory and punitive damages that arise from the target-protective, conflated approach).

concepts as to loyalty and obedience may have to yield to permit employees to fulfill their role as citizens" and allow them to participate in public discourse on matters of widespread concern.[297] As Blumberg himself admitted, "Participation in public controversy involving the employer through the exercise of free speech presents the most appealing case for extension of employee rights" beyond the shackles of a generic duty of loyalty.[298]

Dissemination of truthful information is especially protected when related to matters of public concern; the public's interest in "free and unhindered debate on matters of public importance" is a core value of the First Amendment.[299] Indeed, "state action to punish the publication of truthful information seldom can satisfy constitutional standards."[300] But proponents of ag-gag legislation are attempting to do just that, claiming privacy and property rights trump free speech on matters of public concern.[301] This claim is baseless. When balanced against the interest in disclosing matters of public importance, privacy concerns have repeatedly given way.[302] "The right of privacy does not prohibit any publication of [a] matter which is of public or general interest."[303] As the Supreme Court noted in *Bartnicki*, "One of the costs associated with participation in public affairs is an attendant loss of privacy."[304] Inarguably, a business offering goods or services to the public has chosen to participate in "public affairs" and must accept the attendant scrutiny as a cost of doing business.

297. Blumberg, *supra* note 149, at 303 (citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968)).

298. *Id.* at 311. But does permitting an employee this leeway allow her to engage in "economic warfare" against her employer under the pretext of free speech? *Id.*

299. Pickering v. Bd. of Educ., 391 U.S. 563, 573 (1968); *see also* Time, Inc. v. Hill, 385 U.S. 374, 401 (1967) (Douglas, J., concurring) (explaining "state action to abridge freedom of the press is barred by the First and Fourteenth Amendments where the discussion concerns matters in the public domain.").

300. Smith v. Daily Mail Publishing Co., 443 U.S. 97, 102 (1979).

301. Animal Legal Defense Fund v. Herbert, 263 F. Supp. 3d 1193, 1208 (D. Utah 2017); Animal Legal Defense Fund v. Otter, 118 F. Supp. 3d 1195, 1202 (D. Idaho 2015), *aff'd in part, rev'd in part sub nom.* Animal Legal Def. Fund v. Wasden, No. 15-35960, 2018 WL 280905 (9th Cir. Jan. 4, 2018); *Hearings on H.B. 405*, *supra* note 80 (statement of N.C. Rep. Chuck McGrady, Sponsor, Apr. 21, 2015) (claiming, "Truthful information doesn't trump property rights. I mean that's a constitutional piece.").

302. *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 534 (2001).

303. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890).

304. *Bartnicki*, 532 U.S. at 534.

a. The First Constitutional Blow to Ag-Gag: *Animal Legal Defense Fund v. Otter*

In August 2015, a decision came down in the U.S. District Court for the District of Idaho marking the first successful constitutional challenge to a state's ag-gag law.[305] The court in *Animal Legal Defense Fund v. Otter*[306] struck down the ag-gag provisions of an Idaho statute on the ground that those provisions violated the First Amendment right to free speech.[307] Under the Idaho law, an employee could be convicted for recording animal abuse or worker safety violations at an agricultural facility "without first obtaining the owner's permission."[308]

This notion of unconsented recording is at the heart of the North Carolina and Arkansas ag-gag statutes as well.[309] The problem with requiring consent, as North Carolina ag-gag adversary Senator Stein recognized, is that no employer would ever consent to an employee's request to film his company's unethical or illegal practices.[310] "I assure you," Senator Stein remarked, "that under no person's contract of employment does it say you're authorized to film violations of law. So, by definition, if you do these things, you have exceeded your authority and you're in violation of [this bill]."[311]

---

305. *Otter*, 118 F. Supp. 3d 1195. In July 2017, the ag-gag regime was dealt a second blow with the publishing of the *Herbert* decision. *Herbert*, 263 F. Supp. 3d 1193. In that ruling, the U.S. District Court for the District of Utah struck down that state's ag-gag statute on similar grounds. *Id.*

306. *Otter*, 118 F. Supp. 3d at 1202.

307. The district court struck down the challenged portions of the statute in their entirety. *Id.* at 1212 (granting plaintiffs' motion for summary judgment on all claims). On appeal, the 9th Circuit affirmed in part and reversed in part, upholding the district court's determinations with regard to audiovisual recording and entrance by misrepresentation, but finding the statute's prohibitions on lying to obtain records or employment to be constitutionally permissible. Animal Legal Defense Fund v. Wasden, No. 15-35960, 2018 WL 280905 (9th Cir. Jan. 4, 2018). The appellate court's affirmance on the issue of unconsented recording is particularly damning for North Carolina's and Arkansas's ag-gag legislation, since those states rely exclusively on recording prohibitions to effectuate their anti-whistleblower purpose. N.C. GEN. STAT. §99A-2(b)(2)(2015); ARK. CODE ANN. § 16-118-113(c) (2017); *Wasden*, 2018 WL 280905, at *15 ("Idaho is singling out for suppression one mode of speech—audio and video recordings of agricultural operations—to keep controversy and suspect practices out of the public eye.").

308. *Otter*, 118 F. Supp. 3d at 1201.

309. N.C. GEN. STAT. § 99A-2(b)(2) (2015); ARK. CODE ANN. § 16-118-113(c)(2) (2017).

310. *Debate During Second Reading of H.B. 405 in the Senate*, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015) (statement of N.C. Sen. Josh Stein, May 18, 2015).

311. *Id.*

Moreover, covert photography and video recording is "a common form of politically salient speech."[312] Members of the North Carolina General Assembly who opposed the state's ag-gag bill expressed a similar view.[313] During debate on H.B. 405, North Carolina Representative Michaux urged a 'nay' vote on the basis that investigative reporting has been an important mechanism for keeping North Carolina businesses in check and preventing companies from "prey[ing] on the public."[314] He called the work of investigative reporters "necessary" in order to provide the public with crucial knowledge.[315] Nevertheless, his plea was drowned out by the bill sponsors' rhetoric surrounding the need to "safeguard business property" and protect against "internal data breaches" by "bad actors who seek employment with the intent to engage in corporate espionage or act as an undercover investigator."[316]

These claims are familiar. The State of Idaho defended its ag-gag law by claiming it was "not designed to suppress speech critical of certain agricultural operations but instead [was] intended to *protect private property and the privacy of agricultural facility owners*."[317] Yet U.S. District Court Judge Winmill rejected this proffered justification, noting, "[A]n agricultural facility's operations that affect food and worker safety are not exclusively a private matter. Food and worker safety are matters of public concern."[318] Judge Winmill further noted that laws against trespass, theft, defamation, and fraud already exist—laws that

312. *Otter*, 118 F. Supp. 3d at 1201; Animal Legal Defense Fund v. Herbert, 263 F. Supp. 3d 1193, 1208 (D. Utah 2017) (holding, "[T]he act of recording is protectable First Amendment speech.").

313. *Debate on Motion to Override Governor's Veto of H.B. 405 in the House*, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015) (statement of N.C. Rep. Henry Michaux, Jr., June 3, 2015).

314. *Id.*

315. *Id.*

316. *Hearings on H.B. 405*, *supra* note 80 (statement of N.C. Rep. John Szoka, Sponsor, Apr. 21, 2015); *Debate on Motion to Override Governor's Veto of H.B. 405 in the House*, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015) (statement of N.C. Rep. John Szoka, Sponsor, June 3, 2015).

317. *Otter*, 118 F. Supp. 3d at 1202 (emphasis added); *cf. Herbert*, 263 F. Supp. 3d at 1211 (noting that while "portions of the State[of Utah]'s briefing refer loosely to privacy and property interests, . . . at oral argument the State explicitly disclaimed reliance on privacy or property interests" for purposes of establishing a compelling government interest).

318. *Otter*, 118 F. Supp. 3d at 1202; *cf.* Animal Legal Defense Fund v. Wasden, No. 15-35960, 2018 WL 280905, at *11, *13 (9th Cir. Jan. 4, 2018) (noting government has a legitimate interest in protecting against harm to an agricultural production facility's *sensitive and confidential information* but not protecting against the nominal harm inflicted by entry through misrepresentation; in other words, unlike the district court, the court of appeals drew a distinction between the privacy and property interests imbued in a company's commercially sensitive documents versus its physical premises).

"serve the property and privacy interests the State professes to protect . . . but without infringing on free speech rights."[319]

b. Content-Based and Viewpoint-Based Speech Restrictions

In striking down Idaho's recording prohibition as unconstitutional, Judge Winmill noted, "[T]he act of audiovisual recording is a purely expressive activity 'entitled to full First Amendment Protection.'"[320] Constitutional protection is at its highest when laws limiting such expressive activity attempt do so on the basis of *content*.[321] To determine whether a law is content-based or content-neutral, courts look to the purpose or motive behind the law.[322] Government regulation of expressive activity is typically content-neutral if it is "justified without reference to the content of the regulated speech."[323] With respect to the Idaho ag-gag statute, its purpose as revealed in the legislative history was "striking."[324] Likewise in Utah, whose ag-gag law was struck down in 2017, the court in that case found the sponsors' true purpose for the legislation to be crystal clear (despite the state's desperate attempt to proffer *ex post facto* rationales in litigation).[325]

---

319. *Otter*, 118 F. Supp. 3d at 1202; *accord. Wasden*, 2018 WL 280905, at *15 (affirming *Otter* in holding statute's recording prohibition is "not narrowly tailored" to achieve its purported purpose of protecting property and privacy rights, since "agricultural production facility owners can vindicate their rights through tort laws against theft of trade secrets and invasion of privacy"—laws which burden "little or no speech.").

320. *Otter*, 118 F. Supp. 3d at 1205 (citing Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061–62 (9th Cir. 2010); *accord. Wasden*, 2018 WL 280905, at *13 (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) ("Audiovisual recordings are protected by the First Amendment as recognized 'organ[s] of public opinion' and as a 'significant medium for the communication of ideas.'"). Moreover, the district and appellate courts acknowledged the particular *political* importance of this type of expressive activity: "Audio and visual evidence is a uniquely persuasive means of conveying a message, and it can vindicate an undercover investigator or whistleblower who is otherwise disbelieved or ignored." *Otter*, 118 F. Supp. 3d at 1202, *aff'd in relevant part sub nom. Wasden*, 2018 WL 280905, at *13; *cf. Debate on Motion to Override Governor's Veto of H.B. 405 in the House*, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015) (statement of N.C. Rep. Grier Martin, June 3, 2015) (urging other members of the North Carolina House to vote 'no' on the ag-gag bill, citing concerns about denying whistleblowers the opportunity to document evidence corroborating their oral testimony).

321. Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 680 (1994).

322. Bartnicki v. Vopper, 532 U.S. 514, 526 (2001).

323. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *Turner Broadcasting System*, 512 U.S. at 642–43 ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.").

324. *Animal Law Podcast #3*, *supra* note 119 (interviewing animal attorney and constitutional law scholar Justin Marceau).

325. Animal Legal Defense Fund v. Herbert, 263 F. Supp. 3d 1193, 1211–13

To be sure, the legislative histories for Idaho's and Utah's laws are rife with "smoking gun" statements by the bills' sponsors.[326] These candid statements included one by an Idaho legislator who explained the need to stop animal-rights activists from releasing the undercover footage to the Internet and calling for boycotts.[327] The president the Idaho Dairymen even went on record explaining that dairy farmers needed the law in order to keep animal activists from "stand[ing] up on a soapbox"—*the soapbox being the classic metaphor for political speech*.[328] This explicit legislative history made it very hard for the state to defend the law by claiming it had nothing to do with speech.[329] Similarly, in Utah's legislative chambers, sponsors of that state's ag-gag law boldly proclaimed the need to prevent "vegetarian people" from "hiding cameras" in their effort "to kill the animal industry."[330]

As a result, the cases against Idaho and Utah were relatively easy ones.[331] The tougher cases will be against ag-gag laws enacted in silence, without treasure troves of legislative history betraying legislators' unconstitutional motives.[332] Nevertheless, while ag-gag proponents may have gotten a little wiser in the wake of the Idaho and Utah district court decisions, even the cautiously mum legislature bespeaks a content-based motive when viewed in the context of previous efforts.[333]

As further evidence of the state's content-based motive in Idaho, the district court in *Otter* pointed to the Idaho legislature's decision to include a *restitution provision* in its statute.[334] This

---

(D. Utah 2017).

326. Chen & Marceau, *supra* note 18, at 1470–71 (discussing legislative history of Idaho ag-gag law); *Herbert*, 263 F. Supp. 3d at 1212 (noting legislative history of Utah ag-gag law was "rife with discussion" of sponsors' intent to prevent "vegetarian people" from putting Utah meat producers out of business).

327. Chen & Marceau, *supra* note 18, at 1470–71.

328. *Id.* at 1470; *Animal Law Podcast #3*, *supra* note 119 (interviewing constitutional law scholar Justin Marceau).

329. *Animal Law Podcast #3*, *supra* note 119.

330. *Herbert*, 263 F. Supp. 3d at 1198.

331. *Animal Law Podcast #3*, *supra* note 119 (calling the legislative history a "treasure trove" for the plaintiffs challenging the law as content-based).

332. *Id.*

333. *Id.*

334. Animal Legal Defense Fund v. Otter, 118 F. Supp. 3d 1195, 1206 (D. Idaho 2015), *aff'd in part, rev'd in part sub nom.* Animal Legal Def. Fund v. Wasden, No. 15-35960, 2018 WL 280905 (9th Cir. Jan. 4, 2018). Judge Winmill explained:

> [T]he only loss that a victim is likely to suffer from any misrepresentation or unauthorized image captured at a facility is the loss of profits generated by public outcry from the conduct depicted in an unfavorable video. The imposition of such a harsh penalty for speech critical of an agricultural production facility evinces an intent to suppress such speech.

provision created a civil remedy for the aggrieved agricultural facility owner.[335] The North Carolina and Arkansas statutes, creating civil causes of action against disloyal employees who surreptitiously record, are analogous to the restitution provision of Idaho's ag-gag statute and, as such, further evince a content-based motive behind these civil ag-gag laws.[336]

Content-based restrictions on speech face a "strict scrutiny" standard of juridical review.[337] To pass this highest standard, the law must serve a "compelling state interest" and be "narrowly tailored" to that interest.[338] The purposes underlying Idaho's and Utah's ag-gag statutes did not serve a compelling government interest, "because compelling interests need to serve the *public* good."[339] Ag-gag laws merely protect private industry from public scrutiny, an interest that is far from "compelling" under the constitutional standard.[340]

Having established that Idaho's and Utah's prohibitions on unauthorized recording regulated *content-based* speech, the district court judges in both cases next considered whether the law passed

---

Id. On appeal, however, the 9th Circuit chose to interpret the statute's civil-damages provision more narrowly, noting that *Hustler Magazine, Inc. v. Falwell* prohibits recovery for such reputational or publication damages. *Wasden*, 2018 WL 280905, at *12 (citing 485 U.S. 46, 52 (1988)). The appellate court explained only restitution for "economic loss" is allowed and reasoned "reputational damages would not be considered an 'economic loss'" since "Idaho case law defines 'economic loss' as 'tangible out-of-pocket loss'" and "excludes 'less tangible damage' such as emotional distress." *Id.* (quoting State v. Straub, 153 Idaho 882, 888 (2013)). Yet the appeals court seemingly fails to recognize that a producer who experiences "reputational harm" might try to quantify it as "economic loss" (e.g., ensuing lost sales, discontinued contracts, PR damage control, litigation costs, etc.); *see, e.g.*, Food Lion, Inc. v. Capital Cities/ABC, Inc. (*Food Lion I*), 964 F. Supp. 956, 962 (M.D.N.C. 1997), *aff'd on other grounds*, 194 F.3d 505 (4th Cir. 1999) (describing plaintiff's attempt to characterize the lost profits, lost sales, and other losses it experienced in the wake of an undercover exposé as "publication damages"); Gilles, *supra* note 132 (defining "publication damages" to include financial losses such as lost profits, diminished stock value, etc.). Thus, a court faced with such claims may find Judge Winmill's analysis more instructive, though the 9th Circuit's take on the Idaho statute leads to the same conclusion: Restitution for such losses is simply not allowed.

335. *Otter*, 118 F. Supp. 3d at 1206; IDAHO CODE § 18-7042(4) (2014) (mandating restitution "in an amount equal to twice the value of the damage resulting from the violation").

336. *Otter*, 118 F. Supp. 3d at 1206 (explaining, "if a *favorable* video of an agricultural facility's operations is published, a 'victim' under the statute will not incur any losses," and therefore will have no claim against the employee for unconsented recording); *but see supra* note 334 and accompanying text (describing 9th Circuit's narrower reading of restitution provision and its disagreement with *Otter* court on that basis).

337. Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 680 (1994).

338. *Id.*

339. *Animal Law Podcast #3*, *supra* note 119 (quoting Justin Marceau).

340. *Otter*, 118 F. Supp. 3d at 1207.

strict scrutiny.[341] To pass this test, "[t]here must be some pressing *public* necessity, some essential value that has to be preserved; and even then the law must restrict as little speech as possible to serve the goal."[342] The State of Idaho claimed an interest in protecting the privacy and property of agricultural facilities, but the federal district court held the statute was "not narrowly drawn to serve those interests," even if they *were* "compelling" in the First Amendment sense (a position the court likewise rejected).[343] Compare this holding with the assertion of North Carolina ag-gag sponsor Representative McGrady: "[T]ruthful information doesn't trump property rights."[344] A federal judge has stated exactly the contrary, calling a state's interest in protecting private property an "important" one but "not compelling" in the First Amendment sense.[345]

Moreover, like Idaho, North Carolina and Arkansas already have ample civil and criminal laws to protect the interests of their businesses without impinging on free-speech rights.[346] The federal district court in *Otter* took this as a nefarious sign.[347] Its reasoning similarly undermines the stated intent of the civil ag-gag laws:

> It is already illegal to steal documents or to trespass on private property. In addition, laws against fraud and defamation already exist to protect against false statements made to injure or malign [a business]. Because the State has "various other laws at its disposal that would allow it to achieve its stated interests while burdening little or no speech," it has not shown any need to have a special statute . . . . [T]he State fails to explain why already existing laws against trespass, conversion, and fraud do not already serve [the

341. *Id.*; Animal Legal Defense Fund v. Herbert, 263 F. Supp. 3d 1193, 1211–13 (D. Utah 2017).

342. *Otter*, 118 F. Supp. 3d at 1207 (citing *Turner Broadcasting System*, 512 U.S. at 680) (emphasis in original). *See also* Chen & Marceau, *supra* note 18, at 1498 (describing state interest in protecting businesses' proprietary information). "[T]he state has a legitimate interest in helping businesses protect trade secrets and other proprietary information that allows them to fairly compete in the economic marketplace." *Id.* But conduct designed to expose or misappropriate a company's trade secrets is "clearly covered by more specific available legal remedies," and therefore the government's interest in restricting such conduct is already satisfied by alternatives less restrictive than laws that ban undercover investigations outright. *Id.*

343. *Otter*, 118 F. Supp. 3d at 1208.

344. *Hearings on H.B. 405*, *supra* note 80 (statement of N.C. Rep. Chuck McGrady, Sponsor, Apr. 21, 2015).

345. *Otter*, 118 F. Supp. 3d at 1207 (rejecting the State's attempt to ensure the property interests of agricultural production facilities supersede all other interests). "Given the public's interest in the safety of the food supply, worker safety, and the humane treatment of animals, it would contravene strong First Amendment values to say the State has a compelling interest in affording these heavily regulated facilities extra production from public scrutiny." *Id.*

346. *Id.* at 1208.

347. *Id.* at 1210.

> purpose of protecting private property]. The existence of these laws "necessarily casts considerable doubt upon the proposition that [the statute] could have rationally been intended to prevent those very same abuses."[348]

Admittedly, the North Carolina and Arkansas statutes, since they apply to *all* businesses, not just agriculture, may be appropriate with respect to a limited category of businesses that do not have a direct effect on public health or safety.[349] But even with their wide breadth, these statutes are still clearly content-based.[350] It shows how far legislators will go to protect the ag industry; lawmakers in these states drew in these other industries just to make it look like their laws were not content-based.[351] No judge should let him- or herself be fooled by this thinly veiled attempt to avoid strict-scrutiny review.

At bottom, undercover investigations "advance core First Amendment values by exposing misconduct to the public eye and facilitating dialogue on issues of considerable public interest."[352] Damages resulting from this type of "politically salient speech" are insulated from recovery by First Amendment protections.[353] In addition to these constitutional protections, public policy considerations and principles of logic also operate to limit damage awards for tortious newsgathering activity.

2. Proximate Causation

In order to recover monetary damages for its loss, the plaintiff in a civil action must show a proximate connection between the defendant's conduct and the plaintiff's harm."[354] Black's Law

---

348. *Id.* at 1208, 1210 (quoting Comite de Jornaleros v. City of Redondo Beach, 657 F.3d 936, 949 (9th Cir. 2011) (en banc) and U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 536–37 (1973)); *see also* Chen & Marceau, *supra* note 18, at 1485. "[M]ost lies that result in the exposure of unsavory or illegal industry practices but do not compromise intellectual property or trade secrets will be protected insofar as they are not made with the intent or reckless disregard of the risk of exposing trade secrets or similarly protectable interests." *Id.* Upton Sinclair, for instance, "may have gained access to things that the slaughterhouse owner wished he had not seen, but he did not expose (nor did he intend or care to expose) any properly protected intellectual property." *Id.* at 1485–86.

349. Then again, *any* business that caters to a public audience ought to have reduced privacy rights. *See supra* note 304 (explaining the cost of participation in public affairs is a diminished expectation of privacy).

350. *Animal Law Podcast #3*, *supra* note 119.

351. *Id.*

352. Animal Legal Defense Fund v. Otter, 118 F. Supp. 3d 1195, 1204 (D. Idaho 2015), *aff'd in part, rev'd in part sub nom.* Animal Legal Def. Fund v. Wasden, No. 15-35960, 2018 WL 280905 (9th Cir. Jan. 4, 2018).

353. *Id.*; Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988).

354. Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 830 (2009).

Dictionary defines *proximate cause* as "[a] cause that is *legally sufficient* to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor."[355] Proximate cause is an elastic concept designed to achieve justice on a case-by-case basis.[356] At its core, proximate cause serves a liability-limiting function inextricably linked to both logic and policy, operating to shield investigators from liability for truth-disseminating conduct.[357]

In the context of an undercover investigation, allowing recovery of damages for reputational harm against an investigator is best characterized as forcing the causal train to jump its tracks. Recognizing this, the district court in *Food Lion* disallowed compensatory damages for the lost profits and diminished consumer confidence Food Lion experienced in the wake of ABC's exposé, reasoning that such damages were not the *proximate* result of the defendants' tortious acts.[358] Proximate causation is a slippery, abstract concept, and courts routinely struggle with how to apply it in tort actions of all sorts (though it is most often discussed in the context of negligence).[359]

In spite of its difficulties, proximate cause nevertheless performs an important line-drawing function in the assignment of liability.[360] As the U.S. Supreme Court has explained, "The term 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability."[361] In other words, we must draw the line somewhere, beyond which it would simply be unfair or irrational to impose liability. Thus, both *policy* and *logic* play a role in this liability-limiting analysis.

In determining whether a defendant's conduct amounts to the proximate cause of a plaintiff's injury, courts taking a policy-based

---

355. *Cause*, BLACK'S LAW DICTIONARY (10th ed. 2014).

356. Andrew L. Merritt, *A Consistent Model of Loss Causation in Securities Fraud Litigation: Suiting the Remedy to the Wrong*, 66 TEX. L. REV. 469, 495 (1988).

357. *See, e.g.*, Sperino, *supra* note 359, at 1202 (explaining "proximate cause inherently relates to policy" in that it serves a politically motivated "liability-limiting" function).

358. Food Lion, Inc. v. Capital Cities/ABC, Inc. (*Food Lion I*), 964 F. Supp. 956, 962–63 (M.D.N.C. 1997), *aff'd on other grounds*, 194 F.3d 505 (4th Cir. 1999).

359. *See* Sandra F. Sperino, *Statutory Proximate Cause*, 88 NOTRE DAME L. REV. 1199, 1200, 1206 (2013) (styling proximate causation "a notoriously flexible and theoretically inconsistent concept" applied primarily to determine liability for negligent acts); *cf.* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1390 (U.S. 2014) ("The proximate-cause inquiry is not easy to define, and over the years it has taken various forms; but courts have a great deal of experience applying it, and there is a wealth of precedent for them to draw upon in doing so.").

360. CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2637 (U.S. 2011).

361. *Id.*

approach apply principles of fairness and justice to determine the extent of a defendant's liability.[362] Some scholars have commented that such an approach "is not about causation at all but rather involves an analysis of the policy considerations affecting the scope of the defendant's legal responsibility for the plaintiff's injury."[363] In this way, proximate causation provides a mechanism for implementing public policy judgments in which the wrongfulness of a defendant's conduct is weighed against the severity of the plaintiff's harm to determine whether society should provide judicial redress.[364] Wrongfulness is measured in part by looking at the defendant's purpose behind his illegal act (i.e., whether conducted in pursuit of commercial profit versus pursuit of the public interest).[365] Based on these factors, legal responsibility is limited "upon the basis of some social idea of justice or policy."[366]

Other jurists have espoused a more linear/analytical approach to proximate causation.[367] Considerations include whether there is "some direct relation between the injury asserted and the injurious conduct alleged," or whether the injuries are "too remote, purely contingent, or indirect."[368] Along these same lines, whether a cause is considered "proximate" may be analyzed in terms of its *relevancy* to the particular harm: "[T]he plaintiff must 'show that the element that makes the conduct wrongful or creates the undue risk was *relevant* to the harmful outcome for which the law provides a remedy.'"[369] The Restatement (Third) of Torts incorporates this

362. *See* Johnson v. Greer, 477 F.2d 101, 106 (5th Cir. 1973) (analyzing proximate cause in terms of "whether the principles of logic, fairness, and justice dictate the defendant should be held liable in a given situation").

363. Fisch, *supra* note 354, at 831 n.119 (2009); Palsgraf v. Long Island R.R., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) (distinguishing between "logic" and "practical politics" in resolving questions of proximate cause).

364. Jarchow v. Transamerica Title Ins. Co., 122 Cal. Rptr. 470, 482 (Cal. Ct. App. 1975); Sperino, *supra* note 359, at 1204 n.18 (adding as a factor "the concern that the extent of liability *not be wholly out of proportion* to the degree of wrongfulness"); *see also* Caputzal v. Lindsay Co., 222 A.2d 513, 517 (N.J. 1966) (basing proximate cause determination on "mixed considerations of logic, common sense, justice, policy and precedent").

365. Sperino, *supra* note 359, at 1204, n.18.

366. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, 264 (5th ed. 1984) (emphasis added).

367. CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2645–46 (U.S. 2011) (Roberts, C.J., dissenting); Sperino, *supra* note 359, at 1203–04 (citing Chief Justice Roberts's dissent in *CSX Transp.* to illustrate this logic-based approach).

368. *CSX Transp.*, 131 S. Ct. at 2645–46 (Roberts, C.J., dissenting) (quoting Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 838 (1996)); *accord.* Sperino, *supra* note 359, at 1204–05; *see, e.g.*, Chen & Marceau, *supra* note 18, at 1502 (applying this linear approach, stating, "[H]arms borne of publication on issues of public concern, and the concomitant public discourse that results, are harms that cannot fairly be traced to the lie that created the opportunity for the exposure.").

369. Jill E. Fisch, *Cause for Concern: Causation and Federal Securities*

approach, at least in the context of physical-injury torts; it limits an actor's liability to "those harms that result from the risks that made the actor's conduct tortious."[370] This approach essentially counts the links in the causal chain to determine the relevancy of the defendant's conduct and the rationality of imposing liability.

Proximate causation has also been explained in terms of an act's *necessity* and *sufficiency* in bringing about a particular harm: "The determination of legal causation depends in part on whether an initial event is necessary, sufficient, or both, in the causing of a second event."[371] As U.S. Supreme Court Justice Brennan once explained:

> [O]rdinary principles of causation used throughout the law of torts recognize that 'but for' causation . . . is never a sufficient condition of liability. . . . [T]he causes of an event go back to the dawn of human events, and beyond . . . . As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.[372]

This necessary-sufficient framework may be applied to limit an undercover investigator's liability for the target company's pecuniary losses. While trespass or fraud may in some cases be the only means of accessing nonpublic areas of a facility in order to gather damning evidence in the first place, these antics do not themselves cause the target any actual harm.[373] Gaining access and surreptitiously filming company misconduct is not itself sufficient to generate public scorn against the company.[374] There are at least three essential intermediate steps: *publication* of the evidence,

---

Fraud, 94 IOWA L. REV. 811, 831 (2009) (quoting Tony Honoré, *Necessary and Sufficient Conditions in Tort Law*, *in* PHIL. FOUND. OF TORT L. 363, 368 (David G. Owen ed., 1995) and RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 29 (2010)).

370. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 29 (2010).

371. Kaimipono David Wenger, *Causation and Attenuation in the Slavery Reparations Debate*, 40 U.S.F. L. REV. 279, 287 (2006); *see also* Sperino, *supra* note 359, at 1201–02 ("At common law, causation often embraces two different kinds of issues: cause in fact and legal or proximate cause. . . . [F]actual cause is a necessary, but not a sufficient basis for imposing liability on a defendant for harm. In these cases, courts impose a requirement of legal cause, also called proximate cause.").

372. City of Oklahoma City v. Tuttle, 471 U.S. 808, 833 n.9 (1985) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41 (5th ed. 1984)).

373. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc. (*Food Lion I*), 964 F. Supp. 956, 962–63 (M.D.N.C. 1997), *aff'd on other grounds*, 194 F.3d 505 (4th Cir. 1999) (holding trespass and fraud by undercover reporters did not proximately cause lost sales or diminished consumer confidence in target company).

374. *Id.*

digestion of this evidence by consumers, and a subsequent decision to take their business elsewhere.[375] In this sense, newsgathering torts are a *necessary* but *insufficient* cause of the exposed company's lost sales and profits.[376] In other words, the undercover investigation is not the *proximate* cause of the plaintiff's loss.[377]

Some commentators have balked at the notion of courts applying proximate-causation principles to limit liability in statutory causes of action.[378] Yet even those authors recognize that proximate cause serves a valid and important role in limiting liability for certain statutory causes of action, particularly those that expressly codify common-law principles.[379] When construing the language or scope of a statute, courts may "presume that statutes are adopted against a background of common law."[380] In any case, these more conservative commentators caution courts to consider "whether the statute they are interpreting is enough like common law torts that use proximate cause."[381]

In passing North Carolina's ag-gag law, the state legislature expressly sought to codify the common-law analysis applied in *Food Lion*.[382] However, it conveniently ignored the court's attitude toward punitive damages and publication (compensatory) damages.[383] As one of the bill's sponsors explained, the law "puts teeth into North Carolina trespass law by providing a [$]5,000 per

375. *Id.*

376. *Id.*

377. *Id.*

378. *See* Sperino, *supra* note 359, at 1247 (arguing courts should be loath to read proximate cause into the elements of a statutory cause of action without considering the statute's interaction with the common law).

379. *Id.* at 1214–15. The Supreme Court itself has increasingly applied proximate causation to statutes. *Id.* at 1216; *see, e.g.*, Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1390 (U.S. 2014) (unanimously holding that a plaintiff attempting to sue under the Lanham Act must show defendant's deceptive advertising *proximately caused* plaintiff's economic or reputational injury); Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 342–46 (2005) (requiring proximate cause for securities-fraud claims); Sosa v. Alvarez-Machain, 542 U.S. 692, 703–04 (2004) (analyzing proximate causation in the context of the Federal Tort Claims Act); Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 267–68 (1992) (stating proximate cause is necessary to recover under the Racketeer Influenced and Corrupt Organizations (RICO) Act); Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687, 713 (1995) (O'Connor, J., concurring) (applying proximate causation to Endangered Species Act analysis).

380. Sperino, *supra* note 359, at 1215. "To properly apply tort concepts to a statute, the courts should convincingly invoke one or more of the accepted reasons for doing so . . ." (for instance, evidence of legislative intent, evolving social understandings, or "pragmatic considerations"). *Id.*

381. *Id.* at 1234.

382. *See Hearings on H.B. 405*, *supra* note 80 (statement of N.C. Rep. Jonathan Jordan, Sponsor, May 14, 2015); *see also supra* text accompanying note 141.

383. *See supra* notes 272–276 and accompanying text.

day penalty for [a] violation . . . ."[384] This provision violates the spirit of the *Food Lion* holding by allowing a judge or jury to inordinately punish an undercover investigator who collects and truthfully reports information about employer wrongdoing and to unconstitutionally compensate the plaintiff for reputational harm caused by its *own* unethical practices.[385]

Although the district and appellate courts in *Food Lion* relied on very distinct approaches denying the plaintiff's claim for publication damages, application of either rationale insulated the reporters and the network from liability for the losses Food Lion sustained as a result of diminished consumer confidence following the *PrimeTime Live* broadcast.[386] All told, *Food Lion* turned out extremely well for undercover investigators and reporters and much less so for employers. It is curious, then, that the North Carolina legislature would want to codify *that* case as a protective measure for businesses.[387] But a closer look at the bill's language explains this peculiarity: By including the $5000-per-day exemplary-damages provision in an attempt to put "teeth" into the *Food Lion* holding,[388] the bill drafters departed significantly from the court's analysis, violating principles of free speech, fairness, and logic as a result.

IV. PROPOSAL

Ag-gag statutes that authorize civil restitution for reputational harm violate the concept of proximate causation and are unconstitutional under the First Amendment.[389] Moreover, to the extent ag-gag laws authorize punitive damages and attorneys' fees

384. *See Hearings on H.B. 405*, *supra* note 80 (statement of N.C. Rep. John Szoka, Sponsor, May 14, 2015).

385. Food Lion, Inc. v. Capital Cities/ABC, Inc. (*Food Lion I*), 964 F. Supp. 956, 962–63 (M.D.N.C. 1997), *aff'd on other grounds*, 194 F.3d 505 (4th Cir. 1999) (refusing to allow the jury to include lost profits, lost sales, diminished stock value, "or anything of that nature" in its calculation of compensatory damages, having determined that the defendants' unconsented recording and broadcast was not the proximate cause of the company's pecuniary losses); Food Lion, Inc. v. Capital Cities/ABC, Inc. (*Food Lion II*), 194 F.3d 505, 522 (4th Cir. 1999) (rebuffing Food Lion's attempt to recover publication damages for non-reputational torts "without satisfying the stricter (First Amendment) standards of a defamation claim").

386. *Food Lion I*, 964 F. Supp. at 966; *Food Lion II*, 194 F.3d at 524.

387. *See Hearings on H.B. 405*, *supra* note 80 (statement of N.C. Rep. Jonathan Jordan, Sponsor, May 14, 2015); *see also supra* notes 141, 144, 147 and accompanying text (discussing bill sponsors' stated intent to codify the common-law principles set forth in *Food Lion*).

388. *See Hearings on H.B. 405*, *supra* note 80 (statement of N.C. Rep. John Szoka, Sponsor, May 14, 2015).

389. *See supra* Part III–C (describing how free-speech and proximate-causation principles apply to limit recovery against undercover whistleblowers).

against undercover investigators, these provisions similarly operate to suppress political speech and will not pass strict scrutiny.[390] In this section, I call upon litigators and lawmakers to tackle the unconstitutional civil-damage provisions found in nearly half of the ag-gag statutes in this country.[391] I provide several constitutional and policy-based arguments in favor of overturning these laws, drawing analogies to recent court opinions.[392] I also illustrate how the liability-limiting function of proximate causation precludes recovery against undercover investigators who expose illegal or unethical business practices.[393] I then point out various practical considerations that ought to dissuade companies from seeking restitution against undercover investigators.[394] Finally, I encourage the continued evolution of free-speech and agency principles to facilitate the outing of employer wrongdoing in order to protect the well-being of animals, workers, and the general public.

A company that experiences decreased profits and diminished consumer confidence in the wake of a truthful exposé may not recover compensatory damages for these losses. Such recovery is barred under the speech-protective "actual malice" standard (promulgated by the Supreme Court in *Sullivan* and *Hustler* and applied by the Fourth Circuit in *Food Lion*).[395] Ag-gag provisions authorizing punitive or exemplary damages are likewise prohibited by the First Amendment, insofar as these damages punish protected speech.[396]

When a law regulating expressive activity is justified with reference to the content of the restricted speech, it must withstand strict scrutiny in order to pass constitutional muster.[397] Applying

---

390. *See generally supra* notes 337–345 and accompanying text.

391. ARK. CODE ANN. § 16-118-113(e) (2017); N.C. GEN. STAT. § 99A-2(d) (2015); KAN. STAT. ANN. § 47-1828(a) (2015); MONT. CODE ANN. § 81-30-104(1) (2015); IDAHO CODE § 18-7042(4) (2014).

392. *See infra* notes 395–404 and accompanying text.

393. *See supra* notes 356–381 (describing various approaches to proximate causation and the doctrine's liability-limiting function); *see also infra* notes 411–412 and accompanying text.

394. *See infra* notes 413–418 and accompanying text.

395. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc. (*Food Lion II*), 194 F.3d 505, 522 (4th Cir. 1999) (citing Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988)); *see also supra* notes 288–291 and accompanying text (explaining why current Supreme Court precedent disallows publication damages for truthful reporting).

396. *See* Stewart v. Nation-Wide Check Corp., 182 S.E.2d 410, 416 (N.C. 1971); Sims, *supra* note 260, at 522; *see also supra* text accompanying note 282.

397. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 642–643 (1994) ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based."); Animal Legal Defense Fund v. Otter, 118 F. Supp. 3d 1195, 1206 (D. Idaho 2015), *aff'd in relevant part sub nom.* Animal Legal Def. Fund v. Wasden, No. 15-35960, 2018 WL 280905, at *13 (9th Cir. Jan. 4, 2018) (citing Berger v. City of Seattle, 569

this well-settled principle to North Carolina's ag-gag law, one can see it is justified *with* reference, albeit indirect, to the content and viewpoint of the regulated speech: An expressive act (i.e., recording or photography) on an employer's premises, if disseminated, is illegal under the North Carolina statute only if it depicts the employer in a negative light.[398] To record and disseminate such footage would be "disloyal," whereas a surreptitiously recorded video that *praises* the employer would be perfectly in line with the employee's duty of loyalty.[399] The distinction rests in the tenor of the publication.

Arkansas's analogous statute is likewise impermissibly based on content, despite its slightly more adroit wording: Recording on an employer's premises is illegal under the Arkansas law only if it is subsequently used to damage the employer.[400] As written, the law invariably targets only those recordings whose content is damaging to the employer; secret recordings that are ultimately beneficial or inconsequential to the employer are not illegal. This is a content-based distinction that does not pass constitutional muster.

The natural (and intended) effect of creating a statutory cause of action against whistleblowing employees is to censor speech critical of the employer.[401] Civil-recovery provisions in ag-gag statutes effectuate this censorship to protect the animal-agriculture industry.[402] But protecting private industry from public scrutiny is

---

F.3d 1029, 1051 (9th Cir. 2009) (en banc)) ("[A] law can be content based if the underlying purpose of the law is to suppress particular ideas.").

398. N.C. GEN. STAT. § 99A-2(b)(1)-(2) (2015). Unauthorized recording on an employer's premises is a violation of the Property Protection Act *if* the employee uses that recording for a disloyal purpose; recording for any other reason, even if unauthorized, does not run afoul of the Act. *Id.* This amounts to a content-based restriction on expressive activity.

399. Finding a similar distinction in Idaho's ag-gag statute, the federal court in *Otter* struck down Idaho's law as an unconstitutional content-based and viewpoint-based restriction on speech. 118 F. Supp. 3d at 1211, *aff'd in relevant part sub nom. Wasden*, 2018 WL 280905, at *13. Under the Idaho law, an undercover reporter who secretly recorded at an agricultural operation would not violate the statute if her purpose was to publish a laudatory piece about the company, whereas a reporter who exposed illegal or inhumane behavior by the company *would* be liable under the statute. *Id.* The operative distinction was the message the reporter wished to convey. *Id.* Likewise, in North Carolina, a hidden-camera recording that portrays the employer in a positive light would not amount to a breach of her duty of loyalty, whereas publication of a recording critical of the employer *would* be a breach.

400. ARK. CODE ANN. § 16-118-113 (2017).

401. Governor's Veto Message, H.B. 405, 2015 Leg., Reg. Sess. (N.C. 2015) (May 29, 2015), http://ncleg.net/Sessions/2015/h405Veto/letter.pdf.

402. ARK. CODE ANN. § 16-118-113(e); N.C. GEN. STAT. § 99A-2(d); KAN. STAT. ANN. § 47-1828(a) (2015); MONT. CODE ANN. § 81-30-104(1) (2015); IDAHO CODE § 18-7042(4) (2014); *see also supra* note 123 and accompanying text (comparing and contrasting the civil-recovery provisions in these states' ag-gag statutes).

simply not a compelling state interest.[403] Therefore, such civil-recovery provisions cannot pass strict scrutiny and are unconstitutional.[404] For this reason, legislatures ought to repeal those statutes already enacted,[405] or courts must strike them down as unconstitutional infringements on free speech. In the meantime, courts tasked with applying these civil-recovery provisions against undercover investigators must respect the First Amendment principles that limit the amount and type of damages a jury may award.

In addition to these robust First Amendment protections, the concept of *proximate causation* further shields undercover investigators from the (potentially massive) losses a company may sustain as a result of public scorn for its exposed misconduct.[406] From a policy perspective, mild deception or disloyalty utilized in the course of an undercover investigation does not warrant compensatory damages in the thousands or millions. This is especially clear upon examination of evolving agency-law principles.[407] The clear trend in the law of agency has been toward a relaxation of employee loyalty standards in light of other policy considerations—namely, public safety and morals.[408] Courts should apply these relaxed loyalty standards when assessing claims for damages against undercover investigators under ag-gag statutes. In the interest of public policy, courts must reject the notion that industry interests rank above consumer safety and animal welfare.[409] By refusing to award publication damages and exemplary damages against investigators, courts can eviscerate the dangerous effect of these civil ag-gag provisions.

---

403. Animal Legal Defense Fund v. Otter, 118 F. Supp. 3d 1195, 1207 (D. Idaho 2015), *aff'd in part, rev'd in part sub nom.* Animal Legal Def. Fund v. Wasden, No. 15-35960, 2018 WL 280905 (9th Cir. Jan. 4, 2018); *see also supra* text accompanying note 345.

404. *Otter*, 118 F. Supp. 3d at 1208; *see also supra* text accompanying note 343 (explaining that a state's interest in protecting the privacy and property of its agricultural facilities is not compelling, and, even if it were, ag-gag statutes such as Idaho's are "not narrowly drawn to serve those interests").

405. *See supra* note 72 and accompanying text.

406. *See supra* Part III–C–2.

407. *See generally supra* notes 148–167 and accompanying text (describing the evolution of agency law and policy).

408. *Id.*

409. Given the elasticity of concepts like "fairness" and "justice," it is conceivable that a court applying a policy-based approach to proximate causation in a conservative, pro-agriculture state would feel justified ordering retribution against an undercover investigator whose documentation exposes a producer to public scorn and commercial loss. However, even the most industry-friendly judge is bound by First Amendment protections. In this way, the constitutional principles described above insulate the undercover investigator with greater certainty than a policy-based approach to proximate causation.

Even the most industry-friendly judge must reach this conclusion, as he is bound by principles of logic.[410] No matter how despicable a court might find an undercover activist's fraudulent or disloyal conduct, it cannot impose liability where the alleged causal connection between the tort and the loss is illogical. Reputational harm suffered by a company in the wake of an undercover exposé is purely contingent on the reaction of the consuming public and ultimately stems from the company's *own* unsavory conduct, not the investigation that exposed it.[411] This logic-based approach to proximate causation has recently gained favor with the U.S. Supreme Court.[412] Thus, I beseech even those judges who abhor sneakiness or deceit to reject animal-agriculture plaintiffs' requests for damages, if only for the sake of preserving principles of logic—a cornerstone of American jurisprudence.

Animal-agriculture companies themselves would do well to step back and consider the ramifications of bringing a civil claim against a whistleblowing employee. Ag-gag supporters promote these statutes as a means of reducing negative publicity surrounding their industries.[413] Assuming an activist group goes ahead and releases an investigation in spite of these laws, the company that reacts with a lawsuit would only expound the negative publicity triggered by the content of the exposé itself.[414] This outcome is inevitable due to the public's (and media's) pervasive concern with corporate social responsibility.[415] A company exposed for its wrongdoing who then tries to sue its exposers will not sit well with truth-seeking Americans, and the media is quick to condemn such behavior as well.[416] Furthermore,

410. *See supra* notes 367–370 and accompanying text (describing linear approach to proximate cause).

411. *See, e.g.*, Food Lion, Inc. v. Capital Cities/ABC, Inc. (*Food Lion I*), 964 F. Supp. 956, 962–63 (M.D.N.C. 1997), *aff'd on other grounds*, 194 F.3d 505 (4th Cir. 1999) (explaining plaintiff's lost sales and diminished consumer good will were the result of its *own* unsanitary food-handling practices, not of the torts defendants had committed to expose those practices).

412. Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1390 (U.S. 2014).

413. *See, e.g.*, Chen & Marceau, *supra* note 18, at 1470–71; *supra* notes 328, 330 and accompanying text (describing ag-gag supporters' desire to shield their industry from shameful videos and criticisms).

414. *See* Blumberg, *supra* note 149, at 312; *see also supra* notes 193–196 and accompanying text (describing how an employer's ability to seek redress against a whistleblowing employee is limited as a practical matter).

415. *Id.*

416. *See, e.g.*, Justin Jouvenal, *Virginia woman is sued over her Yelp review*, WASHINGTON POST (Dec. 4, 2012), www.washingtonpost.com/local/crime/2012/12/04/1cdfa582-3978-11e2-a263-f0ebffed2f15_story.html (reporting that lawsuits against online reviewers have met with little success and often backfire, generating significant additional negative publicity for the business plaintiffs); *accord.* Justin Parkinson, *The Perils of the Streisand Effect*, BBC NEWS MAGAZINE (July 31, 2014), www.bbc.com/news/magazine-28562156 (describing

animal-agriculture companies' hypocrisy and doublespeak is already blatant: For instance, arguing in favor of ag-gag laws, industry spokesmen claim the hidden-camera footage published by animal activists is staged or dramatized, while in the very next breath they justify the depicted practices as "standard" and "necessary."[417] This glaring inconsistency aside, the industry's attempt to justify such conduct based on its widespread use is fallible reasoning, and consumers are already exasperated by the self-serving rhetoric.[418] For these reasons, companies' attempts to sue undercover investigators under ag-gag laws are bound to meet further distain.

In sum, groups representing interests such as animal welfare, worker's rights, and civil liberties should rise up to challenge the

---

the phenomenon whereby an attempt to censor a piece of information results in the information spreading more widely); Jessica Chasmar, *Galaxy S4 Owner Claims Samsung Tried to Silence Him After Phone Caught Fire*, WASHINGTON TIMES (Dec. 10, 2013) (describing how media outlets quickly picked up the story of a Canadian man who was bullied by cellphone manufacturer Samsung in an attempt to censor his negative comments on YouTube); Milo Yiannopoulos, *What is 'The Streisand Effect'?*, THE TELEGRAPH (Jan. 31, 2009), http://blogs.telegraph.co.uk/technology/miloyiannopoulos/8248311/What_is_The_Streisand_Effect (describing how the Church of Scientology's unsuccessful attempts to censor Tom Cruise's "indoctrination video" sent the video viral).

417. Rick Barrett, Georgia Pabst & Lee Bergquist, *Farmers Say Some Actions Depicted in Video May Not Be Animal Abuse*, MILWAUKEE J. SENTINEL (Dec. 11, 2013), www.jsonline.com/business/farmers-say-some-actions-depicted-in-video-may-not-be-animal-abuse-b99162000z1-235497631.html; *Ag-Gag Debate*, *supra* note 11.

418. Amanda Radke, *Consumer Perceptions Will Determine Agricultural Practices*, BEEF MAGAZINE (Aug. 14, 2012), http://beefmagazine.com/blog/consumer-perceptions-will-determine-agricultural-practices (warning farmers and ranchers that "agriculture has to do a better job of simply answering consumer questions" and avoid talking about "the economics of standard methods").

constitutionality and political soundness of these ag-gag laws in court.[419] In the meantime, legislators in ag-gag states must

419. A coalition of animal-rights and consumer-protection organizations have begun doing just that. As noted above, the plaintiffs in *Otter* and *Herbert* took a hard swing at the ag-gag laws of Idaho and Utah. Complaint, Animal Legal Defense Fund v. Otter, No. 1:14-cv-00104 (D. Idaho Mar. 17, 2014); Complaint, Animal Legal Defense Fund v. Herbert, No. 2:13-cv-00679-RJS (D. Utah July 22, 2013). Notably, the Idaho plaintiffs placed particular focus on the invidious restitution provisions in that state's statute. Complaint, Animal Legal Defense Fund v. Otter, No. 1:14-cv-00104 (D. Idaho Mar. 17, 2014). Plaintiffs in both cases achieved resounding success at the district court level. *See supra* notes 305–308, 317–325 and accompanying text.

In 2016, numerous members of the same coalition of plaintiffs that challenged the laws in Idaho and Utah also filed a constitutional challenge to North Carolina's Property Protection Act, the ag-gag law discussed at length in this Comment. Complaint, People for the Ethical Treatment of Animals v. Cooper, No. 1:16-cv-00025 (M.D.N.C. Jan. 13, 2016). On May 2, 2017, the district court dismissed that suit on standing grounds, calling it "purely speculative" whether a surreptitiously surveilled North Carolina business would ever invoke the law against any of the plaintiffs. People for Ethical Treatment of Animals, Inc. v. Stein, 259 F. Supp. 3d 369, 378 (M.D.N.C. 2017). On that basis, the judge determined the plaintiffs had not demonstrated a sufficiently imminent threat of injury to satisfy Article III standing requirements. *Id.* at 386.

The crux of the district court's dismissal relied on a perceived distinction between pre-enforcement challenges to *civil* versus *criminal* statutes. *Id.* at 376–84. In essence, the court reasoned that, because the Property Protection Act authorizes a private cause of action as opposed to a state criminal prosecution, it is less reasonable to expect the statute will ever be used. *Id.* at 383 (explaining "it would be unreasonable to assume the legislature enacted [a *criminal*] law without intending that it be enforced by the State," but where, as here, "the State is not tasked with enforcement of the Act" because it is *civil* in nature, the same level of threat is not present). This reasoning is farcical. The enactment and enforcement of a civil cause of action falls squarely to the government, and many state entities may sue under the Act just like private corporations. *See, e.g.*, N.C. GEN. STAT. § 116-3 (2017) (granting the University of North Carolina the power to sue, to "take, demand, receive, and possess all moneys," and to otherwise act as a corporate entity); *id.* § 90-85.4 (same, with respect to the North Carolina Pharmaceutical Ass'n); *id.* § 143B-1258 (same, with respect to state Veterans Recreation Authorities). It would be just as unreasonable to assume the legislature enacted a *civil* cause of action without intending that it be used by the state as it would be to assume the same with regard to a criminal statute. *Id.* In other words, it is *as reasonable* for an undercover activist to assume a public entity he surreptitiously surveils and subsequently exposes would bring an action against him in a civil ag-gag state as it is to assume that a prosecutor would bring a criminal action against him in a criminal ag-gag state. The imminent threat of state-sanctioned harm is the same, if not greater, in the context of a civil ag-gag statute.

The North Carolina court thus erred in finding that the plaintiffs – at least one of whom stated it would like to conduct an undercover investigation of a University of North Carolina animal research laboratory – did not have standing to bring a pre-enforcement challenge. People for Ethical Treatment of Animals, Inc. v. Stein, 259 F. Supp. 3d 369, 373, 384 (M.D.N.C. 2017); *see* First Amended Complaint, People for the Ethical Treatment of Animals, Inc. v. Cooper, No. 1:16-cv-00025, 9–10 (M.D.N.C. Feb. 25, 2016) (explaining PETA

promptly make efforts to repeal these statutes, and lawmakers in other states are strongly cautioned against enacting this type of anti-whistleblower legislation in their own states.

V. CONCLUSION

Animals, workers, and conscientious consumers rely almost exclusively on undercover investigations to expose the widespread exploitation and abuse taking place behind closed doors. These investigations have revealed egregious animal cruelty, unsafe working conditions, and severe food-safety violations, leading to meaningful institutional change.[420] So-called ag-gag laws aim to shutter the only window we have into one of the country's most powerful and abusive industries: animal agriculture. Public-interest litigators and free-thinking lawmakers must work on their respective fronts to rid our system of these unconstitutional, unenlightened laws.

In the meantime, courts applying these laws against undercover investigators are limited in terms of the damages they may authorize. Constitutional, political, and common-sense principles disallow recovery for reputational harm sustained by the animal-agriculture company in the wake of a truthful exposé. Exemplary damages are likewise prohibited as speech-suppressive state action. In light of these limitations, restitution provisions in ag-gag statutes authorizing recovery of such damages are unconstitutional and unenforceable, and must be struck down to avoid chilling the socially important work of undercover whistleblowers.

---

would like to conduct another undercover investigation of the animal research facilities at UNC–Chapel Hill but fears liability under the Property Protection Act and has thus decided not to engage in its chosen form of speech).

It could also be argued that the legislature's act of voting a civil ag-gag statute into law is itself an unconstitutional state action due to its chilling effect on would-be whistleblowers' protected speech. But even if we accept that is not the case—i.e., if we accept that the plaintiffs in *People for the Ethical Treatment of Animals, Inc. v. Stein* lacked standing due to the pre-enforcement nature of their challenge—ultimately any court order for damages authorized under the statute would inarguably amount to unconstitutional state action, for the reasons discussed throughout this Comment. So, one way or another, use of civil ag-gag laws will ultimately invoke sufficient state involvement to give activists standing to challenge their constitutionality. The question, then, is whether states wish to draw attention to the businesses within their borders as activists ramp up undercover exposés of those businesses in an attempt to "draw the foul," so to speak, to challenge the legislation from a defensive posture once they have been sued under it.

420. *See supra* notes 42–48 and accompanying text (describing in detail the successful outcomes of undercover investigations).