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Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms

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Summary

In March 2012, Iowa and Utah passed "Ag-Gag" laws in response to a series of high-profile undercover investigations of farms by animal activists. The laws were framed as generally applicable fraud prohibitions. But their aim was clear: to stop animal activists exposing the treatment of animals on industrial-scale farms. A constitutional challenge to the laws now seems likely. A court hearing such a challenge should subject the Ag-Gag laws to heightened First Amendment scrutiny under the newsgathering framework of *Cohen v. Cowles Media Co*. The laws cannot survive such scrutiny.

On November 18, 2011, ABC's *Good Morning America* news program aired undercover footage of workers at Sparboe Farms throwing chickens by the neck into cages, burning the beaks off of chicks without painkillers, and leaving dead chickens to rot in cages alongside live birds.[1] The footage soon aired on *20/20* and *World News Tonight With Diane Sawyer*, generating nationwide uproar.[2] Within a day, McDonald's announced it would no longer accept eggs from Sparboe Farms, which had previously produced all eggs used by McDonald's restaurants west of the Mississippi River.[3] Soon, Target, Sam's Club, and Supervalu followed suit, dropping all ties with Sparboe.[4] Within four months, almost a million people watched the undercover footage on YouTube.[5]

The footage was made by an undercover investigator on contract with animal rights group Mercy for Animals.[6] The investigator applied for work at Sparboe Farms, presumably misrepresenting his identity, organizational affiliations, and intentions to get the job.[7] Sparboe hired him as an employee on a travelling crew that rotated between eight Sparboe facilities in three states.[8] Once inside Sparboe's facilities, the investigator used

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1. ABC Good Morning America, *ABC News Investigation: What's in Your Breakfast*, Nov. 18, 2011, http://www.hulu.com/watch/302147/abc-good-morning-america-abc-news-investigation-whats-in-your-breakfast (last visited Aug. 1, 2012).
2. *See* ABC News, "20/20" episode, Nov. 18, 2011, http://abcnews.go.com/Blotter/mcdonalds-dumps-mcmuffin-egg-factory-health-concerns/story?id=14976054 (last visited Aug. 1, 2012); ABC News, *ABC News Investigations of the Year: What's in Your Egg McMuffin?*, Dec. 30, 2011, http://abcnews.go.com/Blotter/abc-news-investigations-year-egg-mcmuffin/story?id=15199624 (last visited Aug. 1, 2012).
3. Cynthia Galli et al., *McDonald's, Target Dump Egg Supplier After Investigation*, ABC News, Nov. 18, 2011, http://abcnews.go.com/Blotter/mcdonalds-dumps-mcmuffin-egg-factory-health-concerns/story?id=14976054 (last visited Aug. 1, 2012).
4. Bob Von Sternberg, *Shoppers Find Egg Shelves Empty*, Star Trib., Nov. 19, 2011; Jake Anderson, *More Retailers Cut Ties With Sparboe Farms*, Twin Cities Bus. Mag., Nov. 11, 2011.
5. The video had 999,547 views as of March 29, 2012. Video, *McDonald's Cruelty: The Rotten Truth About Egg McMuffins*, http://www.youtube.com/watch?v=r6E8H3C1CrU (last visited Aug. 1, 2012).
6. Mercy for Animals, *FTC Complaint Against Sparboe Farms*, Dec. 1, 2011, at 4, http://www.mercyforanimals.org/SparboeFTCComplaint.pdf (last visited Aug. 6, 2012).
7. Mercy for Animals has not revealed what misrepresentations, if any, its investigator made to get employed at Sparboe facilities. But investigators typically assume a false identity and state they do not intend to video at the facility when asked. *See* Cody Carlson, *The Ag Gag Laws: Hiding Factory Farm Abuses From Public Scrutiny*, Atlantic Online, Mar. 20, 2012, http://www.theatlantic.com/health /archive/2012/03/the-ag-gag-laws-hiding-factory-farm-abuses-from-public-scrutiny/254674/ (last visited Aug. 1, 2012) (former animal rights undercover investigator recounts committing resumé fraud).
8. *Id.*

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hidden pigeonhole cameras to film everything he saw—from workers roughly handling hens to rodents running loose in the egg facilities.[9] The Sparboe facilities were in Colorado, Iowa, and Minnesota.[10]

While Mercy for Animals' investigator was filming, the legislatures of two of those states were considering "Ag-Gag" legislation designed to criminalize his activities. The Iowa House had already passed a bill to make unauthorized filming at agricultural operations and the possession and distribution of videos created without authorization an aggravated misdemeanor.[11] When ABC released the footage of Sparboe's Iowa facility, the Iowa Senate was still debating this bill,[12] and Minnesota's House and Senate were considering an almost identical bill.[13] Had these bills been law, they would have penalized not only the Mercy for Animals investigator, but also ABC News for possessing and distributing the illicitly filmed video.[14]

In March 2012, Iowa and Utah became the first two states to pass Ag-Gag legislation into law.[15] Six other states have considered similar legislation.[16] These laws are not unprecedented: at least 28 states already have "animal enterprise interference" statutes that heighten penalties for fraud, trespass, and damage at animal enterprise facilities.[17] But most of those statutes target physical damage at animal facilities and appear never to have been used against undercover investigators.[18] By contrast, Iowa and Utah's laws directly target these investigators.[19] And in both states, animal rights groups have pledged both to provoke prosecutions and to challenge the laws' constitutionality in court.[20]

The Ag-Gag laws have ignited a fierce media war. Supporters contend the laws are necessary to protect agriculture from misrepresentation by dishonest activists.[21] In Iowa, the Farm Bureau, Pork Producers Association, Poultry Association, Turkey Federation, Cattlemen's Association, Agribusiness Association, and the Monsanto Company lobbied for the legislation.[22] Iowa Gov. Terry Branstad argued, "farmers should not be subjected to people doing illegal, inappropriate things and being involved in fraud and deception in order to try to disrupt agricultural operations."[23]

Critics contend the laws target speech critical of animal agriculture. In Iowa, the American Civil Liberties Union of Iowa, the Sierra Club of Iowa, the Humane Society of the United States, and the American Society for the Prevention of Cruelty to Animals lobbied against the bill.[24] The *New York Times* editorial board argued: "The legislation has only one purpose: to hide factory-farming conditions from a public that is beginning to think seriously about animal rights and the way food is produced."[25]

This is an Article about Ag-Gag laws. I define Ag-Gag laws as laws that target undercover investigations at agricultural operations, either by banning filming or by imposing heightened fraud penalties that do not apply elsewhere.

9. *See supra* note 2.
10. Steve Karnowski & Derek Kravitz, *Target Follows McDonald's Lead, Drops Egg Supplier Sparboe Farms After Shocking Undercover Video*, Huffington Post, Nov. 19, 2011, http://www.huffingtonpost.com/2011/11/20/target-mcdonalds-egg-supplier_n_1103770.html (last visited Aug. 6, 2012).
11. *See* Iowa H.R. Jour., 2011 Reg. Sess., Mar. 8, 2011, at 14; Iowa H.F. 589 as introduced.
12. *See* Iowa Bill Hist., 2012 Reg. Sess. H.F. 589.
13. *See* Minn. S.F. 1118 and H.F. 1369. This bill was still under consideration at the time of this Article's completion.
14. *See* Iowa H.F. 589(9)(1)(b) as introduced (making it a crime to willfully and without the animal facility's owner's consent "[p]ossess or distribute a record which produces an image or sound occurring at the animal facility which was produced" by a person filming at the facility without authorization); Minn. H.F. 1369 Sec. 3(2) (making it a crime to willfully and without the animal facility's owner's consent "possess or distribute a record which produces an image or sound occurring at the animal facility which was produced" by a person filming at the facility without authorization).
15. *See* Ken Anderson, *Ag Facility Fraud Is Now Illegal in Iowa*, Brownfield Ag News, Mar. 6, 2012, http://brownfieldagnews.com/2012/03/06/ag-facility-fraud-is-now-illegal-in-iowa/ (last visited Aug. 1, 2012).
16. At the time of this Article's completion, Ag-Gag laws had passed in two states: Iowa and Utah. *See* Iowa Code Ann. §717A.3A and Utah Code Ann. §76-6-112. Ag-Gag laws had been defeated in three others: Florida (S. 1184), Illinois (H.B. 5143), and Indiana (S.B. 0184). Ag-Gag laws were still pending in three more states: Minnesota (S.B. 1118 and H.F. 1369), Nebraska (L.B. 915), and New York (S.B. 5172).
17. These statutes typically define animal enterprise facilities to include at least both livestock farms and animal testing facilities. Cynthia Hodges, *Detailed Discussion of State Animal "Terrorism"/Animal Enterprise Interference Laws*, Animal Legal and Historical Center, 2011, http://www.animallaw.info/articles/ddusstateecoterrorism.htm (last visited Aug. 1, 2012).
18. In three states—Kansas, Montana, and North Dakota—these statutes ban unauthorized filming at agricultural operations with certain conditions. *See supra* notes 60-65 and accompanying text. But my research has revealed no use of these statutes against undercover investigators, though because these statutes typically involve misdemeanor penalties, it is hard to obtain complete data. *See generally* Laura G. Kniaz, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 Buff. L. Rev. 765, 804 (1995).
19. *See* Utah Code Ann. §76-6-112(a), (c)(iii), (d); Iowa Code Ann. §717A.3A.
20. *See* Jason Clayworth, *We Won't Quit, "Ag Gag" Critics Pledge at Capitol Protest*, Des Moines Reg., Mar. 1, 2012 ("Constitutional scholars this week said they thought the bill, if signed into law, would face challenges hinging partly on a concept known as prior restraint" and "'we will continue with our undercover cruelty prosecutions nationwide,' said [Mercy for Animals spokeswoman] Vandhana Bala."); Lee Davidson, *Animal Rights Groups Seek Veto of Utah's "Ag-Gag" Bill*, Salt Lake Trib., Mar. 9, 2012 ("'If this bill is signed into law, we will challenge it all the way to the Supreme Court,' Nathan Runkle, executive director of Mercy for Animals, said at a Salt Lake City news conference.").
21. *See*, *e.g.*, Laurie Johns, *Iowa Farm Bureau Supports Revised HF 589 to Protect Integrity and Safety of Family Farms*, Iowa Farm Bureau Press Release, Feb. 28, 2012, http://www.iowafarmbureau.com/article.aspx?articleID=54372 (last visited Aug. 1, 2012).
22. Lobbyist Declarations for H.F. 589. http://coolice.legis.state.ia.us/CoolICE/default.asp?Category=Lobbyist&Service=DspReport&ga=84&type=b&hbill=HF589 (last visited Aug. 1, 2012).
23. *See* Ken Anderson, *Ag Facility Fraud Is Now Illegal in Iowa*, Brownfield Ag News, Mar. 6, 2012, http://brownfieldagnews.com/2012/03/06/ag-facility-fraud-is-now-illegal-in-iowa/ (last visited Aug. 1, 2012).
24. Lobbyist Declarations for H.F. 589, http://coolice.legis.state.ia.us/CoolICE/default.asp?Category=Lobbyist&Service=DspReport&ga=84&type=b&hbill=HF589 (last visited Aug. 1, 2012).
25. Editorial, *Hiding the Truth About Factory Farms*, N.Y. Times, Apr. 26, 2011.

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Five states have laws that fit this definition: Iowa, Kansas, Montana, North Dakota, and Utah.[26] Of these, I focus on the two most far-reaching and recently enacted laws: those of Iowa and Utah.[27]

I argue that a court would likely apply the First Amendment newsgathering framework of *Cohen v. Cowles Media Co.*[28] to a constitutional challenge. Under this framework, the Ag-Gag laws should be subject to either strict or intermediate First Amendment scrutiny. And under such heightened scrutiny, the Ag-Gag laws cannot stand constitutional muster.

This Article has four sections. In Section I, I detail the Ag-Gag laws' background, legislative history, and content. In Section II, I outline the U.S. Supreme Court's newsgathering jurisprudence, its decision in *Cohen*, and *Cohen*'s progeny in the circuit courts. In Section III, I argue heightened First Amendment scrutiny should apply to the Ag-Gag laws. In Section IV, I argue that the Ag-Gag laws cannot survive such scrutiny.

I. Undercover Investigations and the Ag-Gag Laws

Ag-Gag laws are a response to increasingly effective and numerous undercover investigations on farms by animal activists.

A. *The History of Undercover Investigations at Agricultural Operations*

In 1904, Upton Sinclair applied for work as a meatpacker at slaughterhouses in Chicago. Inside the slaughterhouses, he documented spoiled meat turned into sausage, dead rats mixed into the meat, and pigs cannibalizing one another.[29] Sinclair published these revelations in *The Jungle*, which sparked uproar over conditions in the meatpacking industry and caused the U.S. Congress to enact the Federal Meat Inspection Act of 1906.[30]

The following century, reporters continued going undercover to expose welfare abuse, voting irregularities, and shoddy health care practices.[31] These reporters often lied about their identities, organizational affiliations, and intentions in order to gain employment.[32] Once employed, they used undercover cameras and recording devices to document what they saw.[33] They got results: undercover reports led Texas officials to regulate nursing homes,[34] Nevada prosecutors to charge lying telemarketers with fraud,[35] and California police to arrest fake doctors.[36]

In the 1980s, the animal rights movement began using undercover investigations to expose animal abuse. In 1981, People for the Ethical Treatment of Animals (PETA) cofounder Alex Pacheco secured work as a volunteer at Dr. Edward Taub's monkey testing laboratory in Silver Spring, Maryland.[37] Pacheco photographed animal abuse in Taub's laboratories, and covertly brought independent researchers into the laboratory to corroborate the abuses.[38] This evidence ultimately resulted in the first criminal conviction of an animal researcher for cruelty to animals, the removal of the monkeys from Dr. Taub's care, and a prolonged custody battle over the monkeys that went all the way to the Supreme Court.[39]

More recently, animal activists have turned their cameras to animal agriculture operations. Since 1998, animal activists have conducted at least 76 undercover investigations at egg, pork, chicken, beef, dairy, deer, duck, turkey, and fish farms across the nation.[40] In Iowa alone, activists have conducted 10 such investigations.[41]

These investigations have jolted animal agriculture. They have revealed violations of food safety and animal cruelty laws,[42] and allowed consumers to glimpse the uniquely hidden practices of agribusiness.[43] They have

26. *See* Iowa Code Ann. §717A.3A; N.D. Cent. Code §12.1-21.1-02(7); Kan. Stat. Ann. §47-1827(c)(4); Mont. Code Ann. §81-30-103(2)(e); Utah Code Ann. §76-6-112.
27. *See* Iowa Code Ann. §717A.3A and Utah Code Ann. §76-6-112. Arguments against Utah's law can also be applied to the three other laws, which are similar. Moreover, no prosecutions appear to have been brought under Kansas, Montana, or North Dakota's laws. *See supra* note 18. By contrast, prosecutions, and constitutional challenges, under Utah and Iowa's laws appear likely. *See supra* note 20.
28. 501 U.S. 663 (1991).
29. *See* Upton Sinclair, The Jungle, 127, 128, 271 (Forgotten Books 2008 (first published 1906)).
30. *See* Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 968 (2012) (attributing a national uproar over the meatpacking industry and subsequent passage of the Federal Meat Inspection Act to Upton Sinclair's reporting); 21 U.S.C. §§601 et seq. (Federal Meat Inspection Act).
31. *See* David A. Logan, *"Stunt Journalism," Professional Norms, and Public Mistrust of the Media*, 9 U. Fla. J. L. & Pub. Pol'y 151, 154 (1998) (documenting undercover investigations).
32. *See* Thomas Dienes, *Protecting Investigative Journalism*, 67 Geo. Wash. L. Rev. 1139, 1142 (1999) (describing fraud committed by undercover reporters).
33. *See* Eleanor Randolph, *"Lipstick Camera" Reshapes TV Investigative Journalism*, L.A. Times, Jan. 14, 1997.
34. *See* Lyrissa C. Barnett, *Intrusion and the Investigative Reporter*, 71 Tex. L. Rev. 433, 433-34 (1992) (describing the effect of a *20/20* undercover investigation on Texas nursing home regulations).
35. *See* Logan, *supra* note 31, n.46.
36. *See* Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (upholding verdict for invasion of privacy against journalists who used hidden cameras and false pretenses to expose medical malpractice).
37. *See* Int'l Primate Prot. League v. Inst. for Behavioral Research, Inc., 799 F.2d 934, 936 (4th Cir. 1986); *see also* Bridget Klauber, *See No Evil, Hear No Evil: The Federal Courts and the Silver Spring Monkeys*, 63 U. Colo. L. Rev. 501, 502 (1992).
38. *Int'l Primate Prot. League*, 799 F.2d at 936.
39. *Id.* The Supreme Court decided only a procedural issue: that the National Institute of Health's removal of the monkey custody battle from state to federal court was invalid. *See* Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 74 (1991).
40. *See*AnimalVisuals,http://www.animalvisuals.org/projects/data/investigations#lawlist (last visited Aug. 1, 2012) (documenting farm animal rights undercover investigations since 1998).
41. *Id.*
42. *See* Andrenna L. Taylor, *Chapter 194: From Downer Cattle to Mystery Meat: Chapter 194 Is California's Response to the Largest Beef Recall in History*, 40 McGeorge L. Rev. 523, 526 (2009).
43. Jeff Leslie and Cass Sunstein have argued that animal agriculture's practices are uniquely hidden, meaning that disclosure could both improve conditions and produce more efficient markets. Leslie and Sunstein argue for mandatory disclosure by food producers. Until such disclosures are mandated though, undercover investigations remain the only means to see inside many animal agriculture facilities. *See* Jeff Leslie & Cass R. Sunstein, *Animal Rights Without Controversy*, 70 Law & Contemp. Probs. 117, 118 (2007).

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led to criminal indictments,[44] U.S. Department of Justice lawsuits,[45] and major food recalls.[46] They have been cited in newspapers,[47] lawsuits,[48] and Supreme Court opinions.[49] Even the U.S. House of Representatives Judiciary Committee has noted: "Regulators, humane societies, and labor unions *rely on* whistleblowers and legitimate undercover investigations to police conditions at food and fiber processing facilities and determine compliance with animal welfare and labor laws."[50]

Take three recent examples. A 2012 investigation at a Butterball turkey farm in North Carolina revealing workers kicking and throwing turkeys led to the arrest of seven workers on animal cruelty charges.[51] A 2009 investigation at an H-Y Line egg hatchery in Iowa revealing millions of chicks ground alive generated a video that 2.7 million people have watched on YouTube.[52] And a 2007 Humane Society of the United States investigation at a Hallmark slaughterhouse in Chino, California, revealing the abuse of downer cows spurred criminal prosecutions, the largest meat recall in U.S. history,[53] and a California ballot initiative banning intense farm confinement practices.[54]

B. The Legislative Backlash

But undercover investigations have also prompted a legislative backlash. Starting in 1988, states began passing animal enterprise interference statutes in response to animal rights break-ins at animal research facilities.[55] These statutes targeted the physical destruction of research facilities, though some were written broadly enough to affect undercover investigations.[56] At least 28 states have now passed animal enterprise interference statutes.[57] Of these statutes, five impose penalties on common acts of undercover investigators—for example entering an animal facility to commit unauthorized acts, or committing fraud on a job application—but do not appear to have been enforced against undercover investigations.[58] Another 19 statutes require a showing of damage or intent to damage an animal facility, which is typically lacking in undercover investigations.[59]

Three states have animal enterprise statutes that resemble proto-Ag-Gag laws: Kansas, Montana, and North Dakota. All three ban unauthorized filming at animal facilities.[60] But the application of at least two of these laws to undercover investigators is limited. Kansas' statute only bans photographing or videoing at an animal facility "with the intent to damage the enterprise conducted at the animal facility."[61] And Montana's statute only bans photographing and videoing in an animal facility with the intent to damage the enterprise and the "intent to commit criminal defamation."[62] Assuming a court refuses to consider reputational harms as "damage,"[63] it is unlikely that a prosecution against an undercover investigator could be brought under either law. North Dakota's statute goes further, imposing liability for unauthorized use of recording equipment at an animal facility, regardless of intent.[64] But no prosecutions appear to have been brought under North Dakota's statute.[65]

These states' efforts to protect animal enterprises culminated in federal legislation to protect animal facilities. The Animal Enterprise Terrorism Act (AETA) of 2006 makes it a crime to intentionally cause the loss of real or

44. *See*, *e.g.*, NBC17, *7th Arrest Made Following Hoke Co. Turkey Abuse Investigation*, Feb. 23, 2012.
45. *See*, *e.g.*, United States ex rel. Humane Soc'y U.S. v. Hallmark Meat Packing Co.; Westland Meat Co., Inc., Civ. No. 08-0221 (C.D. Cal., seal lifted Apr. 28, 2009).
46. *See*, *e.g.*, Dan Flynn, *Suit Seeks Lunch Money Refund for Downer Beef*, Food Safety News, Oct. 2, 2009, http://www.foodsafetynews.com/2009/10/-one-of-the-nastiest/ (last visited Aug. 6, 2012).
47. The *New York Times* editorial board argues: "Nearly every major improvement in the welfare of agricultural animals, as well as some notable improvements in food safety, has come about because someone exposed the conditions in which they live and die." Editorial, *Hiding the Truth About Factory Farms*, N.Y. Times, Apr. 26, 2011.
48. *See*, *e.g.*, Complaint, Oberto Sausage Co. v. Certain Underwriters at Lloyd's London, 2009 WL 8144480 (Wash. Super. 2009) (citing Humane Society undercover investigation as evidence of meat contamination in contractual dispute).
49. *Nat'l Meat Ass'n*, 132 S. Ct. at 969.
50. The House Judiciary Committee made the comment in passing the Animal Enterprise Protection Act, expressing its concern that the Act should not criminalize undercover investigations or whistleblowing. H.R. Rep. No. 102-498(II), at 4 (1992), *reprinted in* 1992 U.S.C.C.A.N. 816 (emphasis added).
51. *See*, *e.g.*, NBC17, *7th Arrest Made Following Hoke Co. Turkey Abuse Investigation*, Feb. 23, 2012, http://www2.nbc17.com/news/2012/feb/23/7th-arrest-made-following-hoke-co-turkey-abuse-inv-ar-1966374/ (last visited Aug. 1, 2012) (reporting on arrest of workers following Mercy for Animals' undercover investigation at a Butterball turkey farm in North Carolina).
52. Associated Press, *Chicks Being Ground Up Alive Video*, Huffington Post, Oct. 17, 2009, http://www.huffingtonpost.com/2009/09/01/chicks-being-ground-up-al_n_273652.html (last visited Aug. 6, 2012); Video at http://www.youtube.com/watch?v=JJ--faib7to (last visited Aug. 1, 2012).
53. *See* United States ex rel. Humane Soc'y U.S. v. Hallmark Meat Packing Co.; Westland Meat Co., Inc., Civ. No. 08-0221 (C.D. Cal., seal lifted Apr. 28, 2009); *see also* Flynn, *supra* note 46.
54. Jonathan Lovvorn & Nancy Perry, *California Proposition 2: A Watershed Moment for Animal Law*, 15:2 Animal L. 149, 156 (2009).
55. *See* Hodges, *supra* note 17.
56. *Id.*
57. *Id.*
58. *See* Ala. Code §13A-11-153; Mo. Ann. Stat. §578.407; 810 Ill. Comp. Stat. Ann. §720 215/4; La. Rev. Stat. Ann. §14:228 §228; Miss. Code Ann. §69-29-307.
59. *See* Ark. Code Ann. §5-62-203; Or. Rev. Stat. Ann. §167.312; Idaho Code Ann. §18-7037; Wash. Rev. Code Ann. §4.24.570; Minn. Stat. Ann. 346.56; 13 Pa. Stat. Ann. §3311; Fla. Stat. Ann. §828.42(4); N.H. Rev. Stat. Ann. §644:8-e(II); N.Y. Agri. & Mkts Law §378 3(d); Md. Code Ann., Crim. Law §6-208; Ohio Rev. Code Ann. §2923.31; Okla. Stat. Ann. tit. §5-105A; Tenn. Code Ann. §39-14-803; S.C. Code Ann. §47-21-30; Ky. Rev. Stat. Ann. §437.420; Iowa Code Ann. §717A.2; Ga. Code Ann. §4-11-32; S.D. Codified Laws §40-38-1-5; Utah Code Ann. §76-6-110.
60. *See* Kan. Stat. Ann. §47-1827(c)(4); Mont. Code Ann. §81-30-103(2)(e); N.D. Cent. Code §12.1-21.1-02(7).
61. Kan. Stat. Ann. §47-1827(c)(4).
62. Mont. Code Ann. §81-30-103(2)(e).
63. In *Desnick v. Am. Broad. Co., Inc.*, 44 F.3d 1345 (7th Cir. 1995), the court refused to allow reputational damages following a tort suit against an ABC undercover investigation. The court also applied the criminal defamation standard that Montana's law embodies. This standard would require an animal facility owner to prove that an undercover investigator set out to misrepresent its operations.
64. *See* N.D. Cent. Code §12.1-21.1-02(7) ("No person without the effective consent of the owner may . . . Enter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment.") and §12.1-21.1-04 (prescribing felony and Class A misdemeanor penalties for all crimes of animal facility damage other than video or audio recording).
65. Based on the author's Westlaw search. But given the prohibition is a misdemeanor, it is possible that prosecutions have been brought without any record appearing on Westlaw.

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personal property of an animal enterprise.[66] Some scholars argue that undercover investigators could be prosecuted under the AETA because investigators fit its prohibition: they intentionally cause the loss of property—goodwill and future profits—of an animal enterprise.[67] Indeed, the Federal Bureau of Investigation's Joint Terrorism Task Force apparently took this position in a 2003 memorandum.[68] But other scholars argue that the AETA does not ban undercover investigations, especially because it defines "economic damage" to not include boycotts resulting from the disclosure of information about an animal enterprise.[69] And as of 2012, the government has not prosecuted any undercover investigators under the AETA.

C. *The Ag-Gag Bills*

On February 21, Florida State Sen. Jim Norman (R) introduced S.B. 1246, a bill to make unauthorized photography on Florida's farms a first-degree felony.[70] The bill immediately sparked uproar, with the *New York Times* ridiculing it as "Croparazzi" legislation,[71] while other newspapers noted that it imposed the same penalty on unauthorized farm photography—up to 30 years in jail—as Florida imposes for rape or murder.[72] The Florida Farm Bureau quickly disclaimed responsibility, saying the bill was the brainchild of egg farmer Wilton Simpson, whose company Simpson Farms produces 21 million eggs annually.[73] The bill was weakened by the time the Florida Senate Agriculture Committee passed it out of committee a month later.[74]

But in the meantime, similar legislation began appearing in other states. First, on March 8, 2011, Iowa Representative and cattle rancher Annette Sweeney (R) introduced a bill that created a new crime of "agricultural facility interference."[75] The bill prohibited not only producing unauthorized audio and visual recordings at agricultural facilities, but also possessing and distributing such recordings.[76] The Iowa Poultry Association later announced that it helped write the bill,[77] and Monsanto and other agribusinesses financially backed the bill's sponsors.[78] The Iowa House dealt with H.F. 589 in record time, passing it by 66 to 27 votes on March 17, 2012, just seven business days after the bill was first introduced.[79]

State legislators in Minnesota and New York soon followed suit, introducing bills to ban unauthorized filming at agricultural operations.[80] In the following year, legislators in four states—Illinois, Indiana, Nebraska, and Utah—proposed similar legislation.[81] These bills had similar provisions[82]; indeed, Minnesota's bills were almost identical to Iowa's House bill.[83] And most of the bills resembled model legislation proposed in 2003 by the American Legislative Exchange Council, an industry lobby group.[84]

D. *Iowa and Utah's Laws*

In March 2012, Iowa and Utah passed the first two Ag-Gag bills into law. The bills were noticeably devoid of official legislative history. Neither bill had a preface outlining

66. The AETA was passed as an amendment to the Animal Enterprise Protection Act of 1992, Pub. L. No. 102-346. The AETA prohibits the use of a facility of interstate or foreign commerce—
> for the purpose of damaging or interfering with the operations of an animal enterprise; and (2) in connection with such purpose—(A) intentionally damages or causes the loss of any real or personal property (including animals or records) used by an animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise . . . .

18 U.S.C. §43(a).

67. *See* Kimberly E. McCoy, *Subverting Justice: An Indictment of the Animal Enterprise Terrorism Act*, 14 Animal L. 53, 70 (2007) (The AETA "essentially criminalizes any activity that might produce such information—such as whistle blowing and undercover investigations—by failing to provide explicit exemptions for these activities.").
68. *See* Dean Kuipers, *FBI Tracking Videotapers as Terrorists?*, L.A. Times, Dec. 29, 2011.
69. *See* Michael Hill, *The Animal Enterprise Terrorism Act: The Need for A Whistleblower Exception*, 61 Case W. Res. L. Rev. 651 (2010) ("a literal reading of AETA's terms may force the conclusion that AETA prohibits certain acts of whistleblowing. A more scrutinizing analysis, however, reveals that the Act was never intended to halt acts of whistleblowing.").
70. *See* Florida S.B. 1246, as introduced, http://flsenate.gov/Session/Bill/2011/1246/BillText/Filed/html (last visited Aug. 1, 2012).
71. David W. Dunlap, *Cracking Down on Croparazzi*, N.Y. Times Lens Blog, Mar. 8, 2011, http://lens.blogs.nytimes.com/2011/03/08/cracking-down-on-croparazzi/ (last visited Aug. 1, 2012).
72. *See, e.g.*, Katie Sanders, *Sen. Jim Norman Scales Back Bill That Inadvertently Criminalized Farm Photography*, Tampa Bay Times, Mar. 22, 2011, http://www.tampabay.com/news/business/agriculture/sen-jim-norman-scales-back-bill-that-inadvertently-criminalized-farm/1158811 (last visited Aug. 1, 2012).
73. *See* Brett Adler, *Egg Producer Requested Norman's Farm-Photo Felony Bill; Similar Legislation Pending in Iowa*, Fla. Indep., Mar. 17, 2011, http://floridaindependent.com/24298/egg-producer-requested-jim-normans-farm-photo-felony-bill-similar-legislation-pending-in-iowa (last visited Aug. 1, 2012).
74. *See* Florida Senate Committee Vote Record, S.B. 1246, Mar. 21, 2011, http://flsenate.gov/Session/Bill/2011/1246 (last visited Aug. 6, 2012).
75. The bill, introduced as Iowa House File 431 and later labeled House File 589, created new penalties for fraud and interference at agricultural facilities. *See* Iowa House File 431, as introduced, http://coolice.legis.state.ia.us/Cool-ICE/default.asp?category=billinfo&Service=Billbook&ga=84&hbill=HF431 (last visited Aug. 6, 2012).
76. *Id.*
77. Arthur G. Sulzberger, *States Look to Ban Efforts to Reveal Farm Abuse*, N.Y. Times, Apr. 13, 2011, http://www.nytimes.com/2011/04/14/us/14video.html?_r=2 (last visited Aug. 1, 2012).
78. *See* Jason Clayworth, *"Ag Gag" Backers Were Also Donors*, Des Moines Reg., Mar. 19, 2012 (noting that Rep. Annette Sweeney and Sen. Joe Seng, the two primary sponsors of Iowa's Ag-Gag bill, received significant campaign contributions from agribusiness in 2010); Tom Laskawy, *Monsanto Cash Helped Fund Bill to Stifle Whistleblowers in Iowa*, Grist Mag., Apr. 7, 2011, http://grist.org/industrial-agriculture/2011-04-06-monsanto-cash-helped-fund-bill-to-stifle-whistleblowers-in-iowa/ (last visited Aug. 1, 2012).
79. *See* Iowa H.R. Jour., 2011 Reg. Sess., Mar. 17, 2011, at 716-18.
80. *See* Minn. S.F. 1118 and H.F. 1369; N.Y. S. 5172-2011.
81. *See* Illinois H.B. 5143, Indiana S.B. 0184, Nebraska L.B. 915, Utah H.B. 187.
82. Only Nebraska took a novel tack, proposing to make it a felony for an employee to fail to give authorities "[a]ll original documentation, if any, or copies thereof, including video, photographs, or audio" of animal abuse within 12 hours of witnessing it. This provision would prevent undercover investigators from building evidence of a pattern of abuse. *See* Nebraska L.B. 915.
83. *Compare* Minn. S.F. 1118, *and* H.F. 1369, *with* Iowa H.F. 589 as introduced.
84. *See* American Legislative Exchange Council, *Animal and Ecological Terrorism in America*, Sept. 4, 2003, app. A "Animal and Ecological Terrorism Act" 21.

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its purpose[85] or a committee report explaining its origins.[86] Nor do committee minutes record what was said in committee about either bill.[87] The Iowa Senate had heavily amended the bill in response to constitutional problems that the Iowa Attorney General identified with the House bill, though it revealed little else of its intentions.[88]

The bills' sponsors, however, offered some insight into their motivations. Rep. Annette Sweeney (R), sponsor of Iowa's House bill, said the legislation was needed "to crack down on activists who deliberately cast agricultural operations in a negative light and let cameras roll rather than reporting abuse immediately."[89] Yet, 42 senators voted to defeat an amendment to require that agricultural operations monitor animal abuse with their own video cameras and release the videos publicly.[90] Sen. Joe Seng (D), sponsor of Iowa's Senate bill, stated his intent was to stop "subversive acts" that could "bring down the industry,"[91] especially when committed by "extremist vegans."[92]

The sponsors of Utah's bill expressed similar interest in stopping undercover videos from harming animal agriculture. Rep. John Mathis (R), the sponsor of the House bill, stated his intent was to stop "national propaganda groups" from using farm footage to advance their political agendas.[93] He also compared farmers to abusive parents, noting undercover investigators are "akin to a neighborhood watch group that goes into your home and hides cameras because you may one day do something to your kids."[94] Meanwhile, Sen. David Hinkins (R), the sponsor of Utah's Senate bill, said it was aimed at "the vegetarian people" who "are trying to kill the animal industry"[95]; a group he called "terrorists" on the Senate floor.[96] He also suggested farmers have privacy concerns akin to those of an abusive spouse: "If a wife were abusing her husband, we wouldn't sneak into their living room and set up a hidden camera."[97]

Iowa and Utah's laws take different approaches to stopping undercover investigators. Iowa's law targets the misrepresentations that investigators make to get employed at agricultural operations. It creates a new crime called "agricultural production facility fraud."[98] A person commits agricultural production facility fraud if she willfully: "a. Obtains access to an agricultural production facility by false pretenses," or "b. Makes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility . . . and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility . . . ."[99]

Iowa's law also targets the animal rights groups and media organizations that frequently organize and publicize undercover investigations. These groups could be held liable for aiding investigations through the law's vicarious liability provisions. Section (3)(a) makes it an offense to "conspire[ ] to commit" or "aid[ ] and abet[ ]" fraud.[100] It dictates that when multiple people acting in concert commit fraud, each is responsible for the acts of the others.[101] And it makes it an offense for anyone with knowledge of the commission of fraud, and knowledge of who committed it, to "harbor[ ], aid[ ], or conceal[ ]" that person with the intent to prevent their apprehension.[102]

By contrast, Utah's law directly restricts unauthorized recordings at animal facilities. It creates a new crime called "agricultural operation interference."[103] A person is guilty of "agricultural operation interference" if she: (a) willfully and without consent records images or sound at the agricultural operation by leaving a recording device there; (b) obtains access to an agricultural operation under false

85. *See generally* Iowa Code Ann. §717A.3A and Utah Code Ann. §76-6-112.
86. *See* Utah House, *Law Enforcement and Criminal Justice Committee Report on H.B. 187*, Feb. 14, 2012 (noting in one sentence that the committee reports a favorable recommendation on the bill), http://le.utah.gov/~2012/comreport/HB187H10.htm (last visited Aug. 1, 2012); *see also* Iowa S.R. Jour., 2011 Reg. Sess., Mar. 30, 2011, at 843 (noting that final committee report recommends passage of bill, but not explaining purpose); *cf.* Iowa House, Bill History for HF 589 (containing no recorded comments on bill), http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=DspHistory&var=HF&key=0642C&GA=84 (last visited Aug. 6, 2012).
87. *See* Utah House, *Minutes of the House Law Enforcement and Criminal Justice Committee*, Feb. 14, 2012, http://le.utah.gov/~2012/minutes/HLAW0214.htm (last visited Aug. 1, 2012).
88. *See* Rod Boshart, *Iowa Senate Likely to Debate Contentious Agriculture Bill*, The Gazette, Jan. 24, 2012 ("Eric Tabor, legislative liaison for the [Iowa Attorney General's] Office, said the original House approach 'raised some very serious First Amendment concerns.' 'We made suggestions to them to tighten up the language and we think as currently drafted we could defend it in court,' Tabor said Tuesday."); Jason Clayworth, *We Won't Quit, "Ag Gag" Critics Pledge at Capitol Protest*, Des Moines Reg., Mar. 1, 2012:
> Senate Democratic leader Michael Gronstal on Thursday deflected the [constitutional] concern, noting that lawmakers from both parties sought the advice of the Iowa attorney general before passing the bill. . . . "I'm confident we went through the effort. Pretty clearly, the House version wasn't constitutional, and that's why we made those changes to it."
89. Jason Clayworth, *State Representative Won't Face Discipline for Removing Animal Picture*, Des Moines Reg., Mar. 29, 2011 (paraphrasing Representative Sweeney's comments).
90. *See* Iowa S.R. Jour., 2012 Reg. Sess., Feb 28, 2012 at 387 (recording vote against Amendment S-5030 to require agricultural operations to video their operations and make the videos public).
91. *"Ag Gag" Bill Passes Iowa Legislature*, Iowa Public Television, Mar. 2, 2012 (quoting Senate sponsor "Senator Joe Seng, D-Davenport, Iowa: 'I really think it is an attempt to protect agriculture, but not have any subversive acts to bring down an industry.'"), http://www.iptv.org/mtom/story.cfm/feature/9179/mtom_20120302_3727_feature (last visited Aug. 6, 2012).
92. *Iowa Approves First Ag Protection Law*, National Hog Farmer, Mar. 2, 2012, http://nationalhogfarmer.com/business/iowa-approves-first-ag-protection-law (last visited Aug. 6, 2012).
93. *See* Josh Loftin, *Filming on Farms Could Be Banned in Utah*, Associated Press, Feb. 27, 2012 ("The prohibition is needed because 'national propaganda groups' are hiding cameras on agricultural property and using the footage as part of their larger agenda of shutting down the operations, said Rep. John Mathis, R-Vernal, the sponsor of House Bill 187.").
94. *Id.* (quoting Representative Mathis).
95. Marjorie Cortez, *Bill to Prohibit Trespassing, Photographing at Agriculture Operations Heads to Final Passage*, Deseret News, Mar. 6, 2012 (quoting Senator Hinkins).
96. Marjorie Cortez, *Bill to Protect Agricultural Operations Wins Final Passage*, Deseret News, Mar. 7, 2012 (quoting Senator Hinkins in Senate debate: "We really need to know whose coming and going because there's a lot of terrorists out there.").
97. Ladd Brubaker, "*Ag-gag" Bill May Run Into Constitutional Problems, Experts Say*, Deseret News, Mar. 21, 2012 (quoting Senator Hinkins).
98. Iowa Code Ann. §717A.3A.
99. *Id.* §717A.3A(1)(a) and (b).
100. *Id.* §717A.3A(3)(a).
101. *Id.*
102. The husband or wife of the agricultural production facility fraudster are exempted. *Id.*
103. Utah Code Ann. §76-6-112.

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pretenses; (c) records images or sound at an agricultural operation, if she applied for employment at the operation with the intent to record there, and knew at the time of accepting employment that the owner prohibited such recordings; or (d) willfully records images or sound at an agricultural operation without consent while committing criminal trespass.[104]

The laws impose harsh penalties. A first conviction under the Iowa law is a serious misdemeanor, punishable by a fine of $315 to $1,875 and by up to one year in jail.[105] All subsequent convictions in Iowa are aggravated misdemeanors, punishable by a fine of $625 to $6,250 and by up to two years in jail.[106] A person who commits agricultural operation interference in Utah by leaving a recording device at an operation is guilty of a Class A misdemeanor, punishable by a fine of up to $2,500 and up to one year in jail.[107] A person who commits any of the other three forms of agricultural operation interference in Utah is guilty of a Class B misdemeanor, punishable by a fine of up to $1,000 and up to six months in jail.[108]

Perhaps more significantly, both Iowa and Utah's criminal codes provide for restitution. Both states' restitution statutes would allow an agricultural operation to recover all "pecuniary damages" resulting from an undercover investigator's crimes.[109] Both statutes define "pecuniary damages" to include all damages that a victim could recover in a civil action, except punitive damages and damages for pain and suffering.[110] Under these statutes, undercover investigators could be forced to pay millions of dollars to agricultural operations in restitution for lost profits following the broadcast of an investigation.

II. First Amendment Protections for Undercover Investigations

In this section, I outline the constitutionality of restraints on undercover investigations. Several circuit courts have heard tort actions—typically for fraud, trespass, and intrusion—arising from undercover investigations. These courts have addressed the First Amendment issues under the Supreme Court's newsgathering jurisprudence. This section outlines that jurisprudence, the seminal newsgathering case of *Cohen*, and the leading circuit court cases of *Desnick v. American Broadcasting Companies, Inc.*[111] and *Food Lion, Inc. v. Capital Cities/ABC, Inc.*[112] It also briefly considers the current legality of animal rights undercover investigations through two tort cases brought in response to such investigations.

A. *First Amendment Protections for Newsgathering*

The Supreme Court has sharply distinguished between the First Amendment protections accorded to publishing news and gathering news.[113] The Court has applied greater scrutiny to restrictions on publication than to restrictions on newsgathering. Restrictions on the publication of lawfully acquired truthful information are subject to strict scrutiny. In *Smith v. Daily Mail Publishing Co.*,[114] the Court held unconstitutional a West Virginia statute that barred a newspaper from publishing an alleged juvenile delinquent's name.[115] The Court applied strict scrutiny, noting, "state action to punish the publication of truthful information seldom can satisfy constitutional standards."[116] A series of subsequent decisions have proven this admonition.[117]

The Supreme Court has even applied strict scrutiny to publication restrictions where the source acquired the information illegally. In *New York Times Co. v. United States*,[118] the Court held that the *New York Times* had a First Amendment right to publish the classified Pentagon Papers, even though the *Times* received the papers from a federal employee who stole them.[119] In *Bartnicki v. Vopper*,[120] the Court held that "a stranger's illegal conduct does not suffice to remove the First Amendment shield," protecting a radio commentator who played an illicitly recorded tape of a private telephone conversation between union officials.[121]

In contrast to restrictions on publication, the Court has applied less scrutiny to restrictions on newsgathering activities. In *Branzburg v. Hayes*,[122] the Court held 5-4 that the First Amendment did not insulate reporters from criminal sanctions for refusing to appear and testify before a grand jury, even where the reporters might be required to reveal confidential news sources.[123] The Court, relying on precedent subjecting the press to labor, antitrust, and tax laws, reasoned that the press is subject to generally applicable civil and criminal laws, even when it is acquiring news.[124] The Court concluded: "It would be frivolous to assert . . .

104. *Id.* §76-6-112(2)(a)-(d).
105. Iowa Code Ann. §§717A.3A(2)(a) and 903.1(1)(b).
106. *Id.* §§717A.3A(2)(b) and 903.1(2).
107. Utah Code Ann. §§76-6-112, 76-3-204, and 76-3-301.
108. *Id.*
109. *See* Iowa Code Ann. §910.2; Utah Code Ann. §77-38a-302(1).
110. *See* Iowa Code Ann. §910.1(3); Utah Code Ann. §77-38a-102(6).
111. 44 F.3d 1345 (7th Cir. 1995).
112. 194 F.3d 505 (4th Cir. 1999).
113. *See generally* Anthony L. Fargo & Laurence B. Alexander, *Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media From Newsgathering Torts*, 32 Harv. J.L. & Pub. Pol'y 1093, 1096-106 (2009).
114. 443 U.S. 97 (1979).
115. *Id.*
116. *Id.* at 102.
117. *See* Fla. Star v. B.J.F., 491 U.S. 524 (1989) (holding that the First Amendment protected a newspaper from liability for publishing the lawfully acquired name of a rape victim); Landmark Commc'ns, Inc. v. Va., 435 U.S. 829 (1978) (holding that the First Amendment protected a newspaper from criminal punishment for publishing truthful information regarding confidential proceedings of the Virginia Judicial Inquiry and Review Commission).
118. 403 U.S. 713 (1971) (per curiam).
119. *Id.* at 714.
120. 532 U.S. 514 (2001).
121. *Id.* at 535. The Court, however, stressed that the tape's publication would not insulate the person who recorded it from criminal prosecution. *Id.* at 529.
122. 408 U.S. 665 (1972).
123. *Id.*
124. *Id.* at 682-83. *See also* Zemel v. Rusk, 381 U.S. 1, 16-17 (1965) (holding that there is no First Amendment right to travel to Cuba to gather information).

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that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws."[125]

In *Houchins v. KQED*,[126] the Court went further, interpreting *Branzburg* to hold that "there is no First Amendment right of access to information."[127] In *Houchins*, the Court, by another 5-4 vote, rejected the news media's claim that it had a constitutional right to enter a county prison to film, photograph, and make sound recordings.[128] The Court reasoned that the press has no "special privilege of access . . . which is not essential to guarantee the freedom to communicate or publish."[129]

Still, newsgathering is not entirely devoid of First Amendment protections. In *Branzburg*, the Court emphasized that "news gathering [sic] is not without its First Amendment protections,"[130] because "without some protection for seeking out the news, freedom of the press could be eviscerated."[131] The Court also appeared to apply intermediate scrutiny, demonstrating that the government's restrictions bore a substantial relationship to an important government interest.[132] Since *Branzburg*, the Court has applied strict scrutiny to the elimination of preexisting newsgathering rights to access criminal trials.[133]

Branzburg and *Houchins* made clear that newsgathering is entitled to less First Amendment protection than news publishing. But they left unclear the exact line between permissible restrictions on newsgathering and impermissible restrictions on the press. In *Cohen*, the Court sought to clarify this line.

B. Cohen v. Cowles Media Co.

In *Cohen v. Cowles Media Co.*,[134] the Supreme Court held that the First Amendment does not apply to generally applicable laws with only incidental effects on newsgathering.[135] During Minnesota's 1982 gubernatorial campaign, Republican campaign operative Dan Cohen gave two newspapers the court records of a Democratic candidate in return for a promise of confidentiality.[136] The newspapers then broke that promise, identifying Cohen as their source in articles about the court records.[137] After Cohen was fired, he sued the newspapers, alleging fraudulent misrepresentation and breach of contract.[138]

A jury awarded him $200,000 in compensatory damages and $500,000 in punitive damages, though an appellate court reversed the punitive damages award[139] and the Minnesota Supreme Court reversed the compensatory damages award.[140] The Minnesota Supreme Court also rejected the possibility of a promissory estoppel action because it "would violate defendants' First Amendment rights."[141]

A 5-4 majority of the Supreme Court overruled that determination on First Amendment grounds, allowing Cohen to recover on his promissory estoppel action.[142] Justice Byron White, writing for the majority, distinguished the line of cases holding that the First Amendment protects the publication of truthful information, noting that those cases required the information be "lawfully acquired," which was a matter of dispute in this case.[143] Instead, the majority held the case to be controlled by the "line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[144] The majority noted that the press is required to obey copyright, labor, antitrust, and tax laws, and "may not with impunity break and enter an office or dwelling to gather news."[145] Because Minnesota's doctrine of promissory estoppel applied equally to all citizens, the majority held that it was a law of general applicability not barred by the First Amendment.[146]

Justices Harry Blackmun and David Souter both filed dissents on behalf of three and four Justices, respectively. Both dissents argued that laws of general applicability are still subject to First Amendment scrutiny if they burden the content of speech.[147] Justice Blackmun argued that the case was controlled by *Hustler Magazine, Inc. v. Falwell*,[148] which held that constitutional libel standards apply to a claim of intentional infliction of emotional distress for the publication of a parody.[149] Because Cohen sought to impose liability based on the publication of truthful information, as the plaintiff had in *Hustler*, Justice Blackmun would have applied strict scrutiny and affirmed the Minnesota Supreme Court's dismissal of the case.[150] Justice Souter, by contrast, would have balanced the state's interest in enforcing promises of confidentiality against the public interest in the publication of information revealed by that breach, and found the public interest in publication greater.[151]

125. *Branzburg*, 408 U.S. at 691.
126. 438 U.S. 1 (1978).
127. *Id.* at 11.
128. *Id.*
129. *Id.* at 12.
130. *Branzburg*, 408 U.S. at 707.
131. *Id.* at 681.
132. *Id.* at 700-01.
133. *See* Press-Enter. Co. v. Superior Court, 478 U.S. 1, 8, 13-14 (1986) (applying strict scrutiny to restrictions on the press attending preliminary court hearings); Press-Enter. Co. v. Superior Court, 464 U.S. 501, 510 (1984) (applying strict scrutiny to restrictions on the press attending voir dire in criminal cases); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982) (applying strict scrutiny to restrictions on access to criminal trials).
134. 501 U.S. 663 (1991).
135. *Id.* at 665.
136. *Id.*
137. *Id.* at 666.
138. *Id.*
139. Cohen v. Cowles Media Co., 445 N.W.2d 248, 260 (Minn. Ct. App. 1989).
140. Cohen v. Cowles Media Co., 457 N.W.2d 199 (Minn. 1990).
141. *Id.* at 205.
142. *Cohen*, 501 U.S. at 665.
143. *Id.* at 669, 671.
144. *Id.* at 669.
145. *Id.* at 669-70.
146. *Id.* at 670.
147. *Id.* at 674 (Blackmun, J., dissenting), 676-77 (Souter, J., dissenting).
148. 485 U.S. 46 (1988).
149. *Cohen*, 501 U.S. at 674 (Blackmun, J., dissenting).
150. *Id.* at 675-76.
151. *Id.* at 678-79 (Souter, J., dissenting).

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Cohen has become the core authority for courts considering newsgathering torts. But *Cohen*'s scope remains unclear. The majority stressed that *Cohen* sought only compensatory damages, which "are not a form of punishment, as were the criminal sanctions at issue in *Smith v. Daily Mail*."[152] Similarly, the majority distinguished *Hustler* because Cohen was not seeking damages for injury to his reputation.[153] And the majority emphasized that the application of promissory estoppel law imposed only an "incidental" burden on the press.[154] It is not clear, however, whether these three factors—the lack of criminal sanctions, reputational damages, or a nonincidental burden—were dispositive.

Moreover, commentators have noted that *Cohen* cannot mean what it says.[155] Defamation and intentional infliction of emotional distress torts are generally applicable, yet their application to the press routinely raises First Amendment issues.[156] And in *Barnes v. Glen Theatre*,[157] decided the same term as *Cohen*, the Supreme Court applied heightened First Amendment scrutiny to a generally applicable law on public nudity enforced against nude-dancing clubs.[158] The Court admitted this ambiguity in *Turner Broadcasting Systems, Inc. v. FCC*,[159] noting that "the enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment."[160] This uncertainty about *Cohen*'s scope has led to conflicting interpretations of the decision in the circuit courts.[161] It has also led to much uncertainty about the extent of First Amendment protections for newsgathering.[162]

C. Cohen's *Application to Undercover Investigations*

Lower courts have applied the *Cohen* framework to First Amendment challenges to torts arising from undercover investigations.[163] This section considers the two leading circuit court opinions on undercover investigations: *Desnick* and *Food Lion*. Both cases arose from circumstances similar to a typical animal rights investigation: an investigator gained employment at an enterprise under false pretenses, secretly videoed abusive practices, and subsequently published those videos, resulting in harm to the enterprise. And in both cases, the courts dismissed the majority of the torts brought.

This section outlines *Desnick* and *Food Lion* because a court considering the constitutionality of the Ag-Gag laws would likely be informed by these cases.[164] Although *Food Lion* only relied explicitly on the First Amendment on one count, and *Desnick* did not rely on it at all, both cases appear to tread softly because of First Amendment concerns.[165] Indeed, legal scholar Richard Epstein has attacked the results in *Desnick* and *Food Lion* as examples of "First Amendment exceptionalism."[166] This section also outlines two cases challenging animal rights undercover investigations.

The key difference between these cases and any challenge to the Ag-Gag laws, however, is the cause of action. All of these cases involved aggrieved enterprises bringing civil claims against the undercover investigators and their employers under generally applicable common-law tort and contract doctrines. By contrast, under Iowa and Utah's laws, the state would be bringing criminal charges under special criminal statutes. The next section of this Article considers whether this distinction is of constitutional significance.

1. *Desnick v. American Broadcasting Companies, Inc.*

In *Desnick*, the U.S Court of Appeals for the Seventh Circuit, in an opinion authored by Chief Judge Richard Posner, held that investigative television reporting is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation, "regardless of the name of the tort . . . and . . . regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast."[167]

Desnick arose from the production and broadcast of a June 1993 episode of ABC's *PrimeTime Live* show, which exposed alleged medical malpractice at the Desnick Eye Center.[168] In March, Dr. James Desnick permitted ABC to film at his eye studio following assurances that the coverage would not involve "ambush" interviews or "undercover" surveillance, and that it would be "fair and balanced."[169] Unbeknownst to Desnick, ABC then dis-

152. *Cohen*, 501 U.S. at 670.
153. *Id.* at 671.
154. *Id.* at 672.
155. *See* Jeffrey Grossman, *First Amendment Implications of Tort Liability for News-Gathering*, 1996 Ann. Surv. Am. L. 583, 596 (1996) ("the Supreme Court has gone beyond the superficially appealing 'general applicability' rule to examine more closely the impact of general laws on the press and the incentives such laws create for potential plaintiffs").
156. *See*, *e.g.*, N.Y. Times v. Sullivan, 376 U.S. 254 (1964) (libel); Hustler v. Falwell, 485 U.S. 46 (1988) (intentional infliction of emotional distress).
157. 501 U.S. 560 (1991).
158. *Id.* at 566-67.
159. 512 U.S. 622 (1994).
160. *Id.* at 640 (comparing *Cohen* and *Glen Theatre*).
161. *Compare Desnick*, 44 F.3d at 1355, *with* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 520 (4th Cir. 1999).
162. *See* Erik Ugland, *Newsgathering, Autonomy, and the Special-Rights Apocrypha: Supreme Court and Media Litigant Conceptions of Press Freedom*, 11 U. Pa. J. Const. L. 375, 420-21 (2009) ("Despite thirty-five years of litigation and legislative action, the law of newsgathering is still a contested and unsteady terrain in which there are only a handful of loosely formed theoretical and doctrinal anchors.").
163. *See* Fargo & Alexander, *supra* note 113, at 1115-32.
164. *See* Michael W. Richards, *Tort Vision for the New Millennium: Strengthening News Industry Standards as a Defense Tool in Law Suits Over Newsgathering Techniques*, 10 Fordham Intell. Prop. Media & Ent. L.J. 501, 509 (2000) (noting *Desnick* "could help frame a future First Amendment approach to suits over newsgathering filed despite the truthfulness of the underlying report"); Enrique J. Gimenez, *Who Watches the Watchdogs?: The Status of Newsgathering Torts Against the Media in Light of the Food Lion Reversal*, 52 Ala. L. Rev. 675, 683 (2001) (noting *Desnick* "is the strongest and most frequently cited support for [a newsgathering] privilege or immunity").
165. *See* Dienes, *supra* note 32, at 1149 (calling *Desnick* "a case where First Amendment concerns significantly influenced the court").
166. *See* Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 Stan. L. Rev. 1003, 1018-23 (2000).
167. *Id.* at 1355.
168. *Id.* at 1347.
169. *Id.* at 1348.

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patched undercover "test patients" equipped with hidden cameras to film at several Desnick eye centers.[170] These test patients filmed doctors recommending unnecessary surgery and using a testing machine that experts suggested was rigged.[171] After this footage aired, Desnick sued ABC for fraud, trespass, intrusion, violation of federal and state wiretapping laws, breach of contract, and defamation.[172] A federal district court dismissed all except for the breach of contract claim.[173]

The Seventh Circuit upheld the lower court's dismissal of the four tort claims.[174] Judge Posner rejected the trespass and intrusion claims because ABC had not violated the privacy interests that these torts seek to protect.[175] He emphasized that ABC's test patients had filmed in offices, not homes; that they filmed only doctors' professional interactions with patients, not their private communications; and that they were peaceful, not disruptive.[176] He analogized ABC's test patients to "testers" who pose as home buyers to gather evidence of housing discrimination: both misrepresent their purpose to gain entry, but neither commits trespass because neither interferes with the ownership or possession of land.[177] Judge Posner also dismissed the wiretapping claims because ABC's test patients did not record conversations with the purpose of committing a crime or a tort, and "public exposure of misconduct" is not an "injurious act."[178] And he dismissed the fraud claim because "any person of normal sophistication would expect" investigative journalists to break promises of the sort Desnick received.[179]

Although Judge Posner dismissed Desnick's claim on tort law grounds, he also reached the First Amendment. Interpreting *Cohen* narrowly for the proposition that the media have no general immunity from tort or contract law, Judge Posner held that the constitutional defamation standards of *Hustler* apply to tort suits about the production of investigative television broadcasts.[180] He concluded: "If the broadcast itself does not contain actionable defamation, and no established rights are invaded in the process of creating it . . . then the target has no legal remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly."[181]

2. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*

In *Food Lion,* the U.S. Court of Appeals for the Fourth Circuit considered a case very similar to *Desnick*, involving another undercover investigation by ABC's *Prime-Time Live*. But the Fourth Circuit interpreted *Cohen* more broadly than *Desnick* did, exempting all generally applicable tort claims with only incidental effects on newsgathering from First Amendment scrutiny.[182]

In November 1992, ABC's *PrimeTime Live* show broadcast footage of Food Lion supermarket employees repackaging fish that had passed its expiration date, grinding expired beef with fresh beef, and coating expired chicken with barbeque sauce to mask its smell.[183] Two ABC reporters, hired as a meat wrapper and a deli clerk at Food Lion supermarkets, filmed the exposé.[184] Both reporters lied on their job applications, providing false identities, references, addresses, educational histories, employment experiences and, crucially, hiding their intent to film meat-handling practices.[185] They filmed the footage covertly with cameras and microphones concealed on their bodies.[186] *PrimeTime Live* aired this footage nationwide to huge effect: within one week of the broadcast, Food Lion's stock value plunged by roughly $1.3 billion.[187]

Food Lion sued ABC and *PrimeTime Live*'s producers and reporters for fraud, breach of the duty of loyalty, trespass, and unfair trade practices.[188] A jury found all of the ABC defendants liable for fraud and two reporters liable for breach of the duty of loyalty and trespass, and awarded $1,402 in compensatory damages and $5.5 million in punitive damages.[189] The jury did not award reputational damages resulting from the broadcast of *PrimeTime Live*—"lost profits, lost sales, diminished stock value or anything of that nature"—because the district court held these damages were caused by Food Lion's "food handling practices themselves" not by the alleged torts of the ABC defendants.[190]

The Fourth Circuit upheld the trespass verdict on narrower grounds, but overruled the fraud verdict and punitive damages.[191] On the trespass claim, the court rejected the theory that "successful resumé fraud" alone constituted trespass, noting, "we have not found any case sug-

170. *Id.*
171. *Id.*
172. Desnick v. Capital Cities/ABC, Inc., 851 F. Supp. 303 (N.D. Ill. 1994).
173. *Id.* at 313. The plaintiffs subsequently voluntarily dismissed this claim, so it was not before the Seventh Circuit. *Desnick*, 44 F.3d at 1354.
174. The Seventh Circuit did, however, remand the defamation claim because it found there were facts in dispute. *Desnick*, 44 F.3d at 1351. But the district court again dismissed the claim on remand—a dismissal that the Seventh Circuit affirmed. *See* Desnick v. Am. Broad. Co., 233 F.3d 514 (7th Cir. 2000).
175. *Desnick*, 44 F.3d at 1352-53.
176. *Id.*
177. *Id.* at 1353.
178. *Id.*
179. *Id.* at 1354.
180. *Id.* at 1355.
181. *Id.*
182. *Id.* at 520.
183. *Id.* at 511.
184. *Id.* at 510.
185. *Id.*
186. *Id.*
187. Felicity Barringer, *Appeals Court Rejects Damages Against ABC in Food Lion Case*, N.Y. Times, Oct. 21, 1999.
188. Food Lion did not allege defamation because it did not contest the truth of the broadcast. Instead, it challenged only the methods ABC used in its undercover investigation. *Food Lion*, 194 F.3d at 510.
189. The district court later reduced these damages by remittur to $315,000. *Id.* at 520.
190. Food Lion, Inc. v. Capital Cities/ABC, Inc., 964 F. Supp. 956, 958, 963 (M.D.N.C. 1997).
191. The Fourth Circuit also affirmed the finding that the reporters breached their duty of loyalty to Food Lion, and overturned the finding of breach of the North Carolina Unfair and Deceptive Trade Practices Act. *Food Lion*, 194 F.3d at 516, 520. These issues were specific to North and South Carolina law and are thus less relevant to this Article.

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gesting that consent based on a resumé misrepresentation turns a successful job applicant into a trespasser."[192] But the court held that the reporters committed trespass when they filmed in nonpublic areas, thus exceeding the scope of their consent to enter.[193] On the fraud claim, the court held that though Food Lion showed the reporters lied on their job applications, it failed to prove "injurious reliance" on those lies.[194]

The Fourth Circuit also reached the First Amendment, holding that it allowed Food Lion to bring torts against ABC, but barred all publication damages. The court interpreted *Cohen* to require that laws be both generally applicable and have only an "incidental effect" on newsgathering to avoid First Amendment scrutiny.[195] The court held that the duty of loyalty and trespass torts met this test.[196] But the court also held that *Hustler* foreclosed publication damages because Food Lion had not proven actual malice.[197] Food Lion would have had to demonstrate actual malice to prove defamation; the court refused to let Food Lion achieve "an end-run around First Amendment strictures" by winning similar damages through nonreputational tort claims.[198]

3. Animal Rights Cases

Only two tort suits appear to have arisen from animal rights undercover investigations.[199] In both cases, the courts applied reasoning similar to the *Desnick* and *Food Lion* courts' reasoning and dismissed all of the charges brought. The courts' dismissal of these claims suggests why Iowa and Utah lawmakers saw a need for the Ag-Gag laws. But these cases also demonstrate how a court could exercise constitutional avoidance principles to dismiss claims under the Ag-Gag laws on statutory grounds. And they demonstrate that courts have applied the same analysis to animal rights groups and media defendants in undercover investigation cases—an approach consistent with the concurrent protections of the Press and Speech Clauses of the First Amendment.[200]

In *PETA v. Bobby Berosini Ltd.*,[201] the Nevada Supreme Court overruled a jury verdict of $4.2 million stemming from the publication of an animal rights undercover video.[202] In July 1989, a dancer in the Stardust Hotel's "Lido" show covertly filmed Bobby Berosini beating the orangutans that performed in Berosini's famous animal show.[203] After PETA released this video, Berosini sued PETA and the dancer who filmed the video for libel and invasion of privacy, and won a jury verdict of $4.2 million.[204] The court rejected the libel claim, finding that the video was neither false nor defamatory, and that the commentary accompanying it was protected speech.[205] The court also rejected the invasion of privacy claim, concluding that Berosini had no reasonable privacy expectation in his treatment of his animals backstage and that nonintrusive taping was not inherently offensive.[206]

In *Ouderkirk v. PETA, Inc.*,[207] a federal judge in Michigan dismissed the claims of the owners of a chinchilla ranch against PETA, which publicized the ranch in an undercover investigation. In 2004, PETA staffers, misrepresenting themselves as chinchilla buyers, filmed at the ranch.[208] After PETA publicized the video, the chinchilla ranch owners sued for intrusion on seclusion, appropriation of plaintiffs' likenesses, false light, and intentional infliction of emotional distress. The court held that there could be no intrusion with consent, citing *Desnick* for the proposition that consent to enter property is not vitiated by fraud.[209] It rejected the appropriation claim because PETA had a "constitutional right to report on matters of public concern,"[210] and the false light claim because PETA's statements about the chinchilla ranch "were substantially true."[211] And the court rejected the intentional infliction of emotional distress claim because it could not "conclude that an undercover investigation is 'intolerable' in contemporary society" given the media's use of such investigations to "reveal improper, unethical, or criminal behavior."[212]

III. The Ag-Gag Laws Should Be Subject to Heightened First Amendment Scrutiny

In this section, I argue that a court should apply strict or intermediate scrutiny in a constitutional challenge to the Ag-Gag laws. A court would likely assess such a challenge under the framework of *Cohen*, while looking to *Food Lion* and *Desnick* for guidance.[213] Under this framework, the Ag-Gag laws should be subject to heightened First Amendment scrutiny for five reasons: (1) they are not generally applicable laws; (2) their enforcement will single out, and disproportionately burden, those engaged in First Amendment activities; (3) they criminalize speech about affiliations and identity; (4) their enforcement will affect conduct

192. *Food Lion*, 194 F.3d at 518.
193. *Id.*
194. *Id.* at 514.
195. *Id.* at 521.
196. *Id.*
197. *Id.* at 522.
198. *Id.*
199. Based on my Westlaw search (search conducted Mar. 27, 2012).
200. *See* Frederick Schauer, *Towards an Institutional First Amendment*, 89 Minn. L. Rev. 1256, 1257 (2005) ("existing First Amendment doctrine renders the Press Clause redundant and thus irrelevant, with the institutional press being treated simply as another speaker").
201. 111 Nev. 615 (1995).
202. *Id.* at 617.
203. *Id.* at 620.
204. *Id.* at 617.
205. *Id.* at 620-28. The Court did not reach the First Amendment because it found the speech was protected under the Nevada Constitution's speech protections. *Id.* at 628, n.8.
206. *Id.* at 634-36. The Court also rejected Berosini's privacy appropriation tort because it found he was seeking publicity damages beyond the tort's scope. *Id.* at 638-39.
207. 2007 WL 1035093 (E.D. Mich. Mar. 29, 2007).
208. *Id.* at 4-5.
209. *Id.* at 16-17.
210. *Id.* at 18.
211. *Id.* at 22.
212. *Id.* at 23.
213. *See* Fargo & Alexander, *supra* note 113, at 1110 (treating *Desnick* and *Food Lion* as the two leading cases about the First Amendment protections for undercover investigations); *see also supra* note 164.

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"intimately related" to expression; and (5) they punish false statements without proof of harm. Under reasons (1)-(3), strict scrutiny is appropriate; under reasons (4)-(5), intermediate scrutiny is appropriate.

As an aside, some scholars have argued that the Ag-Gag laws could be challenged outside of the *Cohen* framework as direct restrictions on speech.[214] In particular, Utah, Kansas, Montana, and North Dakota's laws appear to be speech restrictions because they regulate films, photographs, and sound recordings.[215] Some circuits have recognized a First Amendment right to film police officers on public property.[216] Some courts have even recognized a broader First Amendment right to film matters of public concern on public property.[217] But no case appears to have recognized a First Amendment right to film without authorization on private property.[218] And the Supreme Court has analyzed filming and photography restrictions under the framework of newsgathering.[219]

A. *The Ag-Gag Laws Should Be Subject to Strict Scrutiny Because They Are Not Generally Applicable Laws*

As a threshold issue, *Cohen* dealt only with the routine enforcement of a generally applicable law. The Supreme Court refused to invalidate a common tort claim, promissory estoppel, that was routinely applied to all citizens in similar circumstances, simply because the defendant was the press.[220] Emphasizing that the tort "would otherwise be enforced" against everyone other than the press, the Court refused to confer special immunity on the press from generally applicable laws.[221] By contrast, "laws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State' . . . and so are always subject to at least some degree of heightened First Amendment scrutiny."[222] Thus, if the Ag-Gag laws are viewed not as generally applicable laws, but rather as laws specifically targeting people engaged in First Amendment activities, they should be subject to heightened scrutiny.

The Ag-Gag laws are not generally applicable laws, because they were drafted to stop expressive activity at agricultural operations, and are underinclusive for any other purpose. In the analogous area of Free Exercise jurisprudence, the Supreme Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[223] applied strict scrutiny to a generally applicable ban on animal sacrifice. The Court reasoned that the law's "careful drafting" to prohibit one form of religious exercise, coupled with its underinclusiveness for any other aim, showed that it was not a generally applicable law.[224]

Similarly, the Ag-Gag laws are drafted to prohibit only the work of undercover investigators at agricultural operations. Iowa's bill began as a sweeping prohibition on interference with agricultural operations, but was amended repeatedly to exempt every group other than undercover investigators from its prohibitions.[225] Conversely, amendments that would have immunized undercover investigators were rejected.[226] Similarly, the legislature never voted[227] on amendments to make the bill generally applicable to interference with abortion clinics[228] and other medical facilities.[229] In its final form, the law excludes the actions of a curious worker, a government inspector, or a customer, because all three would either not be applying for work or would lack the necessary intent to commit unauthorized acts.[230] This careful drafting leaves only one possible application of Iowa's law: to penalize undercover investigators.

The Ag-Gag laws are also underinclusive for any goal other than penalizing undercover investigators. Iowa cannot assert that its law targets resumé fraud generally because the law only applies to agriculture operations—not to factories, stores, or any other location where resumé fraud occurs.[231] Nor can Iowa assert its law is targeted at stopping the disruption of agricultural operations: it does not penalize disruptive acts, only fraud.[232] And Iowa can-

214. *See*, *e.g.*, Brubaker, *supra* note 97 (quoting University of Utah constitutional law professor Michael Teeter).
215. *See* Utah Code Ann. §76-6-112(2)(a), (c), (d); Kan. Stat. Ann. §47-1827(c)(4); Mont. Code Ann. §81-30-103(2)(e); N.D. Cent. Code §12.1-21.1-02(7).
216. *See* Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a First Amendment right to film police officers); Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011) (recognizing "a right to film government officials or matters of public interest in public space" in context of filming of police officers); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing a First Amendment "right to record matters of public interest" in context of protestor filming police on public property).
217. *See* Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994) (recognizing a First Amendment right to film at public meetings); Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (recognizing a First Amendment right to videotape state troopers conducting truck inspections on a public highway).
218. Such a right has rarely even been asserted, but where it has been, it has been summarily dismissed. *See*, *e.g.*, Barrett v. Outlet Broad., Inc., 22 F. Supp. 2d 726, 748 (S.D. Ohio 1997) (rejecting a First Amendment right for a news crew to film inside a suicide victim's home without permission).
219. *See Houchins*, 438 U.S. at 11 (applying newsgathering precedent to restrictions on press' ability to film, photograph, and make sound recordings at a county prison).
220. *Cohen*, 501 U.S. at 672.
221. *Id.*
222. Turner Broad. System, Inc. v. FCC, 512 U.S. 622, 640 (1994) (quoting Ark. Writers' Project Inc. v. Ragland, 481 U.S. 221, 228 (1987)).
223. 508 U.S. 520 (1993).
224. *Id.* at 536-43.
225. *See* Amendment H-1278 (requiring an intent to disrupt the agricultural operation); Amendment H-1375, (exempting animal shelters, boarding kennels, commercial kennels, pet shops, and pounds); Amendment S-5004 (striking all but the fraud and vicarious liability provisions). *See* Iowa H.R. Jour., 2011 Reg. Sess., Mar. 17, 2011, at 717; Iowa S.R. Jour., 2011 Reg. Sess., Feb. 28, 2012, at 388.
226. *See*, *e.g.*, Amendment H-1286, H.J. 666 (exempting "A representative of a nonprofit organization present for the purpose of informing the public of an illegal activity observed at the animal facility.").
227. *See* Iowa S.R. Jour., 2012 Reg. Sess., Feb. 28, 2012, at 388.
228. Amendment S-3205.
229. Amendment S-3206.
230. Iowa Code Ann. §717A.3A(1)(b).
231. *See* Iowa Code Ann. §717A.1(2A) (defining "agricultural production facility" as "A location where an agricultural animal is maintained for agricultural production purposes, including but not limited to a location dedicated to farming as defined in section 9H.1, a livestock market, exhibition, or a vehicle used to transport the animal or a crop operation.").
232. Iowa Code Ann. §717A.3A(1)(b).

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not assert that its law protects property owners' privacy interests. The law does not stop privacy intrusions by anyone who does not commit resumé fraud or who lacks an advance plan to commit unauthorized acts.[233]

The careful drafting to target undercover investigators is even more pronounced in Utah's law than in Iowa's. Utah's law creates three separate offenses for filming at agricultural operations: one for leaving a recording device at the operation, one for filming while employed with a prior motive to film, and one for filming while committing criminal trespass.[234] None of these prohibitions targets a general harm from fraud, trespass, or privacy invasion. Instead, the three prohibitions target precisely the three methods that undercover investigators use to create videos.[235] This careful drafting and underinclusion is fatal because it reveals the law's true purpose: to suppress expression critical of animal agriculture.

This conclusion is bolstered by the laws' legislative histories, which show the laws are designed to target certain *speech*: videos critical of animal agriculture. The Iowa and Utah bills' sponsors expressed their intent to stop the harm from undercover videos that they believe portray animal agriculture in an unfair light.[236] They focused on the harms from lost profits, lost goodwill, and economic disruption—all harms that only arise from videos with critical viewpoints.[237] As such, the laws were not designed as generally applicable prohibitions on fraud or trespass, but rather as indirect penalties for criticizing animal agriculture. Indeed, the restitution awards will function as indirect publication penalties, since they will compensate agricultural operations for economic losses. Both the *Desnick* and *Food Lion* courts held that such indirect penalties for harms resulting from publication must satisfy the constitutional defamation standard of *Hustler* and *Sullivan*.[238] Yet, neither Iowa nor Utah's law requires proof of intent to defame an agricultural operation. This is precisely the "end-run around First Amendment strictures" that the *Food Lion* court refused to allow.[239]

Furthermore, the laws' legislative histories show the laws are targeted at certain *speakers*: activists critical of animal agriculture. Representative Mathis, the sponsor of the Utah House bill, said the bill was directed at "national propaganda groups."[240] Sen. David Hinkins (R), the sponsor of the Utah Senate bill, said it was aimed at "the vegetarian people."[241] Rep. Annette Sweeney (R), the sponsor of the Iowa House bill, said it was directed at activists.[242] And Sen. Joe Seng (D), the sponsor of the Iowa Senate bill, said it was directed at "extremist vegans."[243] The laws were neither drafted as, nor intended to be, generally applicable laws. Thus, a court should apply strict scrutiny to them.

B. The Ag-Gag Laws Should Be Subject to Strict Scrutiny Because Their Enforcement Will Single Out, and Disproportionately Burden, Expressive Activity

Even if the Ag-Gag laws are generally applicable, their enforcement should be subject to strict scrutiny. In *Turner*, the Supreme Court reconciled *Cohen* and *Glen Theatre* by noting, "the enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment."[244] The Court has applied strict scrutiny to the enforcement of generally applicable laws to target speech or speakers.[245] The Court has shown particular concern for the "pretextual use" of general laws to punish expressive activities.[246]

In *Arcara v. Cloud Books, Inc.*,[247] the Court noted strict scrutiny applies to "statute[s] based on a nonexpressive activity" in two circumstances: when these statutes (1) have "the *inevitable effect of singling out* those engaged in expressive activity"; or (2) "impose a *disproportionate burden* upon those engaged in protected First Amendment activities."[248] Enforcement of the Ag-Gag laws will have both effects, and may create prior restraint problems too.

First, enforcement of the Ag-Gag laws will inevitably single out activists engaged in expressive activity. The laws are drafted to apply to no one other than undercover investigators.[249] A customer or competitor who films agricultural operations will not have lied on a job application. A whistleblowing worker who takes photos will lack intent. Only an undercover investigator will satisfy all elements of the crime.

233. *See generally* Iowa Code Ann. §717A.3A(1)(a) and (b).
234. *See* Utah Code Ann. §76-6-112 (1953).
235. *See, e.g.*, Harriet Sherwood, *Battery Hens' Reality on Israeli Farm Exposed by Hidden Webcam*, The Guardian, Nov. 9, 2010 (detailing activists leaving recording device at Israeli egg facility); Carlson, *supra* note 7 (recounting how undercover investigator applied for employment with intent to film and filmed without authorization); Mark Caro, The Foie Gras Wars: How a 5,000-Year-Old Delicacy Inspired the World's Fiercest Food Fight, 63-65 (Simon & Schuster, 2009) (detailing filming by undercover investigators trespassing at foie gras farms).
236. *See supra* notes 89-97 and accompanying text.
237. *Id.*
238. *Desnick*, 44 F.3d at 1355; *Food Lion*, 194 F.3d at 522.
239. *Food Lion*, 194 F.3d at 522.
240. *See supra* note 93.
241. *See supra* note 95.
242. *See supra* note 89.
243. *See supra* note 92.
244. *Turner*, 512 U.S. at 640 (1994) (contrasting *Cohen* and *Glen Theatre*).
245. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) (applying strict scrutiny to application of generally applicable public accommodation law to require parade organizers to include a message they did not approve of); Marsh v. Alabama, 326 U.S. 501 (1946) (reversing a conviction of a Jehovah's Witness distributing literature under a generally applicable trespass statute on First Amendment grounds); Arcara v. Cloud Books, Inc., 478 U.S. 697, 709 (1986) (Blackmun, J., dissenting) ("Generally applicable statutes that purport to regulate nonspeech repeatedly have been struck down if they unduly penalize speech, political or otherwise.").
246. *See Arcara*, 478 U.S. at 708 (1986) (O'Connor, J., concurring) ("If . . . a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns").
247. 478 U.S. 697 (1986).
248. *Id.* at 704 (emphasis added).
249. *See supra* notes 89-104 and accompanying text.

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In fact, the laws will not even be enforced uniformly against all undercover investigators; they will only be enforced against investigators who publish their videos. Undercover investigators film surreptitiously, so authorities will only become aware of violations of the Ag-Gag laws following the publication of undercover videos. Authorities will therefore only ever enforce the Ag-Gag laws against investigators who chose to publish their videos. A law that punished activists for publishing videos of agricultural operations would be subject to strict scrutiny as a content-based regulation of speech.[250] As enforcement of the Ag-Gag laws will inevitably have the same effect, they should be subject to the same scrutiny.

Moreover, enforcement of the Ag-Gag laws will not be viewpoint-neutral. The laws only prohibit unauthorized fraud and filming.[251] So, a prosecutor's first task following the release of an undercover video will be to ask the agricultural operation whether the video, or the fraud that preceded it, was authorized. Presumably, if the video portrays the operation in a positive light, the operation will retroactively authorize the video. Conversely, if the video is critical, the operation will refuse authorization. Thus, prosecutors will only ever be able to enforce the Ag-Gag laws against activists with viewpoints critical of agricultural operations.

Second, the laws will disproportionately burden activists and the press engaged in expressive activities. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,[252] the Supreme Court struck down a generally applicable tax on the sale of large quantities of newsprint and ink because the tax disproportionately burdened newspapers engaged in First Amendment activities. Absent any legislative history showing intent to target the press, the Court still reasoned that "differential treatment" of newsprint and ink "suggests that the goal of the regulation is not unrelated to suppression of expression."[253]

The Ag-Gag laws treat undercover investigators differently from everyone else who makes misrepresentations. The laws impose graver penalties for fraud and filming at agricultural operations than for committing the same acts elsewhere. Utah's law makes leaving a recording device at an agricultural operation a Class A misdemeanor[254]—the same offense level as negligent homicide,[255] and a more serious offense than reckless or negligent child abuse.[256] Iowa's law makes first offenses a serious misdemeanor[257]—the same offense level as assault causing mental or bodily injury.[258]

The restitution provisions will even more disproportionately burden activists based on the success of their speech in mobilizing public opinion. Utah and Iowa's restitution laws allow for economic damages.[259] Undercover investigations routinely cause millions of dollars of such damages in lost profits and reputational harm.[260] If activists are penalized for these consequences of their speech, they may avoid speaking at all. Moreover, agricultural operations will be able to collect the same damages as in a libel action without satisfying the constitutional defamation standard. For this reason, the *Food Lion* court held that the First Amendment bars such publication damages.[261]

Third, the laws may function as prior restraints on speech. In *In re King World Productions*,[262] the U.S. Court of Appeals for the Sixth Circuit overruled a temporary restraining order preventing the broadcast of an undercover video as an unconstitutional prior restraint on speech. The court noted: "No matter how inappropriate the acquisition, or its correctness, the right to disseminate that information is what the Constitution intended to protect."[263] Constitutional law scholar David Kende has argued that the Ag-Gag laws create similar prior restraint problems because they restrict undercover videos before they have a chance to enter the public discourse.[264]

Iowa's law as introduced created prior restraint problems because it banned the possession and dissemination of videos.[265] These would have been restraints on the publication of truthful information. The law, as enrolled, lacks these provisions. But even the law as enrolled may create prior restraint problems because of its vicarious liability provisions. News organizations often receive undercover videos in advance of their publication, allowing the news organization to verify the video's accuracy and solicit opposing viewpoints.[266] Under Iowa's law, once a news organization received a video, it would become liable for "harbor[ing], aid[ing], or conceal[ing]" the investigator unless it handed the video over to authorities.[267] If the news organization had advance knowledge of the investigation, it could also be guilty of aiding and abetting the offense.[268] Given Iowa and Utah's restitution provisions, aiding and abetting an undercover investigation could make a news organization liable for millions of dollars in damages.[269] The threat of such criminal penalties may deter news organizations from airing undercover videos. This burden on news organizations could function as a prior restraint.

250. *See Daily Mail Publishing*, 443 U.S. at 102 ("state action to punish the publication of truthful information seldom can satisfy constitutional standards").
251. Iowa Code Ann. §717A.3A(1); Utah Code Ann. §76-6-112.
252. 460 U.S. 575 (1983).
253. *Id.* at 587.
254. Utah Code Ann. §76-6-112.
255. *Id.* §76-5-206(2).
256. *Id.* §76-5-109(3)(a), (b).
257. Iowa Code Ann. §717A.3A(2)(a).
258. *Id.* §708.2(2).
259. *See* Iowa Code Ann. §910.2; Utah Code Ann. §77-38a-302(1).
260. *See*, *e.g.*, Barringer, *supra* note 187 (reporting that ABC *PrimeTime Live* investigation caused Food Lion's market capitalization to fall by $1.3 billion in one week).
261. *Food Lion*, 194 F.3d at 518.
262. 898 F.2d 56 (6th Cir.1990).
263. *Id.* at 59.
264. Jason Clayworth, *"Ag Gag" Bill May Gag Free Speech, Say Legal Scholars*, Des Moines Reg., Mar. 1, 2012 (quoting Professor Kende).
265. *See* Iowa H.F. 589 as introduced.
266. *See*, *e.g.*, ABC News, "20/20" episode, Nov. 18, 2011, http://abcnews.go.com/Blotter/mcdonalds-dumps-mcmuffin-egg-factory-health-concerns/story?id=14976054 (last visited Aug. 6, 2012) (describing how ABC received undercover video and sought to verify its accuracy with Sparboe Farms before broadcast).
267. Iowa Code Ann. §717A.3A(3)(a).
268. *Id.*
269. *See* Iowa Code Ann. §910.2; Utah Code Ann. §77-38a-302(1).

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C. The Ag-Gag Laws Should Be Subject to Strict Scrutiny Because They Criminalize Speech About Identity and Affiliations

All of the Ag-Gag laws criminalize certain misrepresentations made in applying for employment at agricultural operations. Iowa's law is clearest, making it a crime to "make[ ] a false statement or representation as part of an application or agreement to be employed" with certain intent and knowledge requirements.[270] This prohibition would criminalize the most common misrepresentations undercover investigators make: about their identity, their intentions at an operation, and their organizational affiliations.[271]

This prohibition invokes First Amendment cases protecting anonymity of identity and association. In *Shelton v. Tucker*,[272] the Supreme Court held that it violates employees' rights of free association to compel them to disclose their associational ties.[273] The Court has since applied strict scrutiny to punishment of government employees for their failure to disclose their associational ties.[274] The Court has also applied strict scrutiny to efforts to force individuals to disclose their identities, even where valid fraud concerns exist.[275]

Of course, agricultural operations are private employers, with greater rights to demand associational conformity than the government. But the Ag-Gag laws invoke strict scrutiny because of the state action they involve.[276] Under Iowa's law, the state could send an activist to jail for his failure to state his membership in an animal rights group on an application at an agricultural operation. If Iowa's government sent its own employees to jail for their failure to state their affiliation with an animal rights group, that decision would run afoul of *Shelton*. The analysis should be no different when the government sends someone else's employees to jail for the same act.

D. The Ag-Gag Laws Should Be Subject to at Least Intermediate Scrutiny Because Their Enforcement Will Affect Conduct "Intimately Related" to Expression

Even if a court does not apply strict scrutiny to the Ag-Gag laws, it should at least apply intermediate scrutiny because the laws' enforcement will affect expression. The Supreme Court has applied intermediate scrutiny to the enforcement of generally applicable laws against expressive conduct and conduct "intimately related" to expression.[277] For example, the Court applied intermediate scrutiny to the prosecution of erotic dancing clubs under a public nudity statute,[278] protestors under a ban on sleeping in public parks,[279] and picketers under an anti-noise ordinance.[280]

The Ag-Gag laws regulate conduct intimately related to expression because they regulate newsgathering. In *Branzburg*, the Supreme Court noted, "news gathering is not without its First Amendment protections" and appeared to apply intermediate scrutiny to the incidental effects of forcing reporters to answer grand jury subpoenas.[281] The Ag-Gag laws restrict newsgathering on an issue of great public concern. This newsgathering is always a predicate to pure expression; activists create videos for broadcast, not for the sake of creating them. Thus, the Ag-Gag laws' restrictions on newsgathering will affect conduct intimately related to expression.

Moreover, the act of filming, sound recording, and photographing is conduct intimately related to expression. Several circuit courts have recognized a "First Amendment right to film matters of public interest" on public property.[282] These cases recognize that filming has elements of "expressive conduct."[283] These cases do not imply a right to film on private property (where different privacy interests exist). But that does not affect their conclusion that the act of filming is intimately related to expression.

Because the Ag-Gag laws will be enforced against conduct at least intimately related to expression, a court should apply intermediate scrutiny to all of the laws' incidental effects on First Amendment activity. If a law is enforced against activity with "a significant expressive element," then the law's "incidental effect on First Amendment activities are subject to First Amendment scrutiny."[284] The Ag-Gag laws will have significant incidental effects on First Amendment activity.

First, the Ag-Gag laws will significantly restrict the flow of information in the public domain. "[T]he First Amendment . . . prohibit[s] government from limiting the stock

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270. The full prohibition makes it a crime to
> make[ ] 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.

IOWA CODE ANN. §717A.3A.

271. *See*, *e.g.*, *Food Lion*, 194 F.3d at 510 (documenting undercover investigators' use of false identities, and failure to state intent to film at Food Lion or to disclose concurrent employment with ABC).

272. 364 U.S. 479 (1960).

273. *Id.* at 485-86 ("It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.").

274. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967) (holding that law barring members of a Communist-action organization from employment in any defense facility was unconstitutional); Elfbrandt v. Russell, 384 U.S. 11 (1966) (holding that Arizona public employee loyalty oath which penalized member of organization for his membership violated the First Amendment).

275. *See* McIntyre v. Ohio Election Comm'n, 514 U.S. 334 (1995) (holding that law against anonymous pamphleteering during election violated First Amendment despite justification of preventing fraud); Talley v. Cal., 362 U.S. 60 (1960) (invalidating law prohibiting distribution of handbills without sponsors' identity and affiliations, despite justification of preventing fraud).

276. *See* N.A.A.C.P. v. State of Alabama ex rel. Patterson, 357 U.S. 449, 460-61 (1958) ("state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny").

277. *Arcara*, 478 U.S. at 706 and n.3.

278. Barnes v. Glen Theatre. Inc., 501 U.S. 560, 566-67 (1991).

279. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984).

280. Grayned v. City of Rockford, 408 U.S. 104, 115-20 (1972).

281. *Branzburg*, 408 U.S. at 707.

282. *Fordyce*, 55 F.3d at 439; *see also supra* notes 216, 217.

283. *Blackston*, 30 F.3d at 120.

284. Alexander v. U.S., 509 U.S. 544, 557 (1993).

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of information from which members of the public may draw."[285] The Ag-Gag laws are tailored to limit the stock of information about intensive animal agriculture on which members of the public may draw. Until 2012, there had been at least 11 undercover investigations on Iowa farms.[286] Each of these investigations generated significant publicity, informing the public about modern animal agriculture practices.[287] A ban on new videos at farms is a significant incidental burden on that flow of information.

Second, the Ag-Gag laws will stop informed debate about a matter of public concern. The First Amendment exists to ensure open and informed debate on public issues.[288] Undercover videos have spurred a heated public debate about animal agriculture in the media, the courts, and on the campaign trail.[289] The Supreme Court has recognized that undercover investigations have contributed to this debate by revealing food safety and animal cruelty violations at agricultural operations.[290] And the House Judiciary Committee has noted: "Regulators, humane societies, and labor unions rely on . . . legitimate undercover investigations to police conditions at food and fiber processing facilities."[291] The Ag-Gag laws are intended to silence that debate,[292] imposing a significant incidental burden on First Amendment activities.

This is particularly worrisome, given the public interest in the debate about the ethics of intensive animal agricultural practices. Courts have recognized that the treatment of animals at agricultural operations is a matter of public concern.[293] Yet, the Ag-Gag laws would curtail this debate. As such, a court reviewing the Ag-Gag laws should apply at least intermediate scrutiny.

E. The Ag-Gag Laws Should Be Subject to Heightened Scrutiny Because They Punish False Statements Without Proof of Harm

Both Iowa and Utah's laws penalize false speech made to gain access to agricultural operations. Utah's law prohibits obtaining access to an agricultural operation under false pretenses.[294] Iowa's law includes a similar provision, and additionally penalizes "false statement[s] or representation[s]" made "as part of an application or agreement to be employed at an agricultural production facility."[295] All three of these provisions penalize the speech that activists use to misrepresent themselves.

The First Amendment presumptively applies to state action to penalize speech, regardless of its truthfulness.[296] To be sure, "resumé fraud is not protected speech"[297] because fraud is a categorical exception from First Amendment scrutiny.[298] But "[s]imply labeling an action one for 'fraud,' of course, will not carry the day"; the government must prove an action fits the First Amendment exception for fraud.[299]

Utah and Iowa's laws may not fit the fraud exception because they do not require proof of harm. In a "properly tailored fraud action" a "[f]alse statement alone does not subject a [speaker] to fraud liability."[300] Instead, in *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*,[301] the Supreme Court held that fraud requires proof the false statement was: (1) knowing and intended to mislead; (2) material; and (3) did mislead.[302] This third factor—proof of bona fide harm—is within the common-law definition of fraud.[303] Indeed, courts have dismissed fraud torts against lying undercover investigators for failure to prove this harm.[304] But courts have differed on whether proof of harm is a constitutional requirement for a fraud statute to evade First Amendment scrutiny.[305] The Utah Supreme Court recently suggested proof of harm is a requirement.[306]

285. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978) (holding that a Massachusetts campaign finance statute violated the First Amendment).
286. *See* Animal Visuals, http://www.animalvisuals.org/projects/data/investigations (last visited Aug. 6, 2012).
287. *See*, *e.g.*, *supra* notes 1-5 and accompanying text.
288. *See Sullivan*, 376 U.S. at 270.
289. *See supra* notes 42-54 and accompanying text.
290. *Nat'l Meat Ass'n*, 132 S. Ct. at 969.
291. H.R. Rep. No. 102-498(II), at 4 (1992), *reprinted in* 1992 U.S.C.C.A.N. 816.
292. *See supra* notes 89-97 and accompanying text.
293. *See* Ouderkirk v. People for Ethical Treatment of Animals, Inc., 2007 WL 1035093 at *19 (E.D. Mich. Mar. 29, 2007) ("The methods and practices of raising and destroying animals, especially for commercial purposes, has been recognized as a matter of public concern."); Farm Sanctuary, Inc. v. Dep't of Food & Agric., 63 Cal. App. 4th 495, 504 (1998) ("We think it clear that the slaughtering of animals through humane methods . . . is a matter of public importance."); Safarets, Inc. v. Gannett Co., Inc., 80 Misc. 2d 109, 113, 361 N.Y.S.2d 276, 280 (1974) ("we find that this article dealing with humane treatment of animals and birds . . . involves a subject of general public concern").
294. Utah Code Ann. §76-6-112(2)(b).
295. Iowa Code Ann. §717A.3A(1)(a), (b).
296. *See Sullivan*, 376 U.S. at 271 ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker.").
297. Durgins v. City of E. St. Louis, Ill., 272 F.3d 841, 843 (7th Cir. 2001).
298. *See*, *e.g.*, Donaldson v. Read Mag., Inc., 333 U.S. 178, 190 (1948) (the government's power "to protect people against fraud" has "always been recognized in this country and is firmly established").
299. Illinois ex rel. Madigan v. Telemarketing Assoc., Inc., 538 U.S. 600, 617 (2003).
300. *Id.* at 620.
301. 538 U.S. 600 (2003).
302. *Illinois ex rel. Madigan*, 538 U.S. at 620. ("the complainant must show that the defendant made a false representation of a *material fact* knowing that the representation was *false*; further, the complainant must demonstrate that the defendant made the representation with the *intent to mislead* the listener, and *succeeded in doing so*.") (emphasis added).
303. *See Black's Law Dictionary* (9th ed. 2009), *available at* Westlaw BLACKS (defining "fraud" as "[a] knowing misrepresentation of the truth or concealment of a material fact *to induce another to act to his or her detriment*") (emphasis added); *see also* Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 123-24 (1st Cir. 2000) (under fraudulent misrepresentation theory, the "representation must be a 'substantial factor' in bringing about the harm").
304. *See Food Lion*, 194 F.3d at 514 (dismissing fraud claims against undercover investigator who lied on his resumé for failure to prove "injurious reliance" on those lies).
305. *Compare* United States v. Alvarez, 617 F.3d 1198, 1211 (9th Cir. 2010) ("Fraud statutes must be precisely crafted to target only specific false statements that are likely to cause a bona fide harm."), *with Alvarez*, 617 F.3d at 1227 (Bybee, J., dissenting) ("The likelihood of a 'bona fide harm' has nothing to do with whether a category of speech loses First Amendment protection."), *and* United States v. Robbins, 759 F. Supp. 2d 815, 818, *adhered to*, 785 F. Supp. 2d 552 (W.D. Va. 2011) (under First Amendment "false statements of fact are generally unprotected, aside from the protection for 'speech that matters'").
306. State v. Norris, 152 P.3d 293, 297 (Utah 2007) ("speech that is knowingly false but that is neither defamatory, fraudulent, nor otherwise harmful to

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The Supreme Court's recent decision in *United States v. Alvarez*[307] has only muddied the issue. In *Alvarez*, the Court held that the Stolen Valor Act, which made it a crime to falsely claim receipt of military decorations or medals, violated the First Amendment. The plurality of four Justices held that the First Amendment protects false statements,[308] and noted that even in the context of fraud, "falsity alone may not suffice to bring the speech outside the First Amendment."[309] But the plurality noted: "Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say *offers of employment*, it is well established that the Government may restrict speech without affronting the First Amendment."[310] Two other Justices would have subjected the Act's regulation of false statements to intermediate scrutiny and invalidated the Act due to its speech-related harms.[311]

Assuming that fraud statutes must require proof of harm, Utah and Iowa's laws should be subject to First Amendment scrutiny.[312] Both laws do require that falsehoods be told willfully.[313] But they do not require that the defendant actually commit any unauthorized acts, or otherwise cause harm.[314] For example, an investigator who lied to gain access to an agricultural operation would be liable, even if he never turned his camera on or committed any other harmful act.

Moreover, the harm cannot be from intrusion, trespass, or fraud. In *Desnick*, Judge Posner found that undercover investigators filming professional conduct in a nondisruptive manner did not commit intrusion.[315] He also reasoned that "testers" routinely obtain entry to houses under false pretenses, but this does not make them trespassers.[316] Similarly, the *Food Lion* court noted, "we have not found any case suggesting that consent based on a resumé misrepresentation turns a successful job applicant into a trespasser."[317] And fraud cannot be the harm because this would be circular: the harm of a fraud statute cannot be fraud.

Nor can the harm come from lost wages paid to investigators or reputational injuries from investigators' exposés. As the *Food Lion* court pointed out, undercover investigators are not necessarily worse employees, and any wages paid to them are paid because of their work, not their misrepresentations.[318] Likewise, any reputational injuries would be proximately caused by publication, not by the investigator's misrepresentations.[319] And the laws apply even to investigators who never produce a video.[320]

Finally, the prohibitions of the Ag-Gag laws do not fit any of the other categorical exceptions from First Amendment scrutiny. They do not fit the perjury exemption because job applicants are not under oath.[321] They do not fit the defamation exemption because the act of lying on a job application does not itself damage anyone's reputation.[322] They do not fit the intentional infliction of emotional distress exception because "[u]ndercover investigations have been found not to involve [the] extreme and outrageous conduct" required to prove this tort.[323] Because the Ag-Gag laws do not fit any First Amendment exception, they should be subject to First Amendment scrutiny.

IV. The Ag-Gag Laws Cannot Survive Strict Scrutiny and May Not Be Able to Survive Intermediate Scrutiny

In this section, I argue that the Ag-Gag laws cannot survive strict scrutiny. There is no compelling government interest in protecting agricultural operations from undercover investigations, and the laws are not narrowly tailored to achieve any other interest. I also argue that the laws may not survive intermediate scrutiny.

A. The Ag-Gag Laws Cannot Survive Strict Scrutiny

Under strict scrutiny, the government must prove that a law "furthers a compelling interest and is narrowly tailored to achieve that interest."[324] A compelling interest is "one of the highest order."[325] Narrow tailoring requires that the law use the "least restrictive alternative" to achieve that interest.[326]

The Ag-Gag laws fail this test. Iowa and Utah cannot assert an interest that is broad enough to be compelling, but narrow enough that their laws are narrowly tailored to achieve it. There is likely a compelling government

the interests of society may well be protected by the Constitution from state prohibitions. The question is not before us, but it is unlikely that such a case would pass constitutional muster").

307. 567 U. S.__ (2012).
308. *Id.* at 10.
309. *Id.* at 7.
310. *Id.* at 11.
311. 567 U. S. __ (2012) (Breyer, J., concurring), at 1-3.
312. The level of First Amendment scrutiny would depend on whether the restrictions on misrepresentations are held to be content-based. If the court treats the restrictions like fraud restraints, which are content-neutral, it would apply intermediate scrutiny. *See* American Target Adver., Inc. v. Giani, 199 F.3d 1241, 1247 (10th Cir. 2000) (finding fraud and misrepresentation restrictions to be content-neutral, and applying intermediate scrutiny).
313. *See* Utah Code Ann. §76-6-112; Iowa Code Ann. §717A.3A(1) and (1)(b).
314. *Id.*
315. *Desnick*, 44 F.3d at 1352-53.
316. *Id.* at 1353.
317. *Food Lion*, 194 F.3d at 518.
318. *Id.* at 514 (noting undercover investigators "were paid because they showed up for work and performed their assigned tasks as Food Lion employees", "not . . . because of misrepresentations on their job applications. Food Lion therefore cannot assert wage payment to satisfy the injurious reliance element of fraud").
319. *See Food Lion*, 964 F. Supp. at 958, 963.
320. *See generally* Iowa Code Ann. §717A.3A.
321. *See Black's Law Dictionary* (9th ed. 2009), *available at* Westlaw BLACKS (defining "perjury" as "[t]he act or an instance of a person's deliberately making material false or misleading statements while under oath").
322. *See id.* (defining "defamation" as a "written or oral statement that damages another's reputation").
323. *Ouderkirk*, 2007 WL 1035093 at *23.
324. Citizens United v. FEC, 130 S. Ct. 876, 898 (2010).
325. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).
326. Sable Commc'n of Cal. v. FCC, 492 U.S 115, 126, 130-31 (1989) (holding that a ban on "dial-a-porn" services was not narrowly tailored to the interest in protecting children because the government could require the services to use credit cards, access codes, and message scrambling to weed out children).

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interest in preventing fraud generally,[327] and in preventing economic disruption.[328] But Utah and Iowa's laws are underinclusive to either aim.[329] Neither law applies anywhere but agricultural operations. Iowa's law only applies to the job application process. Utah's law does not apply to most forms of economic disruption other than using recording devices. The existing generally applicable laws against fraud and economic damage are surely better tailored to prevent general fraud and economic disruption. The Ag-Gag laws are thus only narrowly tailored for two purposes: to prevent filming and fraud by undercover investigators at agricultural operations. But these interests are too narrow to be compelling.

B. The Ag-Gag Laws May Not Be Able to Survive Intermediate Scrutiny

Whether the Ag-Gag laws can survive intermediate scrutiny is a closer question. Intermediate scrutiny requires that a law "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."[330]

Iowa's law may fail this standard. Even assuming that preventing fraud at agricultural operations is an important government interest,[331] it is related to the suppression of free speech. The misrepresentations that investigators make are speech.[332] And Iowa's aim in penalizing this fraud appears to be to halt criticism of agricultural operations—an interest in suppressing speech.[333] However, a court may view misrepresentations as unprotected fraud,[334] and the laws' legislative histories as uninformative.[335] If it does, it may find Iowa's interest unrelated to suppression of speech. In that case, Iowa's law would likely survive intermediate scrutiny, since it is tightly worded to burden no more speech than necessary.

By contrast, Utah's law likely fails intermediate scrutiny. Any government interest that is drawn narrowly enough to justify banning recording images or sound at an agricultural operation is "related to the suppression of free speech."[336] For instance, if Utah's interest was to prevent reputational damage to agricultural operations—which appears to be the law's true motive[337]—this interest is related to the suppression of speech because reputational damages only arise from the publication of videos with critical viewpoints.[338] But if the government interest is drawn more broadly, Utah's prohibitions likely "burden substantially more speech than necessary to further those interests."[339] For instance, if Utah's interest was to protect agricultural operations from physical interference, a law heightening trespass or damage provisions at agricultural operations could achieve this interest while burdening substantially less speech.

V. Conclusion

The Ag-Gag laws are an overt attempt to silence speech critical of animal agriculture. Undercover investigations at farms have revealed animal abuse, prompted food recalls, produced legislative reform, and sparked a vibrant debate about how food is produced. The Ag-Gag laws are a backlash to that success. Iowa and Utah legislators targeted the creation of undercover videos only as a means to stop their publication. Craftily, the legislators concealed these intentions in anti-fraud and filming measures.

A court should see through this subterfuge. A court should apply strict scrutiny to the Ag-Gag laws because they are not generally applicable laws, they criminalize speech about affiliations, and their enforcement will inevitably single out activists engaged in expressive activities. At the very least, a court should apply intermediate scrutiny because the laws punish false statements without proof of harm, and their enforcement will affect conduct "intimately related" to expression. And a court should find the laws cannot withstand such heightened scrutiny.

The First Amendment reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[340] Iowa and Utah legislators passed the Ag-Gag laws because an uninhibited and robust debate about industrial agriculture cannot end well for the status quo. For that same reason, the laws should not stand.

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327. *See* Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater, 2 F.3d 1514, 1544 (11th Cir. 1993) ("the state does indeed have a compelling interest in protecting church members from affirmative, material misrepresentations designed to part them from their money").
328. *See* Universidad Cent. de Bayamon v. NLRB, 793 F.2d 383, 390 (1st Cir. 1985) ("There is a compelling government interest in minimizing economic disruptions caused by labor unrest.").
329. *Cf.* Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729, 2740 (2011) (using underinclusiveness as evidence of lack of narrow tailoring).
330. *Turner*, 520 U.S. at 189 (quoting *O'Brien*, 391 U.S. at 377).
331. *Cf.* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 792 (1988) ("The interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation.").
332. *See supra* note 296.
333. *See supra* notes 89-97 and accompanying text.
334. *See supra* notes 297, 298.
335. *See supra* notes 85, 86.
336. *Turner*, 520 U.S. at 189.
337. *See supra* notes 93-97 and accompanying text.
338. *Cf.* Tex. v. Johnson, 491 U.S. 397, 410 (1989) (interest in "preserving the flag as a symbol of nationhood and national unity" is an interest "related to the suppression of free expression" because nationhood concerns only arise when person's treatment of flag communicates a message).
339. *Turner*, 520 U.S. at 189.
340. *Sullivan*, 376 U.S. at 270.