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Ag-Gag Laws: A Shift in the Wrong Direction for Animal Welfare on Farms

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COMMENT

AG-GAG LAWS: A SHIFT IN THE
WRONG DIRECTION FOR ANIMAL
WELFARE ON FARMS

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INTRODUCTION

Americans are increasingly interested in a plant-based diet.¹ Reasons for becoming vegetarian can vary, but they often include concerns about animal welfare and human health.² The realization of animal suffering and its health implications for consumers can largely be attributed to the plethora of recent undercover investigations that have revealed appalling living conditions for animals inside factory farms.³

In light of growing consumer consciousness, many agricultural organizations have started pushing for the passage of laws that circumvent this public response against factory farm conditions. Agribusiness actions include lobbying for the passage of anti-

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¹ See *Vegetarianism in America*, VEGETARIAN TIMES, www.vegetariantimes.com/article/vegetarianism-in-america (last visited Feb. 23, 2014).

² See Christina Sterbenz & Gus Lubin, *Reasons To Go Vegetarian In Charts*, BUS. INSIDER (Oct. 18, 2013, 12:33 PM), www.businessinsider.com/reasons-to-go-vegetarian-in-charts-2013-10.

³ For a list of undercover investigations conducted by one organization alone, see *Undercover Investigations of Factory Farms and Slaughterhouses*, MERCY FOR ANIMALS, www.mercyforanimals.org/investigations.aspx (last visited Feb. 23, 2014).

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whistleblower laws, also known as “ag-gag” laws,⁴ which have the purpose of criminalizing “acts related to investigating the day-to-day activities of industrial farms, including the recording, possession or distribution of photos, video and/or audio [taken] at a farm.”⁵ Ag-gag laws generally vary in terms of strength and scope, penalizing a broad range of actions, including obtaining employment by misrepresentation;⁶ exercising control within an animal facility without permission of the owner;⁷ and recording or photography in farms, either altogether⁸ or to the extent that any abuse witnessed or captured on film must be reported to authorities within a limited time period.⁹ This Comment focuses on states with varying ag-gag laws and looks at examples of laws proposed, passed, or failed within the past several years.

This Comment argues that ag-gag laws are roadblocks to the creation, enforcement, and expansion of animal cruelty laws. Part I provides background on the development of farming, current farming conditions, and the implications of farm conditions for consumers. It also gives a brief history of undercover investigative reporting and the ag-gag laws that have followed. Part II explains how ag-gag laws prevent the creation of effective animal welfare statutes by limiting the public awareness that leads directly to the establishment of new anti-cruelty measures. Part III explains that ag-gag legislation obstructs the enforcement of animal welfare statutes because these measures stymie the undercover investigations vital to the prosecution of animal abuse. Part IV explains that ag-gag laws hinder the expansion of anti-cruelty laws because without evidence of animal abuse, there would be no need to change existing law.

⁴ This term was coined by Mark Bittman. Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES OPINIONATOR BLOG (Apr. 26, 2011, 9:29 PM), <http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals>.

⁵ *Ag-Gag Whistleblower Suppression Legislation*, ASPCA, www.aspc.org/fight-cruelty/advocacy-center/ag-gag-whistleblower-suppression-legislation (last visited Feb. 23, 2013).

⁶ For example, Idaho penalizes misrepresentation as part of an application for employment with intent to commit certain acts. IDAHO CODE ANN. § 18-7042(1)(c) (Westlaw 2014).

⁷ There are at least twenty-eight states with laws prohibiting the exercise of control in an animal facility without permission of the owner. Dan Flynn, *Five States Now Have “Ag-Gag” Laws on the Books*, FOOD SAFETY NEWS (Mar. 26, 2012), www.foodsafetynews.com/2012/03/five-states-now-have-ag-gag-laws-on-the-books.

⁸ Idaho, Utah, Kansas, Montana, and North Dakota all have enacted outright bans of recordation and/or photography. IDAHO CODE ANN. § 18-7042(1)(d); UTAH CODE ANN. § 76-6-112(2) (Westlaw 2014); KAN. STAT. ANN. § 47-1827(c)(4) (Westlaw 2014); MONT. CODE ANN. § 81-30-103(2)(e) (Westlaw 2014); N.D. CENT. CODE ANN. § 12.1-21.1-02(6) (Westlaw 2014).

⁹ For example, Missouri now requires that any video recording of animal abuse must be reported within twenty-four hours. S.B. 631, 2012 Gen. Assemb., Reg. Sess. (Mo. 2012).

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Throughout this Comment, California is used as a model state in this arena because of its opposition to ag-gag laws and its recent passage of a strong anti-cruelty statute in response to undercover investigations.

I. BACKGROUND

Understanding the effects of ag-gag laws requires examination of how and why such laws were enacted, and the impact that factory farming in the United States has on consumers. This Part explains a) the rise of factory farming and its implications on humans, b) the history of undercover investigations, and c) the development of ag-gag bills and laws in response to undercover investigations.

A. THE RISE OF FACTORY FARMING AND ITS IMPLICATIONS FOR CONSUMERS

In the mid-nineteenth century, sixty-four percent of the United States labor force consisted of farmers.¹⁰ Traditional farms were primarily family-owned, allowing animals to behave naturally.¹¹ Feed for farm animals was taken from adjacent farmlands, and animal waste was used to re-nourish farm soil.¹² After the 1940's, however, such small farms were pushed out by larger farming systems, and financial profit became the primary focus of the farming industry.¹³

Today, a mere two percent of the population is involved in farming.¹⁴ The farms that exist are modeled after factory production, in which each farm produces only one kind of crop, feed is no longer grown on adjacent lands, and animals are packed together as tightly as possible.¹⁵ Animal waste is stored in lagoons and, although applied to soil as fertilizer, it far exceeds the quantity the soil can absorb, which in turn leads to runoff that can contaminate drinking water.¹⁶

¹⁰ *History of the American West, 1860-1920: Photographs from the Collection of the Denver Public Library*, LIBR. OF CONGRESS, www.loc.gov/teachers/classroommaterials/connections/hist-am-west/history.html (last visited Apr. 8, 2014).

¹¹ Holly Cheever, *Concentrated Animal Feeding Operations: The Bigger Picture*, 5 ALB. L. ENVTL. OUTLOOK 43 (2000).

¹² *Id.*

¹³ *Id.* at 44.

¹⁴ Amy Mosel, Comment, *What About Wilbur? Proposing a Federal Statute To Provide Minimum Humane Living Conditions for Farm Animals Raised for Food Production*, 27 U. DAYTON L. REV. 133, 145 (2001).

¹⁵ Cheever, *supra* note 11, at 44.

¹⁶ *How Factory Farms Impact You*, FACTORY FARM MAP, www.factoryfarmmap.org/problems (last visited Feb. 23, 2014) [hereinafter *Factory Farms Impact*].

The rate of modern food production in the United States proceeds at a staggering rate. Every twenty-four hours, ninety thousand cows and calves are slaughtered.¹⁷ Every minute, fourteen thousand chickens are killed.¹⁸ Sustaining this rate of productivity means poor conditions for animals, as hens are tightly compacted into battery cages with little room for movement, and sows are confined in crates that restrict movement for years on end.¹⁹

Moreover, the effects of modern farming practices on the health of consumers are becoming more apparent. Because animals are tightly confined at factory farms, antibiotics are fed to the animals in an effort to curb infection and disease.²⁰ Constant and continuous use of antibiotics in farm animals results in strains of bacteria that become resistant to drugs, which in turn results in antibiotics being unable to cure infections in humans who consume these animals.²¹ Studies have traced exact antibiotic-resistant strains of bacteria from farm animals directly to human beings, highlighting the link between human infections and livestock operations.²² Antibiotic-resistant strains of bacteria result in ineffective medicine and lead to long-term illnesses and death.²³

Furthermore, the conditions in which animals are housed lead to bacterial contamination of meat.²⁴ It is estimated that eighty-nine percent of beef patties made in the United States contain the *E. coli* bacterium strain.²⁵ Every day, over five thousand people in the United States become ill with the *Campylobacter* bacteria, which is found primarily in contaminated chicken meat.²⁶ Each year, six hundred Americans die from eating eggs tainted with *Salmonella*.²⁷

Grave concerns for the welfare of animals and the safety of humans who consume them show the importance of undercover investigations at

¹⁷ *What's Wrong with Factory Farming?*, THE CTR. FOR FOOD SAFETY, www.centerforfoodsafety.org/files/factoryfarmingfactsheet.pdf (last visited Feb. 23, 2014) [hereinafter *What's Wrong*].

¹⁸ *Id.*

¹⁹ See Cheryl L. Leahy, *Large-Scale Farmed Animal Abuse and Neglect: Law and Its Enforcement*, 4 J. ANIMAL L. & ETHICS 63, 65-68 (2011).

²⁰ Ariele Lessing, Note, *Killing Us Softly: How Sub-Therapeutic Dosing of Livestock Causes Drug-Resistant Bacteria in Humans*, 37 B.C. ENVTL. AFF. L. REV. 463, 469 (2010).

²¹ *Id.* at 472; Mosel, *supra* note 14, at 162.

²² Lessing, *supra* note 20, at 472-73.

²³ Mosel, *supra* note 14, at 163.

²⁴ *Factory Farms Impact*, *supra* note 16.

²⁵ *What's Wrong*, *supra* note 17.

²⁶ *Id.*

²⁷ *Id.*

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factory farms and the need for such investigations to raise awareness and initiate change in the way animals are handled.

B. THE HISTORY OF UNDERCOVER INVESTIGATIONS

Undercover investigations at slaughterhouses are a relatively recent development. In the early twentieth century, writer and activist Upton Sinclair went undercover as a meatpacker in Chicago and published his findings in *The Jungle*.²⁸ Sinclair's account led not only to the launch of undercover reporting at factory farms, but also to the implementation of new laws and the establishment of governmental oversight.²⁹

In the past decade, there have been numerous undercover reports by animal welfare agencies documenting abuse and contamination at factory farms.³⁰ Such investigations have revealed employees scalding³¹ and punching animals, ripping their heads off, and slicing their throats while still conscious.³² These types of investigations and exposés are embraced by modern society, as evidenced by a poll released in 2012 that revealed that seventy-one percent of Americans support undercover

²⁸ The findings as described in *The Jungle*:

There would be meat that had tumbled out on the floor, in the dirt and sawdust, where the workers had tramped and spit uncounted billions of consumption germs. There would be meat stored in great piles in rooms; and the water from leaky roofs would drip over it, and thousands of rats would race about it. It was too dark in these storage places to see well, but a man could run his hand over these piles of meat and sweep off handfuls of the dried dung of rats. These rats were nuisances, and the packers would put poisoned bread out for them; they would die, and then rats, bread, and meat would go into the hoppers together.

UPTON SINCLAIR, *THE JUNGLE* 112 (Paul Negri & Joslyn T. Pine eds., Dover Thrift Editions 2001) (1906).

²⁹ In direct response to Sinclair's revelations, Congress enacted the Meat Inspection Act and the Pure Food and Drug Act, which led to the formation of the federal Food and Drug Administration (FDA). *Ag-Gag and Animal Welfare Investigations*, ASPCA, www.aspc.org/fight-cruelty/advocacy-center/ag-gag-whistleblower-suppression-legislation/ag-gag-and-animal-welfare (last visited Feb. 23, 2014) [hereinafter *Animal Welfare Investigations*]; see also *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 968 (2012).

³⁰ For an archive of video links to factory farm investigations, see *Video Links*, VEGAN OUTREACH, www.veganoutreach.org/video (last visited Feb. 23, 2014).

³¹ In 2005, an investigator for People for the Ethical Treatment of Animals reported the mutilation and scalding of conscious birds at a Tyson Foods farm in Alabama. *Tyson, PETA Clash Over Chicken Slaughter*, USA TODAY, May 25, 2005, 3:30 PM, http://usatoday30.usatoday.com/money/industries/food/2005-05-25-tyson-peta_x.htm.

³² In 2007, a Mercy For Animals member took an undercover job at House of Raeford Farms in North Carolina, one of the largest poultry producers in the country, and filmed the abuse with a hidden camera. *House of Raeford Slaughterhouse Investigation*, MERCY FOR ANIMALS, www.mercyforanimals.org/hor (last visited Feb. 23, 2014).

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investigations at factory farms.³³ The poll also underscored the American public's concern for food safety and animal welfare. Ninety-four percent of Americans believe in the importance of having measures that ensure animal products are safe for consumption, and the same percentage of Americans believe that farm animals should not be subjected to abuse.³⁴

C. THE DEVELOPMENT OF AG-GAG BILLS AND LAWS IN RESPONSE TO UNDERCOVER INVESTIGATIONS

Circumstantial evidence gives the strong indication that ag-gag bills are a direct response to more recent undercover investigations at factory farms. Undercover investigations have caused damage to the animal agriculture industry, leading to food recalls and revocation of contracts between meat suppliers and purchasers.³⁵ For example, in 2008, workers with the Humane Society of the United States (HSUS) filmed the mistreatment of downed³⁶ cows in California that were slaughtered for school children's lunchmeat, leading to the largest meat recall in United States history.³⁷ In 2013, Tyson Foods, the largest meat producer in the United States, cancelled its contract with an Oklahoma supplier after seeing footage of workers physically abusing pigs and piglets.³⁸

It is no surprise that an increase of ag-gag law proposals across the country have coincided with increased media attention surrounding farming practices exposed by undercover investigations. In 2012, the nonprofit animals-rights organization, Mercy for Animals (MFA), went undercover at an Idaho farm and filmed the sexual abuse and beating of cows.³⁹ This led to the introduction and eventual passage⁴⁰ of Idaho's

³³ *ASPCA Research Shows Americans Overwhelmingly Support Investigations To Expose Animal Abuse on Industrial Farms*, ASPCA (Feb. 17, 2012), www.aspc.org/Pressroom/press-releases/021712.

³⁴ *Id.*

³⁵ *Animal Welfare Investigations*, *supra* note 29.

³⁶ Downed animals are "those who are too sick or injured to stand or walk unassisted." *Downed Animals*, ASPCA, www.aspc.org/about-us/aspc-policy-and-position-statements/downed-animals (last visited Apr. 8, 2014).

³⁷ Andrew Martin, *Company Orders Largest Recall of Ground Beef*, N.Y. TIMES, Feb. 18, 2008, www.nytimes.com/2008/02/18/business/18recall.html.

³⁸ Anna Schecter, Monica Alba & Lindsay Perez, *Tyson Foods Dumps Pig Farm After NBC Shows Company Video of Alleged Abuse*, NBC NEWS (Nov. 20, 2013, 3:12 AM), www.nbcnews.com/news/investigations/tyson-foods-dumps-pig-farm-after-nbc-shows-company-video-v21534986.

³⁹ Peter Moskowitz, *Idaho Gov. Signs "Ag Gag" Bill into Law*, AL-JAZEERA AMERICA (Feb. 28, 2014, 5:06 PM), <http://america.aljazeera.com/articles/2014/2/28/idaho-gov-signs-aggagbillintolaw.html>.

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ag-gag bill, which prohibits obtaining employment “by force, threat, or misrepresentation with the intent to cause economic or other injury,” and prohibits unauthorized audio and video recording within a facility.⁴¹

Iowa has also seen its fair share of scandals. In 2010, undercover investigators and federal inspectors separately investigated several of Iowa’s egg-producing farms, some of which were at the center of a Salmonella outbreak that led to the largest egg recall in United States history.⁴² In an effort to hide animal abuse and prevent damage to the industry, agricultural corporations in states such as Iowa have aggressively pushed for ag-gag laws to protect themselves.⁴³ Iowa’s ag-gag bill passed in March 2012, creating the crime of “agricultural production facility fraud,” which occurs when a person goes into a facility under false pretenses or makes a false representation to obtain employment at a facility with “intent to commit an act not authorized by the owner” of the facility.⁴⁴

These few examples are just the tip of the iceberg, however, as in recent years, a multitude of ag-gag bills were introduced and passed across the country. In 2012, Utah passed strict ag-gag legislation that prohibits outright any recordation or photography in animal facilities.⁴⁵ In 2013, fifteen ag-gag bills of varying breadth and scope were introduced across eleven states.⁴⁶ At the time of this Comment, some have failed, while others are still being debated.⁴⁷ In 2014, Idaho’s ag-

⁴⁰ *Id.*

⁴¹ IDAHO CODE ANN. § 18-7042(1)(c)-(d) (Westlaw 2014).

⁴² Cody Carlson, *The Ag Gag Laws: Hiding Factory Farming Abuses from Public Scrutiny*, THE ATLANTIC (Mar. 20, 2012, 9:06 AM), www.theatlantic.com/health/archive/2012/03/the-ag-gag-laws-hiding-factory-farm-abuses-from-public-scrutiny/254674.

⁴³ *Id.*

⁴⁴ IOWA CODE ANN. § 717A.3A(1) (Westlaw 2014).

⁴⁵ Utah’s ag-gag bill provides that a person is guilty of “agricultural operation interference” if the person records image or sound from the facility, accesses the facility under false pretenses, applies for employment with intent to record, or records within the facility without consent of the owner. UTAH CODE ANN. § 76-6-112(2) (Westlaw 2014).

⁴⁶ Varying ag-gag laws were introduced in Arkansas, California, Indiana, Nebraska, New Hampshire, New Mexico, North Carolina, Pennsylvania, Tennessee, Wyoming, and Vermont. *Anti-Whistleblower Bills*, HUMANE SOC’Y OF U.S. (Jan. 7, 2014), www.humanesociety.org/issues/campaigns/factory_farming/fact-sheets/ag_gag.html#id=album-185&num=content-3312.

⁴⁷ See S.B. 13, 89th Gen. Assemb., Reg. Sess. (Ark. 2013), passed on April 10, 2014, now Act 1160 (prohibiting investigation by anyone other than law enforcement); Assemb. B. 343, 2013-2014 Leg., Reg. Sess. (Cal. 2013), and S.B. 648, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013), both of which were withdrawn by their sponsors; S.B. 552, 51st Legis., First Sess. (N.M. 2013), which did not pass out of committee by the end of the session; S.B. 1248, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013), and H.B. 1191, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013), both of which passed both the House and Senate but were vetoed by the governor; S.B. 391, 118th Gen. Assemb., 1st Reg.

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gag law passed,⁴⁸ and several new ag-gag bills in other states are being considered.⁴⁹

Many states with ag-gag laws also have animal welfare laws that are lacking, excluding farm animals from protection by exempting acts against animals that are common or accepted husbandry practice.⁵⁰ Because these states have ag-gag laws on the books, it is unlikely that their existing animal welfare laws will ever change to provide more protection for animals within their states.

States should set the goal of protecting farm animals and human consumers by following California, a state with relatively strong animal welfare laws. Although California is not perfect, it is a good model state, where undercover investigations have led not to the passage of ag-gag laws, but to the creation, enforcement, and expansion of anti-cruelty laws,⁵¹ thereby protecting animal wellbeing and consumer safety.

II. AG-GAG LEGISLATION PREVENTS THE CREATION OF EFFECTIVE ANIMAL WELFARE STATUTES, REGULATIONS, AND POLICIES

Pending legislation regarding the confinement or treatment of farm animals often cite undercover investigations as proof that mistreatment is happening.⁵² Undercover investigations increase public awareness and undoubtedly lead to the development of new anti-cruelty legislation.

Sess. (Ind. 2013), and H.B. 1562 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013), referred; Legis. B. 204, 103d Leg., 1st Reg. Sess. (Neb. 2013), carried over to 2014 Session; H.B. 110, 2013 Leg., Reg. Sess. (N.H. 2013), tabled; H.B. 683, 2013 Gen. Assemb., Reg. Sess. (Pa. 2013), referred to judiciary; H.B. 126, 2013 Leg., Reg. Sess. (Wyo. 2013), returned by Senate; S.B. 162, 2013 Gen. Assemb., Reg. Sess. (Vt. 2013), referred to Committee on Agriculture.

⁴⁸ IDAHO CODE ANN. § 18-7042 (Westlaw 2014).

⁴⁹ See H.B. 2587, 51st Leg., 2d Reg. Sess. (Ariz. 2014); H.B. 222, 2014 Leg., Reg. Sess. (Ky. 2014), amended to include ag-gag language; H.B. 2258/S.B. 2406 and H.B. 1779/S.B. 1892, 108th Gen. Assemb., Reg. Sess. (Tenn. 2014).

⁵⁰ For example, Iowa's anti-cruelty laws protect one's own farm animals only to the extent that they are neglected, and neglect includes the "failure to provide livestock with care consistent with animal husbandry practices." IOWA CODE ANN. § 717.2(1)(a) (Westlaw 2014). In Utah, like Iowa, the statutory definition of animal does not include livestock if "the conduct toward the creature, and the care provided to the creature, is in accordance with accepted animal husbandry practices." UTAH CODE ANN. § 76-9-301(1)(b)(ii)(C) (Westlaw 2014).

⁵¹ See generally *Text of Proposed Laws*, CAL. SECRETARY OF STATE, <http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf> (last visited Feb. 23, 2014).

⁵² The Argument in Favor of Proposition 2 stated, "[w]e all witnessed the cruel treatment of sick and crippled cows exposed by a Chino slaughter plant investigation this year, prompting authorities to pull meat off school menus and initiate a nationwide recall." *Proposition 2 Arguments*, CAL. SECRETARY OF STATE, <http://voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebut2.htm> (last visited Feb. 23, 2014).

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Without the undercover investigative method, the public has a narrow set of alternatives to prompt legislative action, which include legitimate employees blowing the whistle on their employers, or farming corporations' own willingness to conduct transparent operations that allow the public to see when abuse is happening. Without undercover investigations, the development and promulgation of anti-cruelty measures would be seriously hindered, if not altogether halted.

A. WITHOUT UNDERCOVER INVESTIGATIONS, THERE WILL BE NO DEVELOPMENT OF ANTI-CRUELTY LAWS OR COMPANY POLICIES THAT APPLY TO FARM ANIMALS

As described in Part I of this Comment, many states have animal welfare statutes that do not apply to common practices of animal husbandry. These "Common Farming Exemptions" legalize whatever practices are common.⁵³ This allows corporations to fashion its own definition of cruelty, for so long as a practice is widely followed within the industry, it is legal.⁵⁴ Valparaiso University law professor Rebecca J. Huss defined the exception by explaining, "[i]f enough people do it, then it's commonly accepted, even if the general population wouldn't understand or think that it's humane. If gestation crates are prevalent, it would take them out of the definition of cruelty"⁵⁵

Some common practices among factory farms include confining hens in battery cages where their movements are severely restricted⁵⁶ and confining calves in crates that limit movement for the production of veal.⁵⁷ The kind of law that exempts common practices leaves little or no protection for farm animals. Animal-rights activists point out that local and state laws governing animal treatment are inadequate, and the staggering number of animal-abuse videos that surface show that the industry alone cannot be relied upon to ensure the humane handling of

⁵³ Mark Bittman, *Some Animals Are More Equal Than Others*, N.Y. TIMES OPINIONATOR BLOG (Mar. 15, 2011, 8:30 PM), <http://opinionator.blogs.nytimes.com/2011/03/15/some-animals-are-more-equal-than-others>.

⁵⁴ JONATHAN SAFRAN FOER, *EATING ANIMALS* 51 (2009).

⁵⁵ Joanna Zelman, *Humane Society Investigation at Wyoming Premium Farms Raises Livestock Welfare Concerns*, HUFF POST GREEN (May 21, 2012, 6:09 PM), www.huffingtonpost.com/2012/05/21/humane-society-wyoming-premium_n_1528541.html.

⁵⁶ Approximately ninety-five percent of hens are kept in battery cages in America. Jonathan R. Lovvorn & Nancy V. Perry, Essay, *California Proposition 2: A Watershed Moment for Animal Law*, 15 ANIMAL L. 149, 152 (2009).

⁵⁷ *The Dirty Six*, HUMANE SOC'Y OF U.S., available at www.humanesociety.org/assets/pdfs/farm/DirtySixBrochure.pdf (last visited Feb. 23, 2014).

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animals.⁵⁸ As Paul Shapiro of HSUS says, “[a]ll that’s required is enough farmers to participate in the cruelty to have it exempted from the cruelty laws.”⁵⁹

Not only do such states lack statutes protecting farm animals; often, these states also have ag-gag laws⁶⁰ that carry heavy penalties, including long-term imprisonment, heavy fines, and misdemeanor or felony charges.⁶¹ These penalties may have served as real deterrents to undercover investigations in such states. For example, since the passage of Kansas’s ag-gag law in 1990,⁶² Montana’s and North Dakota’s⁶³ passage in 1991, and Iowa’s and Utah’s passage in March 2012,⁶⁴ there have been little or no reports of subsequent undercover investigations, successful or otherwise.⁶⁵ Thus, the living conditions of animals in farms in these states are now largely concealed from public scrutiny.

Without undercover reporting and filming, no public attention will be brought to the conditions that animals are subjected to within the factory farming system. Hence, the likelihood that states with ag-gag laws will create animal welfare laws is low.

Several states have tried or are still trying to pass ag-gag laws. In such states, undercover investigations have prompted public outcry, leading to positive steps in curbing animal abuse in the form of new animal welfare legislation or public pressure for suppliers to adopt new animal-handling practices. Taking a look at a couple of these states that

⁵⁸ Zelman, *supra* note 55.

⁵⁹ *Id.*

⁶⁰ For example, Kansas, Montana, Utah, Iowa, and North Dakota all have ag-gag laws as well as animal welfare statutes that exempt common practice. KAN. STAT. ANN. §§ 21-6412(c)(6), 47-1827 (Westlaw 2014); MONT. CODE ANN. §§ 45-8-211(4)(b), 81-30-103 (Westlaw 2014); UTAH CODE ANN. §§ 76-6-112, 76-9-301(1)(b)(ii)(C) (Westlaw 2014); IOWA CODE ANN. §§ 717.2(1)(a), 717A.3A (Westlaw 2014); N.D. CENT. CODE ANN. §§ 12.1-21.1-02, 36-21.2-01(4)(a)(1), 36-21.2-02(3)(a)(1), 36-21.2-03(3)(a)(1), 36-21.2-04(3)(a)(1) (Westlaw 2014).

⁶¹ For example, a violation of Kansas’s ag-gag law is punishable as a felony if the farm suffers damage to the facility, animals, product, or property of \$1,000 or more, and a misdemeanor if the farm suffers less than \$1,000 in damages. KAN. STAT. ANN. § 47-1827(g). In Montana, a violation of their ag-gag law can carry imprisonment from three months up to ten years. MONT. CODE ANN. § 81-30-105 (Westlaw 2014).

⁶² KAN. STAT. ANN. § 47-1827.

⁶³ MONT. CODE ANN. § 81-30-103; N.D. CENT. CODE ANN. § 12.1-21.1-02.

⁶⁴ IOWA CODE ANN. § 717A.3A; UTAH CODE ANN. § 76-6-112.

⁶⁵ Research yields no undercover investigations in Kansas, Montana, North Dakota, or Iowa after the enactment of their respective ag-gag legislations. However, in Utah, charges were brought and later dropped against Amy Meyers for filming abuse witnessed on public land; it was the first prosecution in the country under this type of ag-gag law. Eli Epstein, *Nation’s First “Ag Gag” Prosecution Dismissed in Utah*, MSN NEWS (May 1, 2013), <http://news.msn.com/us/nations-first-ag-gag-prosecution-dismissed-in-utah>. Furthermore, in the case of Idaho, it is too early to tell whether there will be undercover investigations subsequent to the recent passage of the state’s ag-gag law.

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have recently proposed ag-gag legislation, one can see the effects that undercover investigation has had in promoting new anti-cruelty legislation as well as changing company regulations regarding animal welfare.

1. *New York: Introduction of Proposed Legislation to Protect Animals*

Between December 2008 and February 2009, an upstate New York farm, Willet Dairy, was subject to an investigation by MFA.⁶⁶ MFA investigators captured footage of a worker cutting off a calf's tail as it struggled and moaned.⁶⁷ Workers were also caught punching and kicking cows, as well as dragging calves by their legs.⁶⁸ The footage made its way to the American Broadcasting Company, which aired portions of the video,⁶⁹ garnering national attention.

After the investigation, MFA tried to persuade the local district attorney to bring cruelty charges against the farm.⁷⁰ Although the farm itself was cleared of animal cruelty in 2011, one farm worker was charged with cruelty for hitting a cow with a tool.⁷¹ On a larger scale, however, the video stirred a demand for new legislation, which prompted New York Democrat Assemblywoman Linda Rosenthal to propose a bill to ban tail-docking in New York.⁷² The bill is currently pending⁷³ and, if passed, would add New York to the list of three other states⁷⁴ that have banned this cruel practice.

⁶⁶ Mary Esch, *Cow Torture Video: Willet Dairy Caught Burning Off Cows' Horns, Chopping Calf's Tail in Mercy for Animals Expose*, HUFF POST NEW YORK (Mar. 29, 2010, 6:12 AM), www.huffingtonpost.com/2010/01/27/cow-torture-video-willet-_n_438403.html.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Disturbing Reality of Dairy Land*, ABC NEWS (Jan. 26, 2010, 5:43 AM), <http://abcnews.go.com/video/playerIndex?id=9671990>.

⁷⁰ Esch, *supra* note 66.

⁷¹ Debra J. Groom, *Investigations Clear Cayuga County's Willet Dairy Farm of Animal Cruelty*, THE POST-STANDARD (Mar. 25, 2011, 4:50 PM), www.syracuse.com/news/index.ssf/2011/03/investigations_find_no_animal.html.

⁷² Esch, *supra* note 66.

⁷³ Assemb. B. 1076, 2013 Gen. Assemb., Reg. Sess. (N.Y. 2013), currently pending in Agricultural Committee.

⁷⁴ See HUMANE SOCIETY OF U.S., AN HSUS REPORT: WELFARE ISSUES WITH TAIL DOCKING OF COWS IN THE DIARY INDUSTRY (2012), available at www.humanesociety.org/assets/pdfs/farm/HSUS-Report-on-Tail-Docking-of-Dairy-Cows.pdf.

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New York's ag-gag law died in the 2011-2012 legislative session.⁷⁵ However, if it had passed, important investigations like those at Willet Dairy would have ceased, and bills like the tail-docking ban would not have been proposed.

2. *Minnesota: Companies Demand Humane Practices from Suppliers*

In 2012, the public became aware of appalling animal conditions at Christensen Family Farms, a Minnesota-based pig farm.⁷⁶ An MFA investigator acted as a farm employee and filmed conditions over a four-month period.⁷⁷ Footage captured the mutilation of piglets' testicles and tails without anesthesia, and sick piglets getting slammed onto the ground.⁷⁸ Other disturbing findings included the footage of a sow left bleeding after birth, and allegations by MFA that sows were force-fed diarrhea and dead piglets.⁷⁹ The video of the investigation, narrated by the well-known celebrity and animal activist Bob Barker,⁸⁰ was sent to companies that purchase from Christensen Family Farms, with the goal of urging companies to stop using gestation crates that tremendously limit the movement for pregnant sows, causing wounds and sores from continuous contact with bars and concrete flooring.⁸¹

Immediately after a private release of the footage to Costco Wholesale Corporation and Kmart (companies that obtained their pork supply from Christensen Family Farms), both companies quickly denounced the use of gestation crates.⁸² Costco notified MFA of a letter they were sending out to suppliers urging the discontinuation of gestation crates by 2022.⁸³ Although not all retailers have reacted in a similar

⁷⁵ S.B. 5172, 2011 Gen. Assemb., Reg. Sess. (N.Y. 2011). The bill sought to make it a crime to unlawfully tamper with a farm animal. It was referred to the Agricultural Committee on January 4, 2012, with no further actions to date.

⁷⁶ Kathleen Miles, *Walmart, Christensen Farms' Alleged Abuse of Pigs Caught on Undercover Video*, HUFF POST LOS ANGELES (Jul. 19, 2012, 5:07 PM), www.huffingtonpost.com/2012/07/18/walmart-christensen-farms-mercy-for-animals-video_n_1683119.html.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See Bob Barker Biography, BIO., www.biography.com/people/bob-barker-9542237?page=2 (last visited Apr. 8, 2014).

⁸¹ Miles, *supra* note 76.

⁸² Nathan Runkle, *Victory! Costco and Kmart Commit to Ditching Gestation Crates Following MFA Investigation*, MFA BLOG (Jul. 18, 2012), www.mfablog.org/2012/07/victory-costco-and-kmart-commit-to-ditching-gestation-crates-following-mfa-investigation.html.

⁸³ See Steve Karnowski, *Walmart, Christensen Farms Targeted in Mercy for Animals Investigation Focused on Gestation Crates*, HUFF POST GREEN (Jul. 17, 2012, 10:21 PM),

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manner,⁸⁴ the fact that big corporations are pushing for an end to the current living conditions of animals through supplier policy (and perhaps soon, through legislation) is a positive step in ending the suffering of farm animals that may not have happened if not for undercover investigations. Minnesota's proposed ag-gag law did not advance in the 2011-2012 biennium.⁸⁵

Undercover investigations are necessary to ensure continuing change in law and policy for the protection of farm animals. If passed, ag-gag laws would likely have prevented any future steps in the right direction for the welfare of animals in states like New York and Minnesota. Currently, there are no pending anti-cruelty laws seeking to protect farm animals in some of the states with the strictest ag-gag laws, including Iowa and Utah.

B. SIMILARLY, IN CALIFORNIA, VOTERS IMMEDIATELY APPROVED ANTI-CRUELTY MEASURES FOR FARM ANIMALS AFTER A HIGHLY PUBLIC UNDERCOVER INVESTIGATION

In 2007, undercover investigators from HSUS documented animal abuse at Westland/Hallmark Meat Packing Company ("Hallmark") in Chino, California.⁸⁶ Investigators' footage depicted employees ramming downed cows with forklift blades, applying electric shocks to cows' bodies, and torturing them on their way to slaughter.⁸⁷ Within forty-eight hours of speaking with the HSUS investigator who had gone undercover, the United States Department of Agriculture (USDA) recalled all meat bought from the facility—meat that was to be used for school children's lunches across the country.⁸⁸ It remains the largest meat recall in United States history.⁸⁹

While the Hallmark scandal continued to saturate the media, an MFA member worked at Norco Ranch in Menifee, California, and filmed

www.huffingtonpost.com/2012/07/18/walmart-christensen-mercy-for-animals-gestation-crates_n_1683811.html.

⁸⁴ Walmart, a purchaser of Christensen Farms pork, did not react as Costco did. However, a spokeswoman for the company said it will continue to have talks with the suppliers to increase the numbers of sellers that offer crate-free pork. *Id.*

⁸⁵ S.B. 1118, 87th Leg., Reg. Sess. (Minn. 2011); H.B. 1369, 87th Leg., Reg. Sess. (Minn. 2011).

⁸⁶ Lovvorn & Perry, *supra* note 56, at 156.

⁸⁷ *Id.* at 156-57.

⁸⁸ *Id.* at 157.

⁸⁹ Martin, *supra* note 37.

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what he saw at the egg farm.⁹⁰ He witnessed the horrendous confinement of hens in cages so small they could barely move, as well as the mishandling of birds by workers, and the neglect of animals needing veterinary care.⁹¹ MFA took this investigation as an opportunity to encourage voters to take action and vote for better treatment of animals in the state election that year.⁹²

The California ballot in 2008 included Proposition 2, also known as the Prevention of Farm Animal Cruelty Act, or Standards for Confining Farm Animals Initiative.⁹³ This act sought to regulate the confinement of farm animals to allow animals to stand up, lie down, fully extend their limbs, and turn around freely.⁹⁴ The supporters of the act reminded voters of the Hallmark scandal,⁹⁵ and organizations such as MFA used their investigations as tools to encourage affirmative votes for the initiative.⁹⁶ On November 4, 2008, over sixty-three percent of California voters (8,203,769 votes) voted in favor of Proposition 2.⁹⁷ It is set to become law on January 1, 2015.⁹⁸

California's relatively broad laws seem written with the welfare of farm animals in mind, as evidenced by the arguments submitted to the California Secretary of State when Proposition 2 was put on the ballot.⁹⁹ Instead of responding to the Hallmark scandal by creating ag-gag laws to silence undercover investigators and protect agribusiness corporations, California chose to defend its animals. In any effort to ensure continuous animal welfare and consumer safety, it is imperative that the public continue to become aware of the conditions of animals on farms, and the best way to do that is through undercover investigations. The information gleaned from undercover investigations ignites change in law and policy to protect animal welfare, an impossibility for states that have enacted ag-gag laws.

⁹⁰ *California Egg Farm Investigation*, Video, MERCY FOR ANIMALS, www.mercyforanimals.org/norco (last visited Feb. 23, 2014).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Text of Proposed Laws*, *supra* note 51; *Proposition 2 Arguments*, *supra* note 52.

⁹⁴ *Text of Proposed Laws*, *supra* note 51.

⁹⁵ *Proposition 2 Arguments*, *supra* note 52.

⁹⁶ *California Egg Farm Investigation*, *supra* note 90.

⁹⁷ *Statement of Vote, November 4, 2008, General Election*, CAL. SECRETARY OF STATE, www.sos.ca.gov/elections/sov/2008-general/sov_complete.pdf (last visited April 8, 2014).

⁹⁸ *Text of Proposed Laws*, *supra* note 51.

⁹⁹ The Argument in Favor of Proposition 2 defined the proposition as one that "stops cruel and inhumane treatment of animals." *Proposition 2 Arguments*, *supra* note 52.

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III. AG-GAG LEGISLATION OBSTRUCTS THE ENFORCEMENT OF ANIMAL WELFARE STATUTES AND REGULATIONS

The House of Representatives Judiciary Committee has said that “regulators . . . rely on whistleblowers and legitimate undercover investigations to police conditions at food . . . processing facilities and determine compliance with animal welfare . . . laws.”¹⁰⁰ As ag-gag laws eliminate the highly functional method of undercover investigations, there are only a handful of methods for the government and the public to find out about animal abuse in factory farms. These methods are limited to government inspections and whistleblowing by employees not working undercover. Both methods are not often effective and cannot be the only methods relied upon.

A. AG-GAG MEASURES HALT ENFORCEMENT OF ANTI-CRUELTY LAWS BECAUSE REMAINING MEASURES ARE INADEQUATE TO EXPOSE CRUELTY ON FARMS

Before the passage of Iowa’s ag-gag law in 2012, MFA conducted an undercover operation at Iowa Select Farms, one of the nation’s largest producers of hogs.¹⁰¹ Their findings of animals being castrated without anesthesia and piglets being thrown across rooms¹⁰² led to massive public outcry and media attention.¹⁰³ The findings were so disturbing that major food suppliers, such as Costco and Safeway, refused to continue purchasing their pork from Iowa Select.¹⁰⁴ In that same year, another Iowa farm was put under the microscope when birds at Sparboe Farms were being swung by their feet and mutilated.¹⁰⁵ That investigation led not only to the U.S. Food and Drug Administration

¹⁰⁰ Lewis Bollard, *Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ENTVL. L. REP. NEWS & ANALYSIS 10960, 10962 (2012) (citing H.R. Rep. No. 102-498(II), at 4 (1992), reprinted in 1992 U.S.C.C.A.N. 816).

¹⁰¹ Michael J. Crumb, *Iowa Select Farms Undercover Video: Mercy for Animals Footage Shows Inside One of Nation’s Largest Pork Producers*, HUFF POST GREEN (Jun. 29, 2011, 10:14 AM), www.huffingtonpost.com/2011/06/29/iowa-select-farms-mercy-for-animals-video_n_886743.html.

¹⁰² *Id.*

¹⁰³ Nathan Runkle, *Exposing the Truth: MFA’s Pig Farm Investigation Stirs Massive Mainstream Media Exposure*, MFA BLOG (Jul. 7, 2011), www.mfablog.org/2011/07/exposing-the-truth-mfas-pig-farm-investigation-stirs-massive-mainstream-media-exposure.html.

¹⁰⁴ Melissa Allison, *Costco Stops Buying Pork from Farm Shown in Undercover Video*, SEATTLE TIMES, Jul. 1, 2011, 4:29 PM, http://seattletimes.com/html/business/technology/2015486505_costco02.html.

¹⁰⁵ *McDonald’s Cruelty: The Rotten Truth About Egg McMuffins*, MERCY FOR ANIMALS, www.mcdonaldscruelty.com (last visited April 8, 2014).

warning Sparboe about food safety violations at their facility caused by farm conditions, but also to McDonald's dropping Sparboe as its egg supplier.¹⁰⁶ These steps taken by the government and private companies in opposition to abuse are encouraging, but unfortunately, since Iowa passed its ag-gag law in 2012,¹⁰⁷ there have been no subsequent reports of undercover investigations in that state.

Without continued investigative reporting in states like Iowa, authorities are limited in their ability to enforce cruelty laws without quantifiable proof. While inspections by the government and whistleblowing by legitimate workers are options, both of these methods have serious limitations.

1. *Limited Effectiveness of Government Inspection of Farms in Preventing Farm Animal Abuse*

Farms that do not slaughter animals but only raise them are subject to federal regulation only to the extent that federal law regulates the transport of animals on such farms.¹⁰⁸ The handling of animals on these factory farms is regulated solely at the state and local levels.¹⁰⁹ By contrast, slaughterhouses are subject to federal regulation and state regulation.¹¹⁰

State inspection programs operate under an agreement with the Food Safety Inspection Service (FSIS), and enforce requirements similar to those established under the Federal Meat Inspection Act and Poultry Products Inspection Act.¹¹¹ The Federal Meat Inspection Act, as enforced by the Secretary of Agriculture, requires the governmental examination of animals before slaughter,¹¹² the governmental

¹⁰⁶ Steve Karnowski, *McDonald's Drops Egg Supplier over Cruelty Charges*, BLOOMBERG BUSINESSWEEK (Nov. 18, 2011, 7:09 PM), www.businessweek.com/ap/financialnews/D9R3F7F02.htm.

¹⁰⁷ IOWA CODE ANN. § 717A.3A (Westlaw 2014).

¹⁰⁸ See The "28-Hour Law," which provides that an animal must have food or water if transported for more than twenty-eight hours. 49 U.S.C.A. § 80502 (Westlaw 2014).

¹⁰⁹ Animals on farms (where they spend 99% of their lives) have no federal protection because federal laws apply to slaughter and transport. The monitoring of animal handling on factory farms and the enactment of animal cruelty laws fall on state and local governments. Zelman, *supra* note 55.

¹¹⁰ See 21 U.S.C.A. §§ 451–472, 603–605 (Westlaw 2014); see also CAL. FOOD & AGRIC. CODE § 19501(b)(1) (Westlaw 2014) (describing the required method by which an animal may be slaughtered in California).

¹¹¹ *Requirements for State Programs*, USDA, www.fsis.usda.gov/wps/portal/fsis/topics/inspection/state-inspection-and-cooperative-agreements/requirements-for-state-programs (last visited Feb. 23, 2014).

¹¹² 21 U.S.C.A. § 603(a).

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examination of carcasses post-mortem,¹¹³ and the governmental oversight of humane slaughter.¹¹⁴ The Poultry Products Inspection Act requires the pre- and post-mortem inspection of poultry,¹¹⁵ and the compliance with sanitary facilities and practices,¹¹⁶ among other requirements.¹¹⁷

Although these requirements have been put in place, inspections to ensure compliance with these laws are infrequent and inadequate. In monitoring compliance regarding humane slaughter, FSIS District Veterinary Medical Specialists inspect facilities only once every twelve to eighteen months.¹¹⁸ Each slaughterhouse has only one FSIS Public Health Veterinarian assigned to it to observe animal handling and slaughter.¹¹⁹ Moreover, with 6,200 federally inspected slaughterhouses and animal processing establishments in the United States, FSIS employs only 8,000 personnel to oversee the establishments,¹²⁰ a ratio of just 1.29 personnel per facility.

The inspection program is not a rigorous one. USDA inspectors generally have only two seconds to examine each bird in a poultry farm while looking for more than a dozen diseases or defects.¹²¹ This inspector examines about twenty-five thousand birds every day.¹²² It is not difficult to imagine the mistakes that may arise when one individual is in charge of such large-scale oversight. Journalist Scott Bronstein, who conducted interviews with USDA poultry inspectors from thirty-seven plants, said that every week, “millions of chickens leaking yellow pus, stained by green feces, contaminated by harmful bacteria, or marred by lung and heart infections, cancerous tumors, or skin conditions are shipped for sale to consumers.”¹²³

¹¹³ *Id.* §§ 604–605.

¹¹⁴ *Id.* § 603(b).

¹¹⁵ *Id.* § 455(a), (b).

¹¹⁶ *Id.* § 456(a).

¹¹⁷ *See id.* §§ 451–472.

¹¹⁸ *Key Facts: Humane Slaughter*, USDA, www.fsis.usda.gov/wps/wcm/connect/fsis-content/internet/main/topics/food-safety-education/get-answers/food-safety-fact-sheets/production-and-inspection/key-facts-humane-slaughter/key-facts-humane-slaughter (last visited Apr. 8, 2014).

¹¹⁹ *Id.*

¹²⁰ *Inspection for Food Safety: The Basics*, USDA, www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/production-and-inspection/inspection-for-food-safety-the-basics/inspection-for-food-safety-basics (last visited Feb. 23, 2014).

¹²¹ FOER, *supra* note 54, at 134.

¹²² *Id.*

¹²³ *Id.*

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The graver concern, however, is the fact that government-led inspections at slaughterhouses are starting to phase out. The USDA has proposed plans to begin a program that would privatize the inspection of poultry products.¹²⁴ This program would limit the scope of the FSIS inspector's duties to focus solely on detecting bacteria in animals on the production line, leaving general inspection of the animals to the private establishment itself.¹²⁵

The USDA has already begun piloting the program in two dozen slaughterhouses since 1998 and permits up to two hundred birds to be slaughtered per minute, which is much faster than in non-program plants.¹²⁶ Although the USDA has released little to no information on how the pilot program is working, according to documents obtained by the consumer watch organization Food & Water Watch, current regulations are not being enforced by private establishments, leading to parts of birds (such as scabs, sores, feathers and digestive tract tissue) not being correctly removed from chicken carcasses.¹²⁷ The drastically increased rate of production and new responsibility have also put extreme pressure on regular workers at these factory farms, who, even before the announcement of the program, were quitting factories by the hour because the speed of processing animals was "too fast to keep up with."¹²⁸ Further, allowing private regulation could make it easy to manipulate health safety testing results.¹²⁹

Inadequate governmental oversight of the handling and processing of farm animals underscores the need to allow undercover investigations to ensure that animals at food processing facilities are being treated humanely, and that our food supply is free from harmful contaminants.

¹²⁴ Dave Jamieson, *USDA Poultry Plant Proposal Could Allow Plants To Speed Up Processing Lines, Stirring Concern for Workers*, HUFF POST POLITICS (Apr. 19, 2012, 4:44 PM), www.huffingtonpost.com/2012/04/19/usda-poultry-inspections-workers_n_1438390.html.

¹²⁵ *Id.*

¹²⁶ Anna Ghosh & Rich Bindell, *Consumer Group Opposes USDA's Privatization of Poultry Inspection*, FOOD & WATER WATCH (Jan. 20, 2012), www.foodandwaterwatch.org/pressreleases/consumer-group-opposes-usda's-privatization-of-poultry-inspection.

¹²⁷ *Id.*

¹²⁸ Jamieson, *supra* note 124.

¹²⁹ Consumer Watch Food & Water Watch Organization Executive Director Wenonah Hauter stated that "[the USDA claims that] salmonella rates in the pilot project plants are lower than the rates for plants that receive conventional inspection. But given the GAO criticism of the design of the program and the fact that production practices can easily be manipulated during government testing periods, FSIS's claims are suspect." Ghosh & Bindell, *supra* note 126.

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2. *Limited Effectiveness of Legitimate Employee Whistleblowers in Preventing Farm Animal Abuse*

It is not advisable to rely heavily on legitimate employees to blow the whistle on their employers. Whistleblowing generally carries a negative connotation and often results in harassment by co-workers,¹³⁰ and it has harmed employees in other serious ways. In 1999, a survey of over seven hundred U.S. whistleblowers showed that sixty-nine percent of them had lost their jobs or were forced to retire.¹³¹ An earlier study of over two hundred U.S. whistleblowers showed that twenty-seven percent of them faced lawsuits, and twenty-six percent of them required psychiatric or medical referrals after blowing the whistle.¹³²

The repercussions of whistleblowing can be real deterrents for anyone trying to blow the whistle on their employer. Below the fears of job loss or harassment often lie deeper fears, especially for workers at factory farms. More than half of all farm workers are unauthorized workers.¹³³ These workers are often threatened by employers to keep under the radar, as evidenced by the words of one Arkansas poultry plant worker: “They have us under threat [bajo amenaza] all the time. They know most of us are undocumented My supervisor said they say they’ll call the INS if we make trouble.”¹³⁴ For the same reasons that undocumented workers are unlikely to complain about their own work conditions (including low pay and hazardous conditions),¹³⁵ they are also unlikely to complain about the mistreatment of animals.

The underlying truth is that both the government and the American public cannot solely rely on government inspections or legitimate employee whistleblowers to enforce anti-cruelty and food safety laws. Many violations would not be unearthed if more ag-gag laws are adopted.

¹³⁰ A 1999 survey of almost 800 US whistleblowers showed that sixty-nine percent of them were criticized or avoided by co-workers. Kim R. Sawyer, Jackie Johnson & Mark Holub, *The Necessary Illegitimacy of the Whistleblower* 4 (working paper, unnumbered, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917316.

¹³¹ *Id.*

¹³² *Id.*

¹³³ This statistic was gathered from a 2001-2002 national survey. DANIEL CARROLL ET AL., U.S. DEP’T OF LABOR, A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARM WORKERS 3 (2005), available at www.doleta.gov/agworker/report9/naws_rpt9.pdf.

¹³⁴ LANCE COMPA ET AL., HUMAN RIGHTS WATCH, BLOOD, SWEAT AND FEAR: WORKERS’ RIGHTS IN U.S. MEAT AND POULTRY PLANTS 111 (2004), available at www.hrw.org/reports/2005/usa0105/usa0105.pdf.

¹³⁵ *Factory Farm Workers*, FOOD EMPOWERMENT PROJECT, www.foodispower.org/factory_farm_workers.php (last visited Dec. 24, 2012).

B. UNDERCOVER INVESTIGATIONS IN STATES LIKE CALIFORNIA HAVE DIRECTLY LED TO CRIMINAL AND CIVIL LIABILITY FOR THOSE INVOLVED

The undercover video footage from the Hallmark scandal in California that raised concern about animal treatment and human health risks led not only to new legislation but also to civil law suits against the company, filed by both the U.S. Government and private organizations, as well as criminal charges against the individuals who perpetrated the abuse.

In a civil suit filed by HSUS under the federal False Claims Act, a \$497 million judgment was entered against Hallmark.¹³⁶ The U.S. Department of Justice also later joined the suit, claiming Hallmark misrepresented its treatment of animals as abiding by federal regulations, when in reality, it slaughtered downed cows at least three times per month.¹³⁷ For this, Hallmark must pay the U.S. government \$316,802 in settlement over the span of five years.¹³⁸ The company is now defunct¹³⁹ and although HSUS will never see its multi-million dollar-judgment, the undercover investigation led to the U.S. government recognizing animal abuse and taking action against the perpetrator.

Hallmark's employees have also seen their share of criminal penalties. Due to the investigation, Daniel Navarro, the employee caught abusing the animals, was charged with five felony counts and three misdemeanor counts under California's anti-cruelty statutes.¹⁴⁰ Another worker, Jose Sanchez, was charged with three misdemeanors.¹⁴¹

California is not the only state that has used undercover footage to successfully enforce anti-cruelty statutes. In 2010, an MFA undercover investigation at a Maine egg farm led to the filing of a civil complaint regarding the abusive treatment of hens.¹⁴² The owner pled guilty to ten civil counts of animal cruelty, and as part of a settlement, agreed to pay restitution and fines of \$130,000.¹⁴³ Moreover, the owner agreed to

¹³⁶ Victoria Kim, *Chino Slaughterhouse To Pay \$300,000 in Settlement*, L.A. TIMES, Nov. 16, 2012, www.latimes.com/news/local/la-me-slaughterhouse-settlement-20121117,0,1072908.story.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Lovvorn & Perry, *supra* note 56, at 157-158.

¹⁴¹ *Id.* at 158.

¹⁴² Nathan Runkle, *Maine Egg Producer Pleads Guilty to 10 Counts of Cruelty to Animals*, MFA BLOG (Jun. 7, 2010), www.mfablog.org/2010/06/maine-egg-producer-pleads-guilty-to-10-counts-of-cruelty-to-animals.html.

¹⁴³ *Id.*

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random inspection of the farm for the following five years.¹⁴⁴ That same year, an employee was charged with twelve misdemeanor counts of animal cruelty after he was caught on undercover investigation footage torturing animals at a dairy farm in Ohio.¹⁴⁵ In December 2011, undercover investigators entered the Butterball Turkey farm in North Carolina and filmed turkeys being kicked and thrown by employees.¹⁴⁶ Two months after the release of the footage, five Butterball employees were charged with felony and misdemeanor animal cruelty.¹⁴⁷ In 2012, nine workers at Wyoming Premium Farms were charged with animal cruelty after an undercover investigation showed workers punching pigs and throwing piglets in the air.¹⁴⁸

None of these civil penalties or criminal charges would have happened if not for the undercover investigations that brought attention to the abuse at the farms. Although it can be difficult to get a prosecutor to charge a farm with animal cruelty, public pressure and social attention that are often brought on by undercover reporting can be effective in encouraging prosecutors to press charges.¹⁴⁹ Without undercover investigations, companies like those based in Maine or Ohio have no incentive to ensure their farms' animals are treated humanely. This is exactly what ag-gag laws seek to protect: noncompliance with animal treatment standards. Without the evidence that undercover investigations provide to authorities, enforcing anti-cruelty laws would be difficult, if not impossible.

¹⁴⁴ *Id.*

¹⁴⁵ Nathan Runkle, *Update! Dairy Farm Worker Arrested on 12 Counts of Animal Cruelty*, MFA BLOG (May 27, 2010), www.mfablog.org/2010/05/update---dairy-farm-worker-arrested-on-12-counts-of-cruelty.html.

¹⁴⁶ *Butterball Turkey Raid Leads to Criminal Charges and Arrests*, HUFF POST FOOD (Feb. 16, 2012, 2:47 PM), www.huffingtonpost.com/2012/02/16/butterball-turkey-raid_n_1282308.html.

¹⁴⁷ *Id.*

¹⁴⁸ Joanna Zelman, *Wyoming Premium Farms Employees Charged with Animal Cruelty, Humane Society Says*, HUFF POST GREEN (Dec. 24, 2012, 1:22 PM), www.huffingtonpost.com/2012/12/24/wyoming-premium-farms-charge-animal-cruelty_n_2359465.html.

¹⁴⁹ See Rashida Harmon, *Animal Law: Restrictions and Rewards*, VEGNEWS (Mar. 19, 2012), <http://vegnews.com/articles/page.do?pageId=4319&catId=1>.

IV. AG-GAG LEGISLATION HINDERS THE EXPANSION OF EFFECTIVE ANIMAL WELFARE STATUTES AND REGULATIONS

Proposals to change legislation come about when current laws are inadequate or ineffective in serving the needs of the populace.¹⁵⁰ Often, the need to change laws comes from public pressure to change laws, as described by Matthew Liebman, an attorney at Animal Legal Defense Fund: “When we sue, we’re suing to enforce laws, and if those laws aren’t there to begin with—if there hasn’t been public pressure or political pressure, social movements or activism, to get those laws in place—then we have nothing to sue about.”¹⁵¹ Therefore, in order to obtain public pressure or social movements to change current laws, we must first show that the law is flawed. This Part focuses on two states that stand on opposite ends of the spectrum in changing animal welfare laws: in one state, ag-gag law exists, and in the other, it does not.

A. NORTH DAKOTA HEADED IN THE WRONG DIRECTION FOR ANIMAL WELFARE WHEN THE STATE AMENDED ITS CONSTITUTION TO PROTECT FARMERS FROM ANIMAL WELFARE LEGISLATION

North Dakota has a strict ag-gag law that prohibits exercising control of a facility with intent to deprive the owner and damage the enterprise, entering a facility with intent to commit a prohibited act, or using or attempting to use a recording device.¹⁵² With an ag-gag law in place, expansion of existing anti-cruelty laws that protect farm animals in North Dakota will likely not take place. In fact, the State is on a steady path backward and has begun narrowing its protections of farm animals.

In November 2012, North Dakota passed Measure 3 with almost a sixty-seven-percent vote in favor.¹⁵³ The Measure amends the North Dakota Constitution to preserve the right of farmers to “engage in modern farming . . . practices.”¹⁵⁴ More importantly, it restricts any legislation that would abridge “the right of farmers . . . to employ

¹⁵⁰ “The municipality is usually requested by a local officer to prepare legislation on a specific subject because there is a need for a new local law; or because there is a need to change the existing law, to supplement it, or to amplify it.” N.Y. STATE DEP’T OF STATE, ADOPTING LOCAL LAWS IN NEW YORK STATE 10 (1998, reprinted 2012), available at www.dos.ny.gov/lg/publications/Adopting_Local_Laws_in_New_York_State.pdf.

¹⁵¹ Harmon, *supra* note 149.

¹⁵² N.D. CENT. CODE ANN. § 12.1-21.1-02 (Westlaw 2014).

¹⁵³ *Secretary of State Election Night Results November 6th 2012*, N.D. VOICES, <http://results.sos.nd.gov/resultsSW.aspx?text=BQ&type=SW&map=CTY> (last visited Feb. 23, 2014).

¹⁵⁴ N.D. CONST. ART. XI, § 29 (Westlaw 2014).

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agricultural technology, modern livestock production, and ranching practices.”¹⁵⁵ President of the North Dakota Farm Bureau, Eric Aasmundstad, said the goal of the measure was to protect the agricultural industry from stricter animal welfare laws that might be sought by organizations like HSUS.¹⁵⁶ Supporters of the measure pointed to HSUS’s success in supporting animal welfare legislation in other states, such as California’s Proposition 2, to show the need to protect the farming industry in North Dakota from legislation that would damage the industry.¹⁵⁷

Measure 5 indicates North Dakota’s regression in the farm animal welfare movement. Instead of listening to advocacy groups’ concerns about animal welfare on farms, North Dakota took a defensive position and indefinitely shielded its farmers from the important work of national animal-rights advocacy groups, thereby significantly limiting the avenues for expansion of anti-cruelty laws. One explanation of this regression can be found in North Dakota’s ag-gag law and the prevalence of such laws recently appearing on ballots across the nation. North Dakota is a strong example of how the existence of an ag-gag law can change a state’s animal welfare climate, even decades after the ag-gag law went into effect.

B. UNDERCOVER INVESTIGATIONS HAVE LED DIRECTLY TO THE EXPANSION OF CALIFORNIA’S EXISTING ANTI-CRUELTY LAWS

California trends in the opposite direction of North Dakota. Instead of amending the state constitution to avoid animal welfare legislation, California fought for animal welfare laws through measures such as the Standards for Confining Farm Animals initiative mentioned in Part II. Specifically, the California initiative addresses the need of farm animals to express movement and mobility.¹⁵⁸ California also has several other anti-cruelty laws, some applying to all animals (including farm animals¹⁵⁹) and others tailored specifically to farm animals. California

¹⁵⁵ *Id.*

¹⁵⁶ Blake Nicholson, *North Dakota Farmers Push for Constitutional Right To Farm*, CNS NEWS (Oct. 31, 2011, 3:05 AM), www.cnsnews.com/news/article/north-dakota-farmers-push-constitutional-right-farm.

¹⁵⁷ *Id.*

¹⁵⁸ *Proposition 2 Arguments*, *supra* note 52.

¹⁵⁹ “Animals” are defined as “every dumb creature.” CAL. PENAL CODE § 599b (Westlaw 2014); *see* *People v. Baniqued*, 101 Cal. Rptr. 2d 835, 840 (Ct. App. 2000) (holding that “every dumb creature” includes roosters and other birds: “[T]he phrase ‘dumb creatures’ describes all animals except human beings. The use of the adjective ‘every’ in the definition indicates that a broad meaning was intended.”)

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law prohibits the malicious and intentional maiming, mutilation, torture, or wounding of animals.¹⁶⁰ A person must not overwork an animal, or deprive an animal of food, drink, or shelter.¹⁶¹ A person cannot cause an animal to be cruelly beaten, mutilated, or cruelly killed; and whoever having custody of an animal, subjects the animal to “needless suffering” or in any other way abuses the animal is guilty of animal cruelty.¹⁶² Violation of this law can be punishable as a felony or misdemeanor, with imprisonment, fine, or both.¹⁶³ Specifically regarding farm animals, California regulates their slaughter through a fairly detailed law providing that an animal need be first rendered “insensible to pain” in a rapid and effective manner.¹⁶⁴ The State has also recently outlawed the painful force-feeding of birds for the purpose of enlarging their livers for foie gras.¹⁶⁵

California’s unwavering support for better conditions for farm animals is further evidenced by its triumph over potential setbacks. In early 2013, an ag-gag bill was proposed that would have required mandatory reporting of animal abuse within a limited time period;¹⁶⁶ however, the bill was met with such strong opposition from organizations across the state that the author, Assemblyman Jim Patterson, withdrew the bill two months after its introduction.¹⁶⁷

California’s ever-growing anti-cruelty statute and its stance against animal abuse, coupled with the recently-passed Proposition 2, have allowed California to take the status as one of the country’s most progressive states in terms of animal welfare and consumer safety. However, there is still much more that can be done to ensure that animals are being treated humanely and our food supply is not hazardous to our health.¹⁶⁸ The potential for California to expand on its anti-cruelty

¹⁶⁰ CAL. PENAL CODE § 597(a) (Westlaw 2014).

¹⁶¹ *Id.* at § 597(b).

¹⁶² *Id.*

¹⁶³ *Id.* at § 597(d).

¹⁶⁴ CAL. FOOD & AGRIC. CODE § 19501(b)(1) (Westlaw 2014).

¹⁶⁵ CAL. HEALTH & SAFETY CODE § 25981 (Westlaw 2014). Fatty geese liver is also known as foie gras. *Force-Fed Animals*, HUMANE SOC’Y OF U.S., www.humanesociety.org/issues/force_fed_animals (last visited April 8, 2014).

¹⁶⁶ Assem. B. 343, 2013-2014 Leg., Reg. Sess. (Cal. 2013).

¹⁶⁷ *California’s Dangerous Anti-Whistleblower Bill Pulled by Author*, HUMANE SOC’Y OF U.S. (Apr. 17, 2013), www.humanesociety.org/news/press_releases/2013/04/calif-anti-whistleblower-bill-pulled-041713.html#UwkjFShBuQY.

¹⁶⁸ Perhaps one proposition could be the taxation of meat; the proceeds could be applied to hiring a multitude of state-level factory farm inspectors. These inspectors could act as an added layer of protection on top of undercover investigations, to increase pressure on farms to treat animals more humanely and ensure that contaminants stay out of the food supply. Another proposition could be to limit the amount of antibiotics in feed that are given to animals; excessive antibiotic use causes

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statutes is unrestricted by ag-gag laws, and one can only look forward to the new legislation that will undoubtedly follow so long as California keeps its status quo of being mindful of animal welfare and consumer safety.

CONCLUSION

The rising prevalence of ag-gag laws should be a loud and clear warning to those of us who care about animal treatment as well as our own health safety. Individuals cannot rely on self-policing farms to ensure that animals are treated humanely or that animal products are safe to eat. Nor can individuals rely on state legislatures to decide what is best for us and strike down ag-gag laws on their own initiative.

States that have ag-gag laws pending should not allow them to pass. States that have never received ag-gag law proposals should ensure that no bills will be introduced, and they can do so through public awareness and the general encouragement of the humane treatment of animals. Citizens in states that currently have ag-gag laws should push to repeal them. Steps have been taken to fight back against ag-gag laws currently in existence,¹⁶⁹ but the trend must continue. States should follow in California's footsteps because, although the State is not perfect, it is a pioneer with regard to animal welfare by continuously striking down ag-gag laws and strengthening anti-cruelty laws.

The legal and social effects of undercover investigations are clear: cruelty laws have been changed and strengthened, perpetrators of cruelty have been punished, and people have become aware of the suffering of animals and of the health and safety implications caused to humans by poor animal treatment. Without the ability to conduct undercover investigations legally, individual states would be eliminating the catalyst of change that prompts how animal cruelty laws are created, enforced, and expanded upon for our society.

not only painful physical conditions for animals, but also antibiotic resistance in consumers. California could also expand on Proposition 2 and require additional or separate living space for animals so that they can best engage in behaviors natural to them.

¹⁶⁹ A lawsuit against Utah's ag-gag law was filed in 2013, making it the first challenge to ag-gag laws. See Civil Rights Complaint, Animal Legal Defense Fund v. Herbert, No. 2:13-cv-00679 (D. Utah Jul. 22, 2013); see also *Taking Ag-Gag to Court*, ANIMAL LEGAL DEFENSE FUND, <http://aldf.org/cases-campaigns/features/taking-ag-gag-to-court> (last visited Feb. 23, 2014). Idaho's recent ag-gag law is also being challenged in the United States District Court for the District of Idaho. Civil Rights Complaint, Animal Legal Defense Fund v. Otter, No. 1:14-cv-104 (D. Idaho Mar. 17, 2014), available at <https://acluidaho.org/wpsite/wp-content/uploads/1.complaint1.pdf>.