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Idaho's Ag-Gag Law Goes Down And Other States May Be Next

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Law360, New York (August 24, 2015, 3:36 PM ET) -- In 1904, Upton Sinclair misrepresented himself in order to get a job in Chicago's meatpacking industry so he could conduct an undercover investigation of the working conditions. The animal cruelty and meat-handling procedures he recounted in the 1907 novel, *The Jungle,* led to the passage of the federal Meat Inspection Act and Pure Food and Drug Act.

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In 2014, an undercover investigator working for Mercy For Animals documented horrific animal cruelty at the Dry Creek Dairy in Hansen, Idaho. Video of the abuse was released nationally. The owners of the dairy instituted reforms and the abusers were prosecuted. But the law that was passed this time, within months of the video's release, protects neither the animals nor the food supply, but the agriculture industry.

The "interference with agricultural production" law[1] criminalizes entering an "agricultural production facility" by "force, threat, misrepresentation or trespass," obtaining records or employment the same way, making video or audio recordings of an agricultural production facility's operations without consent, or damaging the facility's "operations, livestock, crops, personnel, equipment or premises."

Animal Legal Defense Fund and other plaintiffs filed a case challenging the constitutionality of the prohibitions on misrepresenting oneself to obtain employment at an agricultural production facility and intentionally causing physical damage or injury to a facility's operations. The court dismissed the latter challenge, holding the plaintiffs did not allege any intent to violate the prohibition and therefore had no standing to challenge it.[2] Unpersuaded by defendants' claim that the law prohibits conduct, not speech, the court allowed the plaintiffs' other First Amendment and equal protection claims to proceed. The ALDF's two remaining challenges were against the prohibition against misrepresentation to gain employment and the prohibition against recording without consent. In early August, the court overturned the misrepresentation to gain employment and recording without consent provisions of the statute.[3]

First Amendment Challenges

Taking first the misrepresentation challenge, the court addressed the state's reliance on *U.S. v. Alvarez*, in which the U.S. Supreme Court struck down the Stolen Valor Act, which made it a crime to lie about receiving military decorations. The state tried to distinguish *Alvarez*, claiming that the interference with agricultural production statute criminalized not just lies, but lies accompanied by conduct. The court was unpersuaded and further noted that *Alvarez* held that the government could criminalize only lies that caused "legally cognizable harm." The court then determined that any harm caused by undercover investigators would not be caused by the misrepresentation used to gain employment but by publication of a story about the facility, and that any harm caused by a true story is not the kind of harm contemplated by the holding in *Alvarez*. The court returned to the story of Upton Sinclair and held that § 18-7042 punishes

and suppresses the speech of undercover investigators and whistleblowers who raise issues of importance to the public: food safety, treatment of farm animals, working conditions of agricultural workers. The court noted that Upton Sinclair could have been punished under this law.

Turning to the recording provision, the court found that provision further violates the First Amendment by impermissibly regulating content-based speech. Although the state argued that the statute is content neutral because it regulates where protected speech occurs, not what is said, again, the court was not persuaded, finding that the law does, indeed, repress speech based on the content of the recording since it only prohibits recordings of the agricultural facility's operations. The court further reiterated its earlier findings that the purpose of the statute was to suppress speech critical of agricultural practices, in essence an impermissible regulation of particular ideas.

The state argued that the privacy and property rights superseded other interests, but the court held that the state failed to show a compelling interest and that the statute was not narrowly tailored, thus failing the strict scrutiny test. Highlighting again the public's strong interest in food safety, worker safety and the humane treatment of animals, the court easily found the state had no compelling interest. Furthermore, given that Idaho has laws prohibiting fraud, trespass, defamation and stealing documents, the court found that the law is not narrowly tailored. The state's argument that the statute is narrowly tailored because it regulates speech only in a private forum failed, again because food production is not private and instead is a matter of great public concern.

Equal Protection Challenge

The First Amendment argument in this case was a foreseeable challenge; the equal protection argument less so. There were two prongs to the court's analysis. The state had only to show that the discrimination in the statute, treating undercover investigators and whistleblowers in agricultural production facilities differently than whistleblowers in any other business, was rationally related to a legitimate government interest. The state argued that agricultural production deserves extra protection because agriculture is key to Idaho's economy and culture, and that agricultural production facilities are often the target of undercover investigations. The court's language in refuting this argument is strong:

> The State's logic is perverse—in essence the State says that (1) powerful industries deserve more government protection than smaller industries, and (2) the more attention and criticism an industry draws, the more the government should protect that industry from negative publicity or other harms. Protecting the private interests of a powerful industry, which produces the public's food supply, against public scrutiny is not a legitimate government interest.[4]

Furthermore, the court looked to the rather damning legislative history underlying the statute. The legislative history reveals not only the purpose of the law, but the legislature's attitude toward animal rights investigators and animal welfare organizations. The legislative history contains phrases like "marauding invaders centuries ago who swarmed into foreign territory and destroyed crops to stave foes into submission," "terrorists," "farm terrorism," "vigilante tactics" and, "this is the way you combat your enemies."[5] The court found that it was "based on these assumptions" the legislature passed the interference with agricultural production law, and that "a purpose to discriminate and silence animal welfare groups in an effort to protect a powerful industry cannot justify" the statute.[6] In the face of this, the state's argument that the statute didn't create an impermissible classification was irrelevant — the animus evidenced in the legislative history was sufficient for the court to find an equal protection violation.

Constitutional scholar Erwin Chemerinsky filed an amicus brief in this case urging the court to consider a further equal protection argument. He suggested the court should apply a strict scrutiny standard because the statute discriminates on the basis of a fundamental right: free speech.[7] Having already completed a full free speech analysis, the court had to only briefly analyze the argument here and quickly held that because the statute was not narrowly tailored to meet a substantial government interest, it also violated the equal protection clause.

The Future of Ag-Gag Legislation

Agricultural gag laws, or so-called ag-gag laws (i.e., laws that protect the agriculture industry from undercover investigation and intentional disruption), appeared in a few states in the early 1990s. Legislatures claimed they were necessary to defend against extreme acts of violence perpetrated largely against pharmaceutical companies that tested on animals. These laws have not been tested because they have rarely been used. However, the past few years have seen a resurgence in ag-gag legislation, this time aimed more at undercover investigation. These laws have failed in several states, passing only in Missouri, Idaho and Utah, but given the current public scrutiny of food production issues, it is likely more legislatures will consider them.

ALDF v. Otter should be a cautionary warning to states considering one form of the new legislation, the prohibition against misrepresentation to gain employment at an agricultural production facility, especially since some legislatures were already wary of First Amendment challenges. Another new legislative approach criminalizes failure to report animal cruelty within a limited time-period, usually 24 or 48 hours.

These "quick reporting laws" make failure to report animal cruelty a form of animal cruelty itself. Proponents claim they protect animals by preventing undercover investigators from keeping video and using it for fundraising purposes instead of reporting the crimes immediately. Opponents claim the laws prevent investigation into systemic animal cruelty, which takes time to document so it can be prosecuted. Missouri is the only state in which this type of law has been enacted and it remains untested. It has failed in several other states.

Where this case should have a significant impact on future of ag-gag legislation is in its strong findings of the public interest in food safety and animal welfare and the animus toward animal welfare organizations underlying ag-gag legislation. The court's earlier findings that ALDF demonstrated no plans to intentionally cause physical damage or injury to agricultural production facilities contradict the "terrorist" label that is so carelessly thrown around in legislatures. The rhetoric labeling animals rights and animal welfare organizations as terrorists is pervasive, and, in some legislatures, persuasive.

But, at the same time, mainstream and alternative media are full of stories highlighting food safety and in the face of public pressure, and recently several large restaurants and grocery store chains have announced they will only source more humanely raised meat. The court is still determining the remedy in this case, but its holdings are clear: protecting the agriculture industry does not trump constitutional free speech and equal protection.

Ag-gag legislation that criminalizes participation is a significant public interest conversation that should have a hard time standing.

—By Stacey L. Gordon, University of Montana

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[1] Idaho Code Ann. § 18-7042 (Supp. 2015).

[2] Animal Legal Defense Fund v. Otter, 44 F. Supp. 3d 1009, 1018 (D. Idaho 2014).

[3] Animal Legal Def. Fund v. Otter, No. 1:14-CV-00104-BLW, ___ F. Supp. 3d ___ (D. Idaho Aug. 3, 2015) (quoting *U.S. v. Alvarez*, ___ U.S. ___, 132 S. Ct. 2537 (2012).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Brief of Amicus Curiae Erwin Chemerinsky, *Animal Legal Def. Fund*, ___ F. Supp. 3d ___ (D. Idaho Aug. 3, 2015) (No. 1:14-CV-00104-BLW).