

# PUNISHING ANIMAL RIGHTS ACTIVISTS FOR ANIMAL ABUSE: RAPID REPORTING AND THE NEW WAVE OF AG-GAG LAWS

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*In the last few years, several states have proposed so-called “ag-gag” legislation. Generally, these bills have sought to criminalize (1) recording video or taking pictures of agricultural facilities without the consent of the owner and/or (2) entering an agricultural facility under false pretenses or misrepresenting oneself in job applications with the intent to commit an unauthorized act. These bills have gained little public support and have mostly been defeated in the past two years. However, a third type of ag-gag legislation is gaining traction in state legislatures across the country. This new type of law would require individuals to turn over any video footage of animal abuse to the police within 24, 48, or 120 hours of obtaining the evidence. Though these laws are promoted as a sincere effort to guard against animal abuse, critics argue that a pattern of abuse must be documented in order to build a strong case for prosecution, and that these industry-supported bills would force undercover journalists and activists to blow their cover after one incident, allowing facility owners and operators to claim the incident was just a one-time occurrence.*

## I. INTRODUCTION

On January 30, 2008, the Humane Society of the United States released a video of workers at the Hallmark Meat Packing Company in Chino, California “kicking sick cows and using forklifts to force them to walk.”<sup>1</sup> As a result, the now defunct

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1. Andrew Martin, *Largest Recall of Ground Beef is Ordered*, N.Y. TIMES (Feb. 18, 2008), [http://www.nytimes.com/2008/02/18/business/18recall.html?\\_r=0](http://www.nytimes.com/2008/02/18/business/18recall.html?_r=0).

Westland/Hallmark Meat Company was forced to issue a recall of 143 million pounds of beef — the largest beef recall in U.S. history<sup>2</sup> — because the federal government has banned “downer cows” from the food supply to reduce the risk of mad cow disease.<sup>3</sup> After six weeks’ worth of video evidence<sup>4</sup> was turned over to the police, and millions saw portions of the footage on YouTube and nightly news broadcasts, the company faced lawsuits, the aforementioned record-breaking recall, and ultimately, bankruptcy. Had California’s proposed “ag-gag”<sup>5</sup> bill been enacted in 2008, the undercover Humane Society members would have been legally required to surrender the footage of abuse to the police within 120 hours of recording it,<sup>6</sup> potentially leading to a far different result. Workers might have been reprimanded or fired and a small recall may have been issued, but Westland/Hallmark might still be in operation if not for the widespread media attention to the well-documented abuse.

Ag-gag laws attempt to restrict undercover investigations into abuses at agricultural facilities. These industry-supported laws are criticized for intimidating would-be whistleblowers and silencing undercover reporters that try to expose abuses on industrial farms. Proposed ag-gag bills vary from state to state, but they share a common goal: to keep evidence of the unflattering, and sometimes criminal, practices of farms and slaughterhouses from public view. After straightforward bills banning the taking of photographs and videos without permission on agricultural

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2. *Id.* (“The recall on Sunday was more than four times bigger than the previous record, the 1999 recall of 35 million pounds of ground beef by Thorn Apple Valley, federal officials said.”).

3. *Id.* (“Cows that cannot walk are banned from use in the food supply because they pose an added risk of mad cow disease, or bovine spongiform encephalopathy, a fatal disease that eats away at the brain. There have been three confirmed cases of infected cattle in this country since 2003.”).

4. *Rampant Animal Cruelty at California Slaughter Plant*, HUMANE SOC’Y OF U.S. (Jan. 30, 2008), [http://www.humanesociety.org/news/news/2008/01/undercover\\_investigation\\_013008.html](http://www.humanesociety.org/news/news/2008/01/undercover_investigation_013008.html). The Hallmark Meatpacking Co. was a major supplier of the National School Lunch Program. *Id.*

5. Mark Bittman coined the term “ag-gag” in a 2011 editorial. Mark Bittman, *Op-ed., Who Protects the Animals?*, N.Y. TIMES, Apr. 27, 2011, at A27, available at <http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/>.

6. A.B. 343, 2013–14 Reg. Sess. (Ca. 2013), available at [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB343](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB343) (“This bill would require any person, with certain exceptions, who willfully or knowingly documents evidence of animal cruelty to provide a copy of the documentary evidence to local law enforcement within 120 hours of documentation, and would make a violation of this requirement an infraction punishable by a fine of \$250.”).

facilities failed in state legislatures across the country, a new breed of ag-gag has emerged. These laws would require undercover reporters to turn over evidence of abuse, generally within twenty-four or forty-eight hours of recording it. Drafted to appear tough on animal abuse, these bills actually do significantly more harm than good by forcing undercover investigators to blow their cover within a day or two of recording the first evidence of abuse. This is problematic because it eliminates the chance to establish evidence of a pattern of abuse at a given facility.<sup>7</sup> Since the agricultural industry cannot get photos and videos banned altogether, its supporters are now trying to prevent another Westland/Hallmark fiasco by preventing undercover reporters from gathering enough evidence to build a devastating case.

In 2009, “8,520,225,000 chickens, 245,768,000 turkeys, 113,600,000 pigs, 33,300,000, cattle, 22,767,000 ducks, 2,768,000 sheep and lambs, and 944,200 calves were killed for their meat in the United States.”<sup>8</sup> In 2002, Michael Pollan, author of several bestselling books on food issues and the agriculture industry, wrote:

This is going to sound quixotic, but maybe all we need to do to redeem industrial animal agriculture in this country is to pass a law requiring that the steel and concrete walls of the CAFO’s [Concentrated Animal Feeding Operations] and slaughterhouses be replaced with . . . glass. If there’s any new “right” we need to establish, maybe it’s this one: the right to look. No other country raises and slaughters its food animals quite as intensively or brutally as we [in the United States] do. Were all the walls of our meat industry

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7. As one *New York Times* reporter described the need to establish a pattern of abuse:

But animal rights groups say investigations take months to complete. Undercover workers cannot document a pattern of abuse, gather enough evidence to force a government investigation and determine whether managers condone the abuse within one to two days, said Matt Dominguez, who works on farm animal protection at the Humane Society of the United States. “Instead of working to prevent future abuses, the factory farms want to silence them,” he said. “What they really want is for the whistle to be blown on the whistleblower.”

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

8. TIMOTHY PACHIRAT, EVERY TWELVE SECONDS: INDUSTRIALIZED SLAUGHTER AND THE POLITICS OF SIGHT 3 (2011).

to become transparent, literally or even figuratively, we would not long continue to do it this way. Tail-docking and sow crates and beak-clipping would disappear overnight, and the days of slaughtering 400 head of cattle an hour would come to an end. For who could stand the sight?<sup>9</sup>

A decade later, we are further from Pollan's dream of agricultural transparency than ever. Rather than passing legislation making slaughterhouses more open, states have passed or attempted to pass legislation making them even more restricted.

The new wave of ag-gag legislation appears less extreme than some of its predecessors. Though these new ag-gag bills contain seemingly innocuous language and provisions about reporting animal abuse, such legislation would effectively silence whistleblowers and activists and further protect the industry from serious consequences. This new trend is therefore dangerous to animal welfare and food safety. By couching ag-gag provisions in statutes that seem concerned with animal safety, the agriculture industry may more easily advance an anti-whistleblower agenda.

This Note argues that these laws do far more harm than good and should therefore be resisted in every state in which they are proposed. Part II discusses the history of ag-gag legislation. II.A examines early ag-gag legislation. II.B briefly discusses animal-enterprise terrorism laws and their effect on animal welfare activists. II.C surveys traditional ag-gag bills proposed or passed starting in 2012, and II.D explains why this renewed ag-gag movement mostly failed. Part III analyzes rapid reporting ag-gag bills. III.A examines proposals state by state, and III.B explains why such bills are so problematic. Part IV proposes that animal rights activists build broad coalitions with those concerned about First Amendment rights as well as food safety and workers' rights in order to expose these bills to the public as whistleblower suppression legislation masquerading as animal protection bills.

## II. HISTORY OF AG-GAG

Ag-gag laws have existed since 1990, but after two decades of dormancy, have made a resurgence. This Part explores the evolution of these laws. First, II.A discusses the first wave of ag-gag

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9. Michael Pollan, *An Animal's Place*, N.Y. TIMES SUNDAY MAGAZINE, November 10, 2002, <http://www.nytimes.com/2002/11/10/magazine/an-animal-s-place.html>.

laws in the early 1990s. II.B examines animal-enterprise terrorism laws and their relationship with the ag-gag movement. II.C explores the second wave of traditional ag-gag bills, beginning in early 2012. Finally, II.D discusses the downfall of “classic” ag-gag, which led to the development of rapid reporting ag-gag laws.

#### A. THE FIRST WAVE: KANSAS, MONTANA, AND NORTH DAKOTA

The term ag-gag was not coined until 2011, but variations of these laws had existed for over twenty years. In 1990, Kansas passed the Farm Animal and Field Crop and Research Facilities Protection Act<sup>10</sup> (the “Kansas Act”). The Kansas Act forbade “enter[ing] an animal facility to take pictures by photograph, video camera or by any other means.”<sup>11</sup> Importantly, this precursor to other ag-gag legislation restricted prosecution under the law to those “with the intent to damage the enterprise conducted at the animal facility.”<sup>12</sup> Whether “intent to damage” includes activists’ attempts to expose abuse and unsanitary conditions is a question yet to be argued in court.<sup>13</sup> Courts could interpret activist goals such as reducing the consumption of meat products from a facility as intent to damage. However, “the Kansas code defines ‘damage’ as requiring costs directly related to code violations, [so] it is more likely that courts will interpret ‘damage’ in a way that requires direct harm, and undercover activists’ filmmaking would likely not be punishable under the statute.”<sup>14</sup>

In 1991, Montana and North Dakota passed their own versions of the Kansas Act. Montana’s Farm Animal and Research Facilities Protection Act (the “Montana Act”) also prohibits “enter[ing] an animal facility to take pictures by photograph, video camera, or other means,” but unlike the Kansas Act, requires “the intent to commit criminal defamation.”<sup>15</sup> In Montana, in-

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10. KAN. STAT. ANN. § 47-1827 (West 2014).

11. *Id.* § 47-1827(c)(4).

12. *Id.* § 47-1827(c).

13. See Jessalee Landfried, Note, *Bound & Gagged: Potential First Amendment Challenges to “Ag-gag” Laws*, 23 DUKE ENVTL. L. & POL’Y F. 377, 377 (2013). Landfried’s note analyzes potential First Amendment challenges to the ag-gag bills that existed at the time. She “concludes that the ag-gag laws most likely to pass do not obviously implicate First Amendment rights and advises activists to plan their investigations in anticipation of future legal challenges.” *Id.*

14. *Id.* at 392.

15. MONT. CODE ANN. § 81-30-103 (West 2013).

formation is not criminally defamatory so long as it is accurate.<sup>16</sup> Thus, if an activist releases accurate footage, she will not be guilty of breaking the Montana Act.<sup>17</sup> On the other hand, North Dakota's Animal Research Facility Damage Act<sup>18</sup> lacks any language regarding the intent of the photographer or videographer, and is therefore "likely to criminalize a broader scope of conduct than the Kansas and Montana Acts."<sup>19</sup>

## B. ANIMAL ENTERPRISE TERRORISM LEGISLATION

Animal-terrorism laws are another tool that the agricultural industry can use to keep activists away. Congress passed the Animal Enterprise Protection Act (AEPA) in 1992, criminalizing any "physical disruption" to an animal enterprise.<sup>20</sup> Though the act targeted vandals and activists who release laboratory animals, the Act's vague language left unclear whether AEPA could be applied against whistleblowers involved in animal enterprises.<sup>21</sup> At least eight states have passed similar animal-terrorism laws.<sup>22</sup>

In 2006, Congress amended AEPA with the Animal Enterprise Terrorism Act (AETA).<sup>23</sup> AETA replaced the already vague phrase "physical disruption" with the broader "interfering."<sup>24</sup> It expanded the number of enterprises covered under the Act, and "created an independent source of liability for anyone who, while

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16. *Id.* § 45-8-212.

17. *See* Landfried, *supra* note 13, at 392.

18. N.D. CENT. CODE ANN. § 12.1-21.1-01 to 05 (West 2013).

19. Kevin C. Adam, Note, *Shooting the Messenger: A Common-Sense Analysis of State "Ag-gag" Legislation Under the First Amendment*, 45 SUFFOLK U. L. REV. 1129, 1159 (2012). Adam's note asks whether taking photographs and video should be considered protected speech under the First Amendment. He concludes "that current 'ag-gag' legislation is either unconstitutional or ineffective, and that existing laws — trespass, wiretapping laws, and libel — would be a more appropriate means of punishing the inappropriate conduct of undercover investigations." *Id.* at 1132.

20. *See id.* at 1165.

21. *Id.* at 1165–66. Adam explains that while whistleblowers were not initially the target of AEPA, the term "physical disruption" was originally left undefined. Even after Congress defined the term to exclude "lawful disruptions" so that whistleblowers would not be punished, "Congress failed to detail what type of conduct constituted a 'lawful disruption' under the AEPA, thus leaving open the possibility that certain whistleblowing conduct could fall within the purview of the statute." *Id.*

22. *See* Landfried, *supra* note 13, at 393.

23. *Id.*

24. *See* Adam, *supra* note 19, at 1166.

interfering with an animal enterprise, places another in reasonable fear of death or injury.”<sup>25</sup>

AETA has a savings clause, directing that it should not be interpreted “to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution.”<sup>26</sup> Still, critics argue that the Act’s harsh penalties are meant to scare off all activists, and not just so called “terrorists.”<sup>27</sup> A group of animal rights activists challenged AETA in federal court in March 2013, but their case was dismissed for lack of standing when the activists failed to establish an injury-in-fact.<sup>28</sup>

### C. THE SECOND WAVE: CLASSIC AG-GAG

Twenty-one years after Kansas, North Dakota, and Montana passed the first ag-gag laws in the country, ag-gag legislation reappeared when Iowa criminalized “agricultural production facility fraud” on March 2, 2012. Along with Iowa, Utah passed an ag-gag law in 2012 and eleven other states considered legislation.<sup>29</sup>

Before Missouri passed Senate Bill 631,<sup>30</sup> the first rapid reporting ag-gag statute in the country, ag-gag bills generally came in two broad categories (or a combination of the two).<sup>31</sup> Legisla-

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25. *Id.*

26. 18 U.S.C.A. § 43 (West 2014).

27. Adam, *supra* note 19, at 1166–67. AETA has been criticized for imposing “disproportionally harsh penalties for conduct that falls outside of what most would consider ‘terrorism.’” To illustrate this disproportionality, Adam cites the case of the “SHAC 7,” a group of animal-rights activists whose members were sentenced to four to six years in federal prison under AETA for operating a website that they used to organize undercover investigations. *Id.* “Furthermore, critics have argued the AETA chills free speech, inappropriately labels activists as terrorists, wastes government resources that could be used to battle legitimate terrorist threats, and targets behavior that is already criminal in nature.” *Id.*

28. *Blum v. Holder*, 930 F. Supp. 2d 326, 335 (D. Mass. 2013).

29. See Sara Lacy, Comment, *Hard to Watch: How Ag-gag Laws Demonstrate the Need for Federal Meat and Poultry Industry Whistleblower Protections*, 65 ADMIN. L. REV. 127, 130–31 (Winter 2013). This comment “recommends that the USDA, through its existing power, promulgate and enforce whistleblower protections as a condition for facility inspection across the entire meat and poultry production industry to ensure that the American food supply remains competitive, safe, and healthy for workers, consumers, and livestock.” *Id.*

30. MO. ANN. STAT. § 578.013 (West 2014). SB 631 took effect August 28, 2012.

31. Categorizing ag-gag bills is not a perfect process. One author has used five categories: “(1) broadly banning all audio and video recording on farms as ‘agricultural interference’; (2) criminalizing employment fraud in agricultural settings; (3) forbidding distribution of recordings; (4) redefining trespass to specifically include agricultural facilities; and (5) requiring rapid reporting of animal abuse.” Landfried, *supra* note 13, at 394.

tion in the first category made it illegal to photograph or record video of an agricultural operation without the consent of the property's owner, distribute such footage without consent, or both. Utah was the first to pass such a bill when House Bill 187 became law on March 20, 2012.<sup>32</sup> Illinois,<sup>33</sup> Minnesota,<sup>34</sup> Florida,<sup>35</sup> Indiana,<sup>36</sup> and New York<sup>37</sup> all failed to pass proposed legislation similar to Utah's.

The second type of ag-gag legislation pre-Missouri SB 631 made it a crime to misrepresent oneself when applying to work at an industrial farm or slaughterhouse, so as to prevent activists from gaining employment for the purpose of exposing animal abuse. Iowa was the first state to pass such a law with the en-

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Another has used three categories: "(1) criminalizing dishonesty in the job-application process, when the applicant has the intention of infiltrating the facility to investigate; (2) criminalizing the act of photographing or videotaping on agricultural facilities; and (3) criminalizing the act of photographing or videotaping, as well as the possession or distribution of such videos." Adam, *supra* note 19, at 1164. Both of those papers analyzed ag-gag bills under the First Amendment and therefore the more specific categories were used to show what would or would not likely be a First Amendment violation. As shown below, the trend throughout the states has moved away from outlawing photographing and videotaping, and therefore further distinction is not still necessary.

32. UTAH CODE ANN. § 76-6-112 (West 2014). Section 2 of the statute states that a person violates the crime of agricultural operation interference if he or she:

- (a) without consent from the owner of the agricultural operation, or the owner's agent, knowingly or intentionally records an image of, or sound from, the agricultural operation by leaving a recording device on the agricultural operation;
- (b) obtains access to an agricultural operation under false pretenses;
- (c)(i) applies for employment at an agricultural operation with the intent to record an image of, or sound from, the agricultural operation; (ii) knows, at the time that the person accepts employment at the agricultural operation, that the owner of the agricultural operation prohibits the employee from recording an image of, or sound from, the agricultural operation; and (iii) while employed at, and while present on, the agricultural operation, records an image of, or sound from, the agricultural operation; or
- (d) without consent from the owner of the operation or the owner's agent, knowingly or intentionally records an image of, or sound from, an agricultural operation while the person is committing criminal trespass, as described in Section 76-6-206, on the agricultural operation.

*Id.*

33. H.B. 5143, 97th Gen. Assemb. (Ill. 2012).

34. H.F. 1369, 87th Leg. Sess. (Minn. 2011). The Bill was known as Senate File 1118 in the State Senate.

35. S.B. 1184, Reg. Sess. (Fla. 2012). The House counterpart was H.B. 1021.

36. S.B. 184, 117th Gen. Assemb., Second Reg. Sess. (Ind. 2012).

37. S.B. 5172, 2011–12 Reg. Sess. (N.Y. 2011), available at <https://legiscan.com/NY/text/S05172/id/283902>. This bill sought to establish the crime of "unlawful tampering with a farm animal." *Id.* "Unlawful tampering" was defined as "any interference with a farm animal or farm through the injection of any unauthorized substance, the release of a farm animal, the unauthorized feeding or *unauthorized video, audio recording or photography done without the farm owner's written consent.*" *Id.* (emphasis added).



actment of House File 589.<sup>38</sup> Under this act, a person is guilty of agricultural production facility fraud when he willfully “[o]btains access to an agricultural production facility by false pretenses,” or

[m]akes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the statement with the intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized.<sup>39</sup>

Tennessee<sup>40</sup> and Vermont<sup>41</sup> failed to pass bills with similar language in 2012 and 2013, respectively. North Carolina,<sup>42</sup> New Mexico,<sup>43</sup> and Pennsylvania<sup>44</sup> failed to pass hybrid ag-gag bills that sought to criminalize photographing and videotaping without consent of the facility owner as well as application fraud.

Arkansas legislators took a slightly different approach in trying to criminalize “agricultural production facility fraud.” Arkansas’ Senate Bill 13<sup>45</sup> was titled “An act providing legal protection to animal owners and their animals; to ensure that only law enforcement agencies investigate charges of animal cruelty; and for other purposes.”<sup>46</sup> Wedged between innocuous and loosely related sections,<sup>47</sup> Section Three sought to criminalize “improper animal

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38. IOWA CODE ANN. § 717A.3A (West 2014).

39. *Id.* This law also contains strict aiding and abetting language that could potentially have far-reaching effects on animal welfare organizations such as HSUS and Mercy for Animals. When these organizations seek to help one of their members gain access to a facility under false pretenses, any member that knowingly helped the undercover investigator skirt the law also risks prosecution.

40. S.B. 3460, 107th Gen. Assemb. (Tenn. 2012). A similar bill was introduced in the House. See H.B. 3620, 107th Gen. Assemb. (Tenn. 2012).

41. S.B. 162, 2013–14 Reg. Sess. (Vt. 2013).

42. S.B. 648, 2013–14 Reg. Sess. (N.C. 2013).

43. S.B. 552, 51st Legislature, 1st Sess. (N.M. 2013).

44. H.B. 683, Gen. Assemb. Sess. of 2013 (Pa. 2013).

45. Technically, S.B. 13 was passed and signed into law, becoming Act 1160. However, that Act was stripped of the provisions that would make it ag-gag. As passed, Act 1160 simply says: “An owner of an animal that has been seized under this subchapter shall be responsible only for reasonable expenses that were incurred for the care of the animal while the animal was in the appropriate place of custody.” Ark. Code Ann. § 5-62-106 (West 2014).

46. S.B. 13, 89th Gen. Assemb. (Ariz. 2013) (quoting from second draft).

47. For example, Section 1 addressed the treatment of a diseased or injured animal, Section 2 protected animal owners by prohibiting seizure of an animal without a warrant, and Section 4 stipulated that a law enforcement agency investigating criminal conduct involving an equine shall seize and quarantine that equine until the appropriate agency verifies the animal is in compliance with all required disease testing. *Id.*

investigation.”<sup>48</sup> Essentially, this section incorporated an ag-gag bill into an animal protection act:

A person who is not a certified law enforcement officer who knowingly conducts an investigation, including collection of evidence into alleged claims of criminal conduct involving an animal by another person or entity, or coerces a person to surrender his or her personal property through threat of criminal investigation or prosecution related to alleged claims of criminal conduct involving an animal by another person or entity upon conviction is guilty of a Class B misdemeanor.<sup>49</sup>

Rather than criminalize application fraud or videotaping, this bill simply sought to criminalize investigations conducted by anyone other than certified law enforcement officers. However, this language was not included in the draft of Act 1160 that was ultimately enacted,<sup>50</sup> thus adding Arkansas to the list of states with failed ag-gag attempts in 2013.

#### D. WHY TRADITIONAL AG-GAG BILLS FAILED: BACKLASH, THE FIRST AMENDMENT, AND AMY MEYER

A January 2013 article published on Grist, an environmental news and commentary website, asked if 2013 would be the “Year of Ag-gag.”<sup>51</sup> Though there were plenty of proposals, all of the bills failed to become law. So while some authors, such as Eliza Barclay of National Public Radio, declare “2013 Was The Year Bills To Criminalize Animal Cruelty Videos Failed,”<sup>52</sup> 2013 is

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48. *Id.*

49. *Id.*

50. *See supra* note 45.

51. Susie Cagle, *Will 2013 Be the Year of Ag-gag Bills?*, GRIST (Jan. 29, 2013), <http://grist.org/news/will-2013-be-the-year-of-ag-gag-bills/>. Cagle’s piece also comments on the history of ag-gag:

But the corporate- and Koch-backed American Legislative Exchange Council wanted to crack down even further. In 2003[,] it proposed model legislation that would make it illegal to “enter an animal or research facility to take pictures by photograph, video camera, or other means with the intent to commit criminal activities or defame the facility or its owner.” Today’s ag-gag bills are direct descendants of that far-reaching legislation.

*Id.*

52. Eliza Barclay, *2013 Was the Year Bills to Criminalize Animal Cruelty Videos Failed*, NAT’L PUB. RADIO (Dec. 27, 2013), <http://www.npr.org/blogs/thesalt/2013/12/19/>

probably more accurately described as the year “Big Ag” abandoned classic ag-gag bills in favor of a Missouri SB 631-style rapid reporting approach.

Within the second wave of ag-gag legislation, why did “traditional” ag-gag bills fail to pass outside of Utah? There are three main reasons. First, a broad coalition of activist groups won the public opinion battle. Second, some state legislators and governors expressed concerns about the constitutionality of these laws. Finally, prosecutors dropped the charges in the first criminal case in the country brought under a traditional ag-gag statute, casting doubt on the efficacy of this form of ag-gag going forward.

### 1. *Animal Welfare Activists and Allies Won the Public Debate Over Ag-gag*

The first reason for the demise of classic ag-gag was that a united front of anti-ag-gag activists successfully swayed public opinion. As with any hot-button issue, there were two sides to the public debate over ag-gag, but the farm lobby clearly lost in 2013. Consider a reaction posted on the National Hog Farmer Blog:

There are many facets of this most recent undercover video incident that prove particularly frustrating. If the employee doing the filming was so concerned about the animals, why didn't she stop the abuse? How do these insincere people, with no apparent regard for the animals entrusted to their care, manage to secure these jobs? But perhaps the more troubling question is what can the pork industry do to stop this attack against meat consumption? Controversial “Ag-gag” laws were making some progress, but perhaps not enough.

In the end, producers are working against a system built on blackmail. The *Pipestone County Star* reported this week that officials from Walmart had come to the community to tour the pork production facilities in the wake of this video

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255549796/2013-was-the-year-every-new-ag-gag-bill-failed. Barclay interviews HSUS's Matt Dominguez for her article. Dominguez predicts that ag-gag bills will “likely come back in the states where [HSUS has] been fighting, and in new states. Lawmakers view it that they were beat by animal rights groups. They'll tweak the bills, make them more like animal protection bills to dupe the public.” *Id.*

release. When I attended a Mercy for Animals press conference last year following the release of another video taken on a pork operation, the organization's spokesperson was very open about the fact that videos are taken in specifically targeted operations with the intention of showing the videos to the retail companies that the farms supply. If the retailers agree to make a statement about stopping the purchase of pork from farms using gestations stalls, the video is not released to the media. Does that sound like they really care about the animals? The spokesman also admitted that the over-arching goal of the organization is to promote a complete departure from meat consumption.<sup>53</sup>

The author concludes by asking: "What can the pork industry do to be more successful when it comes to preventing bad people from attacking good pork producers?"<sup>54</sup> This response is typical of those in the meat-production industry. The paradigmatic argument is that groups such as the Humane Society and Mercy for Animals have an extreme mission to end meat consumption in this country.<sup>55</sup> By showing one employee's actions out of context, these groups can force retailers to end their relationship with the farm, causing a huge economic impact. David Hardin, Confined Animal Feeding Operation (CAFO) owner and supporter of Indiana's most recent ag-gag bill, argues that the average person does not have the proper context to understand what she sees when watching one of these undercover videos:

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53. Lora Berg, *When Bad Videos Happen to Good Pork Producers*, NAT'L HOG FARMER BLOG (Nov. 1, 2013), <http://nationalhogfarmer.com/blog/when-bad-videos-happen-good-pork-producers>.

54. *Id.*

55. One group that seeks to paint groups such as the Humane Society as extremists is the Center for Consumer Freedom. The Center's website states:

The Humane Society of the United States (HSUS) has a good PR game going on: Its promotional material largely focuses on the welfare of dogs and cats, but a significant proportion of its resources are spent promoting the *rights* of other animals — including cows, pigs, and chickens. It's a clever ploy that allows HSUS to appear mainstream while it pursues the same agenda of the more infamous PETA: to end as many human uses of animals as possible. First and foremost, that means getting rid of animal products in our diet — including meat, eggs, cheese, and milk.

*Humane Honesty At Last*, THE CTR. FOR CONSUMER FREEDOM (Feb. 25, 2011), <https://www.consumerfreedom.com/2011/02/4392-humane-honesty-at-last/>.

“In this day and age it doesn’t take much for a producer to be put out of business if they get some very bad publicity about things that have gone on at their farm,” he says. “It may not be something that is necessarily bad, but to the public today that hasn’t grown up with production agriculture and doesn’t understand what they’re looking at. It may not look like something good, but it could be a veterinary approved practice — a best management practice that we have on the farms today.”<sup>56</sup>

The groups protesting ag-gag, however, had a much simpler message: if there is nothing to hide, why ban the cameras? If Mercy for Animals and the Humane Society were the only organizations taking up the cause, the agriculture industry likely would have had more success in painting these activists as extremists. However, the coalition against ag-gag has grown impressively large and diverse. The list of seventy-eight organizations signed onto the “Statement of Opposition to Proposed ‘Ag-gag’ Laws from Broad Spectrum of Interests Groups” includes many of the major environmental and animal rights groups.<sup>57</sup> It also includes the American Civil Liberties Union, Amnesty International USA, United Farm Workers, Consumer Federation of America, STOP (Stop Foodborne Illness), the Southern Poverty Law Center, and

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56. Jimmy Jenkins, “Ag-gag” Bill Makes Second Appearance at Legislature, IN. PUB. MEDIA (Jan. 21, 2014), <http://indianapublicmedia.org/news/ag-gag-bill-appearance-legislature-61769/>.

57. *Statement of Opposition to Proposed “Ag-gag” Laws from Broad Spectrum of Interest Groups*, AM SOC’Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <http://www.aspc.org/fight-cruelty/advocacy-center/ag-gag-whistleblower-suppression-legislation/statement-opposition> (last visited Dec. 18, 2014). The Statement reads:

We, the undersigned group of civil liberties, public health, food safety, environmental, food justice, animal welfare, legal, workers’ rights, journalism, and First Amendment organizations and individuals, hereby state our opposition to proposed whistleblower suppression laws, known as “ag-gag” bills, being introduced in states around the country. These bills seek to criminalize investigations of farms that reveal critical information about the production of animal products.

These bills represent a wholesale assault on many fundamental values shared by all people across the United States. Not only would these bills perpetuate animal abuse on industrial farms, they would also threaten workers’ rights, consumer health and safety, law enforcement investigations and the freedom of journalists, employees and the public at large to share information about something as fundamental as our food supply. We call on state legislators around the nation to drop or vote against these dangerous and un-American efforts.

*Id.*

the National District Attorneys Association.<sup>58</sup> Through an effective campaign putting the debate in terms of food safety and whistleblower rights rather than just animal welfare, this diverse coalition clearly won the battle for public opinion over ag-gag in 2013.

Since journalists have a clear stake in whistleblowing and undercover videos, newspaper editorials unsurprisingly played a large role in shaping public opinion against ag-gag bills as they were considered in state legislatures across the country. Local newspapers editorialized against proposed ag-gag legislation in California,<sup>59</sup> Indiana,<sup>60</sup> Pennsylvania,<sup>61</sup> and Tennessee.<sup>62</sup> *The New York Times*<sup>63</sup> and *The Washington Post*<sup>64</sup> wrote against ag-gag efforts generally. These editorials showed the public that ag-

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58. *Id.*

59. See, e.g., Editorial, *Livestock Abuse: The Perils of "Ag-gag" Bills*, L.A. TIMES (Mar. 27, 2013), <http://articles.latimes.com/2013/mar/27/opinion/la-ed-animal-cruelty-ab343-20130327> ("In reality, it's one of a crop of disturbing 'ag-gag' bills being introduced across the country. Although AB 343 is not as bad as some others that ban outright recording and videotaping at animal facilities, it would effectively hamper animal welfare undercover investigators and employee whistle-blowers who are collecting information on systemic animal cruelty at meatpacking plants, slaughterhouses, livestock ranches and farms. It should be put out of its misery and killed quickly in committee.")

60. See, e.g., Editorial, *Our View: Return of the Ag-gag Bill is a Bad Deal for All*, THE STAR PRESS (Jan. 9, 2014), <http://archive.thestarpress.com/article/20140110/OPINION01/301100019/Indiana%20Legislature,%20ag%20gag,%20farming,%20politics,%20agriculture> ("The silly season we know as the Indiana General Assembly is off and running. Legislators wasted no time getting down to business on unneeded legislation that likely violates the First Amendment.")

61. See, e.g., Editorial, *Bill to Make You "Ag-gag,"* THE TIMES-TRIBUNE (Mar. 27, 2013), <http://thetimes-tribune.com/opinion/bill-to-make-you-ag-gag-1.1463945> ("The bill directly contradicts a state law th[at] protects whistleblowers and it raises significant freedom of speech issues. It should be plowed under.")

62. See, e.g., Editorial, *Governor Should Fight Animal Cruelty, Veto "Ag-gag Bill,"* KNOXVILLE NEWS SENTINEL (Apr. 20, 2013), <http://www.knoxnews.com/news/2013/apr/30/editorial-governor-should-fight-animal-cruelty/?print=1> ("The agriculture lobby is strong, and the bill's sponsors are allies. Holt is a member of the Tennessee Cattlemen's Association, as well as other farm and ranch trade associations. Gresham is a member of the Tennessee Cattle Women's Association. Both are Tennessee Farm Bureau members. But [Governor] Haslam should note that the Humane Society and the ASPCA oppose the measure, and they are in the animal cruelty prevention business.")

63. See Editorial, *Eating With Our Eyes Closed*, N.Y. TIMES (Apr. 9, 2013), [http://www.nytimes.com/2013/04/10/opinion/eating-with-our-eyes-closed.html?\\_r=1&](http://www.nytimes.com/2013/04/10/opinion/eating-with-our-eyes-closed.html?_r=1&) ("Their only purpose is to keep consumers in the dark, to make sure we know as little as possible about the grim details of factory farming.")

64. See Editorial, *Cruelty to Farm Animals Demands Exposure*, WASH. POST (Apr. 26, 2013), [http://www.washingtonpost.com/opinions/cruelty-to-farm-animals-demands-exposure/2013/04/26/9a972c8e-a6bf-11e2-a8e2-5b98cb59187f\\_story.html](http://www.washingtonpost.com/opinions/cruelty-to-farm-animals-demands-exposure/2013/04/26/9a972c8e-a6bf-11e2-a8e2-5b98cb59187f_story.html) ("Society demands a level of openness, and America has a proud tradition of people doing good by showing what's wrong. As you next cut into a steak or crack an egg, ask yourself why an industry that claims it has nothing to hide demands protections afforded to no other.")

gag bills were not proposed to support the small farmer. Rather, they had been “pushed by intensive lobbying from agribusiness corporations and animal production groups” and would lead to “increased distrust of American farmers and our food supply in general.”<sup>65</sup>

## 2. *First Amendment Concerns Prevented Some Lawmakers from Supporting Ag-gag Legislation*

The second major reason for ag-gag’s failure in 2013 was that some legislators and governors expressed First Amendment concerns over traditional ag-gag bills.<sup>66</sup> Take for example Tennessee, in which ag-gag legislation passed through both houses but was hesitantly vetoed by the governor.<sup>67</sup> Governor Bill Haslam released a statement outlining his reasons for vetoing the bill and urging the General Assembly to reconsider the issue:

First, the Attorney General says the law is constitutionally suspect. Second, it appears to repeal parts of Tennessee’s Shield Law without saying so. If that is the case, it should say so. Third, there are concerns from some district attorneys that the act actually makes it more difficult to prosecute animal cruelty cases, which would be an unintended consequence.

For these reasons, I am vetoing HB1191/SB1248, and I respectfully encourage the General Assembly to reconsider this issue.<sup>68</sup>

Similarly, after an ag-gag bill failed in Indiana last year, House Speaker Brian Bosma declared the issue to be among the most important the legislature should study during its recess: “There’s clearly a need for protection from outside influences in regard to the ag industry . . . The question is the best remedy and

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65. Editorial, *supra* note 63.

66. Several authors have written about ag-gag and First Amendment concerns in the last few years. See, e.g., Landfried, *supra* note 13; Adam, *supra* note 19; Sonci Kingery, Note, *The Agricultural Iron Curtain: Ag-gag Legislation and the Threat to Free Speech, Food Safety, and Animal Welfare*, 17 DRAKE J. AGRIC. L. 645, 667–75 (2012).

67. Press Release, Tennessee Governor Bill Haslam, Haslam Releases Statement on HB 1191/SB 1248 (May 13, 2013), available at <https://news.tn.gov/node/10688>.

68. *Id.*

one that doesn't run afoul of the First Amendment."<sup>69</sup> Indiana reconsidered ag-gag legislation in 2014 with Senate Bill 101, but ultimately passed a tough agricultural operation trespass and property damage law instead.<sup>70</sup>

### 3. *The First Ag-gag Case Was Dropped*

Finally, ag-gag failed in 2013 because the first opportunity to prosecute an ag-gag case was dropped. Amy Meyer was charged with a class B misdemeanor for agricultural-operation interference in Utah on February 19, 2013. Meyer, an animal-welfare activist, took video on her cell phone at the Dale T. Smith and Sons Meatpacking Company. The prosecutor filed charges under Utah's ag-gag law, but later dropped them claiming that Meyer possessed video evidence that proved she was standing on public property when she took the video.<sup>71</sup> Though the prosecutor claimed negative publicity did not affect his decision to drop the charges, the case had made national headlines in the days leading up to his announcement.<sup>72</sup> The public outcry and publicity this case received demonstrates that the public opinion war is not over once ag-gag legislation is on the books, and that such an unpopular law may therefore not be the most useful way to keep activists away from agricultural facilities.<sup>73</sup>

## III. AG-GAG AND THE RAPID REPORTING REQUIREMENT

The latest wave of ag-gag proposals sweeping across state legislatures are bills that create the duty to rapidly report evidence of abuse to the police. This section examines rapid reporting ag-gag laws. First, Part III.A discusses state laws that have been

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69. "Ag-gag" Bill Fails to Pass in Indiana, ALL ABOUT FEED (May 2, 2013), <http://www.allaboutfeed.net/Home/General/2013/5/Ag-gag-bill-fails-to-pass-in-Indiana-1245917W/>.

70. Act of July 1, 2014, 2014 Ind. Legis. Serv. P.L. 21-2014 (West).

71. Jim Dalrymple, *Utah Prosecutor Dismisses Suddenly High-Profile "Ag-gag" Case*, THE SALT LAKE TRIBUNE (May 1, 2013), <http://www.sltrib.com/sltrib/news/56240592-78/case-meyer-law-gag.html.csp>.

72. *Id.* The town mayor was also part owner of the meatpacking company. *Id.*

73. Amy Meyer wrote an op-ed about her experience and the dangers of ag-gag legislation. Amy Meyer, Op-Ed., "Ag-gag" Laws Will Deter Reporting on Animal Abuse, WASH. POST (June 7, 2013), [http://www.washingtonpost.com/opinions/ag-gag-laws-will-deter-reporting-on-animal-abuse/2013/06/07/f93e8876-ca42-11e2-9245-773c0123c027\\_story.html](http://www.washingtonpost.com/opinions/ag-gag-laws-will-deter-reporting-on-animal-abuse/2013/06/07/f93e8876-ca42-11e2-9245-773c0123c027_story.html) ("My hope was that, through my videotaping of what appeared to me to be acts of cruelty, perhaps charges could be filed. And indeed they were: against me.").



proposed or passed, analyzing the language of the bills as well as the public and legislative debate surrounding them. Part III.B then explains why such bills are problematic from a policy perspective, and shows how rare duty-to-report laws are in general.

#### A. RAPID REPORTING THROUGHOUT THE STATES

##### 1. *Missouri SB 631*

In April 2012, the Missouri House passed House Bill 1860 by a vote of 124–29.<sup>74</sup> That bill incorporated aspects of both types of classic ag-gag legislation.<sup>75</sup> As passed in the House, House Bill 1860 would have been among the toughest and most thorough ag-gag bills in the country. First, it would have created the crime of “agricultural production facility fraud”:

A person commits the crime of agricultural production facility fraud if the person willfully does any of the following:

- (1) Obtains access to an agricultural production facility by false pretenses;
- (2) Makes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized.<sup>76</sup>

A person convicted of this crime would face a Class B misdemeanor.<sup>77</sup> A second violation would result in a Class A misdemeanor,<sup>78</sup> punishable by up to a year of jail time, a \$1000 fine, or both.<sup>79</sup> Repeat offenders would be punished with up to four years in prison and stiff fines.<sup>80</sup> In addition, “[a]ny person who aids,

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74. Dan Flynn, *Missouri House Moves Ag-Gag Bill to Senate*, FOOD SAFETY NEWS (Apr. 19, 2012), [http://www.foodsafetynews.com/2012/04/missouri-house-moves-ag-gag-to-senate/#.Ux0li\\_SwJCM](http://www.foodsafetynews.com/2012/04/missouri-house-moves-ag-gag-to-senate/#.Ux0li_SwJCM).

75. H.B. 1860, 96th Gen. Assem., 2d Reg. Sess. (Mo. 2012).

76. *Id.*

77. *Id.*

78. *Id.*

79. See Flynn, *supra* note 74.

80. *Id.*

abets, acts in concert, or otherwise participates, directly or indirectly, in the commission of the crime is guilty of the crime of agricultural production facility fraud.”<sup>81</sup> The serious penalties and broad structure of the bill could have been extremely effective at scaring off animal welfare activists in the state of Missouri.

House Bill 1860 would have also created the crime of “agricultural production facility interference”, a Class A misdemeanor for first time offenders and a Class D felony for a subsequent offense.<sup>82</sup> This provision was one of the broadest proposals for “type one” ag-gag.<sup>83</sup> In addition to outlawing photography and videography without owner consent, House Bill 1860 would have also made it illegal to:

(2) Possess or distribute a record which reproduces an image or sound occurring at the facility which was produced as provided in subdivision (1) of this subsection;

(3) Exercise control over the facility, including an animal or crop maintained at the facility or other property kept at the facility, with intent to deprive the facility of an animal, crop, or property; or

(4) Enter onto the facility or remain at the facility if such person has notice that the facility is not open to the public. A person has notice that a facility is not open to the public if the person is provided notice before entering onto the facility or the person refuses to immediately leave the facility after being informed to leave. The notice may be in the form of a written or verbal communication by the owner, a fence or other enclosure designed to exclude intruders or contain animals or crops, or a sign posted which is reasonably likely to come to the attention of an intruder and which indicates that entry is forbidden.<sup>84</sup>

With such broad provisions and tough penalties, House Bill 1860 would have likely been the most far-reaching ag-gag law in the country, and possibly the most effective at keeping activists away from agricultural production facilities.

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81. H.B. 1860, 96th Gen. Assem., 2d Reg. Sess. (Mo. 2012).

82. *Id.*

83. *See supra* Part II.C.

84. H.B. 1860, 96th Gen. Assem., 2d Reg. Sess. (Mo. 2012).

House Bill 1860 easily passed the Missouri House with over seventy-five percent of the vote and headed to the Republican-controlled Senate.<sup>85</sup> Whether the Senate feared a veto from Democratic Governor Jay Nixon or changed course for a different reason is unclear, but the resulting bill — Senate Bill 631 — shifted the direction of ag-gag in Missouri, and possibly in the rest of the country.

Now law, Senate Bill 631 was a comprehensive agriculture bill addressing a wide variety of subjects. For example, the Act sets the maximum weight of a truck carrying livestock or milk,<sup>86</sup> and establishes the “Agritourism Promotion Act.”<sup>87</sup> Alongside these noncontroversial sections, the Senate included an ag-gag provision:

(1) Whenever any farm animal professional videotapes or otherwise makes a digital recording of what he or she believes to depict a farm animal subjected to abuse or neglect under sections 578.009 or 578.012, such farm animal professional shall have a duty to submit such videotape or digital recording to a law enforcement agency within twenty-four hours of the recording.

(2) No videotape or digital recording submitted under subsection 1 of this section shall be spliced, edited, or manipulated in any way prior to its submission.

(3) An intentional violation of any provision of this section is a class A misdemeanor.<sup>88</sup>

Importantly, “farm animal professional” is defined as “any individual employed at a location where farm animals are harbored.”<sup>89</sup> While trespassing is still illegal in Missouri, if Amy Meyer recorded a video of abuse on her cell phone from across the street of a Missouri CAFO, she would not have had the duty to submit that video to the police. Still, this law is an effective ag-gag approach because most undercover investigations by the Humane Society, Mercy for Animals, and similar groups are con-

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85. See Flynn, *supra* note 74.

86. MO. ANN. STAT. § 304.180 (West 2014).

87. *Id.* at § 537.850.

88. *Id.* at § 578.013.

89. *Id.* at § 578.005.

ducted by an activist gaining employment at an agricultural production facility.<sup>90</sup>

## 2. *Nebraska Legislative Bill 204*

Nebraska was the first state to follow Missouri's lead by introducing Legislative Bill 204 on January 15, 2013.<sup>91</sup> Like Missouri's law, LB 204 focused on rapid reporting of abuse. By proposing the first bill of its type since Missouri introduced ag-gag's newest form, Nebraska became the initial battleground for shaping public perception of this new type of law.

LB 204 shows clear signs that the bill's authors tried to shed the ag-gag label. First and foremost, the bill declares that it should not be perceived to have any First Amendment implications:

(5) Nothing in this section shall be construed:

(a) To prohibit any expressive conduct, including peaceful picketing or other peaceful demonstration, protected from legal prohibition by the First Amendment to the Constitution of the United States; or

(b) To create new remedies for interference with activities protected by the free speech or free exercise clause of the First Amendment to the Constitution of the United States regardless of the point of view expressed or to limit any existing legal remedies for such interference.<sup>92</sup>

Since LB 204 would not prohibit taking photographs or videos as classic Utah-type ag-gag bills do, this section may not be entirely necessary. However, another section leaves some ambiguity as to whether the person lawfully reporting abuse may keep

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90. Industry groups lauded the law's potential to quell "extremist" groups such as the Humane Society of the U.S. and PETA. For example, a post on the website of the National Hog Farmer quotes Missouri Cattlemen's Association President Lonny Duckworth: "This is a common-sense law that is good for our animals and our farmers and ranchers. If abuse does in fact occur, it needs to be dealt with immediately instead of being sensationalized months later as a fundraising tool for extremist animal rights groups like HSUS, PETA, and others." *Missouri Group Applauds Recent Passage of Undercover Video Bill*, NAT'L HOG FARMER (Jul. 12, 2012), <http://nationalhogfarmer.com/animal-well-being/missouri-group-applauds-recent-passage-undercover-video-bill>.

91. L.B. 204, 103d Leg., 1st Sess. (Neb. 2013).

92. *Id.* at § 3(5)(a)–(b).

and/or distribute a copy of the evidence. That subsection states that the person<sup>93</sup> making the report should include “[a]ll original documentation, if any, or copies thereof, including video, photographs, or audio, which is evidence of animal abandonment, cruel neglect, or cruel mistreatment.”<sup>94</sup> The disjunctive “or copies thereof” interpreted alongside the directions not to construe the bill to violate the First Amendment might suggest that the reporter may keep and distribute the footage as she wishes.

Critics of the bill maintained that the legislation nevertheless protected agricultural facility owners from all undercover investigations. Jocelyn Nickerson, Nebraska director for the Humane Society of the United States, called LB 204 just another ag-gag bill trying to prevent whistleblowing: “Any type of restriction shields abuse at factory farms. Whistle blowing is something we have to do to keep people accountable.”<sup>95</sup> The bill’s sponsor, Senator Tyson Larson, disagreed: “If she calls this an ag-gag bill, I think that’s the farthest from the truth,” and said that if organizations like the Humane Society truly cared about the animals, they would turn over evidence immediately, rather than using it to create media campaigns.<sup>96</sup> Larson stood by the bill as a legitimate way to protect animals, saying, “Our state and our producers take great pride in treating animals well, and when people don’t treat animals well, it puts everybody in a negative light.”<sup>97</sup> The Nebraska bill has not been passed.

### 3. *California Assembly Bill 343*

On February 13, 2013, California Assemblyman Jim Patterson introduced AB 343.<sup>98</sup> As amended, the bill took an even softer approach than prior drafts and attempted to move away from common ag-gag language. The bill would have required anyone who documented evidence of animal cruelty to “provide a copy of the applicable form of documentary evidence obtained by the per-

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93. Note that the final draft of the bill removed or replaced the word “employee” with “person.” See L.B. 204, 103d Leg., 1st Sess. (Neb. 2013).

94. *Id.* at § 2(5)(e).

95. Heather Johnson, *Bill Would Force Witnesses to Report Animal Abuse*, NORTH PLATTE TELEGRAPH (Jan. 17, 2013), [http://www.nptelegraph.com/news/bill-would-force-witnesses-to-report-animal-abuse/article\\_83cd0547-3848-5100-b498-8f7d0e98b099.html](http://www.nptelegraph.com/news/bill-would-force-witnesses-to-report-animal-abuse/article_83cd0547-3848-5100-b498-8f7d0e98b099.html).

96. *Id.*

97. *Id.*

98. A.B. 343, 2013–14 Reg. Sess. (Ca. 2013).

son to local law enforcement or an associated animal control officer within 120 hours. . . .”<sup>99</sup> The penalty of \$250 was minor compared to other ag-gag proposals.<sup>100</sup> Additionally, the bill appeared to protect undercover investigations:

Nothing in this section shall limit or impede an ongoing investigation as long as a copy of the documentary evidence is provided to law enforcement as required by subdivision (a). Nothing in this section shall require or encourage law enforcement agencies to reveal the source of the documentary evidence to the employer of the person who is the source of the material or to any person who is suspected of animal cruelty.<sup>101</sup>

Despite the anti-animal cruelty language, animal welfare groups and newspaper editorials attacked the bill, characterizing it as ag-gag. A March 2013 *Los Angeles Times* editorial declared that while AB 343 sounded like a tough attempt to eradicate animal abuse, “[i]n reality, it’s one of a crop of disturbing ‘ag-gag’ bills being introduced across the country.”<sup>102</sup> The editorial quotes the bill’s sponsor, who defended the bill as a legitimate means to curb animal abuse. Patterson asks, “Do you really have to have 10 animals abused? Isn’t one enough?”<sup>103</sup> The response: “A single incident, reported to a district attorney or police, is rarely enough for a strong case for prosecution and can easily be dismissed by the facility owner as a one-time occurrence, according to the director of undercover investigations for the Humane Society of the U.S.”<sup>104</sup> While ag-gag bills have changed significantly since Iowa and Utah, the response from the Humane Society and others has remained largely the same. This response has also remained effective, at least in California. The bill was pulled at the request of its author.

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99. *Id.*

100. For example, North Carolina’s S.B. 648 would have imposed a \$10,000 fine for the first time a person failed to turn over evidence. *See infra* Part III.A.v.

101. A.B. 343, 2013–14 Reg. Sess. (Ca. 2013).

102. *See* Editorial, *supra* note 59.

103. *Id.*

104. *Id.*

#### 4. *Tennessee Senate Bill 1248/House Bill 1191*

Tennessee's duty to report animal abuse proposal was simple:

Any person who records by photograph or video a violation of subsection (a) as committed against livestock shall, within twenty-four (24) hours of the photograph's or recording's creation:

- (1) Report such violation to law enforcement authorities; and
- (2) Submit any unedited photographs or video recordings to law enforcement authorities.<sup>105</sup>

House Bill 1191 and Senate Bill 1248 each passed through its respective house, but as discussed above, Governor Haslam hesitantly vetoed the measure.<sup>106</sup> Citing constitutional concerns and a potential conflict with Tennessee's Shield Law (which protects reporters from being forced to give up their sources), the Governor "respectfully encourage[d] the General Assembly to reconsider this issue."<sup>107</sup>

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105. H.B. 1191, 108th Gen. Assemb. (Tenn. 2013).

106. See *supra* Part II.D.ii.

107. Press Release, Tennessee Governor Bill Haslam, *supra* note 67. The General Assembly quickly returned to the issue in 2014, but with a different approach. First, Senate Bill 2406 defined the word "disrupt" in the "Farm Animal and Research Facilities Protection" section of the Tennessee Code, which was enacted in 1992. 2014 Tenn. Pub. Acts Ch. 893 (S.B. 2406) (to be codified at TENN. CODE ANN. § 39-14-803). "Disrupt" now means "to engage in conduct that materially interferes with the operations of the animal facility in a manner such that the activities conducted by or in the facility are permanently or temporarily halted, compromised, delayed, harmed or impaired." *Id.* The inclusion of words such as "temporarily" and "delayed" set a low bar under which an activist or investigator may be prosecuted.

The real ag-gag provision, however, was inserted into Senate Bill 1892, which is largely a restriction on the use of drones to photograph private property, including agricultural facilities. See 2014 Tenn. Pub. Acts Ch. 876 (S.B. 1892). And while such restrictions may impact the strategy of animal welfare groups in the future if they turn to drones to record abuse, for now, Section 10 of the bill would have created the crime of "surreptitious commercial surveillance." *Id.* This provision would have banned taking photographs or videos under false pretenses, the classic type of ag-gag that has failed in numerous states over the last two years. The House Civil Justice Subcommittee took out the section, and the bill was signed into law sans ag-gag. See Tom Humphrey, *House Subcommittee Kills Effort to Ban 'Surreptitious Commercial Surveillance'*, KNOXVILLE NEWS SENTINEL (Mar. 23, 2014), <http://www.knoxnews.com/news/house-subcommittee-kills-effort-to-ban>.

### 5. North Carolina Senate Bill 648

North Carolina, site of the famous Mercy for Animals undercover investigation of Butterball's turkey facility,<sup>108</sup> was the next state to propose mandatory reporting of animal abuse with the broad and strategically named "NC Commerce Protection Act of 2013."<sup>109</sup> The bill's wide scope included the "Predatory Third Party Financing of Litigation Act," as well as the "Transparency in Private Attorney Contracts Act."<sup>110</sup> With ag-gag bundled with such other provisions, the agriculture industry enjoyed the backing of the powerful North Carolina Chamber of Commerce.<sup>111</sup> Perhaps for that reason, the bill's backers attempted to pass such a strong ag-gag bill.

First, the bill created the crime of employment fraud, which would have made it illegal to make false statements or representations to get hired for the purpose of producing photographs or video or for capturing or removing data.<sup>112</sup> This is the form of ag-gag first passed in Iowa.<sup>113</sup> The bill also went on to require that all video and photographs be turned over to the police within twenty-four hours of recording or procurement.<sup>114</sup> Whereas violators of California's AB 343 would have been fined \$250, North Carolina's SB 648 would impose a \$10,000 fine for the first time a person failed to turn over evidence and a \$50,000 penalty for a subsequent violation.<sup>115</sup> North Carolina passed the NC Commerce Protection Act of 2014 the following year, but the ag-gag language was not included in the law.<sup>116</sup>

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108. "In the hidden camera video, workers can be seen kicking and stomping on turkeys, as well as dragging them by their wings and necks. The video also shows injured birds with open wounds and exposed flesh." Cindy Galli et al., *Butterball Turkey Raided Amid Animal Abuse Allegations*, ABC NEWS (Dec. 29, 2011), <http://abcnews.go.com/Blotter/butterball-turkey-raided-amid-animal-abuse-allegations/story?id=15249456>.

109. S.B. 648, 2013–14 Reg. Sess. (N.C. 2013).

110. *Id.*

111. Dan Flynn, "Ag-gag" Battle Moves on to North Carolina, FOOD SAFETY NEWS (May 29, 2013), <http://www.foodsafetynews.com/2013/05/ag-gag-battle-moves-on-to-north-carolina/#.UuNsRGQo5hA> ("[T]he 'ag-gag' provisions are backed by the state Chamber of Commerce and other powerful business allies. But the NC chamber says SB 648 is not an 'ag-gag' bill as it is not focused solely on agriculture and does not loosen whistleblower protections in state law.")

112. S.B. 648, 2013–14 Reg. Sess. (N.C. 2013).

113. See IOWA CODE ANN. § 717A.3A (West 2014).

114. S.B. 648, 2013–14 Reg. Sess. (N.C. 2013).

115. *Id.*

116. See S.B. 648, 2013 Gen. Assemb., 2014 Reg. Sess. (N.C. 2013).



## 6. *New Hampshire House Bill 110*

New Hampshire's House Bill 110 was a basic rapid reporting statute that would require a person to turn over unedited photographs or videos to law enforcement authorities within twenty-four hours.<sup>117</sup> First proposed in 2013, the bill was most recently introduced in January 2014.<sup>118</sup> HB 110 was tabled, and on September 17, 2014, considered dead.<sup>119</sup>

## 7. *Arizona House Bill 2587*

A rapid reporting bill was introduced in Arizona on February 10, 2014.<sup>120</sup> Seemingly learning from past ag-gag failures in other states, the bill's sponsors slipped an ag-gag provision in alongside anti-animal-abuse language. Section 2(G) read: "Any person who possesses a video, a photograph or other evidence of a violation of this section shall provide the evidence to a law enforcement agency within five days after the person acquires the evidence."<sup>121</sup> While the bill's authors assumed an anti-abuse tone,<sup>122</sup> the anti-abuse provisions are redundant of the animal abuse laws Arizona already has in place.<sup>123</sup> Therefore, this bill would have done little to nothing in terms of protecting animals, but would have significantly restricted undercover investigators' ability to build a case against an agricultural facility. The most recent draft of the bill did not include the ag-gag language, and the Senate has not acted on the bill since April 2014.

## 8. *Rapid Reporting in 2014 and Beyond*

The only successful ag-gag legislation in 2014 was a combination of the two original types of ag-gag. Idaho's new crime of "interference with agricultural production" makes it illegal to both

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117. H.B. 110, 163d Gen. Ct., Reg. Sess. (N.H. 2013).

118. See New Hampshire General Court — Bill Status System, [http://www.gencourt.state.nh.us/bill\\_status/bill\\_status.aspx?lsr=54&sy=2014&sortoption=&txtsessionyear=2014&txtbillnumber=hb110](http://www.gencourt.state.nh.us/bill_status/bill_status.aspx?lsr=54&sy=2014&sortoption=&txtsessionyear=2014&txtbillnumber=hb110) (last visited Dec. 22, 2014).

119. *Id.*

120. H.B. 2587, 51st Leg., 2d Reg. Sess. (Ariz. 2014).

121. *Id.*

122. Section 1(A) reads: "A person shall not intentionally or knowingly cause injury or undue suffering to livestock, including by torturing or tormenting, depriving of necessary sustenance or unnecessarily or cruelly beating, injuring or mutilating any livestock." *Id.*

123. See ARIZ. REV. STAT. ANN. § 13-2910 (West 2012). This is the part of the code Section 2 of the proposed legislation would amend.

(1) misrepresent oneself when applying to a facility “with the intent to cause economic or other injury to the facility’s operations” and (2) make “audio or video recordings<sup>124</sup> of the conduct of an agricultural production facility’s operations” without consent.<sup>125</sup>

Despite Idaho’s recent success in passing traditional ag-gag legislation, rapid reporting will still likely be the approach of choice elsewhere in the near future, particularly in states without a dairy lobby as influential as the one in Idaho.<sup>126</sup> According to a January 2014 *Food Safety News* report, “Kay Johnson Smith, chief executive officer of the national Animal Agriculture Alliance, has acknowledged to industry media that quick reporting is the group’s 2014 legislative strategy.”<sup>127</sup> New ag-gag proposals are thus more likely to look like the ones in Missouri and California than ones containing traditional ag-gag provisions.<sup>128</sup>

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124. Unlike in the other states with similar legislation, photographs were not included, leaving activists a potential loophole. IDAHO CODE ANN. § 18-7042 (2014).

125. *Id.*

126. Idaho’s law was introduced on February 11th and signed into law just over two weeks later on February 28th. See LegiScan, <https://legiscan.com/ID/bill/S1337/2014> (last visited Dec. 21, 2014). Though Hamdi Ulukaya, founder of Chobani yogurt (whose plant is in Idaho), urged Governor C.L. “Butch” Otter to veto the bill, the rest of Idaho’s \$2.4 billion dairy industry seemed to back the legislation. See Dan Flynn, *Idaho Governor Signs ‘Ag-Gag’ Bill into Law*, FOOD SAFETY NEWS (Feb. 28, 2014), <http://www.foodsafetynews.com/2014/02/governor-otter-should-reconsider-idaho-ag-gag-bill-says-chobani-founder/#.UxkkmPSwJCM>. Members of the Idaho Dairymen’s Association testified for the bill, saying that animal-welfare activists were more concerned with attacking the industry than actually helping animals. *Id.* Mercy for Animals produced a video, originally filmed in 2012, showing animals being abused and sexually molested at Bettencourt Dairy in Idaho. See Paresh Dave, *Graphic Cow Abuse Video Released as Idaho Advances ‘Ag-gag’ Bill*, L.A. TIMES (Feb. 18, 2014), <http://articles.latimes.com/2014/feb/18/nation/la-na-nn-cow-abuse-video-idaho-ag-gag-bill-20140218>. As a result, five employees were fired and the man that was filmed sexually abusing a cow eventually spent 102 days in jail. *Id.*

127. Dan Flynn, *Animal Ag’s 2014 Legislative Strategy: Require Quick Abuse Reporting*, FOOD SAFETY NEWS (Jan. 8, 2014), <http://www.foodsafetynews.com/2014/01/animal-agricultures-quick-reporting-strategy-for-abuse/#.UuN7OWQo5hA> (“Johnson claims that animal welfare groups that go undercover at animal agriculture facilities string out investigations to tie abuse that’s documented to brand names to drum up publicity. Short reporting deadlines mean that patterns of abuse cannot be documented, according to animal welfare groups that do such investigations.”).

128. At least one other state — Kentucky — considered criminalizing the taking of photos or videos of agriculture operations. House Bill 222 originally sought to prohibit “animal shelters from using gas or decompression chambers to euthanize stray pets.” See Dan Flynn, *Kentucky Animal Euthanasia Bill Amended with ‘Ag-gag’ Language Probably Won’t Make it*, FOOD SAFETY NEWS (Apr. 8, 2014), <http://www.foodsafetynews.com/2014/04/animal-euthanasia-bill-amended-in-kentucky-with-ag-gag-language-wont-make-it/#.VCi7qildVps>. The bill easily passed the House, 84–6, but an ag-gag amendment was then added in the Kentucky Senate. *Id.* The amended bill passed the Senate, but the bill’s original sponsor withdrew her support, and the two versions have not been reconciled. *Id.*

Furthermore, a failed attempt in Colorado to prosecute an activist in the absence of ag-gag legislation will encourage the industry to persist in the fight for these provisions in state legislatures across the country. Taylor Radig, an activist with the animal welfare organization Compassion Over Killing, was charged with animal cruelty, a Class 1 misdemeanor, in November 2013.<sup>129</sup> Radig recorded video evidence of abuse while working at the Quannah Cattle Company between July and September.<sup>130</sup> Compassion Over Killing turned the videos over to police, leading to the citation of three employees for animal abuse.<sup>131</sup> However, Radig was also cited for animal abuse because she held onto the evidence for so long, allowing the perpetrators to inflict more abuse.<sup>132</sup> Colorado does not have any form of ag-gag law. Charges against Radig were dropped on January 10, 2014, because the District Attorney's Office determined that charges could not be proven beyond a reasonable doubt.<sup>133</sup> Had Radig been found guilty, or even forced to go to trial, industry proponents may have paused the push for ag-gag legislation and pursued the Colorado approach. With this prosecutorial failure, however, the agriculture lobby is likely to focus its efforts on passing rapid reporting provisions for the foreseeable future.

## B. WHY RAPID REPORTING LAWS ARE PROBLEMATIC

Rapid reporting ag-gag laws run contrary to public policy. This section details the reasons these laws are harmful, and then shows how rare mandatory reporting laws are in general. By establishing that (1) extant duty-to-report laws are reserved for serious felonies, and (2) even those laws do not require reporting *rapidly*, this section demonstrates that no matter how innocuous the language in a given statute, rapid reporting ag-gag laws are simply anti-activist measures.

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129. See Erica Shaffer, *Videographer Cited in Colorado Animal Abuse Case*, MEAT & POULTRY MAGAZINE (Nov. 26, 2013), [http://www.meatpoultry.com/articles/news\\_home/Business/2013/11/Videographer\\_cited\\_in\\_Colorado.aspx?ID=%7B92D6801A-B3C4-487C-B824-B3A3FDCE7942%7D&cck=1](http://www.meatpoultry.com/articles/news_home/Business/2013/11/Videographer_cited_in_Colorado.aspx?ID=%7B92D6801A-B3C4-487C-B824-B3A3FDCE7942%7D&cck=1).

130. *Id.*

131. *Id.*

132. *Id.*

133. Press Release, Weld Cnty. Dist. Attorney's Office, Charges Dismissed Against Woman Who Filmed Calf Abuse (Jan. 10, 2014), *available at* <http://www.co.weld.co.us/assets/6b43d37dAA7AA6074752.pdf>.

### 1. *Rapid Reporting Laws Run Contrary to Public Policy*

The policy reasoning against duty to report animal abuse laws is simple: without showing a pattern of abuse, the agricultural facility where the abuse happens will not face tough consequences. There may be fines and an employee or two may be fired. The owner or owners, however, will not face criminal or economic consequences to the extent they did in the fallout from the Westland/Hallmark investigation.<sup>134</sup> Newspapers, animal welfare groups, and other ag-gag opponents have successfully used this argument in almost every state in which these bills have been proposed. But as these laws are proposed and re-proposed in 2014 and beyond — perhaps with more general language and/or bundled with uncontroversial provisions — opponents should consider another argument: duty-to-report laws are exceedingly rare in the United States.

### 2. *Duty-to-Report Laws Are Exceedingly Rare*

In the United States, laws mandating that an observer to a crime must report the violation to the authorities are unusual. This section begins by examining child abuse laws, which are the only type of duty-to-report laws enacted consistently in states across the country. It then turns to miscellaneous duty-to-report statutes, state-by-state, in an effort to demonstrate two phenomena. First, unlike rapid reporting ag-gag laws, all other duty-to-report laws have easily discernible policy reasoning behind them. Moreover, these rare statutes are reserved for serious felonies, whereas animal abuse — though certainly serious — is generally only a misdemeanor. Second, these statutes impose a duty to report, but not a duty to report rapidly. This distinction is exactly what makes rapid reporting of animal abuse statutes “ag-gag.” Animal welfare activists *want* to report abuse. Reporting the abuse is why they go undercover and work at slaughterhouses for weeks and months, gathering evidence. Mandating that these individuals turn that evidence over within one to five days forces them to blow their cover before they have the chance to build a viable case.

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134. See *supra* Part I.

a. *Child Abuse Laws*

The one major exception to the lack of duty-to-report laws in the United States is the duty to report suspected child abuse or neglect. “Approximately 48 [s]tates, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands designate professions whose members are mandated by law to report child maltreatment.”<sup>135</sup> The most commonly designated professions include doctors, nurses, social workers, teachers and childcare providers, mental health professionals, and law enforcement officers.<sup>136</sup> Twenty-seven states also require members of the clergy to report suspected abuse.<sup>137</sup> “In approximately 18 [s]tates and Puerto Rico, any person who suspects child abuse or neglect is required to report,” regardless of his profession.<sup>138</sup> For designated professionals, “[t]ypically, a report must be made when the reporter, in his or her official capacity, suspects or has reasons to believe that a child has been abused or neglected.”<sup>139</sup> In other states, the standard is when “the reporter has knowledge of, or observes a child being subjected to, conditions that would reasonably result in harm to the child.”<sup>140</sup>

The obvious question, then, is why not also impose a duty to report animal abuse? After all, like many children, animals cannot speak for themselves. The simple answer is that the consequences of a single report of child abuse are much different than a single report of animal abuse. Prosecutors need not compile weeks of video evidence to successfully try a case. In the animal abuse scenario, owners of the slaughterhouses can claim any abuse was a one-time occurrence, and while a worker or two may be fired and possibly face prosecution, the owner does not face any major consequences. Furthermore, the *rapid* reporting requirement is clearly anti-activist when compared to child abuse reporting statutes. If such time restrictions do not exist for doc-

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135. CHILD WELFARE INFORMATION GATEWAY, U.S. DEP’T. OF HEALTH AND HUMAN SERVICES, CHILDREN’S BUREAU, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1 (2014).

136. *Id.* at 1–2.

137. *Id.* at 2.

138. *Id.*

139. *Id.* at 3.

140. *Id.*

tors or teachers that suspect child abuse, they should not apply to observers of animal abuse.

b. *Other Duty-to-Report Laws*

Aside from the duty to report child abuse, few laws exist creating a legal duty to report a crime to the authorities. Repudiating the common law crime of misprision of a felony, Chief Justice Marshall once stated: “It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man.”<sup>141</sup> Some states have created a duty to report certain crimes, but generally those crimes are felonies such as sexual assault and murder. Though punishments vary greatly among the states, first-time animal cruelty is almost always a misdemeanor.<sup>142</sup> Therefore, rapid reporting ag-gag laws are the only laws in the country that legally require the reporting of a misdemeanor.

i. *Ohio*

Ohio has perhaps the most expansive duty-to-report law in the country.<sup>143</sup> This law was described by the Legislative Service Commission as “similar to, but narrower than the common law crime of misprision of a felony.”<sup>144</sup> Basically, persons with knowledge of a felony are required to inform authorities: “Except as provided in division (A)(2) of this section, no person knowing that a felony has been or is being committed, shall knowingly<sup>145</sup> fail to report such information to law enforcement authorities.”<sup>146</sup> The statute goes on to name specifically the duty to report upon

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141. Susan Hoffman, Note, *Statutes Establishing a Duty to Report Crimes or Render Assistance to Strangers: Making Apathy Criminal*, 72 KY. L.J. 827, 849 (1984) (quoting *Marbury v. Brooks*, 20 U.S. 556 (7 Wheat.) 575 (1822)).

142. *Animal Cruelty Laws State by State*, STRAY PET ADVOCACY, available at <http://www.straypetadvocacy.org/PDF/AnimalCrueltyLaws.pdf> (last visited Dec. 22, 2014). Felony status can be reached in some states for animal ‘torture’, or abusing service animals, for example. *Id.*

143. OHIO REV. CODE ANN. § 2921.22 (West 2014).

144. *Id.*

145. Discussion of whether a person must have knowledge of these specific duties to report laws is not necessary here. Ag-gag laws are generally aimed at activists and activist groups, who would presumably know of the ag-gag law in that state.

146. OHIO REV. CODE ANN. § 2921.22.

finding a dead body,<sup>147</sup> and to require medical personnel to report gunshot and stab wounds,<sup>148</sup> burn injuries,<sup>149</sup> and to note perceived domestic abuse.<sup>150</sup> The statute protects the attorney–client, doctor–patient, and clergy privileges, among others.<sup>151</sup> Animal cruelty<sup>152</sup> is a misdemeanor in Ohio,<sup>153</sup> so without an ag-gag statute, there is no duty to report the crime.

ii. *Massachusetts*

Massachusetts requires a person at the scene of an aggravated rape, rape, murder, manslaughter, or armed robbery to report the crime to the police.<sup>154</sup> Unlike rapid reporting ag-gag bills, this law only specifies that the person report “as soon as reasonably possible.”<sup>155</sup> The punishment for not reporting these crimes is a fine between \$500 and \$2,500.<sup>156</sup>

iii. *Duty to Report Sexual Assault: Florida and Rhode Island*

Florida only legally requires a person to report the crime of sexual battery.<sup>157</sup> Likewise, Rhode Island requires “[a]ny person, other than the victim, who knows or has reason to know that a first degree sexual assault or attempted first degree sexual assault is taking place in his or her presence” to notify the police.<sup>158</sup>

These laws seem somewhat analogous to duty-to-report ag-gag provisions — that is, if you see one specific crime, you must report that specific crime. However, the history behind the two sets of laws is quite different. Whereas rapid reporting ag-gag laws evolved from laws and bills seeking to ban capturing evidence of

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147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at § 959.02 (“No person shall maliciously, or willfully, and without the consent of the owner, kill or injure a horse, mare, foal, filly, jack, mule, sheep, goat, cow, steer, bull, heifer, ass, ox, swine, dog, cat, or other domestic animal that is the property of another. This section does not apply to a licensed veterinarian acting in an official capacity.”).

153. *Id.* at § 959.99.

154. MASS. GEN. LAWS ANN. ch. 268, § 40 (West 2014).

155. *Id.*

156. *Id.*

157. FLA. STAT. ANN. § 794.027 (West 2014).

158. R.I. GEN. LAWS ANN. § 11-37-3.1 (West 2014).

abuse, these sexual assault reporting laws were introduced because legislators thought people were not calling for help without them. Rhode Island's statute, for example, was a direct response to the infamous 1983 "Tavern Rape" in New Bedford, Massachusetts, in which "a young woman was raped repeatedly in a bar by four men while at least fifteen other men stood by and watched; some applauded and cheered, but no one called the police."<sup>159</sup>

#### iv. *Colorado*

Colorado's duty-to-report provision is more of a general statement than an actual legal duty: "It is the duty of every corporation or person who has reasonable grounds to believe that a crime has been committed to report promptly the suspected crime to law enforcement authorities."<sup>160</sup> There is no penalty for failing to report a crime. This provision simply encourages people to report crimes while granting immunity from civil liability when making a report in good faith.<sup>161</sup>

#### v. *Good Samaritan Laws*

Several states have related laws that impose a duty to act, which can include reporting to authorities. Hawaii,<sup>162</sup> Minnesota,<sup>163</sup> Vermont,<sup>164</sup> and Wisconsin<sup>165</sup> all have some variety of a "Good Samaritan" statute that either requires an observer to come to a victim's aid in certain scenarios or simply grants a "Good Samaritan" immunity from any civil liability.

### IV. RAPID REPORTING STATUTES SHOULD BE RESISTED BY A COALITION OF THOSE CONCERNED ABOUT ANIMAL WELFARE, FOOD SAFETY, WORKERS' RIGHTS, AND TRANSPARENCY

Ag-gag laws are not sound public policy because they provide animal abusers and their employers with advanced warning before any serious enforcement action can be brought. However,

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159. Hoffman, *supra* note 141, at 840.

160. COLO. REV. STAT. ANN. § 18-8-115 (West 2014).

161. *Id.*

162. HAW. REV. STAT. § 663-1.6 (West 2014).

163. MINN. STAT. ANN. § 604A.01 (West 2014).

164. VT. STAT. ANN. tit. 12, § 519 (West 2014).

165. WIS. STAT. ANN. § 940.34 (West 2013).



this reason alone cannot stop the powerful agriculture lobby from pushing legislation through in certain states. Therefore, animal welfare groups should restate their message and form a broader coalition with groups that deal with non-animal issues.

Two main reasons traditional ag-gag bills have largely failed in the past two years are that (1) opponents of the bills had a clear and simple message, and (2) animal welfare activists were joined in their opposition by groups from beyond the animal welfare community.<sup>166</sup> As rapid reporting statutes become the preferred policy of Big Ag backers, the animal welfare groups will not necessarily enjoy these same advantages.

First, the public message against classic ag-gag was simple: if there is nothing to hide, then why ban the cameras?<sup>167</sup> With rapid reporting ag-gag, however, that message will no longer apply. The strategic brilliance of rapid reporting laws is that they allow the agriculture industry to have the simple message. As Assemblyman Jim Patterson put it when defending California's version: "Do you really have to have 10 animals abused? Isn't one enough?"<sup>168</sup> The laws appear to be strict anti-animal-cruelty measures on their face. Groups such as the Humane Society will surely do their best to educate the public on the true effect of these laws. The problem, though, is that in states with strong agricultural support, the general public may not take the time to listen to the more complicated policy debate.

Second, and just as crucial, the animal welfare groups will not automatically garner the same broad support that they had when battling classic ag-gag. Classic ag-gag bills were more clearly whistleblower suppression, so workers' rights groups were vehemently against these proposals. Classic ag-gag bills more clearly stepped on freedom of the press. The press will still disfavor rapid reporting statutes because they could derail potential stories, but these laws may not whip up the same level of fury on editorial pages.

Because of these two potential hurdles, animal welfare groups have their work cut out for them in preventing rapid reporting bills from becoming law in states across the country. Without a clear message and a broad base of opposition to these bills, industry proponents will paint the animal welfare groups as extremists

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166. See *supra* Part II.D.

167. *Id.*

168. Editorial, *supra* note 59.

intent on bringing down the entire agriculture industry. As the states in which these bills are likely to be proposed are generally quite pro-farming, this strategy could be extremely effective.

Animal welfare groups therefore need to coordinate a strategy and message with the groups that previously helped them defeat classic ag-gag in state after state. Importantly, their public message must go beyond animal welfare. They should focus on food safety. Whether or not a person cares about what an animal feels before it is killed, she wants to trust that she is not going to get mad cow disease from her hamburger. Ag-gag laws threaten transparency in food production. As food safety is important to the public, the animal welfare groups should continue to ask why special laws that no other industry enjoys should shield the agricultural industry. These groups should argue that, because food safety is an important concern to all of the population, the industry should have to become more transparent, not less.

The message of animal welfare groups should also focus on workers' rights going forward. In no other industries are would-be whistleblowers punished for not turning their evidence over to the police within twenty-four hours. What, they should ask, makes this industry different? Just as workers should not be prevented from speaking out as whistleblowers, they should not be forced to speak out in order to avoid a criminal penalty. Animal welfare groups should make clear that rapid reporting ag-gag statutes are not in the best interest of agricultural workers.

Ag-gag advocates have continuously improved their messaging over the past several years in order to broaden their base of support. Animal welfare activists must respond accordingly. By using simple messages with broad appeal, animal welfare activists and their allies will have a much greater chance of stopping rapid reporting statutes from sweeping through state legislatures across the nation.

## V. CONCLUSION

Rapid reporting statutes appear to be the most plausible way for states to enact ag-gag legislation going forward. And, depending on the outcome of lawsuits challenging ag-gag statutes filed

in Utah<sup>169</sup> and Idaho,<sup>170</sup> rapid reporting statutes might soon be considered the only constitutionally valid form of ag-gag. Though New Hampshire and Arizona failed to pass rapid reporting legislation this year, other recent events, including the dropped animal abuse charges in ag-gag-free Colorado, show that the agriculture industry will have difficulty keeping undercover investigators away without them.

Ag-gag laws threaten both animal safety and the safety of the country's food supply. Because the agriculture lobby failed in 2013 to pass laws that would help cover up animal cruelty by banning videos and preventing activists applying for jobs at their facilities, it is now pushing laws that will effectively destroy an undercover investigation after the first pieces of evidence are recorded. Undercover investigations like the ones in North Carolina and California had huge economic and legal consequences, and agricultural facility owners are rightly worried about such an exposé of their facilities. Their proper course, however, should not be to prevent full-scale undercover investigations. Rather, it should be to properly train and monitor their employees so that they may rid their facilities of abuse.

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169. Complaint, Animal Legal Defense Fund v. Herbert, No. 2:13-cv-00679-RJS (D. Utah July 22, 2013), *available at* [https://www.animallaw.info/sites/default/files/pbusutaldf\\_herbert.pdf](https://www.animallaw.info/sites/default/files/pbusutaldf_herbert.pdf).

170. Animal Legal Defense Fund v. Otter, No. 1:14-cv-00104-BLW, 2014 WL 4388158 (D. Idaho Sept. 4, 2014).