Free-Speech Rights versus Property and Privacy Rights

"Ag-Gag" Laws and the Limits of Property Rights

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Beginning in the 1990s, private agricultural firms, research institutions, and their political allies began seeking governmental protection from undercover investigations conducted by animal rights activists. Some state governments responded by enacting statutes that regulate undercover investigatory behavior, creating statutory prohibitions on trespasses and on evidence gathering without permission and requiring undercover investigators to quickly turn over evidence of animal abuse or face civil and criminal fines and penalties (Lin 2015, 474). To date, three such state laws—popularly known as *ag-gag laws,* a term used by critics of the laws—have been successfully challenged based on claims that they violate First Amendment free-speech rights, and most scholars have agreed with the analytical approach taken by federal courts' doctrinal approach. However, in this article, using tort and property rights theory, I contend that so-called ag-gag laws are efforts to protect property rights that do not threaten free-speech rights. The doctrine applied by federal courts to date, the "false speech" doctrine, is an unwarranted expansion of speech protection that threatens to eviscerate the common-law rights of property owners to

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exclude others from their property and maintain their privacy. Ag-gag laws and the free-speech claims they have produced are important beyond the insular doctrinal debates among lawyers and judges. The expansion of the "false-speech" doctrine is a threat to private businesses, for-profit and nonprofit alike, because they are faced with the possibility of undercover investigations without recourse to the courts under traditional property rights protections.

Since the 1990s, when state ag-gag laws were first enacted, most scholars have supported undercover animal activists' claims that ag-gag laws violate speech rights (see, for example, Reid and Kingery 2015; Shea 2015; Coleman 2017). Some scholars have suggested that the advent of ag-gag laws highlights the need for greater workplace "whistleblower" protections (Lacy 2013; Negowetti 2014). Others have argued that ag-gag laws are simply bad policy because they purportedly seek to protect business owners' privacy and property rights but result in illegal animal abuse going undetected (Shea 2015). Some critics have concentrated on particular problems that ag-gag laws seek to hide, such as sexual abuse of animals (Lewis 2017). However, most scholars have concentrated on the objective of quashing undercover investigations per se and on the constitutional issues raised by ag-gag laws. They contend that ag-gag laws are overbroad unconstitutional restrictions on speech (Bollard 2012; Landfried 2013).

In *United States v. Alvarez* (2012), the U.S. Supreme Court held that free-speech protections extend to false speech, with the provision that the speech does not involve a legally cognizable harm and the speaker otherwise derives no benefit from the speech (at 723).[1] Most scholars have construed business owners' property rights claims as unserious objections, distractions, or evasions of the problem of animal abuse or as simply much less worthy of consideration in comparison to free-speech concerns. For example, Larissa U. Liebmann has contended that the real purpose of ag-gag laws is to prevent "the dissemination of truthful, unprivileged information to the public" (2014, 590). Rita-Marie Cain Reid and Amber Kingery similarly argue that the claims of privacy and property rights are smoke screens because "[f]arms need protection from animal or food safety activists only to hide animal cruelty or unsafe food practices" (2015, 63). James Cooper's sentiments encapsulate most scholars' opinions: "[A]g-gag legislation is not only unconstitutional, but is also morally reprehensible" (2013, 254). In short, critics see ag-gag laws as pernicious attempts to quash unfavorable publicity of the agricultural industry (Pitts 2012; Wilson 2014; Potter 2017; Rasmussen 2017).

As of June 2020, ag-gag laws have been enacted in one form or another in thirteen states:[2] Alabama (2002), Arkansas (2017), Idaho (2014),[3] Iowa

1. The references at the end of this article include a sublist of legal cases using a case-date reference format. See that list for case numbers.

2. See the sublist "Statutes" in the references for state ag-gag laws.

3. Held unconstitutional by the Ninth Circuit Court of Appeals in *Animal Legal Defense Fund v. Wasden* (2018).

(2012),[4] Kansas (1990, 2012),[5] Missouri (2012), Montana (1991, 2015), North Carolina (2015),[6] North Dakota (1991), South Carolina (2012), Texas (2017), Utah (2012),[7] and Wyoming (2016).[8]

Animal Rights Undercover Investigations

Contemporary animal activists, like their Progressive Era predecessors, have filled in what they see as a gap between statutory prohibitions on animal cruelty and law enforcement, doing the undercover investigative work that police cannot afford or refuse to do. Cruelty concerns in the context of industrial-scale livestock-slaughtering operations have been regulated only since enactment of the federal Humane Slaughter Act of 1958 (Curnutt 2001, 72, 169).[9] Protections for animals used in commercial and scientific research facilities began with the federal Laboratory Animal Welfare Act of 1966.[10] Yet even the federal government's own compliance reports have shown that enforcement in the farm industry has been inconsistent (U.S. Government Accountability Office [GAO] 2004, 2008, 2010). Activists accordingly contend that undercover investigators "need to be allowed to do the work that the federal and state governments are not: documenting the kind of behavior most of us abhor" (Bittman 2011).[11]

Beginning in the 1980s, animal activists engaged in undercover investigations of animal experimentation labs, and some activists took a radical course, using bombings, arson, cyber infiltration of research institutions' computer systems, and vandalism. Congress responded in 1992 with the Animal Enterprise Protection Act, which created the new crime of "animal enterprise terrorism" (Hirsch-Hoefler and Mudde 2014, 587). At the state level, activists committed common-law crimes, such as arson, breaking and entering, theft, burglary, and property crimes under the rubric of vandalism. Because animals are considered property in all jurisdictions in the United States, the common-law property crimes would apply to acts involving the "liberation" of animals, whether in labs or farm operations (Hodges 2011). The state-level ag-gag laws

4. Held unconstitutional by U.S. District Court for the Southern District of Iowa in *Animal Legal Defense Fund v. Reynolds* (2019).

5. Held unconstitutional by U.S. District Court for the District of Kansas in *Animal Legal Defense Fund v. Kelly* (2020).

6. Held unconstitutional by U.S. District Court for the Middle District of North Carolina in *People for the Ethical Treatment of Animals v. Stein* (2018).

7. Held unconstitutional by the U.S. District Court of Utah in *Animal Legal Defense Fund v. Herbert* (2017).

8. Held unconstitutional by the Tenth Circuit Court of Appeals in *Western Watersheds Project v. Michael* (2017).

9. For federal statutes, see the "Statutes" sublist in the references, where a "statute-date" format is used.

10. This law was later renamed the Animal Welfare Act.

11. Mark Bittman's op-ed was apparently the first recorded instance of applying the term *ag-gag* to such state laws.

enacted in the 1990s were justified with claims that terrorism was being thwarted (Loadenthal 2013).

Since 1998, there have been more than a hundred reported undercover investigations in North America by a variety of nonprofit animal activist groups (Animal Visuals n.d.). Activists call such investigations DIY (do-it-yourself) direct action, which originated with the environmental activist group Earth First! and became popular in the 1990s. Nonviolent "direct actions" include mailings, hunger strikes, demonstrations, and undercover surveillance (Munro 2005, 76). The purposes of animal welfare undercover investigations vary, but the most common objectives are (1) to publicize unethical treatment of animals used in industrial farming operations in an effort to shame local, state, and federal officials into initiating prosecutions of such treatment of animals; (2) to encourage consumers to reject meat consumption and adopt vegetarianism or veganism; and (3) to encourage public revulsion and stigma against the companies that manufacture, distribute, or purchase the products of such animal operations. The publication of these undercover investigations is done in order to "shock the conscience" of the general public, and animal rights activists believe such efforts are helpful in recruiting members, generating media coverage, and creating public pressure on officials to take action through legislation and enforcement (Garner 2002). The evidence generated by such undercover investigations has resulted in criminal prosecutions of farm owners, managers, and employees; animal meat recalls; and the closure of some facilities (Carlson 2012). Importantly, though, it must also be noted that publication of such activities contributes to nonprofit group fund-raising efforts (Bray 2015, 380).

Activists surreptitiously take photos and make videos of what they interpret as abusive acts. Such surveillance is preferred by activists because they do not consider their methods illegal, their work usually does not result in imprisonment for the investigator, and their methods are nonviolent. As one activist advised, "Get a video camera, get yourself a job in a research place[,] . . . [and] go out there and get the film and you're not breaking the law, but you're breaking the back of the opponents" (qtd. in Munro 2005, 89). Prosecutors often rely upon the evidence provided by these activists in prosecutions for animal cruelty.

The Legal Rights of Commercial Animal Facility Owners

Although activists may believe their investigations are legal, it can be argued that they violate multiple state laws. For example, trespass is the entry onto the property of another without permission, which can be a civil or criminal violation. However, modern case law regarding whether deception is allowed to gain entry to land is "largely a mess," and at least one federal district court refused to decide a case involving this factor, claiming there was no clear majority rule among state and federal courts regarding whether deception terminates consent to enter upon land. In that case,

undercover reporters, posing as prospective patients, surreptitiously filmed a face-lift clinic (Sacharoff 2015, 363 n. 19).

Two pertinent federal circuit court of appeals decisions addressed the problem of access to property through misrepresentation. These cases have also proven pivotal in the constitutional analysis of ag-gag laws in federal courts. First, in *Desnick v. American Broadcast Companies, Inc.* (1995), the Court of Appeals for the Seventh Circuit held that television reporters' lies did not vitiate the clinic's grant of permission, noting that the goal of trespass is to prevent "interference with the ownership or possession of land" (at 1353). In this case, the reporters did not publish private facts about anyone or reveal confidential communications between doctors and patients. The reporters did not surveil off-limits areas, did not obtain trade secrets, and did not interfere with business operations. Accordingly, the undercover investigation was not deemed a "trespass."

In another pertinent federal case, *Food Lion v. Capital Cities/ABC* (1999), a grocery store unwittingly hired news reporters, who lied to gain jobs to investigate the store's sanitation practices and made recordings in nonpublic areas. After the videotapes were broadcast, the store successfully sued the reporters and network for fraud, breach of the duty of loyalty (as employees), and trespass. Trespass can occur only when a person enters property without consent. In *Food Lion,* the store argued its consent was terminated by the reporters' misrepresentations. But the Fourth Circuit Court of Appeals held the reporters' lies were insufficient to terminate the store's consent. However, the court held the reporters breached their duty of loyalty to the store, which did terminate consent. In U.S. employment law since the nineteenth century, employee duty of loyalty requires employees to "perform the duties incident to his employment honestly . . . and [with] due regard to his master's interest and business" (Wood 1886, 165–66, qtd. in Aaron and Finkin 1998–99, 321). The Fourth Circuit held that the use of hidden cameras was a breach of the reporter-employees' common-law duty of loyalty (*Food Lion* 1999, at 519).[12] The court also looked to the purposes of trespass, noting that the "peaceable enjoyment of property" (at 519) is one reason for prohibiting nonconsensual entry.

Accordingly, the common-law duty of loyalty supports a rule that deceiving an owner or operator in order to gain access to his property should be disallowed, regardless of motive. However, the disparate court holdings on whether consent to enter property is killed by lies during a hiring interview likely incentivized agricultural facility

12. The damages awarded Food Lion amounted to $1.00 on the trespass claim, presumably because no physical harm was caused. The appellate court also held that the state's Unfair and Deceptive Trade Practices Act of 1977 would not allow a claim against the media because the consuming public was not harmed and claims of deceptive trade practices are allowed only to competitors in the same industry. In *LL NJ, Inc. v. NBC-Subsidiary (WCAU-TV), L.P.* (2008), the federal district court abstained from addressing a trespass claim brought by a cosmetic surgical practice against a television news organization that used undercover reporters posing as patients to gain access to and make video recordings on the premises. The court held that there was a lack of decisions from other state and federal courts on the question of whether trespass claims were allowed regarding undercover investigators.

owners' efforts in the 1990s to lobby state and federal legislators for uniform protective legislation.

Employers have won common-law fraud claims against undercover employees. In *Food Lion* (1999), for example, the jury awarded the store the wages and benefits paid to the fake employees in the amount of $1,400 and awarded $5,545,750 in punitive damages on a fraud claim against ABC and its two producers. Another example is *Schiffman v. Empire Blue Cross and Blue Shield* (1998), which upheld a fraud claim against a reporter who gained entry to medical clinic by posing as a patient. The extant reported court cases, such as *Desnick* and *Food Lion,* usually involve journalists. Yet there is no consistency in how federal courts have treated undercover investigations cases: some have held the use of deception to gain entry is a trespass; others have held a trespass occurs when secret filming begins; and others have held that use of deception is no trespass at all (Sacharoff 2015, 363). As one federal district court has noted, "[T]here is no clear majority rule on the subject of fraud vitiating consent to entry upon land" (*LL NJ, Inc. v. NBC-Subsidiary (WCAU-TV), L.P.* 2008, at *16). It is impossible to know if private owners have established any deterrence against undercover investigations through tort suits because the federal appellate courts are so divergent on the question, and there simply are no mechanisms for tracking suits in state or federal trial courts. Finally, there are no reported successful civil cases against animal rights activists who infiltrated agricultural or lab facilities.

Ag-Gag Laws

Beginning in the late 1980s, in response to the threat of undercover investigations, commercial agricultural operations owners lobbied state legislatures and the U.S. Congress to enact protective legislation. Kyla Henderson (2017) has rightly criticized the advent of ag-gag laws as examples of regulatory capture, wherein the agricultural industry has sought protection through the state from the threats posed by animal rights activists' undercover investigations.

In 1992, Congress enacted the Animal Enterprise Protection Act, which created misdemeanors for the "physical disruption" of animal research and production facilities. The law was designed to target terrorism and provided additional penalties for acts that caused bodily injuries or death. It was amended in 2006 and broadened the prohibited acts to include those done "for the purpose of damaging or interfering with the operations of an animal enterprise" (18 U.S.C.A. §43(a)(1)). The statute prohibits conduct leading to "economic damage" but expressly excludes from "economic damage" (and thereby protects) acts leading to "any lawful economic disruption (including a lawful boycott) that results from lawful public, governmental, or business reaction to the disclosure of information about an animal enterprise" (18 U.S.C.A. §43(d)(3)(B)). In addition, the Animal Enterprise Protection Act of 1992 has a free-

speech safe-harbor provision that protects "expressive conduct" (18 U.S.C.A. §43(e)(1)).

In addition to the federal legislation, also beginning in the 1990s, states enacted legislation intended to reduce undercover investigations of animal operations. The first of these so-called ag-gag laws was enacted in 1990 in Kansas. Known officially as the Farm Animal and Field Crop and Research Facilities Protection Act, this state law sought to protect industrial farming operations from ecoterrorism and vandalism. The law also forbade anyone to "take pictures by photograph, video camera or by any other means" (K.S.A. §47-1825 (1990)). Under the law, owners can file a civil suit seeking treble damages.

Within a year, two more states—Montana and North Dakota—enacted their own ag-gag laws. In 2010, the American Legislative Exchange Council drafted a model bill that was ultimately enacted (with variations) in ten more states (Broad 2016, 49). The state laws, like the federal law, were premised upon farmers' and researchers' fears of ecoterrorism. For example, in 1990 the World Medication Association claimed that a "staggering" amount of violence had had a "chilling effect" on animal-based research ("Statement on Animal Use" 1990).[13] In 2012, during this second wave of ag-gag enactments, Joe Seng, Iowa state senator, veterinarian, and cosponsor of what became Iowa's ag-gag law, claimed that undercover videos were "staged attempts" to "discredit" the industry. Seng acknowledged activists' free-speech concerns but contended that the "U.S. constitution [*sic*] *says* that you cannot enter a person's private property without formal knowledge." Seng emphasized the industry's arguments regarding the sanctity of private property and argued that employees could still report abuses and use the protections of workplace "whistleblower" laws (Seng 2012, emphasis in original). It should be noted that under federal law there are no whistleblower protections for meat and poultry industry line workers, although some states may have their own statutes (Lacy 2013, 129). Accordingly, there are few protections or incentives—other than ideological commitment—for employees to reveal abuses at facilities. Yet, Seng contended, owners were concerned mainly about the fraud perpetrated by undercover activists when seeking employment (Seng 2012). The concerns regarding terrorism in the 1990s were replaced with concerns about reputation and property rights in the 2010s.

The First Amendment versus Private Property

The U.S. Supreme Court has held that the constitutional rights to free speech and freedom of the press do not allow individuals or media to violate generally applicable

13. In 1990, the World Medication Association claimed "[a]nimal rights violence has had a chilling effect on the scientific community internationally." Animal rights activists were "radical" and "far outside mainstream public attitudes." The statement proclaimed that the "magnitude" of violence was "staggering" and included thousands of acts of violence and vandalism targeting "biomedical research facilities and individual scientists" and resulting in millions of dollars in damages, which had a "chilling effect" on research and deterred young scholars from pursuing a research career ("Statement on Animal Use" 1990).

civil and criminal laws. In *Cohen v. Cowles Media* (1991), the U.S. Supreme Court reviewed a case wherein a staff worker for a political campaign agreed to provide confidential information about a rival campaign to news reporters with the stipulation that the staff worker's identity would remain confidential. However, the reporters' editors decided to publish the staff worker's name. The Court held the First Amendment did not prevent the staffer's suit against the paper, reasoning that the press must abide by generally applicable laws, even if enforcement of those laws has an "incidental effect" that hinders the gathering of news. The lawsuit was premised upon generally applicable law and "did not single out the press" (at 670). In *Cohen,* the Supreme Court specifically stated that "[t]he press may not with impunity break and enter an office or dwelling to gather news" (at 669). In addition, as noted in the *Food Lion* case discussed earlier, the federal district court, also citing *Cohen,* referenced *Branzburg v. Hayes* (1972) to note that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally" (*Food Lion* 1997, at 929). The legal question regarding ag-gag laws is whether they are generally applicable laws that only incidentally burden free speech or are laws that impermissibly target protected speech.

The most recent case addressing ag-gag laws is the Ninth Circuit Court of Appeals case *Animal Legal Defense Fund v. Wasden* (2018). In February 2014, Idaho enacted law Section 18-7042, which made "interference with agricultural production" a misdemeanor. Those convicted were subject to up to a year of imprisonment and/or up to a $5,000 fine as well as payment of restitution set at twice the value of any damage to the agricultural operation. A person committed the "crime of interference" if he, among other things, gained access to an "agricultural production facility" by "misrepresentation or trespass" or entered the facility with the "owner's express permission" and "makes audio or video recordings of the conduct of an agricultural production facility's operations." All crimes require wrongful intent, and the Idaho law required an "intent to cause economic or other injury" (*Idaho Stat.* 2014).

The Idaho law was enacted after an undercover video depicting dairy employees abusing cows at an Idaho dairy was released by a Los Angeles–based animal advocacy group. The advocacy group, Mercy for Animals Dairy, readily admitted that its employees or coordinated volunteers accessed the dairy by misrepresenting their identities and surreptitiously made videos without the facility's consent. Although the dairy owners fired the abusive employees and promised to take corrective action to prevent future abuse, the Idaho Dairymen's Association "wrote and sponsored" a law criminalizing such undercover operations (*Animal Legal Defense Fund v. Otter* 2014). In response, the Animal League Defense Fund (ALDF), a nonprofit legal advocacy firm based in California (ALDF n.d.), filed a federal lawsuit, claiming the statute violated the First Amendment's Free Speech Clause.

The plaintiffs prevailed in the federal district court, with the trial court holding that the state law violated the undercover activists' speech rights. Upon appellate review, the Ninth Circuit Court of Appeals gave a mixed ruling on the speech claims (*Animal Legal*

Defense Fund v. Wasden 2018). The Ninth Circuit's assessment of the constitutional claims is important not only for future undercover investigations of animal cruelty in the states of the Ninth Circuit[14] but also for any kind of undercover investigation, including news-gathering efforts, even though the Idaho statute applies only to "agricultural production facilities."

The Ninth Circuit considered different elements of the Idaho law, which made "interference with agricultural production" a misdemeanor when a person

1. Gains entry to an "agricultural production facility" by knowingly making misrepresentations or
2. Obtains business records of such a facility by knowingly making misrepresentations or
3. Obtains employment by knowingly making misrepresentations, coupled with the intent to cause economic or other injury, or
4. Enters a facility and without express consent of the owner or pursuant to judicial process makes audio or video recordings of the conduct of facility operations (*Idaho Stat.* 2014).

The activists claimed that all of these provisions violated their free-speech and Fourteenth Amendment equal-protection rights.

The Ninth Circuit unanimously upheld the second (obtaining business records) and third (obtaining employment) provisions. However, a divided court struck down the first provision (obtaining entry) and unanimously struck down the fourth provision (entering without consent and making recordings) under the Constitution's Free Speech Clause.

In striking down the provisions that criminalize the obtaining of *entry* and prohibit the making of *audio or video recordings without express permission* upon First Amendment free-speech grounds, the Ninth Circuit Court relied upon the U.S. Supreme Court case *United States v. Alvarez* (2012). In *Alvarez*, the Supreme Court held that the federal Stolen Valor Act of 2005, which criminalized false statements that claimed a person had been awarded the Congressional Medal of Honor, violated free-speech rights. *Alvarez* was a plurality decision but arguably stands for the proposition that simply prohibiting lies is impermissible under the First Amendment. Although the Ninth Circuit acknowledged the *Alvarez* plurality's qualification that "false speech may be criminalized if made 'for the purpose of material gain' or 'material advantage,' or if such speech inflicts a 'legally cognizable harm,'" it held that, standing alone, the Idaho law's prohibition on lies to gain access was insufficient to uphold the law (*Animal Legal Defense Fund v. Wasden* 2018, at 1194). The Ninth Circuit Court distinguished lies to obtain employment or records, which the court held are purposes that are harmful to

14. In addition to Idaho, the states within the jurisdiction of the Ninth Circuit Court of Appeals are Alaska, Arizona, California, Hawaii, Montana, Nevada, Oregon, and Washington.

the owner of property, reasoning that lying to gain "access" was "innocent behavior," and analogized the activists' efforts to a teenager obtaining a reservation at a high-end restaurant by falsely claiming to be the son of a famous reporter. The court reasoned that such access would not harm the restaurant, nor would there be any material gain to the teenager.[15] In addition, the court held without discussion that the statute's "purpose" was "targeted at speech and investigative journalists" (*Animal Legal Defense Fund v. Wasden* 2018, at 1194–195).

One Ninth Circuit judge dissented regarding the access provision, noting that both the teenager hypothetical and the real case involving the activists involved a trespass claim. However, the majority dismissed the dissenter's trespass objection by noting Idaho law required posting "No Trespass" signs (which were not posted in this case) and by citing the tort cases discussed earlier, *Desnick* (1995) and *Food Lion* (1999), regarding common-law trespass claims. The Ninth Circuit majority reconciled the instant case with these prior cases by claiming that the purposes of trespass law (i.e., protecting the "ownership and peaceful possession of the land") are not affected by lying to gain access, without some material harm to the owner or gain to the liar.[16] In addition, the *Wasden* dissent noted that Idaho common law construes misrepresentations to gain entry as a cognizable claim because landowners have "*exclusive* dominion" over their land and the right to exclude others from it (*Animal Legal Defense Fund v. Wasden* 2018, at 1208).[17]

The *Wasden* majority's reasoning is doubtful. Certainly, a nonprofit animal rights activist group's self-interest is served by lying to gain access to a facility where the activists suspect animals are abused. The group's raison d'être is to reveal animal abuse, and such groups are able to further fund their activities by uncovering such abuse. For instance, the ALDF, the lead plaintiff in *Wasden,* maintains a donations page on its website that states: "Your generous gift will assure that ALDF can continue to take on cases that advance the interests of animals" (ALDF n.d.). The website highlights its efforts against ag-gag laws and urges tax-deductible donations to the ALDF. The original activist group in what would become the *Wasden* case, Mercy for Animals, maintains a website proclaiming, "See the Impact Your Support Makes," with a link to "Undercover Investigations" (Mercy for Animals n.d.a, n.d.b). Unlike the claimant in *Alvarez,* who lied to gain distinction as a purported Medal of Honor winner, the activists in *Wasden* were lying to gain access for the morally praiseworthy act of revealing animal abuse. However, they also had their nonprofit business's interests at stake as well. A pair of authors writing in *Nonprofit Quarterly* have advised activist organizations, "Your cause will stand out only when you can demonstrate your success. Not only will

15. This is arguably doubtful. The teenager might gain a complimentary meal from the restaurant or other perks because the staff would be laboring under the impression the teenager is the child of a famous reporter.

16. Recall that the Fourth Circuit in *Food Lion* upheld the judgments against the journalists based on the tort claims, rejecting the First Amendment claims (*Food Lion v. Capital Cities/ABC* 1999, at 522).

17. The quoted material is from Judge Carlos T. Bea's dissent, with the emphasis in the original.

your cause not sell itself, the retention of donors and contracts may hinge on your ability to prove that you are accomplishing what you say you want to accomplish." In addition, "the nonprofit landscape is crowded; to stay relevant, nonprofits need to actively and repeatedly justify their survival" (Hager and Searing 2015). It should be noted that the *Alvarez* plurality stated that false speech that produces "legally cognizable harm[s]," such as "an invasion of privacy [and] the costs of vexatious litigation," does not have First Amendment protection (*United States v. Alvarez* 2012, at 719). Unlike in *Alvarez*, activists have distinct material advantages from lying to gain access.

Notwithstanding the plaintiffs' victory on the access claim, the *Wasden* court upheld the Idaho statute's prohibitions on "obtaining records" and "obtaining employment" via misrepresentation. The Ninth Circuit held that the "obtaining records" provision targeted "conduct" rather than speech and noted the legislature's legitimate interest in protecting property and privacy (*Animal Legal Defense Fund v. Wasden* 2018, 1199–200). The court rejected the activists' equal-protection argument, noting that although the majority were convinced the legislature was expressly targeting "reporters and activists," the government also had a clear and constitutionally legitimate reason for protecting "property rights and privacy interests" (*Animal Legal Defense Fund v. Wasden* 2018, 1201).

In addition, relying on the Supreme Court's holding in *Alvarez*, the Medal of Honor case, the Ninth Circuit reasoned that lying to "obtain employment" is not protected by the First Amendment because it is lying for "material gain" (i.e., the remuneration derived from employment). Although not mentioned by the *Wasden* majority, it should be noted that Congress has criminalized material misstatements on federal government job applications (*Blake v. United States* 1963).

Finally, the *Wasden* court held that the provision prohibiting the making of recordings in an agricultural production facility violates free-speech rights because it is "a classic example of a content-based restriction that cannot survive strict scrutiny" (*Animal Legal Defense Fund v. Wasden* 2018, 1203).

Wasden provides a mixed message on property rights versus free-speech rights. On the one hand, lying to gain entry to land for specific purposes such as employment or access to confidential business records can be prohibited. On the other hand, lying simply to gain access is protected speech. However, it is doubtful anyone ever lies simply to gain access. The activists in ag-gag cases claim they are serving the noble purpose of protecting animals. It is reasonable to ask why the exercise of a constitutional right—whether the protection of property or the exercise of free-speech rights—is dependent on the purpose for which the right is being exercised. Moreover, as noted earlier, the activists are also serving their organizations' financial (i.e., fund-raising) interests when using "false speech" to gain access to businesses, regardless of whether abuse is revealed. The *Wasden* court's application of the false-speech holding from *Alvarez* (2012) annuls the traditional common-law property right to exclude another from one's property. It is important to note that the reasoning in *Wasden* was not restricted to the context of "agricultural production facilities." The majority's reasoning

could apply to any statute that sought to protect any type of business from undercover investigations by private actors lying and posing as prospective employees in order to gain access to a business's premises. Although the *Wasden* case allows some statutory protections for business records, no businesses will celebrate the case. Once an employee has legal access based on lies, the property rights of exclusion and privacy have been voided. As Justin Marceau, one of the attorneys for the activists in *Wasden*, has written, the "opinion from the 9th [Circuit Court of Appeals] can be read by the clients as allowing them to resume investigations. They never 'intend' to cause harm to the facilities—they seek transparency—so this decision [*Wasden*][,] while less than we asked for in some ways, can be read as tantamount to complete victory" (email from Justin Marceau to the author, May 30, 2019).

Wasden was the first of several pending cases concerning ag-gag laws to be decided by a federal appellate court. To date, the remaining pending cases have been at the federal trial court level. Two have been decided—*Animal Legal Defense Fund v. Herbert* (2017) and *Animal Legal Defense Fund v. Reynolds* (2019)—both of which struck down the laws based on the Supreme Court's *Alvarez* (2012) "false-speech" rationale. As of June 2020, two pending federal cases at the district court level seek to challenge ag-gag laws on First Amendment grounds. In the case *Animal Legal Defense Fund v. Kelly* (2020), which challenged Kansas's ag-gag law, the oldest in the nation (enacted in 1990), a federal district court in Kansas held the law violated the First Amendment's Free Speech Clause, relying upon the "false-speech" holding in *Alvarez*. Also, in *People for the Ethical Treatment of Animals v. Stein* (2018), the North Carolina Property Protection Act (*N.C. Gen. Stat.* 2015, §99A-2)—the state's version of an "ag-gag" law—is being challenged in federal district court.

Beyond Animal Rights

All of the federal cases referenced heretofore concern so-called ag-gag laws: state laws targeting undercover animal rights investigations. However, the issues of property and privacy rights versus free-speech rights can arise in other contexts. One recent example is a Wyoming law that sought to protect against trespasses to private land by those gathering "data" on adjacent land. The statute criminalized entering private land "for the purpose of collecting resource data" and "[c]ross[ing] private land to access adjacent or proximate land [to] collect[] resource data" (*Wyoming Stat.* 2016, 6-4-414(c), 40-27-101(c)). "Resource data" were defined as "including but not limited to data regarding agriculture, minerals, geology, history, cultural artifacts, archeology, air, water, soil, conservation, habitat, vegetation or animal species" (Wyoming Senate 2016). In *Western Watersheds Project v. Michael* (2017), the Tenth Circuit held that collecting data is protected speech. The court noted that state law already prohibited trespass and that the challenged statute specifically targeted an activity central to free speech because the entry upon land to "collect resource data" was part of the "creation

and dissemination of information," which the Supreme Court has held is speech in itself (at 1195–196).[18]

As the Tenth Circuit noted in *Michael,* the U.S. Supreme has previously protected actions as speech that states had prohibited in the name of property and privacy rights. For example, in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton* (2002), the Supreme Court struck down an ordinance that prohibited "canvassers from going on private property for the purpose of explaining or promoting any cause, unless" the canvasser had first obtained a permit from the town government (*Western Watersheds Project v. Michael* 2017, at 1195).[19] In *Michael* (2017), the Tenth Circuit held that the Wyoming statute was unconstitutional because it prohibited data collection, which is speech per se, and the state's objective of protecting private property was met under trespass statutes not aimed at quelling speech. The *Michael* court stated that the law targeted "speech-creating" acts (at 1197).[20]

Many types of businesses—grocery stores, restaurants, research facilities of all types, and, of course, agricultural production facilities—likely want protection from undercover investigations. A notable and very politically contentious example is in the area of abortion services.

A federal district court sitting in the Northern District of California has demonstrated in *National Abortion Federation v. Center for Medical Progress* (2018) the broad applicability of the property/privacy rights versus free-speech rights conflict. The Center for Medical Progress (CMP) is an anti-abortion activist group that has used false speech to gain access to pro–abortion rights businesses in order to conduct undercover investigations. In the instant case, the CMP conducted an undercover investigation of an abortion rights group's meeting after signing nondisclosure agreements and obtaining access to the meeting through misrepresentations. The National Abortion Federation sued the CMP for breach of contract, seeking an injunction and other contract-based remedies under California state law. The district court held that *Wasden* (2018) was not controlling because the law on misrepresentation was generally applicable, whereas the statute reviewed in *Wasden* was targeted at speech. Also, the district court noted the ag-gag law in *Wasden* was "overbroad" and punished "innocent behavior" (*National Abortion Federation v. Center for Medical Progress* 2018, at 6). The district court did not elaborate on its conclusion that the behavior in *Wasden* was "innocent," but the behavior examined in *National Abortion Federation* implicitly was not. The district court refused to rely upon *Wasden* as a basis for providing protection to the CMP's undercover investigation efforts. The Ninth Circuit Court of Appeals upheld

18. The *Michael* court quotes the U.S. Supreme Court case *Sorrell v. IMS Health, Inc.* (2011, at 570).

19. The *Michael* court quotes *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton* (2002, 165).

20. The *Michael* court cited *Zemel v. Rusk* (1965), in which the Supreme Court held that the federal government's ban on travel to Cuba did not violate a First Amendment free-speech right to "gather information" (*Zemel* 1965, at 17).

the trial court's refusal to rely upon *Wasden* (*National Abortion Federation v. Center for Medical Progress* 2019, at 482), which demonstrates the political salience of this conflict between property/privacy rights and free-speech rights.

The ag-gag statutes will likely be only one type of statute that will drive the courts to address this conflict-of-rights problem. Ag-gag laws and common-law doctrines can "cut both ways" regarding the political and business interests that seek to quash undercover investigations and thwart negative publicity. The *National Abortion Federation* (2018) case demonstrates how the rights battle that began with animal activists and livestock operations can spread to other types of businesses and affect other types of activists and journalists. Whether a burgeoning of similar "gag"-type laws—applied, as in *Western Watersheds Project v. Michael* (2017), to all manner of investigatory or data-gathering activities—will occur is currently unknown. What seems likely is that the U.S. Supreme Court will need to clarify the extent of the "false-speech" doctrine in ag-gag law cases. Federal courts of appeal may differ in their interpretation of ag-gag laws or broader laws, like those in *Michael* (data collection) or *National Abortion Federation* (false speech), thereby requiring guidance from the Supreme Court.

How Might the Supreme Court Rule?

It is uncertain how the Court would view a conflict between speech rights and property/privacy rights. *United States v. Alvarez* (2012) is one of the broadest conceptualizations of speech the Supreme Court has rendered. In addition, other recent cases indicate that a narrow majority of the Court favors broad speech protections: *Janus v. American Federation of State, County, and Municipal Employees, Council 31* (2018), protecting against mandatory public-union fee expenditures; *National Institute of Family Life Advocates v. Becerra* (2018), protecting pro-life pregnancy centers from having to post mandatory notices of abortion services; *Minnesota Voters Alliance v. Mansky* (2018), striking a law prohibiting the wearing of politically oriented apparel at or near the polling locations; and *Lozman v. City of Riviera Beach* (2018), ruling that even an arrest made with "probable cause" can be deemed unconstitutional retaliation for the exercise of speech critical of the government. The five justices consistently appearing in the majority in these cases from the 2018 term constitute the so-called conservative bloc on the Court: Chief Justice John G. Roberts Jr. and Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Anthony Kennedy. It would be too speculative at this point to predict how Justice Brett Kavanaugh will rule on any conflict between free-speech and property/privacy rights claims (Zick 2018). Although the four so-called liberal justices—Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan—have been less willing to view the Free Speech Clause broadly,[21] I believe

21. These four justices voted in the minority in *Janus v. American Federation of State, County, and Municipal Employees* (2018) and *National Institute of Family Life Advocates v. Becerra* (2018).

it is doubtful they will seek to protect property rights for agricultural operations over the free-speech claims of animal rights activists.

The Supreme Court's modern speech jurisprudence embraces a "balancing test" approach, wherein free-speech challenges are reviewed under different "levels of scrutiny," all of which require an evaluation of both the challenger's interests in free speech or expression and the government's interest. This approach is used even in the context of content-based restrictions upon speech. In *United States v. Alvarez* (2012), the Supreme Court noted that content-based restrictions are "presumed invalid" but that the burden of proof shifts to the government to require it to demonstrate it has a compelling interest to protect (at 716–17).

The Supreme Court could evaluate ag-gag laws solely under an approach similar to that taken in free-exercise-of-religion cases and some free-speech cases. The reasoning in the Tenth Circuit's opinion in *Michael* (2017) points to a method of analysis that the U.S. Supreme Court might use if it were to review an ag-gag law case: laws of general applicability that incidentally burden speech are constitutional, but laws targeting speech are unconstitutional. This is the approach the Court has used in some free-speech cases, often citing the *Cohen* (1991) precedent referenced earlier. This approach is also used in cases challenging laws that affect religious activities under the Free Exercise Clause. In a long line of cases that originated in 1990, the Supreme Court has held that "neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause" (*Holt v. Hobbs* 2015, at 859). The "neutrality" approach crafted by the Court in free-exercise-of-religion cases overturned and replaced a "balancing test" approach theretofore used by the Court, wherein the Court had to "balance the interests" of the challenger against the interests of the government and effectively had to play a legislative role by weighing stakeholders' interests. Under this "balancing" method, the challenger had to demonstrate that his religious liberty had been "substantially burdened" by the law, and then the government had to prove it had a "compelling interest" that could be achieved only via enforcement (*Sherbert v. Verner* 1963, at 403; *Wisconsin v. Yoder* 1972, at 214). The Supreme Court could formulate a neutrality rule, providing that a law targeting speech at the "speech-formation" stage of information gathering, as the Tenth Circuit held in *Michael,* is unconstitutional, whereas a law that neither by its terms nor by the manner of enforcement targets particular speech or speakers and only incidentally impinges upon speech is constitutional.

A neutrality approach would have some advantages over the Supreme Court's current free-speech doctrinal approach. First, in the case of ag-gag and other laws that seek to restrict or prohibit data-gathering or undercover investigations, the valuable speech needed to inform society of illegal behavior and of contestable and political activities and issues would be protected under traditional principles of free-speech jurisprudence. Second, property- and privacy-protection efforts would be preserved under speech-neutral statutes, like those that civilly and criminally prohibit trespass and

invasion of privacy. In short, a neutrality approach could preserve property/privacy rights and free-speech rights.

However, the expansion of the *Alvarez* "false-speech" doctrine presents a particular threat to the protection of property and privacy rights. *Alvarez* was a plurality opinion and did not provide a clear, black-letter rule regarding when false speech is protected under the First Amendment. It is important that the *Alvarez* case was decided by an unusual plurality: liberal justices Ginsburg and Sotomayor joined Chief Justice Roberts and Justice Kennedy to protect the false speech, whereas conservative justices—those often in the majority favoring expansive protections of speech—Alito, Thomas, and Scalia dissented. Justices Breyer and Kagan concurred in the result. The plurality opinion was authored by Justice Kennedy, joined by Justices Roberts, Ginsburg, and Sotomayor, and held that the "Court has never endorsed the categorical rule" that false speech is unprotected simply by its falsity (*United States v. Alvarez* 2012, 719). To hold otherwise would constitute a "new category of unprotected speech" (at 722). The plurality held instead that speech that is used to "gain a material advantage" is not protected (at 723). The plurality expressly pointed to cases of invasion of privacy as examples of unprotected false speech. Also, the plurality noted that the Stolen Valor Act "target[ed] falsity and nothing more" (at 719).

The concurrence, authored by Justice Breyer and joined by Justice Kagan, distinguished the Stolen Valor Act from laws "requiring . . . specific harm to identifiable victims" and from laws prohibiting false speech "made in contexts in which a tangible harm to others is especially likely to occur" (*United States v. Alvarez* 2012, at 734, Breyer concurring). As would be expected of those in dissent in *Alvarez,* Justices Alito, Scalia, and Thomas contended that "the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest" (at 739, Alito dissenting). In sum, all of the justices in *Alvarez* agreed that false speech is unprotected if some quantum of "harm" occurs. The peculiar facts of the *Alvarez* case may be a rare example of false speech that does not cause some kind of harm.

It is my contention that false statements for the purpose of gaining entry to another's business, contra the *Wasden* holding, provide a "material advantage" to the undercover investigators. The existence of undercover investigations per se is important to the mission and funding of nonprofit animal advocacy organizations. As multiple scholars have noted, the animal rights movement has used "moral shocks" to recruit members (Jasper and Poulsen 1995; Jasper 1999, 125; Wrenn 2013). The gaining of access to a facility in order to take videos of abuse and the posting of such videos are done not only for the purpose of prosecuting animal abuses but also for the purposes of recruiting members and raising funds. Activists, once admitted to a facility they are investigating, usually create videos and take photographs of business activities, which they later publish online to tar the industry's reputation, regardless of whether the business's actions are illegal or not. From an activist's perspective, many activities that are legal should be illegal. The access provided under the *Wasden* approach would allow a veritable right of access and ability to reveal any activity—from the activist's

perspective—that the activist deems immoral. This access is "materially valuable" from the activist's perspective and from the perspective of those who are later shown the pictures and videos and make monetary contributions to the activists. In short, access to an operation viewed as "the enemy" is the stock and trade of animal rights activism and is therefore "materially valuable." The access, resultant ads, and material published online are certainly "materially valuable" to an animal rights activist organization and arguably meet the standard set by the plurality in *Alvarez* for placing such false speech outside the protections of the First Amendment.

One of the seminal recent cases in free-speech law, *Citizens United v. FEC* (2010), may provide further assistance in rejecting animal activists' free-speech claims. In *Citizens United,* the Supreme Court refused to embrace a view that "corporate power" (both economic and political) is sufficiently tangible and outweighs political speech rights (at 344). That is, the Court treated all speakers equally, regardless of businesses entity status or size. In the ag-gag case, the false speech is not inherently political—although motivated by political objectives—but is speech used to gain access that would otherwise be trespassory. Ag-gag laws are an instance of the state preventing false speech from allowing one actor a material advantage over the property rights of another. The restrictions on false speech treat the actors equally, refusing to subordinate property rights. In addition, *Citizens United* used the term *discussion* as the assumed purpose of the protected speech. In the ag-gag case, there is no discussion in the offing; rather, the activist's speech is false for the purpose of gaining entry to private property.

Another line of cases in First Amendment jurisprudence are the defamation cases that require "malice" (knowledge of falsity or reckless disregard for the truth) to successfully sue someone who has defamed a public official or public figure or who has made a false statement regarding a public issue (*Gertz v. Robert Welch, Inc.* 1974). The Court in *Alvarez* noted the Court's history of rejecting protection for knowingly false speech. The malice standard in defamation law is intended to narrow the restrictions on speech, even false speech. Similarly, the Court in *Alvarez* was concerned with a broad statute that was not "finely tailored" to restrict false speech to contexts where "specific harm" occurred. In the ag-gag cases, by contrast, it is arguable that, just as in defamation cases, the knowing falsehood—trespass to the business and admission to the premises of a person assumed to be a loyal employee—causes a specific and tangible reputational and operational harm to the targeted businesses.

Finally, it should be noted that the business owners likely do not have any Fourth Amendment search claims against the activists' investigatory efforts. Under the Supreme Court precedent *Smith v. Maryland* (1979), the Court held that a third party can provide incriminating information to the government without violating the Fourth Amendment's prohibition of warrantless searches. In *Smith,* the Court upheld a conviction based on the phone company's provision of information *at the request of the police.* The Court recently gave Fourth Amendment protection to a private actor who had voluntarily allowed his movements to be tracked via cell-site location information obtained by the actor's wireless phone carrier. However, that case involved "novel

circumstances" because of the new technology (*Carpenter v. United States* 2018, at 2217). The ag-gag cases, by contrast, do not involve new applications of technology and are more akin to the traditional third-party problem. In the ag-gag cases, the state is not requesting activists to investigate, even though the state enjoys not having to expend resources to conduct its own investigations of the businesses purportedly committing abuses.

The challenges to ag-gag laws in various federal circuits will likely require the U.S. Supreme Court to address this conflict in coming years. The resolution of this conflict will be important not only for the animal rights movement but also for the interpretation of fundamental principles and theories of law in America. Courts are likely the only institutions that can address this conflict between property/privacy rights and free-speech rights. It is my contention that if and when such cases come to the U.S. Supreme Court, the Court should hold that the "false-speech" doctrine of *Alvarez* does not invalidate ag-gag laws. Rather, the false speech involved in ag-gag cases is speech that furthers a violation of landowners' and business operators' property and privacy rights. Such a violation constitutes a tangible harm to the owners and operators and should be prohibited, just like fraudulent speech in commercial transactions.

Conclusion

In recent years, the Supreme Court has expanded the concept of speech to include many forms of "expression" and expressive conduct. Among the American populace, although recent trends among younger Americans favor greater restrictions on freedom of thought and expression, the United States is among the leaders in the world with a populace that gives substantial support to free speech (Wike 2016; Freedom Forum Institute 2018).[22] Americans have considered property rights to be integral to a well-ordered society since the earliest days of the colonial period, and ever since opinion polls addressed the issue in the 1970s, Americans have voiced support for significant protections for property rights (Nadler, Diamond, and Patton 2008). The ag-gag and similar statutes bring these values into conflict. The rise of ag-gag laws has not been widely reported. Many members of the public are unaware of such laws, but one study suggests that the more people are made aware of them, the less "trust" they have in farmers (American Society for the Prevention of Cruelty to Animals 2012; Robbins et al. 2016). However, I am unaware of any studies gauging the public's sentiments regarding a conflict between property/privacy rights and speech rights claims.

Ultimately, the conflict between property/privacy rights and speech rights will likely be resolved in the federal courts. The U.S. Supreme Court will likely be the site of resolution for this conflict because the questions involved are fundamentally

22. The Freedom Forum Institute has polled Americans on First Amendment rights every year since 1997. The poll taken in 2018 reported that 77 percent of Americans supported First Amendment freedoms (Freedom Forum Institute 2018).

jurisprudential and constitutional. To date, ag-gag laws still exist in seven states (American Society for the Prevention of Cruelty to Animals 2019). An additional three states' ag-gag (or data-collection) laws have been held unconstitutional in federal courts, one ruling (*Wasden* 2018) applies to the entire Ninth Circuit and another (*Michael* 2017) to the Tenth Circuit. Organized agribusiness interests have been successful in obtaining protective legislation in only a handful of states since the 1990s, but these laws are increasingly being challenged in the federal courts. Since the undercover investigators are claiming federal constitutional rights violations, these claims ultimately will likely be (and should be) resolved by the Supreme Court.

As noted earlier, academic commentators have uniformly sided with animal rights activists in condemning ag-gag-type laws and have dismissed the property and privacy arguments of agricultural facility owners as sham arguments in an effort to shield their industry from investigations. The recent federal court decisions holding ag-gag laws unconstitutional also have not given much shrift to facility owners' property- and privacy-based arguments. Yet the chief precedent used by federal courts—the U.S. Supreme Court's *Alvarez* decision in 2012—is a weak source of authority for protecting the false speech used by undercover animal activists. I contend that the false speech used by undercover activists should not be allowed as a sword to gain entry to private property. Such false speech yields a benefit for the fund-raising efforts of activist nonprofit organizations and causes a cognizable harm of violating a right to exclusive possession of one's property. In addition, the striking of ag-gag-type restrictions on a broader array of activities such as "data collection" (as at issue in *Michael*) suggests that the false-speech doctrine may be applied to a broad array of efforts to gain access to private property, well beyond animal rights investigations. Finally, there is the danger that the false-speech doctrine will be selectively applied to protect only certain kinds of undercover investigations. The undercover anti-abortion investigation at issue in *National Abortion Federation* (2018) is an example of a court choosing not to apply the false-speech doctrine to protect false speech. This potential application of the false-speech doctrine to press and activist undercover investigations begs the question of whether property and privacy rights, either those recognized at common law or those created by statute, can withstand an expansive interpretation of the First Amendment's Free Speech Clause. It is my contention that false speech used to gain access to the private property of another should not be protected by the First Amendment. Such false speech reduces property and privacy rights and financially and politically benefits the undercover investigators' advocacy organizations. Property rights were one of the main concerns of the Founding-era generation of political thinkers. The extension of the false-speech doctrine to undercover investigations unwarrantedly elevates the constitutional concerns regarding speech above those regarding property.

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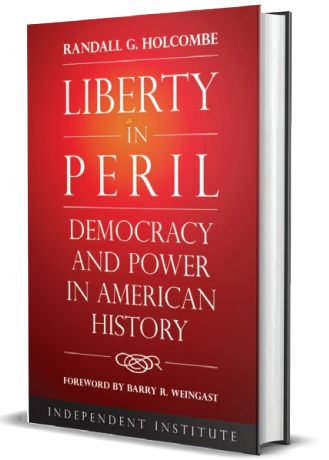

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