

## PolicyPennings by Daryll E. Ray &amp; Harwood D. Schaffer

## Ag-gag law in Idaho ruled unconstitutional

Idaho's law making it a crime to, among other things, "obtain employment in an agricultural production facility for the purpose of making "audio and video recordings of the conduct of [that] facility's operations" was ruled unconstitutional by B. Lynn Winmill, Chief Judge, US District Court for the District of Idaho (USDCI) on August 3, 2015 (<http://tinyurl.com/pu3cwf2>). The crime is called "interference with agricultural production." The Idaho law and others like it passed by other states are often referred to as ag-gag laws.

Idaho's law was passed in response to an undercover video of animal abuse recorded at the Betencourt Dairies' Dry Creek Dairy facility in Hansen, Idaho. The video showed a number of instances of animal abuse including the wrapping of a chain around a cow's neck and pulling it out of the barn with a tractor (<http://tinyurl.com/pzrl6np>) and was published online by Mercy for Animals (MFA) who noted that the Dry Creek Dairy was a cheese supplier for Burger King. According to CBS News, "MFA [urged] Burger King to implement meaningful animal protection guidelines for all dairy suppliers that includes a zero tolerance for animal abuse, care for ailing 'downers,' and an end to mutilations without painkillers" (<http://tinyurl.com/pfkzo83>).

The negative publicity was immediate and the "Idaho Dairymen's Association responded...to the negative publicity by drafting and sponsoring a bill that [was adopted by the Idaho legislature and signed by the governor]. The bill proposed criminalizing the types of undercover investigations that exposed the activities at the Dry Creek Dairy" (USDCI).

In response to the Idaho law, the Animal Legal Defense Fund (ALDF) and a number of other organizations challenged the law arguing that it was unconstitutional and a "violation of the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment."

In his ruling in favor of ALDF, Judge Winmill reviewed the legislative history of the ag-gag law to show intent. He noted that Idaho State Senator Patrick "compared undercover investigations to 'terrorism, [which] has been used by enemies for centuries to destroy the ability to produce food and the confidence in the food's safety'.... The drafter of the legislation, Dan Steenson, likewise expressed a desire to shield Idaho dairymen and other farmers from undercover investigators and whistleblowers who expose the agricultural industry to 'the court of public opinion.'"

The judge then characterizes the intent of the law saying, it "seeks to limit and punish those who speak out on topics relating to the agricultural industry, striking at the heart of important First Amendment values.

The effect of the statute will be to suppress speech by undercover investigators and whistleblowers concerning topics of great public importance: the safety of the public food supply, the safety of agricultural workers, the treatment and health of farm animals, and the impact of business activities on the environment.

"Indeed, private party media investigations, such as investigative features on 60 Minutes, are a common form of politically salient speech. A review of Idaho media reports in recent years reveals a range of undercover investigations from life on the streets, to wolf-hunting contests, to family planning services, to public-school safety.... Such investigations into private matters, both by government and private actors, are recognized and embraced as important political speech in Idaho."

In driving his analysis home, Judge Winmill points out that in gathering material for his book, *The Jungle*, Upton Sinclair "misrepresented his identity so he could get a job at a meat-packing plant in Chicago." Under Idaho's law he would be subject to prosecution.

Winmill's determination that Idaho's ag-gag law violated the Free Speech Clause of the First Amendment is based on a technical analysis that takes up 15 of the 29 pages of his decision. In that analysis he points out that Idaho law has ways to protect "agricultural production facilities from interference by wrongful conduct.... If an undercover investigator 'staged a video' at an agricultural production facility, as some Idaho legislators fear...not only could the facility owner sue the investigator for fraud or defamation, but the facility owner could launch its own public relations campaign to refute the video.

"The remedy for misleading speech, or speech we do not like, is more speech, not enforced silence." Then quoting from a previous court decision, he writes. "'The remedy for speech that is false is speech that is true....The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth.'"

In coming to the conclusion that the law also violated the Equal Protection Clause of the Fourteenth Amendment, the judge writes, "The State contends that the purpose of [the ag-gag law] is to protect the private property of agricultural facility owners by guarding against such dangers as trespass, conversion, and fraud. But the State fails to explain why already existing laws against trespass, conversion, and fraud do not already serve this purpose."

He looks at the legislative history and comes to the conclusion that the law was not designed to protect private property but to "silence animal welfare

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activists, or other whistleblowers, who seek to publish speech critical of the agricultural production industry.” Thus the law violates the Equal Protection Clause because it “discriminates on its face by classifying between whistleblowers in the agricultural industry and whistleblowers in other industries.”

Taking up an amicus brief that argues that the law also “discriminates on the basis of a fundamental right—free speech” Judge Winmill points out that “an undercover journalist who misrepresents his identity to secure a job at an agricultural production facility so he can publish a laudatory piece about the facility would not violate the statute.... But an undercover journalist who misrepresents his identity to secure a job at the same facility seeking to expose illegal, inhumane, or unsafe behavior would violate the statute.... The operative distinction is the message the employee or undercover journalist wishes to convey.” Thus he argues that the law “distinguishes between different

types of speech, or conduct facilitating speech, based on content,” violating the Equal Protection Clause.

Using economic theory, we dealt with this issue back on October 12, 2012 saying, “The availability of complete-as-possible information to all market participants is a key expectation for economic transactions in free market economies. Information restrictions of all kinds are indefensible and totally foreign to the perfectly competitive models ascribed to by economists” (<http://tinyurl.com/pg9gy4a>).

Harwood D. Schaffer is a Research Assistant Professor in the Agricultural Policy Analysis Center, Institute of Agriculture, University of Tennessee. Daryll E. Ray is Emeritus Professor, Institute of Agriculture, University of Tennessee, and is the former Director of the Agricultural Policy Analysis Center (APAC). (865) 974-3666; Fax: (865) 974-7484; hdschaffer@utk.edu and dray@utk.edu; <http://www.agpolicy.org>.