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STRIKING A BALANCE:

RAPID REPORTING LAWS COMBINED WITH FARMED ANIMAL WELFARE LAWS AS AN ALTERNATIVE TO AG-GAG STATUTES

Jennifer Satterfield

In 2011, Mark Bittman coined the term “ag-gag” in his op-ed *Who Protects the Animals?*¹ Ag-gag laws come in various forms, but the basic premise is that they criminalize acts that may interrupt or negatively impact agricultural operations.² For example, Iowa’s former ag-gag law criminalized obtaining access to an agricultural facility under false pretenses or intentionally using a false statement or representation on an employment application with an agricultural production facility in order to commit an unauthorized act.³ However, these laws have come under intense scrutiny for intimidating potential whistleblowers,⁴ hiding alleged animal cruelty,⁵ and violating First Amendment

1. Alicia Prygoski, *Detailed Discussion of Ag-Gag Laws*, MICH. ST. U.C. OF L. ANIMAL LEGAL & HIST. CTR. (2015), <https://www.animallaw.info/article/detailed-discussion-ag-gag-laws> (citing Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES (Apr. 26, 2011, 9:29 PM), https://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/?_r=0).

2. *Id.*

3. IOWA CODE ANN. § 717A.3A (West 2019).

4. Matthew Shea, Note, *Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-Gag Laws*, 48 COLUM. J.L. & SOC. PROBS. 337, 338–39 (2015) (discussing how ag-gag laws intimidate would-be whistleblowers).

5. *E.g.*, Kelsey Piper, “Ag-Gag Laws” Hide the Cruelty of Factory Farms from the Public. Courts Are Striking Them Down., VOX, <https://www.vox.com/future-perfect/2019/1/11/18176551/ag-gag-laws-factory-farms-explained> (last updated Jan. 11, 2019, 2:48 PM) (discussing how ag-gag laws prevent undercover investigations into animal cruelty).

rights.⁶ Although these laws are under fire, they still play a role in protecting agricultural facilities and interests from strategically released videos by animal rights activists, which can “wreak havoc on the agriculture industry.”⁷ Thus, in an attempt to protect the animal agriculture industry, states are introducing rapid reporting laws, which generally require a person to turn over evidence of animal cruelty within a short, specified time frame, as an alternative measure to traditional ag-gag legislation.⁸ Yet, rapid reporting laws are also criticized for hindering long-term investigations into systemic animal abuse.⁹

On the other end of the spectrum, groups advocating for the humane treatment of animals contend that existing animal cruelty laws are ineffective because of their light punishments¹⁰ and livestock exemptions,¹¹ allowing agricultural operations to potentially circumvent these laws. Even the highly publicized and recently enacted federal animal cruelty law, the Preventing Animal Cruelty and Torture Act, carves out exceptions for agricultural husbandry and other animal management practices.¹² While innocuous on the surface, such exceptions allow common

6. See Jessalee Landfried, *Bound & Gagged: Potential First Amendment Challenges to “Ag-Gag” Laws*, 23 DUKE ENVTL. L. & POL’Y F. 377, 379–87 (listing different ways ag-gag statutes can be challenged under the First Amendment).

7. Amanda Radke, *Do You Support Ag-Gag Laws?*, BEEF MAGAZINE (Mar. 14, 2012), <https://www.beefmagazine.com/blog/do-you-support-ag-gag-laws>.

8. Shea, *supra* note 4, at 352–63 (discussing states that have introduced bills with rapid reporting laws).

9. *Id.* at 368–69 (noting how rapid reporting laws provide advanced warning before serious enforcement actions can be brought).

10. Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law’s Role in Prevention*, 87 IOWA L. REV. 1, 37 (2001) (“In other jurisdictions, however, the available remedies are lacking in flexibility and heft.”).

11. David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 ANIMAL L. 123, 124 (1996) (describing how many animal cruelty statutes have exemptions for farm animals and farming practices).

12. Preventing Animal Cruelty and Torture (PACT) Act, Pub. L. No. 116-72, 133 Stat. 1151, 1152 (2019).

livestock management practices, such as poultry beak trimming,¹³ that animal rights¹⁴ activists consider cruel but farmers may consider necessary management for the safety of their animals. With the combination of ag-gag laws in some states and livestock exemptions to the federal animal cruelty law, it is no wonder animal rights activists and members of the general public are suspicious of large-scale livestock farmers and are requesting more transparency in the industry.¹⁵ But, if ag-gag laws are unconstitutional and rapid reporting laws by themselves may stifle investigations into systemic animal abuse, a middle ground is necessary to balance the interests of livestock farmers, animal rights activists, and the general public.

The goal of this Note is to propose two potential solutions that balance the interests of livestock farmers, animal rights activists, and the general public. Part I discusses the history of ag-gag laws in the United States and the current status of animal cruelty laws at both the state and federal level. Part I also acknowledges recent viral videos with animal cruelty allegations and concludes with examples of current animal agriculture industry policy programs in place. Part II discusses why livestock farmers may support ag-gag statutes while also noting the current problems with ag-gag. Part II then considers two potential solutions to the problem of balancing stakeholder concerns: (1) combining rapid reporting laws with increased livestock protec-

13. Jacquie Jacob, *Beak Trimming of Poultry in Small and Backyard Poultry Flocks*, EXTENSION (May 5, 2015), <https://poultry.extension.org/articles/poultry-behavior/beak-trimming-of-poultry/> (describing how “[p]oultry producers use beak trimming as part of an overall strategy to reduce feather pecking injuries in groups of poultry”).

14. Animal rights is not the same concept as animal welfare. “Animal [w]elfare . . . is a human responsibility that encompasses all aspects of animal well-being, including proper housing, management, disease prevention and treatment, responsible care, humane handling, and, when necessary, humane euthanasia” whereas “[a]nimal [r]ights is a philosophical view that animals have rights similar or the same as humans. True animal rights proponents believe that humans do not have the right to use animals at all. Animal rights proponents wish to ban all use of animals by humans.” *Welfare vs. Rights*, ANIMAL WELFARE COUNCIL, https://www.animalwelfarecouncil.org/?page_id=16 (last visited Nov. 2, 2019).

15. See, e.g., Ted Genoways, *Close to the Bone: The Fight Over Transparency in the Meat Industry*, N.Y. TIMES MAG. (Oct. 5, 2016), <https://www.nytimes.com/interactive/2016/10/09/magazine/meat-industry-transparency-fight.html> (“If companies like Hormel feel that they have been misrepresented, they might do better seeking more transparency, not less.”).

tions under a federal farmed animal welfare statute and (2) establishing strong industry policy initiatives that promote transparency and animal welfare. Part II proceeds to analyze the benefits and drawbacks of each aspect of these solutions and how they can be an effective compromise.

I. BACKGROUND

This Part provides the necessary background information to understand and address the various stakeholder positions regarding the current state of livestock husbandry in the United States. First, this Part considers the history of ag-gag laws and how modern ag-gag legislation came to exist. Second, this Part discusses the application of current animal cruelty and welfare laws to farmed animals at both the state and federal levels and then describes an attempt at a comprehensive framework law for animal welfare. Finally, this Part concludes with recent events that have dragged ag-gag laws back into the public spotlight. Since these different topics represent an intersection of stakeholder interests, they provide a pathway toward finding an equitable solution between animal rights activists, farmers, and the general public.

A. THE HISTORY OF AG-GAG LAWS IN THE U.S.

i. The Path to Modern Ag-Gag Laws in the United States

There are three general types of ag-gag laws in the United States:¹⁶ (1) agricultural interference laws, (2) agricultural fraud

16. While ag-gag legislation is not necessarily cookie cutter, they share similarities that may overlap with small distinctions relative to their form, substance, or historical time period. *See* Shea, *supra* note 4, at 343 n. 31 (“Categorizing ag-gag bills is not a perfect process”). One author uses five categories: “(1) broadly banning all audio and video recording on farms as ‘agricultural interference’; (2) criminalizing employment fraud in agricultural settings; (3) forbidding distribution of recordings; (4) redefining trespass to specifically include agricultural facilities; and (5) requiring rapid reporting of animal abuse.” *Id.* (quoting Landfried, *supra* note 6, at 394). A second author uses three categories: “(1) criminalizing dishonesty in the job-application process, when the applicant has the intention of infiltrating the facility to investigate; (2) criminalizing the act of photographing or videotaping on agricultural facilities; and (3) criminalizing the act of photographing or videotaping, as well as the possession or distribution of such videos.” *Id.* at 344 (quoting Kevin C. Adam, Note, *Shooting the Messenger: A Common-Sense Analysis of State “Ag-gag” Legislation Under the First Amendment*, 45 SUFFOLK U. L. REV. 1129, 1164 (2012)).

laws, and (3) rapid reporting laws.¹⁷ Agricultural interference “laws place outright bans on recording sounds or images within an industrialized farming operation, usually when done without the owner’s consent.”¹⁸ From 2011–2012, agricultural interference provisions were common in ag-gag bills.¹⁹ But, these types of laws “have become less frequent in more recent ag-gag bills, possibly due to the fact that these kind of ag-gag laws have been subject to constitutional scrutiny.”²⁰ Also prevalent from 2011–2012 were agricultural fraud laws. Agricultural “[f]raud laws criminalize obtaining access to industrialized farming operations by false pretenses or misrepresentation, or applying for employment at an industrialized farming operation under false pretenses or misrepresentation.”²¹ Finally, beginning in 2013, rapid reporting laws became the current, prevalent form of agricultural protection legislation.²² Rapid reporting laws “require[] anyone who records an image or sound at an industrialized farming operation to turn all copies of the recordings over to authorities within a certain amount of time, usually within twenty-four to forty-eight hours.”²³

In addition, ag-gag laws can be split into two historical eras: pre-2011 and post-2011.²⁴ Modern ag-gag laws have roots in “ecoterrorism” or “agroterrorism” laws from the 1990s,²⁵ which state legislatures enacted in response to the actions of animal

17. Prygoski, *supra* note 1.

18. *Id.*

19. *Id.*

20. *Id.* (citing Shea, *supra* note 4, at 351).

21. *Id.*

22. While opponents label rapid reporting laws as ag-gag, the mechanics of these types of laws is not the same because they create a duty to report. Unlike traditional ag-gag laws, rapid reporting laws usually “stand alone and are not tied to agricultural interference or fraud provisions” that discourage recording agricultural operations. Prygoski, *supra* note 1.

23. *Id.*

24. *Id.*

25. See, e.g., Animal Enterprise Protection Act, Pub. L. No. 102-346, 106 Stat. 928 (1992) (codified as amended at 18 U.S.C. § 43 (2006)) (making it a federal terrorism crime to cause the “physical disruption to the functioning of an animal enterprise”); Farm Animal and Field Crop and Research Facilities Protection Act, KAN. STAT. ANN. § 47-1827 (West 2019) (making it illegal for a person “without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility, [to] damage or destroy an animal facility or any animal or property in or on an animal facility” and making it illegal to enter an animal facility that is not open to the public to take pictures or video).

rights organizations during the 1970s and 1980s.²⁶ The primary intent behind these ecoterrorism laws was to specifically “criminalize[] entering the premises of industrialized farming operations without permission and destroying or damaging property.”²⁷ But, these laws also planted the seeds for “criminalizing recording at industrialized farming operations that is very similar to some of the modern-day ag-gag legislation.”²⁸

In 2008, the Humane Society of the United States (HSUS)²⁹ released a video showing workers at the Westland/Hallmark Meat Packing Company forcing cattle to walk by kicking them and using forklifts.³⁰ The video prompted the largest beef recall in the history of the United States and a nearly \$500 million dollar partial settlement to resolve HSUS’s False Claims Act lawsuit against the company.³¹ Undercover investigations of animal

26. See Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317, 1319–20 (2015) (“The modern animal rights movement began in the late 1970s and early 1980s with the overriding objective of reducing the amount of animal suffering by eliminating the exploitation of animals by humans At the same time, many activists also took a more direct approach to alleviating animal suffering by engaging in various direct action campaigns, including the liberation of confined animals.”). The legislative responses to such actions were “swift and harsh.” *Id.* at 1321.

27. Prygoski, *supra* note 1.

28. *Id.*

29. Contrary to its name, HSUS is not the typical humane society or charitable organization with which people would associate it. HSUS is actually a lobbying organization with an anti-meat vegan agenda that uses manipulative advertising and receives poor charity evaluation marks. See *10 Things You Should Know About HSUS*, HUMANEWATCH (Jan. 26, 2016, 8:38 PM), <https://www.humanewatch.org/10-things-you-should-know-about-hsus/> (last updated Feb. 2020) (describing the less socially acceptable history, tactics, and agenda of HSUS).

30. Andrew Martin, *Largest Recall of Ground Beef Is Ordered*, N.Y. TIMES (Feb. 18, 2008), https://www.nytimes.com/2008/02/18/business/18recall.html?_r=0; see also Miriam Falco, *USDA: Reinspection of Downed Cattle was Key Issue in Beef Recall*, CNN (Feb. 20, 2009, 6:52 PM) (describing “downer” cattle as cattle that cannot walk to slaughter and discussing the 2004 United States Department of Agriculture requirement that cattle walk to slaughter as a precaution against bovine spongiform encephalopathy, commonly known as mad cow disease).

31. Martin, *supra* note 30; see also United States *ex rel.* Humane Soc’y of the U. S. v. Hallmark Meat Packing Co., No. EDCV 08-00221-VAP (OPx), 2013 U.S. Dist. LEXIS 126945, at *5 (C.D. Cal. Apr. 30, 2013) (“This case is brought under the False Claims Act . . . and alleges several defendants falsely certified and represented in their technical proposals and bids to the United States Department of Agriculture that cattle processed at the facility in question were handled humanely and in accordance with federal rules and regulations.”).

agriculture operations during this 2007–2009 time period also drove the introduction of ag-gag legislation in several states.³²

With the focus shifting away from preventing property damage to preventing recording of animal operations and agricultural facilities, 2011 marked the start of a new wave of ag-gag legislation.³³ Since this new wave of ag-gag, at least twenty-six states have introduced and, of these states, seven have passed ag-gag laws.³⁴ However, courts have struck down some of these ag-gag laws as unconstitutional.³⁵

ii. Challenges to the Constitutionality of Modern Ag-Gag Laws, and Rapid Reporting Laws as a Response to the Challenges

Of the seven states that passed modern ag-gag laws, courts have invalidated ag-gag laws in Idaho, Iowa, Kansas, North Carolina, Utah, and Wyoming for violating free speech under the First Amendment.³⁶ In 2019, the U.S. District Court for the

32. *Prygoski, supra* note 1 (“A series of ag-gag laws were introduced in several states following the Hallmark-Westland investigation and similar undercover investigations into other industrialized farming operations (also known as factory farms).”); *see also* Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1198 (D. Utah 2017) (“Over the next three years [following investigations like Westland/Hallmark in 2008], sixteen states introduced ag-gag legislation.”).

33. *See* Prygoski, *supra* note 1 (citing Rebekah Wilce, *Wave of “Ag Gag” Bills Threaten Food Safety and Freedom of the Press*, PR WATCH (Mar. 13, 2013, 7:02 AM), <https://www.prwatch.org/news/2013/03/11411/wave-ag-gag-bills-threaten-food-safety-and-freedom-press>).

34. *See* *What Is Ag-Gag Legislation?*, ASPCA, <https://www.aspc.org/animal-protection/public-policy/what-ag-gag-legislation> (last visited Jan. 2, 2020) (describing ag-gag legislation by state). These numbers are based on ag-gag legislation introduced after 2011 and do not include pre-2011 ag-gag legislation.

35. *Id.* (listing state ag-gag laws that were struck down as unconstitutional).

36. *Id.* (identifying Idaho, Iowa, North Carolina, Utah, and Wyoming as states whose ag-gag laws have been struck down); *see also* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1190 (9th Cir. 2018) (striking down provisions that limit free speech in Idaho Code § 18-7042); Animal Legal Def. Fund v. Reynolds, 353 F. Supp. 3d 812, 827 (S.D. Iowa 2019) (determining Iowa Code § 717A.3A fails to survive judicial scrutiny based on the First Amendment); People for the Ethical Treatment of Animals, Inc. v. Stein, No. 1:16CV25, 2020 U.S. Dist. LEXIS 103541, at *75–76 (M.D.N.C. June 12, 2020) (holding N.C. Gen. Stat. §§ 99A-2(b)(1) and (b)(5) unconstitutional as applied to the plaintiffs’ exercise of free speech and N.C. Gen. Stat. §§ 99A-2(b)(2) and (b)(3) as facially unconstitutional); Animal Legal Def. Fund v. Schmidt, No. 18-2657-KHV, 2020 U.S. Dist. LEXIS 10202, at *50 (D. Kan. Jan. 22, 2020) (holding the content-based portions of Kansas’s ag-gag statute, K.S.A. § 47-1827(b), (c) and (d), fail

Southern District of Iowa struck down Iowa's ag-gag law in *Animal Legal Defense Fund v. Reynolds*.³⁷ Iowa's ag-gag law provided that a person commits agricultural production facility fraud if a person willfully:

- a. Obtains access to an agricultural production facility by false pretenses[, or]
- b. Makes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized.³⁸

Iowa's "lawmakers described the bill [which was signed into law] as being responsive to two primary concerns of the agricultural industry: facility security (both in terms of biosecurity and security of private property) and harms that accompany investigative reporting."³⁹ "[A]ccepting [the] argument that property and biosecurity are the state's actual interests protected by § 717A.3A, the [c]ourt [was] persuaded these interests are important," but not compelling under the First Amendment.⁴⁰ The court, applying both strict and intermediate scrutiny, found that the law was too broad in its scope and "include[ed] no limiting features whatsoever, allowing it to apply even to the most innocent of circumstances."⁴¹ Thus, the court struck down the law,

strict scrutiny and therefore are unconstitutional); *W. Watersheds Project v. Michael*, 353 F. Supp. 3d 1176, 1191 (D. Wyo. 2018) ("The First Amendment's guarantee of free speech in this case leads the Court to find Wyoming statutes §§ 6-3-414(c) and 40-27-101(c) are facially unconstitutional."); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017) (holding Utah Code § 76-6-112 unconstitutional for "[s]uppressing broad swaths of protected speech without justification."). Furthermore, although *Michael* is about a data censorship law, it falls under the broad umbrella of ag-gag laws as they relate to environmental rather than animal welfare concerns. See Kellen Miller, *Ag-Gag Laws*, U.C. HASTINGS C. L. (Jan. 23, 2018), <http://sites.uchastings.edu/helj/2018/01/23/ag-gag-laws/> ("While many ag-gag laws make it illegal to enter factory farms for the purpose of collecting data and documenting legal violations, in other states the law is not limited simply to farms. There, the laws criminalize the collection and gathering of any data regarding environmental conditions from public lands . . .").

37. *Reynolds*, 353 F. Supp. 3d at 827.

38. IOWA CODE ANN. § 717A.3A (West 2019).

39. *Reynolds*, 353 F. Supp. 3d at 817.

40. *Id.* at 824.

41. *Id.* at 826.

holding that “the right to make the kinds of false statements implicated by § 717A.3A . . . is protected by [the United States] guarantee of free speech and expression.”⁴² However, § 717A.3A’s true purpose was not to attack free speech or silence critics—the law was created to protect biosecurity on agricultural production facilities and defend private property interests.⁴³ Although the state appealed the ruling to U.S. Court of Appeals for the Eight Circuit, the Iowa legislature passed another ag-gag law in March of 2019, creating the crime of agricultural production facility trespass.⁴⁴

In light of these recent cases, several states have introduced bills containing rapid reporting requirements.⁴⁵ As of yet, only Missouri’s rapid reporting law has been enacted.⁴⁶ This law, representative of a typical rapid reporting law, creates a duty “[w]hensoever any farm animal professional videotapes or otherwise makes a digital recording of what he or she believes to depict a farm animal subjected to abuse or neglect . . . to submit such videotape or digital recording to a law enforcement agency within twenty-four hours of the recording.”⁴⁷ So far, this law has not been challenged in court.⁴⁸ States legislators are considering rapid reporting laws like Missouri’s as a measure to stop animal

42. *Id.* at 827.

43. See Laura Belin, *Iowa Lawmakers Pass Another Unconstitutional “Ag Gag” Bill*, BLEEDING HEARTLAND (Mar. 13, 2019), <https://www.bleedingheartland.com/2019/03/13/iowa-lawmakers-pass-another-unconstitutional-ag-gag-bill/> (acknowledging that “the state claimed the current law’s true purpose was to protect biosecurity and private property,” while expressing doubt that a court of appeals will agree).

44. IOWA CODE ANN. § 717A.3B (West 2019) (describing agricultural production facility trespass as a person obtaining access to or employment with an agricultural production facility by use of deception with the intent to cause “physical or economic harm or other injury”).

45. Shea, *supra* note 4, at 353–63 (identifying Missouri, Nebraska, Tennessee, North Carolina, and New Hampshire as states that have introduced bills containing rapid reporting laws); see also *What is Ag-Gag Legislation?*, *supra* note 34 (identifying Colorado, Montana, and New Mexico as states that have introduced bills containing rapid reporting laws).

46. MO. ANN. STAT. § 578.013 (West 2014). The bill, SB 631, was effective August 28, 2012.

47. *Id.*

48. In *Animal Legal Defense Fund v. Herbert*, the court notes that Mo. Ann. Stat. § 578.013 “is seemingly both more narrowly tailored to and more effective at addressing delays in reporting animal abuse than are the provisions at issue here [in Utah Code § 76–6–112].” 263 F.Supp.3d 1193, 1212 n. 101 (D. Utah 2017).

abuse by mandating quick reporting and to protect farmers' reputations in cases where videos depict best practices, but are misunderstood as animal abuse by uninformed consumers.⁴⁹

B. ANIMAL CRUELTY AND WELFARE LAWS IN THE UNITED STATES

In contrast to ag-gag laws, there are also both federal and state animal cruelty and welfare laws. Animal cruelty laws generally prohibit actions done to or against animals while welfare laws set minimum standards for animal care.⁵⁰ One common factor across these laws is some form of exemption for livestock. Most notably, for example, the federal Animal Welfare Act (AWA) specifically excludes "other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber" from its definition of "animal," thereby removing protections under AWA from livestock.⁵¹ As a result, people criticize AWA for its failure to protect livestock and for allowing the diminution of livestock wellbeing.⁵² Likewise, the recent federal Preventing Animal Cruelty and Torture Act leaves out livestock from its protections by exempting agricultural husbandry and animal management practices.⁵³

Furthermore, many states also have livestock exemptions in their animal cruelty laws or impose lesser standards on the

49. See, e.g., Rob Schultz, *Legislator Wants to Introduce Controversial 'Ag-Gag' Bill*, WISC. ST. J. (Feb. 9, 2015), https://madison.com/wsj/news/local/legislator-wants-to-introduce-controversial-ag-gag-bill/article_6eb375b3-3b2e-5d6f-881c-2d3e8f25e9b0.html ("If you're doing it according to the best practices and know how you have to do it and then somebody takes a video and says it's abuse and puts it out there, it affects the farmer's reputation.").

50. See, e.g. *Laws that Protect Animals*, Animal Legal Def. Fund, <https://aldf.org/article/laws-that-protect-animals/> (last visited Feb. 11, 2021) (discussing the various types of federal and state laws protecting animals).

51. Animal Welfare Act, 7 U.S.C. § 2132(g) (2015).

52. Justin Marceau, *How the Animal Welfare Act Harms Animals*, 69 HASTINGS L.J. 925, 938 (2018) ("The decline in the protection of animals, particularly animals raised for food, since the enactment of . . . AWA is particularly striking when juxtaposed with the improved scientific understanding of the capacity for animals to think, feel, and fear over the same period of time.").

53. Preventing Animal Cruelty and Torture Act, Pub. L. No. 116-72, 133 Stat. 1151 (2019) (to be codified at 18 U.S.C. § 48) (exempting from the offense visual depictions of "customary and normal . . . veterinary, agricultural husbandry, or other management practice").

treatment of livestock.⁵⁴ However, some states have enacted legislation specifically aimed at farm animal abuse.⁵⁵ These states include Nebraska, Iowa, New Jersey, and Wyoming.⁵⁶ For example, the Iowa statute provides, in part, that a person commits livestock neglect if he or she “[f]ails to provide livestock with care consistent with customary animal husbandry practices;” “[d]eprives livestock of necessary sustenance;” or “[i]njures or destroys livestock by any means which causes pain or suffering in a manner inconsistent with customary animal husbandry practices.”⁵⁷ While this statute provides anti-cruelty measures, it also leaves potential exemptions for “customary animal husbandry practices.”⁵⁸

Unlike these states, California has specifically targeted certain agricultural practices with what many consider progressive animal welfare laws.⁵⁹ In 2008, California passed Proposition 2 which banned battery cages⁶⁰ for laying hens and several other states followed suit.⁶¹ Then, in 2018, it passed Proposition 12, the Prevention of Cruelty to Farm Animals Act, strengthening the earlier measures in Proposition 2.⁶² The Prevention of Cruelty to Farm Animals Act mandates floor space requirements for

54. See *Legal Protections for Animals on Farms*, ANIMAL WELFARE INST. 1, 2 (Oct. 2018), <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-LegalProtections-AnimalsonFarms-110714.pdf> (“Many state cruelty codes exempt practices that are routinely performed on farm animals.”).

55. *Id.*

56. *Id.*; see also NEB. REV. STAT. ANN. §§ 54-901–13 (West 2019); IOWA CODE §§ 717.1–.5 (West 2019); N.J. STAT. ANN. § 4:22-16.1 (West 2019); WYO. STAT. ANN. §§ 11-29-101–15 (West 2019).

57. IOWA CODE ANN. § 717.2(1)(a)–(c) (West 2019).

58. *Id.*

59. Greg Henderson, *California Passes Animal Welfare Law*, AG WEB (Nov. 7, 2019, 5:17 PM), <https://www.agweb.com/article/california-passes-animal-welfare-law> (“Called by many the most progressive animal welfare law in the nation, Proposition 12 comes a decade after California banned battery cages with Proposition 2 in 2008.”).

60. Battery cages are the most predominant worldwide system for egg-laying hens. Selam Meseret, *A Review of Poultry Welfare in Conventional Production System*, 28 LIVESTOCK RES. FOR RURAL DEV. (2016), <http://www.lrrd.org/lrrd28/12/mese28234.html>. Although it is widely acknowledged that conventional battery cages promote hen welfare in certain respects such as hygiene and reducing aggressive cannibalistic behavior, the general consensus is that disadvantages such as the barren environment and restrictions on behavior outweigh any benefits. *Id.*

61. Henderson, *supra* note 59.

62. *Id.*

calves confined for production and breeding sows while also increasing floor space requirements for egg-laying hens with a goal of being cage-free by 2022.⁶³

In addition to animal cruelty laws, several states impose mandatory reporting laws on veterinary professionals, while others have laws regarding non-mandatory reporting.⁶⁴ For example, Nebraska requires licensed veterinarians and licensed veterinary technicians, while acting in their official capacity, to report any observation or incident which leads them to “reasonably suspect that an animal has been abandoned, cruelly neglected, or cruelly mistreated.”⁶⁵ The statute also immunizes the reporter from liability and imposes no duty to investigate further.⁶⁶ On the other hand, states like Iowa, New Jersey, and Wyoming, which also have livestock-specific animal cruelty laws like Nebraska, do not impose mandatory reporting on veterinary professionals.⁶⁷

C. UNDERCOVER VIDEOS ON FARMS: WHO IS MAKING THEM AND WHY

In June 2019, ag-gag laws once again entered the public spotlight due to an undercover video investigation of an Indiana dairy farm.⁶⁸ At that time, Animal Recovery Mission (ARM), an

63. 2018 Cal. Legis. Serv. Prop. 12 (West).

64. *Abuse Reporting Requirements by State*, AM. VETERINARY MED. ASS'N, <https://www.avma.org/KB/Resources/Reference/AnimalWelfare/Pages/Abuse-Reporting-requirements-by-State.aspx> (last visited Nov. 3, 2019) (depicting a graphic listing states with mandatory reporting, non-mandatory reporting, and no reporting laws). Some states, such as Iowa, that have passed both ag-gag laws and livestock-specific cruelty laws do not require mandatory reporting of animal cruelty by veterinary professionals while other states, like Nebraska, do not have ag-gag laws but do have livestock-specific cruelty laws and mandatory reporting of animal cruelty of animal cruelty by veterinary professionals.

65. NEB. REV. STAT. ANN. § 28-1020 (West 2021).

66. *See id.* (“Nothing in this section shall be construed to impose a duty to investigate observed or reasonably suspected abandonment, cruel neglect, or cruel mistreatment of an animal. Any person making a report under this section is immune from liability except for false statements of fact made with malicious intent.”).

67. *See Abuse Reporting Requirements by State*, *supra* note 64 (presenting a map showing which states require mandatory reporting).

68. *See* Jeff Daniels, *Alleged Animal Abuse at Indiana Farm, Undercover Video Putting ‘Ag-Gag’ Laws in Spotlight*, CNBC (June 13, 2019, 12:23 AM), <https://www.cnbc.com/2019/06/12/alleged-animal-abuse-at-indiana-farm-puts-ag-gag-laws-in-spotlight.html> (“The controversy over video showing alleged

animal rights and pro-vegan organization,⁶⁹ released a video of Fair Oaks Farms highlighting alleged animal abuse.⁷⁰ The video sent the general public into an uproar and caused an outcry to boycott the company's associated milk brand Fairlife, which is owned by the Coca Cola Company.⁷¹ In response, farmers and those in the agriculture industry showed their support of Fair Oaks Farms' leadership, pointing out that the actions of the few do not represent the many and how ARM, throughout its three month investigation, neglected to report the abuse immediately.⁷²

In response, Fair Oaks Farms Chairman of the Board,⁷³ Dr. Mike McCloskey, made a public statement and accompanying

abuse of calves at Fair Oaks Farms in Indiana is calling attention to so-called ag-gag laws in at least seven states.”).

69. Although ARM calls itself an “investigative animal welfare organization,” it promotes animal rights ideals. *Compare About ARM*, ANIMAL RECOVERY MISSION, <https://animalrecoverymission.org/about-arm/> (last visited Nov. 26, 2019) (describing ARM as a “vanguard investigative animal welfare organization”), with *Be Fair, Be Vegan Campaign-NYC*, ANIMAL RECOVERY MISSION, <https://animalrecoverymission.org/humane-lifestyle/be-fair-be-vegan/> (last visited Nov. 26, 2019) (discussing ARM campaigns to promote veganism and animal rights). For a comparison of the difference between animal rights and animal welfare, see discussion *supra* note 14.

70. See *Disturbing Undercover Video Shows Animal Abuse at Fair Oaks Farms in Indiana*, NBC5 CHICAGO (June 5, 2019, 4:39 PM), <https://www.nbcchicago.com/news/local/fair-oaks-farms-indiana-abuse-undercover-video-animal-recovery-mission-arm-510862941.html>. The video depicts calves being hit, kicked, thrown into livestock trucks, branded, and dragged. *Id.* There are also several shots of dead calves. *Id.* The video alleges mother cows are calling for their calves and shows mooing cows. *Id.* The video describes widespread narcotics use by employees and claims marijuana was grown on the property. *Id.* The video also notes the connection between bull calves born on Fair Oaks Farms and Midwest Veal. *Id.*

71. Dan Nosowitz, *Coke's Milk Product Fairlife Faces Lawsuits, Boycotts After Animal Abuse Video*, MODERN FARMER (July 10, 2019), <https://modernfarmer.com/2019/07/cokes-milk-product-fairlife-faces-lawsuits-boycotts-after-animal-abuse-video/>.

72. See, e.g., Molly Joiner, *Don't Boycott Fairlife Because of Fair Oaks Farms Just Yet*, ODYSSEY (June 10, 2019), <https://www.theodysseyonline.com/fairlife-fair-oaks-farms-scandal-boycott> (discussing how the incidents were isolated and how the ARM videographers failed to report the abuse); cf. *Read Fair Oaks Farms' Full Statement After Undercover Video Released*, NBC CHI. (June 5, 2019, 4:40 PM), <https://www.nbcchicago.com/news/local/read-fair-oaks-farms-full-statement-and-animal-welfare-groups/78843/> (describing how the investigation took three months and that the Newton County Sheriff's office requested “the identity of the witness who ‘failed to report this activity for some time’”).

73. *Read Fair Oaks Farms' Full Statement*, *supra* note 72.

video.⁷⁴ In his statement, McCloskey pointed out that, of the four employees in the video, three had already been terminated prior to the video.⁷⁵ McCloskey also emphasized Fair Oaks' "see something, say something policy," in which employees were required to report suspected abuse, and noted he was concerned that "ARM [took] months before notifying owners or authorities regarding on-going animal abuse."⁷⁶ While the Fair Oaks Farms video is just one example of many, it is representative of undercover investigations into large scale animal operations.⁷⁷

D. CURRENT INDUSTRY POLICY INITIATIVES TO IMPROVE ANIMAL CARE STANDARDS AND INCREASE CONSUMER TRANSPARENCY

Even though the controversy surrounding ag-gag laws, the inadequacy of most animal cruelty and welfare laws, and undercover investigations are at the forefront of the public's purview, industry efforts have already begun to improve consumer transparency and promote higher standards of animal care and welfare. One such initiative is National Dairy Farmers Assuring Responsible Management (FARM).⁷⁸ FARM's program embraces four main "silos:" animal care, environmental stewardship, antibiotic stewardship, and workforce development.⁷⁹ "The Animal Care Program is the cornerstone FARM Program in which all producers are required to participate."⁸⁰ In addition to its Animal Care Program, FARM has a "See it? Stop it!" initiative in place "[to provide] those who work around animals with resources and guidance to immediately report instances of animal abuse, neglect, harm or mishandling."⁸¹

74. *ARM Video: Official Statement*, FAIR OAKS FARMS (June 12, 2019), <https://fofarms.com/post/response/>.

75. *Id.*

76. *Id.*

77. *See Past Investigations*, MERCY FOR ANIMALS, <https://mercyforanimals.org/investigations> (last visited Jan. 1, 2020) (listing investigations with videos into various animal agriculture operations such as pork, chicken, dairy, eggs, turkey, veal, and fish).

78. *What is FARM?*, NAT'L DAIRY FARM, <https://nationaldairyfarm.com/> (last visited Nov. 2, 2019) ("FARM works with dairy farmers, cooperatives, processors and industry partners to show customers and consumers that the dairy industry holds itself to the highest standards.").

79. *Id.*

80. *Id.*

81. *How to Report Animal Abuse*, NAT'L DAIRY FARM, <https://nationaldairyfarm.com/dairy-farm-standards/animal-care/how-to-report-animal-abuse/> (last visited Nov. 27, 2019).

Currently, there are several “FARM Proud” brands consisting of farmers, dairy cooperatives, and processors that participate in the Animal Care Program, including Fair Oaks Farms.⁸² Prior to ARM’s video release but after learning about the investigation, Fair Oaks Farms requested an audit from FARM.⁸³ The initial audit showed that Fair Oaks “met or exceeded requirements of the FARM animal care program” and that FARM “will continue to work with Fair Oaks to ensure full implementation of all corrective actions.”⁸⁴ Although there are gaps in animal cruelty and reporting laws, industry-driven initiatives like FARM can help fill those gaps by providing guidance and oversight.

II. ANALYSIS

Part II first discusses the reasons farmers support ag-gag laws and why these laws are problematic from both a farmer’s and an animal rights activist’s perspective. Farmers support ag-gag laws for several reasons. For example, ag-gag laws can ensure biosecurity and the security of food resources, help farmers employ honest people, and prevent negative public perception of the agriculture industry.⁸⁵ On the other hand, ag-gag laws can hinder investigations into systemic animal cruelty, criminalize free speech, and create the opposite of the intended effect on farmers’ reputations by causing public distrust of agricultural operations.⁸⁶ Hence, ag-gag laws are not a viable solution for protecting farmers’ interests.

Next, this Part analyzes in more detail the problems with current animal cruelty and animal welfare laws and proposes two potential solutions that balances the interests of farmers, animal rights activists, and consumers. Currently, several state and federal anti-cruelty and animal welfare statutes leave gaps

82. *FARM Proud Participants*, NAT’L DAIRY FARM, <https://nationaldairy-farm.com/what-is-farm/farmproud-participants/> (last visited Nov. 27, 2019).

83. Joyce Russell, *Evaluators: Fair Oaks Farms Operating within Industry Standards; Audit Called for After Alleged Undercover Videos*, NWI TIMES (May 2, 2019), https://www.nwitimes.com/news/local/newton/evaluators-fair-oaks-farms-operating-within-industry-standards-audit-called/article_0a5edd93-078d-5b5b-8778-9183615876e5.html.

84. *National Dairy FARM Program Statement on Fair Oaks Farms*, NAT’L MILK PRODUCERS FED’N (June 5, 2019), <https://www.nmpf.org/national-dairy-farm-program-statement-on-fair-oaks-farms/>.

85. See discussion *infra* Part II.A.

86. See discussion *infra* Part II.B.

by exempting livestock. One potential solution is a federal Farmed Animal Welfare Act (FAWA) that is overseen by a knowledgeable administrative body. I created a proposed FAWA using current legislation and a model act to ensure it covers existing gaps in other laws while affording each of the stakeholder groups a means to protect their interests. In addition to potential animal welfare legislation and regulation, voluntary industry organizations are another avenue to increase consumer transparency, provide for animal welfare standards, and protect farmers' interests. Like FAWA, voluntary industry organizations can implement specific animal welfare standards that can appease animal rights organizations and constitute both a monitoring and enforcement system, thereby increasing consumer transparency.

A. WHY LIVESTOCK FARMERS SUPPORT AG-GAG LEGISLATION

Although ag-gag laws receive harsh criticism,⁸⁷ there are sensible reasons why many farmers and legislators still support them. Farmers want to ensure the security of food resources and employ honest, hardworking people who have animal welfare as their highest priority.⁸⁸ In many cases, undercover investigators make false statements on job applications to get hired and may violate employment contracts prohibiting the recording of images and sounds.⁸⁹ Hence, undercover investigators are not honest with their employers and do not always have the welfare of the animals as their highest priority. Instead, the investigators' priority is to get unfavorable footage that promotes their anti-

87. See, e.g., *Why Are Ag-Gag Laws Harmful?*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/issue/ag-gag/> (last visited Feb. 5, 2021) ("Undercover investigations and whistleblowers have exposed some of the worst aspects of factory farming, but [a]g-[g]ag laws punish people who speak out about cruelty in animal agriculture.").

88. Kevin C. Adam, *Shooting the Messenger: A Common-Sense Analysis of State Legislation Under the First Amendment*, 45 SUFFOLK U. L. REV. 1129, 1160–61 (2012) ("[S]upporters of the legislation, such as the Iowa Farm Bureau Federation (IFBF), have celebrated the legislature's decision, claiming the bill supports local farms and ensures that food sources are secure . . . Responsible farmers take good care of their land and livestock and want to employ honest, hardworking people that have the welfare of their livestock as their top priority.").

89. TERENCE J. CENTNER, CONSUMERS, MEAT AND ANIMAL PRODUCTS: POLICIES, REGULATIONS AND MARKETING 209 (2019) ("In many cases, the persons had gained entry through lies on their employment applications. In other situations, persons violated employment contracts that prohibited the employee from recording images and sounds.").

animal agriculture agenda, “leading to things not getting done properly and animals get[ting] hurt, all in the name of animal rights.”⁹⁰

Furthermore, livestock farmers have an interest in ensuring a positive public perception of the farmed animal industry because it is their livelihood. If the public stops purchasing animal products, livestock farmers lose their source of income. But, since “media and consumers often take the [animal rights undercover] videos at face value,” the videos often mislead the public about the livestock industry.⁹¹ For example, the animal rights organization Mercy for Animals released a video of chickens at a meat processing plant.⁹² The organization alleged that the animals were being tortured and abused.⁹³ However, an expert panel from the Center for Food Integrity reviewed the video and found no abuse.⁹⁴ As one veterinarian and panelist described, “[s]ome of the process isn’t camera-friendly—it’s not pretty. There are systems and processes in place to make sure it’s carried out in a humane manner and I did not see animal abuse in this video.”⁹⁵ Consequently, practices that are humane and efficient from an animal sciences perspective may appear grotesque to a public that is growing more and more out of touch with food production.⁹⁶

90. Casey Kinler, *Don’t Believe Everything You See: The Truth About Undercover Videos*, ANIMAL AGRIC. ALLIANCE (Apr. 10, 2015), <https://animalagalliance.org/dont-believe-everything-you-see-the-truth-about-undercover-videos/>.

91. *Id.*

92. See Sam P.K. Collins, *Undercover Investigation Finds Shocking Torture of Chickens in Slaughterhouse*, THINK PROGRESS (Mar. 17, 2015, 2:30 PM), <https://thinkprogress.org/undercover-investigation-finds-shocking-torture-of-chickens-in-slaughterhouse-141d18a8db0f/> (detailing the release of Mercy for Animals’ 2015 video and the policy concerns surrounding this type of animal rights advocacy).

93. *Id.* (“The investigator who filmed the video described the practices as ‘torture.’”).

94. Erica Shaffer, *Review Panel Finds Inaccuracies in Undercover Video*, MEAT + POULTRY (Mar. 16, 2015), <https://www.meatpoultry.com/articles/12600-review-panel-finds-inaccuracies-in-undercover-video> (“I don’t see horrific animal abuse in this video . . . USDA inspectors are on site. If they see abuse [sic] they have authority to stop things.”).

95. *Id.* (internal quotations omitted).

96. See, e.g., U.S. FARMERS & RANCHERS ALL., *Nationwide Surveys Reveal Disconnect Between Americans and their Food*, CISION PR NEWSWIRE (Sept. 22, 2011, 4:00 PM), <https://www.prnewswire.com/news-releases/nationwide-sur->

Similarly, animal rights organizations can misinform the public through videos and photographs. For example, videos or photographs often circulate of calves in plastic boxes called hutches, claiming they are something called a “veal crate.”⁹⁷ People believe this incorrect information and think these calves are “condemned to spend their entire lifespans stuffed into little boxes.”⁹⁸ However, hutches are used for individually housing dairy calves for the first eight weeks of their lives, allowing farmers to properly manage, monitor the health of, and cater to the needs of each individual calf.⁹⁹ Thus, a simple photograph or video depicting an innocuous farming practicing can mislead the uninformed consumer.

Although some livestock farmers may prefer to keep the less camera-friendly practices under wraps, consumers deserve the ability to know how farmers produce their food. Yet, knowledge of common animal agricultural practices is within easy reach through either a simple internet search or animal sciences textbook from the library. But average consumers are unlikely to bother researching this information and educating themselves, instead preferring to remain passively ignorant. Hence, farmers are beginning to prioritize consumer transparency and are developing different ways to connect to consumers and educate them about farming practices via social media.¹⁰⁰ For example, dairy farmer Derrick Josi created a Facebook page called TDF Honest Farming where he often posts videos of daily life on his dairy farm, including the less appealing aspects such as cow-calf

veys-reveal-disconnect-between-americans-and-their-food-130336143.html (describing a 2011 consumer survey in the United States which indicated that “72 percent of [U.S.] consumers know nothing or very little about farming or ranching”).

97. David Mikkelson, *Veal Crates*, SNOPE (Mar. 30, 2016), <https://www.snopes.com/fact-check/veal-crates/> (“Animal rights activists often post pictures and videos online to try to call public attention to some food animals who live and die in appallingly inhumane conditions, but an item about the housing of calves raised for veal production, however well-intentioned, is woefully inaccurate . . .”).

98. *Id.*

99. *Id.*

100. See, e.g., Michelle Miller “Farm Babe” (@IowaFarmBabe), FACEBOOK, https://www.facebook.com/pg/IowaFarmBabe/about/?ref=page_internal (last visited Feb. 29, 2020) (“Passionate about bridging the gap between farmers & [c]onsumers with a fun, scientific twist.”).

separation.¹⁰¹ By connecting with and educating consumers, people like Josi can dispel myths or misunderstandings surrounding certain farming practices.

B. THE PROBLEMS POSED BY TRADITIONAL AG-GAG STATUTES

Although supporting traditional ag-gag statutes is reasonable from a livestock farmer's perspective, these statutes pose significant problems from both a legal and societal standpoint. Several ag-gag statutes have been struck down for violating the First Amendment.¹⁰² Courts are highly likely to strike down traditional ag-gag statutes because these laws typically seek to regulate expressions of free speech based on content.¹⁰³ In addition to legal issues, people criticize ag-gag laws for intimidating potential whistleblowers and silencing animal abuse reporters and critics of animal agriculture.¹⁰⁴ Furthermore, ag-gag statutes

101. Derrick Josi "TDF Honest Farming" (@tillamookdairyfarmer), FACEBOOK, https://www.facebook.com/pg/tillamookdairyfarmer/about/?ref=page_internal ("I didn't realize that my small farming town wasn't so small, and had lost touch with its farmers . . . so[,] I decided to start a blog about my life on the farm . . ."); *see also* TDF Honest Farming (@tillamookdairyfarmer), *Calf Separation*, FACEBOOK (Dec. 6, 2019), <https://www.facebook.com/watch/?v=1143667699162208> (depicting Josi removing a calf from its mother in a pasture).

102. *See What Is Ag-Gag Legislation?*, *supra* note 34; *see also* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1190 (9th Cir. 2018) (striking down provisions that limit free speech in Idaho Code § 18-7042); Animal Legal Def. Fund v. Reynolds, 353 F. Supp. 3d 812, 827 (S.D. Iowa 2019) (determining Iowa Code § 717A.3A fails to survive judicial scrutiny based on the First Amendment); Animal Legal Def. Fund v. Schmidt, No. 18-2657-KHV, 2020 U.S. Dist. LEXIS 10202, at *50 (D. Kan. Jan. 22, 2020) (holding the content-based portions of Kansas's ag-gag statute, K.S.A. § 47-1827(b), (c) and (d), fail strict scrutiny and therefore are unconstitutional); W. Watersheds Project v. Michael, 353 F. Supp. 3d 1176, 1191 (D. Wyo. 2018) ("The First Amendment's guarantee of free speech in this case leads the Court to find Wyoming statutes §§ 6-3-414(c) and 40-27-101(c) are facially unconstitutional."); Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017) (holding Utah Code § 76-6-112 unconstitutional for "[s]uppressing broad swaths of protected speech without justification.>").

103. *See* Jacquelyn M. Lyons, Comment, *The Future Implications for Ag-Gag Laws*, 47 SETON HALL L. REV. 915, 916–20 (2017) (arguing traditional ag-gag laws are per se unconstitutional). If a law is content based on its face, it is subject to strict scrutiny by a court. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228–29 (2015). Hence, even if an ag-gag law has an innocent motive, it "do[es] not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Id.* at 2229.

104. Shea, *supra* note 4, at 337–71.

are disparaged for creating a “legal barrier of sorts around farms . . . send[ing] a message that farmers have something to hide.”¹⁰⁵

The desire for consumer transparency is completely at odds with ag-gag laws. Due to these problems, traditional ag-gag statutes are not a viable option for their original purpose of protecting agricultural facilities from animal rights organizations.¹⁰⁶ Yet, with all of the problems associated with ag-gag statutes, there has not been a viable alternative that considers the interests of farmers alongside those of animal rights activists and the general public.

C. FINDING A COMPROMISE BY IMPLEMENTING A FARMED ANIMAL WELFARE ACT CONTAINING A RAPID REPORTING REQUIREMENT

One alternative to traditional ag-gag laws is to combine increased livestock protections with a rapid reporting requirement under a federal farmed animal welfare statute. This proposed statute integrates language from a model act on animal welfare and existing statutes as a compromise, considering each of the various stakeholder interests.

i. A Model Animal Welfare Act Addressing Specific Categories of Animal Use

Considering recent ethical, scientific, and policy developments, two animal welfare scholars and policymakers created a Model Animal Welfare Act (MAWA) to assist with the process of improving animal welfare legislation across the globe.¹⁰⁷ Although MAWA addresses various aspects of animal welfare and

105. Charlie Arnot, Opinion, *Ag Gag Laws: Why Barricading the Barn Door Doesn't Help Agriculture*, DES MOINES REG. (Jan. 11, 2019, 4:48 PM), <https://www.desmoinesregister.com/story/opinion/columnists/2019/01/11/ag-gag-laws-dont-help-farmers-instead-build-trust-consumers-livestock-animal-abuse-undercover/2539543002/>.

106. See Prygoski, *supra* note 1 (discussing how modern ag-gag laws are rooted in the eco-terrorism and agro-terrorism laws passed in the 1990s).

107. JANICE H. COX & SABINE LENNKH, MODEL ANIMAL WELFARE ACT: A COMPREHENSIVE FRAMEWORK LAW 17 (Amy J. Chin & World Animal Net eds., 2016). Cox is experienced in managing practical animal welfare programs worldwide and has worked extensively on animal welfare policy and legislation. *Id.* at Authors/Researchers. Lennkh is a fully qualified lawyer in Germany and completed her doctorate with a specialization in Comparative Law and Animal Welfare Legislation. *Id.*

is comprehensive, this Note will only touch on a portion of MAWA.¹⁰⁸ Section 5 of MAWA is comprised of definitions.¹⁰⁹ Here, “animal” is defined as “[a]ny mammal, bird, reptile, amphibian, fish, insect or other multi-cellular organism that is not a plant or fungi” and a “farmed animal” is defined as “[a]ny domestic or wild animal which is normally kept and raised on farms, and is kept for the production of any animal products . . . or for the breeding of animals for such production.”¹¹⁰ MAWA also defines “animal welfare” as “[h]ow an animal is coping with the conditions in which he/she is living. For animal welfare to be satisfactory, the animal must be in a state of overall well-being . . . includ[ing] the provision of the Five Freedoms.”¹¹¹ Section 6, which pertains to the fundamental principles of animal welfare, establishes the Five Freedoms as freedom from (1) hunger, thirst, and malnutrition; (2) freedom from physical and thermal discomfort; (3) freedom from pain, injury, and disease; (4) freedom to express normal patterns of behavior; and (5) freedom from fear and distress.¹¹²

In addition, a hallmark of MAWA is the designation of a “Competent Authority,” defined in Section 5 as “[t]he regulatory authority that has the legally delegated or vested authority, capacity, or power to perform the designated functions [to carry out MAWA].”¹¹³ The Competent Authority is integral to Section 23, which specifies animal welfare standards for animals kept for farming purposes.¹¹⁴ This section requires the Competent Authority to (1) “prescribe minimum standards for housing systems for farmed animals;” (2) “establish a scheme of prior ap-

108. Several of the sections in MAWA are outside the scope of this Note or are relevant but corollary to this Note’s focus and, therefore, are not discussed. Furthermore, although Section 7 provides detailed provisions regarding the general prohibition of cruelty to animals, it will not be discussed in this Note. *See id.*, at 96–100. Since MAWA has a specific section on animals kept for farming purposes, this Note will instead discuss this section in detail. *See id.* at 118–20.

109. *Id.* at 41–43.

110. *Id.* at 41.

111. *Id.*

112. *Id.* at 43.

113. *Id.* at 41. Section 28 further prescribes the Competent Authority’s role in ensuring that “any secondary legislation [i.e. regulations] . . . is drafted consistently with [MAWA]” and the Competent Authority’s responsibility for “issuing implementations and enforcement instructions and guidance.” *Id.* at 70.

114. *Id.* at 61–62.

proval for commercial animal housing systems and installations;” (3) “inspect each farm at least once each year, to ensure continued compliance;” (4) “adopt regulations to prohibit ways of keeping farmed animals . . . which are manifestly inconsistent with principles of animal welfare;” (5) “adopt regulations to prohibit the keeping of farmed animals . . . for inessential, luxury products;”¹¹⁵ (6) “issue regulations to prohibit farming practices which are manifestly inconsistent with the principles of animal welfare;” and (7) “create a list of species which are allowed to be kept for farming purposes.”¹¹⁶ The Competent Authority may also “restrict the manufacture, importation, supply, sale or use of any housing system or installation which does not conform to the required animal welfare standards.”¹¹⁷ Thus, the Competent Authority is delegated the power to oversee the welfare of farmed animals in several ways.

Furthermore, Section 23 imposes direct requirements on intensive farming operations as well as farmed animal owners and keepers. For example, all modern intensive farming systems are required to have video surveillance (“a CCTV system”) for monitoring and inspection.¹¹⁸ Section 23 also requires farmed animal owners and keepers to thoroughly inspect the condition and health of the animals at least once a day or “at intervals sufficient to avoid unnecessary suffering,” which may be more frequent for modern intensive farming systems.¹¹⁹ By designating power and oversight to the Competent Authority and requiring monitoring and inspection of farmed animals, Section 23 provides important avenues for ensuring farmed animal welfare.

MAWA also requires the Competent Authority to “appoint an Animal Welfare Committee which shall advise and assist the . . . Competent Authority on animal welfare issues.”¹²⁰ The Committee “shall have a good balance of members from the fields of animal welfare, animal care, animal use, professionals and in-

115. The authors note that “[p]rohibitions could be considered for (but not limited to) farming for fur, feathers, down, and gourmet foods.” *Id.* at 108–09. While this type of prohibition may be a goal for some people, it is likely not feasible to have such a law today given the variety of stakeholders involved from producers to consumers of such luxury items.

116. *Id.* at 61–62.

117. *Id.* at 61.

118. *Id.* at 61.

119. *Id.*

120. *Id.* at 74 (discussing requirements detailed in section 35).

dependent scientists (including veterinarians and animal [behaviorists]).”¹²¹ The Committee’s responsibilities include assisting with the development of a national animal welfare policy and strategy, assisting with drafting regulations, and monitoring, reviewing, and evaluating the enforcement and execution of MAWA.¹²² The Committee not only strengthens MAWA’s oversight, it also allows for different perspectives in the implementation of regulations under MAWA—giving a voice to various stakeholders from those interested solely in animal welfare to industry professionals.

Finally, MAWA imposes a duty to alert and report offenses in Section 33.¹²³ This duty applies to “[a]nyone who has reasons to believe that any sentient animal is exposed to mistreatment, cruelty or serious neglect . . . [and] [a]nyone who becomes aware that a number of wild or stray animals are exposed to sickness, injury or other abnormal suffering.”¹²⁴ Furthermore, “[t]he Competent Authority is obliged to take action on each such alert or report” and “[t]he Competent Authority is obliged to file a criminal complaint when [specific] violation[s] . . . ha[ve] been committed intentionally.”¹²⁵ MAWA’s authors established a duty to report because “authorities are not always in a position to easily discover breaches of the law . . . [and] the aim is not so much reprisal, [but rather] assistance for the animal.”¹²⁶ Also, by requiring the Competent Authority to file a criminal complaint for specific instances of cruelty, MAWA ensures these crimes are investigated and prosecuted.

ii. Using the Model Animal Welfare Act as a Basis for a Farmed Animal Welfare Act

Certainly, there are several competing interests at play between the general public, animal rights activists, and livestock farmers. By implementing a federal Farmed Animal Welfare Act (FAWA) that contains a rapid reporting requirement, a compromise can form between these competing interests. Using MAWA as its basis, FAWA can fill the gaps left by animal cruelty and welfare law exemptions by providing for minimum housing,

121. *Id.*

122. *Id.*

123. *Id.* at 73.

124. *Id.*

125. *Id.*

126. *Id.* at 122.

monitoring, and care requirements with strong administrative oversight and representation from knowledgeable stakeholders.

At both the federal level and often at the state level, animal welfare and cruelty laws exempt livestock or livestock husbandry practices from coverage.¹²⁷ For example, the federal Preventing Animal Cruelty and Torture Act has exceptions for agricultural husbandry and other animal management practices,¹²⁸ and AWA specifically excludes farm animals from its definition of “animal.”¹²⁹ Contrasting these laws, FAWA explicitly targets farmed animals. Like California’s Prevention of Cruelty to Farm Animals Act, FAWA creates a mechanism to establish certain mandatory requirements for farmed animal housing and care. But, unlike California’s state level act, FAWA is far-reaching at the federal level, allowing it to cover existing gaps at both the state and federal level. Thus, farmers are more likely to be protected from invasive investigations by undercover animal rights organizations because FAWA will create the necessary oversight of animal welfare to facilitate consumer trust through transparency. Undercover investigations will no longer be necessary to root out systemic abuse because there should be nothing unknown to reveal to the public.

The key portions of MAWA are (1) delegating a Competent Authority to implement the act and promulgate regulations; (2) creating an Animal Welfare Committee to provide expertise; (3) implementing a duty to report animal cruelty; (4) requiring a system of approval for commercial animal housing systems; and (5) requiring certain monitoring and care provisions for farmed animals.¹³⁰ Since the United States already has the U.S. Department of Agriculture (USDA) and its sub-agency, the Animal and Plant Health Inspection Service, a Competent Authority already exists that can carry out FAWA. Thus, the pertinent provisions of FAWA, borrowing from the language of both MAWA and AWA as well as other statutes, can be drafted as such:

Section 1. Definitions

For the purposes of this Act, the following definitions apply:

127. See *supra* Part I.B.

128. Animal Cruelty and Torture (PACT) Act, Pub. L. No. 116-72, 133 Stat. 1151, 1152 (2019).

129. Animal Welfare Act, 7 U.S.C. § 2132(g).

130. See *supra* Part II.C.i.

1. The term “Secretary” means the Secretary of Agriculture of the United States or his or her representative who shall be an employee of the United States Department of Agriculture.¹³¹
2. The term “Animal Welfare” means how an animal is coping with the conditions in which it is living. For animal welfare to be satisfactory, the animal must be in a state of overall physical and mental wellbeing.¹³²
3. The term “Farmed Animal” means any domestic animal which is normally kept and raised on farms, such as those domestic animals kept for the production of animal products (i.e. food, feed, fur, feathers, leather, skin, wool and fiber) or those kept for the breeding of animals for such production.¹³³
4. The term “Farmed Animal Professional” means any individual or entity that owns or manages farmed animals. This definition includes, but is not limited to, farm workers and farmed animal transportation workers.
5. The term “Farm” means any place from which \$1,000 or more of farmed animal products were produced and sold, or normally would have been sold, during the year.¹³⁴

Section 2. Farmed Animal Welfare Committee

1. The Secretary shall appoint a Farmed Animal Welfare Committee that shall advise and assist the Secretary on all farmed animal welfare issues, including drafting regulations and monitoring, reviewing, and evaluating the enforcement and execution of the Act.
2. The Farmed Animal Welfare Committee shall be composed of not fewer than six (6) members. Each member shall possess sufficient ability to assess farmed animal care, treatment, and practices. At least two (2) members must represent society’s concerns regarding the welfare of farmed animals, at least two (2) members must represent the interests of farmed animal professionals, and at least two (2) members must be licensed Doctors of Veterinary Medicine (DVMs).¹³⁵

131. The definition of “Secretary” comes from the definition provided in AWA, 7 U.S.C. § 2132(b).

132. The definition of “Animal Welfare” comes from MAWA. COX & LENNKH, *supra* note 107, at 41.

133. The definition of “Farmed Animal” comes from MAWA. *Id.*

134. The definition of a “Farm” is based on the definition provided by the USDA. See Christine Whitt, *Farm Structure*, U.S. DEP’T AGRIC., <https://www.ers.usda.gov/topics/farm-economy/farm-structure-and-organization/farm-structure/> (last updated Jan. 16, 2020).

135. The Farmed Animal Welfare Committee idea comes from Section 35 of MAWA. COX & LENNKH, *supra* note 107, at 74. However, the composition of the

Section 3. Animals Kept for Farming Purposes

1. The Secretary shall, considering species-specific needs, prescribe minimum standards for housing systems for farmed animals. The Secretary shall ensure that these housing systems meet the minimum standards of animal welfare, accounting for the farmed animals' physical and mental wellbeing. These standards must be created in conjunction with the advice and expertise from the Farmed Animal Welfare Committee.

2. The Secretary shall issue regulations to prohibit farming practices which are manifestly inconsistent with the principles of animal welfare. These regulations must be created in conjunction with the advice and expertise from the Farmed Animal Welfare Committee.

3. The Secretary shall inspect each farm at least once a year to ensure continued compliance with this Act and any regulations made under it.¹³⁶

Section 4. Duty to Report

1. Whenever any farmed animal professional videotapes or otherwise makes a digital recording of what he or she believes to depict a farmed animal subjected to abuse or neglect or conditions in violation of this Act, the farmed animal professional shall have a duty to submit such videotape or digital recording to a law enforcement agency within forty-eight (48) hours of the recording.

2. No videotape or digital recording submitted under subsection 1 of this section shall be spliced, edited, or manipulated in any way prior to its submission.

3. No employer may terminate or otherwise subject a farmed animal professional to an adverse employment action by reason of reporting suspected or recorded animal abuse. An employer who terminates an employee is not only liable for any damages suffered by the employee but is also subject to at least \$15,000 in exemplary damages regardless of the actual damages suffered by the employee.

Committee is also influenced by the interests of farmers instead of purely those who are sympathetic to all animal welfare objectives as MAWA expresses.

136. This section, which is the meat of FAWA, is based on parts of Section 23 in MAWA. See COX & LENNKH, *supra* note 107, at 60. However, several parts of Section 23 were left out because they required too much overreach into animal farming operations and the goal of this statute is to act as a compromise between the different stakeholder interests. Instead, it should be up to the USDA to prescribe specific requirements that balance the farmers' interests alongside pure animal welfare considerations.

4. Failure to submit such videotape or digital recording or violating subsection two (2) of this section is a Class A misdemeanor.¹³⁷

Section 5. Penalties

Any person that fails to follow this Act or any regulations set forth under this Act (except for section four (4) of this Act) shall be fined, imprisoned not more than five years, or both, for each violation.¹³⁸

Although this sample language for FAWA is far from comprehensive, it focuses on animal welfare interests and consumer transparency by giving the USDA oversight. Further, it requires monitoring of farm management, to ensure that farmed animals no longer slip through the cracks of animal cruelty statutes. Furthermore, FAWA is relatively balanced—it does not overtly restrict farming practices. Instead, it leaves room for regulations that may ban certain practices considered inhumane by the USDA. Farmers, and conversely animal rights activists, could argue that it gives too much power to the USDA to decide what practices are or are not acceptable. Nevertheless, by implementing the Farmed Animal Welfare Committee, which advises the regulation drafting process and must have at least two representatives on behalf of the different interests, all the stakeholders can find some value in FAWA.

In addition, FAWA's duty to report section is integral in replacing the desire for traditional ag-gag legislation. Rapid reporting laws ensure abuse is reported quickly, preventing further abuse while also preventing animal rights activists from gathering content for an agenda-driven videos at the cost of an individual animal's welfare. Instead of filming multiple instances of abuse, the first recorded instance must be reported so the abuse cannot continue. Nevertheless, those who oppose rapid

137. Here, Section 4 is based on Missouri's enacted rapid reporting law instead of MAWA's duty to report in Section 33. *See* MO. ANN. STAT. § 578.013 (West 2014); COX & LENNKH, *supra* note 107, at 73. MAWA's duty to report applies to all people and is not limited to any type of professional. Imposing a duty to report on a layperson is asking too much, whereas a farm animal professional is in a position to be able to identify cruelty or neglect. This type of duty is comparable to veterinarians having a duty to report. *See* discussion *supra* Part I.B. for background information on mandatory reporting laws for veterinary professionals. In addition, this duty to report is also accompanied by some employment protections, so reporters do not have to be torn between reporting or potentially losing their job.

138. The penalties section borrows from the general penalties set forth in 18 U.S.C. § 49(a) for the enforcement of animal fighting provisions.

reporting claim it harms animals by preventing investigators from compiling evidence to prove a case of systemic abuse since the first report alerts the agricultural facilities to the investigator's presence.¹³⁹ However, a farmed animal welfare law with more government oversight can assuage the need for long-term investigations into systemic cruelty. So, while rapid reporting can prevent long term investigations into systemic animal cruelty because it alerts the farm and, potentially, the alleged abusers to the investigation,¹⁴⁰ rapid reporting also stops animal abusers from continuing to abuse by giving authorities and livestock farmers the opportunity to intervene as soon as possible.

Hence, the goal should not be to "build a devastating case"¹⁴¹ against abuse in animal agriculture but rather to ensure the highest standard of animal welfare. The Fair Oaks Farms incident is a prime example of mandatory reporting at work. Three individuals in the ARM video of Fair Oaks Farms had already been reported by their co-workers before the video even went public.¹⁴² What is more, the undercover investigators violated Fair Oaks' "see something, say something" reporting policy¹⁴³ to promote their anti-animal agriculture agenda, thereby perpetuating the abuse instead of putting a stop to it. If there had been a rapid reporting statute, the investigators would have been mandated by law to report the animal cruelty they discovered rather than allowing the abuse to continue.

Even if the small amount of investigation footage due to rapid reporting is not enough for the authorities to intervene pursuant to FAWA or other applicable laws, investigators are

139. See, e.g., Jacob Coleman, *ALDF v. Otter: What Does It Mean for Other State's "Ag-Gag" Laws?*, 13 J. FOOD L. & POL'Y 198, 222 (2017) ("Rapid reporting statutes prevent animal investigators from compiling a record of evidence because the statute requires that they report the first instance of abuse almost immediately, likely outing themselves as an investigator because the agency receiving the recording will undoubtedly contact the facility about the violation.").

140. Matthew Shea, Note, *Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting Laws and the New Wave of Ag-Gag Laws*, 48 COLUM. J.L. & SOC. PROBS. 337, 339 (2015) ("Drafted to appear tough on animal abuse, these [rapid reporting] bills actually do significantly more harm than good by forcing undercover investigators to blow their cover within a day or two of recording the first evidence of abuse.").

141. *Id.*

142. Fair Oaks Farms, *Dr. Mike McCloskey Video Response*, YOUTUBE (June 5, 2019), <https://www.youtube.com/watch?v=uy1WWuUY1vQ>.

143. See *id.*

free to use the video and show it to the world, continuing their role as a watchdog for animal welfare. Furthermore, farmers have animal welfare as a top priority and also want to ensure a positive public perception of their business, so they are likely to intervene just as Fair Oaks Farms initiated a third-party audit once it found out about the ARM investigation.¹⁴⁴ Rapid reporting can shift the culture away from “gotcha” investigations and smear campaigns toward a culture of accountability among farm workers for animal welfare and public trust. Thus, FAWA, with its provisions for animal welfare and rapid reporting, can act as a compromise among the interests of farmers, animal rights activists, and the general public.

D. INDUSTRY POLICY OPTIONS AS A FEASIBLE ALTERNATIVE TO FAWA

Whereas FAWA is one option for balancing the different stakeholder interests, passing legislation and subsequently promulgating regulations is a long and arduous process with no guarantees. The final version of a bill may look completely different from its first version. Thus, industry-led policy initiatives, such as FARM,¹⁴⁵ may be a viable and attractive alternative or, at the very least, a stopgap until legislation can be passed. Industry policy initiatives can be successful because they increase consumer transparency, countering anti-animal agriculture agendas by fostering public trust, thereby replacing the need for ag-gag laws.

These policy initiatives can also provide species-specific animal welfare standards, which consumers can maintain and self-police by “[v]oting . . . with [t]heir [w]allet.”¹⁴⁶ If consumers overwhelmingly choose to purchase products with the stamp of approval from the policy initiative, it will compel more and more livestock farmers to take part. On the other hand, the idea of consumers voting with their wallet is not airtight. Some consumers may have economic constraints preventing them from truly choosing which products to buy or consumers may merely be un-

144. Russell, *supra* note 83.

145. See discussion *supra* Part I.D. for an overview of FARM.

146. See Brittany Hunter, *Consumers Should Be Voting Every Day—with Their Wallets*, FOUND. ECON. EDUC. (Nov. 6, 2018), <https://fee.org/articles/consumers-should-be-voting-every-day-with-their-wallets/> (describing how consumers, by purchasing products, choose which businesses survive or die).

informed and not realize the difference. Therefore, these initiatives may need some other way to gain buy-in from farmers. Accordingly, buy-in can also come from the desire to gain resources from the initiative like training and evaluation services because farmers do care about their livestock. Without healthy and prosperous livestock, farmers would lose their source of income.

Nonetheless, while these initiatives have the potential to be effective, there are very few publicized industry policy initiatives at the present time. As an example, the pork industry has the “We Care” initiative that provides ethical principles, resources, and training for swine farmers.¹⁴⁷ However, unlike FARM, there is no required participation in specific programs for membership in the initiative. While providing resources and training is an excellent start, consumers need to be able to identify which farms abide by and products are made under the requisite animal welfare standards of the initiative in question.

Consequently, consumer marketing and awareness is a hurdle these initiatives will need to overcome. Even though FARM is an excellent example of such an initiative, the average consumer has probably never heard of it. One way to publicize these initiatives is through labelling products that meet the initiative’s standards (e.g., “National Dairy FARM Certified” or “Partnered with National Dairy FARM”). Then, simple marketing tactics such as television advertisements, social media influencers, and possibly billboards are different ways to alert the general public about the labels.¹⁴⁸

In particular, agriculture-focused social media influencers, like Josi with TDF Honest Farming, are one of the easiest ways to connect with modern consumers.¹⁴⁹ By both promoting these

147. *About We Care*, PORKCARES.ORG, <https://www.porkcares.org/about-we-care/> (last visited Feb. 1, 2020) (“The We Care commitment . . . comprise[s] . . . six ethical principles that allow everyone who comes into contact with pigs to create advancements that positively impact animals, farms, people, communities, food and the environment.”).

148. Marketing and promotion strategies should focus on the target audience to maximize consumer awareness. There are several modern audience-targeting strategies that organizations can use to promote the labels. *See* Lisa Smith, *8 Audience Targeting Strategies from Digital Marketing Experts*, WORDSTREAM, <https://www.wordstream.com/blog/ws/2019/04/15/audience-targeting> (last updated July 22, 2020) (“With audience targeting, you’re more likely to reach consumers interested in your products or services with relevant messaging. It also decreases the odds you’ll waste ad spend on uninterested eyeballs and help move potential customers down the proverbial funnel.”).

149. *See* discussion *supra* Part II.A.

policy initiatives and educating consumers about different agricultural practices, social media influencers are in a strong position to facilitate consumer transparency. Eventually, the initiatives can go beyond influencers and partner with other businesses and organizations to grow public knowledge about the label and what it means in terms of animal welfare, further building public trust. A person can look at the label and think, “I should buy this product because [farm/brand/product] follows FARM’s guidelines.”

Overall, for industry-led policy initiatives to be successful, they will need to require adherence to specific published animal welfare guidelines, have a monitoring and oversight program in place, and highly publicize the initiative’s existence to facilitate consumer transparency. If these initiatives meet this basic threshold, they will negate the need for ag-gag laws because these farms should be following the animal welfare guidelines. Hence, undercover investigations will no longer be as effective at denigrating the animal agriculture industry because consumers will have more knowledge and trust.

CONCLUSION

Undoubtedly, the era of traditional ag-gag statutes is past, and yet, ag-gag critics have failed to propose alternative options that balance the interests of the competing stakeholders. What is more, predominantly both animal cruelty and animal welfare laws in the United States continue to exempt farmed animals, leaving them vulnerable to inhumane practices. Consequently, whether it is with rapid reporting laws or a brand-new wave of ag-gag type legislation, legislators will eventually attempt to fill the vacuum left behind in an effort to protect agricultural interests. Likewise, animal activists will continue to push for legislation that offers protection to farmed animals. Meanwhile, consumers will be pushed and pulled in different directions between the information and misinformation online and in the media. Despite these competing interests among farmers, animal rights activists, and the general public, a middle ground is possible through two potential avenues: a federal Farmed Animal Welfare Act or industry-led policy initiatives regarding animal welfare. While both options have their benefits and drawbacks, they both provide a practical solution that balances these diverse interests.