
ANYTHING BUT AG-GAG: ENDING THE INDUSTRY-ADVOCATE CYCLE

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CONTENTS

INTRODUCTION	368
I. THE SICKNESS: COMMON CAFO SIDE-EFFECTS	371
A. <i>Animal Abuse</i>	372
B. <i>Health and Food Safety</i>	374
C. <i>Environmental Pollution</i>	375
D. <i>Worker Safety</i>	376
E. <i>Economic Impacts</i>	377
II. THE CYCLE: INDUSTRY VS. ADVOCATE-ACTIVIST	378
A. <i>Tug-of-War, CAFO-Style: Under-Regulation, and Undercover Investigations</i>	379
B. <i>The Rise of Ag-Gag</i>	382
C. <i>Animal Legal Defense Fund v. Herbert</i>	383
1. <i>The Odds of Success for the Herbert Plaintiffs</i>	384
III. THE SIDE-STEP: AVOIDING THE CYCLE ENTIRELY	387
A. <i>Sunlight Provisions</i>	387
B. <i>Problems Even Sunlight Cannot Solve: The Sinclair Effect</i>	389
IV. THE SOLUTION: DECREASED DEMAND, SMALLER FARMS, AND PREVENTATIVE LEGISLATION	391
CONCLUSION	394

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“Our best weapon is sunlight.”¹

“If slaughterhouses had glass walls everyone would be vegetarian.”²

INTRODUCTION

On February 8, 2013, Amy Meyer, a twenty-five-year-old animal sanctuary volunteer, recorded footage of workers pushing a downed cow³ with a forklift outside the Dale T. Smith & Sons Meat Packing Company in Draper, Utah,⁴ a suburb south of Salt Lake City.⁵ The plant manager approached Meyer and informed her that recording activities on the property was illegal under state law, and after Meyer refused to leave, summoned the local police.⁶ Although Meyer was standing on public property and she was not arrested, she became the first person in the state charged with violating Utah’s Agricultural Operation Interference law.⁷

After Meyer sought counsel from a legal clinic, People for the Ethical Treatment of Animals (PETA) agreed to help with the legal fees associated with her representation.⁸ Charges were dropped, however, within twenty-four hours after journalist Will Potter broke the story about the case on his website.⁹ Later, Meyer joined a federal case brought by the Animal Legal Defense Fund (ALDF), PETA, and others against the Governor and Attorney General of Utah for enforcing Utah

1. Will Potter, *The Shocking Move to Criminalize Nonviolent Protest*, TED (Mar. 2014), http://www.ted.com/talks/will_potter_the_shocking_move_to_criminalize_non-violent_protest?language=en.

2. Paul McCartney, *Glass Walls*, PETA, <http://www.peta.org/videos/glass-walls-2/> (last visited Jan. 11, 2016).

3. A “downed cow” or a “downer cow” is a cow that is unable to stand or walk on its own, most likely due to trauma. *The Downer Cow*, THE CATTLE SITE, <http://www.thecattlesite.com/diseaseinfo/246/the-downer-cow/> (last visited Jan. 11, 2016).

4. At the time of the incident, the owner of the meatpacking company was also the Mayor of Draper. *BBB Business Review*, BETTER BUS. BUREAU, <http://www.bbb.org/utah/business-reviews/meat-packers/dale-t-smith-and-sons-meat-company-in-draper-ut-4000773> (last visited Jan. 11, 2016); Collette Gillian, *Charges Dropped Against Woman in Utah’s First Ag Gag Case*, EXAMINER (Apr. 30, 2013, 5:16 PM), <http://www.examiner.com/article/charges-dropped-against-woman-utah-s-first-ag-gag-case>.

5. Leighton Akio Woodhouse, *Charged With the Crime of Filming a Slaughterhouse*, THE NATION (July 31, 2013), <http://www.thenation.com/article/175506/charged-crime-filming-slaughterhouse#>.

6. George Prentice, *Ag-Gags, Animal Cruelty and Lettuce Bikinis*, BOISE WKLY. (Oct. 1, 2014), <http://www.boiseweekly.com/boise/amy-meyer/Content?oid=3317818>.

7. *Id.*; see UTAH CODE ANN. § 76-6-112(2)(d) (LexisNexis 2012) (citing UTAH CODE ANN. § 76-6-206(2) (LexisNexis Supp. 2015)).

8. Prentice, *supra* note 6.

9. Woodhouse, *supra* note 5.

Criminal Code section 76-6-112, which they claim violates several constitutional provisions.¹⁰ The case, *Animal Legal Defense Fund v. Herbert*, is currently pending in the United States District Court of Utah, Central Division.¹¹

Framing factory farm¹² abuse and regulatory violations issues within the recent outcry over so-called “ag-gag” laws and their potential First Amendment rights violations, especially in the wake of *Animal Legal Defense Fund v. Herbert* and *Animal Legal Defense Fund v. Otter*,¹³ this Note will consider alternatives to both the enactment and adjudication of ag-gag statutes, and the methods used by advocates and activists¹⁴ to ensure the enforcement of current regulations. Sunlight

10. *Taking Ag Gag to Court*, ANIMAL LEGAL DEF. FUND, <http://aldf.org/cases-campaigns/features/taking-ag-gag-to-court/> (last visited Jan. 11, 2016).

11. No. 2:13-cv-00679 (D. Utah July 22, 2013).

12. The term “factory farm” is misleading and perpetuates the nearly extinct Jeffersonian image of red barns and green pastures, even with the modifying “factory” preceding the term. Michael Pollan, *Power Steer*, N.Y. TIMES (Mar. 31, 2002), <http://www.nytimes.com/2002/03/31/magazine/power-steer.html> (stating that in the age of the Concentrated Animal Feeding Operation (CAFO), “[t]he word ‘farm’ no longer applies.”). This Note will use the term Concentrated Animal Feeding Operations, in place of “factory farm.”

13. *Animal Legal Def. Fund v. Herbert*, No. 2:13-cv-00679 (D. Utah July 22, 2013); *Animal Legal Def. Fund v. Otter*, 44 F. Supp. 3d 1009 (D. Idaho 2014). In Idaho, in an opinion by Chief Judge Winmill, the court held that Idaho Code section 18-7042 violates the First and Fourteenth Amendments of the Constitution. Memorandum Decision and Order at 6, 8, *Animal Legal Def. Fund v. Otter*, No. 1:14-cv-00104-BLW, 2015 WL 4623943 (D. Idaho Aug. 3, 2015) (stating that “§ 18-7042 seeks to limit and punish those who speak out on topics relating to the agricultural industry, striking at the heart of important First Amendment values. The effect of the statute will be to suppress speech by undercover investigators and whistleblowers concerning topics of great public importance: the safety of the public food supply, the safety of agricultural workers, the treatment and health of farm animals, and the impact of business activities on the environment.”). In regard to ALDF’s Fourteenth Amendment argument, the court found that,

[t]he overwhelming evidence gleaned from the legislative history indicates that § 18-7042 was intended to silence animal welfare activists, or other whistleblowers, who seek to publish speech critical of the agricultural production industry. Many legislators made their intent crystal clear by comparing animal rights activists to terrorists, persecutors, vigilantes, blackmailers, and invading marauders who swarm into foreign territory and destroy crops to starve foes into submission.

Id. at 25.

Ag-gag legislation, discussed more fully in Section II.B, is an umbrella term used to describe state laws “intended to undermine the ability of groups to conduct long-term, employment-based undercover investigations at agricultural production facilities.” Larissa U. Liebmann, *Fraud and First Amendment Protections of False Speech: How United States v. Alvarez Impacts Constitutional Challenges to Ag-Gag Laws*, 31 PACE ENVTL. L. REV. 566, 568 (2014).

14. Throughout this Note, the term “activist(s)” will be used to denote individuals aligned with a particular group or cause, such as members of animal rights, food, or worker safety groups, etc. While “advocate(s)” will be used as a general, catch-all term to represent

provisions, including the use of drones, to monitor CAFO workers and agency inspectors during all stages of slaughter could, if properly implemented, be a first step towards addressing CAFO ills, discussed more fully below.

This first step, however, would not solve all of the issues associated with industrial animal agriculture. A system that revolves around high-speed, systematic killing of living beings¹⁵ creates an environment in which negative physical and psychological effects on workers¹⁶ become an externalized cost of operation—much like the pollution created by CAFOs¹⁷—borne by society. Transparency would also leave untouched the effects industrial animal agriculture has on the environment. Were we to “open the slaughterhouses,” one possible result could be that a fraction of the population that does not yet follow such a lifestyle switches to a vegetarian or vegan diet, or at least consumes fewer meat and dairy products.¹⁸ Another possibility, which could be the real reason why sunlight is the best weapon against the harsh conditions and social, environmental, and economic ills faced by the animals that we eat, could be a complete overhaul of the way we raise, care for, use, and kill those animals. If the public were given audio and visual access to slaughterhouse activities, it may, as the industry¹⁹ fears,²⁰ prompt demands for a radical shift in the way the

individuals who may not pursue the same goals, including: (1) individuals hired by activist groups that do not necessarily align themselves with the group’s ideologies, but engage in undercover investigations in exchange for monetary compensation; (2) members of the public with no ties to activist groups who document, or are interested in documenting, agricultural activities for personal reasons; (3) slaughterhouse employees with no ties to activist groups who document, or seek to preserve the ability to document, CAFO activities for worker-protection or whistleblowing purposes; (4) journalists who engage in undercover investigations for news-gathering purposes; and (5) any other individual(s) engaging in or advocating for undercover investigations at CAFOs. The term “advocate-activist” is used for convenience and does not denote any affiliation between the two.

15. This Note focuses more fully on meat animal production, but does not suggest the absence of the same or similar issues within the dairy industry.

16. Jennifer Dillard, Note, *A Slaughterhouse Nightmare: Psychological Harm Suffered by Slaughterhouse Employees and the Possibility of Redress Through Legal Reform*, 15 GEO. J. ON POVERTY L. & POL’Y 391, 392–93 (2008).

17. Lisa Winebarger, Comment, *Standing Behind Beastly Emissions: The U.S. Subsidization of Animal Agriculture Violates the United Nations Framework Convention on Climate Change*, 27 AM. U. INT’L L. REV. 991, 1006–17 (2012) (arguing that government subsidies artificially prop up the animal agricultural industry and do not encourage internalization of economic costs of pollution in violation of international agreements).

18. *Id.*

19. Throughout this Note, “industry” will be used as a general term encompassing several operations of varying size and ownership and should not suggest a single entity acting in the interests of an individual or single group of actors.

20. Jedediah Purdy, *Open the Slaughterhouses*, N.Y. TIMES (Apr. 8, 2013),

industry operates.

Part I highlights commonly cited issues surrounding the CAFO model and introduces the roles industry and advocate-activists play in the ag-gag debate. Part II discusses sunlight provisions and their potential part in the solution. This Note then concludes with the assertion that sunlight, although a potential first step to the time and resource-consuming legal battle, will not by itself address all of the issues associated with the industrialization of animal agriculture.

I. THE SICKNESS: COMMON CAFO SIDE-EFFECTS

Every year ten billion animals are slaughtered for human consumption in the United States—ten times more than in 1940.²¹ The majority of these animals spend their lives in Concentrated Animal Feeding Operations, or CAFOs,²² where over ninety-five percent of pork, turkey, and chicken, and over seventy-five percent of beef are generated.²³ CAFOs are defined by the United States Environmental Protection Agency (EPA) as feeding operations with “at least 700 dairy cows; 1000 beef cattle; 2500 hogs over 55 pounds; 30,000 broiler chickens producing wet manure;²⁴ 125,000 broiler chickens producing dry manure; or 82,000 laying hens.”²⁵ Depending on waste disposal, smaller operations are sometimes considered CAFOs as well.²⁶

Artificially low prices, made possible by heavy government subsidies, have led to a growing demand for meat and dairy products, and over the past fifty years CAFOs have become the dominant source of these products.²⁷ These operations have largely replaced smaller

http://www.nytimes.com/2013/04/09/opinion/open-the-slaughterhouses.html?_r=0.

21. Daniel Imhoff, *Introduction*, in *THE CAFO READER* xiii (Daniel Imhoff ed., 2010) (citing ERIK MARCUS, *MEAT MARKET* 5 (2005)).

22. *Id.* The “C” in CAFO is also sometimes defined as “confined.”

23. 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, 1144 (2012) (citing JONATHAN S. FOER, *EATING ANIMALS* 271 (2009)).

24. “Wet manure” is manure washed down with water and handled and stored via liquid, as opposed to dry, management systems. ENVTL. PROT. AGENCY, EPA/600/R-04/042, *RISK ASSESSMENT EVALUATION FOR CONCENTRATED ANIMAL FEEDING OPERATIONS* 21–22 (2004), <http://nepis.epa.gov/Adobe/PDF/901V0100.pdf>.

25. Daniel Imhoff, *A Glossary of CAFO Terms and Euphemisms*, in *THE CAFO READER* 395, 395 (Daniel Imhoff ed., 2010).

26. *Id.*

27. Adam, *supra* note 23, at 1144 (first citing James I. Pearce, Note, *A Brave New Jungle: Factory Farming and Advocacy in the Twenty-First Century*, 21 *DUKE ENVTL. L. & POL’Y F.* 433, 433–39 (2011); then citing Melanie J. Wender, Comment, *Goodbye Family Farms and Hello Agribusiness: The Story of How Agricultural Policy is Destroying the Family Farm and the Environment*, 22 *VILL. ENVTL. L.J.* 141, 144–48 (2011); then citing

family-owned farms and produced a “litany of significant public and consumer-safety concerns.”²⁸

A. Animal Abuse²⁹

Our society recognizes the correlation between animal abuse or devaluation and abuse of other humans, such as domestic partners or children.³⁰ For example, in *Knox v. Massachusetts Society for the Prevention of Cruelty to Animals*, the court affirmed the existence of this correlation when it determined that goldfish were “animals” under the state’s anti-cruelty statute, and therefore could not be given away as prizes.³¹ Part of the court’s reasoning was based on the assumption that public morals are corrupted by the devaluation of non-human animal life.³²

Despite this correlation, the animals we eat suffer harsh conditions and treatment that many would consider cruel—much of which is completely legal. Laws that regulate how dinner-plate-destined animals

DAVID KIRBY, ANIMAL FACTORY xiv (2010); then citing PEW COMM’N ON INDUS. FARM ANIMAL PROD., PUTTING MEAT ON THE TABLE 3–10 (2008), http://www.ncifap.org/_images/PCIFAPSmry.pdf; then citing U.S. DEP’T OF AGRICULTURE, THE TRANSFORMATION OF U.S. LIVESTOCK AGRICULTURE: SCALE, EFFICIENCY, AND RISKS 1–4 (2009), <http://www.ers.usda.gov/media/184977/eib43.pdf>; and then citing C.M. Williams, *CAFOs: Issues and Development of New Waste Treatment Technology*, 10 PA. ST. ENVTL. L. REV. 217, 240 (2002)).

28. *Id.*

29. While this Note breaks up the negative effects CAFO production has on differing aspects of human and animal life into distinct categories, there is much overlap between the categories laid out over the next few pages. For example, the rapid pace at which workers must operate to keep up production as the result of increased demand for animal products has been linked to high rates of worker injuries and animal cruelty. *See e.g.* Dillard, *supra* note 16, at 392–94; Atsuko Matsuoka, *Human Consequences of Animal Exploitation*, XL J. OF SOC. & SOC. WELFARE, Dec. 2013, at 14–15; Steve Striffler, *Watching the Chickens Pass By*, in THE CAFO READER 127–28 (Daniel Imhoff ed., 2010).

30. Dillard, *supra* note 16, at 396 (“In this country, we have a common understanding that taking pleasure in the cruel death of a helpless animal is an antisocial and potentially psychotic characteristic.”) (citing *Sixth-Grade Boy Kills Class Ducks*, CJONLINE.COM (May 5, 2007), http://cjonline.com/stories/050507/kan_167775124.shtml#.VkfagaMo75p); *Animal Cruelty and Domestic Violence*, ANIMAL LEGAL DEF. FUND, <http://aldf.org/resources/when-your-companion-animal-has-been-harmed/animal-cruelty-and-domestic-violence/> (last visited Jan. 11, 2016) (“Abusers of animals are five times as likely to harm humans.”); Charles Siebert, *The Animal-Cruelty Syndrome*, N.Y. TIMES (June 11, 2010), http://www.nytimes.com/2010/06/13/magazine/13dogfighting-t.html?_r=0 (“[A]nother significant reason for the increased attention to animal cruelty is a mounting body of evidence about the link between such acts and . . . spousal and child abuse, rape and homicide.”).

31. 425 N.E.2d 393, 396 (Mass. App. Ct. 1981).

32. *Id.* (quoting *Commonwealth v. Higgins*, 178 N.E. 536, 538 (Mass. 1931)).

are to be treated while alive are scant,³³ with birds receiving virtually no protections before slaughter.³⁴ These gaps are filled in by industry accepted practices or industry standards.³⁵ For example, “tail-docking,” a euphemism for clipping or chopping off a tail, is performed on pigs and cows without anesthesia, and bird beaks are also totally removed or clipped without prior numbing.³⁶ Moreover, since certain feed that many farm animals are not able to properly digest is heavily subsidized by the government, animals are often raised on diets lacking vital nutrients necessary to maintain their health.³⁷ This, discussed further in the next sub-section, contributes to the need for sub-therapeutic antibiotics to keep otherwise unhealthy animals from contracting diseases in the crowded conditions in which they live, increasing the chances that contaminated animal products make it into the food supply.³⁸

While much of the treatment food-animals endure is perfectly legal, some certainly exceed routine industry-accepted practices and enter into the realm of extreme animal abuse.³⁹ CAFO employees have been documented on numerous occasions torturing, kicking, and

33. Federally, the two main laws governing commercial use of live animals for food are the Twenty-Eight-Hour Law, which limits the number of hours animals can be held in vehicles for transport without unloading for food, water, and rest, and the Humane Methods of Slaughter Act (HMSA), which requires that animals be rendered “insensible to pain” by a single blow to the head, gunshot, or other “rapid and effective” method before death or other potentially painful experience occurs. Transportation of Animals Act, 49 U.S.C. § 80502 (2012); Humane Methods of Livestock Slaughter Act, 7 U.S.C. §§ 1901–1906 (2012). Both laws exclude birds. SONIA S. WAISMAN ET AL., ANIMAL LAW 378 (5th ed. 2014) (citing a 2006 U.S. Department of Agriculture letter stating that the Twenty-Eight Hour Law “does not apply to chickens, who represent 90% of the animals transported and killed for food.”); *Id.* at 454 (discussing the HMSA’s lack of protection for birds); 7 U.S.C. § 1902(a) (2012). Animals used in agriculture are excluded from the Animal Welfare Act. *Id.* § 2132(g). Agricultural animals are also excluded from most state and federal animal cruelty statutes. WAISMAN, *supra* note 33, at 379; Dillard, *supra* note 16, at 395.

34. 7 U.S.C. § 1901; 7 U.S.C. § 2132(g); WAISMAN, *supra* note 33, at 378.

35. Adam, *supra* note 23, at 1145 (citing Iowa Chapter, Sierra Club, *Why Industrial Livestock Factories Want to Silence Whistleblowers*, SIERRA CLUB, <http://www.sierraclub.org/sites/www.sierraclub.org/files/sce/iowa-chapter/Ag-CAFOs/CAFOWhistleblowersSilenceRule.pdf> (last visited Jan. 11, 2016)).

36. *Id.* (citing Jonny Frank, *Factory Farming: An Imminent Clash Between Animal Rights Activists and Agribusiness*, 7 B.C. ENVTL. AFF. L. REV. 423, 425–33 (1979)).

37. *Id.* (citing Amy Mosel, Comment, *What About Wilbur? Proposing a Federal Statute to Provide Minimum Humane Living Conditions for Farm Animals Raised for Food Production*, 27 U. DAYTON L. REV. 133, 145 (2001)).

38. *Id.* at 1149 (citing R. Jason Richards & Erica L. Richards, *Cheap Meat: How Factory Farming Is Harming Our Health, The Environment, and the Economy*, 4 KY. J. EQUINE, AGRIC., & NAT. RESOURCES L. 31, 43–47 (2012)).

39. *Id.* at 1146 (citing GAIL A EISNITZ, *SLAUGHTERHOUSE: THE SHOCKING STORY OF GREED, NEGLIGENCE, AND INHUMAN TREATMENT INSIDE THE U.S. MEAT INDUSTRY* (1997)).

otherwise inflicting unnecessary pain on the animals they work with.⁴⁰ In one example, workers were caught sexually assaulting pigs with steel rods.⁴¹ There are also documented cases of the sexual assault of cows,⁴² turkeys, and chickens.⁴³ One of the most infamous examples of ongoing animal cruelty was documented in 2008 by the Humane Society of the United States, which showed workers kicking, electrocuting, and spraying water through the nostrils of downed cows.⁴⁴ While it may be tempting to believe that these incidents of animal torture are the exception, endless sources of documentation of this kind of activity tell another story.

B. Health and Food Safety

Several health concerns arise when considering the effect CAFOs have on the quality and amount of animal products we consume.⁴⁵ Some of the greatest concerns revolve around the use of sub-therapeutic antibiotics to prevent the spread of disease in crowded living conditions. It is estimated that up to eighty percent of all antibiotics sold in the United States are purchased for use in animal agriculture.⁴⁶ The greatest

40. See Dillard, *supra* note 16, at 394 n.20 (quoting Robyn Mallon, *The Deplorable Standard of Living Faced by Farmed Animals in America's Meat Industry and How to Improve Conditions by Eliminating the Corporate Farm*, 9 MICH. ST. J. MED. & L. 389, 401 (2005)).

41. Laura Zuckerman, *ACLU Cites Free Speech in Suit Against Idaho's 'Ag-Gag' Law*, REUTERS (Mar. 17, 2014, 11:47 PM), <http://www.reuters.com/article/2014/03/18/usa-idaho-livestock-idUSL2NOMF05D20140318>; Shawna Flavell, *Four More Former Iowa Pig Factory Farm Workers Admit Guilt!*, PETA (June 24, 2009), <http://www.peta.org/blog/four-former-iowa-pig-factory-farm-workers-admit-guilt/>.

42. Peter Moskowitz, *Idaho Gov. Signs 'Ag Gag' Bill into Law*, ALJAZEERA AM. (Feb. 28, 2014, 5:06 PM), <http://america.aljazeera.com/articles/2014/2/28/idaho-gov-signs-aggagbillintolaw.html>.

43. Shawna Flavell, *Sexual Abuse of Animals: A Recurring Theme on Factory Farms*, PETA (Sept. 13, 2010), <http://www.peta.org/blog/sexual-abuse-animals-recurring-theme-factory-farms/>.

44. Marya Torrez, *Health and Welfare Preempted: How National Meat Association v. Harris Undermines Federalism, Food Safety, and Animal Protection*, 10 J. FOOD L. & POL'Y 35, 36 (2014) (quoting Brief for Am. Soc'y for the Prevention of Cruelty to Animals as Amicus Curiae Supporting Respondents at 19, *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965 (2012) (No. 10-224)).

45. Emily A. Kolbe, Note, "Won't You Be My Neighbor?" *Living With Concentrated Animal Feeding Operations*, 99 IOWA L. REV. 415, 425 (2013) ("While animal welfare represents perhaps the most viscerally disturbing aspect of CAFOs, CAFOs cause numerous threats to human health.").

46. *Prescription for Trouble: Using Antibiotics to Fatten Livestock*, UNION CONCERNED SCIENTISTS, http://www.ucsusa.org/food_and_agriculture/our-failing-food-system/industrial-agriculture/prescription-for-trouble.html#.VfhRi5eJmwI (last visited Jan. 11, 2016); Maryn McKenna, *Update: Farm Animals Get 80 Percent of Antibiotics Sold in U.S.*, WIRED (Dec. 24, 2010, 2:59 PM), <http://www.wired.com/2010/12/news-update-farm->

concern with the overuse of antibiotics is the creation of drug-resistant strains of bacteria making infections harder, if not impossible, to treat in humans.⁴⁷

The use of growth hormones⁴⁸ is also a concern, which has been linked to increased risks of cancer and other health issues, such as “disrupt[ed] human hormone balances, causing significant developmental and reproductive problems.”⁴⁹

C. Environmental Pollution

As farming operations have become more and more condensed, the problem of waste generated in quantities too high for sustainable reintegration has become alarming.⁵⁰ With CAFO animal waste sometimes exceeding the daily amount produced in large cities such as Philadelphia,⁵¹ the issue of where to put it results in the creation of massive, swirling pools of urine and feces.⁵² These pools, called “lagoons,” can span several football fields and leach into local water supplies, contaminating drinking water.⁵³ Even when solid waste is sprayed on fields, this contributes to runoff water pollution when rainwater washes surface soil into nearby waters.⁵⁴ This runoff pollution has caused massive “dead zones” in several bodies of water that can no longer support life because of the contamination levels.⁵⁵

animals-get-80-of-antibiotics-sold-in-us/.

47. Kolbe, *supra* note 45, at 425 (citing Sudeshna Ghosh & Timothy M. LaPara, *The Effects of Subtherapeutic Antibiotic Use in Farm Animals on the Proliferation and Persistence of Antibiotic Resistance Among Soil Bacteria*, 1 INT’L SOC’Y FOR MICROBIAL ECOLOGY 191, 191 (2007)).

48. See *Steroid Hormone Implants Used for Growth in Food-Producing Animals*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/AnimalVeterinary/SafetyHealth/ProductSafetyInformation/ucm055436.htm> (last updated Oct. 20, 2015).

49. Adam, *supra* note 23, at 1150 (citing Leticia M. Diaz, *Hormone Replacement Therapy, or Just Eat More Meat: The Technology Hare vs. The Regulatory Tortoise*, 27 B.C. ENVTL. AFF. L. REV. 391, 392 (2000)); but see Weiert Velle, *The Use of Hormones in Animal Production*, FOOD & AGRICULTURE ORG. UNITED NATIONS, <http://www.fao.org/docrep/004/x6533e/x6533e01.htm> (last visited Jan. 11, 2016) (stating that *when used properly*, there is little evidence of negative health effects from the use of certain hormones in food animals).

50. See Susan M. Brehm, Comment, *From Red Barn to Facility: Changing Environmental Liability to Fit the Changing Structure of Livestock Production*, 93 CAL. L. REV. 797, 810–11 (2005).

51. *Id.* at 811 (citing U.S. CENSUS BUREAU, POPULATION CHANGE AND DISTRIBUTION 1990 TO 2000 (Apr. 2001), <http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf>).

52. Kolbe, *supra* note 45, at 420 (citing Warren A. Braunig, Note, *Reflexive Law Solutions for Factory Farm Pollution*, 80 N.Y.U. L. REV. 1505, 1509 (2005)).

53. *Id.*

54. Brehm, *supra* note 50, at 811.

55. *What is a Dead Zone?*, NAT’L OCEAN SERV., <http://oceanservice.noaa.gov/facts/>

CAFO waste affects air quality as well, and has been linked to serious conditions and illnesses such as methemoglobinemia (also known as blue baby syndrome), neurological disease, and pregnancy complications.⁵⁶ The greatest environmental threat CAFOs present to the environment, however, is the release of massive amounts of greenhouse gas emissions, namely methane, a greenhouse gas with “21 times the global warming potential of carbon dioxide.”⁵⁷ Livestock production covers between 40% to 50% of land in the United States, accounting for more than 30% of methane emissions,⁵⁸ and worldwide animal agriculture contributes up to 51% of all greenhouse gas emissions.⁵⁹ With global consumption of animal products set to double by 2050⁶⁰—the growing problem of CAFO greenhouse gas emissions is one that is too great to ignore.

D. Worker Safety⁶¹

Heavy government subsidization of the animal agriculture industry has led to an incredible demand for animal products.⁶² This demand has led to increased production requirements which has, in turn, increased the expected per worker production rate.⁶³ Workers on the disassembly

deadzone.html (last visited Jan. 11, 2016); *Nitrogen & Phosphorous*, CHESAPEAKE BAY FOUND., <http://www.cbf.org/about-the-bay/issues/dead-zones/nitrogen-phosphorus> (last visited Jan. 11, 2016) (stating that the “largest source of pollution to the bay comes from agricultural runoff.”); see generally Elizabeth Grossman, *As Dairy Farms Grow Bigger, New Concerns About Pollution*, YALE ENV. 360 (May 27, 2014), http://e360.yale.edu/feature/as_dairy_farms_grow_bigger_new_concerns_about_pollution/2768/.

56. Brehm, *supra* note 50, at 813–14.

57. Winebarger, *supra* note 17, at 1008 (citing CLAUDIA COPELAND, CONG. RESEARCH SERV., RL32948, AIR QUALITY ISSUES AND ANIMAL AGRICULTURE: A PRIMER (2006)).

58. *Id.* Thirty percent of the United States’s methane comes from animal agriculture, which is interesting when compared to the EPA’s estimate that animal agriculture accounts for only nine percent of greenhouse gas emissions. *Sources of Greenhouse Gas Emissions*, ENV. PROT. AGENCY, <http://www.epa.gov/climatechange/ghgemissions/sources/agriculture.html> (last visited Jan. 11, 2016). Notably, the EPA emission figures only seem to account for *percentages* of greenhouse gases overall, not their warming potential.

59. Robert Goodland & Jeff Anhang, *Livestock and Climate Change: What if the Key Actors in Climate Change Are Cows, Pigs, and Chickens?*, WORLDWATCH INST., Nov./Dec. 2009, at 11.

60. Winebarger, *supra* note 17, at 1008.

61. This Section will focus on the *physical* safety of CAFO and slaughterhouse employees, while the psychological effects of this type of work are discussed in Section II.B.

62. Winebarger, *supra* note 17, at 1009–10 (citing R. Dennis Olsen, *Below-Cost Feed Crops: An Indirect Subsidy for Industrial Animal Factories*, INST. FOR AGRIC. & TRADE POL’Y (June 14, 2006), <http://www.iatp.org/documents/below-cost-feed-crops-an-indirect-subsidy-for-industrial-animal-factories>).

63. Dillard, *supra* note 16, at 392; Animal Legal Defense Fund, *Tyson Foods Treats*

line, and at other points in the animal agricultural production process, must work at breakneck speeds to keep up.⁶⁴ This rapid pace of production, coupled with the fact that workers in the disassembly line often wield sharp knives used to make the same cut in the flesh again and again, creates an environment “3 times more dangerous than the average construction site,” according to federal statistics.⁶⁵ In Iowa, while full-time employees in general experience roughly 9.8 injuries or illnesses per year, slaughterhouse employee rates are at a staggering fifty-one injuries or illnesses per year.⁶⁶ Moreover, the relationship between CAFO size and the number of workers is indirect, meaning that as individual CAFOs continue to grow, the number of employees operating them has actually decreased.⁶⁷

Another concern is related to the type of worker attracted to CAFO employment. Much like in other hazardous, low-paying jobs,⁶⁸ CAFO employees tend not to have access to healthcare, which places them at an even higher risk of injury or illness. In an industry in which up to forty percent of workers fall prey to respiratory illnesses alone, a lack of healthcare can be especially dangerous.⁶⁹

E. Economic Impacts

The CAFO model also has adverse effects on small farms⁷⁰ and costs taxpayers billions of dollars a year in the form of direct and indirect federal subsidies.⁷¹ Since these subsidies are paid to operations

its Chickens So Badly It Makes Employees Sick, THE DODO (Sept. 15, 2015), <https://www.thedodo.com/tyson-foods-undercover-chickens-workers-sick-1347576804.html> (stating that “[t]he plant processes up to a quarter of a million chickens a day, forcing each worker to handle thirty-five birds per minute. The slaughter process moves so fast, there’s no way the workers can handle the birds humanely. The speed also makes repetitive stress injuries common among workers.”).

64. Dillard, *supra* note 16, at 392.

65. *Id.* at 394.

66. *Id.* (citing Michael S. Worrall, *Meatpacking Safety: Is OSHA Enforcement Adequate?*, 9 DRAKE J. AGRIC. L. 299, 307 (2004)).

67. Kolbe, *supra* note 45, at 425–26 (citing Sudeshna Ghosh & Timothy M. LaPara, *The Effects of Subtherapeutic Antibiotic Use in Farm Animals on the Proliferation and Persistence of Antibiotic Resistance Among Soil Bacteria*, THE ISME JOURNAL (May 24, 2007), <http://www.nature.com/ismej/journal/v1/n3/full/ismej200731a.html>).

68. Dillard, *supra* note 16, at 392 (stating that by 2002, slaughterhouse workers made twenty-four percent less than average manufacturing employees.).

69. Kolbe, *supra* note 45, at 426–27.

70. Adam, *supra* note 23, at 1147–48 (citing Melanie J. Wender, *Goodbye Family Farms and Hello Agribusiness: The Story of How Agricultural Policy Is Destroying the Family Farm and the Environment*, 22 VIL. ENVTL. L.J. 141, 141–44 (2011)).

71. Winebarger, *supra* note 17 at 1011–16 (stating that through the Farm Bill, the federal government provided \$994 million to the dairy industry in 2009, and more than \$5

that yield the most product at the lowest cost, larger facilities have the upper hand in winning these subsidies,⁷² ever-pushing animal agriculture towards the goal of efficiency at the cost of food and farm quality, and animal and worker welfare. Small farms simply cannot compete, and small farmers that were once able to make a decent living in animal agriculture are finding it more and more difficult to do so.⁷³

Again, these subsidies also contribute to artificially low prices, which drive demand for animal products, while “allowing otherwise unprofitable farms to stay in business” by decreasing operational costs and externalizing environmental and other costs.⁷⁴

II. THE CYCLE: INDUSTRY VS. ADVOCATE-ACTIVIST

The transition from smaller, family-owned operations to the industrial model has prompted some regulation of the meat packing and slaughter industry. Those opposed to this shift cite under-regulation and under-enforcement of existing regulations as some of the greatest concerns surrounding CAFOs. This regulatory gap is partially filled by undercover investigations, which spur the creation of ag-gag legislation, which in turn spawns the constitutional litigation at issue in *Animal Legal Defense Fund v. Herbert* and *Animal Legal Defense Fund v. Otter*.⁷⁵ Regardless of the outcome of these cases, agricultural actors are likely to find ways around blatant constitutional violations, replacing problematic statutes with seemingly benign legislation. In successive revolutions around the ag-gag cycle, constitutional litigation will likely involve the more difficult task of attacking more cleverly-disguised violations. This is the ag-gag cycle.

billion to producers of several sources of livestock feed, lowering the cost of feed for animal agriculture by about fifteen percent). Additionally, Winebarger maintains that “[a]ny subsidy that artificially decreases the price of animal food product is significant because meat consumption has been shown to be ‘elastic,’ meaning that its consumption falls with increasing prices.” *Id.* at 1014–15.

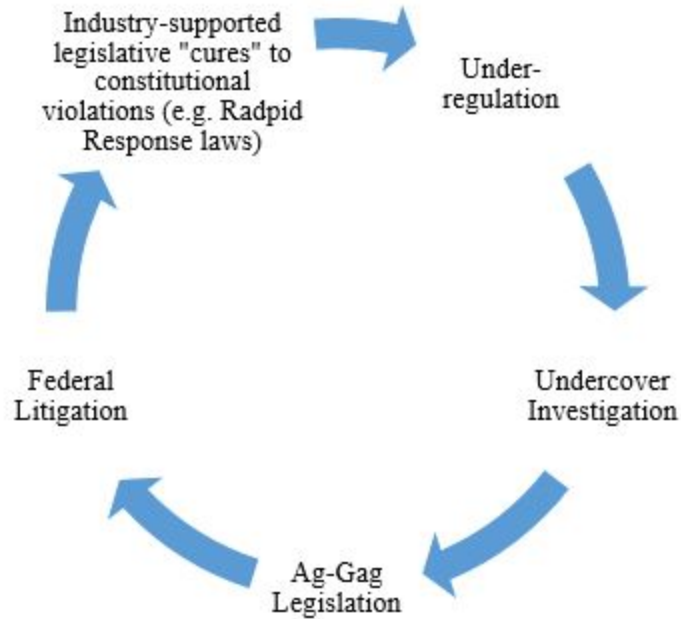
72. Adam, *supra* note 23, at 1148.

73. Pollan, *supra* note 12 (stating that the push towards increasing growth rates of steer by replacing their natural, grass-based diet with a corn-based one, cutting down their “harvest age” to a little over a year old has “transformed raising cattle into a high-volume, low-margin business.”).

74. Winebarger, *supra* note 17, at 1009–10.

75. *Animal Legal Def. Fun v. Herbert*, No. 2:13-cv-00679 (D. Utah July 22, 2013); *Animal Legal Def. Fund v. Otter*, 44 F. Supp. 3d 1009 (D. Idaho 2014); *see* note 13.

Figure 1. The Ag-Gag Cycle



A. Tug-of-War, CAFO-Style: Under-Regulation, and Undercover Investigations

Even though statutes and regulations meant to safeguard against animal abuse and food contamination at CAFOs exist,⁷⁶ there is ample documentation of consistent and systemic violations of both by facility employees and government inspectors alike.⁷⁷ Because of the close-knit

76. See *supra* note 33.

77. USDA, OFFICE OF THE INSPECTOR GENERAL, AUDIT REPORT 24601-0101, FOOD SAFETY AND INSPECTION SERVICE—INSPECTION AND ENFORCEMENT ACTIVITIES AT SWINE SLAUGHTER PLANTS (2013) (stating that “the [Food Safety and Inspection Service] enforcement policies do not deter swine slaughter plants from becoming repeat violators of the [Federal Meat Inspection Act]” and the inspectors also did not take appropriate action when faced with even “egregious” violations of the Humane Methods of Slaughter Act); *Undercover Investigations: Exposing Animal Abuse*, MERCY FOR ANIMALS, <http://www.mercyforanimals.org/investigations.aspx> (last visited Jan. 11, 2016); *Butterball’s House of Horrors: A PETA Investigation*, PETA, <http://www.peta.org/features/butterball-peta-investigation/> (last visited Jan. 11, 2016); *Burger King Cruelty: Video Exposes Horrific Animal Abuse at a Burger King Dairy Supplier*, MERCY FOR ANIMALS, <http://www.burgerkingcruelty.com/> (last visited Jan. 11, 2016).

working relationship between regulators and plant employees, managers and owners, enforcement tends to be lax or nonexistent.⁷⁸ This is not to say that enforcement never occurs,⁷⁹ but to ignore the close industry-regulator relationship would be overlooking a significant potential for abuse. This relationship becomes more suspect indeed, in the face of accusations of lax enforcement in exchange for cushy consulting jobs once regulators leave government work.⁸⁰ Even in the absence of self-serving ulterior motives, for there most likely are a significant number of government inspectors that fulfill their duties faithfully, there are simply not enough government regulators to properly inspect each animal post-mortem and live-animal handling conditions.⁸¹

In response to this lack of regulation enforcement, advocate-activists rely heavily on undercover investigations to infiltrate CAFOs and document regulatory violations by both CAFO employees and government inspectors. Investigators gain employment in meat packing factories or slaughterhouses for the purpose of securing hard evidence in the form of video or audio recordings that can be used to build cases against high-level offenders.⁸² The more time advocates-activists have to compile evidence, the stronger the cases against facilities that commit these violations.⁸³ This type of muckraking journalism has led to

78. Dillard, *supra* note 16, at 394; Torrez, *supra* note 44, at 36 (stating that during the horrific abuse of non-ambulatory cows at the Hallmark and Westland Meat packing companies, at least five USDA inspectors were present).

79. James Bruggers, *USDA Punishes Slaughterhouse Accused of Abuses*, THE COURIER JOURNAL (Apr. 24, 2014, 6:08 PM), <http://www.courier-journal.com/story/tech/science/environment/2014/04/24/usda-punishes-slaughterhouse-accused-abuses/8119471/>.

80. Dillard, *supra* note 16, at 394 n.19.

81. David N. Cassuto, *Meat Animals, Humane Standards and Other Fictions*, LAW, CULTURE AND THE HUMAN., 2013, at 5 (stating that it is mathematically impossible for the number of government inspectors to fully fulfill all of their regulatory duties).

82. Woodhouse, *supra* note 5.

83. The ag-gag legislation discussed in this Note belongs to the second wave of ag-gag legislation that began in 2012. The laws in this wave generally focus on trespass, audio or visual recording, and fraud, expanding the scope of the first wave of ag-gag that began in the 1990s which mainly focused on trespass coupled with recording. Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317, 1335–37 (2015). The third wave, not thoroughly discussed in this Note, consists of Rapid Reporting laws. *Id.* at 1340. Ag-gag opponents may have more difficulty defeating these laws since they are disguised as animal welfare laws requiring that any footage of animal abuse be turned over to law enforcement between twenty-four and forty-eight hours. *Id.* (stating that “[r]epresentatives and senators portray these bills as aids for animal welfare.”). Despite the fact that there is “no evidence that there is a problem with people failing to report animal abuse to authorities” in a CAFO setting and there is a general distaste for criminalizing crimes of omission, at least one state has passed this type of law. *Id.* at 1340–41. Furthermore, rapid reporting laws have historically been restricted to serious felonies such as rape and child abuse, not misdemeanors such as animal abuse. *Id.* at 1341 (“US jurisdictions have

revelations of “widespread noncompliance,” “food recalls and . . . criminal convictions,”⁸⁴ and according to a Kansas State University study in 2010, these exposés may be linked to drops in demand for meat products.⁸⁵

The industry’s response to negative media attention resulting from undercover CAFO investigations has been, to a great extent, political. Working with state legislatures, industry leaders have lobbied, successfully in some states,⁸⁶ in support of ag-gag legislation.⁸⁷ These laws curb CAFO infiltration by criminalizing aspects of undercover investigations, such as trespass and fraud coupled with audio or visual recording in CAFOs. Ag-gag legislation works against public health and welfare, animal agricultural laborers, and farmed animals.

Were state and federal laws, regulations, and agencies functioning properly in regards to keeping food for human consumption safe, preserving our environment, and guarding against rampant animal cruelty thought to “dull humanitarian feelings and to corrupt morals,”⁸⁸

resoundingly renounced the notion that it should *be a crime* to fail to report a crime, even when the crime one observes is murder or rape. So it would be incongruous in the extreme to say that for this one crime (perhaps just a misdemeanor), reporting must be immediate and without exceptions.”)

84. Brief for Center for Food Safety, Public Justice, Healthy Food Action, and Food & Water Watch as Amicus Curiae Supporting Plaintiffs at 2, *Animal Legal Def. Fund v. Herbert*, No. 2:13-cv-00679-RJS, 2014 WL 524688 (D. Utah Jan. 9, 2014); *see also* Torrez, *supra* note 44, at 36 (describing the Humane Society’s investigation of the Hallmark and Westland meat companies that led to the plants’ shutdown and the largest meat recall in United States history).

85. GLYNN T. TOSOR & NICOLE J. OLYNK, KANSAS STATE UNIV. AGRIC. EXPERIMENT STATION AND COOP. EXTENSION SERV., U.S. MEAT DEMAND: THE INFLUENCE OF ANIMAL WELFARE MEDIA COVERAGE 2 (Sept. 2010), <http://www.agmanager.info/livestock/marketing/AnimalWelfare/MF2951.pdf>. Overall demand for meat products, however, continues to grow. Winebarger, *supra* note 17 at 1008–09 (discussing the effects of ever-increasing demand for meat and dairy products on climate change and stating that “global demand for meat and dairy [is] set to double by 2050”); Imhoff, *supra* note 21.

86. Zaineb Mohammed, *Has Your State Outlawed Blowing the Whistle on Factory Farms?*, MOTHER JONES (June 17, 2013, 5:20 PM), <http://www.motherjones.com/blue-marble/2013/06/ag-gag-laws-map> (showing the eight states that have passed ag-gag legislation: Utah, North Dakota, Iowa, Kansas, South Carolina, Missouri, Montana, and Arkansas; the two states where such legislation is pending: Pennsylvania and North Carolina; and the thirteen states where it has failed, including Minnesota, Illinois, Washington, and New York).

87. Larissa Wilson, *Ag-Gag Laws: A Shift in the Wrong Direction for Animal Welfare on Farms*, 44 GOLDEN GATE L. REV. 311, 312 (2014); *see also* Will Potter, *Exposing Animal Cruelty Is Not a Crime*, CNN (June 26, 2014, 11:59 AM), <http://www.cnn.com/2014/06/26/opinion/potter-ag-gag-laws-animals/> (Potter maintains that the owners of a dairy farm that had recently been convicted of animal cruelty charges as a result of an undercover investigation responded by drafting legislation that “outlawed the footage”).

88. *Knox v. Massachusetts Soc’y for Prevention of Cruelty to Animals*, 425 N.E.2d 393, 396 (Mass. App. Ct. 1981).

there would be little need for the ag-gag cycle. And while unlawful intrusions onto private property may not be *legally* justified, it does not necessarily follow that legislatures should fully back the industry-proposed solution of drawing the curtain ever tighter, especially when those intrusions are to combat the failure to follow the letter of the law by those we trust to do so. As human consumption of meat and dairy products continues to rise,⁸⁹ the regulatory gap that advocate-activists are attempting to fill threatens the health and welfare of both human and non-human populations.⁹⁰

B. *The Rise of Ag-Gag*

Ag-gag laws are “intended to undermine the ability of groups to conduct long-term, employment-based undercover investigations at agricultural production facilities.”⁹¹ Industry representatives and their legislators maintain that this legislation is necessary to protect the animal agricultural sector from animal rights groups, specifically, and undercover investigations, more generally.⁹² There are several versions of ag-gag laws that target particular conduct. In general these laws criminalize certain methods used by advocate-activists who collect audio or video recordings of factory farm regulatory violations to distribute to the public or prosecutors in order to force compliance.⁹³

The term “ag-gag” was first coined by Mark Bittman of the New York Times in 2011.⁹⁴ The majority of the statutes introduced from 2012 to 2013 ditto a model statute⁹⁵ drafted by the American

89. *Supra* notes 63, 85.

90. Daniel Imhoff, *Myth: Industrial Food Is Healthy*, in THE CAFO READER 69 (Daniel Imhoff ed., 2010) (citing the Center for Disease Control estimate “that contaminated meat-and poultry-related infections make up to three million people sick each year, killing at least 1,000”).

91. Liebmann, *supra* note 13, at 568.

92. Civil Rights Complaint at 10–13, *Animal Legal Def. Fund v. Herbert*, No. 2:13CV00679, 2013 WL 4017889, at 2–3* (D. Utah July 22, 2013); Marceau, *supra* note 83, at 1336 (stating that “[n]ot surprisingly, legislators . . . 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”).

93. See UTAH CODE ANN. § 76-6-112 (LexisNexis 2012) (agricultural operation interference); see also IOWA CODE ANN. § 717A.3A (West 2012) (agriculture production facility fraud); KAN. STAT. ANN. § 47-1827 (2006) (livestock and domestic animals, prohibited acts, criminal penalties); N.D. CENT. CODE § 12.1-21.1-02 (2011) (animal research facility damage); MONT. CODE ANN. § 81-30-103 (2011) (farm animal and research facility protection act).

94. Adam, *supra* note 23, at 1131 (citing Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES (Apr. 26, 2011, 9:29 PM), http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/?_r=0).

95. Aly Miller, *Big-Ag Afraid of Its Reflection, Seeks Bill for Protection*, HUFFINGTON

Legislation Exchange Council (ALEC), a wealthy, Arlington-based lobbying group with ties to powerful industrial players like Monsanto and the Farm Bureau.⁹⁶ As of 2014, thirteen states have declined to pass ag-gag laws, and eight states have ag-gag laws on the books.⁹⁷

The first law of this type appeared on the books in Kansas in 1990, with North Dakota and Montana following suit the very next year.⁹⁸ These early laws passed without incident and are seldom applied, if at all.⁹⁹ The recent ag-gag revival has been, in part, due to public reaction to undercover investigations that have garnered widespread media attention, resulting in costly food recalls and contract cancellations within the industry.¹⁰⁰

Ag-gag laws fall into one or more of five general categories that criminalize: (1) agricultural interference; (2) fraud; (3) anti-distribution; (4) trespass; and (5) delayed reporting.¹⁰¹ These categories can be further distinguished by what type of conduct the provision targets: such as audiovisual recording and distribution and other activity, such as fraud, trespass and delayed reporting.

C. Animal Legal Defense Fund v. Herbert

On July 22, 2013, the Animal Legal Defense Fund, joined by PETA, Counterpunch, Amy Meyer, Will Potter, and others filed suit in the United States District Court of Utah, claiming that Utah's Agricultural Operation Interference statute section 76-6-112¹⁰² violated their First and Fourteenth Amendment Rights and the Supremacy Clause of the Constitution.¹⁰³ In their complaint, plaintiffs state that the

POST (Apr. 26, 2013, 6:12 PM), http://www.huffingtonpost.com/food-politic/bigag-afraid-of-its-refle_b_3147628.html. The Animal Enterprise Terrorism Act (AETA), was adopted federally in 2006, replacing its statutory predecessor, the Animal Enterprise Protection Act of 1992. 18 U.S.C. § 43 (2012). Much of its language was borrowed for use in state ag-gag statutes.

96. *Id.*

97. UTAH CODE ANN. § 76-6-112. As previously mentioned, the constitutionality of both the Utah and Idaho ag-gag laws are being challenged by several plaintiffs in federal court. In Idaho, a district court overturned that state's ag-gag law. *See supra* note 13.

98. Jessalee Landfried, *Bound and Gagged: Potential First Amendment Challenges to Ag-Gag Laws*, 23 DUKE ENVTL. L. & POL'Y F. 377, 378 (2013).

99. *Id.*

100. Wilson, *supra* note 87, at 316; *see* Torrez, *supra* note 44, at 36.

101. Landfried, *supra* note 98, at 380.

102. UTAH CODE ANN. § 76-6-112 (LexisNexis 2012). This suit shares plaintiffs in common with *Animal Legal Defense Fund v. Otter*. *See* 44 F. Supp. 3d 1009 (D. Idaho 2014).

103. Press Release, Animal Legal Def. Fund, Animal Legal Defense Funds Files Historic "Ag Gag" Lawsuit (July 22, 2013).

law intentionally seeks to interfere with the public's ability to inform itself of CAFO conditions by criminalizing efforts to gather evidence of regulatory violations.¹⁰⁴ Specifically, ALDF claims that the statute is "both facially content-based, and predicated on a viewpoint-based legislative purpose," and that the legislative history leaves little doubt that the legislative purpose was to curtail a form of political speech of great public interest.¹⁰⁵

1. The Odds of Success for the Herbert Plaintiffs

In a recent article, Samantha Morgan analyzed the likelihood of the plaintiffs' success in *Animal Legal Defense Fund v. Herbert*.¹⁰⁶ According to the author, the first and biggest obstacle for the plaintiffs is the issue of standing.¹⁰⁷ Article III of the Constitution requires that in order for a court to hear a case, there must exist some "case or controversy."¹⁰⁸ The Supreme Court interpreted this to require three things: (1) injury in fact, (2) causation, meaning that the injury can be traced to the defendant, and (3) redressability, or that a favorable decision will address the plaintiff's injury.¹⁰⁹

While Meyer might be able to show injury and causation since the arrest may have damaged her reputation and is traceable to the state, showing redressability might be more difficult because the charges have already been dropped.¹¹⁰ To show injury in fact, the organizations would have to show "that its members would have standing to sue in their own right; the interests the group seeks to protect must be germane to the organization's purpose[,] and the claim must not require participation of individual members."¹¹¹ Overall, Morgan maintains that for all of the plaintiffs involved, "standing presents a serious challenge . . . one they are not likely to overcome."¹¹²

Should the plaintiffs make it past the standing hurdle, which is quite possible in light of the Court's decision in *Animal Legal Defense*

104. Civil Rights Complaint, *supra* note 92, at 4.

105. *Id.* at 5.

106. Samantha Morgan, *Ag-Gag Challenged: The Likelihood of Success of Animal Legal Defense Fund v. Herbert's First Amendment Claims*, 39 VT. L. REV. 241, 256–61 (2014). See *Animal Legal Defense Fund v. Herbert*, No. 2:13-cv-00679 (D. Utah July 22, 2013).

107. Morgan, *supra* note 106, at 248. Note, however, that the court in *Otter* had no trouble finding that defendants had standing. *Otter*, 44 F. Supp. 3d at 1018–19.

108. U.S. CONST. art. III, § 2, cl. 1.

109. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

110. Morgan, *supra* note 106, at 248–49.

111. *Id.* at 247.

112. *Id.* at 248; *but see Otter*, 44 F. Supp. 3d at 1017.

Fund v. Otter,¹¹³ the Court will move on to the plaintiffs' two main constitutional arguments: that section 76-6-112¹¹⁴ (1) is unconstitutionally overbroad, and (2) impermissibly restricts content-based speech.¹¹⁵

A statute is constitutionally violative for overbreadth if it restricts a substantial amount of speech.¹¹⁶ Comparing the overbreadth argument in *Herbert* to that in *United States v. Stevens*, a case in which the Supreme Court invalidated a federal statute banning crush videos,¹¹⁷ Morgan asserts that because the terms “image” or “sound” are not defined—where the terms at issue in *Stevens* were defined, just not sufficiently—the Court is likely to find that the scope of the statute is unconstitutionally overbroad.¹¹⁸ Moreover, the lack of terms that would sufficiently narrow the scope of the statute make it even more likely that the Supreme Court will find section 76-6-112 unconstitutionally overbroad.¹¹⁹ While some may question the precedential potential of *Stevens*, arguing that the Court prematurely considered the overbreadth doctrine, Morgan maintains that this “alleged failure . . . is not a concern here.”¹²⁰

113. See *Otter*, 44 F. Supp. 3d at 1017 (recognizing that the various organizations had standing to sue, paving the way for the *Herbert* Court should it choose to follow).

114. UTAH CODE ANN. § 76-6-112 (LexisNexis 2012) (stating, in full, that: “(1) [a]s used in this section, ‘agricultural operation’ means private property used for the production of livestock, poultry, livestock products, or poultry products. (2) A person is guilty of agricultural operation interference if the person: (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. (3) A person who commits agricultural operation interference described in Subsection (2)(a) is guilty of a class A misdemeanor. (4) A person who commits agricultural operation interference described in Subsection (2)(b), (c), or (d) is guilty of a class B misdemeanor.”).

115. Morgan, *supra* note 106, at 250.

116. *Id.*

117. *Id.* at 252 (stating that “crush videos typically depict women crushing animals to death for the viewer’s sexual titillation”).

118. *Id.* at 256.

119. *Id.* at 257–58.

120. Morgan, *supra* note 106, at 258.

Before moving on to the content-based restriction portion of her argument, Morgan similarly brushes aside arguments distinguishing *Stevens*. She does so based on factual differences and concludes this section of her argument with the assertion that the plaintiffs are likely to succeed on their overbreadth claim based on the sweeping language of section 76-6-112.¹²¹

Laws that target specific types of speech based on their ideas, views, or message are content-based restrictions, and are thus analyzed under strict scrutiny.¹²² This means that in order to overcome a court's heightened scrutiny analysis, the law "must be narrowly tailored to promote a compelling Government interest."¹²³ While the doctrine of content-based restrictions is quite complex and nuanced (for the purposes of this discussion it suffices to say that the existence of equally efficient, less-restrictive means toward the same ends would likely invalidate the statute), the government has the burden of proving that such alternatives do not exist, and the very "existence of a content-based restriction render[s] the statute 'presumptively invalid.'"¹²⁴

Morgan maintains that, because section 76-6-112 only refers to "image" or "sound" generally, instead of specifying the content of the prohibited recordings, the Court is not likely to find that the law is a content-based restriction of speech.¹²⁵ Moreover, the Court might, in light of *Showing Animals Respect & Kindness v. West Hollywood*, find that section 76-6-112 is a content-neutral restriction on time, place, and manner since it focuses on the way information is gathered, rather than the content of that information.¹²⁶ Should the Court find this way, it would also likely find that the statute is "substantially related to an important government interest in order to uphold it," since Utah is an agriculturally-dependent state.¹²⁷ That interest, Morgan points out, would likely be the interests of farmer-property owners' privacy rights.¹²⁸ However, the fact that section 76-6-112 leaves no alternative ways to engage in the same communication, since there would be no other ways for advocate-activists to collect images or audio recordings aside from undercover investigations, the statute may fail to fit

121. *Id.* at 259–60.

122. *Id.* at 261.

123. *Id.* (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000)).

124. *Id.* at 261–63.

125. Morgan, *supra* note 106, at 264–65.

126. *Id.* at 265–66.

127. *Id.* at 266.

128. *Id.* at 266.

permissibly into the content-neutral restriction category.¹²⁹

The district court's recent decision in *Otter*, certainly calls into question aspects of Morgan's *Animal Legal Defense Fund v. Herbert* analysis.¹³⁰ There, Judge Winmill saw through the State's arguments supporting Idaho Code section 18-7042 and held that the statute violates the First and Fourteenth Amendments of the U.S. Constitution.¹³¹ It remains to be seen how the federal court in Utah will decide.

III. THE SIDE-STEP: AVOIDING THE CYCLE ENTIRELY

A. Sunlight Provisions

Because of the lack of access to what goes on inside these operations, CAFOs have been compared to CIA blackout sites.¹³² Since a lack of monitoring in such facilities tends to breed regulatory violations including rampant animal abuse, filling the regulatory gap becomes necessary in the absence of meaningful public access to CAFO conditions. The ag-gag cycle, however, is a pitifully inadequate tool for the job.¹³³

Some suggest that a safer and arguably more efficient way to solve the ag-gag cycle quagmire would be to place open-source cameras at key points of the production process.¹³⁴ Professor Jedediah Purdy argues that this transparency would replace the need for undercover investigations by providing the monitoring necessary to keep workers and government inspectors in line.¹³⁵ Cameras would be positioned so that whenever a curious individual wanted to click on the link to a particular slaughterhouse, which would be available on the product packaging, he or she would get a bird's-eye view of that stage in the process.¹³⁶ Because agricultural lobbies are powerful players in many state legislatures, Purdy suggests ballot initiatives to circumvent this potential obstacle.¹³⁷ In response to industry arguments that the footage

129. *Id.* at 267–68.

130. *See* 44 F. Supp. 3d 1009 (D. Idaho 2014).

131. *Id.* at 28.

132. Jeff Pierce, *Video Auditing of Slaughterhouses—A Good Idea*, ANIMAL LEGAL DEF. FUND (June 5, 2013), <http://aldf.org/blog/video-auditing-of-slaughterhouses-a-good-idea/>.

133. *See supra* Figure 1.

134. Purdy, *supra* note 20.

135. *Id.*

136. *Id.*

137. *Id.* This would not ensure that the cameras would go up, however, since significant portions of the populations of big ag-states rely on the income they receive from CAFO employment and CAFO owners perpetuate the idea that any opposition or change

would unfairly portray an inherently gruesome process, Purdy maintains that the industry would be free to add more cameras or engage in public education about the stages of slaughter to combat these potentially damaging images.¹³⁸

In the same vein, independent journalist Will Potter recently launched a Kickstarter project to use drones to “shine a light” on CAFO ills.¹³⁹ While Potter’s idea is structured as a one-time investigative journalistic endeavor, the regular use of drones to monitor CAFO activities would bolster Purdy’s open-source plan, ultimately allowing for maximum transparency and offering the public free access to one of the most important aspects of modern human life: the source of our edible animal products.

While sunlight provisions such as these could provide a crucial step in uncovering the mystery that is the modern industrial animal agricultural system, without proper implementation and management these systems could also become just another ineffective part of what is already a failing complex regulatory machine. A properly implemented sunlight system would be one in which control of the placement of cameras and storage management was divided equally between advocate-activists, scientists, scholars, industry, and regulators. Were the system controlled by the existing agricultural actors, cameras could be placed in strategically benign stages, leaving areas more prone to regulatory violations free to continue in the dark. A system that takes into consideration goals other than those of the industry and state legislatures in big-ag states is an intriguing potential route around the ag-gag cycle.

Despite their promising potential—were they able to overcome industry opposition, of course—sunlight provisions, while they might decrease egregious forms of animal abuse and other regulatory violations, would not solve all the problems associated with the CAFO model.¹⁴⁰ The true potential of these provisions lies in revealing the reality of CAFO conditions to the general public as a necessary step in

could have negative effects on the employees’ livelihoods. *See* Liebmann, *supra* note 13.

138. Purdy, *supra* note 20.

139. Will Potter, *Drone on the Farm: An Aerial Exposé*, KICKSTARTER.COM (June 9, 2015), <https://www.kickstarter.com/projects/1926278254/drone-on-the-farm-an-aerial-expose>.

140. This is true, especially since the industry has recently co-opted the “glass walls” approach (which promotes transparency in the industrial animal agricultural system) and used it as a marketing tool. Timothy Pachirat, Ph.D., Address at Farm Sanctuary’s 2015 Hoe Down: The Glass Wall Fallacy (Aug. 15–16, 2015). Pachirat also discussed more disturbing, unexpected effects of the transparency movement, including providing unlimited access to those actively seeking to view such activities for pleasure. *Id.*

overhauling the industrial animal agricultural system. In short, sunlight provisions would best serve as a first step on the path toward change on a systemic level.

B. Problems Even Sunlight Cannot Solve: The Sinclair Effect

In 2009, an empirical study of the effects of slaughterhouses on rural communities revealed a troubling observation: while new factory employment opportunities in manufacturing usually result in lower arrest rates for violent criminal conduct, slaughterhouse installations tend to have the opposite effect.¹⁴¹ This potential correlation between violent crime and slaughterhouse employment was qualitatively identified early on in the industrialization of the animal industry in Upton Sinclair's *The Jungle*:

He [the police officer] has to be prompt—for these two-o'clock-in-the-morning fights, if they once get out of hand, are like a forest fire, and may mean the whole reserves at the station. The thing to do is to crack every fighting head that you can see, before there are so many fighting heads that you cannot crack any of them. There is but scant account kept of cracked heads in back of the [stock] yards, *for men who have to crack the heads of animals all day seem to get into the habit, and to practice on their friends, and even on their families, between times.*¹⁴²

The *Fitzgerald Study* points out that the Sinclair Hypothesis, or the Sinclair Effect, has yet to receive the academic attention it should and must be researched more thoroughly before drawing any concrete conclusions. According to the study, however, the proclivity to engage in violent behavior seems to increase in individuals who, as a part of their employment, routinely slaughter hundreds of non-human animals on a daily basis.¹⁴³

In a related article, Temple Grandin explains that slaughterhouse workers tend to develop constructions that allow these workers to engage in the systematic killing and dismembering of other animals.¹⁴⁴ Slaughterhouse workers, she maintains, usually either adopt (1) a

141. Amy J. Fitzgerald, Linda Kalof & Thomas Dietz, *Slaughterhouses and Increased Crime Rates: An Empirical Analysis of the Spillover from "The Jungle" Into the Surrounding Community*, ORG. & ENV'T, 2009, at 1, 18.

142. *Id.* at 1 (quoting UPTON SINCLAIR, *THE JUNGLE* 18–19 (Grosset & Dunlap, 1905)).

143. *Id.* at 2.

144. Temple Grandin, *Behavior of Slaughter Plant and Auction Employees Toward the Animals*, 1 ANTHROZOOS 205, 208 (1988). Grandin also discusses other ways to decrease animal cruelty in slaughterhouses, including increased manager engagement and employee sanctions for instances of animal cruelty. *Id.* at 212.

Mechanical Approach; (2) a Sacred Ritual Approach; or (3) a Sadistic Approach.¹⁴⁵ While the first two approaches do not result in the desire to inflict unnecessary pain, employees that fall into the third category devalue the animals they work with, enjoy killing them, and look for ways to increase the animal's suffering.¹⁴⁶

Absent or lenient managers and administrators are also a part of the problem of animal cruelty, according to Grandin.¹⁴⁷ While it is less common for managers to engage in the abusive behavior and other regulatory violations, managerial avoidance of the more gruesome aspects of CAFO operation contributes to such devolution.¹⁴⁸ Violations and animal abuse are less likely to occur where managers actively engage with workers and enforce a "strict code of conduct."¹⁴⁹

To combat animal cruelty, human rights violations, and other commonly-cited ills of the CAFO model, some groups promote vegetarian and vegan diets.¹⁵⁰ It is likely, however, that a significant portion of the population, domestic and international, will continue relying on animal products which makes addressing a system with such significant effects on slaughterhouse employees an important human rights issue.

145. *Id.* Grandin explains that employees that take the Mechanical Approach tend to view their conduct as they would non-violent, routine office work, such as stapling or filing papers. *Id.* The killing is efficient, robotic and formalistic. *Id.* In the Ritualistic Approach, workers transform the act of killing into a sort of ceremony, recognizing the life of the creature and its extinguishment at the hands of the actor. Temple Grandin, *Behavior of Slaughter Plant and Auction Employees Toward the Animals*, 1 ANTHROZOOS 205, 212 (1988). This approach tends to prevent the desensitization that might lead to violence against humans and non-human animals outside of the factory. *Id.* at 212–14.

146. *Id.* at 208. Grandin discusses an incident where an employee "took pleasure in shooting the eyes out of cattle before he killed them," and another in which a worker stuck a live hog between the shoulder blades with a hook and dragged it like a hay bale. *Id.*

147. *Id.*

148. Temple Grandin, *Behavior of Slaughter Plant and Auction Employees Toward the Animals*, 1 ANTHROZOOS 205, 208 (1988).

149. *Id.*

150. See generally PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, www.peta.org (last visited Jan. 11, 2016); MERCY FOR ANIMALS, <http://www.mercyforanimals.org/> (last visited Jan. 11, 2016).

IV. THE SOLUTION: DECREASED DEMAND, SMALLER FARMS, AND
PREVENTATIVE LEGISLATION

The CAFO model of animal production that makes animal products available at artificially low prices¹⁵¹ comes at high economic, social, and environmental costs. The ag-gag cycle only compounds these issues and exacerbates the negative effects of this model. Such sweeping Government-sponsored attempts to censor information-gathering have already been found to violate the U.S. Constitution in one federal court, making the future of traditional ag-gag legislation bleak indeed.

Undercover investigations are a necessary part of a cycle that revolves around an industry so far removed from the public eye whose products go from the packing plant, to the grocery store, and into our mouths and the mouths of those we care for. Recognizing the inherent flaws of the ag-gag cycle is essential in the push toward a more humane and sustainable animal agricultural industry, but using the existing system to attack system failure might be as Sisyphean as it gets.¹⁵² The ag-gag cycle, with all the countless hours and dollars invested thus far, is but a distraction from the real solution to the problems created by the CAFO model.

While transparency measures might deter some instances of animal abuse and other violations, adopting these measures is merely the first step in addressing the host of other issues inherent in the CAFO model. Along with the alarming effects on the environment, the physical and mental effects suffered by those employed in CAFOs survive transparency efforts embodied by sunlight provisions. The most effective solution lies in decreasing demand for animal products as well as the size and speed of operations, and overhauling the current system of agency oversight.

The second step, after the implementation of effective sunlight provisions, would be the elimination of government subsidies for industrial animal agriculture. This would cause artificially low meat and dairy prices to rise—more accurately reflecting the true costs of production¹⁵³—and demand to decrease.¹⁵⁴ Efforts to decrease demand should focus on the benefits of a diet that consists of fewer animal

151. Winebarger, *supra* note 17, at 1013–14.

152. See Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110 (1984) (discussing societal change and marginalized female populations within the feminist movement).

153. See generally Winebarger, *supra* note 17.

154. *Id.*

products. For example, the Dietary Guidelines Advisory Committee recently promoted the health and environmental gains of such a diet.¹⁵⁵ Similarly, the United Nations Conference on Trade and Development emphasizes the need to shift to more sustainable agricultural systems and consumption patterns in order to avoid catastrophic effects of global climate disruption,¹⁵⁶ and the World Health Organization recently classified red meat as a probable carcinogen, and processed red meat as a carcinogen.¹⁵⁷

Breaking up giant industrial entities and shifting to proprietarily and spatially smaller ones that house a fraction of the number of animals is an important third step. However, this alone will not necessarily translate into more humane conditions for the animals, safer food for consumers, or better working environments for the employees.¹⁵⁸ In fact, Grandin herself found that, in one study, there did not seem to be a correlation between the size of the facility and the occurrence of animal abuse.¹⁵⁹ In the same study, however, she found that one of the factors influencing cruelty and abuse was lack of manager oversight and involvement.¹⁶⁰ Therefore, a shift to smaller

155. BARBARA E. MILLEN, U.S. DEP'T OF AGRIC., SCIENTIFIC REPORT OF THE 2015 DIETARY GUIDELINES ADVISORY COMMITTEE: ADVISORY REPORT TO THE SECRETARY OF HEALTH AND HUMAN SERVICES AND THE SECRETARY OF AGRICULTURE, PART B. CHAPTER 2: 2015 DGAC THEMES AND RECOMMENDATIONS: INTEGRATING THE EVIDENCE 3 (2015), <http://www.health.gov/dietaryguidelines/2015-scientific-report/PDFs/Scientific-Report-of-the-2015-Dietary-Guidelines-Advisory-Committee.pdf> (“Moderate to strong evidence demonstrates that healthy dietary patterns that are higher in plant-based foods, such as vegetables, fruits, whole grains, legumes, nuts, and seeds, and lower in . . . animal-based foods are associated with more favorable environmental outcomes (lower greenhouse gas emissions and more favorable land, water, and energy use) than are current U.S. Dietary patterns.”).

156. CARLOS PÉREZ DEL CASTILLO, U. N. CONFERENCE ON TRADE AND DEVELOPMENT, TRADE AND ENVIRONMENT REVIEW 2013: WAKE UP BEFORE IT IS TOO LATE, MAKE AGRICULTURE TRULY SUSTAINABLE NOW FOR FOOD SECURITY IN A CHANGING CLIMATE 7 (2013), http://unctad.org/en/publicationslibrary/ditcted2012d3_en.pdf (stating that “the required transformation of agriculture [must include the] reduction of direct and indirect . . . GHG emissions of livestock production” and “[c]hanging dietary patterns towards climate-friendly food consumption”). The report also states “GHG emissions are predicted to rise by 35-60 per cent by 2030 in response to population growth and changing diets in developing countries, in particular towards greater consumption of ruminant meats and dairy products.” *Id.* at 3.

157. Press Release, International Agency for Research on Cancer, IARC Monographs Evaluate Consumption of Red Meat and Processed Meat, World Health Organization Press Release No. 240 (Oct. 26, 2015).

158. A recent documentary has also found that smaller farms without a decrease in demand would not solve the impact animal agriculture has on the environment. COWSPIRACY (A.U.M. Films & First Spark Media 2014).

159. *See* Grandin, *supra* note 144.

160. *Id.*

facilities with higher manager-to-employee ratios, coupled with built-in safeguards against managerial absenteeism, could result in fewer violations.

Smaller operations will also not, by themselves, address the desensitization that occurs within some employees as a way to cope with the constant killing of non-human animals and potentially related negative social effects that spill over into the communities that house slaughter plants. However, assuming that the speed of production and the size of the operation have a direct relationship, smaller facilities would not require employees to kill, for example, one cow every twelve seconds.¹⁶¹

Instead of massive government subsidization of the animal agricultural production, plant owners and CEOs could receive limited economic benefits for investing in employee wellness procedures. Programs such as employee assistance programs provide counseling and other mental health services to slaughterhouse employees and their families. Ending the subsidization of this industry and using even a portion of those resources to fund the overhaul of the current regulatory system would allow for the replacement of a system that leaves a significant regulatory gap—currently being filled by the ag-gag cycle—with one that more-fully addresses the symptoms of and cures for the toxic industrial animal agricultural system. To have any real effects at all, the new system would necessarily have to include diversifying the animal agricultural shot-callers, including more individuals from outside of the industry-legislator clubhouse.

One way to approach such a daunting task would be via a media campaign such as the highly successful anti-smoking campaign that began in the 1990s.¹⁶² If the animal agricultural industry is as powerful an entity as the pre-nineties tobacco industry, attempting such a campaign would be a formidable endeavor indeed. However, in that David-and-Goliath battle to bring about greater public awareness of the damaging effects of smoking, we should remember that David came out on top.

161. See TIMOTHY PACHIRAT, *EVERY TWELVE SECONDS: INDUSTRIALIZED SLAUGHTER AND THE POLITICS OF SIGHT* (Yale Univ. Press, 2011) (describing the author's undercover employment at a slaughterhouse in the Great Plains where 2500 cattle were killed daily, breaking down to about one every twelve seconds).

162. See *Ending the Tobacco Problem: Resources or Local Action*, INST. MED. NAT'L ACADS. SCI., ENG'G, & MED., http://sites.nationalacademies.org/Tobacco/SmokingCessation/TOBACCO_051284 (last visited Jan. 11, 2016).

CONCLUSION

Though the fate of Meyer and the other plaintiffs of *Animal Legal Defense Fund v. Herbert* has yet to be determined, even a favorable outcome for Meyer and the other plaintiffs would not likely be the end of the ag-gag cycle once and for all. Powerful industry lobbyists and supportive legislators are likely to find other legal maneuvers to stop the flow of undercover investigations in CAFOs, such as the delayed or rapid reporting laws mentioned above.¹⁶³

A solution that involves a variety of techniques and systemic changes including ending industry subsidies, decreasing operation sizes, overhauling the oversight system, and mounting a media campaign with the goal of decreasing demand for animal products is necessary to ensure that the food Americans consume and feed their families is healthful, that slaughterhouse conditions are safe for employees and at least mitigate the negative effects of such employment, that our impact on the environment is at least lessened, and that food animals are truly treated humanely, above and beyond the current minimal industry practice standards.

163. See *supra* Part II.B.