ARTICLES

Trespass Plus: Ag-Gag and the Right to Exclude

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ABSTRACT

The recent proliferation of agricultural anti-whistleblower legislation, or "ag-gag," has finally given the right to exclude the weight that property theory claims it deserves. By offering hefty fines and imprisonment to would-be agricultural trespassers, ag-gag is one of the few legal frameworks to treat the right to exclude seriously. Scholars and judges are taking notice. Given the significant environmental harms that agriculture causes – nearly one-third of all greenhouse gas emissions – and the conspicuous First Amendment concerns, it's no wonder. But what commentators aren't noticing is just how radical ag-gag is when compared to the legal regimes of which it purports to be a part.

Ag-gag's extremism is two pronged. First, ag-gag rewrites the history of agricultural and animal law by suggesting that investigations into, citizen enforcement of, and education about agriculture's harms is something new. In reality, citizens have been the primary enforcers of animal law since the mid-1800s, and the investigations they made led to the foundation of agricultural regulatory programs still in place today. Second, it weaponizes the right to exclude, which has always been strict in theory and nimble in practice. Often hailed as the fundamental principle of property, and the object of trespass, the right to exclude is almost always thrown aside when stood up against some sort of socially beneficial encroachment on private property. Ag-gag does the opposite, elevating the right to exclude to the primary determinant of the trespass framework. This promotion is unsettling, and investigating why leads to the conclusion that we don't care all that much about the right to exclude. If we did, exclusion's supremacy in ag-gag wouldn't be so striking. Instead, this Article contends that what we do care about are secondary harms, specifically, the right of pursuit.

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INTRODUCTION

We simply don't care that much about the right to exclude. Although advertised as the most important property right,[1] it's never given the weight that it's meant to carry. Even William Blackstone, who called property the "sole and despotic dominion"[2] over an object "in total exclusion of the world,"[3] found exceptions to man's absolute domain.[4] Indeed, trespass, exclusion's legal protection, often collapses in the face of challenges to a landowner's assertion of her exclusion rights. When examining trespass, courts have rarely considered exclusion so immovable, instead fashioning simple yet creative avenues for finding even blatant violations of a landowner's right to exclude to be nothing of the sort.[5] And once identified as the fundamental core of property, scholars cast the right to exclude aside in search of more socially beneficial outcomes.[6] But exclusion can't be the most essential constituent of property when it so easily goes the way of the dinosaurs. It's analytically problematic to say that it is critical yet treat it as secondary.

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1. *See* Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) ("[W]e hold that the 'right to exclude,' so universally held to be the fundamental element of the property right . . . ."); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) ("The right to exclude is 'one of the most treasured' rights of property ownership.").

2. 1 WILLIAM BLACKSTONE, COMMENTARIES *1, *1.

3. *Id.*

4. 3 WILLIAM BLACKSTONE, COMMENTARIES *208, *212-13.

5. *See* Desnick v. Am. Broad. Co., Inc., 44 F.3d 1345 (7th Cir. 1995); Food Lion, Inc. v. Capital Cities/ABC, Inc. 194 F.3d 505 (4th Cir. 1999).

6. *See, e.g.*, Lyrissa C. Barnett, *Intrusion and the Investigative Reporter*, 71 TEX. L. REV. 433 (1992); David F. Freedman, *Press Passes and Trespasses: Newsgathering on Private Property*, 84 COLUM. L. REV. 1298 (1984).

Ag-gag legislation, or anti-whistleblower legislation in the agricultural industry,[7] helps illuminate this conundrum. Ag-gag is quite straightforward and is essentially a trespass statute with a few extra steps. First, ag-gag carves out for special protection the unconsented entry onto a farm, through deception or otherwise.[8] Next, ag-gag prevents the recording of agricultural operations, both directly through restraints on photography, video-recording, and audio-recording, as well as indirectly through the criminalization of resume fraud and the laggardly reporting of animal abuse.[9] These statutes come with significant penalties, imprisonment and hefty fines. Unlike the common law, ag-gag treats the right to exclude seriously, painfully so, such that a would-be trespasser would almost certainly pause before crossing the barnyard door. It's thus "tresspass plus," a framework for analyzing trespass that heightens the right to exclude from the ancillary property right that it's treated as to the primary one it's intended to be.

Even so, analyses of ag-gag relegate exclusion to a secondary concern. Most scholars have emphasized the First Amendment impacts that ag-gag carries.[10] After all, preventing someone from saying something – whether on a resume or at the entrance of a farm – is a regulation of speech. First Amendment challenges to ag-gag have had considerable success.[11] And rightfully so. Even though ag-gag purports to return control to the landowner, it merely prevents the public from learning about what happens on increasingly industrial farms. But these challenges miss something. While the laws might well be unconstitutional,[12] they're also more. Interrogating that more shows just how radical ag-gag is, and provides a lens for discovering why we don't care about the right to exclude.

Ag-gag's radicalism is two-pronged. First, ag-gag prevents private citizens from enforcing animal law – a role that they have played since 1866, when

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7. Ag-gag is a relatively new term, coined by Mark Bitman in April 2011. *See* Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES (Apr. 26, 2011) [https://perma.cc/KM2U-JZR3].

8. *See* IOWA CODE ANN. § 717a.3 (West 2012); KANS. STAT. ANN. § 47-1827 (2022); MONT. CODE ANN. § 81-30-103 (West 2013); N.D. CENT. CODE ANN. § 12.1-21.1-02 (West 1991); UTAH CODE ANN. § 76-6-112 (West 2012); IDAHO CODE ANN. § 18-7042 (West 2014); MO. ANN. STAT. § 578.013 (West 2012).

9. *See supra* note 8. While their impact may not be immediately clear, resume fraud and rapid-reporting laws are quite effective in preventing recording. By criminalizing resume fraud, someone who is part of an environmental or animal rights organization would have to disclose their affiliation before getting a job, preventing them from gaining access to the facility to record. And rapid-reporting dove tails with the amount of footage needed to demonstrate a widespread practice; if any case of animal abuse isn't reported in 24 hours, the recorder may be subject to liability.

10. *See, e.g.*, Larissa U. Liebmann, *Fraud and First Amendment Protections of False Speech: How United States v. Alvarez Impacts Constitutional Challenges to Ag-Gag Laws,* 31 PACE ENV'T L. REV. 566 (2014); Jessalee Landfried, *Bound & Gagged: Potential First Amendment Challenges to "Ag-Gag" Laws*, 23 DUKE ENV'T L & POL'Y F. 377 (2013).

11. *See, e.g.*, Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018); Animal Legal Def. Fund v. Reynolds, 8 F.4th 781(2021); Animal Legal Def. Fund v. Kelly, 9 F.4th 1219 (10th Cir. 2021).

12. In fact, several courts have struck down various ag-gag statutes, in whole or in part, as violating the First Amendment. *See id.*; *see also* Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017), Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195 (D. Idaho 2015).

New York enacted the country's first anti-cruelty statute with teeth.[13] Investigations of agricultural facilities formed the foundation of our agricultural regulatory system, but ag-gag makes that historical role nearly impossible to fulfill. As one federal district court put it, Utah's ag-gag law "appears perfectly tailored toward . . . . preventing undercover investigators from exposing abuses at agricultural facilities."[14] And, since agriculture is almost entirely exempted from the environmental arena, potentially harmful (yet likely legal) discharges to our air and water go obscured as well. But a speech-burdening statute is unexceptional; many statutes aim to do the same. What most statutes don't do is rewrite the history of a regulatory sphere without fanfare. Second, ag-gag does what courts, judges, scholars, and the common law have refused to do for centuries: give primacy to the right to exclude. Trespass has never been the strict liability statute it purports to be. A trespasser is either found not to be trespassing because of some sort of loophole or just given a slap on the wrist, with a nominal $1 in damages.[15]

So, ag-gag rewrites history and weaponizes trespass. Both of those aspects are far more striking than a run-of-the-mill prohibition on speech. Moreover, ag-gag's treatment of the right to exclude helps reveal why exclusion isn't the object of either trespass's or property's legal regime. Even stripped of its First Amendment impacts, ag-gag is still concerning. Take away the prohibitions on lying, deception, and resume fraud, and ag-gag still subjects an agricultural trespasser to imprisonment and large fines. It's not that we're inherently uncomfortable with jail time; many crimes bring long sentences. But, if exclusion were the ultimate expression of property, then the ag-gag remedy shouldn't be so disconcerting. Here, though, the violation seems trifling compared to the remedy.

This paper excavates these deeper tensions. It doesn't ignore either the constitutional or policy implications of ag-gag but, rather, sheds light on an aspect of it that has yet to be scrutinized. Federal courts, scholars, animal advocates, and journalists have all dissected and analyzed ag-gag legislation for its constitutionality and policy implications. None have placed it in historical context to demonstrate ag-gag's radicalism, or used it as a means of analyzing exclusion and trespass.

I proceed in two parts. In Part I, I analyze the extremism of ag-gag by placing its citizen enforcement and trespass framework in historical context. In doing so, I demonstrate the importance of the oversight and regulation of agricultural facilities. Farms are some of the largest polluters in the world, wreaking havoc on the environment, human health, and animal welfare at nearly every step of the process. In Part II, I flip the camera around. From the vantage point of ag-gag, what can we learn about the right to exclude, and why don't we seem to care that much

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13. *See* DIANE L. BEERS, FOR THE PREVENTION OF CRUELTY: THE HISTORY AND LEGACY OF ANIMAL RIGHTS ACTIVISM IN THE UNITED STATES 60-61 (Swallow Press, 2006).

14. *Herbert*, 263 F. Supp. at 1213.

15. Food Lion, Inc. v. Capital Cities/ABC, Inc. 194 F.3d 505, 514 (4th Cir. 1999).

about it? That analysis uncovers what I argue is the main purpose of trespass: to protect the "right of pursuit," the ability of a property owner to pursue her interests in a particular object, whether land or otherwise. Exclusion may be what adds texture to property as a conceivable idea, but it isn't the end-all of the legal entitlement. If it were, a First Amendment-free ag-gag wouldn't be concerning, and the common law would look quite different. Ag-gag thus enables a new analytical framework for questioning property.

I. THE UNDER APPRECIATED RADICALISM OF AG-GAG

Ag-gag gives most people pause, and for good reason: it burdens speech by preventing means of disclosure, it comes with significant penalties, and it prevents consumers from being informed of the agricultural process. All without a justifiable policy rationale – why do farms need these protections more than anyone else, business or otherwise? These considerations are what most critics refer to when discussing ag-gag. After all, not much more is needed to conclude that ag-gag is an exceptionally poor legislative scheme that penalizes investigators who, for the most part, just want to educate consumers about how and where we get our food. But nothing about these harms – burdening speech, hiding consumer information, providing corporate favoritism – is all that unique. Ag-gag should be discomforting for all these reasons, but it's even more radical than initially meets the eye.

Ag-gag isn't just a speech-burdening, business-friendly, consumer-impeding statute. It's a regulatory scheme that fundamentally rewrites the history of animal law and agricultural enforcement and creates a new framework for trespass. Animal and agricultural law began with citizen enforcement, investigation, and disclosure of farming practices.[16] Citizen investigations were not just common; they were the main method of enforcing cruelty statutes. And once those investigations took off, they laid the groundwork for creating the regulatory framework that we have today. Ag-gag throws this history away and creates a structure where citizens are not only disempowered from educating the populace on agricultural practices but also prohibited from doing so, subjecting them to liability if they try. This might burden speech, but that isn't all that remarkable given the attempts to regulate speech in countless other contexts. Rewriting agricultural regulatory history, however, is exceptional.

Ag-gag does something similar to the history of trespass. Generally, trespass is a common law tort, strict in theory and malleable in practice. It's intended to safeguard that most precious property right – the right to exclude – and so even the unintentional encumbrance of a landowner's right to exclude is meant to result in liability. But courts jump through all sorts of hoops to find a particular action

16. *See infra* Section 1.D.1.

isn't a trespass, either because violation of the exclusion right was socially beneficial or because there wasn't any harm to the land.[17] Then, when someone is actually found to commit trespass, the damages are nominal. The most important property right gets a mere dollar. Ag-gag, on the other hand, eliminates this flexibility. First, it carves out a special place for farms in a state's trespass framework. Second, it strips a court's ability to contextualize the trespass and determine whether the action is the sort of one that deserves to be labeled a trespass at all. And, third, it creates significant penalties in the form of imprisonment and substantial fines. Taken together, these features demonstrate that ag-gag isn't just a trespass statute but one of "trespass plus." That ag-gag takes an age-old right and reconstitutes it is far more radical than the corporate favoritism that it embodies.

In context, ag-gag's radicalism is underappreciated. The speech and policy implications disguise deeper conflicts. This Part explores these tensions, but first, it places agriculture itself in context. I lay out the impact that agriculture has on our economy, environment, and welfare. Next, I take a closer look at how ag-gag statutes work and how the courts have dealt with them. Finally, I place ag-gag in historical context, examining the role of citizens and analyzing the usual operation of trespass.

A. FARMING AND ITS EFFECTS

Food from small, idyllic family farms has vanished from our grocery stores and tables.[18] Industrial farms, which have precision, efficiency, and output as their mantra, provide the bulk of the United States' agricultural output. In 1935, there were seven million small farms,[19] but, by 2017, there were only 2 million.[20] While that may still seem like a substantial number, a breakdown of the market adds perspective. The total market value of agricultural products sold from those 2 million farms is $390 billion.[21] But over two-thirds of that, about $265 billion, came from only 76,865 farms.[22] About half of that number – $135 billion – was produced by just 8,888 farms.[23] In other words, about 0.5 percent of all farms make up 35 percent of the total market value of all agricultural products in the United States.[24]

Getting $390 billion worth of agricultural products onto our tables requires a vast, interconnected system that touches nearly every facet of the American

17. *See infra* Section I.D.II.

18. *See 2017 Census of Agriculture*, U.S.D.A. 9-10 (Apr. 2019), [https://perma.cc/EXB6-F8SS] (outlining the market value of different sized farms in the United States).

19. Susan A. Schneider, *A Reconsideration of Agricultural Law*, 34 WM. & MARY ENV'T L. & POL'Y REV. 935, 944 (2010).

20. 2017 CENSUS OF AGRICULTURE, *supra* note 18 at 7.

21. *Id.* at 9.

22. *Id.*

23. *Id.*

24. *Id.*

economy. Farms cover 900 million acres, and their expenses total over $326 billion annually.[25] Those expenses include $62 billion for feed, $23 billion for fertilizer and related products, $13.5 billion for fuel, $31 billion for labor, and $17.5 billion for chemicals.[26]

When it comes to meat, the top four meatpacking firms had accounted for around 50 percent of all United States poultry and pork production and 80 percent of beef production by the mid-1990s.[27] No more than a handful of states have farms that slaughter an average of over 10,000 pigs and over one million birds each year.[28] These large-scale agricultural facilities raise ninety-nine percent of all chickens raised for meat, ninety-six percent of all chickens raised for eggs, ninety-seven percent of all turkeys raised for meat, ninety-five percent of all pigs raised for meat, and seventy-eight percent of all cows raised for meat.[29] Perhaps as a result of the drastic efficiency of the industrial process, meat consumption is on the rise. In 2016, 2.94 million head of cattle, 46,200 head of calf (for veal), 10.7 million head of pig, and 194,100 head of lamb were raised and slaughtered in federally inspected slaughterhouses.[30] For poultry, the numbers are staggering: 710 million chickens, 18 million turkeys, and nearly 2.4 million ducks.[31]

Given the vast amount of land, livestock, fuel, labor, and chemicals committed to modern agriculture, it should be no surprise that farming, and in particular industrial farming, presents significant environmental and health concerns. Yet even though agriculture's impacts range from soil erosion to increased risk of asthma, ag-gag legislation helps to obscure these outputs. As outlined above, farming implicates huge swaths of our economy, but ag-gag legislation, in tandem with a decided lack of regulatory enforcement,[32] makes it increasingly difficult to understand, adapt to, and respond to a sector that affects nearly every inch of modern life.

The sheer size of industrial agricultural production means that the industry's externalities are inevitably amplified.[33] Take the roughly 900 million acres of farmland currently developed in the United States: at one point, nearly all of those acres were potential habitats for wildlife.[34] And although the United States

25. *Id*. at 7.

26. *Id*.

27. Justin Marceau, *How the Animal Welfare Act Harms Animals*, 69 HASTINGS L.J. 925, 934 (2018).

28. James S. Cooper, *Slaughterhouse Rules: How Ag-Gag Laws Erode the Constitution*, 32 TEMP. J. SCI. TECH. & ENV'T L. 233, 234 (2013).

29. *Id*.

30. *Livestock Slaughter* 5, U.S.D.A. (Sept. 21, 2017), [https://perma.cc/WA7T-TJH9].

31. *Poultry Slaughter 2016 Summary* 4, U.S.D.A. (Feb. 2017), [https://perma.cc/XT4S-5KA2].

32. *See infra* Section I.B.

33. *Cf*. Rolf U. Halden & Kellog J. Schwab, *Industrial Farm Animal Production, Environmental Impact of Industrial Farm Animal Production*, PEW COMMISSION ON INDUS. FARM ANIMAL PRODUCTION 1 (2011), [https://perma.cc/52TR-Y3DY] ("Industrial farm operations adversely impact all major environmental media, including water, soil, and air.").

34. J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOL. L.Q. 263, 275 (2000).

actually loses a small percentage of farmland each year, the impact on habitat loss may not manifest "for decades or centuries," and for endangered species, "habitat restoration is a necessary ingredient for recovering the species from the path toward extinction."[35] Moreover, even without considering habitat loss due to land conversion, farms still cause significant downstream effects on various ecosystems.[36] Chemicals and pesticides are transported through the air and water, leading to "inadvertent fertilization, … eutrophication, shifts in species diversity, … [and] sedimentation in reservoirs and lakes."[37] The large dead zone – an area of "low to no oxygen that can kill fish and marine life"[38] – in the Gulf of Mexico is linked to agricultural run-off.[39] In 2021, the dead zone was equivalent to over four million acres of habitat.[40] Large-scale agriculture not only diminishes animal biodiversity but also reduces the types of crops planted and consumed.[41]

Farming's externalities go beyond direct and indirect habitat loss. It's estimated that 173,000 miles of national waterways are impacted by runoff from agricultural sources and that livestock cultivation accounts for fifty-five percent of soil and sediment erosion, thirty-seven percent of nationwide pesticide usage, eighty percent of antibiotic usage, and more than thirty percent of the total nitrogen and phosphorus loading to American drinking water sources.[42] The large volumes of animal waste produced, the lack of appropriate management and disposal of such waste, and the unsustainable water usage and soil degradation associated with feed production all contribute to these incredible numbers.[43] For perspective, farming produces about three times the total amount of human waste in the U.S. annually, with "[a] single dairy farm with 2,500 animals produc[ing] as much waste as a city of 400,000 people."[44] As for the pesticides, not all of them make it to their target. Instead, they are often deposited into the soil with some, such as DDT, "persist[ing] in the environment for decades."[45] And agriculture not only discharges a considerable amount of pollution but also consumes a sizable chunk of water, with nearly half of it diverted to animal facilities.[46] That

35. *Id*. at 275 n.42 (citing Michael L. Rosenzweig, *Heeding the Warning in Biodiversity's Basic Law*, 284 SCI. 276, 277 (1999); Theodore C. Foin *et al*., *Improving Recovery Planning for Threatened and Endangered Species*, 48 BIOSCI. 177, 179-80 (1998)).

36. *Id*. at 276-77.

37. *Id*. at 277.

38. *Larger-than-Average Gulf of Mexico 'Dead Zone' Measured*, NOAA (Aug. 3, 2021), [https://perma.cc/GHU9-Y3TH].

39. Cheryl L. Leahy, *Large-scale Farmed Animal Abuse and Neglect: Law and its Enforcement*, 4 J. ANIMAL L. & ETHICS 63, 70 (2011).

40. NOAA, *supra* note 38.

41. Halden & Schwab, *supra* note 33, at 30.

42. *Id*. at 5.

43. *Id*.

44. Jonathan Lovvorn, *Clean Food: The Next Energy Revolution*, 36 YALE L. & POL'Y REV. 283, 297 (2018).

45. Ruhl, *supra* note 34, at 283.

46. Leahy, *supra* note 39, at 69.

translates to "55 *trillion* gallons of water annually – more than 520 times the amount used in hydraulic fracturing."[47]

Agriculture impacts more than water and land. It's also one of the leading contributors to air pollution, greenhouse emissions, and climate change. Globally, agriculture accounts for between nineteen to twenty-nine percent of all greenhouse gas emissions, with livestock accounting for eighty percent of agriculture-related emissions.[48] Agricultural greenhouse gas emissions surpass even the transportation sector.[49] And, the number one source of methane emissions in the United States, an extraordinarily potent greenhouse gas, is farming.[50] Although air pollution and agriculture might initially seem unrelated, the high emissions make sense considering it takes nearly a gallon of gasoline to produce one bushel of corn.[51] It's not just long-term impacts on climate, either: one study found that "US agriculture results in 17,900 deaths . . . . per year via reduced air quality."[52] Of those, food production causes eighty-nine percent of the deaths, with the remaining "linked to biofuels and other nonfood products (e.g., plant and animal fibers)."[53] Emissions go beyond methane and carbon dioxide, with agricultural emissions tied to "hundreds of identified" volatile organic compounds, ranging from "acids, alcohols, aldehyde, amides, amines, aromatics, esters, ethers, [and] hydrocarbons . . . [to] steroids."[54] Some emissions are acutely toxic, with all the animal waste discussed above releasing hydrogen sulfide, which can cause "unconsciousness or death" with just brief exposure.[55]

These dangers to human health are varied and aren't solely tied to air emissions outside the fence line. Large segments of the population are exposed to health

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47. Lovvorn, *supra* note 44, at 297 (quoting Christopher Hyner, A *Leading Cause of Everything: One Industry That Is Destroying Our Planet and Our Ability To Thrive on It*, ENV'T L. REV. SYNDICATE (2015), [https://perma.cc/DW6R-LSDQ]).

48. *Id.* at 298 (quoting Stephen Clune, Enda Crossin & Karli Verghese, *Systematic Review of Greenhouse Gas Emissions for Different Fresh Food Categories*, 140 J. CLEANER PROD. 766, 766 (2017); Marco Springmann *et al.*, *Analysis and Valuation of the Health and Climate Change Cobenefits of Dietary Change*, 113 PROC. NAT'L ACAD. SCI. 4146, 4146 (2016)).

49. Halden & Schwab, *supra* note 33, at 22.

50. *See* Oil and Natural Gas Sector: Emission Standards for New and Modified Sources, 181 Fed. Reg. 56,593 (Sept. 18 2015) (to be codified at 40 C.F.R. pt. 60). Interestingly, when industry and commenters were upset that the Environmental Protection Agency (EPA) was choosing not to regulate the number one source of methane emissions, EPA changed the numbers by a few points so that it would be the number two source of emissions. *See* Jonathan Lovvorn, *Climate Change Beyond Environmentalism Part I: Intersectional Threats and the Case for Collective Action*, 29 GEO. ENV'T L. REV. 1, 16 (2016).

51. Lovvorn, *supra* note 44, at 299 (quoting Mary Jane Angelo, *Corn, Carbon, and Conservation: Rethinking U.S. Agricultural Policy in a Changing Global Environment*, 17 GEO. MASON L. REV. 593, 612 (2010)).

52. Nina G. G. Domingo *et al.*, *Air Quality-Related Health Damages of Food*, 118 PROC. NAT'L ACAD. SCI. 1, 1 (2021).

53. *Id.* at 2.

54. Viney P. Aneja *et al.*, *Effects of Agriculture Upon the Air Quality and Climate: Research, Policy, and Regulations*, 43 ENV'T SCI. & TECH. 4234, 4235 (2009).

55. *Id.*

risks: farm workers and their families, animal breeders, veterinarians, feed suppliers, construction workers, inspectors, and the community at large, especially children and the elderly.[56] Workers are exposed to hazardous animal agents, such as hair, dander, and feces.[57] The extreme confinement of animals leads to increased concentrations of toxic chemicals resulting from the "decomposition of animal urine and feces," which produces "ammonia, hydrogen sulfide[,] and methane[,] among others."[58] Fossil fuels are burned inside some agricultural facilities, exposing workers to both carbon dioxide and carbon monoxide. In these conditions, workers often risk chronic respiratory health problems.[59]

Interaction with animals also comes with risk of disease. Poultry workers, for example, interact with hundreds of thousands of chickens throughout the workday.[60] These conditions exacerbate the potential for novel viruses to be transmitted to humans.[61] What was a rare risk of infection from zoonotic pathogens fifty years ago is far more likely today.[62] The potential long-term health impacts beyond acute distress from pathogens is serious as well. Workers and grain handlers experience "chronic bronchitis, non-allergic asthma-like syndrome, mucous membrane irritation, and non-infectious sinusitis."[63] The larger the facility, the more serious and frequent the symptoms.[64] In some cases, workers are interacting with deceased animals, too. For example, in poultry farms, chickens may lay eggs on top of carcasses that have yet to be removed.[65] The combination of decomposing animals with productive livestock is a deadly combo, with workers having "intense and prolonged" exposure to animals that can carry disease.[66]

Much like environmental externalities, health impacts extend beyond the farm. Surrounding neighbors and communities are exposed to a mixture of bioaerosols, gases, vapors, noxious odors, waterborne diseases, and waste.[67] Unlike workers, who are exposed with more intense levels but for shorter periods of the day, those living near an agricultural facility may be exposed for "24 hours a day, seven days a week."[68] Nearby communities are at risk of asthma and the aggravation of

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56. *Occupational and Community Public Health Impacts of Industrial Farm Animal Production*, PEW COMM'N ON INDUS. FARM ANIMAL PROD. 2-4 (2011), [perma.cc/433L-XMU8].
57. *Id.* at 8.
58. *Id.*
59. *Id.* at 11.
60. *Id.*
61. *Id.* at 13-14.
62. *Id.*
63. *Id.* at 15.
64. *Id.* at 16.
65. Cody Carlson, *The Ag Gag Laws: Hiding Factory Farm Abuses from Public Scrutiny*, ATLANTIC (Mar. 20, 2012), [perma.cc/N7QV-PM2E].
66. *Occupational and Community Public Health Impacts of Industrial Farm Animal Production*, *supra* note 56, at 12.
67. *Id.* at 35, 51-52.
68. *Id.* at 55.

preexisting diseases such as chronic heart disease and chronic bronchitis.[69] Proximity to large-scale agricultural facilities has also been connected to increases in negative neurobehavioral effects, such as depression.[70] Through contaminated water systems, communities can also be exposed to zoonotic pathogens, such as E. coli, salmonella, and listeria.[71] Surrounding surface waters carry increased nutrients and veterinary pharmaceuticals, which can cause severe problems such as hemorrhaging of the spleen and chronic illness.[72]

Poor practices leach into the quality of meat produced. "Downer" cows, those that are too sick to stand,[73] sometimes make it into the food supply. One of the only ways to know about contamination, other than self-reporting, is through undercover investigations. One such investigation by the Humane Society of the United States documented the distribution of sick animal meats to public school cafeterias.[74] The investigation resulted in the largest meat recall in history – 143 million pounds of beef [75] – and a $317 million settlement.[76] A similar situation occurred with the largest egg recall in United States history, due to a massive salmonella outbreak.[77]

Farming has grown up to threaten more than just the peaceful enjoyment of property.[78] It looms over humans, animals, and the global environment. It's detrimental to the health of workers, the surrounding community, and consumers. Such impacts might create the assumption that farms are regulated and restricted. But, to the contrary, farms are often exempt, either in fact or in practice, from many environmental laws, a gap that citizens have historically filled[79] and that ag-gag attempts to keep open.

B. AGRICULTURE'S COMPREHENSIVE REGULATORY EXEMPTION

Given the significant environmental and health risks associated with large-scale agricultural operations, it would be reasonable to assume that there is a

69. *Id.*
70. *Id.* at 63.
71. *Id.* at 66.
72. *Id.* at 65.
73. Cooper, *supra* note 28, at 235.
74. David Brown, *USDA Orders Largest Meat Recall in U.S. History*, WASH. POST (Feb. 18, 2008), [perma.cc/9RMW-BXE5].
75. *Id.*
76. Michael Winter, *Calif. Meat Packer to Pay $317M Over Abuse, Recall*, USA TODAY (Nov. 16, 2012), [perma.cc/U3AA-3KMF].
77. Carlson, *supra* note 65.
78. As cities expanded, residents often complained of odors and other nuisances caused by farms. *See, e.g.*, *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 702-704 (Ariz. 1972) (requiring a protesting developer who developed close to a farm to indemnify the farmer for the cost of moving or shutting down). Those farms were much smaller, however, and hardly had the significant local, community, and global effects that industrial farms have today.
79. *See infra* Section I.C.

robust regulatory framework to govern the process of farm to table. Yet, even with these risks and the fact that farmed animals represent ninety-eight percent of all animals,[80] the regulatory apparatus, and the enforcement thereof, is severely lacking. As I explain in Section 1.D, humane societies have historically enforced animal law. With the move away from humane society enforcement, there has been a decided decrease in transparency, even as farming generates more externalities and becomes more resource intensive. There are two categories of exemptions: first, the statutes designed to regulate livestock don't do so in practice and, second, environmental statutes specifically carve out agriculture from their ambit.

There is no regulatory scheme for the raising of livestock. However, the Humane Slaughter Act ("HSA") governs the slaughter of animals at agricultural facilities.[81] Passed in 1958, the HSA declares that the slaughter of livestock should be by humane means only.[82] Poultry – and the 710 million chickens slaughtered annually[83] – is outside the HSA's purview.[84] As originally passed, the HSA had no means of enforcement, and the United States Department of Agriculture ("USDA") didn't promulgate any means of enforcement, either.[85] Perhaps Congress and the USDA assumed that humane agents would enforce the newly passed law.[86] Twenty years later, Congress incorporated the HSA into the Federal Meat Inspection Act ("FMIA").[87] In doing so, USDA meat inspectors were tasked with suspending meat inspections if they found any violations of the HSA.[88] Without federal inspections, production would be halted.

The incorporation of the HSA into the FMIA was, in theory, a clever and efficient move. Meat inspectors were already on the ground, which meant that inspectors could provide ample means of oversight and regulation. In practice, however, the system falls apart. Meat inspectors are rarely in the slaughter

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80. David Wolfson, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 206 (Cass R. Sunstein & Martha C. Nussbaum, eds. 2005)

81. 7 U.S.C. § 1901.

82. *Id.*

83. *Poultry Slaughter 2016 Summary*, *supra* note 31, at 4.

84. *See* Treatment of Live Poultry Before Slaughter, 70 Fed. Reg. 56,624, 56,624-25 (Sept. 28, 2005).

85. *See* Humane Slaughter of Livestock; Designation of Methods, 24 Fed. Reg. 1549, 1549-53 (Mar. 3, 1959).

86. Humane agents were enforcers of a separate animal welfare act, the Twenty-Eight Hour Law. *See* BEERS, *supra* note 13, at 69. Given this historical backdrop, it's possible that federal legislators assumed that humane agents would continue their historical role as enforcers.

87. *See* 21 U.S.C. §§ 603(b), 610(b); Humane Methods of Slaughter Act of 1978, Pub. L. No. 95-445, § 2, 92 Stat. 1069, 1069 (1978)); *see also* Humane Methods of Slaughter Regulations, 44 Fed. Reg. 68,809, 68,811 (Nov. 30, 1979).

88. See 21 U.S.C. §§ 603(b), 610(b); Humane Methods of Slaughter Act of 1978, Pub. L. No. 95-445, sec. 2, § 3(b), 92 Stat. 1069, 1069; *see also* Humane Methods of Slaughter Regulations, 44 Fed. Reg. 68,809, 68,811.

sections of a factory farm,[89] and, on average, there are only 1.29 inspectors per facility.[90] Considering the sheer size of these operations,[91] even if the inspectors were in the slaughter section of the facility, there wouldn't be enough to cover all slaughterhouse activity. And that assumes that workers and farms are willing to cooperate: there is evidence that, to evade citation, workers alert each other when an inspector is heading to a different section of the facility.[92]

The bigger problem, however, might be that many inspectors simply don't know which actions violate the HSA. The Government Accountability Office ("GAO") has found, on two separate occasions, that USDA inspectors not only are under-enforcing the law but also have little idea as to what it is they're enforcing.[93] A 2004 GAO report found that "[i]nspectors did not always document violations of the [HSA] because they may not have been aware of the regulatory requirements."[94] Then in 2010, another GAO report found that "[fifty-seven] percent [] of the inspectors-in-charge at the plants we surveyed . . . reported incorrect answers on at least one of six possible signs of sensibility."[95] Violations can occur right before an inspector's eyes, with the Office of Inspector General ("OIG") stating that workers would engage in criminal conduct in front of inspectors without citations being issued.[96] The OIG reports that one-third of inspectors didn't understand what the humane slaughter laws call for.[97] What was a shrewd decision to incorporate the HSA into the FMIA has fallen flat.

The HSA only regulates the ending of farmed animals' lives. There is no federal regulatory apparatus for the raising of livestock. The Animal Welfare Act ("AWA") completely exempts farmed animals, and no other federal law applies to life before slaughter.[98] By exempting farmed animals, the federal "welfare" act

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89. Jo Warrick, *They Die Piece By Piece*, WASH. POST (Apr. 10, 2001), [https://perma.cc/7CFL-6ES4] ("Inspectors' regular duties rarely take them to the chambers where stunning occurs.").

90. Larissa Wilson, *Ag-Gag Laws: A Shift in the Wrong Direction for Animal Welfare on Farms*, 44 GOLDEN GATE U. L. REV. 311, 327 (2014).

91. *See, e.g.*, Paul Solotaroff, *In the Belly of the Beast*, ROLLINGSTONE (Dec. 10, 2013) ("At her plant, which was about as long as four football fields and connected to a separate birthing barn, she was one of 12 to 15 workers tending nearly 1,000 pigs each, which is par for the course in these places.") [https://perma.cc/7MAJ-VXJK].

92. TIMOTHY PACHIRAT, EVERY TWELVE SECONDS: INDUSTRIALIZED SLAUGHTER AND THE POLITICS OF SIGHT, 144 (2011).

93. *Humane Methods of Slaughter Act: USDA Has Addressed Some Problems but Still Faces Enforcement Challenges*, GAO-04-247, U.S. GOV'T ACCOUNTABILITY OFFICE, 23-25 (2004) [https://perma.cc/AU3T-SANZ]; *Humane Methods of Slaughter Act: Actions are Needed to Strengthen Enforcement*, GAO-10-203, U.S. GOV'T ACCOUNTABILITY OFFICE, 16, 25 (2010) [https://perma.cc/2DTG-QZ2X].

94. GAO-04-247, *supra* note 93.

95. GAO-10-203, *supra* note 93, at 25.

96. Office of the Inspector Gen., *Food Safety and Inspection Service-Inspection and Enforcement Activities at Swine Slaughter Plants: Audit Report 24601-0001-41*, U.S. DEP'T OF AGRIC. 22-23 (2013), [https://perma.cc/948D-T9PP].

97. *Id.* at 25.

98. Wolfson, *supra note* 80, at 207.

doesn't apply to "ninety-eight percent of animals interacting with humans" in the United States.[99] All of the practices discussed before – downer cows, cramped cages, decomposing livestock mixed with productive livestock – have been permitted to develop while the AWA[100] and HSA are in place. In other words, compliance with these statutes means little in terms of controlling the negative impacts of farming.[101]

While animal welfare is in practice exempt from regulation, agriculture in general is also statutorily exempt from most environmental statutes. The Clean Water Act ("CWA"), Clean Air Act ("CAA"), Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), and Resource Conservation and Recovery Act ("RCRA") all provide some sort of exemption.[102]

The CWA is the United States' catch-all water statute that prohibits the "discharge of any pollutant" into certain categories of waterways.[103] It further defines a "pollutant" to include "agricultural waste discharged into water."[104] This seemingly straightforward definition is "riddled with important exemptions for farms," including exempting "agricultural wastewater, stormwater, and fill material."[105] As first passed, the CWA did in fact include farms but, "[a]wed by the prospect of issuing [] permits to two million farms," EPA promulgated an exception to the CWA, which Congress eventually codified.[106] Additionally, § 404 of the CWA, which is the "principal vehicle for wetlands protection, specifically excludes normal farming . . . activities."[107] Exemptions abound.[108]

The CAA hardly fares better. The CAA is designed to offer a comprehensive regulatory scheme for both stationary (e.g., power plants) and mobile (e.g., cars) sources of air pollution.[109] Farms generally skirt the reach of the CAA through "de minimis discharge exceptions."[110] "By limiting their emphasis to 'major sources' emitting more than threshold quantities of regulated pollutants, CAA

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99. Marceau, *supra* note 27, at 930.

100. *Id*. at 936-938.

101. Justin Marceau argues that, more than the AWA doing little to protect farmed animals, it actually harms: the AWA "has the perverse effect of providing the public with a false confidence that animal welfare is being rigorously overseen by the federal government. The public, relying on both the title of the law and, more broadly, the knowledge that the federal government has agreed to oversee animal protection, quite fairly believes that the animals they are viewing are well cared for." *Id*. at 943.

102. *See* Charlotte E. Blattner & Odile Ammann, *Agricultural Exceptionalism and Industrial Animal Food Production*, 15 J. FOOD. L. & POL'Y 92, 110-12 (2019); Ruhl, *supra* note 34, at 293-314.

103. 33 U.S.C. § 1311(a).

104. *Id*. § 1362(6).

105. Ruhl, *supra* note 34, at 293-94.

106. *Id*. at 294-95.

107. *Id*. at 296-97 (citing 33 U.S.C. § 1344(f)(2)).

108. A thorough examination of the CWA's agriculture-related exemptions is beyond the scope of this paper, but the exemptions are many, as explored by J.B. Ruhl. *See id*. at 297-305

109. *See* 42 U.S.C. § 7401 *et seq*.

110. Ruhl, *supra* note 34, at 305-06.

regulatory programs essentially give farms yet another safe harbor."[111] Moreover, the CAA exempts large, concentrated agricultural facilities explicitly.[112] For those farms not specifically exempt, the CAA empowers the administrator to "exempt entirely [] any substance that is a nutrient used in agriculture when held by a farmer."[113] For the provisions that do apply to farms, most states don't utilize their own regulatory authority within the cooperative federalism framework, "and EPA actively dissuades them from doing so."[114]

RCRA and CERCLA do little to remedy the gap. RCRA, the nation's "cradle to grave" waste statute, doesn't define waste from agriculture, whether from harvesting crops or from animals, as hazardous subject to its regulatory purview.[115] Farm irrigation return flows, used oil, and pesticides are all exempt as well.[116] CERCLA, or Superfund, is a remedial program designed to clean up contaminated sites,[117] but it doesn't require cleanup or liability for registered pesticides and excludes the "normal application of fertilizer."[118] Thus, while the CWA and CAA exempt farms from limiting their emissions, RCRA and CERCLA exempt them from cleaning up their messes.

In all, one of the largest polluting sectors in the country is given an extensive exemption from regulatory apparatuses that should cover its activities, whether it's the practical exemptions for raising livestock or the specific ones in our environmental laws. As I explain in Section I.D.1, the public eye was the original means of ensuring some accountability on agricultural facilities. With ag-gag, that traditional means of enforcement now comes with serious fines and criminal penalties.

C. A FREE PASS FROM PUBLIC SCRUTINY

At its most basic, ag-gag is another exemption, this time from public scrutiny. It makes it exceedingly difficult to uncover wrongdoing at an agricultural facility. Some of that wrongdoing might not even be illegal, like certain discharges into drinking water, deadly air pollution, or traditional husbandry practices that offend normal sensibilities. After all, American environmental law doesn't regulate farming with any force. Of course, the public might still want to know, even if the actions aren't illegal. But with ag-gag imposing such serious ramifications, the most dedicated whistleblower will likely hesitate. So, what does ag-gag legislation do? It criminalizes one or more of the following: (1) gaining access to agricultural facilities; (2) photography, videotaping, or audio-recording on the

111. *Id.*
112. Blattner & Ammann, *supra* note 102, at 112.
113. *Id.*
114. Ruhl, *supra* note 34, at 306.
115. Blattner & Ammann, *supra* note 102, at 111.
116. Ruhl, *supra* note 34, at 314.
117. *Id.*
118. *Id.* at 315 (citing 42 U.S.C. § 9607(i)).

premises of agricultural facilities; (3) possessing or distributing recordings made on agricultural facilities; (4) being dishonest while applying for employment to gain access to an agricultural facility; and (5) failing to report recorded abuse and/or relinquish recordings within a short timeframe.[119] No matter which type of action ag-gag criminalizes, the result is the same: behavior that would be a minor tort in most other contexts is turned into a criminal violation solely because it occurs on, or in connection with, a farm. This Section briefly surveys the current ag-gag legislation, the few circuit cases that address it, and the scholarship surrounding it.

Ag-gag legislation arrived in two waves. The first began in the early 1990s with three states: Kansas (1990),[120] Montana (1991),[121] and North Dakota (1991).[122] These early iterations were somewhat narrower than contemporary ag-gag statutes in that both Kansas and Montana have a *mens rea* for injury to the facility baked in. Kansas, among other things, prohibits entry into an "animal facility" to record audio or video "with the intent to damage the enterprise."[123] Montana has a similar intent requirement and makes it illegal, "without the effective consent of the owner," to "enter an animal facility to take pictures by photograph, video camera, or other means with the intent to commit criminal defamation."[124] North Dakota, like the second wave statutes, dispenses with the *mens rea* requirement and makes it illegal to "enter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment."[125]

The recent wave of ag-gag legislation tends to criminalize more conduct than its predecessors. Iowa kicked off the new wave in 2012, criminalizing the act of gaining access to an agricultural facility "by false pretenses" and by making a "false statement or representation as part of an application" for employment.[126] Utah passed a similar bill, now held unconstitutional,[127] that outlawed recording and obtaining access and employment under false pretenses.[128] Idaho adopted a comparable bill, also held unconstitutional,[129] that banned recording and lying.[130] Missouri has adopted a different kind of ag-gag. Instead of criminalizing recording and resume fraud, it made it illegal to fail to turn over a recording of animal

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119. *See* Rita-Marie Cain Reid & Amber L. Kingery, *Putting a Gag on Farm Whistleblowers*, 11 J. FOOD L. & POL'Y 31, 37 (2015) (describing four categories of ag-gag legislation).

120. KANS. STAT. ANN. § 47-1827 (2022).

121. MONT. CODE ANN. § 81-30-103.

122. N.D. CENT. CODE ANN. § 12.1-21.1-02 (West 1991).

123. KANS. STAT. ANN. § 47-1827(c)(4) (2022).

124. MONT. CODE ANN. § 81-30-103(2)(e).

125. N.D. CENT. CODE. ANN. § 12.1021.1-02(6).

126. IOWA CODE ANN. § 717a.3 (West 2021).

127. Animal Legal Defense Fund v. Herbert, No. 2:13-cv-00679-RJS, 2017 WL2912423, at *15 (D. Utah. July 7, 2017).

128. UTAH CODE ANN. § 76-6-112 (West 2012).

129. Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195 (D. Idaho 2015).

130. IDAHO CODE ANN. § 18-7042 (West 2014).

abuse or neglect within twenty-four hours of discovery.[131] North Carolina has gone a step further and made lying and entry without permission in any industry a crime.[132] The bill was passed over the governor's veto.[133] Arkansas House Bill 1664[134] is unlike previous ag-gag bills in that it creates a civil cause of action, rather than criminal, for unauthorized access to non-public areas of commercial property.[135]

While each state has a somewhat unique spin, the animating core is the same: access to an agricultural facility, often combined with audio or video recording, is a criminal act, with corresponding prison time and steep financial penalties. Three of these statutes have made it to circuit courts – Idaho, Iowa, and Kansas – making them worthy of a closer look.

The first to make it to the appellate level was Idaho.[136] Idaho is a second wave state, adopting its statute in early 2014.[137] The statute prohibits five actions, which come with up to a year imprisonment and/or a fine not to exceed $5,000[138]:

> (1) A person commits the crime of interference with agricultural production if the person knowingly:
>
> (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 operations; or
>
> (e) Intentionally causes physical damage or injury to the agricultural production facility's operations, livestock, crops, personnel, equipment, buildings or premises.[139]

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131. MO. ANN. STAT. § 578.013(1) (West 2012). The bill also makes it illegal to edit the video prior to turning it over to law enforcement. *Id.* § 578.013(2).

132. 2015 North Carolina House Bill No. 405 § 99A-2.

133. The Editorial Board, *No More Exposés in North Carolina*, N.Y. TIMES (Feb. 1, 2016), http://www.nytimes.com/2016/02/01/opinion/no-more-exposes-in-north-carolina.html.

134. H.B. 1665, 91st Gen. Assemb., Reg. Sess. (Ark. 2017).

135. *Id.*

136. Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018).

137. *See* IDAHO CODE ANN. § 18-7042 (West 2014).

138. *Id.* § 18-7042(3).

139. *Id.* § 18-7042(1)(a)-(e).

An "agricultural production facility" is broad enough to cover any type of farming and is defined as "any structure of land . . . used for agricultural production," with "agricultural production" covering any remotely agricultural activity, from the expected planting, harvesting, and husbandry, to "[h]andling or applying pesticides" and "[p]rocessing and packaging agricultural products."[140] In addition to direct fines and jail time, the statute also requires restitution, including "economic losses."[141] Idaho's ag-gag law thus increases penalties at agricultural facilities for trespassing (subsection a), theft (subsection b), resume fraud (subsection c), recording (subsection d), and property damage (subsection e). The Animal Legal Defense Fund ("ALDF") took aim at the statute, honing in on the misrepresentation and recording clauses in subsections a through d, arguing that these activities were speech protected by the First Amendment.[142]

In *Wasden*, a divided panel of the Ninth Circuit agreed in part, utilizing the framework from *United States v. Alvarez*, to conclude that, as long as a misrepresentation was not "made for material gain or advantage or [to] inflict harm," it was protected by the First Amendment.[143] The Ninth Circuit struck down the misrepresentation clause in subsection a – the trespass subsection – because, "lying to gain entry merely allows the speaker to cross the threshold of another's property, including property that is generally open to the public."[144] "Entry alone," the court reasoned, is neither material gain nor harm to the property owner sufficient to cast off First Amendment protections.[145] This was particularly true given the breadth of the statute, which could be read to include "grocery stores, garden nurseries, [or] restaurants that have an herb garden or grow their own produce," and which specifically targeted journalists producing segments on animal cruelty.[146] Given the ease of possible alternatives, such as a simple trespass statute, the majority concluded that the misrepresentation clause of subsection a violated the First Amendment.[147]

The court also held as unconstitutional the recording provision in subsection d. First, it determined that the statute was content based, subjecting it to strict scrutiny, in that it "prohibits the recording of a defined topic," in particular, "the conduct of an agricultural production facility's operations."[148] Against strict scrutiny, the majority found the provision unconstitutional. Specifically, the court found it underinclusive because it (1) didn't prohibit photographs and (2) only covered the operations of a farm, rather than "all audio and video records at agricultural

140. *Id.* § 18-7042(2)(a)-(b).
141. *Id.* § 18-7042 (4); IDAHO CODE ANN. § 19-5304.
142. Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1190 (9th Cir. 2018).
143. *Id.* at 1194.
144. *Id.* at 1195.
145. *Id.*
146. *Id.* at 1196-97.
147. *Id.* at 1998-99.
148. *Id.* at 1204.

production facilities."[149] As to the first, the Ninth Circuit found no compelling reason why audio and video recordings would implicate "property or privacy harms," but photographs of the same content would not.[150] As to the second, the court reasoned that recordings of the farm's buildings or an employee birthday party should still implicate concerns of property and privacy, yet neither were singled out under the statute.[151] This led to the conclusion that Idaho "singl[ed] out for suppression one mode of speech . . . to keep controversy and suspect practices out of the public eye."[152] And, because other laws could vindicate Idaho's property and privacy interests, such as theft of trade secrets and invasion of privacy, the *Wasden* court concluded that the statute was also overinclusive and, therefore, not narrowly tailored.[153] The court struck down the recording provision in whole.[154]

Subsections b and c fared better. Subsection b prohibited obtaining records of an agricultural facility by misrepresentation and subsection c barred gaining employment by misrepresentation.[155] To the court, these were characteristically different from the other subsections because lying in these two contexts either caused cognizable legal harm or came with material gain.[156] For subsection b, the theft provision, the court reasoned that obtaining a facility's records by misrepresentation inflicted a cognizable harm in the form of "impairing an agricultural production facility owner's ability to control who can assert dominion over, and take possession of, his property," and had the possibility to expose trade secrets or confidential information.[157] Those trade secrets could "bestow a 'material gain'" by giving the would-be thief information "valuable to those in the industry," such as breeding history and proprietary research.[158] For subsection c, the resume fraud provision, the employee who lied in the course of her job search is paid by the farm, even if that undercover employee was not specifically seeking out compensation.[159] Because the speaker under these subsections either gained something or caused harm through their misrepresentations, the Ninth Circuit held that the lies had no First Amendment protections.[160]

Judge Bea dissented as to subsection a, the trespass provision.[161] He took issue with the majority's short shrift of the "fundamental element of [] property," the

149. *Id.* at 1205.
150. *Id.* at 1204-05.
151. *Id.* at 1205.
152. *Id.*
153. *Id.*
154. *Id.*
155. IDAHO CODE ANN. § 18-7042(1)(b)-(c) (West 2014).
156. *Wasden*, 878 F.3d at 1199-1202.
157. *Id.* at 1199.
158. *Id.* at 1199-1200.
159. *Id.* at 1202.
160. *Id.* at 1200, 1202.
161. *Id.* at 1206-13 (Bea, J., dissenting).

"right to exclude anyone from entry, at any time, and for any reason at all or indeed for no reason."[162] While the majority concluded that lying to gain entry caused no material harm, Judge Bea reasoned that the harm was the trespass itself, or, in other words, the violation of the right to exclude.[163] Under this reasoning, *Alvarez* has no import; subsection a was a mere trespass statute, not a speech statute that implicated the First Amendment.[164] According to Judge Bea, if *Alvarez* was relevant, trespass, or the violation of the right to exclude, was the legally cognizable harm that rendered the misrepresentation unworthy of First Amendment protection.[165]

Second to reach a circuit court was Iowa's first ag-gag statute.[166] Iowa's statute is simple yet broad: it criminalizes "agricultural production facility fraud" by making it illegal to (a) "[o]btain[] access to an agricultural production facility by false pretenses" or (b) "[m]ake a false statement . . . as part of an application or agreement to be employed . . ., 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. . . ."[167] A first offense is punishable by up to one year imprisonment and a $2,560 fine.[168] Like the Idaho statute, Iowa's ag-gag law contains both a trespass provision (subsection a) and a resume fraud provision (subsection b). Unlike the Idaho law, however, the Eighth Circuit in *Reynolds* came out the other way: the trespass provision was constitutional, and the resume fraud provision was not.[169]

As to the trespass provision, the Eighth Circuit followed a similar analysis to Judge Bea's. The court reasoned that "[t]respass is an ancient cause of action that is long recognized in this country . . . and harm flowing from trespass is legally cognizable."[170] Because *Alvarez* didn't encompass "intentionally false speech taken to accomplish a legally cognizable harm," and trespass was such a legally cognizable harm, lying to gain access to a farm was outside the gamut of the First Amendment, and therefore subsection a survived.[171]

The resume fraud provision, however, was too broad. The Eighth Circuit assumed that "a narrowly tailored statute aimed at preventing false claims to

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162. *Id.*

163. *Id.*

164. *Id.* at 1207 ("This provision no more regulates pure speech than do prohibitions on larceny by trick or false pretenses.").

165. *Id.* at 1208.

166. Iowa has had several iterations since, responding to the various litigation and arguments below in hopes of circumventing possible negative rulings.

167. IOWA CODE § 717A.3A(1)(a)-(b) (West 2012).

168. *Id.* § 2.A; IOWA CODE § 903.1(1)(b).

169. Animal Legal Def. Fund v. Reynolds, 8 F.4th 781, 786-87 (8th Cir. 2021).

170. *Id.* at 786.

171. *Id.*

secure offers of employment would pass constitutional muster."[172] However, the resume fraud provision in Iowa had no limiting principle: there was no requirement that the misrepresentation "be material to the employment decision" such that it "allows for prosecution of those who make false statements that are not capable of influencing an offer of employment."[173] In other words, an employee who lied about the rigorousness of his exercise routine could be subject to prosecution under the statute.[174] Even assuming that Iowa had a compelling interest "in preventing false statements made to secure offers of employment, a prohibition on immaterial falsehoods is not actually necessary to achieve the interest."[175] Without that limitation, the court ruled the resume fraud provision unconstitutional.[176]

The last statute to reach its way to an appellate court was Kansas's, even though it is the country's first ag-gag provision. Kansas's statute requires specific intent to damage the "enterprise" (i.e., the agricultural facility), making it narrower than Iowa and Idaho.[177] That said, Kansas's statute not only proscribes traditional ag-gag activities – recording and trespass – but also agricultural theft and property damage.[178] Specifically, it states that:

> (a) No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility, damage or destroy an animal facility or any animal or property in or on an animal facility.
>
> (b) No person shall, without the effective consent of the owner, acquire or otherwise exercise control over an animal facility, an animal from an animal facility or other property from an animal facility, with the intent to deprive the owner of such facility, animal or property and to damage the enterprise conducted at the animal facility.
>
> (c) No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility:
>
> (1) Enter an animal facility, not then open to the public, with intent to commit an act prohibited by this section;
>
> (2) remain concealed, with intent to commit an act prohibited by this section, in an animal facility;
>
> (3) enter an animal facility and commit or attempt to commit an act prohibited by this section; or

172. *Id.* at 787.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. KAN. STAT. ANN. § 47-1827 (2022).
178. *Id.*

> (4) enter an animal facility to take pictures by photograph, video camera or by any other means.
>
> (d)(1) No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility, enter or remain on an animal facility if the person:
>
> (A) Had notice that the entry was forbidden; or
>
> (B) received notice to depart but failed to do so.[179]

The traditional ag-gag provisions, subsections c and d, are criminal misdemeanors,[180] carrying up to one year and six months imprisonment, respectively.[181] And, as relevant to the act, force, fraud, deception, duress, and threat vitiate an owner's consent.[182] The Tenth Circuit in *Kelly* analyzed subsections b, c, and d, holding each unconstitutional under the First Amendment.[183]

The *Kelly* court determined that each subsection at issue regulated speech, not conduct, because they restricted "what may be permissibly said to gain access to or control over an animal facility."[184] As to subsection b, which prohibits gaining "control over an animal facility," the court reasoned that the statute operates "only when someone makes a false statement," and, as a result, regulates what someone might say, rather than what someone can do.[185] Furthermore, the Tenth Circuit found the statute viewpoint discriminatory in that it only applies to someone "intending to expose wrongdoing" but would not apply to someone "who tells the same lie . . . intending to laud the facility."[186] Pursuant to *Alvarez*, the court reasoned that the speech is protected because the misrepresentation made to gain entry itself did not immediately cause harm, with "[d]amage occur[ing] only if the investigators uncover evidence of wrongdoing and share that information."[187] Kansas thus sought not to prevent the harm from a misrepresentation used to gain entry but rather the harm from the public exposure of any wrongdoing, which arose from "true speech on a matter of public concern," plainly protected under the First Amendment.[188] Subsections c and d failed for the same reasons: because each incorporated both "deception" and "intent to damage" in their operation, the provisions regulated speech, not conduct, and did so on the basis of damaging, not salutary, language.[189] As content-discriminatory speech,

179. *Id.*
180. *Id.* § (g)(2)-(3).
181. KAN. STAT. ANN. § 21-6602(a)(1)-(2) (2022).
182. KAN. STAT. ANN. § 47-1826(e)(1) (2022).
183. Animal Legal Def. Fund v. Kelly, 9 F.4th 1219 (10th Cir. 2021).
184. *Id.* at 1232.
185. *Id.* at 1233.
186. *Id.*
187. *Id.* at 1234.
188. *Id.* at 1235.
189. *Id.* at 1236-37.

all three provisions were subject to strict scrutiny, which Kansas did not attempt to argue was satisfied.[190]

The courts have thus – for the most part – coalesced around analyzing ag-gag statutes through the lens of *Alvarez* and speech. While each has taken a slightly different tact, the general analysis is the same: some false speech is protected, and whether it's protected depends on the type of harm that it may cause. Where the courts split is on that harm. For the Ninth and Tenth Circuit, the harm that the statutes were attempting to regulate was secondary because the misrepresentation did not cause any immediate damage and, as a result, the First Amendment prevailed.[191] For the Eighth Circuit and some dissenters, the misrepresentation did cause immediate harm, the violation of the right to exclude. Notably, even though property, trespass, and the right to exclude played prominent parts in each opinion, these were not property decisions; instead, they were squarely First Amendment ones.

Much like the courts, scholarly treatment has focused on the practical and constitutional issues that ag-gag creates – speech and the First Amendment, food quality, animal abuse, transparency, privacy, and so on. For example, Lucy Holifield argues that ag-gag pits the public's right to know about the system that creates their food against an agricultural operations' right to privacy and property.[192] Holifield asserts that the public has the right to know about safety issues, animal abuse, and environmental degradation.[193] Similarly to Holifield's 'right to know,' several scholars have tied ag-gag to the idea of veggie libel – suits that set a lower bar for prosecution in the context of food disparagement.[194] Melanie Ghaw calls for greater transparency in agricultural facilities and directly connects ag-gag with veggie libel.[195] Nicole Negowetti makes a similar connection between ag-gag and veggie libel, but argues that institutional pressures on agricultural facilities, such as the fact that many farmworkers are not authorized to work in the United States, make it unlikely that a standard whistleblower will

190. *Id*. at 1233-37.

191. Given that ag-gag statutes are almost invariably struck down, it may be worth questioning what threat ag-gag still poses. A full answer is beyond the scope of the paper. However, even when struck down, proponents go back to the drawing board to find a version that might pass muster. Iowa is on its fourth iteration in an attempt to find a working model. *See* William Morris, *Judge Strikes Down 4th Iowa 'Ag-Gag' Law in Ongoing Conflict Over Free Speech vs. Trespassing*, DES MOINES REGISTER (SEPT. 27, 2022, 5:02 PM), [https://perma.cc/6MLL-7JC7]. But even if ag-gag continues to be struck down, it's still a useful lens to analyze the history of agriculture and trespass, as well as those parts of the right to exclude that matter.

192. Lucy L. Holifield, *Animal Legal Defense Fund v. Otter: Industrial Food Production Simply is Not a Private Matter*, 12 J. FOOD L. & POL'Y 16, 19 (2016).

193. *See id*. at 21-27.

194. *See, e.g*., Nicole E. Negowetti, *Opening the Barnyard Door: Transparency and the Resurgence of Ag-Gag & Veggie Libel Laws*, 38 SEATTLE U. L. REV. 1345, 1346 (2015); Melanie M. Ghaw, *Animal Farm Reality: The First Amendment Struggle to Reveal the Frightening Truth Behind Industrial Farm Animal Production*, 20 BUFF. ENV'T L.J. 33, 52-64 (2012).

195. Ghaw, *supra* note 194, at 59.

expose abuse on farms.[196] Several scholars have addressed the constitutionality of ag-gag and, like the courts, have come out strongly against their constitutionality under the First Amendment.[197] These scholars cite heightened scrutiny and overbreadth as the main obstacles to ag-gag's constitutionality.[198] And their analyses were partly vindicated by *Wasden*, *Kelly*, and *Reynolds*.

What these analyses miss is ag-gag's historical context.[199] Ag-gag is unique not because it burdens speech or protects corporate interests – impermissible attempts to regulate speech abound and corporate favoritism is nothing new – but because it both upsets a long history of citizen enforcement and weaponizes the right to exclude. Placed in historical context, ag-gag is far more exceptional.

D. REWRITING HISTORY AND WEAPONIZING A NOMINAL RIGHT

From the perspective of agricultural exemptions, unconstitutional regulation of speech, and corporate favoritism, ag-gag is old news. What is special about ag-gag is the legal regime it is purportedly a part of. As noted, ag-gag is yet another agricultural exemption, this time from public scrutiny. While exempting any industry from the public eye would be striking, it is particularly so in the agricultural context: citizen enforcement and investigations have historically been the primary motivator for both reform and education in the agricultural sphere. Ag-gag effectively outlaws how agricultural law was fashioned. The way it does so is unusual, too, not because it burdens speech, but because it transforms trespass into a supercharged strict liability regime. Other than a few special cases – like military bases, nuclear facilities, schools, and so on – people generally don't think of simple trespass as a crime that can lead to imprisonment and significant criminal sanctions. But ag-gag turns trespass, which is strict in theory and nimble in practice, into "trespass plus."

1. Citizen Enforcer

It's a surprise to many to discover that private citizens, deputized and granted limited authority, have been the primary enforcers of animal law since the passage of the first substantive anti-cruelty statute in the 1860s.[200] Humane agents are granted a range of different powers, from full investigative, warrant, and

196. Negowetti, *supra* note 194, at 1380.

197. *See, e.g.*, Liebmann, *supra* note 10, at 594; Landfriend, *supra* note 10, at 380.

198. Liebmann, *supra* note 10, at 594; Landfried, *supra* note 10, at 380.

199. For her part, Sonci Kingery does link ag-gag to agency and the common law, but the thrust of the article is grounded in constitutional considerations and built on public policy arguments and does not place ag-gag in context. *See* Sonci Kingery, *The Agricultural Iron Curtain*, 17 DRAKE J. AGRIC. L. 645, 667 (2012) (arguing that agency law is a sufficient means of combating dishonesty and undercover investigations).

200. *See* BEERS, *supra* note 13, at 61.

arrest, to the ability to seize abused animals.[201] Humane agents have even sparked the imagination of Hollywood, resulting in long-running television shows: *Animal Cops* and *Animal Precinct*.[202] Regardless of their merit as subjects of popular culture, humane agents and private citizens have played a pivotal role in enforcing anti-cruelty statutes and in shedding light on the inside workings of farms. This Section first explores that history and then demonstrates how ag-gag pushes the private citizen away from her role as an enforcer, and into one as a passive member of the community.

Although the first state to pass an anti-cruelty statute didn't do so until 1866, the Massachusetts Bay Colony, in its "Body of Liberties," protected the rights of "Bruite Creatures."[203] Liberty 92 stated that "[n]o man shall exercise any Tirranny or Crueltie towards any bruite Creature which are usuallie kept for man's use."[204] Beyond the colony's proclamation, cruelty statutes in the United States laid dormant until 1821, when Maine passed a cruelty statute shortly before the landmark Martin's Act across the Atlantic.[205] New York, Massachusetts, and Vermont all followed suit with their own anti-cruelty laws.[206] This wave of legislation continued, and by the time New York amended its first law in the 1860s, fourteen states and six territories had anti-cruelty laws on the books.[207]

The real breakthrough came in 1866, when Henry Bergh pushed through legislation that made it illegal to cruelly beat any animal, regardless of ownership.[208] The breakthrough was twofold. First, ridding the ownership requirement began dismantling the idea that animals were personal property over which you had complete control. Second, and most important for ag-gag's history, the law created the American Society for the Prevention of Cruelty to Animals ("ASPCA") and provided the ASPCA with enforcement powers.[209] The creation of the ASPCA spurred others to action.[210] Soon, there were groups in Boston, Philadelphia, Providence, San Francisco, St. Louis, and Washington, D.C.[211] Like New York,

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201. Christopher A. Pierce, *Detailed Discussion of Humane Societies and Enforcement Powers*, ANIMAL LEGAL & HIST. CTR. (2011), [https://perma.cc/MKM4-ABPG].

202. *See, e.g.*, *Animal Cops: Houston*, IMBD.COM (2021), [https://perma.cc/FM5P-MD25] (last visited Jan. 8, 2021); *Animal Precinct*, IMBD.COM (2021), [https://perma.cc/J68H-VAJ7] (last visited Jan. 8, 2021).

203. BEERS, *supra* note 13, at 20.

204. The Massachusetts Body of Liberties (1641), [https://perma.cc/LB3J-TP5T].

205. *See* Thomas G. Kelch, *A Short History of (Mostly) Western Animal Law: Part II*, 19 ANIMAL L. 347, 354 (2013); David S. Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800s*, 1993 DETROIT C. L. REV. 1, 8 (1993).

206. BEERS, *supra* note 13, at 23; Kelch, *supra* note 205, at 355.

207. BEERS, *supra* note 13, at 23.

208. BEERS, *supra* note 13, at 44; Kelch, *supra* note 205, at 355-56.

209. BEERS, *supra* note 13, at 44; Kelch, *supra* note 205, at 357.

210. BEERS, *supra* note 13, at 45.

211. *Id.* at 40.

the enabling legislation in these cities permitted humane agents to enforce and prosecute anti-cruelty laws.[212]

Legitimacy for humane agents did not come easily or quickly. Bergh was ridiculed when attempting to make his first arrest.[213] When he tried to bring his target to court, the judge dismissed the case, questioning the validity of the statute itself.[214] The first recorded cruelty conviction in the United States occurred in April 1866.[215] In a complete reversal of modern trends, the conviction was against a butcher for the mishandling of livestock, an unheard-of proposition today.[216] The fine was for only ten dollars,[217] but compared to being laughed out of court, a conviction combined with a minimal fine was a significant step for the nascent citizen enforcers.

After this first prosecution, Bergh and other humane agents were able to use the power of precedent to continue prosecuting and adjudicating cruelty cases.[218] By the end of the ASPCA's first year, it had prosecuted 119 cases, resulting in 66 convictions.[219] Thirteen years later, in 1879, the ASPCA had 6,000 prosecutions under its belt, and by 1888, that number had doubled to 12,000.[220] Similar successes occurred in other states. From 1867 to 1921, the Pennsylvania Humane Society had investigated 1,192,203 cases, resulting in 17,826 convictions.[221] The Massachusetts groups had prosecuted 102,523 cases and secured 4,716 convictions.[222]

At first blush, the conviction rates seem low, but humane agents were working within a hostile system in which judges frequently questioned the idea of cruelty toward animals, let alone the prosecution of it.[223] Eventually, humane agents were permanent fixtures on city streets, and Diane Beers argues that it was the humane agent's role toward livestock that "made the movement's beliefs and goals comprehensible to the public."[224] Thus, although the modern mind might first jump to companion animals when picturing anti-cruelty laws, it was their application to livestock, farming, and working animals that first captured the attention of the community.

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212. Favre & Tsang, *supra* note 205, at 21.

213. BEERS, *supra* note 13, at 60 ("As he recalled later, the man momentarily looked befuddled, then burst into laughter and resumed whipping his horse.").

214. *Id.* at 60-61.

215. *Id.* at 61.

216. *Id.* Specifically, sheep and calves had their hooves tied together and were then placed into carts on top of each other "like sacks." Favre & Tsang, *supra* note 205, at 19.

217. Favre & Tsang, *supra* note 205, at 19.

218. BEERS, *supra* note 13, at 61.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 63.

Humane societies' newfound prominence led them to work toward greater protection of animals. They "sickened Americans with vivid descriptions" – the antecedent to today's undercover videos – of hog cholera, infected wounds, and dead carcasses turned into food.[225] And with the public's support, Congress passed the Twenty-Eight Hour Law[226] in 1873.[227] Still in effect today, this law stipulates that transporters of animals may not "confine animals in a vehicle or vessel for more than twenty-eight consecutive hours without unloading the animals for feeding, water, and rest."[228] Continuing their historical role, humane agents investigated and prosecuted the act. They stationed themselves at railroad intersections to catch railroad companies violating the statute,[229] and, in 1896, the Women's Chapter of the Pennsylvania Society for the Prevention of Cruelty to Animals ("WSPCA") even secured a conviction against the Reading Railroad.[230]

Unwilling to stop there, local societies moved more directly into agriculture. The WSPCA investigated and prosecuted overcrowded poultry barns.[231] The Massachusetts Society for the Prevention of Cruelty to Animals was granted authority to investigate slaughterhouses.[232] In New York and Philadelphia, societies uncovered the "garbage milk" scandal, where cows were kept in underground facilities with accumulating manure, causing sores, infections, tuberculosis, and brucellosis.[233] Humane societies continued to investigate agriculture into the 1920s and 1930s, exposing conditions at increasingly industrialized farms.[234] Upton Sinclair's *The Jungle*, which, among other things, described less-than-sanitary practices in the meatpacking industry, helped lead to the passage of the Federal Meat Inspection Act, discussed earlier.

The picture is clear: humane societies were the main enforcers of animal laws until sometime in the mid-1900s. While their role as front-line enforcers has dissipated, humane societies and groups like the ALDF still play a pivotal part in alerting consumers and the public to what occurs on farms across the country. Every significant piece of animal welfare legislation (from the first anti-cruelty statutes to the Twenty-Eight Hour Law, to the Humane Slaughter Act, and even

225. *Id*. at 69.
226. 49 U.S.C. § 80502.
227. BEERS, *supra* note 13, at 69.
228. 49 U.S.C. § 80502(a)(1). Until 2006, the USDA interpreted the Twenty Eight Hour Law as excluding trucks from its gambit. *See* Harry Snelson, *USDA Concedes the 28-Hour Law Applies to Trucks*, AM. ASS'N OF SWINE VETERINARIANS, (Oct. 4, 2006), [https://perma.cc/RKF9-DM9L].
229. BEERS, *supra* note 13, at 69.
230. *Id*.
231. *Id*. at 72.
232. *Id*.
233. *Id*.
234. *Id*. at 103.

to the would-be egg bill[235]) was the result of humane society enforcement and animal advocate investigations.

The point is not that ag-gag directly outlaws humane agents from enforcing laws on farms; legislation exempting farms from anti-cruelty statutes has done that.[236] Rather, by eliminating the few remaining tools that advocates have, ag-gag legislation displaces the historical role that investigators and humane agents have played in animal law since its inception. And as agriculture has grown from small-scale to industrial, the harms extend far beyond our food supply, into the air, water, and climate. But very little of this is brought directly to the public.

Proponents of ag-gag legislation claim that animal advocates are trying to "undo[] animal agriculture" or "put [agriculture] out of business."[237] While some groups might wish to see the end of animal production entirely, it's not just abuse that they display, but the contamination of the food supply and the degradation of our environment. More importantly, statements like these ignore the rich history of humane societies and animal groups acting as enforcers. The first animal cruelty conviction in the United States was for abuse of sheep and calves, and humane agents prosecuted over a million cases by the 1920s.[238] It was the investigation of agriculture that normalized humane agents in society and convinced judges to uphold cruelty laws well over a century ago.[239]

Ag-gag legislation makes it impossible, without criminal sanctions, for citizens to fulfill their historical role. "No recording" provisions are a prime, and direct, example. The first animal welfare act in the United States, the Twenty-Eight Hour Law, was the result of a public outreach campaign that described to the American public what occurred during the transportation of animals.[240] Without the ability to investigate and portray the abuses that agents saw, reform would have had little success. The same can be said of the garbage milk scandal and the poultry investigations of the early-1900s. While recording was not an option for early investigators and agents, it was the same process; only the outlet for dissemination was different.

The "no lying" provisions are different in kind. Historically, humane agents were authorized to investigate abuses and were not confined to undercover tactics. But with the slow erosion of their authority, advocates have resorted to alternative means of enforcement and persuasion. To ensure that farmers have complete control over their methods, ag-gag shields industrial agriculture from

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235. Dan Charles, *U.S. Pig and Cattle Producers Trying to Crush Egg Bill*, NPR (July 11, 2012, 11:45AM), [https://perma.cc/7J9K-H2BM] (outlining a proposed bill that would have required egg producers to provide certain standard-of-living requirements for egg-producing hens).

236. *See, e.g.*, CONN. GEN. STAT. § 53-247(b) (2016); ME. REV. STAT. ANN. tit. 7, § 4011(2)(D) (2016); VT. STAT. ANN. tit. 13, § 351b (2016) (exempting "customary" or "industry-standard" farming practices from the reach of the state anti-cruelty statute).

237. Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017).

238. BEERS, *supra* note 13, at 61.

239. *Id.* at 63.

240. *Id.* at 69.

public scrutiny. Humane agents' power didn't derive solely from their ability to arrest and prosecute wrongdoers. Rather, through these investigations, the public, and thus judges, slowly came to accept their role as enforcers and educators. And the investigations added color and context to the need for agricultural regulation. Bergh became the laughingstock of major New York newspapers when he attempted to arrest an entire ship crew for cruelly transporting turtles.[241] The purpose wasn't to secure a prosecution – he knew he wouldn't succeed – but to get newspapers to cover the incident.[242] With the modern enforcement apparatus so lacking,[243] undercover investigations are often the only means of complete public disclosure.

Thus, while ag-gag laws might be eye-catching for their speech implications and agricultural protectionism, their rewriting of history is what's remarkable. Public disclosure through investigation is not novel; it's the foundation of agriculture's entire regulatory regime. But ag-gag and its supporters couch these investigations as a new-found impediment to America's oldest and greatest occupation, even as farming looks radically different than it did one hundred years ago. And, on top of ag-gag's revisionist theory of agriculture, it transforms the means of protecting the "fundamental element of [] property."[244]

2. When Nominal Becomes Punitive

Ag-gag targets and expands traditional conceptions of trespass, the primary method of enforcing the right to exclude. At common law, trespass was a pure tort and not a crime.[245] In England, trespass remained a civil tort until the Criminal Justice and Public Order Act of 1994.[246] The United States, however, has generally been more aggressive in expanding the definition of trespass. Many states contain criminal trespass statutes,[247] but they typically apply to all landowners and all property. While some statutes add extra protection to certain properties, such as schools or churches,[248] trespass is largely a civil, common-law tort. As a result, nominal damages are the norm.[249] Ag-gag statutes, however, disrupt

241. *Id*. at 62.
242. *Id.*
243. *See* Section I.B, *supra*.
244. Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1206 (9th Cir. 2018) (Bea, J., dissenting).
245. BLACKSTONE, *supra* note 4, at *208, *208-10.
246. Criminal Justice and Public Order Act 1994, 33 c. § 61 (Eng.)
247. *See, e.g*., GA. CODE. ANN. § 16-7-21 (2020); ME. REV. STAT. ANN.tit. 17-A402 (2007); COLO. REV. STAT. § 18-4-502 (2017).
248. *See, e.g*., VA. CODE. ANN. § 18.2-128 (2006).
249. If we go back far enough, trespass wasn't so forgiving. As Robert Ellickson and Charlies DiA. Thorland noted, the laws of Eshnunna put both a nighttime trespasser in cropland and a home to death. Robert C. Ellickson & Charles DiA. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.-KENT L. REV. 321, 342-343 (1995). The Code of Hammurabi had a similar death sentence, and Exodus 22:2-3, "only slightly more forgiving," allows a homeowner to kill a burglar during the night, but not once the sun rises. *Id*. at 343.

this historical practice and extend special trespass protections to agricultural facilities. Critically, these special protections extend to those who were given explicit access to the premises. Yet solely because an applicant doesn't disclose her membership in an animal advocacy group, she is subject to fines and incarceration. Trespass has never been so exacting.

Trespass is an age-old common-law tort that has existed for nearly one thousand years.[250] In its more recent form, trespass is defined as:

> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
>
> (a) Enters land in the possession of the other, or causes a thing or a third person to do so, or
>
> (b) Remains on the land, or
>
> (c) Fails to remove from the land a thing which he is under a duty to remove.[251]

As is evident from the Restatement, no harm need be done to the property to constitute trespass. The injury is the unconsented entry itself.[252] This stems from what many scholars consider the most important stick in the bundle: the right to exclude.[253] The Restatement itself, however, provides several escape hatches: consent,[254] public necessity,[255] private necessity,[256] abatement of private nuisance,[257] and abatement of public nuisance,[258] among others.[259] Beyond these specific enumerations, the common law seeks balance, and rarely gives property owners complete control over what is considered lawful access and what is not. Blackstone noted several exceptions to the rule, including allowing people with low incomes to take from someone's property after a harvest, hunting a dangerous beast, and entering a public inn.[260] Even customary practice around the entry of open lands has been found to soften the strict rules of trespass.[261] As Peter Winn put it, "the severity of the common law of trespass is constantly lessened by

250. George E. Woodbine, *The Origins of the Action of Trespass*, 33 YALE L.J. 799, 802 (1924).
251. RESTATEMENT (SECOND) OF TORTS § 158 (AM. L. INST. 1965).
252. BLACKSTONE, *supra* note 4, at *208, *208-10.
253. Ben Depoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090, 1095 (2011) ("Within this bundle, the most important is the right to exclude, which enables owners to protect their investments in land."); Gideon Parchomovsky & Alex Stein, *Reconceptualizing Trespass*, 103 NW. U. L. REV. 1823, 1825 (2009) ("[T]he most important right associated with property is protected with a remedy typical of the domain of accidents in the law of torts.").
254. RESTATEMENT (SECOND) OF TORTS §§ 167, 892 (AM. L. INST. 1965).
255. *Id.* § 196.
256. *Id.* § 197.
257. *Id.* § 201.
258. *Id.* § 203.
259. *Id.* § 191-211.
260. BLACKSTONE, *supra* note 4, at *208, *212-13.
261. *See* McKee v. Gratz, 260 U.S. 127, 136 (1922).

privileges, licenses and immunities as a matter of law to protect reasonable public use of the ostensibly private source."[262]

When there is no explicit escape hatch in the common law, judges have often found it necessary to informally adjust strict liability. For example, damages are often only nominal, and judges will reduce punitive damages if there was no harm to the land itself.[263] At other times, courts have ruled that what might be thought of as a trespass is not actually one.[264] For example, in *Florida Publishing Company v. Fletcher*, the Florida Supreme Court held that no trespass occurred when a gaggle of reporters followed firefighters into a house without the consent of the owner because doing so was common custom.[265] Thus, while trespass is often conceptualized as a strict liability tort, the common law has always provided a malleable approach to intrusions on private property.

Even in the context of ag-gag, where misrepresentation is held to vitiate consent, the common law traditionally is flexible. Although the Restatement proclaims that misrepresentation to gain access to property will invalidate consent,[266] the actual law is much more adaptable. Indeed, one judge even refused to rule on the issue of misrepresentation and trespass, finding the law far too ambiguous.[267]

In the case of *Martin v. Fidelity*, a homeowner attempted to bring a claim for trespass when a roof repairman fraudulently claimed that he would repair the plaintiff's roof.[268] As alleged, the worker had no intention of properly repairing the roof and was told by an insurance agency to repair it incorrectly.[269] Nevertheless, the Supreme Court of Alabama held that, even if the worker fraudulently obtained consent, the consent was still valid.[270] The court reasoned that:

> An action for trespass . . . will not lie unless plaintiff's possession was intruded upon by defendant without his consent, even though consent may have been given under mistake of facts, or procured by fraud[.][271]

Thus, although a plaintiff may not have consented to an intrusion, because of the state of mind or intentions of the defendant, trespass may not be actionable.

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262. Peter A. Winn, *The Guilty Eye: Unauthorized Access, Trespass and Privacy*, 62 BUS. LAW. 1395, 1423 (2007).

263. *See* Shiffman v. Empire Blue Cross & Blue Shield, 681 N.Y.S.2d 511, 512 (N.Y. App. Div. 1998); Stockman v. Duke, 578 So. 2d 831, 832-33 (Fla. Dist. Ct. App. 1991).

264. Northside Realty Assocs., Inc, v. United States, 605 F.2d 1348, 1355 (5th Cir. 1979); Fla. Publ'g Co. v. Fletcher, 340 So. 2d 914, 917 (Fla. 1976); State v. Shack, 277 A.2d 369, 374-75 (N.J. 1971).

265. *Fletcher*, 340 So. 2d at 915, 918-19.

266. RESTATEMENT (SECOND) OF TORTS §§ 173, 892B (AM. L. INST. 1965).

267. LL NJ, Inc. v. NBC-Subsidiary (WCAU-TV), L.P., No. 06-14312, 2008 WL 1923261, at *16 (E.D. Mich. Apr. 28, 2008).

268. Martin v. Fidelity & Cas. Co. of N.Y., 421 So. 2d 109, 110 (Ala. 1982).

269. *Id.*

270. *Id.* at 111.

271. *Id.*

This principle has also frequently applied to situations in which a reporter or undercover agent has lied about her qualifications or intentions. The two landmark cases extolling this idea are *Desnick v. ABC*[272] and *Food Lion v. ABC*.[273] In *Desnick*, the ABC show *PrimeTime Live* sent undercover "customers" to see whether Desnick's eye centers would suggest cataract surgery, even though all of the customers had been pre-screened by a separate doctor who had determined that the surgery wasn't necessary.[274] *PrimeTime Live* gathered several pieces of incriminating evidence, including that doctors at Desnick's facilities manipulated an eye test and often suggested surgery to elderly patients receiving Medicaid.[275] *PrimeTime Live* eventually aired the material, and Desnick brought a claim for trespass.[276] Although Chief Judge Posner stated that there is "no journalists' privilege to trespass," he did note that consent is often given "even though the entrant has intentions that if known to the owner . . . would cause him . . . to revoke his consent."[277] But here, there was "no invasion . . . of any of the specific interests that the tort of trespass seeks to protect."[278] That is, "it was not an interference with the ownership or possession of land."[279] If mere lack of consent were all that there was to trespass, it would make liable for trespass the restaurant critic, the window-shopper who had no intention to purchase, or the consumer who "falsely claimed to be able to buy the same" product "somewhere else at a lower price."[280]

Food Lion similarly involved a *PrimeTime Live* television segment. Here, however, the defendants were not fake customers pretending to need eye exams but, rather, undercover journalists who lied on their resumes to gain employment.[281] ABC had gathered information that Food Lion stores frequently marked expired food as fresh, and when the food was no longer disguisable as fresh, they would cook the food or use sauce to conceal the stench.[282] Once the journalists were given positions, they documented these practices using hidden cameras.[283] Food Lion brought a trespass charge, alleging that, because Food Lion never would have given the journalists jobs had it known their intentions, consent was vitiated.[284] The court found that a trespass did not occur merely because the journalists had lied on their resumes.[285] There was no authority "suggesting that consent based on a resume misrepresentation turn[ed] a successful job applicant into

272. Desnick v. Am. Broad. Co., Inc., 44 F.3d 1345 (7th Cir. 1995).
273. Food Lion, Inc. v. Capital Cities/ABC, Inc. 194 F.3d 505 (4th Cir. 1999).
274. *Desnick*, 44 F.3d at 1345.
275. *Id.*
276. *Id.* at 1347.
277. *Id.* at 1352.
278. *Id.*
279. *Id.*
280. *Id.* at 1351.
281. Food Lion, Inc. v. Capital Cities/ABC, Inc. 194 F.3d 510 (4th Cir. 1999).
282. *Id.* at 511.
283. *Id.* at 510-11.
284. *Id.* at 509.
285. *Id.* at 518.

a trespasser the moment she enters the employer's premises."[286] Had the court found that such a misrepresentation did vitiate consent, the court "would not be protecting the interest underlying the tort of trespass – the ownership and peaceable possession of land."[287] However, filming in private locations violated the duty of loyalty to Food Lion and thus was in "excess" of the "authority to enter . . . [the] premises as employees," turning the breach of loyalty into a viable trespass claim.[288] Notably, however, the court awarded only one dollar in nominal damages.[289]

Numerous other courts have similarly found that a trespass doesn't occur because of a misrepresentation in procuring employment or services. One news station misrepresented the status of its car to see if repair shops would suggest unnecessary repairs, but the court found no trespass.[290] Another threw out a trespass claim of a survivor of domestic violence who unwittingly allowed reporters to record her interactions with the police on the belief that the recording was for the district attorney's office.[291] The court reasoned that there is no requirement that consent to entry on land "be knowing or meaningful and the Court does not find any reason to add that requirement . . . . In a case where consent was fraudulently induced . . . [a] plaintiff has no claim for trespass."[292] Even when courts find that a trespass has occurred from undercover reporting, they often don't allow the plaintiff to recover damages that resulted from the news story and fallout.[293] This is because it's the publication, not the trespass, that causes damage.[294]

These situations cover much of the same behaviors that ag-gag statutes proscribe. In each, an undercover "agent" seeks entry onto land by misrepresenting her intentions. But unlike the animal advocate, the *PrimeTime Live* reporters are not found to be trespassing, let alone subject to significant fines and imprisonment. And even if courts do find a trespass, they limit the damages to nominal. The only difference between *PrimeTime Live* and the Humane Society is that the Humane Society gains access to an agricultural facility rather than a grocery store. Even the fraudulent repairman was not found to be trespassing, although he entered the property with an intention to improperly install a roof.[295] Yet, the "most diligent well-trained" undercover farm worker, who may "perform[] her

286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.* at 514.
290. Am. Transmission, Inc. v. Channel 7 of Detroit, Inc., 609 N.W.2d 607, 614 (Mich. Ct. App. 2002).
291. Baugh v. CBS, Inc. 828 F. Supp. 745, 757 (N.D. Cal. 1993).
292. *Id.*
293. *See, e.g.*, Med. Lab. Mgmt. Consultants v. Am. Broad. Co., 306 F.3d 806, 820-21 (9th Cir. 2002).
294. *Id.* at 821.
295. Martin v. Fidelity & Cas. Co. of N.Y., 421 So. 2d 109, 110 (Ala. 1982).

job admirably," is a special type of trespasser who is sent to jail rather than fined a dollar.[296]

In *Desnick*, the Seventh Circuit found that, for there to be a viable trespass claim, there needs to be an invasion of the "specific interests that the tort of trespass seeks to protect."[297] Since at least Blackstone's Commentaries in the eighteenth century, that interest has been the possession and ownership of land.[298] Thus, because the fake patients at Desnick's eye centers were given permission to enter and were not interfering with Desnick's ownership or possession, they were not considered to be trespassers.[299] The same could, and should, be said for the undercover employee at an industrial farm. Whether undercover or not, that employee continues to do her job, presumably well, otherwise she might be fired. The "regular" employee "interferes" with the possession of the factory farm in the same manner and fashion as the undercover employee. It is difficult to characterize the adverse intentions of the undercover employee as somehow interfering with the ownership or possession of the farm. The *Food Lion* court also unequivocally stated that there is no evidence that resume fraud turns an employee into a trespasser the moment she steps on the premises. For violators of ag-gag trespass statutes, however, the judicial jiujitsu of loyalty-turned-trespass is unnecessary, and the award far from nominal.

Thus, throughout common-law history, and continuing through today, trespass is typically a civil tort resulting in nominal damages. Yet in the context of agricultural facilities, trespass results in significant criminal sanctions. Although criminal trespass statutes exist, they rarely target specific property or categories of people. The result is that trespass at agricultural facilities is unlike trespass anywhere else.[300]

Much like the history of citizen enforcement, placing ag-gag within the legal structure of traditional trespass demonstrates its radical departure from the legal regime of which it technically is a part. Even if Judge Bea is right that the "use of the term 'enters'" in Idaho's ag-ag statute "is a clear invocation of the standards and interests of the law of trespass,"[301] how Idaho uses trespass is far from the traditional means of enforcing it. If Judge Bea had his way – like the Eighth Circuit – and ag-gag didn't violate the First Amendment, it would still be a trespass statute like no other. As outlined above, courts have been nimble in addressing trespass claims, demarking its flexible edges and, even when finding a trespass,

296. Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017).

297. Desnick v. Am. Broad. Co., Inc., 44 F.3d 1345, 1352 (7th Cir. 1995).

298. BLACKSTONE, *supra* note 4, at *208, *212-13.

299. *Desnick*, 44 F.3d at 1351-53.

300. This is not to say that the legislature could not have the power to enact a generally applicable trespass law, criminal or civil, that prohibits access by deception. Although *Wasden* might disagree. *See* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1190 (9th Cir. 2018) (striking down the trespass-by-deception portion of Idaho's ag-gag law).

301. *Id.* at 1207 (Bea, J., dissenting).

almost always limiting the damages to nominal. Nothing about an ag-gag statute resembles the means of enforcing the "longstanding principle of property" that a landowner has the right to exclude any person for any reason.[302] Indeed, one scholar commented that there is no "need to abandon ordinary trespass rules . . . [for] the journalism cases because trespass law itself makes clear that their trespass will ordinarily lead to nominal damages only."[303] In other words, nominal damages from trespass are meant to protect the property right that trespass encompasses by delineating a firm rule, but not punish more than necessary to give the right to exclude some sort of color. This makes sense, as few homeowners would believe that a slight trespass, for example, cutting through the corner of a convenient backyard, should subject the trespasser to criminal fines and imprisonment. Nor would the storeowner who inadvertently allows a nobody customer to shop after close because that customer lied and said she was a celebrity. The homeowner or storeowner might want to eject her from the property – and perhaps, if they're angry enough, have the trespasser pay a small fee – but serious criminal sanctions are far from mind. With ag-gag, criminal sanctions are front and center.

Ag-gag thus holds a unique position as a legal regime that not only rewrites agriculture's regulatory history but also galvanizes a relatively weak legal entitlement. And it has done so with few taking notice. The First Amendment implications blind writers, judicial or otherwise, to the transformative effect of ag-gag; there is a deeper, more unsettling nature to ag-gag than prohibiting speech. Indeed, even if the statutes were rewritten to avoid the speech implications – or found not to implicate speech, like the Eighth Circuit – they would still strike most as troubling. Moreover, they would do so even though agriculture already holds special regulatory exemptions, meaning ag-gag is just one more special protection among many. What's so disquieting about ag-gag, and thus trespass plus, is that the right to exclude has never been the cornucopia it has been held out as. Given that, what can ag-gag and trespass plus tell us about property, trespass, and the right to exclude?

II. THE RIGHT TO EXCLUDE AND SECONDARY HARMS

Trespass plus is a useful lens to analyze those aspects of the right to exclude that we actually care about. If the right to exclude were indeed the most important stick in the bundle, ag-gag wouldn't seem out of place. In fact, if the right to exclude were as important as it's made out to be, trespass plus would be the best means of enforcing that right; nominal damages and judicial flexibility would not. Yet, if we strip away ag-gag's speech implications and corporate and regulatory favoritism, either by creating a trespass-plus statute that doesn't burden

302. *Id.* at 1206.

303. Laurent Sacharoff, *Trespass and Deception*, 2015 BYU L. REV. 359, 362 (2015).

speech, like the Eighth Circuit's reading, or that applies equally to all properties, most will still find it unsettling. It's unsettling because we generally don't think much about the right to exclude as the aim of trespass or the core of property. The same goes for judges and legal scholars. If they did, there wouldn't be scores of articles and cases trying to strike the right balance between exclusion and public benefit. The rule would be simple: the landowner gets to choose who, how, and when someone enters her property, and a violation of that is a compensable trespass commensurate with its status as a foundational property right. That's not to say that the government couldn't prescribe some limits to it – say refusing entry based on a protected class – but, for everything else, it would be a straightforward rule with real enforcement effect, just like the theory says it should be.

But no one wants to live in a trespass plus world, nor does anyone really think we need to. What we really care about, and what the cases and common law are trying to do, is protect landowners from relevant secondary harms. The trespass, the actual violation of the right to exclude, isn't important. What results from that trespass is the harm that the law is policing. For example, interfering with a shop owner's ability to do business or preventing a homeowner from using her backyard. Depending on that secondary harm, the common law will either not consider the action a true trespass, or, if there's no way around it, offer nominal damages. Trespass plus as formulated in ag-gag is concerning because it removes the consideration of secondary harms and places the emphasis on the right to exclude. With ag-gag, it doesn't matter what happens after you've gained entry to the property, whether through lying or resume fraud or some other means; perhaps the undercover agent finds a perfectly well-run facility, happy hens and all, and decides not to release a video investigation. With ag-gag, you've still broken the law, as soon as you step foot on the farm, just like the right to exclude says you have. Formulated another way, secondary harms are also "trespass plus": if violation of the exclusion right is the trespass, there must be something else, a "plus" to make it worthy of sincere consideration.

This Part thus uses ag-gag as a new context through which to analyze the right to exclude. In doing so, I suggest that it's secondary harms – a different kind of trespass plus – that matter, not injuries to the right to exclude. That is, what happens once someone "trespasses" is what the legal entitlement of trespass seeks to guard against, not the actual violation of the right to exclude. And, if there's any one right that does matter when trespassing, secondary harms show us that it's likely what I call the "right of pursuit," which is a landowner's ability to pursue her interests in a particular piece of property, like a farmer's ability to pursue her interest in agricultural output. What this Part doesn't do is just as important as what it does: it doesn't attempt to sketch a new theory of property or ownership. It only offers the subtle yet crucial idea that, although the right to exclude is important, it's not what the law scrutinizes or what we care about. To do that, I proceed as follows. First, I examine the literature around trespass, property, and ownership. Trespass literature attempts to craft a framework that considers both

the fundamental nature of the right to exclude and the benefits that come from certain types of trespass. The problem, however, is a lacking antecedent analysis of the right to exclude that would meaningfully justify the departure of practice from theory. Second, I interrogate what would happen if these property theories were correct. If they were, most of them would make ag-gag-like trespass statutes the norm and not the exception. Finally, I demonstrate that the right to exclude isn't all that important in the trespass analysis: secondary harms and the right of pursuit are.

A. OWNERSHIP, PROPERTY, AND TRESPASS

To analyze trespass through an ag-gag lens, we first need an operating baseline. What is the right to exclude? Where does it fit into the property scheme? How does trespass protect that right? Countless thinkers, from Hugo Grotius to William Blackstone, have thought about and put into practice ideas around property and its societal function. While the exact boundaries and components of each theory differ, some emphasis on the right to exclude is always present. Indeed, even those who don't believe in the right to exclude as the most important property right still stress it as a component of property.

As a starting point, property is generally concerned "with the rights of persons with respect" to certain resources.[304] That is, "property" refers not to a particular object but, instead, how people interact with it. Because of that, possession is something different than property.[305] You can be in possession of something but not own it because someone else is considered the "owner" in relation to your passing possession, like borrowing a friend's car.[306] These alternate possible combinations of people's rights to certain resources led Jeremy Waldron to conclude that property and ownership are merely different concepts, "of which many different conceptions are possible," meaning that components of property and ownership will change.[307] Similar to the idea that property is concerned with the rights each person has in an object as to another, Waldron argues that "property is the concept of rules governing access to and control of material resources."[308] So, as a general matter, and sufficient for our purposes, property is not an object but the means by which people can interact with that object.[309] To say that a particular building is your property is not discussing that building on its own, but the ways in which your friends, family, and strangers may use and interact with it. Without a framework to define the relationship, a building is just a building.

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304. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731-32 (1998).

305. *Id.* at 732-33.

306. As Thomas Merrill uses as an example, you can pick up a book in a bookstore and be in possession, but you would consider the storeowner the owner of the book. *Id.*

307. Jeremy Waldron, *What is Private Property*, 5 OXFORD J. LEGAL STUD. 313, 317 (1985).

308. *Id.* at 324.

309. Property need not be physical, such as intellectual property. This general framework can equally apply to non-physical property as well.

Easy enough. But what are the bounds of those relations, and how do Waldron's concepts spring into action within the framework of Anglo-Saxon property? Adam Mossof does an exceptional job of collecting some of the earliest accounts of property, from Hugo Grotius to John Locke.[310] Grotius, one of the first modern rights theorists, had a similar idea to Waldron: there must be an interaction with a physical object that society generally accepts as valid.[311] But, more importantly, to be private property, according to Grotius, it must belong "to a given individual in such a way as to be incapable of belonging to another individual."[312] As Mossof points out, there's two conclusions from this. First, to own something, you have to be able to use it.[313] Second, that item must be recognized as available for use in such a way that someone else can't use it.[314] Thus, like Waldron, Grotius considered property to be a societal conception that permitted the "owner" to interact with an item in a way that is recognized by the community. And, critically, to use something in a way that prevents others from using it means that "exclusion is the analytical fulcrum" of Grotius's conception of property.[315] Property can't be incapable of belonging to another if a non-owner can use it whenever and however without reference to the owner's wishes. Therefore, in Grotius's view, the right to exclude is the primary demarcation of property. Thus, "the right to property is analytically predicated upon the right to exclude."[316] Samuel Pufendorf, a German jurist, tracks Grotius's account, reasoning that, to have property, you have to both occupy and possess it, and there must be a societal recognition of the same.[317] Non-owners must "keep hands off"[318] for it to be property. We again see exclusion as the principal driver. To ensure hands off, the owner must be able to exclude others from putting hands on.

John Locke started from the same theoretical standpoint as Grotius and Pufendorf: in the state of nature, "the world was available for the use of 'Mankind in common.'"[319] That is, anyone could use anything; there was no exclusion. Like Grotius and Pufendorf, use was insufficient. As Locke reasoned, with use but no exclusion, there comes "a very great difficulty, how any one

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310. Adam Mossof, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 379-89 (2003).

311. *Id.* at 379-80.

312. *Id.* (citing HUGO GROTIUS, DE JURE PRAEDAE COMMENTARIUS 228 (G.L. Williams & W.H. Zeydel trans., 1964)).

313. *Id.* at 380-81.

314. *Id.* at 382.

315. *Id.*

316. *Id.* at 385.

317. *Id.*

318. *Id.* (citing SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM 16 (C.H. Oldfather & W.A. Oldfather trans., 1934) (1688))

319. *Id.* at 386 (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 25, at 286 (Peter Laslett ed., 1988) (1690)).

should ever come to a *Property* in any thing . . . ."[320] To get to property, there must be a use "exclusive of the rest of mankind."[321] Yet again, exclusion is what turns use into property. But, unlike Grotius and Pufendorf, Locke didn't utilize consent to turn use to property. Instead, he offered his labor mixing theory, whereby whenever someone "mixes" their labor with an item, they earn the right to call it property – whether that's through working a field or purchasing something with money that was earned through labor. Thus, labor provides the key to exclusion, because an individual "exclusively owns his life and his labor," and, as a result, that exclusivity turns the object in which you mix that life and labor into a property right.[322] Even though the methods by which use turns into property differ, Grotius, Pufendorf, and Locke all consider exclusivity an essential component.

Fast forwarding just a bit, Blackstone offered a similar conception. In an-oft quoted passage, Blackstone said of property:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.[323]

Here, Blackstone explains that the essential component of property is exclusion. Unlike Grotius, Pufendorf, and Locke, Blackstone doesn't offer a full theoretical explanation of how use turns to property. Rather, he merely states it as a fact that property is the use ("claim[] and exercise[]") at the expense of all others ("in total exclusion . . . of any other").[324] Given that Blackstone's project was different from the others' – he was primarily providing an accounting of English common law – it makes sense that he would state this as a fact. Blackstone later describes property as "the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save by the laws of land."[325] In this list, exclusion seems to disappear, but it's implicit in the triumvirate. It's impossible to use, enjoy, and dispose of property "without any control or diminution" if you don't also have the right to exclude others from that property.[326] In reality, as noted above, property wasn't so despotic or exclusive. Blackstone cataloged a bevy of exceptions to the rule, like hunting "ravenous

320. *Id.* (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 25, at 286 (Peter Laslett ed., 1988) (1690)).

321. *Id.* (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 25, at 286 (Peter Laslett ed., 1988) (1690)).

322. *Id.* at 388.

323. BLACKSTONE, *supra* note 1, at *1.

324. *Id.*

325. *Id.* at *134-35.

326. *Id.*

beasts" and stopping nuisances.[327] Nonetheless, exclusion was a critical component, even if it had to bend to the "laws of the land."[328]

Modern conceptions have hewed closely to exclusion as the quintessential element of property. Thomas Merrill argues that exclusion isn't just one of the most important parts of property; "it is the sine qua non."[329] He reasons, "[d]eny someone the exclusion right and they do not have property."[330] Whatever other rights someone may have in an object – like Blackstone's disposal and enjoyment – they are "purely contingent" on exclusion.[331] These features of property cannot exist without exclusion, making it "fundamental to the concept of property."[332] Felix Cohen expressed a similar concept in his dialogue on property: "Private property may or may not involve a right to use something oneself. It may or may not involve a right to sell, but whatever else it involves, it must at least involve a right to exclude others from doing something."[333] Like Waldron and Merrill's idea that property is relational, Cohen reasoned exclusion's essentialism from the idea that property is a "relationship among human beings" that permits the "so-called owner" to do certain things with his property, but to do those things, exclusion is required.[334] Shyamkrishna Balganesh reasons that "[t]he right to exclude is little more than the correlative" of resource inviolability, in that property "plac [es] individuals under an obligation (or duty) to keep away from the resource by default."[335] The right to exclude, as a function of inviolability, "gives property its structural basis," because, without it, there would lack a "behavioral guide [for] individuals [to] regulate their conduct in a certain way so as to accommodate it."[336] Even the Supreme Court consistently touts the right to exclude as the fundamental basis of property.[337]

This brief foray into the origins and components of property demonstrates that property is a relational concept that informs who and how people may use a particular object. And, within that conception, to be called an "owner," you need the ability to tell others how they may use that object; that is, the ability to exclude them. But, to make it an enforceable entitlement, something more is needed: the

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327. BLACKSTONE, *supra* note 4, at *208, *213.
328. BLACKSTONE, *supra* note 1, at *134-35.
329. Merrill, *supra* note 304, at 730.
330. *Id.*
331. *Id.* at 731.
332. *Id.*
333. Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 371 (1954).
334. *Id.* at 371-73.
335. Shyamkrishna Balganesh, *Demystifying the Right to Exclude*, 31 HARV. J.L. PUB. POL'Y 593, 623 (2008).
336. *Id.* at 619, 623.
337. *See* Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) ("[W]e hold that the 'right to exclude,' so universally held to be the fundamental element of the property right . . . ."); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) ("The right to exclude is 'one of the most treasured' rights of property ownership.").

ability to "secure the assistance of the law."[338] Trespass is that assistance. And, as explained in placing ag-gag in context, trespass is a possessory invasion on the land of another.[339] Or, under the exclusionary framework, trespass is the violation of a landowner's decision to exclude.

The issue, however, is that trespass fails to take seriously the right to exclude. As Gideon Parchomovsky and Alex Stein reason, there is a "mismatch between the right and remedy: the most important right associated with property is protected with a remedy typical of the domain of accidents in the law of torts."[340] That's because, although ex ante the right to exclude is considered inviolable, ex post, a landowner is stuck with mere nominal damages or market-value compensation if she is lucky. It's hard to imagine Grotius being content with such limited protection.

I'm hardly the first to note that common-law trespass doesn't fit snugly within a right-to-exclude framework. Many scholars have attempted to untangle this mess, with each more or less starting from the premise that the right to exclude is a critically important right that nonetheless must collapse in certain circumstances; typically, some sort of societal good. That societal good is often obtained by misrepresentation, probably as a matter of practicality – it's difficult to gain meaningful access to a property through plain old snooping. A watchful foreperson would recognize a stranger, and breaking in at night likely wouldn't yield the type of information the would-be do-gooder is looking for, while also subjecting the burglar to sanctions beyond mere trespass. Misrepresentation is thus fertile ground for analyzing the bounds of trespass.

For most scholars, misrepresentation in the trespass context raises concerns over the First Amendment and the need to gather information to be able to publish newsworthy stories.[341] A smaller subset of writers take a broader view, attempting to make ties between either all deception-like cases or all police deception cases and the Fourth Amendment.[342] However, each writer, although using dissimilar means and analyses, appears to come to a similar conclusion: liability for trespass is a highly contextual inquiry, and there should be some leeway when the public benefits from the interloper's misrepresentation. The problem with this approach is that it fails to account for trespass's core, the unconsented entry onto property as the substantive violation. While a balancing test may work to define the boundaries of appropriate liability, it doesn't answer the antecedent question of what trespass is and why certain actions are considered trespasses while others are not. Thus, the academic literature searches for reasons for when or why trespass should impose liability without properly placing it in its traditional

338. Cohen, *supra* note 333, at 373.

339. RESTATEMENT (SECOND) OF TORTS § 158 (AM. L. INST. 1965).

340. *See* Parchomovsky & Stein, *supra* note 253, at 1825.

341. *See, e.g.*, Barnett, *supra* note 6, at 450; Freedman, *supra* note 6 at 1298.

342. *See* Laurent Sacharoff, *supra* note 303, at 403; Saul Levmore, *A Theory of Deception and Then of Common Law Categories*, 85 TEX. L. REV. 1359, 1359-61 (2007).

framework. If trespass is the legal assistance that works to secure property, a remedy or framework that balances public good against such an inviolable right isn't doing that right justice.

For example, Laurent Sacharoff argues that acceptable misrepresentations are those that are similar to traditional "tester" situations.[343] Testers fake transactional interest to determine whether wrongdoing will occur, such as by falsifying clients and applications to determine whether certain landlords or developments are violating fair housing laws.[344] Sacharoff finds that analyzing the various access-by-deception cases without the tester lens leads to a jumbled and incoherent doctrine.[345] He questions how it's possible that *Food Lion* and *Desnick* came out in two different ways when the underlying action – misrepresentation – was essentially the same.[346] To Sacharoff, the key difference is that, in *Desnick*, the reporters were "enter[ing] to investigate the very transaction for which [they] sought entry."[347] This may well be true, and the tester principle does help to distinguish cases like *Food Lion* from those like *Desnick*, but missing from the analysis is the way in which either situation can be situated in a traditional trespass framework. If the invasion is the unconsented entry itself, as the Restatement and common law claim, then the tester should be equally as liable as the resume-padder, regardless of any societal benefits.

Those scholars who focus on the First Amendment implications of access-by-deception also don't interrogate trespass's fundamental principle. Lyrissa Barnett concludes that, to protect the promises of the First Amendment, liability shouldn't attach to those whose "subterfuge . . . serve[s] the public."[348] To Barnett, newsgathering must be protected to some degree if the First Amendment is to serve its purpose.[349] So the argument goes, for there to be a free flow of information, there must be a means of getting valuable, yet private, information.[350] "The press is the chief information broker in modern society" and an "advocate of social reform."[351] It is this second role, the advocate, that leads Barnett to craft a rule that protects socially beneficial intrusions. However, much like Sacharoff, Barnett doesn't fully account for the right that trespass is intended to protect – the right to exclude. Trespass is a strict liability tort, and although the First Amendment and freedom of the press is a fundamental liberal right, it is unclear how newsgatherers can be carved out for special protection. In the modern world, the blogger, the TikTok star, and the CNN correspondent are all "newsgatherers."

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343. Sacharoff, *supra* note 303, at 402.
344. *Id.* at 371-72.
345. *Id.* at 394-95.
346. *Id.* at 399.
347. *Id.*
348. Barnett, *supra* note 6, at 450.
349. *Id.* at 437.
350. *Id.*
351. *Id.* at 451.

The line between newsgatherers and the public is murky. Because of this, trespass (in theory) does not attempt to police the boundary. A trespass is a trespass: "a rule of strict liability applies, and the landholder can obtain an injunction to prevent future invasions."[352] A newsgathering or socially beneficial rule may protect the press and fulfill the promise of the First Amendment, but it doesn't grapple with trespass's, and property's, underlying assumptions.

David Freedman takes a similar tact to Barnett. After surveying the uneven jurisprudential trajectory of the misrepresentation cases, Freedman finds that courts that refuse to balance competing interests in deception cases "fail to recognize the press's constitutionally protected role of checking abuses of government power and informing the public about the conduct of government affairs."[353] The First Amendment must be protected before property and privacy, so long as the benefits of granting access outweigh the harms.[354] Thus, Freedman explicitly endorses a balancing test approach.[355] Again, however, balancing does not deal with the purported inviolability of the right to exclude. Although it may be correct to explicitly endorse a balancing test due to the squishy case law, that case law doesn't properly wrestle with trespass's underlying framework, either. The end of the analysis may be that trespass's foundational assumptions are incorrect, but those assumptions aren't interrogated when the focus is on the First Amendment and societal benefit.

Without using the First Amendment, Saul Levmore similarly argues that courts should "weigh[] the social costs and benefits of deception and then fashion[] trespass doctrine and judicial rhetoric accordingly."[356] Levmore ends here after a heroic effort to identify an as-yet-undefined area of "deception" law that incorporates police deception, the undercover investigator, resume fraud, and other access-by-deception cases.[357] For Levmore, the key determinant of these cases is whether a sufficient means of deterrence is available through either trespass or similar doctrines.[358] There is no trespass when someone solicits a sex worker with a counterfeit one hundred dollar bill, but there is when a doctor takes advantage of a patient.[359] Deterrence, according to Levmore, is the defining line. The counterfeit customer would, presumably, be deterred by general counterfeit laws.[360] But, other than delicensing, there is no immediate remedy at hand for the victim of the doctor.[361] Thus, trespass must balance the

352. Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 13 (1985).
353. Freedman, *supra* note 6, at 1342.
354. *Id.* at 1335.
355. *Id.*
356. Levmore, *supra* note 342, at 1369.
357. *Id.* at 1359-60.
358. *Id.* at 1364-65, 1369.
359. *Id.* at 1364.
360. *Id.*
361. *Id.*

probability of deterrence with the social benefits of the trespass when crafting a decision. Levmore gets closest of all to placing trespass front and center, but by focusing on costs, benefits, and deterrence, he doesn't fully do justice to exclusion. Indeed, one of the purposes of trespass is deterrence. The deterrence, however, is quite specific. It discourages parties from invading the right to exclude. Traditional trespass doesn't look to broader concerns when conceptualizing the harm that stems from it.

The literature on trespass and deception has created numerous ways of fashioning remedies and liabilities and creating new tests that account for the varying means through which deception and harms are considered in the case law. When scholars create these loopholes, just like the courts do, the critical element of trespass is overlooked: the protection of the right to exclude. Scholars jump over whether creating such balancing tests or refashioning trespass says anything about the right to exclude qua the right to exclude. In other words, the right to exclude is assumed to be important yet meant to automatically cave in the right circumstances. This analysis fails to ask the antecedent question of whether the relevant property harm is a lack of exclusion.

Yet, at the same time, these analyses implicitly assume that the harm isn't exclusion, or, at least, that exclusion isn't as important as it is made out to be. If it were, the tests would look rather different. Take Levmore's deterrence theory. He states that courts are "weighing the social costs and benefits of deception and then fashioning trespass doctrine and judicial rhetoric accordingly, bearing in mind the deterrence provided by other available remedies."[362] Courts might be doing so, but what does that say about the right to exclude? This conception of trespass couldn't protect the right to exclude as it's formulated in theory because it's an inviolable right that can only be circumscribed by generally applicable laws. Deception that benefits the public isn't that. By asserting that the common theme throughout deception cases is that social benefits and deterrence are the focal points, the analysis already assumes that the right to exclude isn't inviolable and that trespass doesn't seek to protect it.

Fashioning a modern-day trespass framework or finding a coherent theory across the case law requires an equation that can be justifiably balanced. That can't be done when the right to exclude is simultaneously proclaimed as critical yet isn't given analytical recognition in the face of societal benefit, newsgathering, or the First Amendment. A critical step is missing when this happens. Other interests can't outweigh an inviolable right simply by noting those interests' importance.

362. *Id.* at 1369.

B. PURSUIT

The right to exclude isn't all that important. To be more precise, safeguarding exclusion on its own terms isn't what laypeople, scholars, or jurists care about when discussing the protection of property rights. Grotius and others might be right – indeed, they probably are – that exclusivity is necessary to turn use into property. It's difficult, if not impossible, to utilize one's property if others can't be prevented from simply taking it and using it themselves. But to say that exclusion is what makes property "property" is different from saying that it's the most important legal element or the function of trespass. Exclusion may be the analytical, theoretical, or philosophical keystone, but that doesn't necessarily mean exclusion needs to be more than that. Ag-gag demonstrates as much. Ag-gag statutes are some of the few, if not the only, statutes that treat the right to exclude as an inviolable principle of property on its own terms. Yet it's ag-gag's treatment of the right to exclude in this way that's unsettling. Generally applicable criminal trespass statutes come close to giving the right to exclude the (theoretical) justice it's promised, but they tend not to offend in the same way, most likely because they apply to situations where the violation, such as a repeated trespass, seems more in line with the remedy. A landowner may not want to sanction a mere yard cutter, but she might if the yard cutter continues to trespass every day after being told not to. Imprisoning a trespasser for stepping a single inch onto someone's property, whether a farm or elsewhere, intuitively feels wrong. And that feeling comes from the sense that the inch didn't cause much harm, even if it violates the right to exclude.

Stripped to its basics, ag-gag is nothing more than a true trespass statute. Consider Iowa. Iowa's ag-gag statute made it illegal to (a) "[o]btain[] access to an agricultural production facility by false pretenses" or (b) "[m]ake a false statement . . . as part of an application or agreement to be employed . . ., 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 . . . ."[363] Both provisions effectively prohibit trespass. Subsection a is a fairly standard trespass-by-deception provision and prevents a careful judge from crafting some sort of exception, such as in *Desnick* and *Food Lion*. Subsection b is essentially a trespass-by-deception provision as well, only the deception is on a resume, rather than at the door. When looked at in this way, ag-gag statutes appear remarkably similar to the Restatement's detailing of trespass:

> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally

363. IOWA CODE § 717A.3A(1)(a)-(b) (West 2012).

> (a) Enters land in the possession of the other, or causes a thing or a third person to do so, or
>
> (b) Remains on the land, or
>
> (c) Fails to remove from the land a thing which he is under a duty to remove.[364]

Without any context as to the remedy or the intricacies around deception, the Restatement and Iowa are in lockstep. There's nothing in the Restatement that lends itself to an interpretation that deception is somehow allowed. If a court was reading this part of the Restatement using typical tools of statutory construction, the plain language of it clearly applies to deception, and a lack of any carveout for deception would mean that finding one would be to add words to the statute. There's no reason that "intentionally"[365] shouldn't cover deliberately deceiving the landowner.

If the Restatement is interpreted textually, and the right to exclude is given the credence the theory says it is owed, *Desnick* and *Food Lion* are incorrect. Chief Judge Posner reasoned that there was "no invasion . . . of any of the specific interests that the tort of trespass seeks to protect" because there wasn't "an interference with the ownership or possession of land."[366] But, according to most thinkers, to have ownership, or "property," you must have the right to exclude. The tort of trespass is meant to be the legal assistance protecting that right. To say that the reporters in *Desnick* didn't trespass merely because they were seeking eye exams, which is what the center provided, brushes right over the right to exclude. The whole idea is that the eye center is allowed to turn away those it doesn't wish to serve.[367] The same problem appears in *Food Lion*. The court reasoned that the lie on the resume didn't turn a "successful job applicant into a trespasser" because such a conclusion "would not be protecting the interest underlying the tort of trespass – the ownership and peaceable possession of land."[368] But, again, to have "ownership" or "peaceable possession," the owner is meant to have the right to exclude, which includes turning down applicants it deems unfit for the role, whether because they have no relevant experience *or* because they're undercover reporters. In fact, when Food Lion brought its trespass claim, it specifically alleged that it wouldn't have hired the reporters had it known who they were.[369] That is the essence of the right to exclude and the supposed point of trespass.

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364. RESTATEMENT (SECOND) OF TORTS § 158 (AM. L. INST. 1965).

365. *Id.*

366. Desnick v. Am. Broad. Co., Inc., 44 F.3d 1345, 1352 (7th Cir. 1995).

367. Save, of course, violation of some sort of statutory or constitutional right, such as to be free from racial discrimination.

368. Food Lion, Inc. v. Capital Cities/ABC, Inc. 194 F.3d 505, 518 (4th Cir. 1999).

369. *Id.* at 509.

If *Desnick* and *Food Lion* took the right to exclude seriously, then they would be easy cases. As holders of property, the plaintiffs had an inviolable right to exclude whomever. Trespass's core is the "possessory interest – each owner's moral interest in controlling his land exclusively," such that the owner has a "domain of practical discretion in which he may choose freely how to use his land."[370] Unlike the *Food Lion* and *Desnick* courts, ag-gag gives farms the reassurance that they in fact have sufficient discretion to choose who and how someone enters their facility by ensuring the remedy matches the violation. Ag-gag is the only true means of effectuating the alleged importance that Anglo-Saxon common law and theory places on property.

But that's an uncomfortable landing pad. It can't be that ag-gag is the appropriate analytical kin to property and the right to exclude. If it were, ag-gag wouldn't be so striking, even without its historical implications or its chilling effect on speech. As Waldron reasoned, property is merely one concept among many different conceptions.[371] The Anglo-Saxon concept of property might be premised on the right to exclude, but the conception is rather different. The conception is far more complex. Our conceptions around property are grounded in morals, with "the moral right shap[ing] the possessory interest and the harm in tort."[372] Our innate unease with ag-gag's centering of the right to exclude demonstrates that the right to exclude isn't the possessory interest or aspect we want stringently enforced. The conception in practice is flexible, depending on the when and how of a trespass. Ag-gag gets the harm, possessory interests, and morals all wrong. We might agree that the farm should be able to exclude a "fake" employee, but we generally don't reach immediately for imprisonment.

What we appear to care about, and what the caselaw and literature implicitly suggest, is that trespass is designed, or should be designed, to guarantee a landowner's ability to pursue their ownership interests, or a right of pursuit. That is, the law only goes far enough to ensure that, once it is established that someone has property, the owner has free range – within legal bounds – to meet their property goals. If the landowner is a homeowner, then the shortcut through a small corner of the yard doesn't interfere with the owner's right of pursuit. Blackstone's second definition of property, as "the free use, enjoyment, and disposal of all his acquisitions,"[373] gestures toward this idea. Exclusion is implied, of course, but the purpose of that exclusion is the owner's utilization of her property. Exclusion is thus a means to achieve the right of pursuit. Exclusion might be necessary for pursuit, but exclusion isn't the focal point. And once exclusion is seen as just a means to attain pursuit, sanctions for trespass are no longer the remedial manifestation of the right to exclude, but, instead, for pursuit.

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370. Eric R. Claeys, *Jefferson Meets Coats*, 85 NOTRE DAME L. REV. 1379, 1388, 98 (2010).
371. Waldron, *supra* note 307, at 317.
372. Claeys, *supra* note 370, at 1407.
373. BLACKSTONE, *supra* note 1, at *134-35.

Protecting pursuit means providing appropriate liability for secondary harms. The yard cutter shows how this might work in practice. As a general matter, the pursuit of a homeowner is to enjoy their home – cook dinner, relax in the backyard, feel safe – free of intrusions. When cutting through the yard, the trespasser causes two harms. First is the bare invasion of exclusion. A quick step into the yard will necessarily burden exclusion, but it doesn't burden pursuit. The homeowner is still able to pursue all her ownership interests. Second, if the yard cutter takes a longer route, much closer to the homeowner, then the trespasser begins to encumber her right to, for example, relax or feel safe; there's now a secondary harm beyond simple exclusion. These secondary harms, the ones that impact the right of pursuit, are those that trespass is actually designed to protect. Nominal damages for primary harms, and possibly more for secondary.

If the right of pursuit is the property conception that trespass protects, the flexibility of the common law and the case law begins to fall in place. And *Desnick* and *Food Lion* remain easy cases. Chief Judge Posner's reasoning that the undercover reporter's actions didn't invade any "specific interest" [374] that trespass protects makes perfect sense. The eye center was pursuing a business in which it provides eye exams. An undercover agent who receives an eye exam doesn't burden that right. Same goes for the reporters in *Food Lion*. Food Lion was using its property to run a supermarket. A qualified employee-reporter who lies about whether she has ulterior motives isn't impacting Food Lion's pursuit. Indeed, the employee would continue to follow Food Lion's protocols, working in the meat department according to its standards. In that sense, the employee-reporter was assisting in Food Lion's pursuit right. The undercover reporters might be burdening the right to exclude because neither business would have let them in otherwise, but there's no secondary harm to the right of pursuit. There could be harm from the fallout of the investigative report, but that's not a harm that implicates the owner's property rights. It's instead grounded in reputation and goodwill, which are governed by a different legal regime.[375] The Ninth and Tenth Circuits' assertion that lying to gain access to a farm doesn't cause any cognizable damage[376] makes sense too. The law generally doesn't recognize a violation of the right to exclude as a cognizable interest because that interest says nothing about an owner's ability to utilize, or pursue, their property. And, even though Judge

374. *Desnick*, 44 F.3d at 1352.

375. It can be appropriate to consider reputation and good will "property," and people often consider it as such. But you can't exclude others from your reputation, it's accessible by all. In that formulation, they're not property in a true sense. Moreover, even if they were, the pursuit interest is self-inflicted in *Desnick* and *Food Lion*, as the reporters were not the implementers of the fake recommendation or poor sanitation practices the businesses were taking part in. And property law is typically not concerned with self-inflicted harms.

376. *See* Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1234 (10th Cir. 2021) ("Damage occurs only if the investigators uncover evidence of wrongdoing and share that information."); Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1195 (9th Cir. 2018) ("[L]ying to gain entry merely allows the speaker to cross the threshold of another's property.").

Bea talks about exclusion, he still gets it wrong because asserting that exclusion is the "fundamental element of [] property"[377] fails to ask whether it's the fundamental element of *property* or the fundamental element of the *legal entitlement*. Exclusion is necessary to make property, but it's not necessary for determining proper violations of relevant property rights.

Additionally, nominal damages begin to take shape as a reasonable remedy when considering pursuit. Property still includes the right to exclude and, so, nominal damages are sufficient for this antecedent-to-pursuit right. Call it trespass minus. Since exclusion is fundamental to property as property, nominal damages nod to exclusion's importance without diminishing the need for tailored liability for secondary harms. The corner-of-the-yard cutter gets nominal damages, if the homeowner wishes, and the more circuitous yard cutter could be subject to something more. If trespass is primarily conceived as an instrument for protecting pursuit, there's no longer a "mismatch between the right and remedy" because the "most important right associated with property"[378] isn't exclusion. Exclusion can maintain its position as a cornerstone of property without it being the analytical crux of trespass.

As a result, the various balancing tests laid out in the existing literature are given an extra tool for their justification. Barnett argues that deception should be permitted when such "subterfuge" benefits the public.[379] That balancing act can't be performed when the right to exclude is considered inviolable and the central focus of trespass. But, if trespass is understood as safeguarding pursuit, the justification for a newsgathering or socially beneficial subterfuge is simple. Some deception, like that in *Desnick* and *Food Lion*, won't violate the right of pursuit, meaning the scales weigh heavily in favor of the benefits gained from that deception. Other ploys, like gaining access and impeding the operation of the business, violate the landowner's pursuit right, placing the thumb back on the side of trespass. Under a balancing test where the right to exclude is effectively written out, there are very few socially beneficial acts that won't tip the scales toward deception. That is, when exclusion is assumed or implied to be meaningless, not much is needed to demonstrate that a particular trespass is socially beneficial; one is always larger than zero. But, with the right of pursuit, there are two sides to the equation, making a balancing test functional. Pursuit can be placed in any of the theories, from Levmore's deterrence to Sacharoff's testers. Doing so helps justify exceptions to trespass.

Finally, pursuit adds color to the unease toward ag-gag. Turning again to Iowa, violating either of Iowa's trespass provisions, standard trespass-by-deception or trespass-by-resume-deception, doesn't interfere with the farm's right of pursuit. Merely gaining access to the facility on false pretenses doesn't interfere with the

377. *Wasden,* 878 F.3d at 1206 (Bea, J., dissenting).
378. Parchomovsky & Stein, *supra* note 253, at 1825.
379. Barnett, *supra* note 6, at 450.

operator's right to pursue a farming enterprise. The silent observer, who happens to hide her intentions, doesn't impede the farm's ability to continue with agricultural production. Nor does the person who lies on her resume about an affiliation with an animal rights organization. Once an action crosses the line of violating exclusion and over into pursuit, trespass kicks in. And an ag-gag statute that specifically proscribes this sort of behavior – such as Iowa's prohibition on agricultural trespass that causes property damage – wouldn't cause the same amount of discomfort because the trespasser would in fact be impeding the farm's ability to function. The undercover employee is no longer a quick yard cutter but a circuitous one. There then is no longer a need for ag-gag's version of trespass plus. Instead, trespass plus can be conceived as trespass plus secondary harms, causing trespass to protect only those property rights that matter.

Unfortunately, identifying pursuit as the aim of trespass creates almost as many problems as it solves. What does it mean for nuisance? How does it impact easements, particularly those that don't interfere with a pursuit right? Will an adverse possessor be able to gain a use right sooner if pursuit isn't violated? And what is the appropriate remedy or compensation for the violation of the right to pursuit? I don't attempt to answer these questions. But adding pursuit to the framework of various property schemes that have been based on a misplaced notion of exclusion will have ripple effects. Adverse possession, which is based on the idea that an owner sits on her exclusion rights, is a prime example. If exclusion is removed as the core legal principle of property, and the adverse possessor doesn't impact the pursuit right, the analysis becomes complicated. Pursuit effectively takes "adverse" out of the analysis. Perhaps the answer is that pursuit is only relevant in the trespass context and exclusion is appropriate elsewhere. But, if we begin to see ag-gag-style adverse possession plus or easement plus provisions, we might again question exclusion as the basis of property's legal regime. Answering these hard questions must wait for another day.

Flipping ag-gag around thus illuminates our indifference to the right to exclude. It's not that we don't care about property or preventing unwarranted intrusions, but that exclusion on its own terms isn't the property right that matters most. Violating exclusion rarely interferes with an owner's ability to be an owner. Something more must happen for the owner to take notice. That more is a secondary harm that stems from exclusion, the right of pursuit. Only once there is a cognizable secondary harm does a trespass become worthy of sanction.

CONCLUSION

Ag-gag is a remarkable legal regime. Not because it prevents someone from lying on their resume but because it disrupts a century of citizen enforcement and realigns with theory an even older common-law right. Ag-gag's radical departure from the regulatory apparatus it purports to be a part of is worthy of notice on its own, but what an examination of that departure displays is even more significant.

Ag-gag is odd because we often care less about the enforcement of the right to exclude than ag-gag suggests. Exclusion may be what it means to own something, but it is not our main concern with trespass. Ag-gag puts exclusion front and center and finds any means possible to keep out certain categories of people from farms even if those people aren't interfering with the farm's ownership as we generally conceive it. The farm is free to pursue its agricultural interests, even with an undercover agent on the premises.

Reconceptualizing trespass as the protection of the right of pursuit adds a new analytical framework with which to examine property. Once exclusion is treated as a theoretical or philosophical underpinning of property, but not the purpose of property's legal regime, courts and scholars are freed from the unfair baggage that exclusion carries. It may be an inviolable element of property as property, but it is not an inviolable legal entitlement. Indeed, it never has been. Once that premise is accepted, other areas of property can be more closely interrogated without paying the necessary service to exclusion. In trespass, not much is likely to change. Scholars and courts have been encroaching on the right to exclude for as long as people have been trespassing. But if pursuit is truly an object of trespass – which I think it is – then it should provide a powerful conception for the rest of property. After all, we don't really care much about the right to exclude.