

2018 SYMPOSIUM NOTE: THE ROLE OF TRANSPARENCY AND FREE SPEECH IN THE ANIMAL RIGHTS MOVEMENT

A unique challenge faces free speech and the transparency of industrial slaughter houses: agricultural gag laws, or ag-gag laws. These laws, enacted by state legislatures, are designed to prohibit the activity of undercover investigators who are critical of agricultural business practices and the industrialized slaughter of agricultural animals.¹ The 2017 *Denver Law Review* Symposium, *Uproar: The Intersection of Animals & the Law*, held on Friday, February 9, 2017 at the University of Denver Sturm College of Law, examined animal's legal rights, or lack thereof. The panel *The Role of Transparency and Free Speech in the Animal Rights Movement* focused on the legal hurdles presented by laws that silence whistleblowers in order to protect agricultural business. Professor Rebecca Aviel, Director of the Constitutional Rights and Remedies Program at the University of Denver Sturm College of Law, and associate professor of law, moderated the panel.² The discussion was initiated by panelist Professor Alan Chen, a leading national expert in free speech doctrine and theory, and an advocate for plaintiffs in constitutional challenges to ag-gag laws around the nation.³ In addition, Professor Heidi Kitrosser, who teaches about government secrecy at the University of Minnesota Law School, and is currently working on a book about the law and policy of information-leaking and whistleblowing, added to the panel's dialogue.⁴ Completing the panel was Camille Labchuck, Executive Director of Animal Justice and one of Canada's leading animal rights lawyers, who spoke on Canada's aqua-gag laws.⁵

Prof. Chen began the panel by illuminating the history of undercover reporter investigations in slaughter houses and the consequential creation of ag-gag law by legislatures in response. What happens, he explained, is that investigators go to a slaughter house to seek employment. The employment, which is based on misrepresentations of the reporter's identity and intention as an employee, provides access for the reporter to uncover the mistreatment of animals. Typically, the undercover investigator works

1. *What is Ag-gag Legislation?* AM. SOC'Y FOR PREVENTION OF CRUELTY TO ANIMALS, <https://www.aspc.org/animal-protection/public-policy/what-ag-gag-legislation> (last visited Feb. 16, 2018).

2. *Faculty & Staff Page of Rebecca Aviel*, U. DENV. STURM C. L., <https://www.law.du.edu/faculty-staff/rebecca-aviel> (last visited Feb. 16, 2018).

3. *Faculty & Staff Page of Alan Chen*, U. OF DENV. STURM C. L., <https://www.law.du.edu/faculty-staff/alan-chen> (last visited Feb. 16, 2018).

4. *Faculty Page of Heidi Kitrosser*, U. MINN. L. SCH., <https://www.law.umn.edu/profiles/heidi-kitrosser> (last visited Feb. 16, 2018).

5. *About Us Page of Camille Labchuk, BA, JD*, ANIMAL JUST., <https://www.animaljustice.ca/about-us> (last visited Feb. 16, 2018).

for an extended period of time and surreptitiously takes video and recordings that reveal the industrial practices of the organization and its employees. This transparency, Prof. Chen asserted, has led to important political reform, such as legislative reform, food safety investigations, recalls on food, and criminal prosecutions.⁶ In addition, the investigations have increased public awareness regarding the issue and have spurred a desire by the American public to ensure farm animals are protected.⁷

Yet, many agriculturally focused regions in the United States have responded adversely, and, according to Prof. Chen, four types of ag-gag laws have sprung up attempting to quell undercover investigations. The first type criminalizes misrepresentation for the purpose of gaining access to an agricultural business. The vast majority of these laws are aimed at employment-based misrepresentation, such as lying on a job application to gain access to a slaughterhouse.⁸ The second type of ag-gag law prohibits employees from taking photographs or video recordings while at work if done without the consent of the employer.⁹ The third type of ag-gag laws are laws that are constructed to sound like an animal welfare law, but in function sanction undercover reporters.¹⁰ This type of law mandates that any person who witnesses an act of animal cruelty must report it within a twenty-four-hour period. Thus, because of the long-term nature in which this type of reporting requires, the twenty-four-hour report requirement effectively compromises the investigator's ability to conduct research and forces self-incrimination upon the reporter. Lastly, the fourth type of ag-gag law is fashioned similarly to North Carolina's tort law, which allows an employer to sue an employee who goes into a private facility and publicly reports misconduct.

Overall, Prof. Chen was hopeful but realistic regarding the challenges to overcoming ag-gag laws. He stated that while there has been some success in invalidating the laws, the decisions are still vulnerable to being overturned. Accordingly, he presented two major legal theories that have proven successful in litigation thus far. First, under *United States v. Alvarez*, the United States Supreme Court has stated that lies are speech.¹¹ This theory contends that lies must be protected in the context of carrying out undercover investigations because they contain value, promote truth, and facilitate free speech.¹² Second, individuals possess a First Amendment right to go on to someone's private property without their consent and secretly record their conduct when that conduct is a matter of public concern. In conclusion, Prof. Chen stated that the invalidation of ag-gag laws aid in

6. See *Victories: Winning the Case Against Animal Cruelty*, ANIMAL LEGAL DEF. FUND, <http://aldf.org/cases-campaigns/victories/> (last visited Feb. 16, 2018).

7. *Id.*

8. KAN. STAT. ANN. §§ 47-1825-47-1830 (2015).

9. IOWA CODE § 717A.3A (2012).

10. MO. REV. STAT §§ 578.405-578.412 (2015).

11. *United States v. Alvarez*, 567 U.S. 709, 712 (2012).

12. *Id.*

the free flow of information and that continuing to challenge these laws are a critical element in the animal welfare movement.

Next, Prof. Kitrosser added to the discussion by expounding upon the necessity of whistleblower protection for employees. She began by asserting that a critical component of exposing abuse in animal slaughterhouses originates from career employees. These employees, whose vocation places them inside agricultural slaughterhouses, are sometimes exposed to animal abuse and consequently seek to take action against the violations they witnessed. However, Prof. Kitrosser contends, the issue lays in the fact that these career employees lack the legal protections necessary to adequately disclose the violations they have witnessed.¹³

To highlight and provide context to this problem, Prof. Kitrosser described the issues Dr. Dean Wyatt faced in his position as a public health veterinarian for the USDA Food Safety Inspection Service.¹⁴ Dr. Wyatt discovered violations of the humane handling regulations of animals in two plants. As a result of the gruesome violations he witnessed, Dr. Wyatt voiced concerns to his supervisors. Rather than heed his recommendation to shut down parts of the plants, Dr. Wyatt was reprimanded and labeled as a “trouble maker.”¹⁵

Notably, it was not until Congress strengthened the Whistleblower Protections Enhancement Act in 2012 that employees were protected in disclosing violations they uncovered during the course of their job.¹⁶ Thus, Prof. Kitrosser explained, the level of protection afforded to employees as whistleblowers connects to a larger ecology of transparency that relates to the exposure of abuse in factory farms and slaughterhouses.

The third panelist, Camille Labchuk, added to the discussion by expanding upon the Canadian version of ag-gag laws, known as “aqua-gag” laws. Aqua-gag laws specifically pertain to cetacean captivity, which include the harbor of whales, dolphins, or porpoises. Ms. Labchuk has intervened in lawsuits on this topic on behalf of her organization, Animal Justice, and is an active representative for the free speech rights of animal advocates.

Recently, Ms. Labchuk participated in an animal welfare case where an activist’s speech was being challenged under copyright law. The suit,

13. *Horton v. Dep’t of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995) (holding that disclosures to the alleged wrongdoer are not protected); *Willis v. Dep’t of Agriculture*, 141 F.3d 1139, 1144 (Fed. Cir. 2000) (excluding from protection a disclosure made as part of an employee’s normal job duties).

14. Dean Wyatt, *Continuing Problems in USDA’s Enforcement of the Humane Methods of Slaughter Act*, HUM. SOC’Y, http://www.humanesociety.org/assets/pdfs/farm/dr_dean_wyatt.pdf (last visited Feb. 24, 2018).

15. Whistleblower Profile of Dean Wyatt, FOOD INTEGRITY CAMPAIGN, <https://www.food-whistleblower.org/profile/dean-wyatt/> (last visited Feb. 16, 2018).

16. Whistleblower Protection Enhancement Act of 2012, S. 743, 112th Cong. (2012).

which was initiated by Vancouver Aquarium after a low-budget documentary was released that was largely critical of the Aquarium for confining cetaceans, contested ownership rights of photographs and videos taken at the Aquarium that depicted harmed cetaceans and other animals.¹⁷ The Canadian court of appeals found that copyright law can't be used to silence criticism of the Aquarium and potentially stifle public debate. This, Ms. Labchuk contended, was a win for freedom of expression.

In addition, public involvement on the issue continued to expand as cetaceans across Canada perished. Fortunately, this led to the creation of the Parks Control By-Law, which banned cetaceans from being brought in captivity. Ultimately, Ms. Labchuk's mission to instill within the Canadian courts that confining cetaceans is sufficiently harmful and connected with violence that the practice of keeping cetaceans in captivity is unworthy of expressive activity protections remains an on-going battle.

Overall, throughout their presentations, the panelists expressed hope for the future of free speech and transparency around animal welfare, and emphasized that civic engagement and upholding societal values that protect free speech provide immediate avenues for the movement to persist.

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17. *Vancouver Aquarium v. Gary Charbonneau*, [2017] BCCA 395 (Can.).

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