

*Hogwash: How “Ag Gag” Legislation is Caving in to Big Business and Crippling Constitutionally Protected Freedoms of the Press*

By David Slade

***Introduction***

In an alarming trend, state legislatures across the country are introducing laws that impose civil and even criminal penalties on parties who obtain employment at agricultural facilities under false pretenses.<sup>1</sup> The animus behind the bills is a desire to thwart tactics used by animal rights activists and investigative reporters, who have historically embedded themselves as floor workers at these factories and farms, surreptitiously recording abusive and unsanitary practices and ultimately publishing their findings, causing significant public outcry and even investigations by regulatory agencies.<sup>2</sup>

Thus the intent of these “ag gag” laws is to shut down, or at least criminalize, a person’s ability to gather and report news related to food safety and public health.<sup>3</sup> Historically, newsgathering entities have enjoyed significant First Amendment protections from litigation by aggrieved subjects of news reports and from laws put in place to prohibit the publishing of the news.<sup>4</sup> However, the First Amendment’s protections are at their apex only when a finished product—a published article, a televised broadcast, etc.—is being threatened, and where a law attacks one’s ability to gather information that will ultimately be used in the finished work, as is the case with ag gag laws, the jurisprudence is less clear.<sup>5</sup>

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<sup>1</sup> See e.g., Iowa H. File 589, 84th Gen. Assembly (Mar. 8, 2011), *infra*; Utah H. 187, 60th Utah Legis., 2012 Gen. Sess. (Feb. 8, 2012), *infra*.

<sup>2</sup> See Cody Carlson, *The Atlantic, The Ag-Gag Laws: Hiding Factory Farm Abuses from Public Scrutiny*, <http://www.theatlantic.com/health/archive/2012/03/the-ag-gag-laws-hiding-factory-farm-abuses-from-public-scrutiny/254674/> (Mar. 20, 2012).

<sup>3</sup> *Id.*

<sup>4</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)

<sup>5</sup> See e.g. *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Herbert v. Lando*, 441 U.S. 153, (1979); *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999).

This paper will examine the constitutionality of ag gag laws. Section I details the current landscape of ag gag legislation in the United States, focusing in particular on the recently enacted bills in Iowa and Utah. Section II provides a synopsis of relevant First Amendment jurisprudence, detailing the protections afforded to the press by the Bill of Rights, particularly within the context of the newsgathering process. Section III makes the argument that, in light of the opinions of the Supreme Court of the United States dealing with First Amendment protections of the press, the ag gag laws put in place in Iowa and Utah, and any similarly-worded legislation, are unconstitutional. Further, such legislation is an impermissible prior restraint, and is thus constitutionally unsound. Finally, this paper makes the argument that ag gag laws, as written, are violative of the Equal Protection Clause of the Fourteenth Amendment.

## SECTION I

### *The Current Landscape of State “Ag Gag” Laws*

#### **I. Background**

On February 28, 2012, the Iowa legislature passed House File 589 (“HF 589”), which created the offense of “agricultural production facility fraud.”<sup>6</sup> The bill was signed into law by Iowa Governor Terry Branstad three days later.<sup>7</sup> Broadly, the law criminalizes the actions of a party making misrepresentations in order to gain access to a farm or agricultural production facility (defined by the statute as either an “animal facility” or a “crop operation property”).<sup>8</sup> Several weeks later, Governor of Utah Gary Hebert signed House Bill 187 (“HB 187”) into law, creating the crime of “agricultural operation interference,” which penalizes not only use of misrepresentation in the course of gaining access to a farm, but also the unauthorized creation of

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<sup>6</sup> Iowa H. File 589, 84th Gen. Assembly (Mar. 8, 2011) (available at <http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&menu=false&ga=84&hbill=HF589>).

<sup>7</sup> Transmittal Ltr. from Terry Branstad, Gov., Iowa, to Matt Schultz, Sec. of St., Iowa (Mar. 2, 2012).

<sup>8</sup> Iowa H. File 589, 84th Gen. Assembly.

video or audio recordings at such an establishment.<sup>9</sup> This type of legislation is not novel, it must be noted: North Dakota, Kansas, and Montana have comparable laws,<sup>10</sup> which were passed over 20 years ago, in 1990-91.<sup>11</sup>

Critics of these and similar bills being submitted to legislatures around the country,<sup>12</sup> say that ag gag laws are exclusively meant to target undercover animal rights activists and prevent them from taking and broadcasting videos depicting animal cruelty and other unsavory practices at factory farms.<sup>13</sup> Historically these activists, along with journalists from the mainstream media, have been able to gain access to facilities by obtaining entry level positions with the use of false résumés, and then taking video footage with hidden cameras.<sup>14</sup> In 2010, for example, an investigator working with the Humane Society uncovered numerous abuses at Iowa egg farms—including overcrowded cages filled with a combination of dead and live laying hens—as a result of going undercover as an egg farm employee.<sup>15</sup> The Humane Society ultimately released a video of these conditions, prompting a national outcry and an investigation by the FDA.<sup>16</sup>

Proponents of the Iowa legislation state that instead of an attempt to prevent embarrassing exposés of industry abuses, the law’s purpose is one of “bio-security” and that it seeks to prevent the introduction of contaminants to factory farms, introduced via unwanted

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<sup>9</sup> Robert Gehrke, *Salt Lake Trib.*, *Herbert Signs So-Called “Ag Gag” Bill*, <http://www.sltrib.com/sltrib/politics/53758916-90/animal-bill-brown-farm.html.csp> (Mar. 20, 2012); Utah H. 187, 60th Utah Legis., 2012 Gen. Sess. (Feb. 8, 2012) (available at <http://le.utah.gov/~2012/bills/static/HB0187.html>).

<sup>10</sup> N.D. Cent. Code Ann. § 12.1-21.1-02 (WL current through end of 2011 Reg. and Spec. Sess.) (prohibiting videotaping or other recording methods in an animal facility without the consent of the facility’s owner); Kan. Stat. Ann. § 47-1827 (WL current through end of 2011 Reg. Sess.) (same); Mont. Code Ann. § 81-30-103 (WL current with all 2011 laws, Code Commr. changes, and 2010 ballot measures) (same, but adds the requirement that the malfeasant videographer must have “intent to commit criminal defamation”).

<sup>11</sup> Dan Flynn, *Food Safety News*, *Five States Now Have “Ag-Gag” Laws on the Books*, <http://www.foodsafetynews.com/2012/03/five-states-now-have-ag-gag-laws-on-the-books/> (Mar. 26, 2012).

<sup>12</sup> *Id.* (Comparable bills are pending in Minnesota, Missouri, Nebraska, New York, and Tennessee).

<sup>13</sup> Kathleen Masterson, *Ag-Gag Law Blows Animal Activists’ Cover*, National Public Radio (Mar. 10, 2012), <http://www.npr.org/2012/03/10/148363509/ag-gag-law-blows-animal-activists-cover>.

<sup>14</sup> Carlson, *supran.* 2.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

trespassers.<sup>17</sup> Some of the legislators in Utah are more candid, however, stating that their bill is aimed at “animal-rights terrorists” and that, regarding the farming operations, they “certainly don't want some jack wagon coming in and taking pictures of them.”<sup>18</sup>

The Iowa law has been over a year in the making.<sup>19</sup> An earlier version of the bill, passed by the House but voted down by the Senate in March of 2011, had language similar to HB 187, making it a crime to take a video, or make any other kind of record, at an animal facility without the consent of the owner.<sup>20</sup> The original criminal penalty for unauthorized videotaping, as well as for agricultural production facility fraud, was an aggravated misdemeanor for the first conviction, and a class “D” felony for subsequent convictions.<sup>21</sup>

The Iowa Attorney General’s office informed the Senate that this iteration of HF 589 would likely face—and be struck down in the event of—a constitutional challenge.<sup>22</sup> The

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<sup>17</sup> Interview by Kai Ryssdal with Joe Seng, St. Sen., Iowa, *Iowa’s “Ag Gag” Sponsor Defends Bill*, Marketplace for American Public Media (Mar. 1, 2012) (“These are private properties owned by either farmers or corporations that have strict bio-security facilities that do not want either birds, mice, vermin, anything like that, even cockroaches entering into these facilities -- people included.”) (available at <http://www.marketplace.org/topics/life/iowas-ag-gag-sponsor-defends-bill>); see also Cecil Dolecheck, St. Rep., Iowa, *House Approves Animal and Crop Facility Aggro-Terrorism Law Update*, Dolecheck’s Details (constituent newsltr.) (Mar. 21, 2011) (Touting an earlier version of HF 589 as an “Agro-Terrorism Law”); Jason Clayworth, *Des Moines Register*, *Group Launches “Stop Ag-Gag” Website*, <http://blogs.desmoinesregister.com/dmr/index.php/2012/03/21/group-launches-stop-ag-gag-web-site/> (Mar. 21, 2012) (“The legislation was a response to what farm advocates have previously described as agricultural terrorism by groups that infiltrate farm facilities, sometimes even staging events to sabotage animal production.”); Uncredited Senate Intern, *Protecting Agricultural Producers from Fraud*, Iowa Senate Democrats (Mar. 2, 2012) (available at <http://www.senate.iowa.gov/democrats/protecting-agricultural-producers-from-fraud/>) (“Supporters say the bill will provide protections for livestock producers concerned about exposure to disease and other problems associated with unauthorized people accessing their private property under false pretenses”).

<sup>18</sup> Dennis Romboy, *Deseret News*, *House Passes Bill to Stop “Animal-Rights Terrorists” Shooting Video on Farms*, <http://www.deseretnews.com/article/865550866/House-passes-bill-to-stop-animal-rights-terrorists--shooting-video-on-farms.html> (Feb. 24, 2012).

<sup>19</sup> Jason Clayworth, *Des Moines Register*, *“Ag-Gag” Bill Passes Legislature, Headed to Governor; Opponents Predict Dire Consequences*, <http://blogs.desmoinesregister.com/dmr/index.php/2012/02/28/iowa-senate-approves-ag-gag-bill-opponents-predict-dire-consequences/> (Feb. 28, 2012).

<sup>20</sup> Iowa H. File 589, 84th Gen. Assembly, Amendment H-1292 (Mar. 14, 2011) (see Proposed Section 717A.2A – *Animal Facility Interference*). For the entire legislative history of HF 589, see <http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=DspHistory&var=HF&key=0642C&GA=84>.

<sup>21</sup> Iowa H. File 589, 84th Gen. Assembly, Amendment H-1292 (Mar. 14, 2011) (see Proposed Section 717A.2A – *Animal Facility Interference*). Penalties for a class “D” felony can include a prison sentence of up to five years and a fine of between \$750 and \$7,500. Iowa Code § 902.9(5) (WL current with immediately effective legis. signed as of 5/8/2012 from the 2012 Reg. Sess.).

<sup>22</sup> Clayworth, *supra* n. 17.

Supreme Court, it noted, has previously ruled that videos depicting animal cruelty amount to the exercise of free speech.<sup>23</sup> In response, senators held a series of meetings with the Attorney General's office, in which they carved out the language banning unauthorized videotaping, and instead focused all of their attention on agricultural production facility fraud.<sup>24</sup> This iteration of the bill is what was ultimately signed into law by Branstad in March of this year.<sup>25</sup>

**a. HF 589 and the Crime of Agricultural Production Facility Fraud**

Under the final adopted language of HF 589, a person is guilty of agricultural production facility fraud if he or she

- a. Obtains access to an agricultural production facility by false pretenses.
- b. Makes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized.<sup>26</sup>

First time violators are guilty of a misdemeanor, while each subsequent violation counts as an aggravated misdemeanor.<sup>27</sup> Additionally, criminal liability attaches to parties who conspire to commit, aid, abet, or knowingly prohibit the apprehension of a practitioner of agricultural production facility fraud.<sup>28</sup>

**b. HB 187 and the Crime of Agricultural Operation Interference**

The Utah law, which is substantially broader than its Iowa analog both in terms of the behavior contemplated and the penalties applied, reads

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<sup>23</sup> *Id.*

<sup>24</sup> Interview by Kai Ryssdal with Joe Seng, St. Sen., Iowa, *supra* n. 17. (“I understand that [critics of HF 589] think U.S. constitutional liberties are being violated. I assure you we have been with the AG's office on at least 8-10 meetings and they've assured us that no constitutional liberties are being violated as far [as] videotaping. Actually, it doesn't even not allow videotaping or recording devices in there”).

<sup>25</sup> Iowa H. File 589, 84th Gen. Assembly.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

(1) As used in this section, "agricultural operation" means property used for the production of livestock, poultry, livestock products, or poultry products.

(2) A person is guilty of agricultural operation interference if the person:

(a) without consent from the owner of the agricultural operation, or the owner's agent, knowingly or intentionally records an image of, or sound from, the agricultural operation by leaving a recording device on the agricultural operation;

(b) obtains access to an agricultural operation under false pretenses;

(c) (i) applies for employment at an agricultural operation with the intent to record an image of, or sound from, the agricultural operation;

(ii) knows, at the time that the person accepts employment at the agricultural operation, that the owner of the agricultural operation prohibits the employee from recording an image of, or sound from, the agricultural operation; and

(iii) while employed at, and while present on, the agricultural operation, records an image of, or sound from, the agricultural operation; or

(d) without consent from the owner of the operation or the owner's agent, knowingly or intentionally records an image of, or sound from, an agricultural operation while the person is committing criminal trespass, as described in Section 76-6-206, on the agricultural operation.

(3) A person who commits agricultural operation interference described in Subsection (2)(a) is guilty of a class A misdemeanor.

(4) A person who commits agricultural operation interference described in Subsection (2)(b), (c), or (d) is guilty of a class B misdemeanor.<sup>29</sup>

**c. Zeroing in on Representations Made During the Hiring Process: a New Wrinkle in Ag gag Legislation**

Both HF 589 and HB 187 differ from their Montana, Kansas, and North Dakota counterparts in one important regard: they both include language that focuses on actions

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<sup>29</sup> Utah H. 187, 60th Utah Legis., 2012 Gen. Sess.

committed during the hiring process.<sup>30</sup> Under both laws, if an applicant makes misrepresentations in order to gain employment, he or she has violated the statute.<sup>31</sup>

Arguably, this represents a shift in purpose for proponents of these types of laws. Historically, while this type of legislation—otherwise known as “animal use protection statutes”—has been chiefly enacted to shield the designated animal industries from animal rights activists, the vast majority of statutes focused on preventing damage or loss to property.<sup>32</sup> The protected industries wish to prevent activist groups from committing acts of sabotage, causing physical damage or otherwise compromising physical property or the animals.<sup>33</sup>

What’s alarming about the more recent ag gag laws is that they don’t target destructive acts. Instead, they target behavior that is simply meant to shed light on industry practices, and punish those who seek to embed themselves in order to gain unfettered access to the industry.<sup>34</sup> Effectively, the laws are meant to choke off meaningful attempts at journalism, as opposed to acts of demolition or theft. Currently, there is ambiguity as to the extent of First Amendment protection to journalists, where they are engaged in news gathering activities.<sup>35</sup> However, the laws currently being enacted so patently threaten the First Amendment protections afforded to the press as to be constitutionally questionable. Additionally, they amount to a prior restraint. Finally, the disconnect in the stated intent of the laws and their actual result suggests that they might not even withstand an Equal Protection challenge, as they would fail a rational basis review.

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<sup>30</sup> Iowa H. File 589, 84th Gen. Assembly, subsection (b); Utah H. 187, 60th Utah Legis., 2012 Gen. Sess., subsection (2)(c).

<sup>31</sup> *Id.*

<sup>32</sup> Jen Girgen, *State Animal Use Protection Statutes: An Overview*, 18 *Animal L.* 57, 68 (2011) (“Of the statutes identified in this research, fifty-five (83.3%) expressly prohibit damaging or causing the loss of real or personal property (including animals.)”).

<sup>33</sup> See e.g. *American Hunter*, “*Animal Rights*” *Terrorists Hit Pheasant Farm*, <http://www.americanhunter.org/blogs/animal-rights-terrorists-hit-pheasant-farm/> (Mar. 26, 2012) (available at).

<sup>34</sup> Iowa H. File 589, 84th Gen. Assembly; Utah H. 187, 60th Utah Legis., 2012 Gen. Sess.

<sup>35</sup> See Section II, *infra*.

## SECTION II

### *Freedom of the Press: News Gathering v. Published Works*

#### **I. First Amendment Protected Speech and the Press**

##### **a. Generally**

The First Amendment of the United States Constitution states that “Congress shall make no law... abridging the freedom of speech, or of the press.”<sup>36</sup> While these protections originally extended only to the federal government, in *Gitlow v. New York* the Supreme Court ruled that specific provisions—notably those safeguarding freedom of speech and freedom of the press—were binding upon state governments as well.<sup>37</sup>

The Supreme Court has historically viewed the Constitution’s guarantee of free speech and a free press as the lifeblood of all forms of discourse in this country, stating that the First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>38</sup> The promise of an open exchange of viewpoints, occurring without the threat of government sanction or censorship, is “essential to the security of the Republic,” and “a fundamental principle of our constitutional system.”<sup>39</sup> The “classic formulation”<sup>40</sup> of the amendment’s importance can be found in Justice Brandeis’s concurring opinion in *Whitney v. California*:

Those who won our independence believed that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to

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<sup>36</sup> U.S. Const. amend. I, § 2.

<sup>37</sup> 268 U.S. 652 (1925).

<sup>38</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

<sup>39</sup> *Id.* (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

<sup>40</sup> *Id.* at 270.

discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.<sup>41</sup>

To be sure, the Court has deemed certain types of speech outside of the scope of the First Amendment’s protections, such as obscenity,<sup>42</sup> advocacy of illegal activity,<sup>43</sup> “fighting words,”<sup>44</sup> and defamation or libel.<sup>45</sup> Similarly, the government may infringe on speech where the restrictions are not based upon content, but rather are meant to place reasonable restrictions upon the time, place, or manner of the exercise of the speech.<sup>46</sup> However, of the types and purposes of speech exercised in the course of American public life, the Court has held none more sacrosanct than the speech of the press.<sup>47</sup>

For instance, in *Gertz v. Robert Welch, Inc.*, the Court famously stated that “[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.”<sup>48</sup> Note that *Gertz* dealt with a defamation claim, demonstrably different than the speech being suppressed by gag laws.<sup>49</sup> This language in *Gertz* unequivocally supports the proposition that laws must allow “‘breathing space’ for core political speech.”<sup>50</sup> If a certain quantity of falsehood is to be tolerated in order to protect an otherwise factual exercise of core political speech, it

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<sup>41</sup> 274 U.S. 357, 375-376 (1927) (Brandeis, J. concurring).

<sup>42</sup> *Miller v. Cal.*, 413 U.S. 15 (1973).

<sup>43</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

<sup>44</sup> *Chaplinsky v. St. of N.H.e.*, 315 U.S. 568 (1942); *but see R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 393 (1992) (supporting the proposition that a government may not regulate fighting words where there is a content-based component to the speech).

<sup>45</sup> *Beauharnais v. Ill.s.*, 343 U.S. 250 (1952).

<sup>46</sup> *U. S. v. O'Brien*, 391 U.S. 367 (1968).

<sup>47</sup> *First Natl. Bank of Bos. v. Bellotti*, 435 U.S. 765, 781-82 (1978) (“press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate”).

<sup>48</sup> 418 U.S. 323, 341 (1974).

<sup>49</sup> No one questions the veracity of the films being produced in the agricultural production facilities. It is, in fact, their authenticity that the aggrieved business owners—and sympathetic lawmakers—find so galling.

<sup>50</sup> *U.S. v. Strandlof*, 667 F.3d 1146, 1153-54 (10th Cir. 2012).

necessarily follows that core political speech untarnished by any inaccuracy should be provided the entirety of First Amendment protections.<sup>51</sup>

In fact, out of a concern for the potential “chilling effect” that laws punishing speech might have on public discourse, Supreme Court jurisprudence has traditionally shielded speech of the press that, were it to be spoken by the lay person, would subject its utterer to tort liability or worse.<sup>52</sup> In the landmark case, *New York Times Co. v. Sullivan*, the Court established an “actual malice” standard for claims brought against the press involving torts of libel or defamation.<sup>53</sup> The mere fact that the newspaper published something untrue was insufficient to warrant a plaintiff’s recovery, the Court held, and instead, for liability to attach the paper would have had to publish the untrue statement “with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>54</sup> While *New York Times Co. v. Sullivan* articulates this high threshold in the context of public officials’ claims of libel or defamation, the Court subsequently applied the actual malice standard in cases involving press speech related to candidates for public office,<sup>55</sup> public figures,<sup>56</sup> and even private citizens who are involved in matters of general or public interest.<sup>57</sup>

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<sup>51</sup> *Id.* See also *Celle v. Filipino Rep. Enter. Inc.*, 209 F.3d 163, 181 (2d Cir. 2000); *Bichler v. Union Bank & Trust Co. of Grand Rapids*, 745 F.2d 1006, 1023 (6th Cir. 1984); *In re IBP Confidential Bus. Documents Litig.*, 755 F.2d 1300, 1310 (8th Cir. 1985) *on reh’g*, 797 F.2d 632 (8th Cir. 1986) (“Requiring citizens to guarantee the accuracy of statements made in the course of petitioning the government, at the risk of multimillion dollar libel judgments, would lead to intolerable self-censorship, deterring not only falsity but truth as well.”); *U. S. v. Alvarez*, 638 F.3d 666, 669-70 (9th Cir. 2011).

<sup>52</sup> See generally *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 279-80.

<sup>55</sup> *Garrison v. State of La.*, 379 U.S. 64 (1964).

<sup>56</sup> *Curtis Publ. Co. v. Butts*, 388 U.S. 130 (1967).

<sup>57</sup> *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), *abrogated by Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Note that in *Gertz*, the Court held that states may establish their own standards of liability for defamatory statements made about private individuals, so long as there is no imposition of liability without fault. 418 U.S. at 347. Additionally, where the state standard is lower than actual malice, then only actual damages may be awarded. 418 U.S. at 350.

**b. Limits on the Freedom of the Press: “Gathering” News versus “Publishing” News, Erosion of First Amendment Protections for Investigative Journalists via Tort Liability, and the End-Run Around the Constitution**

The Supreme Court’s nigh-on-rhapsodic language on the value of an unfettered press notwithstanding, its opinions giving the press its most sweeping First Amendment protections contemplate finished works, already available to the general public.<sup>58</sup> The jurisprudence becomes more granular where the challenged law impedes a reporter’s ability to gather information for a story.<sup>59</sup> In *Branzburg v. Hayes*, the Court held that the First Amendment does not shield a reporter from a grand jury subpoena, where the reporter has witnessed illegal activity in the course of his or her work, even if complying would expose the identity of a confidential source.<sup>60</sup> Justice White, writing for the majority, stated that “[t]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”<sup>61</sup> White conceded, however, that “news gathering is not without its First Amendment protections,” and that a subpoena would have to be made in good faith, or else the state interest in criminal justice would be so watered down as to be outweighed by the public interest in a free press.<sup>62</sup> Further, he noted that “without some protection for seeking the news, freedom of the press would be eviscerated.”<sup>63</sup> Unfortunately, the opinion did not offer an articulation of what such a protection might look like.<sup>64</sup>

Not far on the heels of *Branzburg*, the Court held in *Zurcher v. Stanford Daily* that a student newspaper’s office could be searched by police officers in possession of a valid warrant

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<sup>58</sup> In *New York Times Co. v. Sullivan*, for instance, the allegedly defamatory advertisement had already run. 376 U.S. at 254. See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (same).

<sup>59</sup> See e.g. *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Herbert v. Lando*, 441 U.S. 153, (1979); *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999).

<sup>60</sup> 408 U.S. 665 (1972).

<sup>61</sup> *Id.* at 684.

<sup>62</sup> *Id.* at 707.

<sup>63</sup> *Id.* at 681.

<sup>64</sup> See generally 408 U.S. 665 (1972).

and that in lieu of any First Amendment protections one might expect to apply to confidential information and work product of the press, the Fourth Amendment and its protections against unreasonable searches and seizures would control, as it provides sufficient safeguards against state abuse and interference.<sup>65</sup> Recognizing that the protection of the Fourth Amendment, alone, might be unpalatable to advocates of a free press, the majority opinion offered this less-than-ratcheted-up standard: “Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with ‘scrupulous exactitude.’”<sup>66</sup>

Similarly, *Herbert v. Lando* stands for the proposition that a news organization receives no First Amendment protection from discovery requests by plaintiffs in libel cases, where the information sought concerns the editorial decision-making process.<sup>67</sup> The Court brushed off the idea that its jurisprudence foreclosed a plaintiff’s ability to use traditional tools of litigation, stating that its canonical First Amendment cases did not

suggest any First Amendment restriction on the sources from which the plaintiff could obtain the necessary evidence to prove the critical elements of his cause of action. On the contrary, *New York Times* and its progeny made it essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant. To be liable, the alleged defamer of public officials or of public figures must know or have reason to suspect that his publication is false. In other cases proof of some kind of fault, negligence perhaps, is essential to recovery. Inevitably, unless liability is to be completely foreclosed, the thoughts and editorial processes of the alleged defamer would be open to examination.<sup>68</sup>

In his concurring opinion, Justice Powell voiced skepticism that forcing a news organization to hand over work product relating to its editorial process might have a chilling effect on the speech of the press: “I find this conclusion implausible. Since a journalist cannot work without such

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<sup>65</sup> 436 U.S. 547 (1978).

<sup>66</sup> 436 U.S. 547, 564 (1978) (quoting *Stanford v. State of Tex.*, 379 U.S. 476, pg #? (1965)).

<sup>67</sup> 441 U.S. 153 (1979).

<sup>68</sup> *Id.* at 160.

internal thought processes, the only way this aspect of the editorial process can be chilled is by a journalist ceasing to work altogether.”<sup>69</sup> While this statement appears to be meant as a rhetorical flourish, bolstering the majority holding, it has proved to be an alarmingly prescient articulation of the endgame of the jurisprudence created by these cases.<sup>70</sup> Specifically, where journalists are forbidden First Amendment protections in a news gathering capacity, elbow room is created for courts and legislatures to create laws that effectively force journalists to either *not* publish a story, or face legal consequences for doing so.<sup>71</sup>

In the same spirit as *Branzburg*, *Zurcher*, and *Herbert*, the Court in *Cohen v. Cowles Media Co.* held that a journalist may be sued under a theory of promissory estoppel where he or she has broken a promise of confidentiality to a source.<sup>72</sup> The Court stated that “[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.”<sup>73</sup> Thus, “enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.”<sup>74</sup>

Contrasting the holdings in *Cohen*, *Branzburg*, *Herbert* and *Zurcher* with the holdings in cases like *New York Times v. Sullivan*, one discovers a tension between competing interests—the rights of the press to publish and the privacy rights of the subjects of investigative reporting—that borders on paradox: the press is afforded expansive protections for the article that has been published, but each of the steps taken along the way to publishing are afforded almost no cover

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<sup>69</sup> *Id.* at 192.

<sup>70</sup> See e.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999); Iowa H. File 589, 84th Gen. Assembly; Utah H. 187, 60th Utah Legis., 2012 Gen. Sess.

<sup>71</sup> See e.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999); Iowa H. File 589, 84th Gen. Assembly; Utah H. 187, 60th Utah Legis., 2012 Gen. Sess.

<sup>72</sup> 501 U.S. 663 (1991).

<sup>73</sup> *Id.* at 670 (quoting *Associated Press v. Nat'l Lab. Rel. Bd.*, 301 U.S. 103 (1937)).

<sup>74</sup> *Id.*

by the Bill of Rights.<sup>75</sup> In this fractured legal landscape, a plaintiff may not attack a given statement or expression of the media, but can successfully perform an end run around the First Amendment by targeting the *behavior* of the media outlet and its agents, instead.<sup>76</sup> An argument can be made that this is as it should be; that a reporter should be given wide berth to print what he or she wishes, but should not be able to run roughshod over generally applicable laws in the process of doing so for risk of abusing the public. However, as is evident by facts of section one of this paper, attacking the methods amounts to attacking the end product.<sup>77</sup> If we are to accept the premise that the end result—an unfettered forum for the expression of ideas—is at all worthwhile, then we must not dead leg the steps necessary for bringing the ideas to that forum. To allow cases like *Cohen* to stand for the proposition that the press is afforded no special news gathering First Amendment protections is to allow *Cohen* to stand for the proposition that the press is *never* afforded meaningful First Amendment protections. This is made evident by the Fourth Circuit’s holding in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*<sup>78</sup>

In an attempt to investigate rumors of the unsanitary handling of meat at Food Lion butcher counters,<sup>79</sup> two reporters for the ABC news program *PrimeTime Live* went undercover in the grocery chain, applying for jobs in the deli and meat packing departments using false résumés and assumed identities.<sup>80</sup> The reporters were hired, and over the course of several weeks recorded numerous flagrantly unsanitary practices by Food Lion employees, with the aid

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<sup>75</sup> Compare *Cohen*, 501 U.S. 663, with *Sullivan*, 376 U.S. 254.

<sup>76</sup> Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 Duke J. Const. L. & Pub. Policy 113, 130-31 (2008).

<sup>77</sup> See Iowa H. File 589, 84th Gen. Assembly (Mar. 8, 2011); Utah H. 187, 60th Utah Legis., 2012 Gen. Sess.

<sup>78</sup> 194 F.3d 505 (4th Cir. 1999).

<sup>79</sup> *Id.* at 510. Among the allegations were that employees ground out-of-date beef together with new beef, bleached rank meat to remove its odor, and re-dated (and offered for sale) products not sold before their printed expiration date.

<sup>80</sup> *Id.* Notably, and unsurprisingly, no mention was made of the applicants’ employment with a media outlet.

of hidden cameras and microphones.<sup>81</sup> Following the airing of the *PrimeTime Live* segment broadcasting the grocery store’s indiscretions, the company filed a civil suit against the reporters and ABC, asserting claims of fraud, trespass, unfair trade practices (UTPA), and breach of the duty of loyalty.<sup>82</sup> Notably absent from the plaintiff’s complaint was a claim for defamation.<sup>83</sup>

At the trial court level, ABC and the reporters were found liable on all counts.<sup>84</sup> On appeal, the Fourth Circuit reversed the fraud verdict, finding that Food Lion had failed to establish any damage caused by reliance on the misrepresentations.<sup>85</sup> Food Lion prevailed, however, on its breach of the duty of loyalty claim<sup>86</sup> and its trespass claim,<sup>87</sup> but the Fourth Circuit also reversed on the UTPA claim.<sup>88</sup>

Most importantly, the Fourth Circuit found that the district court did not err in refusing to subject Food Lion’s claims to any type of First Amendment-related scrutiny.<sup>89</sup> While acknowledging that *Branzburg* at least promised “First Amendment interests in newsgathering,” the Court went on to cite *Cohen* for the proposition 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.”<sup>90</sup> The Court found that the reporters’ actions “fit neatly into the [*Cohen*] framework,” as neither the tort of trespass nor breach of the duty of

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<sup>81</sup> *Id.* at 511. Practices included repackaging and re-dating fish that had passed the expiration date, grinding expired beef with fresh beef, and applying barbeque sauce to chicken past its expiration date in order to mask the smell and sell it as fresh in the gourmet food section.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 514 Here, the reporters performed their work sufficiently, and while they only worked for the company for several weeks, the Court stated that, as North Carolina was an at-will employment state, no employer had a reasonable expectation regarding the duration of an employee’s tenure, unless explicitly agreed to.

<sup>86</sup> *Id.* at 516.

<sup>87</sup> *Id.* at 519 (“In sum, we are convinced that the highest courts of North and South Carolina would hold that Dale and Barnett committed trespass because Food Lion’s consent for them to be on its property was nullified when they tortiously breached their duty of loyalty to Food Lion”).

<sup>88</sup> *Id.* at 520.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* (citing *Branzburg*, 408 U.S. 665, and *Cohen*, 501 U.S. 663).

loyalty “singles out the press.”<sup>91</sup> If an employee from a competing grocery chain wished to engage in corporate espionage, the Court reasoned, the same laws would apply.<sup>92</sup> Nor, moreover, did the Court believe that exposing the reporters to tort liability for their investigations would have anything but an “incidental effect” on newsgathering.<sup>93</sup> Ultimately, the Court held, expression of the press is typically beyond the power of state sanction, but its behavior is in play.<sup>94</sup>

### **c. Further Limits on the Freedom of the Press: Prior Restraint**

Prior restraint, in the context of free speech, is a concept in which a law, a licensing requirement, or an administrative or judicial action prohibits, in advance, the publishing of a communication.<sup>95</sup> Typical examples of prior restraint include court orders that forbid speech activities, such as temporary restraining orders and permanent injunctions.<sup>96</sup> As its name implies, prior restraint attacks the communication on the front end, preventing a media outlet from running a story at all, as distinguished from laws imposing liability once a story has been published, such as common law torts.<sup>97</sup> Improper restraints on communication may vary in form and degree, but all have the effect of restricting the dissemination of ideas, and the clearest abuse is an outright prohibition of a constitutionally protected form of speech.<sup>98</sup> Generally, courts look askance at prior restraints, operating under the assumption that liberty of the press is premised on

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<sup>91</sup> *Id.* at 521.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 522.

<sup>95</sup> See e.g. *Alexander v. U.S.*, 509 U.S. 544 (1993); *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), as modified, (Mar. 26, 2009); *Davis v. E. Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 107 Ed. Law Rep. 540 (5th Cir. 1996); *State v. Lead Industries, Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008); *In re State Farm Lloyds*, 254 S.W.3d 632 (Tex. App. Dallas 2008); *In re Marriage of Meredith*, 148 Wash. App. 887, 201 P.3d 1056 (Div. 2 2009).

<sup>96</sup> *In re Marriage of Meredith*, 148 Wash. App. 887, 201 P.3d 1056 (Div. 2 2009).

<sup>97</sup> *Alexander v. U.S.*, 509 U.S. 544 (1993).

<sup>98</sup> *Huntley v. Pub. Utils. Comm'n*, 69 Cal. 2d 67, 72, (1968) (citing *Martin v. City of Struthers, Oh.*, 319 U.S. 141 (1943))

exemption from control, in advance, of what may appear in print.<sup>99</sup> Thus, prior restraints “have been accorded the most exacting scrutiny” in First Amendment jurisprudence.<sup>100</sup>

While the “classic mold of prior restraint” involves an injunction against publication, state licensing schemes can also function as a prior restraint, where there are overly-burdensome requirements for licensure that prohibit the dissemination of a specific type of information.<sup>101</sup> Moreover, the Supreme Court has found that a statute prohibiting the publishing of certain information may still function in this manner—that is, as a prohibitive licensing scheme—and thus amount to a prior restraint even if there is no out-and-out injunction prohibiting publication on a specific issue.<sup>102</sup> Moreover, courts have gone so far as to find generally applicable laws banning both the public and the press from the acquisition and dissemination of information to amount to an impermissible First Amendment violation.<sup>103</sup> In *Glik v. Cunniffe*, the First Circuit held, on interlocutory appeal, that qualified immunity did not apply in a citizen’s § 1983 suit against a police officer, where the citizen was arrested and charged with violation of Massachusetts’s wiretap law for videotaping a police officer arresting another citizen.<sup>104</sup> Here, the Court held, the wiretap charge was in conflict with the plaintiff’s clearly established First Amendment right to videotape a public official.<sup>105</sup>

### **SECTION III**

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<sup>99</sup> *Pell v. Proconier*, 417 U.S. 817 (1974); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); see also *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, (6th Cir. 1996), *opinion clarified*, (May 8, 1996) (advance prohibition of a news story is the height of censorship, and may only be authorized under exceptional circumstances).

<sup>100</sup> *Smith v. Daily Mail Publg. Co.*, 443 U.S. 97 (1979) (citing *Neb. Press Assn. v. Stuart*, 427 U.S. 539, 561 (1976); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 716 (1931)).

<sup>101</sup> *Id.* at 101.

<sup>102</sup> *Id.*

<sup>103</sup> See *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (quoting *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 783 (1978)) (“the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw”); see also *Am. Civ. Liberties Union of Ill.s v. Alvarez*, 11-1286, 2012 WL 1592618 (7th Cir. May 8, 2012).

<sup>104</sup> *Glik*, 655 F.3d at 82.

<sup>105</sup> *Id.*

## *Analysis*

- I. **Do Laws That Either Directly or Indirectly Impose Liability for Newsgathering on Factory Farms (1) Fall Under *Cohen's* Exception to First Amendment Protections of a Free Press or (2) Amount to a Prior Restraint?**
  - a. **Is a video depicting animal cruelty on factory farms, created and broadcast by animal rights activists, even an act of journalism deserving of First Amendment protection?**

Before analyzing whether laws meant to prohibit the creation of recorded images of animal abuse (or general factory farm practices) amount to an attack on the freedoms of the press, it is important to determine whether these videos even amount to a journalistic undertaking. The Supreme Court has never had to decide whether a litigant, invoking First Amendment protections of the press, was actually a member of the press.<sup>106</sup> From a practical perspective, the need to delineate wouldn't typically arise, as most challenges premised on First Amendment issues would fall under the Speech Clause just as handily as the Press Clause.<sup>107</sup> A particularly famous discussion of the meaning of the Press Clause, a 1974 speech at Yale Law School by Justice Potter Stewart later published as a law review article, identified the press as being comprised of entities such as "the daily newspapers and other established media," or "newspapers, television, and magazines."<sup>108</sup>

The Oxford English Dictionary defines "journalism" in a somewhat tautological fashion as "the occupation or profession of a journalist; journalistic writing; the public journals collectively"<sup>109</sup> while defining a "journalist" as "one who makes his living by editing or writing for a public journal or journals."<sup>110</sup> The definitions become more expansive and more conceptually helpful when one looks to "press," where the term "passes from the literal sense

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<sup>106</sup> David A. Anderson, *Freedom of the Press*, 80 Texas L. Rev. 429, 436 (2002).

<sup>107</sup> *Id.*

<sup>108</sup> Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631 (1975).

<sup>109</sup> *Oxford English Dictionary* vol. 1, 607 (Burchfield et al., eds., Oxford U. Press 1980).

<sup>110</sup> *Id.*

into that of [the printing press in operation], as *to bring, put, commit, send, submit to the press.*”<sup>111</sup> Additionally, the dictionary contemplates “press” within the larger concept of “freedom of the press” as “free use of the printing press; the right to print and publish anything without submitting it to previous official censorship.”<sup>112</sup> Here, the emphasis is placed on use and purpose: taking advantage of a given medium to convey a message.<sup>113</sup>

The Supreme Court has stated in a recent case, outright, that “[n]ews reports about animal cruelty have ‘journalistic’ value.”<sup>114</sup> Implicit in this designation is purpose of message: a report, meant to convey to its audience an understanding of events of animal cruelty, bears the imprimatur of journalism. Interestingly, the quoted case stands for the proposition that videos depicting acts of animal cruelty that have *absolutely no journalistic value* nonetheless receive First Amendment protections.<sup>115</sup> In *United States v. Stevens*, the Court struck down a federal law criminalizing the commercial production, sale, or possession of videos depicting cruelty to animals.<sup>116</sup> Morally reprehensible though the films may be, the Court held:

The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our

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<sup>111</sup> *Oxford English Dictionary* vol. 2, 1314 (Burchfield et al., eds., Oxford U. Press 1980).

<sup>112</sup> *Id.*

<sup>113</sup> Function of the endeavor as the dispositive issue has been advocated by other commentators, as well. A particularly appealing proposed factorial test suggests that courts look to whether the putative journalist is “(1) engaged in the process of gathering information of public significance, (2) for the purpose of communicating it to an audience, (3) with the intent at the start of the newsgathering process to distribute the information to others, and (4) whose compliance with the government's demand would pose a legitimate risk of impairing their *future* expressive or newsgathering activity.” Erik Uglund, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 Duke J. Const. L. & Pub. Policy 113, 138 (2008); see also *von Bulow v. Von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987) (affording the privilege to one who has “the intent to use the material—sought, gathered or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process”).

<sup>114</sup> *U.S. v. Stevens*, 130 S. Ct. 1577, 1590 (2010).

<sup>115</sup> See *id.*

<sup>116</sup> *Id.* (The primary films that the law sought to criminalize were “crush videos,” which showed people crushing small animals, purportedly to satisfy sexual fetishes).

Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.<sup>117</sup>

Again, it is important to note that the Court is extending the mantle of the First Amendment's guarantees to commercial films depicting the slaughter of tiny rodents, allegedly for purposes of sexual gratification.<sup>118</sup> Anything showing comparable content, with *more* of a journalistic animus than *that*, the Court states, is a slam dunk in terms of being afforded First Amendment protections.<sup>119</sup>

Accordingly, in light of the plain meaning of "press" and the Supreme Court's analysis in *Stevens*, it is assuredly the case that an animal rights activist's surreptitious filming of incidents of animal cruelty on factory farms, released to the public in an attempt to call its attention to the abuse, qualifies as "journalism" for purposes of the First Amendment.

**b. Laws such as HF 589 and HB 187, and holdings such as the Fourth Circuit's opinion in *Food Lion* misapprehend the Supreme Court's holding in *Cohen*, and amount to an impermissible restriction of First Amendment freedom of the press.**

In *Food Lion*, the Fourth Circuit found that the district court did not err in refusing to subject Food Lion's claims to any level of First Amendment scrutiny, relying on *Cohen* for the proposition that generally applicable laws will not trigger enhanced scrutiny "simply because their enforcement against the press has incidental effects on its ability to gather and report the news."<sup>120</sup> However, all that this language in *Cohen* can really stand for is the notion that the press gets no special exemption from laws that don't explicitly discriminate against the press.<sup>121</sup>

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<sup>117</sup> *Id.* at 1585.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1590.

<sup>120</sup> 194 F.3d at 520 (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991)).

<sup>121</sup> Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1294 (2005).

It offers no analysis on whether the press is entitled to protection from facially content-neutral laws, when those laws are content-based as applied.<sup>122</sup>

As Eugene Volokh points out in his analysis of *Cohen*, the Supreme Court's real reasoning on whether the plaintiff's promissory estoppel claim was valid hinged on theories of contract law:

[L]ater in the opinion, the Court explains why promissory estoppel law is indeed constitutionally applicable to all speakers, whether press or not: "Minnesota law simply requires those making promises to keep them. The parties themselves, as in this case, determine the scope of their legal obligations, and any restrictions which may be placed on the publication of truthful information are self-imposed." So the Court rejected the free speech argument based on the principle that free speech rights, like most other rights, are waivable, rather than on an assertion that speech-neutral laws are per se constitutional.<sup>123</sup>

Thus, *Cohen* side-steps the very argument that was used to bolster the Fourth Circuit's position in *Food Lion*, as Volokh goes on to explain: "This reasoning made it unnecessary for the majority to decide whether promissory estoppel law was purely content-neutral or facially content-neutral but content-based as applied, since the Court's argument that free speech rights may be waived would apply in either event."<sup>124</sup> Whether the Fourth Circuit would have arrived at its same conclusion in *Food Lion* using this analysis of the holding in *Cohen* is highly debatable.

But even if all of the reasoning of the *Food Lion* case remains persuasive, the torts contemplated in that case were common law in origin, long recognized by the state and almost any other jurisdiction. By contrast, HF 589 and HB 187 are boutique acts of legislation, cherry picked to target a single group of individuals, and thus are content-based restrictions on speech as applied. In fact, it is precisely because common law torts such as fraud and breach of the duty

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1297 (citing *Cohen*, 501 U.S. at 671).

<sup>124</sup> *Id.* n. 92.

of loyalty would *not* touch the targeted groups that this legislation was created, and thus they are vehicles meant for suppression of free press.<sup>125</sup>

Ample evidence suggests that legislators were motivated by a desire to foreclose a person's ability to obtain both access to and, more importantly, footage of animal cruelty or of unsanitary practices of the factory farm industry with both HF 589<sup>126</sup> and HB 187.<sup>127</sup> Similarly, while not dispositive of a malicious intent, the sponsors of these bills were amply funded by the agriculture industry—the group most likely to oppose such practices.<sup>128</sup> In Utah, the law actually forbids videotaping of facilities,<sup>129</sup> while in Iowa, the law originally forbade videotaping until the Attorney General's Office warned that this would be unconstitutional, evidencing a clear intent on the part of the Iowa legislature to achieve an unconstitutional end through means that may or may not pass constitutional muster.<sup>130</sup>

In figuring out how to even apply the law, one runs into a problem of proof: both bills target people who have made misrepresentations in gaining employment at agricultural facilities.<sup>131</sup> Accordingly, in order to make a finding of either intent or misrepresentation, a court

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<sup>125</sup> Telephone Interview with Vhandana Bala, Gen. Counsel, Mercy for Animals (Mar. 27, 2012).

<sup>126</sup> Jason Clayworth, *Des Moines Register*, *Group Launches "Stop Ag-Gag" Website*, <http://blogs.desmoinesregister.com/dmr/index.php/2012/03/21/group-launches-stop-ag-gag-web-site/> (Mar. 21, 2012) ("The legislation was a response to what farm advocates have previously described as agricultural terrorism by groups that infiltrate farm facilities, sometimes even staging events to sabotage animal production").

<sup>127</sup> Dennis Romboy, *Deseret News*, *House Passes Bill to Stop "Animal-Rights Terrorists" Shooting Video on Farms*, <http://www.deseretnews.com/article/865550866/House-passes-bill-to-stop-animal-rights-terrorists--shooting-video-on-farms.html> (Feb. 24, 2012) (In referring to "animal rights terrorists," a state legislator was quoted saying "we certainly don't want some jack wagon coming in and taking pictures of [farming operations]").

<sup>128</sup> Sarah Damian, *Food Integrity Campaign*, *Corporate Ag Gag Supporters Donated to Iowa Legislator Campaigns*, <http://foodwhistleblower.org/blog/23-2012/326-corporate-ag-gag-supporters-donated-to-iowa-legislator-campaigns> (Mar. 19, 2012) (Ten percent of Iowa Governor Branstad's \$8.9M war chest came from "big agra," while sponsoring Senator Joe Seng received off 25% of his campaign financing from big agra. Alarming, a story in the *Des Moines Register*, detailing the financing, has recently been taken down from the newspaper's website).

<sup>129</sup> Utah H. 187, 60th Utah Legis., 2012 Gen. Sess.

<sup>130</sup> See Iowa H. File 589, 84th Gen. Assembly (legislative history available at <http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&menu=false&ga=84&hbill=HF589>).

<sup>131</sup> HF 589 ascribes penalty where one "[m]akes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized." Iowa H. File 589, 84th Gen. Assembly (Mar. 8, 2011); HB 187

will be required to look to either the videographer's personal history, drawing weighted inferences from any prior associations with animal rights groups, or will have to look to some question within the employment application itself—such as “are you now, or have you ever been affiliated with PETA, Mercy for Animals, the Humane Society, etc. and/or a media outlet devoted to the reporting of news”—that the employee answered inaccurately. In order for this law to be at all effective, either the court or the employer will have to single out the group whose free speech the law wishes to suppress.

The Utah law goes even farther. Consider two employees: the first an undercover reporter, and the second a fourth-generation Utah hog farmer who has no interest in activism whatsoever, but is instilled with a strong moral compass. Both obtain employment at a production facility and both are horrified to find wanton—and hygienically unsound—acts of animal cruelty being routinely perpetuated. Both parties surreptitiously videotape these acts, each unaware of the other's presence or motive, and send them to a national news network. Under the Utah law, the reporter is guilty of a criminal act (as is everyone involved in reporting the story, arguably on up to the advertisers of the program on which the piece airs), as is the farmer, regardless of the fact that one had an intent to videotape upon applying for the job while the other did not.

Even under Iowa's statutory scheme, problems arise in that an employee complaining of incidents of abuse can be viewed as engaging in a *per se* violation of HF 589. The act is premised on the notion that only perpetrators of fraud would document abuses and thus, anyone who documents an abuse almost inherently has a presumption of guilt. Factfinding in this

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ascribes penalty to one who “applies for employment at an agricultural operation with the intent to record an image of, or sound from, the agricultural operation.” Utah H. 187, 60th Utah Legis., 2012 Gen. Sess. (Feb. 8, 2012).

situation would be very difficult to do in a way that isn't flagrantly in violation not only of the Press Clause, but also the Speech Clause, accordingly.

Both HF 589 and HB 187 are susceptible to attacks on grounds of overbreadth. Criminalizing the use of false pretenses to obtain entry to an agricultural facility runs the risk of penalizing entities working in the justice system, itself. Consider, for instance, a process server who obtains employment at an egg farm in order to serve a party. Under either law, the process server would face criminal prosecution. The same penalty would apply to an FDA inspector or other government official, if he or she conducted an undercover investigation into the practices of an agricultural business.

Further, where laws are challenged for overbreadth on First Amendment grounds, courts must determine whether alternative channels of communication are available for the information at issue.<sup>132</sup> Here, it is not the communication of the information that is directly threatened by the law, so much as it is the ability to acquire the information in order to communicate it. However without the information, there cannot *be* a communication, and thus a law completely proscribing one's ability to gather news should also be viewed as a law that completely proscribes communication of a message. Uncovering abuses and public safety hazards within industries like mass-market agriculture is impossible to do without acts of whistleblowing or investigative reporting (the industries themselves certainly have no incentive to apprise the public of their bad behavior). Accordingly, laws that criminalize an investigative reporter's primary means of obtaining access to facilities where abuses occur (by seeking employment undercover) effectively eliminate the public's ability to receive candid information about what really goes on in factory farms. This author can think of no other alternative, legal channels for

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<sup>132</sup> *Heffron v. Intl. Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981) (citing *Va. Pharm. Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976); *Consolidated Edison Co. v. Pub. Serv. Comm'n.*, 447 U.S. 530, 535 (1980)).

obtaining comparable footage of day-to-day animal rights and safety violations at factory farms.<sup>133</sup> Accordingly, all of the ag gag laws currently in force or awaiting a vote in their state’s legislature are fatally overbroad.

Finally, even if the Fourth Circuit’s application of the law in *Food Lion* was not inapposite—which it was—it bears noting that, of the generally applicable laws cited in *Cohen*, the enforcement of which have incidental effects on the media’s ability to gather and report news, all but two of the cases dealt with commercial regulation.<sup>134</sup> Thus, even if *Cohen* is good law in the context of ag gag legislation, the consequences of HF 589 and HB 187 are not “incidental” effects on newsgathering ability. These aren’t laws that pertain to taxes or copyrights, but instead these are laws that foreclose all meaningful options for broadcasting in the most persuasive medium available to the press.

**c. HF 589, HB 187, and similarly-worded, pending ag gag bills amount to an impermissible prior restraint.**

As discussed in the previous sections, HF 589 and HB 187 seek to attack news items in their infancy, at the newsgathering process, foreclosing the possibility of depictions of animal cruelty or unsanitary factory farm conditions from ever being generated, much less broadcast. As discussed in Section II, subsection (I)(c) of this paper, this amounts to a prior restraint.<sup>135</sup>

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<sup>133</sup> Conceivably, a reporter could obtain video via stolen security camera footage. However, this would likely subject the reporter to criminal penalties similar to those articulated in HF 589 and HB 187.

<sup>134</sup> *U. of Pa. v. E.E.O.C.*, 493 U.S. 182, 201-02 (1990) (must pay non-discriminatory taxes); *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 581-83 (1983) (same); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576-79 (1977) (may not publish copyrighted material without obeying copyright laws); *Branzburg*, 408 U.S. 665, 684 (1972) (reporters must comply with grand jury subpoenas even if it risks revelation of a confidential source’s identity); *Citizen Publ’g Co. v. U.S.*, 394 U.S. 131, 139 (1969) (may not restrain trade in violation of antitrust laws); *Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 192-93 (1946) (must comply with Fair Labor Standards Act); *Associated Press v. U.S.*, 326 U.S. 1 (1945) (may not restrain trade in violation of antitrust laws); *Murdock v. Pa.*, 319 U.S. 105, 112 (1943) (must pay non-discriminatory taxes); and *Associated Press v. Nat’l Lab. Rel. Bd.*, 301 U.S. 103 (1937) (must comply with National Labor Relations Act).

<sup>135</sup> *Alexander v. U.S.*, 509 U.S. 544, 550 (1993) (“[O]rders that actually forbid speech activities...are classic examples of prior restraints.”) (citations omitted).

HB 187 blatantly prohibits speech on the front end, making it a crime to make a video or sound recording without the consent of an agricultural facility’s owner.<sup>136</sup> The language of HF 589 is more circumspect, criminalizing the use of misrepresentation to gain employment to an agricultural production facility.<sup>137</sup> However, the intent of the Iowa legislature is clear, based upon prior language struck from the earlier iteration of the bill—criminalizing the making of a video or sound recording of a facility without the owner’s permission<sup>138</sup>—as well as the public rationalizations for the law, made by the legislators themselves.<sup>139</sup>

Laws such as these that establish a regime of complete, content-based censorship are prior restraints and, as such, the behavior being targeted is afforded expansive First Amendment protections.<sup>140</sup> In the seminal case of *New York Times Co. v. United States* (also known as the Pentagon Papers decision), the Supreme Court stated that “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”<sup>141</sup> Accordingly, the opinion went on to say, the Government “carries a heavy burden of showing justification for the imposition of such a restraint.”<sup>142</sup> Such a burden cannot be met

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<sup>136</sup> Utah H. 187, 60th Utah Legis., 2012 Gen. Sess., Subsection (2)(a).

<sup>137</sup> Iowa H. File 589, 84th Gen. Assembly.

<sup>138</sup> Iowa H. File 589, 84th Gen. Assembly, Amendment H-1292 (Mar. 14, 2011) (see Proposed Section 717A.2A – *Animal Facility Interference*). For the entire legislative history of HF 589, see <http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=DspHistory&var=HF&key=0642C&GA=84>.

<sup>139</sup> Cecil Dolecheck, St. Rep., Iowa, *House Approves Animal and Crop Facility Aggro-Terrorism Law Update*, Dolecheck’s Details (constituent newsltr.) (Mar. 21, 2011) (HF 589 is meant to prevent a “person [from] seeking access to such a [agricultural] facility to create records that impugn and malign the management of the owner/keeper.”); See also Interview by Kai Ryssdal with Joe Seng, St. Sen., Iowa, *Iowa’s “Ag Gag” Sponsor Defends Bill*, Marketplace for American Public Media (Mar. 1, 2012) (HF 589 was created in response to “attempts by certain groups to discredit the agricultural industry to the point where they stage their own productions against owners actually within their own facilities”) (available at <http://www.marketplace.org/topics/life/iowas-ag-gag-sponsor-defends-bill>).

<sup>140</sup> *Channel 10, Inc. v. Gunmarson*, 337 F. Supp. 634, 637 (D. Minn. 1972) (plaintiff news crew suffered an impermissible prior restraint, where police officers confiscated cameras being used in public to document an arrest); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (government may not limit “the stock of information from which members of the public may draw”).

<sup>141</sup> 403 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

<sup>142</sup> *Id.* (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

by the current crop of ag gag laws, as their purpose is, principally, to prevent the embarrassment of private industry through the documentation of abuses.

**d. HF 589 and HB 187 would also succumb to an equal protection challenge, as the disconnect between their “means/end fit” would fail to pass even rational basis review.**

Under traditional equal protection analysis, a legislative classification that does not affect a recognized protected class—thus triggering a heightened level of scrutiny<sup>143</sup>—must be sustained if the classification itself is rationally related to a legitimate governmental interest.<sup>144</sup> Implicit in this is the converse: where a law bears no rational relation to a legitimate government interest, it is constitutionally unsound.<sup>145</sup> The Supreme Court’s holding in *U.S. Department of Agriculture v. Moreno* is illustrative of this concept, where the Court struck down a provision of the Food Stamp Act, excluding “any household containing an individual who is unrelated to any other member of the household” from receiving food stamp assistance, finding that (1) the language of the provision was purposely targeting hippies and (2) burdening a politically unpopular group was “wholly without any rational basis.”<sup>146</sup> The *Moreno* analysis is especially apt in the context of ag gag laws, as the legislation is meant to target a specific group (journalists, activist or otherwise) and its stated purpose either bears no rational relation to its purported goal,<sup>147</sup> or the government interest advanced is simply not a legitimate one.<sup>148</sup>

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<sup>143</sup> See e.g. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (strict scrutiny applies to classifications based upon race, national origin, and, generally, alienage); *Craig v. Boren*, 429 U.S. 190 (1976) (intermediate scrutiny applies to classifications based upon gender); *Clark v. Jeter*, 486 U.S. 456 (1988) (intermediate scrutiny applies to classifications discriminating against nonmarital children).

<sup>144</sup> *U. S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 533 (1973) (citations omitted).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 538 (1973).

<sup>147</sup> Interview by Kai Ryssdal with Joe Seng, St. Sen., *supra* n. 17(citing “bio-security” as the rationale behind HF 589, stating “facilities...do not want either birds, mice, vermin, anything like that, even cockroaches entering into these facilities -- people included”) (available at <http://www.marketplace.org/topics/life/iowas-ag-gag-sponsor-defends-bill>).

<sup>148</sup> Dennis Romboy, *Deseret News*, *House Passes Bill to Stop “Animal-Rights Terrorists” Shooting Video on Farms*, <http://www.deseretnews.com/article/865550866/House-passes-bill-to-stop-animal-rights-terrorists--shooting-video->

Moreover, the Supreme Court has explicitly stated that laws singling out the press, “or certain elements thereof,” are especially prone to abuse at the hands of the State, and thus “are always subject to at least some degree of heightened First Amendment scrutiny.”<sup>149</sup> While the gag laws in question do not explicitly target a protected class, they certainly target the press or its composite elements, and thus, per the direction of the Supreme Court, must be subject to heightened scrutiny. Under this test, the Court should hold these laws constitutionally unsound.<sup>150</sup>

## **II. The Public Interest is Best Served by Favoring Transparency and Protecting Journalism That Exposes Issues Directly Related to Public Health and Food Supply Safety.**

It is almost impossible to overstate the importance of the role played by investigative journalists embedded within the American meat industry in order to conduct exposés. In 1904, Upton Sinclair performed undercover work in Chicago’s meatpacking plants at the behest of the newspaper *The Appeal to Reason*.<sup>151</sup> His investigation yielded the novel *The Jungle*, a social realist depiction of abuses of animals, workers, hygiene, and consumer confidence that sent a shockwave through the American public.<sup>152</sup> The book prompted a federal investigation, which in turn led to the Meat Inspection Act and the Pure Food and Drugs Act of 1906.<sup>153</sup>

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[on-farms.html](#) (Feb. 24, 2012) (In referring to “animal rights terrorists,” a state legislator was quoted saying “we certainly don’t want some jack wagon coming in and taking pictures of [farming operations]”).

<sup>149</sup> *Turner Broad. System, Inc. v. F.C.C.*, 512 U.S. 622, 640-41 (1994) (citations omitted).

<sup>150</sup> *Id.*

<sup>151</sup> James I. Pearce, *A Brave New Jungle: Factory Farming and Advocacy in the Twenty-First Century*, 21 *Duke Envtl. L. & Policy Forum* 433 (2011).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* It should be noted that the Pure Food and Drugs Act of 1906 created the U.S. Department of Agriculture’s Bureau of Chemistry, which was later renamed the Food and Drug Administration. Timothy M. Hammonds, Ph.D., *It Is Time to Designate A Single Food Safety Agency*, 59 *Food & Drug L.J.* 427, 429 (2004).

This work, created over a century ago, serves as a reminder of the need for a vigilant press to uncover practices of the agricultural industry that put our food supply at risk.<sup>154</sup> Unfortunately, recent reports have revealed that the meat and dairy industry do not appear to have meaningfully changed since Sinclair's days.<sup>155</sup> An investigation conducted by the Humane Society of the United States uncovered horrendous conditions at a Pennsylvania-based Kreider Farms egg facility, including rodents on egg conveyor belts, rotting corpses in cages with live laying hens, eggs testing positive for salmonella, and ammonia levels so high that workers were forced to wear masks.<sup>156</sup> A similar Humane Society exposé of four Iowa egg farms identified similar conditions.<sup>157</sup> Several months later, Iowa farms were at the center of a salmonella outbreak that led to the largest egg recall in U.S. history.<sup>158</sup>

It bears mentioning that Iowa has the largest concentration of factory farms in the country.<sup>159</sup> If HF 589 remains law, it will make an increasingly suspicious public even more leery of the quality of the meat and dairy products stocking grocery shelves. As one Iowa state senator, Herman Quirnbach, stated prior to the bill becoming law, “[p]assing this bill will put a big red question mark stamped on every pork chop, every, chicken wing, every steak, and every egg produced in this state because it will raise the question of what do you got to hide.”<sup>160</sup>

### III. Conclusion

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<sup>154</sup> Const. Bill of Rights Found., *Upton Sinclair's The Jungle: Muckraking and the Meatpacking Industry*, Volume 24, No. 1 (Fall 2008) (available at <http://www.crf-usa.org/bill-of-rights-in-action/bria-24-1-b-upton-sinclairs-the-jungle-muckraking-the-meat-packing-industry.html>). The book details, among other things, tubercular workers coughing up blood on the floor; meat trimmings being mixed with saliva, urine, rat poison, rodent excrement, and sawdust to make sausages; the processing of diseased animals when inspectors were absent; and, perhaps most alarmingly, workers falling into vats and becoming rendered, themselves, into canisters of “Durham’s Pure Leaf Lard.”

<sup>155</sup> Tom Philpott, *Four Things Grosser Than Pink Slime*, <http://motherjones.com/tom-philpott/2012/04/things-are-grosser-pink-slime> (Apr. 18, 2012).

<sup>156</sup> *Id.*

<sup>157</sup> Carlson, *supran.* 2.

<sup>158</sup> *Id.*

<sup>159</sup> Tami O’Neill, *Iowa “Ag-Gag” Bill Targets Undercover Whistleblowers*, Take Part (Mar. 6, 2012) (available at <http://www.takepart.com/article/2012/03/06/iowa-ag-gag-bill-targets-undercover-whistleblowers>).

<sup>160</sup> Clayworth, *supran.* 19.

Laws like HF 589 and HB 187 run afoul of protections afforded by the First Amendment, as they seek to completely foreclose the right to obtain information for journalistic purposes, and ultimately seek to completely censor the press in a content-based way. Moreover, the tenuous-at-best rationales offered for these types of bills betray either a complete disconnect of the means from the desired result or a desired result that in no way resembles a legitimate state interest. Another Iowa state senator, Matt McCoy, offered this comment on the emerging national trend of ag gag laws:

I just think this is incredibly bad public policy for a nonexistent problem that is being worked across the country by big ag that doesn't want to play by the rules and has had it their way for a long time.<sup>161</sup>

A press that is afforded First Amendment protections for its newsgathering process serves not only the big-picture interest of an unfettered marketplace of ideas, but also the nuts-and-bolts, quotidian interest of keeping a public informed of potential hazards to its food supply.

Justice Stewart, in his 1974 speech, suggested that the Press Clause of the First Amendment deputizes the news media to serve as a “fourth institution outside the Government [acting] as an additional check on the other three branches,”<sup>162</sup> a sentiment that certainly extends to the instant circumstances. Justice White, in his opinion in *Branzburg*, conceded that “without some protection for seeking the news, freedom of the press would be eviscerated.”<sup>163</sup> Unless courts reject holdings like the Fourth Circuit’s opinion in *Food Lion*, and instead begin striking down ag gag laws such as HF 589, HB 187, and the laws already in place in North Dakota, Kansas, and Montana, this is precisely the threat we face.

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<sup>161</sup> *Id.*

<sup>162</sup> Stewart, *supra* n. 108, at 634.

<sup>163</sup> *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).