

# **THE IMPORTANCE OF PROPERTY RIGHTS IN THE AGRICULTURAL INDUSTRY AND THE ROLE OF FARM PROTECTION LAWS WITH THESE RIGHTS**

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## **ABSTRACT**

This paper examines the importance of property rights within the agricultural sector, the importance of farm protection laws for the preservation of these rights, and how the recent invalidation of farm protection laws, also known as ag-gag laws, will impact the future of farming and the agricultural economy. Well-defined and strongly enforced property rights have been central to civilizations and societies throughout time and are especially important for those individuals making their living in the agricultural industry. Farmers and ranchers need stable access to resources, such as land and water, in order to grow crops or raise livestock; and they also need to feel confident in the protection of their access to those resources. Having a flourishing agricultural sector is beneficial for individuals because it provides a variety of high quality foods; it is good for states because it boosts their economies; and it is vital for countries because it aids national development and international trade. Today, there are growing concerns regarding where our food originates and worries over alleged animal cruelty on farms, which has sprouted an onslaught of animal rights activist groups. These radical groups may have begun with a sincere mission of addressing animal welfare, but in recent years, they have turned to participating in activities that take advantage of farmers and ranchers, leading to severe damage to the agricultural industry. Several states enacted ag-gag laws in order to enhance the protection of farms against these threatening groups. However, several of those laws, including Idaho's farm protection law, have been invalidated under the First Amendment Freedom of Speech clause. The courts have essentially decided that allowing random activists to interfere and gain access to private farms without the permission of the property owner is appropriate and protected under Freedom of Speech, and outweighs the farmer's lawful private property rights. It is yet to be seen how the invalidation of these laws will impact property rights and what this impact means for farming and ranching.

## TABLE OF CONTENTS

I.	INTRODUCTION .....	3
II.	PROPERTY RIGHTS.....	5
A.	HISTORY .....	5
B.	IMPORTANCE OF PROPERTY RIGHTS.....	10
a.	In General.....	10
b.	Property Rights in the Agricultural Industry .....	11
III.	FARM PROTECTION/AG-GAG LAWS .....	15
A.	WHAT ARE FARM PROTECTION/AG-GAG LAWS? .....	15
B.	WHY FARM PROTECTION/AG-GAG LAWS ARE ENACTED .....	17
C.	RECENT DECISIONS REGARDING FARM PROTECTION/AG-GAG LAWS..	24
a.	Idaho: Animal Legal Defense Fund v. Wasden.....	25
b.	Utah: Animal Legal Defense Fund v. Herbert .....	30
IV.	IMPACT OF RECENT DECISIONS.....	31
A.	OTHER FARM PROTECTION/AG-GAG LAWS ARE IN JEOPARDY OF BECOMING INVALIDATED BY THE COURTS.....	31
B.	THE RECENT COURT DECISION REGARDING AG-GAG LAWS WILL NEGATIVELY IMPACT PROPERTY RIGHTS.....	34
C.	INVALIDATION OF FARM PROTECTION LAWS HAVE AN IMPACT ON THE AGRICULTURAL INDUSTRY THROUGH THE EFFECT ON PROPERTY RIGHTS 36	
a.	Invalidation of farm protection laws will affect a Farmer’s decisions and willingness to take risks .....	36
b.	Trespass Law Does Not Protect People from Misrepresentations .....	40
c.	Costs and Benefits of Ag-Gag laws.....	41
V.	CONCLUSION.....	43

## I. INTRODUCTION

Property rights are the foundation of our society, therefore, it is important that they are strongly protected and well-defined. Having control over one's property not only elevates the individual owner, but also allows society to prosper through the activities that the owner does with his or her property. One industry that has depended on property rights since its inception is the agricultural industry.<sup>1</sup> Agriculture requires stable access to resources such as land and water, and the ability to assert ownership over livestock.<sup>2</sup> Property rights help provide farmers and ranchers with the necessary access, as well as confidence, reduced risk, stability, and the opportunity to make a living through the use of their own resources. When farmers and ranchers have the protection of strong property rights, they are able to produce food, and contribute to the economy of states and countries.

In order to protect a farmer's property rights so that they can continue to produce and contribute, several states in the United States enacted farm protection laws, commonly referred to as ag-gag laws.<sup>3</sup> These laws criminalize various activities such as misrepresenting oneself to gain access to a private agricultural facility or obtain employment for the purposes of videotaping the farmer's practices and releasing that video to the world in order to discredit the farmer.<sup>4</sup> When videos such as these get out, farmers can face harassment, death threats, and jeopardy to their

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<sup>1</sup> Samuel Bowles & Jung-Kyoo Choi, *Co-Evolution of Farming and Private Property During the Early Holocene*, 110 PNAS 8830 (May 28, 2013). "The advent of farming around 12 millennia ago was a cultural as well as technological revolution, requiring a new system of property rights." *Id.* at 8830. As groups moved from a hunter-gatherer lifestyle to an agrarian society, property rights were essential in order to create the "incentive to engage in the required investments in clearing, cultivation, animal tending, and storage." *Id.* Property rights arose due to farmers delineating their territories and defending their crops, livestock, and dwellings. *Id.*

<sup>2</sup> *See generally id.*

<sup>3</sup> Alicia Prygoski, *Brief Summary of Ag-Gag Laws*, MICH ST. U. C. L. ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/article/brief-summary-ag-gag-laws> (last visited Feb. 16, 2019).

<sup>4</sup> *Id.*

livelihoods.<sup>5</sup> Farm protection laws were enacted to help protect farmers from being taken advantage of within their own private property; however, courts have recently invalidated several of these laws on First Amendment Freedom of Speech grounds.

The invalidation of these laws may have a severe impact on the agricultural industry by weakening the security of a farmer's property right to exclude others from his property. Ag-gag laws are meant to keep unwanted persons from gaining access to private agricultural facilities by misrepresenting their identities, and to stop marginalizing and devaluing the efforts of farmers and ranchers. Without these laws, landowners are more likely to be constantly threatened by interference from unwanted persons. As a result of unsecured property rights, farmers and ranchers will lose confidence, take less risks, stick to old customs and technologies, and not strive for new and improved practices if they can simply be interfered with.<sup>6</sup> With activist interference in the agricultural industry, society will suffer as the quantity and quality of food products will decrease, state and national economies will be impacted from a stagnant agricultural sector, and the environment will be impaired because more sustainable practices are not being implemented out of fear of repercussions.<sup>7</sup>

The key to staving off this ripple effect of impact is to create and support a strong agricultural sector, which can only be accomplished through secure and stable property rights for

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<sup>5</sup> Casey Kinler, *How to Protect Your Farm from Extreme Activists*, ANIMAL AGRIC. ALLIANCE (Aug. 13, 2018), <https://www.animalagalliance.org/protect/>. The Animal Agriculture Alliance works to monitor activist groups and tries to address the misinformation that these groups publish. *Id.* Its website states, "Animal rights groups have increasingly turned their focus to agriculture, utilizing misleading undercover videos and multi-million dollar political campaigns in an effort to drive farmers and ranchers out of business." *Id.*

<sup>6</sup> See generally ANNA LOCKE, OVERSEAS DEV. INST., PROPERTY RIGHTS AND DEVELOPMENT BRIEFING: PROPERTY RIGHTS AND ECONOMIC GROWTH 11 (2013), <https://www.refworld.org/pdfid/523ab6dc4.pdf>.

<sup>7</sup> See generally Alan Rappoport, *US Farming Groups Hit Back at Activists*, FIN. TIMES (Aug. 16, 2011), <https://www.ft.com/content/166875e2-c4ff-11e0-ba51-00144feabdc0> (including quote that "agri-business is frightened about the marketplace implications"); Per Pinstrup-Andersen & Satoru Shimokawa, *Rural Infrastructure and Agricultural Development*, in RETHINKING INFRASTRUCTURE FOR DEVELOPMENT 175 (Francois Bourguignon & Boris Pleskovic, eds., The World Bank (2008) (2006).

farmers. Property rights have a long-standing history of tremendous importance in our society and around the world, which is why they should be vehemently protected and enforced however and whenever they can be.<sup>8</sup>

## II. PROPERTY RIGHTS

### A. HISTORY

“Property is the foundation of every right we have, including the right to be free.”<sup>9</sup> Property rights establish one’s ownership of things relative to others and “come from culture and community.”<sup>10</sup> When a group of people come together to form a community, it becomes a necessity to implement a set of laws regarding the use of and access to resources; this establishes who is entitled to receive the benefits from those resources.<sup>11</sup> The purposes of property rights are to provide privacy against trespass, allow constrained use of common goods, encourage productivity through the collection of the benefits from ownership, offer stability, maintain peace, allocate scarce resources sustainably, and internalize externalities.<sup>12</sup> Property rights are usually described as a “bundle of sticks” or a “bundle of rights;” a property owner is permitted to keep all of them or grant some to others while maintaining the rest for themselves.<sup>13</sup> Some of these property rights or sticks within the bundle consist of the right to: “sell, lease, mortgage, subdivide, grant an easement,” use the property, and include or exclude people.<sup>14</sup>

There are several theories on the acquisition and retention of property rights that have developed over the years. The first is Locke’s Labor Theory, which states that under natural law,

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<sup>8</sup> Roger Pilon, *Property Rights and the Constitution*, in CATO HANDBOOK FOR POLICYMAKERS 173 (8th ed. 2017).

<sup>9</sup> *Id.*

<sup>10</sup> *Introduction to Property Rights: A Historical Prospective*, U. OF ILL. EXTENSION: LOC. COMMUNITY RESOURCES, <https://extension.illinois.edu/lcr/propertyrights.cfm> (last visited Feb. 3, 2019).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

“every man has property in his own person,” the labor of his body and hands, and anything he removes from nature and mixes with labor.<sup>15</sup> The benefits of this theory to the property owners and to society as a whole are that property is enhanced in value with labor, and waste is limited.<sup>16</sup> In the second approach, Blackstone’s occupation theory, all material resources are common resources; the right of property is based on first occupation in which one individual claims sole and absolute dominion over a material resource.<sup>17</sup> Finally, the theory advanced by the Demsetz economic model argues that if property is allocated and distributed effectively, the most efficient outcome will be reached, and there will be minimal waste, externalities, free riders, and over-consumption.<sup>18</sup> These theories help explain the motivations behind the creation of a secure property rights system.

From the time when societies first began to settle in one place and create an agrarian lifestyle, the motivations described by the property theories have been central to the establishment of structured property rights, which provided the necessary incentive for individuals to invest in resources and improvements.<sup>19</sup> These rights continued to become more defined throughout time and are still being specified today within the legal system. In America, the English tradition of recognizing property rights influenced America’s own emphasis in this area.<sup>20</sup> Colonists benefitted from ownership of resources, and increasingly utilized private contracts, which encouraged the free market economy before America was even officially formed.<sup>21</sup> After the Revolutionary War, new state governments were founded and a majority of them included provisions expressing their

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<sup>15</sup> Sukhinder Panesar, *Theories of Private Property in Modern Property Law*, 10 THE DENNING L.J., 113, 125 (1995).

<sup>16</sup> *See generally id.* at 128.

<sup>17</sup> *Id.* at 116.

<sup>18</sup> *Id.* at 137-38.

<sup>19</sup> Bowles & Choi, *supra* note 1, at 8830.

<sup>20</sup> JAMES W. ELY JR., PROPERTY RIGHTS IN AMERICAN HISTORY 2 (2008), <https://www.hillsdale.edu/wp-content/uploads/2016/02/FMF-2008-Property-Rights-in-American-History.pdf>.

<sup>21</sup> *Id.* at 3.

dedication to the enforcement of property rights and economic liberty.<sup>22</sup> “Several state constitutions, including Massachusetts, New Hampshire, Pennsylvania, and Virginia, affirmed that all persons have the ‘natural, essential, and inherent’ right of ‘acquiring, possessing and protecting property.’”<sup>23</sup> Furthermore, The Northwest Ordinance of 1787, which was adopted by the United States Congress after the Revolutionary War, similarly promoted property rights protections.<sup>24</sup>

Due to the importance of private property rights in the post-Revolutionary era, the framers of the Constitution took action and “treated private property as the cornerstone of a free society.”<sup>25</sup> They believed that well-defined and strongly enforced property rights provided security for the people as well as economic development.<sup>26</sup> The Fifth Amendment of the United States Constitution states that “No person shall be deprived of life, liberty, or *property* without due process of law; nor shall *private property* be taken for public use, without just compensation.”<sup>27</sup> Additionally, the Fourteenth Amendment of the Constitution protects private property from States through the Due Process Clause.<sup>28</sup> Since the adoption of the Constitution, state and federal courts, following the intentions of the framers, have engaged in the active defense and enforcement of private property and contractual rights.<sup>29</sup>

In the United States of America’s formative years, the federal courts propelled the property-conscious intentions of the framers and worked to terminate state interference with

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<sup>22</sup> *Id.*

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

<sup>24</sup> *Id.* The Northwest Ordinance of 1787 was one of the most important and significant pieces of legislation that the United States Congress passed because it was the foundation of property rights that encouraged westward expansion. *Northwest Ordinance of 1787: Purpose, Summary, and Significance*, HISTORYPLEX, <https://historyplex.com/northwest-ordinance-of1787-purpose-summary-significance> (last visited Feb. 17, 2019).

<sup>25</sup> ELY, *supra* note 20, at 0.

<sup>26</sup> *Id.* at 1.

<sup>27</sup> U.S. CONST. amend. V (emphasis added).

<sup>28</sup> Pilon, *supra* note 8.

<sup>29</sup> ELY, *supra* note 20, at 0.

individuals' private property rights.<sup>30</sup> In 1795, a major case, *Vanhorn's Lessee v. Dorrance*, was decided by the United States Supreme Court.<sup>31</sup> The presiding justice in this case, Justice Patterson, stated that having the defendable right of obtaining property is a fundamental right.<sup>32</sup> At the time of their founding, property rights were not just a legal fabrication, they were also embodied within each individual as playing a crucial role in the encouragement of private labor and industry, securing individual belongings and the benefits that come from them, becoming part of the community, and personal enjoyment. The idea of strong and secure property rights was reinforced by *Calder v. Bull*,<sup>33</sup> where the Supreme Court disallowed the taking of property rights from one individual to give to another individual.<sup>34</sup>

By the turn of the nineteenth century, both state and national levels had constitutional safeguards for property.<sup>35</sup> A pattern emerged in the United States Supreme Court from influential justices such as Justices John Marshall, Melville Fuller, and Stephen J. Field, that expressed the idea that the security and safety of all persons and rights stem from secure property rights.<sup>36</sup> As a result, "[p]rotection to the one goes with protection to the other; and there can be neither prosperity nor progress where either is uncertain."<sup>37</sup> Many new technological advances and innovative practices were developed and adopted during the 1800s.<sup>38</sup> The courts had to juggle the public's

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<sup>30</sup> *Id.* at 6.

<sup>31</sup> *Vanhorn's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 28 F. Cas. 1012 (C.C.D. Pa. 1795).

<sup>32</sup> *Id.* at 310. In this case, the court invalidated a law in Pennsylvania which had allowed one group of people to claim a vested title in land after that same land had already been conferred to another party. *Id.* ("[T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact.").

<sup>33</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

<sup>34</sup> ELY, *supra* note 20, at 6; *see also Calder*, 3 U.S. 386.

<sup>35</sup> ELY, *supra* note 20, at 7.

<sup>36</sup> *Id.*; *see also Pilon*, *supra* note 8.

<sup>37</sup> ELY, *supra* note 20, at 7 (quoting Justice Stephen J. Field, who spoke these words at the Centennial Anniversary of the United States Supreme Court).

<sup>38</sup> *Id.* at 8.

interest in information with an owner's security in their property.<sup>39</sup> The increasingly significant establishment of certain protections during this time, such as patents and copyrights, demonstrated encouragement in creation and development through the promise that those private property advancements would be protected from interferences.<sup>40</sup> Additionally, state courts' private property jurisprudence began to evolve during this time, furthering the idea that property rights must be protected and enforced.<sup>41</sup>

In the early twentieth century, the United States began to engage in reform embodied in the Progressive movement, which launched an assault on property rights.<sup>42</sup> However, the Supreme Court continued to defend private property rights in several subsequent cases.<sup>43</sup> In *New State Ice Co. v. Liebmann*, the Supreme Court invalidated a state law that, in effect, banned newcomers from starting businesses in the ice industry.<sup>44</sup> The Court in that case stated that entrepreneurial freedom equates to the freedom of speech and that people have the right to engage in lawful private business without interference.<sup>45</sup> While there were delays from the pro-private property rights agenda during the New Deal Era in the mid-twentieth century, courts, for the most part, remained unaffected in their defense of secure and stable property rights.<sup>46</sup> This continued administration of private property rights—most likely emanated from the courts' historical pattern of enforcement,

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<sup>39</sup> *Id.*

<sup>40</sup> *See generally id.*

<sup>41</sup> *Id.* at 8-9.

<sup>42</sup> *Id.* at 9-10.

<sup>43</sup> ELY, *supra* note 20, at 11.

<sup>44</sup> *Id.*; *New State Ice Co. v. Liebmann*, 285 U.S. 262, 262 (1932). The law in this case asserts “that no one shall be permitted to manufacture, sell, or distribute ice within the state without first having secured a license for that purpose from the commission.” *New State Ice Co.*, 285 U.S. at 271. The Court declared that a law which in effect unreasonably restricts the “common right to engage in a lawful private business” cannot be upheld under the Fourteenth Amendment. *Id.* at 278. “Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, ‘under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.’” *Id.* (citing *Burns Baking Co. v. Bryan*, 264 U.S. 504, 513 (1924)).

<sup>45</sup> ELY, *supra* note 20, at 11.

<sup>46</sup> *Id.* at 12.

the desire to be consistent with the framers intentions, and the aspiration to aid in the furtherance of economic development and technological advancement.

## **B. IMPORTANCE OF PROPERTY RIGHTS**

### **a. In General**

Ownership over resources and materials is a fundamental right and essential for every person's livelihood in the United States and around the world.<sup>47</sup> Property serves two crucial functions in a free society.<sup>48</sup> First, stable and secure property rights are a formidable incentive for economic development through the creation of wealth and prosperity.<sup>49</sup> Justice John Marshall agreed that the protection of private property rights, as well as contractual freedom, were essential to economic growth by stating that it "takes away from the incitements to industry, by rendering property insecure and unprotected."<sup>50</sup> When property is secure through well-defined and enforced rights, individual prosperity and the market economy will flourish, leading to the distribution of benefits to all citizens through increased wealth and goods.<sup>51</sup> The second function that property serves is that property rights have long been connected to personal empowerment, individual liberty, equality, and independence.<sup>52</sup> "An economic system grounded in respect for private ownership" facilitates the dispersal of power throughout society and "strengthen[s] individual autonomy from government."<sup>53</sup>

Due to the fact that economic growth and national wealth are linked to property rights, these rights are not only important in the United States today because Americans want to continue

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<sup>47</sup> *See generally id.*

<sup>48</sup> *Id.* at 1.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> ELY, *supra* note 20, at 1.

<sup>52</sup> *Id.*

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

the trend of advancements and economic growth; these rights are also essential in developing countries and rural communities around the world.<sup>54</sup> More and more countries' policies have begun to recognize that local land and resource ownership is necessary to achieve key goals in poverty reduction, self-governance, gender equality, ecosystem management, environmental and resource sustainability, rural economic growth, and climate change.<sup>55</sup> For example,

Although women may gain access to land through inheritance, marriage, or informal networks, none of this guarantees effective control over it. The traditional rights of women to land have not been adequately recognized: the gender gap in the ownership and control of property is the only significant contributor to the gender gap in the economic well-being, social status, and empowerment of women.<sup>56</sup>

Most rural communities and developing countries depend on ownership rights over natural resources and the land for income and sustenance; therefore, defined and enforced property rights are essential.<sup>57</sup>

#### **b. Property Rights in the Agricultural Industry**

While property rights are critical at a national level because they ensure individual and national prosperity, there are also certain industries within each country for which property rights have traditionally and presently play a crucial role. One such industry that traces its link to property rights back centuries is agriculture. The agricultural industry is mainly dependent on private

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<sup>54</sup> JENNY SPRINGER, U.S. AGENCY FOR INT'L DEV., LAND AND RESOURCE TENURE AND SOCIAL IMPACTS (2016), [https://land-links.org/wp-content/uploads/2016/09/USAID\\_Land\\_Tenure\\_Social\\_Impacts\\_Issue\\_Brief-1.pdf](https://land-links.org/wp-content/uploads/2016/09/USAID_Land_Tenure_Social_Impacts_Issue_Brief-1.pdf).

<sup>55</sup> *Id.*

<sup>56</sup> Shoba Arun, *Does Land Ownership Make a Difference? Women's Roles in Agriculture in Kerala, India*, 7 GENDER & DEV., Nov. 1999, at 19, 19.

<sup>57</sup> SPRINGER, *supra* note 54.

property rights, both through traditional ownership of resources and through newer forms of ownership over technological advancements.

Without recognized property rights over agricultural resources, either through title or a lease, farmers and ranchers would have little ability to control the use of said resource.<sup>58</sup> Control is necessary in order to provide secure and stable access to limited valuable resources such as land, and to provide ownership over livestock.<sup>59</sup> Once protected and stable access or ownership is established, farmers and ranchers are willing to take risks and try new practices, both of which lead to full utilization of resources and an increase in overall productivity.<sup>60</sup> If ownership and control over resources were lacking, there most likely would not be an agricultural industry at all, because resources, such as land, are one of the basic requirements for growing crops or raising livestock.

Property rights provide a bundle of rights for farmers and ranchers to utilize when they make decisions about how to best produce their commodity.<sup>61</sup> “An important feature of a property right is the ability to exclude others from using the resource.”<sup>62</sup> This particular right was set forth by the Supreme Court in *Kaiser-Aetna v. United States*, in which the Court barred the Army Corps of Engineers from going forward with improvements to a privately owned pond due to the resulting loss of “one of the most essential sticks in the bundle of rights . . . the right to exclude others.”<sup>63</sup>

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<sup>58</sup> See Richard Stroup & John Baden, *Property Rights and Natural Resources Management*, 2 LITERATURE LIBERTY (Cato Inst.), Oct.-Dec. 1979; see also *Farmland Ownership and Tenure*, U.S. DEP’T OF AGRIC., <https://www.ers.usda.gov/topics/farm-economy/land-use-land-value-tenure/farmland-ownership-and-tenure/> (last updated Aug. 20, 2019). “Farmland tenure, which broadly refers to the institutions governing the control and use of farmland, shapes many farm decisions, including those related to production, conservation, and succession planning.” *Farmland Ownership and Tenure*, *supra* note 58.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See generally *id.*

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

<sup>63</sup> *Kaiser-Aetna v. United States*, 444 U.S. 164, 176 (1979) (“[O]ne of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.”); see also *Hodel v. Irving*, 481 U.S. 704, 716 (1986); *Jacque v. Steenberg Holmes*, 563 N.W.2d 154 (Wis. 1997) (concluding that a person has a

The Court went on to declare that the government cannot create a right of access for the general public on privately owned property.<sup>64</sup> The policies behind decisions like *Kaiser-Aetna* were to deter violations of private property rights, including trespass, by requiring the government to pay just compensation; aid confidence with the property rights system; and encourage property owners to stay away from self-help remedies when they feel that their property was being threatened.<sup>65</sup>

A few exceptions to the right to exclude have been asserted and upheld in courts such as the New Jersey Supreme Court.<sup>66</sup> However, even with these exceptions, the right to exclude remains effective as evidenced by the categorization of the significance of the right to exclude in cases such as *Kaiser Aetna*, *Hodel*, and *Jacque*, where courts, including the United States Supreme Court, have favored the right to exclude over a competing interest.<sup>67</sup> This “seems not to contemplate anything but an absolute right [to exclude.]”<sup>68</sup>

The right to exclude others from your property in order to enjoy the exclusive use of that property is an essential right.<sup>69</sup> Professor Richard Epstein, a respected law professor and writer in the field of property law, states that “clearly [the bundle of rights] includes the right to exclude” and that this right “has to be protected.”<sup>70</sup> Furthermore, federal and state courts have continually recognized this right within the bundle of sticks and have worked hard to defend it against

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right to exclusive enjoyment of their own property for any purpose which does not invade the rights of another person).

<sup>64</sup> *Kaiser-Aetna*, 444 U.S. at 176.

<sup>65</sup> *See generally id.*

<sup>66</sup> *State v. Shack*, 277 A.2d 369, 374 (N.J. 1971) (holding that a property owner cannot bar access to services that serve human needs such as medical attention or legal services to employees); *Uston v. Resorts Int’l Hotel, Inc.*, 445 A.2d 370, 371-72 (N.J. 1982) (holding that a casino, by opening its doors to the general public, loses its right to selectively exclude card counters). These two cases illustrate a couple of exceptions to the right to exclude.

<sup>67</sup> *Kaiser-Aetna*, 444 U.S. at 176; *Hodel*, 481 U.S. at 716; *Jacque*, 563 N.W.2d at 154.

<sup>68</sup> Elizabeth M. Glazer, *Rule of (Out)Law: Property’s Contingent Right to Exclude*, 156 U. PA. L. REV. 331, 340 (2008).

<sup>69</sup> David L. Callies et al., *The Right to Exclude Others From Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J.L. 39, 40 (2000).

<sup>70</sup> Richard Epstein, *Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property*, ECON. J. WATCH 223, 230 (2011).

abridgment by the government or the public.<sup>71</sup> Due to the pattern of protection that property law and the courts have provided, owners have come to expect that they will be undisturbed in the possession and enjoyment of their property.<sup>72</sup>

The right to exclude others and use one's property as one sees fit so long as one does not interfere with the rights of others is especially important in the agricultural industry. Farmers' and ranchers' livelihoods rest predominantly in their ownership of land.<sup>73</sup> Land is essential for growing crops and for raising livestock; it is also a limited resource and therefore, it is very valuable.<sup>74</sup> The right to exclude others from one's property instills farmers and ranchers with confidence in the protection of their valuable resources, which incentivizes them to take risks such as implementing new practices, thereby leading to an increase in overall productivity.<sup>75</sup> Even if the individual uses the guise of another particular right as their justification for violating a person's property rights, courts have upheld that private property rights and the right to exclude others come first. For example, in *Robins v. Pruneyard Shopping Center*, the court rejected a First Amendment Freedom of Speech violation by holding that the shopping center's right to exclude others does not violate free speech protections.<sup>76</sup> This ruling shows that the California Supreme Court has decided that the right to exclude individuals from private property does not violate Freedom of Speech protections; the right to exclude others is essential to the use or economic value of property.<sup>77</sup> A

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<sup>71</sup> Callies, *supra* note 69, at 41.

<sup>72</sup> *Id.*

<sup>73</sup> Katy Keiffer, *Who Really Owns American Farmland?*, THE COUNTER (July 31, 2017), <https://newfoodeconomy.org/who-really-owns-american-farmland/>. Farmers are increasingly relying on renting land for growing their crops; which is leading to a "tenuous predicament" of trying to maintain a sustainable and secure agricultural sector due to a lower percentage of land ownership. *Id.*

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

<sup>75</sup> See generally LOCKE, *supra* note 6. Farmers and ranchers are generally more incentivized to take risks when they have secure property rights because they are not worrying about the risk of their property rights being violated. *Id.*

<sup>76</sup> *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 343 (Cal. 1979).

<sup>77</sup> *Id.*

farmer's or rancher's property is their livelihood, and therefore, their rights surrounding that property are essential to the use and economic value of it.<sup>78</sup>

Overall, property rights are vitally important for the agricultural industry, especially the right to exclude others from your private property. Having secure and enforced property rights encourages necessary risk-taking behaviors within the industry in areas such as development and the implementation of innovative practices.

### **III. FARM PROTECTION/AG-GAG LAWS**

#### **A. WHAT ARE FARM PROTECTION/AG-GAG LAWS?**

Farm protection laws, also known as ag-gag laws, are state laws that criminalize certain activities that take place on farms in order to impede undercover investigations of the agricultural industry.<sup>79</sup> The first ag-gag laws that states implemented were known as “agricultural interference” laws.<sup>80</sup> These laws began the trend of banning photographs and recordings at private farming facilities without the owner's consent.<sup>81</sup> Additionally, regulations known as “agricultural fraud” laws were introduced in conjunction with the interference laws.<sup>82</sup> This kind of ag-gag law banned the use of false pretenses or misrepresentations in order to enter or obtain employment at an agricultural production facility.<sup>83</sup>

Most of the ag-gag legislation introduced by the states in 2011 and 2012 was a mix of “agricultural interference” and “agricultural fraud” concepts.<sup>84</sup> However, these types of laws faced passage problems in the legislatures due to a lack of reporting requirements; consequently,

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<sup>78</sup> *Id.*

<sup>79</sup> Prygoski, *supra* note 4.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*; see also Jacob Coleman, *ADLF v. Otter: What Does This Mean for Other State's "Ag-Gag" Laws?*, 13 J. FOOD L. & POL'Y 180, 198 (2017) (describing the different forms that ag-gag laws have taken in the different states in order to try to limit undercover investigations on agricultural facilities and secure farmers' property rights).

<sup>83</sup> Prygoski, *supra* note 4.

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

legislators created a new type of farm protection law towards the end of 2012.<sup>85</sup> “This [new] kind [of legislation] is known as ‘rapid-reporting’ legislation and it mandates that anyone who records an image or sound at an industrialized farming operation turn the recording over to authorities within a specified amount of time, usually twenty-four to forty-eight hours.”<sup>86</sup>

One example of a farm protection law arises in Idaho. Idaho enacted its farm protection law in 2014 amid certain events that took place at one of Idaho’s dairies.<sup>87</sup> One animal rights activist went undercover in 2012 in order to gain employment at the Idaho dairy.<sup>88</sup> This activist then secretly videotaped certain acts of what he believed to be animal abuse, which was then publicly released as a portrayal of animal abuse by the animal rights group, Mercy for Animals.<sup>89</sup> The video showed the dairy employees kicking and beating on a downed cow.<sup>90</sup> The owner of the dairy took action in response to the public outcry stemming from the video, and the employees involved were fired.<sup>91</sup> However, the owner and his family still received threats.<sup>92</sup> These events led to Idaho’s enactment of its farm protection—or ag-gag statute—in February 2014.<sup>93</sup> This statute, Interference with Agricultural Production, criminalizes the actions of a person who interferes with agricultural production if they, without informed consent from the owner, enter an agricultural facility under false pretenses, acquire a facility’s records, or obtain employment at an agricultural facility, or they intentionally cause damage at the facility.<sup>94</sup>

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<sup>85</sup> *Id.*

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

<sup>87</sup> Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1189 (9th Cir. 2018), *aff’d in part, rev’d in part*, Animal Legal Def. Fund v. Otter, 118 F.Supp.3d 1195 (D. Idaho 2015).

<sup>88</sup> *Wasden*, 878 F.3d at 1190.

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

<sup>90</sup> Coleman, *supra* note 82, at 199.

<sup>91</sup> *Wasden*, 878 F.3d at 1190.

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

<sup>93</sup> IDAHO CODE § 18-7042 (2014).

<sup>94</sup> The Idaho ag-gag statute provides:

(1) A person commits the crime of interference with agricultural production if the person knowingly:

## B. WHY FARM PROTECTION/AG-GAG LAWS ARE ENACTED

Farm protection laws are put in place by state legislators to protect farms and ranches from interference in their production practices.<sup>95</sup> Interference could come from any number of activities, such as trespassing or vandalizing. But a tremendous concern has arisen in the agricultural industry regarding undercover investigations of farming operations by certain activist groups; these so-called “undercover investigations” can lead to significant economic injury of the farm (damaged property, reputation, lawsuits, etc.).<sup>96</sup> As a result of pressures, including increasing costs and regulations arising from these economic injuries, the number of farms and ranches are continually decreasing as smaller entities are pushed out.<sup>97</sup> Only larger farms and ranches are able to survive the increasing costs by increasing productivity and expanding; thereby cutting down on the number of total farms and escalating nonfarm employment.<sup>98</sup> This may affect the general public through less diversity of producers and products in the marketplace.<sup>99</sup>

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- (a) Is not employed by an agricultural production facility and enters an agricultural production facility by force, threat, *misrepresentation* or trespass;
  - (b) Obtains records of an agricultural production facility by force, threat, *misrepresentation* or trespass;
  - (c) Obtains employment with an agricultural production facility by force, threat, or *misrepresentation* with the intent to cause economic or other injury to the facility's operations, livestock, crops, owners, personnel, equipment, buildings, premises, business interests or customers;
  - (d) Enters an agricultural production facility that is not open to the public and, without the facility owner's express consent or pursuant to judicial process or statutory authorization, makes audio or video recordings of the conduct of an agricultural production facility's operation; or
  - (e) Intentionally causes physical damage or injury to the agricultural production facility's operations, livestock, crops, personnel, equipment, buildings or premises.

*Id.*

<sup>95</sup> See generally Prygoski, *supra* note 4.

<sup>96</sup> *Id.*

<sup>97</sup> *Farming and Farm Income*, U.S. DEP'T OF AGRIC., <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/farming-and-farm-income/> (last updated Aug. 30, 2019). This site contains a graph that depicts the continual decrease in the number of farms starting in 1935 and ending in 2017.

<sup>98</sup> *Id.*

<sup>99</sup> *Crop Diversity: Why It Matters*, CROP TRUST, <https://www.croptrust.org/our-mission/crop-diversity-why-it-matters/> (last visited Feb. 20, 2019). Crop diversity is essential in “ensuring food security, adapting to climate change, reducing environmental degradation, protecting nutritional security, reducing poverty and ensuring

In addition to interferences potentially leading to increased costs that decrease product diversity for society by pushing out small farms, interferences can also have an impact on the owners of those farms. Presently, ninety-nine percent of farms and ranches in the United States are family owned; which means that the families agricultural industry accounts for the livelihoods of many.<sup>100</sup> Thus, when interferences, such as undercover investigations, take place in a farming production facility, leading to economic injury or even shut down for that facility, lives, like those of the owner families, will be negatively affected.<sup>101</sup> Due to the extent of impact on farmer and consumer lives that stemmed from interference with agricultural facilities, state legislators worked to implement farm protection laws in order to avoid negative impacts.<sup>102</sup>

For example, the purpose of Idaho's law as stated by the Idaho Dairyman Association's attorney is "to protect Idaho farmers from wrongful interference . . . Idaho farmer[s] live[s] and work spread out across the land where they're uniquely vulnerable to interference by wrongful conduct."<sup>103</sup> Farmers need to have that confidence and stability in their property rights to protect them from vulnerability. Additionally, the law would help protect farmers and the agricultural industry from undercover activists who "expose the industry to the 'court of public opinion,' which destroys farmers' reputations, results in death threats, and causes loss of customers."<sup>104</sup> Certain civilian activists believe that farms and ranches use cruel practices towards their livestock, and as a result, the activists sneak their way into a facility, either through actual trespass or through

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sustainable agriculture." *Id.* All of these reasons are evidence of the impact that the public may feel when there are less producers and product diversity in the marketplace.

<sup>100</sup> Beth Hoffman, *Ninety-Nine Percent of America's Farms are Family-Owned. But Only Half are Family-Farmed*, THE COUNTER, (May 24, 2018, 8:00 am), <https://newfoodeconomy.org/farmland-rent-iowa-family-farm/>.

<sup>101</sup> *See generally id.*

<sup>102</sup> *See generally* Prygoski, *supra* note 4.

<sup>103</sup> *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1191 (9th Cir. 2018).

<sup>104</sup> *Id.* at 1191-92.

misrepresentation, to try to uncover these alleged poor practices.<sup>105</sup> These so called “investigative actions” most likely have a minimal chance of uncovering poor practices that may be taking place.<sup>106</sup> There is a far greater chance that they will uncover practices that are perfectly acceptable as an industry standard practice that may seem odd or aggressive to those who have not been a part of the agricultural industry.<sup>107</sup> These activist “investigators” may use that oddness or aggressiveness to video the practices in such a way that they are not a representative sample of what actually happens on farms across the United States.<sup>108</sup> Furthermore, the videos become a scare tactic to the public, which detrimentally injures the farm, sometimes shutting it down for good.<sup>109</sup> This outcome can potentially affect many parties, including but not limited to, the operators that run the farm and their families; the workers and their families; the State, which loses income if the farm shuts down; the citizens, who lose a producer of food; and all economic activities and deals associated with the loss of a functioning farm.

While the concept of undercover investigations taking place at an agricultural production facility by civilian activist groups would have been unheard of at the turn of the century, it is very much a reality today. These unwarranted investigations are a result of intensifying efforts and growing numbers of activist groups, who unjustifiably take it upon themselves to address the public’s escalating worry of where food is coming from and how it is prepared—by infiltrating a

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<sup>105</sup> See generally *Monitoring Activism*, ANIMAL AGRIC. ALLIANCE, <https://animalagalliance.org/initiatives/monitoring-activism/> (last visited Feb. 7, 2020) (“Protests, demonstrations and incidents of activists breaking into farms are on the rise. . . . Animal rights activists continue to mislead consumers who have never been to a farm about how livestock and poultry are raised.”).

<sup>106</sup> *Is Farm-Animal Abuse the Exception or the Rule?*, MPR NEWS (Aug. 16, 2013, 12:00 pm), <https://www.mprnews.org/story/2013/08/16/daily-circuit-ag-gag> [hereinafter *Farm-Animal*].

<sup>107</sup> *Id.*; *Vigilance is Key: Simple Steps to Strengthen Farm and Plant Security*, ANIMAL AGRIC. ALLIANCE, <https://animalagalliance.org/resource/vigilance-is-key-simple-steps-to-strengthen-farm-and-plant-security/> (last visited Feb. 7, 2020) (“Increasingly, animal rights extremists target farms and processing plants with “undercover” videos – often edited to depict a certain environment and distributed to the media or on YouTube. While we know that these videos are the extreme exceptions to the high standards of animal care found in most facilities, the alarming images cause a lot of concern among consumers with little exposure to the industry.”).

<sup>108</sup> Kinler, *supra* note 5.

<sup>109</sup> *Id.*; see also Prygoski, *supra* note 4.

farm or ranch and exposing whatever they might—be it good or bad.<sup>110</sup> A few of the larger groups that operate across the United States are: People for the Ethical Treatment of Animals (PETA), Americans for Medical Advancement (AFMA), Animal Liberation Front (ALF), Anti-vivisection Coalition (AVC), Cruelty Free International (CFI), Eleventh Hour for Animals, For Life on Earth (FLOE), and The Humane Society of the United States (HSUS).<sup>111</sup> While there are some instances in which these organizations end inappropriate practices taking place on farms and ranches; these organizations have gained a reputation through their history of exploiting farmers and using any material they find, whether it is acceptable or not, to damage the farmer’s property, take advantage of them, and threaten them.<sup>112</sup>

For example, in April 2018, animal activists targeted a chicken farmer named Ben Falloon and his farm, Taranaki Farms.<sup>113</sup> Falloon lets his chickens roam free during the day and houses them in a shelter at night;<sup>114</sup> which is actually a more modern method of raising chickens, and is seen by many as a more beneficial chicken husbandry practice. Falloon is quite open with his farming practices on social media for the sake of transparency and education, but instead of praising him for his efforts, a group of vegan animal activists began targeting him online.<sup>115</sup> Then, in April 2017, Falloon believes that this activist group snuck onto his farm during the night, and tried to steal, or as Falloon put it, “liberate,” the chickens from their enclosure.<sup>116</sup> “[T]hey . . . released 200+ hens from the safety of their electric fence enclosure- birds that were then savaged

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<sup>110</sup> See generally *Animal Rights Activists and Organizations*, SPEAKING OF RES., <https://speakingofresearch.com/extremism-undone/animal-rights-activists-organizations/> (last visited Feb. 4, 2019).

<sup>111</sup> *Id.*

<sup>112</sup> Jess Davis, *Victorian Livestock Farmers Speak Out Against Abuse From 'Aggressive Vegans'*, ABC NEWS, <https://www.abc.net.au/news/rural/2018-04-12/livestock-farmers-speak-out-against-abuse-from-animal-activists/9643436> (last updated Apr. 15, 2018) (“It’s a big risk for farmers and there’s concern that farmers can be victimised even when they’re doing the right thing.”).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

by dogs and foxes throughout the night . . . 100% of those released died.”<sup>117</sup> Not only did the activists fail in “liberating” the chickens by causing all the chickens to die, they also made Falloon’s small family farm suffer about \$40,000 in damages.<sup>118</sup> Falloon, like many, used modern farming practices for his livestock, but the activist group did not understand his methods and instead of engaging with him civilly, they decided to take matters into their own hands, which destroyed Fallon’s property (the chickens), and did nothing to further the activists’ position.<sup>119</sup>

Falloon’s case is not an anomaly—in recent years, there have been many more instances of animal activist groups, hiding behind claims of animal protection, going to great lengths for their own agenda at the expense of farmers.<sup>120</sup> Several of these incidents arise from the actions of PETA. PETA is the largest animal rights organization in the world with 6.5 million people, and one of the most active animal rights groups in the United States.<sup>121</sup> Their mission statement declares:

PETA focuses its attention on the four areas in which the largest numbers of animals suffer the most intensely for the longest periods of time: in laboratories, in the food industry, in the clothing trade, and in the entertainment industry . . . through [working with] public education, cruelty investigations, research, animal rescue, legislation, special events, celebrity involvement, and protest campaigns.<sup>122</sup>

While PETA may have started out as a legitimate organization engaging in lawful acts to promote animal welfare, many feel that they changed course from their original mission in recent years, at the expense of farmers and ranchers in order to satisfy their own adapting agenda. This organization receives more than \$40 million a year in donations worldwide.<sup>123</sup> There are many

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

<sup>118</sup> Davis, *supra* note 112.

<sup>119</sup> *See generally id.*

<sup>120</sup> Kinler, *supra* note 5.

<sup>121</sup> *Our Mission Statement*, PETA, <https://www.peta.org/about-peta/> (last visited Feb. 4, 2019).

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

<sup>123</sup> Alex Berezow, *PETA's Tactics Hurt Animal Rights...and People, Too*, AM. COUNCIL ON SCI. & HEALTH (Dec. 5, 2018), <https://www.acsh.org/news/2018/12/05/petas-tactics-hurt-animal-rights-and-people-too-13650>.

instances of animal abuse occurring all over the world such as poaching, threats to biodiversity, and overharvesting of oceans that PETA could play a constructive role in mitigating.<sup>124</sup> However, “PETA isn’t interested in that. Instead, they’re interested in extremely bizarre and illogical publicity stunts.”<sup>125</sup> While these stunts help PETA gain a following and support—as people in the general population tend to believe the stunts as a true depiction of reality—these stunts are usually based on false and doctored information that damages livelihoods, encourages the spread of false information, and does actual damage to the genuine promotion of animal rights.<sup>126</sup> This is the most likely justification for ag-gag laws; to protect farmers and ranchers from not only the violation of their property rights, but also from the spread of false information that has the potential to significantly impair their businesses.<sup>127</sup>

For example, PETA members have gone undercover at dairy farms in order to gain unauthorized access on the farmers’ property, video their practices, and take advantage of the farmers for it.<sup>128</sup> In 2013, a member went undercover at Adirondack Farms in New York by obtaining employment under false pretenses<sup>129</sup> This member obtained videos of the dairy workers repeatedly electro-shocking downed cows, hitting them with poles or sticks, or yelling.<sup>130</sup> To someone who is not familiar with dairy farms or cattle operations, this may look like animal abuse, which is why PETA used its undercover videos to go after.<sup>131</sup> However, what PETA failed to either research or reveal to the public is that these practices are quite common and sometimes even a vital

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

<sup>125</sup> *Id.*

<sup>126</sup> *See generally id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Update: PETA Files Suit Seeking Information on Sanctioning of Cruel Dairy Farm*, PETA, <https://www.peta.org/blog/cruel-boss-still-works-dairy-farm-video/> (last updated Aug. 8, 2017).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

necessity when it comes to working with cows.<sup>132</sup> Carrie Mess, a dairy farm owner and operator, states that these practices are actually used.<sup>133</sup> Mess writes:

A down cow is a cow that is sick or injured and is laying down and can't or won't get up. When a cow lays down for long periods of time, all of her weight rests on her legs. Her legs start to lose circulation, and as they lose circulation they become weak. A cow needs strong legs to lift her hefty frame up. The longer a cow is down the less chance there is of her ever getting back up. A down cow that doesn't get up becomes a dead cow.<sup>134</sup>

Mess goes on to say, in the videos captured by undercover activists, you may see dairy workers and owners trying a variety of methods to get their cows up.<sup>135</sup> “The reason why? You have to get a cow on her feet if she is going to live. When we have a down cow, the first thing we do is ask her to get up. If she doesn't try to get up, we know we have to try harder.”<sup>136</sup> Cows are prey animals, therefore if gentle encouragement does not work, scaring it might.<sup>137</sup> Mess states that when it comes down to the cow dying or a little aggressive behavior, the choice becomes simple, especially when that farmer's livelihood depends on those cows living.<sup>138</sup>

This illustrates the lengths that animal activist groups will go for the sake of their own agenda, instead of actually revealing the truth. They are willing to trespass, misrepresent themselves to gain access to facilities, damage property, and even steal private records to meet that agenda. Their actions put farmers and ranchers on edge due to the biosecurity and economic risks.<sup>139</sup> “It's a big risk for farmers and there's concern that farmers can be victimised even when they are doing the right thing.”<sup>140</sup> Farmers are a risk-adverse group, and so when they are faced

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<sup>132</sup>Carrie Mess, *Yes, PETA, Sometimes Farmers are 'Mean' to Cows—In Order to Save Them*, THE GUARDIAN (Dec. 9, 2013), <https://www.theguardian.com/commentisfree/2013/dec/09/peta-dairy-farmer-down-cows-abuse>.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Mess, *supra* note 132.

<sup>139</sup> Davis, *supra* note 112.

<sup>140</sup> *Id.*

with a risk as big as the animal activists pose, they tend not take risks in other areas, areas where a little risk may be desperately needed.<sup>141</sup> These may include areas such as planting new and better seeds, obtaining enhanced livestock genetics, using advanced practices, or upgrading to modern equipment. Activist groups are stifling the agricultural industry by deterring farmers from developing and investing in new, potentially economically risky, practices that could benefit the industry.<sup>142</sup>

While farmers and ranchers can take some steps in order to manage their risk, regulation decreasing risks and securing rights is highly beneficial. There are two factors that drive government intervention into agricultural risk management. First, “[a]gricultural producers do not have the financial means to manage agricultural risk[;]” and second, “[a]gricultural risk cannot be effectively managed and requires government intervention.”<sup>143</sup> This is where farm protection or ag-gag laws come in. These laws are put in place to protect farmers’ property rights from the unknown and sizable risk of potential threats, such as animal activist organizations, trespassers, and vandalizers, from gaining unauthorized entry; which in turn encourages farmers to take risks in other areas.

### **C. RECENT DECISIONS REGARDING FARM PROTECTION/AG-GAG LAWS**

Twenty-five states attempted to pass various forms of farm protection laws and six states succeeded.<sup>144</sup> These states are: Utah, Missouri, Iowa, Idaho, North Carolina, Montana, Kansas, North Dakota, and Wyoming.<sup>145</sup> Each of these states have an agricultural sector that accounts for

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<sup>141</sup> See generally DAVID KAHAN, FOOD & AGRIC. ORG. OF THE U.N, MANAGING RISK IN FARMING 16 (2008), <http://www.fao.org/uploads/media/3-ManagingRiskInternLores.pdf>.

<sup>142</sup> See generally GRAINS RESEARCH & DEV. CORP., FARM DECISION MAKING, [https://grdc.com.au/\\_\\_data/assets/pdf\\_file/0033/16989/farmdecisionmaking\\_final\\_lowres2.pdf.pdf](https://grdc.com.au/__data/assets/pdf_file/0033/16989/farmdecisionmaking_final_lowres2.pdf.pdf) (last visited Feb. 6, 2020).

<sup>143</sup> DAREN BAKST ET AL., SPECIAL REPORT NO. 189, ADDRESSING RISK IN AGRICULTURE 5 (2016), <https://www.heritage.org/agriculture/report/addressing-risk-agriculture>.

<sup>144</sup> Prygoski, *supra* note 4.

<sup>145</sup> *Id.*; see also Coleman, *supra* note 82.

an average of close to ten percent of their state Gross Domestic Product as of 2016, which is the equivalent of almost five billion dollars in Idaho.<sup>146</sup> This means that the agricultural industry is very important to these states.<sup>147</sup> There have been several recent judicial decisions regarding the enacted farm protection laws in Idaho and Utah.<sup>148</sup> The ag-gag laws were challenged in court on the grounds that they are unconstitutional.<sup>149</sup> In 2015, the United States District Court struck down Idaho's ag-gag law; this decision was affirmed by the Ninth Circuit in 2018 on the grounds of Free Speech and Equal Protection.<sup>150</sup> A decision by the United States District Court regarding the Utah ag-gag law also struck down the law as unconstitutional.<sup>151</sup>

**a. Idaho: Animal Legal Defense Fund v. Wasden**

The Animal Legal Defense Fund filed suit in March 2014 against the Idaho Attorney General, Lawrence Wasden.<sup>152</sup> The Animal Legal Defense Fund claims that Idaho's farm protection statute violates the First and Fourteenth Amendments.<sup>153</sup> The Animal Legal Defense Fund alleges that the purpose of the statute is, "to stifle political debate about modern agriculture by (1) criminalizing all employment-based undercover investigations; and (2) criminalizing investigative journalism, whistleblowing by employees, or other expository efforts that entail images or sounds."<sup>154</sup> In district court, the Animal Legal Defense Fund filed a motion for summary judgment on its First Amendment and Equal Protection claims; the district court

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<sup>146</sup> *Farm Contribution to Agricultural GDP at Record Low*, AM. FARM BUREAU FED'N (June 12, 2018), <https://www.fb.org/market-intel/farm-contribution-to-agricultural-gdp-at-record-low> [hereinafter *Farm Contribution*]; see also *Idaho GDP*, DEP'T OF NUMBERS, <https://www.deptofnumbers.com/gdp/idaho/> (last visited Feb. 4, 2019).

<sup>147</sup> *Farm Contribution*, *supra* note 146.

<sup>148</sup> Prygoski, *supra* note 4.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*; see also *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1205 (9th Cir. 2018).

<sup>151</sup> *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017).

<sup>152</sup> *Wasden*, 878 F.3d at 1192.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

granted the motion after applying strict scrutiny to all the provisions.<sup>155</sup> The court held that the statute's recording provision violated the First Amendment Freedom of Speech Clause and therefore, that provision had to be struck down.<sup>156</sup> Additionally, while the court held the state had compelling interests in preserving property and privacy rights, it opined that Idaho could not meet its burden of proof; that the misrepresentations used to enter an agricultural facility that it seeks to criminalize with the statute cause any "legally cognizable harm."<sup>157</sup> Thus, the court struck down the provision for not being narrowly tailored or the least restrictive means available to protect the interests.<sup>158</sup> Furthermore, the district court invalidated the statute's provisions on Equal Protection grounds, stating the law treated whistleblowers for the agricultural industry differently from whistleblowers in other industries by criminalizing their activities.<sup>159</sup>

In December 2015, the state appealed the district court's summary judgment order.<sup>160</sup> The U.S. Court of Appeals for the Ninth Circuit affirmed in part and reversed in part the district court's holding.<sup>161</sup> They affirmed the invalidation of the provision that criminalized misrepresentations to enter a production facility, and the ban on audio and video recordings of the operations; both of which, it stated, were covered by the Free Speech Clause under the First Amendment. The Court reversed the invalidation of the statute's provisions on criminalizing misrepresentation to obtain records and on falsely obtaining employment.<sup>162</sup> The Court stated that these provisions were constitutional and did not fall within First Amendment protection

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<sup>155</sup> *Id.* at 1193.

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

<sup>157</sup> *Id.*

<sup>158</sup> *Wasden*, 878 F.3d at 1193.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1205.

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

<sup>162</sup> *Id.* at 1199.

because they protect against a, “‘legally cognizable harm associated with a false statement’ and therefore survives constitutional scrutiny.”<sup>163</sup>

The Court based its decision on the case *United States v. Alvarez*.<sup>164</sup> In that case, *Alvarez* misrepresented himself to a public meeting by stating he was a Congressional Medal of Honor recipient from his time serving in the military.<sup>165</sup> Since this misrepresentation was in violation of the Stolen Valor Act, he was prosecuted.<sup>166</sup> The United States Supreme Court looked at the Stolen Valor Act and held that it was unconstitutional on the grounds that the misrepresentation was protected under the Freedom of Speech Clause in the First Amendment.<sup>167</sup> The holding concluded that false speech may only be criminalized if made for material gain or if the speech inflicts a, “‘legally cognizable harm.’”<sup>168</sup> The Ninth Circuit maintained that *Wasden* was controlled by the ruling in *Alvarez*.<sup>169</sup> The Court states that the misrepresentation to gain entry onto an agricultural facility is protected speech just like the misrepresentation about being a Medal of Honor recipient because neither inflicted a, “‘legally cognizable harm.’”<sup>170</sup> Therefore, neither could withstand constitutional scrutiny.<sup>171</sup>

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<sup>163</sup> *Id.*

<sup>164</sup> *Wasden*, 878 F.3d at 1194.

<sup>165</sup> *United States v. Alvarez*, 567 U.S. 709, 713-14 (2012).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 730.

<sup>168</sup> *Id.* at 719. This is contrary to what the Supreme Court has stated in other cases. *See* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (“False statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas.”); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (“[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.”); *Herbert v. Lando*, 441 U.S. 153, 171 (1979) (“Spreading false information in and of itself carries no First Amendment credentials.”). These statements are evidence that the Supreme Court has contemplated that false statements should not fall within First Amendment protection when they “derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation.” *Alvarez*, 567 U.S. at 719.

<sup>169</sup> *Wasden*, 878 F.3d at 1194.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

However, if *Alvarez* and *Wasden* are actually compared to each other, there is evidence that they do differ. The misrepresentation in *Alvarez* was not for a material gain, nor did it infringe upon the rights of another, and thus, the Court correctly found that there was no legally cognizable harm and the statement was protected by the First Amendment.<sup>172</sup> On the other hand, in *Wasden*, the utilization of false statements to gain entry to an agricultural facility amount to a violation on a farmers' property rights; so it would seem that the Ninth Circuit should have considered this kind of misrepresentation a legally cognizable harm since it is a violation of another's individual rights. Consequently, if the Court had decided this way, these misrepresentations would not be protected by the First Amendment.

Instead, the Ninth Circuit in *Wasden* declared that a false statement used to enter an agricultural facility, “cannot on its face be characterized as made to effect a fraud or secure moneys or other valuable considerations.”<sup>173</sup> The Court rejected Idaho's argument that lying to gain entry onto someone's private property constituted a fraud or other legally cognizable harm, and it went on to opine that, “lying to gain entry merely allows the speaker to cross the threshold of another's property[.]”<sup>174</sup> The Court decided that these kinds of misrepresentations (lies to gain entry onto private property) are protected speech, like the speech in *Alvarez*; therefore, the law must survive strict scrutiny to remain valid.<sup>175</sup>

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<sup>172</sup> *Alvarez*, 567 U.S. at 729-30.

<sup>173</sup> Compare *Wasden*, 878 F.3d at 1194 (emphasis added), with *Fraud*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“[A] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.”). This means that where the Ninth Circuit declared that lying to gain access to a farmer's private property is not fraud, they were wrong. This is because misrepresenting one's identity and true purpose to gain entry onto private property is a, “knowing concealment of a material fact.” *Fraud*. Furthermore, it could be an act that is considered to be to the farmer's detriment since it is a breach of property rights, it is against the farmer's wishes, and it could lead to a video being released that may detrimentally damage the farmer's business.

<sup>174</sup> *Wasden*, 878 F.3d at 1195. The Court additionally asserts that under this Idaho statute, anyone who lies to gain entry could be criminally prosecuted, including a teenager who lies to obtain a reservation at a restaurant as a joke, which is a severe punishment in the Court's opinion. *Id.*

<sup>175</sup> *Id.* at 1196.

Under strict scrutiny, the statute must be “actually necessary” to accomplish a compelling government interest, and, “there must be a direct causal link between the restriction imposed and the injury to be prevented.”<sup>176</sup> The Ninth Circuit acknowledged that Idaho may have compelling interests in protecting property rights and its farming industry, but criminalizing false statements used to access a facility, that the Court believes do not constitute a legally cognizable harm, are not “actually necessary” to protect those rights.<sup>177</sup> Therefore, the Court held that the statute’s provision on criminalizing the misrepresentation to gain access to an agricultural facility cannot survive strict scrutiny.<sup>178</sup> Additionally, the Court declared that Idaho already has a trespass law in place, which it believes will address these kinds of cases, and therefore, this provision is unnecessary to protect agriculturalists.<sup>179</sup>

Furthermore, the Ninth Circuit held that the banning of the video and audio recordings themselves cannot survive strict scrutiny because these items fall squarely into First Amendment protection as they are the product of a person’s speech.<sup>180</sup> Conversely, in regard to the provision that criminalizes the misrepresentation of oneself to obtain employment or records, the court stated that these misrepresentations constitute false statements that inflict harm because the person making the false statement is taking something of value, whether it is a confidential record, or compensation, from the property owner; as a result, these statements are not protected under the First Amendment Freedom of Speech.<sup>181</sup>

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*; *see also* IDAHO CODE § 25-3504 (2018) (expressing Idaho’s trespass law).

<sup>180</sup> *Wasden*, 878 F.3d at 1203.

<sup>181</sup> *Id.* at 1192.

### **b. Utah: Animal Legal Defense Fund v. Herbert**

Utah's farm protection law was enacted in 2012 and included provisions criminalizing lying to obtain entry onto a farm production facility and banning filming of the facility operation.<sup>182</sup> Representative John Mathis, the sponsor of the statute, declared the bill was motivated by, "a trend nationally of some propaganda groups . . . with a stated objective of undoing animal agriculture in the United States."<sup>183</sup> In 2017, Plaintiff, Animal Legal Defense Fund, brought suit against the state of Utah contending that this law violated their First Amendment and Fourteenth Amendment equal protection rights.<sup>184</sup> Ultimately, the District Court sided with the Animal Legal Defense Fund against the state of Utah.<sup>185</sup>

Since the Plaintiff argued that the statute violated their Freedom of Speech rights under the First Amendment, the court went through an analysis to see whether the First Amendment applies to false statements or misrepresentations.<sup>186</sup> The court found that misrepresentations to gain access to a private agricultural facility do not themselves cause a, "legally cognizable harm."<sup>187</sup> The court goes on to state that the lies used to gain access themselves do not cause a legally cognizable harm and therefore, these misrepresentations fall under First Amendment Freedom of Speech protection.<sup>188</sup> It is only after the lies lead to an additional showing of harm such as damage, injury, force, threat, trespass, or other interference with ownership or possession of the land that the misrepresentation falls outside of First Amendment protection.<sup>189</sup> The District Court held that the statute must face strict scrutiny under the First Amendment; the standard for strict scrutiny requires

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<sup>182</sup> Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1196 (D. Utah 2017).

<sup>183</sup> *Id.* at 1198.

<sup>184</sup> *Id.* at 1199.

<sup>185</sup> *Id.* at 1196.

<sup>186</sup> *Id.* at 1201-02.

<sup>187</sup> *Id.*

<sup>188</sup> *Herbert*, 263 F. Supp. 3d at 1202.

<sup>189</sup> *Id.* at 1203.

that the government must have a compelling interest and the law must be narrowly tailored to address that interest.<sup>190</sup> The court declared that while Utah had a compelling interest in protecting farmers, property rights, animals, and employees from undercover investigators, the law was not narrowly tailored to achieve this goal.<sup>191</sup> Thus, the law was deemed unconstitutional and could not be upheld under the First Amendment Freedom of Speech Clause.<sup>192</sup>

#### **IV. IMPACT OF RECENT DECISIONS**

##### **A. OTHER FARM PROTECTION/AG-GAG LAWS ARE IN JEOPARDY OF BECOMING INVALIDATED BY THE COURTS**

Following the *Herbert* and *Wasden* decisions, invalidating Utah and Idaho's ag-gag laws on First Amendment Freedom of Speech grounds, it is likely that many of the farm protection laws in other states will be found unconstitutional when analyzed under strict scrutiny.<sup>193</sup> Idaho and Utah's ag-gag laws were the strictest in the nation because they both contained language that criminalized filming by activists whether or not the activists are employed under false pretenses.<sup>194</sup> It was because of this provision that the statutes did not survive strict scrutiny.<sup>195</sup> Even though these two statutes included more protection than other states' statutes and were struck down for it, many other states' farm protection laws will be affected by the courts' decisions because they contain similar language to other provisions within the two invalidated statutes that the courts also

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<sup>190</sup> *Id.* at 1211

<sup>191</sup> *Id.* at 1212.

<sup>192</sup> *Id.* at 1212-13. This case has not been appealed by Utah to the Tenth Circuit. Dan Flynn, *Utah Isn't Appealing the Demise of its 2012 "Ag-Gag" Law*, FOOD SAFETY NEWS (Sept. 8, 2017), <https://www.foodsafetynews.com/2017/09/utah-isnt-appealing-the-demise-of-its-2012-ag-gag-law/>.

<sup>193</sup> Jacelyn Lyons, Comment, *The Future Implications for Ag-Gag Laws*, 47 SETON HALL L. REV. 915, 929 (2017).

<sup>194</sup> Coleman, *supra* note 82, at 204.

<sup>195</sup> *Id.* at 213.

struck down.<sup>196</sup> A strong precedent has been established due to the Ninth Circuit’s decision in *Wasden*.<sup>197</sup>

Iowa’s farm protection statute, like Idaho’s and Utah’s, forbids both “obtaining access to an agricultural operation under false pretenses” and “knowingly making a false statement as part of a job application with an intent to commit an act not authorized by the owner.”<sup>198</sup> This statute targets misrepresentations to gain access to a production facility.<sup>199</sup> Iowa’s Southern Federal District Court struck down this law as unconstitutional in January 2019 using a framework similar to that used in *Wasden*.<sup>200</sup> The Wyoming farm protection statute makes it a crime to knowingly or intentionally record data of an agricultural operation with concealed devices without the owner’s consent.<sup>201</sup> This statute also underwent and failed strict scrutiny in the U.S. Court of Appeals for the Tenth Circuit.<sup>202</sup> The Wyoming ag-gag statute was found unconstitutional due to its violation of the First Amendment because it served to regulate and prohibit free speech.<sup>203</sup>

The Kansas, North Dakota, and Montana-statutes all essentially prohibit individuals from producing, possessing, or distributing photographs, videos, or any recordings taken at an animal facility without permission, each requiring the intent to damage the enterprise through defamation.<sup>204</sup> While these statutes are closer to being content-neutral because they have a more limited scope than the Idaho and Utah statutes with regards to the intent requirement, it is likely

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<sup>196</sup> *Id.* at 200; *see also* Lyons, *supra* note 193, at 925 (“Future courts can also look to *Alvarez* in their analysis of whether or not ag-gag laws prohibit content based speech.”).

<sup>197</sup> Coleman, *supra* note 82, at 200.

<sup>198</sup> *Id.* at 203.

<sup>199</sup> *Id.*

<sup>200</sup> Lyle Muller, *Federal Judge Strikes Iowa “Ag-Gag” Law*, THE COUNTER (Jan. 10, 2019, 12:28 pm), <https://newfoodeconomy.org/federal-judge-iowa-ag-gag-law-unconstitutional/>. The judge in that case stated that Iowa’s farm protection law implicated the First amendment, just like Idaho and Utah’s did. *Id.*; *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812 (S.D. Iowa 2019), *appeal docketed*, No. 19-1364 (8th Cir. Feb. 22, 2019).

<sup>201</sup> Coleman, *supra* note 82, at 206-07.

<sup>202</sup> *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1192 (10th Cir. 2017).

<sup>203</sup> *Id.* at 1195-96.

<sup>204</sup> Coleman, *supra* note 82, at 217-19.

that these statutes will still undergo strict scrutiny.<sup>205</sup> This is because the specificity of “animal facility” constitutes viewpoint-based suppression of speech, which subjects these statutes to First Amendment analysis.<sup>206</sup> As in *Wasden*, it is unlikely that a court would find that a compelling governmental interest in protecting agricultural facilities outweighs the public interest in knowledge of its food supply and safety.<sup>207</sup>

Missouri’s law was enacted to try to avoid the problems noted in *Wasden*.<sup>208</sup> The Missouri statute is very similar to Idaho’s ag-gag law because it includes a provision criminalizing anyone who “obtains access to an animal facility by false pretenses for the purpose of performing acts not authorized by the facility.”<sup>209</sup> This means that under Missouri’s ag-gag statute, a person who misrepresents themselves to gain access to an agricultural facility for any reason not authorized by the owner, such as to make a recording, is subject to prosecution.<sup>210</sup> Since this provision is practically the same as Idaho’s misrepresentation provision, the Freedom of Speech Clause will more than likely invalidate this law because a court can use the same framework that was used by the Ninth Circuit in *Wasden*.<sup>211</sup>

Lastly, the farm protection statute in North Carolina creates a civil cause of action in which an individual can recover damages if someone “enters a nonpublic area of the employer’s premises for reasons other than seeking or holding employment, or doing business with the employer and thereafter without authorization, records images or sounds occurring at the employer’s premises and uses the recording to breach the person’s duty of loyalty to the employer.”<sup>212</sup>

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<sup>205</sup> *Id.* at 218-20.

<sup>206</sup> *Id.*

<sup>207</sup> *See generally id.*

<sup>208</sup> *Id.* at 204.

<sup>209</sup> MO. ANN. STAT. § 578.405 (West 2017).

<sup>210</sup> *Id.*

<sup>211</sup> Coleman, *supra* note 82, at 218.

<sup>212</sup> *Id.* at 216-18.

The Fourth Circuit invalidated this property protection statute last year.<sup>213</sup> Like the ruling in *Wasden*, this statute was subject to strict scrutiny for violating the First Amendment Freedom of Speech and was found unconstitutional.<sup>214</sup> This is because the receipt of damages are based upon the publication of the recording being negative, and there is sufficient evidence to suggest that this could be an attempt to target animal rights activists, which is discriminatory.<sup>215</sup>

Following the invalidation of Idaho and Utah’s ag-gag laws, the remaining ag-gag laws are in jeopardy of becoming invalidated, based on the framework used by the Ninth Circuit, and due to the similarity in language and construction of these statutes. As more farm protection statutes are deemed unconstitutional, farms across the nation will more than likely become increasingly vulnerable, and property rights will undoubtedly be negatively impacted.

## **B. THE RECENT COURT DECISION REGARDING AG-GAG LAWS WILL NEGATIVELY IMPACT PROPERTY RIGHTS**

Senator Jim Patrick from Idaho stated that the invalidation of Idaho’s farm protection law is a “private property issue for all.”<sup>216</sup> Without the law in place, people, with their own secret agendas, are able to lie in order to gain access to private property.<sup>217</sup> This violates several rights that are included in your “bundle” of property rights such as the right to include or exclude someone from your property for your personal enjoyment of that property, and a “reasonable expectation of privacy” that you should have on your own land.<sup>218</sup> People have the right to control, enjoyment, and use of their property, real and personal, and to prevent intrusions on those rights.<sup>219</sup>

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<sup>213</sup> *People for the Ethical Treatment of Animals, Inc. v. Stein*, 737 F. App’x. 122, 131 (4th Cir. 2018).

<sup>214</sup> *Id.* at 130-32.

<sup>215</sup> *Id.*; see also Coleman, *supra* note 82, at 226; Muller, *supra* note 200.

<sup>216</sup> Sean Ellis, *No Headline*, CAP. PRESS (Dec. 11, 2015), [https://www.capitalpress.com/state/idaho/no-headline/article\\_a6663cd7-d091-515b-a18b-c1c94676a264.html](https://www.capitalpress.com/state/idaho/no-headline/article_a6663cd7-d091-515b-a18b-c1c94676a264.html).

<sup>217</sup> See generally *id.*

<sup>218</sup> *Id.*

<sup>219</sup> Denise R. Johnson, *Reflections of the Bundle of Rights*, 32 VT. L. REV. 247, 250 (2007), <https://lawreview.vermontlaw.edu/wp-content/uploads/2012/02/johnson2.pdf>.

For comparison to what farmers and ranchers go through without the protection of an ag-gag law, consider how you would feel if a person were to lie to gain access to your home containing your family and valuables. This person may be entering with the purpose of investigating if you are potentially mistreating your children, with the goal of exposing the truth. You are more than likely not mistreating your child and you may engage in certain practices that some people might consider to be mistreatment, but are actually not, such as timeouts. If this person sees you employ these practices, considers them to be mistreatment, records you, and releases that video to the public, how would you feel? This is similar to what is happening to farms. Your private property rights in your home that protect what is yours resembles a farmer's private property rights in their production facility, which protects what is theirs. By allowing a person to misrepresent themselves to come onto their property, record practices that may or may not be bad, and then release those videos to the public, is the same as a person doing that with your children in your home. This lying can truly cause harm through the breach of property rights and interference with personal enjoyment.

Not only does allowing this egregious infringement violate private property rights, it directly opposes our history of strong private property rights that have been established and reinforced for centuries.<sup>220</sup> The courts' invalidation of farm protection laws, which allows people to go undercover onto a farm and take advantage of farmers and their livelihoods, may have created a slippery slope in regards to interferences with individual rights. Allowing people to lie to gain access to private property in order to potentially uncover supposed practices, which some people do not find appealing, could lead to more egregious infringements and damages to rights and property.

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<sup>220</sup> ELY, *supra* note 20.

### **C. INVALIDATION OF FARM PROTECTION LAWS HAVE AN IMPACT ON THE AGRICULTURAL INDUSTRY THROUGH THE EFFECT ON PROPERTY RIGHTS**

The outcome of the courts' decisions regarding ag-gag laws will most likely lead to a tremendously negative impact on the agricultural industry. This is because the invalidation of farm protection laws will have negative implications on private property rights, and secure property rights are essential to the agricultural industry. This impact may be small at first, but it could have a ripple effect, which could cause consequences in many areas worldwide.

#### **a. Invalidation of farm protection laws will affect a Farmer's decisions and willingness to take risks**

Farm protection laws provided farmers with confidence in their private property rights against the present threat of undercover animal activists, along with other people who seek to take advantage of them. Without that security in place, farmers are likely to be less confident in their property rights and the stability of those essential rights over time.<sup>221</sup> This will affect the farmers' decisions and willingness to take risks on their farm in many aspects.

First, investment flows from well-defined property rights and the security of those rights provides the incentive to invest.<sup>222</sup> The more secure the rights are, the more willing an investor may be to invest in riskier ventures.<sup>223</sup> With security in place, farmers have the ability to pledge property as collateral, which leads to increased investment in capital and labor.<sup>224</sup> In contrast, if property rights are not secure and stable, that "could mean that firms and individuals may fail to realize the fruits of their investment and efforts."<sup>225</sup>

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<sup>221</sup> See generally DEPARTMENT FOR INTERNATIONAL DEVELOPMENT, SECURE PROPERTY RIGHTS AND DEVELOPMENT: ECONOMIC GROWTH AND HOUSEHOLD WELFARE, 2014 (UK), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/304551/Property-rights-evidence-paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/304551/Property-rights-evidence-paper.pdf) [hereinafter SECURE PROPERTY RIGHTS].

<sup>222</sup> *Id.* at 9.

<sup>223</sup> *Id.*

<sup>224</sup> LOCKE, *supra* note 6, at 11. When the debtor has secure rights in the collateral, it provides greater security to lender, which increases lending to the debtor, who can then invest it. *Id.*

<sup>225</sup> SECURE PROPERTY RIGHTS, *supra* note 221, at 9.

Second, secure property rights allow the farmer more flexibility and mobility with his or her resources and assets.<sup>226</sup> This means that a farmer has more options, such as trading property as a factor of production, or transferring assets to those who can use them more productively.<sup>227</sup> The result of the increased flexibility and mobility that comes with protected property rights is an increased efficiency and enhanced factor productivity.<sup>228</sup>

Third, if farmers are afraid that there will be violations of their property rights because there is no protection in place, they will devote resources to protecting that property on their own, which is an unproductive use of resources.<sup>229</sup> With secure rights, these resources are free to be used for productive activities on the farm or ranch and to invest in new practices.<sup>230</sup>

Overall, when a farmer has confidence in secure and stable property rights, they can secure more lending and more willing to invest in new and riskier ventures. Additionally, with secure property rights farmers will most likely have increased allocative efficiency with their resources due to flexibility, and they can devote less resources to protection, freeing up those resources for investment and other productive uses.<sup>231</sup> As a result of protected property rights, greater productivity, allocative efficiency, and economic development can take place.<sup>232</sup> However, due to the courts' invalidation of farm protection laws, property rights are now less protected, leading to less productivity, allocative efficiency, and economic development.<sup>233</sup> This result creates a ripple effect of impact because private property rights are the foundation for growth.<sup>234</sup>

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.*; LOCKE, *supra* note 6, at 11.

<sup>228</sup> LOCKE, *supra* note 6, at 11.

<sup>229</sup> SECURE PROPERTY RIGHTS, *supra* note 221, at 9.

<sup>230</sup> *Id.*

<sup>231</sup> *See generally* SECURE PROPERTY RIGHTS, *supra* note 221; LOCKE, *supra* note 6.

<sup>232</sup> *See generally* SECURE PROPERTY RIGHTS, *supra* note 221.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 16.

The effect of unsecured property rights for farmers initially affects the farmer. Decreased confidence in their rights, unwillingness to take risks and make investments, and a devotion of resources to unproductive uses such as protecting their property, reduces farmers' per-capita income.<sup>235</sup> Next, the agricultural sector as a whole feels the impact because it is not developing and advancing.<sup>236</sup> "To provide strong incentives to improve the land, and to adopt for restoring fertility to it, a permanent and enforceable land rights system must evolve" and be secure.<sup>237</sup> Without advancements in this industry, the current limited resources cannot grow more food to feed Earth's growing population.<sup>238</sup> Additionally, the environmental sector feels the impact because farmers are not investing in the newest equipment, adopting technologies, or implementing practices that are more environmentally friendly.<sup>239</sup> Subsequently, society will be affected through a reduced amount of high quality and diverse food products as a result of the reduced amount of advancements and development.<sup>240</sup>

The agricultural sector is a large contributor to many state economies; thus, if the sector feels the impact of lower farm incomes, along with stagnant economic growth and development, many state economies will feel that impact too and will be impaired from it.<sup>241</sup> Furthermore, American agriculture is a sizable provider to the United States' economy and to other countries' economies around the world through international trade.<sup>242</sup> Over \$140 billion of U.S. agricultural

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<sup>235</sup> LOCKE, *supra* note 6, at 11.

<sup>236</sup> Bernd Holznagel & Cord Jakobeit, *Property Rights and Agricultural Development: The Land Issue in Equatorial Guinea* 22 L. & POL. AFR., ASIA & LATIN AM. 158 (1989).

<sup>237</sup> *Id.*

<sup>238</sup> *See generally id.*

<sup>239</sup> *See generally* Organisation for Economic Co-Operation and Development [OECD], *Adoption of Technologies for Sustainable Farming Systems Wageningen Workshop Proceedings* (2001), <https://www.oecd.org/greengrowth/sustainable-agriculture/2739771.pdf>.

<sup>240</sup> *Crop Diversity: Why It Matters*, *supra* note 99.

<sup>241</sup> *Farm Contribution*, *supra* note 146.

<sup>242</sup> *Ag and Food Sectors and the Economy*, U.S. DEP'T OF AGRIC., <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy> (last updated October 17, 2018).

products are exported, and \$130 million of agricultural products are imported each year.<sup>243</sup> If the agricultural sector is diminished, there will be a decreased contribution to the United States' economy and economic growth, and there will be fewer products for export from the farms.<sup>244</sup> Additionally, if farm per-capita incomes become depressed, a smaller quantity of imports will be purchased by the farmers, thereby decreasing international trade for the U.S. and other countries.<sup>245</sup>

Overall, secure, enforceable property rights are essential for a farmer to be willing to make riskier decisions, promote efficiency, and invest in new advancements and practices instead of using their income in the unproductive use of protecting their land from unwanted people. Due to the essential foundation that the agricultural industry plays in today's world, without secure property rights, a ripple effect will most certainly be felt from the farmer all the way to countries around the globe. The courts that decided to invalidate the farm protection laws may not have contemplated this immense ripple effect impact.

Another fact that the courts possibly did not consider is that without the security of farm protection laws, farmers may be less willing to open their farms to strangers and have an increased transparency. Presently, there are quite a few farms and ranches across the country that are opening their land or property up and are giving tours and information sessions to the general public.<sup>246</sup> People are becoming increasingly concerned and interested about where their food is coming from and farmers want to be able to accommodate their consumers by allowing for greater transparency.<sup>247</sup> However, they will undoubtedly be less willing to do this if they are worried that

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<sup>243</sup> KAMRON DAUGHERTY & JIANG HUI, U.S. DEP'T OF AGRIC., AES-107, OUTLOOK FOR U.S. AGRICULTURAL TRADE (2019), <https://www.ers.usda.gov/webdocs/publications/91333/aes-107.pdf?v=3730.5>.

<sup>244</sup> See generally *Ag and Food Sectors and the Economy*, *supra* note 242.

<sup>245</sup> *Id.*

<sup>246</sup> Alta. Ministry of Agric. & Forestry, *Providing Farm Tours*, AGRIC. BUS. STRATEGIES, Mar. 2001, [https://www1.agric.gov.ab.ca/\\$department/deptdocs.nsf/all/agdex1360/\\$file/888\\_4.pdf?OpenElement](https://www1.agric.gov.ab.ca/$department/deptdocs.nsf/all/agdex1360/$file/888_4.pdf?OpenElement).

<sup>247</sup> *Id.*

someone will lie to gain access, videotape their facility, and then use that video to take advantage of them.

### **b. Trespass Law Does Not Protect People from Misrepresentations**

One of the reasons the court invalidated Idaho’s farm protection law was the fact that trespass laws were already in place to address what the farm protection law was trying to stop.<sup>248</sup> In Idaho, “a person commits criminal trespass and is guilty of a misdemeanor . . . when he enters or remains on the real property of another without permission, knowing or with reason to know that his presence is not permitted.”<sup>249</sup> The Idaho farm protection law protected farmers not only from trespass, but also from people going undercover and misrepresenting themselves to gain access to a production facility.<sup>250</sup> Misrepresentation is different than outright trespass because technically an individual enters with the knowledge and consent of the owner.<sup>251</sup> Because animal activists are technically entering the property with the owner’s consent, even if it is under false pretenses, the property owner cannot sue for trespass under this law.<sup>252</sup> Therefore, farmers have little to no protection against people who lie to enter their private property, thereby intruding upon their property rights, until actual damage occurs.<sup>253</sup> Once this happens, farmers can bring a suit against the undercover activist for physical damage or defamation.<sup>254</sup> However, the farmer has already undoubtedly suffered either from a ruined reputation that can never be repaired, or from damages to their property and assets. The ag-gag law that Idaho enacted was attempting to address

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<sup>248</sup> Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1196 (9th Cir. 2018).

<sup>249</sup> IDAHO CODE § 18-7008(2)(a) (2018).

<sup>250</sup> IDAHO CODE § 18-7042 (2014).

<sup>251</sup> See generally IDAHO CODE § 18-7008(2)(a); see also *Entering the Property of Others*, DIG. MEDIA LAW PROJECT, <http://www.dmlp.org/book/export/html/1244> (last visited Feb. 23, 2019) (only in some jurisdictions will the misrepresentation render the consent ineffective and the person who misrepresented themselves *may* face trespass charges).

<sup>252</sup> *Entering the Property of Others*, *supra* note 251.

<sup>253</sup> *Wasden*, 878 F.3d at 1206 (“[A] legally cognizable harm—one from which damages are presumed to flow naturally [is necessary to have a case.]”).

<sup>254</sup> *Id.* at 1205-06.

this obvious gap in trespass law by criminalizing misrepresentations when used to gain access to private property, thereby violating the property rights of the property owner, so that farmers did not have to wait until physical damage to property or defamation took place and it was too late.<sup>255</sup>

### **c. Costs and Benefits of Ag-Gag laws**

While there could be a cost to having ag-gag laws because a minimal amount of animal cruelty may go unchecked as a result of criminalizing undercover operations; the benefit of these laws is significantly higher than the cost. The benefits to having ag-gag laws in place is that farmers and ranchers feel protected and secure in their property rights; this allows farmers to produce greater quality and quantities of food to feed the growing population, along with incentivizing them to take more risks in beneficial areas of improvement.<sup>256</sup> This is an invaluable benefit for the farmer, society, the world population, and the environment.

In addition to discouraging risk-taking and investment from the farmer in new practices that would benefit agriculture and society, ag-gag laws protect farmers and their property from a violation of their property rights. Interference with property rights should only be considered when the invasion will improve outcomes for others, the policy produces social benefits that outweigh the costs it inflicts on the property owners, the losing owners are fully compensated for the interference, and harm to others is proven.<sup>257</sup> Here, undercover activists lie to gain access before animal cruelty is proven, so the harm is not certain when they violate the farmer's property rights. Since finding practices of animal cruelty on a farm are rare, it is highly unlikely that an undercover

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<sup>255</sup> See generally IDAHO CODE § 18-7042 (2014).

<sup>256</sup> See generally SECURE PROPERTY RIGHTS, *supra* note 221 (beneficial areas of improvement can include better water and soil management practices, improving the technology used on the farm, or implementing pest control techniques); INT'L ATOMIC ENERGY AGENCY [IAEA], IMPROVING PRODUCTIVITY IN AGRICULTURE, <https://www.iaea.org/sites/default/files/agriculture.pdf>.

<sup>257</sup> WOLFGANG KASPER, IN DEFENCE OF SECURE PROPERTY RIGHTS 5-6 (Carolynn Chen ed., 2003), <http://www.cis.org.au/app/uploads/2003/06/op84.pdf>.

operation of an animal activist will improve the outcome for others or produce enough social benefits that it outweighs the huge cost on farmers through the immense risk to their livelihoods.<sup>258</sup> Furthermore, farmers are not compensated for this violation of their rights. As a result, interference with a farmer's property rights should not be allowed and it is clear that the benefits of farm protection laws outweigh the costs of a few potential cases of animal cruelty.

Additionally, animal welfare can be addressed in other ways, while misrepresentation to gain access, thereby violating a farmer's property rights, cannot be addressed through other avenues; and once videos containing what animal activists think is bad conduct are published, the reputation of that farmer is already ruined. Idaho, like most states, has its own law that makes it a felony to engage in animal cruelty.<sup>259</sup> Idaho's law states, "Every person who is cruel to any animal, or who causes or procures any animal to be cruelly treated, or who, having the charge or custody of any animal either as owner or otherwise, subjects any animal to cruelty shall, upon conviction, be punished."<sup>260</sup> If this law is violated, individuals can be punished with termination of rights, fines up to nine thousand dollars, and jail time up to a year.<sup>261</sup>

Therefore, even though there may be a small cost with having farm protection laws in place, there is a much higher benefit to address the ripple effect, to protect property owners in general, and to keep with our strong history of enforcing and protecting individual property rights.

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<sup>258</sup> *Farm-Animal*, *supra* note 106. Emily Meredith, the communications director for the Animal Agriculture Alliance, stated that a majority of farmers and ranchers who raise animals are "working hard to [take care of their animals] every day and are doing it the right way and truly care about what they do. And those [farmers] are disgusted by any sort of animal abuse . . . While the industry does have 'bad actors' who abuse animals, she said, 'to argue that it's pervasive in our food system today is uncalled-for and unfair.'" *Id.* This statement shows that animal abuse and cruelty is not a common occurrence within the industry. Thus, it is rare for an undercover activist, who violated a farmers' property rights to gain access to the facility, to find any abuse and expose it to the public.

<sup>259</sup> IDAHO CODE § 25-3504 (2018).

<sup>260</sup> *Id.*

<sup>261</sup> IDAHO CODE § 25-3520A (2018) (listing out penalties for first, second, and third violations of this provision).

Allowing a couple of rare cases of animal abuse to slide and giving the agricultural industry some special treatment is for the greater good of society, the economy, and the world.

## **V. CONCLUSION**

Property rights have a long history of importance throughout societies across the world. They are the basis of our individual freedom and they promote economic growth and risk-taking. Property rights are especially predominant in industries like agriculture. They are the basis for a farmer or rancher's business by giving them access to resources that they need such as land and water. Since these resources are scarce, it is vital that the property rights granting access to them and to use them as the farmer or rancher sees fit are well-defined and stable. Farmers and ranchers are uniquely vulnerable due to their dependency on these resources and the fact that their business is fairly spread out across land and through diversification.

Today, there is a growing worry about animal welfare on farms; this has led to an intensified motivation by groups like PETA to take advantage of farming practices that they consider "bad" by lying to gain access to private property. Farm protection laws were introduced by state legislatures to reinforce a farmer's property rights and protect them from these radical activists. However, by striking down these laws, the courts have suggested that property rights and the right to exclude whomever you want from the personal enjoyment of your property are secondary to a trespasser's right to free speech. The Ninth Circuit has even declared that misrepresenting oneself to gain access to private property does not constitute fraud; however, when compared to the Black's Law Dictionary definition of fraud, lying to obtain entry, thereby interfering with a farmer's property rights, could legally be considered fraud. Ultimately, now that Idaho and Utah's laws have been invalidated, other ag-gag laws across the country are sure to

follow. Without farm protection laws in place, anyone can lie to gain access to a farmer's private facility.

Invalidating state ag-gag laws critically impacts the agricultural industry in many ways. As a consequence, farmers and ranchers could feel less confident in their private property rights. This lack of confidence in the property-rights system may result in a greater number of risk-averse decisions including less investment in productive advancements and practices, which could cause lower farm incomes and a stagnated agricultural industry. The stalling of an industry this important to individuals, states, and the Nation as a whole could prove detrimental, especially as our population continues to grow.

While it is possible that a small number of animal abuse incidents may go unchecked as a result of farm protection laws, the benefits of these laws far outweigh this minimal cost. Ag-gag laws are a necessity to protect the agricultural industry and to preserve the long-standing foundation of property rights.