Industrial farmers have a PR problem: large-scale food manufacturing tends to go hand-in-hand with incidents of animal abuse. We can disagree about the pervasiveness of the problem, but it is nevertheless a problem. Iowa's solution? Criminalize the whistleblowers.

From time to time, animal rights activists infiltrate corporate agribusinesses and film various abuses, such as pigs crammed in gestation crates or a worker stabbing cows with pitchforks. As the LA Times and NPR report, now Iowa (and Florida) are looking to pass a bill to criminalize these undercover investigations. Don't try to fix the problem, just try to cover it up!

I want to take a look at the proposed Iowa bill, to play a little game I call "spot the constitutional issue." (I will, however, refrain from posting any pictures of baby chickens.)

The Iowa bill, SF 431 in the Iowa Senate, defines the following criminal offenses: animal facility tampering, animal facility interference, and animal facility fraud. It also defines a parallel set of offenses for crop operation tampering, interference and fraud. There are additional civil actions and an exception for government officers and licensed veterinarians. Penalties range from simple misdemeanor to class "C" felony.

Animal facility tampering is basically defined as the destruction of property at the facility, or injuring, killing or stealing animals from the facility. This would include disruption of operations at the facility. While I am fairly certain that all those acts are already criminalized under Iowa law, none of those acts have a strong speech element. Clearly, the Iowa legislature is targeting various acts of civil disobedience and criminal acts by animal rights activists that attempt to disrupt facility operations. But I don't think it will be a shock to anyone that destroying property at an animal facility is a crime.

Animal facility interference is more interesting, from a First Amendment perspective. To be guilty of interference, you must do *any* of the following:

1. Record an image or sound while at an animal facility;
2. Possess a record of an image or sound at an animal facility as described in (1);
3. "Exercise control over an animal facility" with intent to deprive the facility of the animal or property; or

4. Enter a facility or remain at the facility with notice that the facility is not open to the public.

(1) and (2) are the biggest losers from a free speech perspective. I can think of only one instance where the Supreme Court has allowed the criminalization of mere possession of an image or sound: child pornography. The Court recently struck a federal law that criminalized, among other things, the sale of dogfighting videos (*United States v. Stevens*). So I see little chance that possession of a recording from an animal facility could ever meet First Amendment scrutiny.

(1) targets the act of recording itself. Because (1) requires that you are at the facility when the recording is made, the recording could be used as evidence of trespass. But that is not what (1) criminalizes. It criminalizes the act of recording, where the speech interest is at its apex. I would liken this to one of my favorite opinions by Justice Scalia, *R.A.V. v. St. Paul*, a case concerning an ordinance that criminalized cross burning, in which he grumbled:

> Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.

The point of *R.A.V. v. St. Paul* was that the ordinance targeted the speech at issue—racial hatred—that amounted to a presumptively invalid content-based regulation. (How Justice Scalia found protected expression in cross burning but not nude dancing is a subject for another day.) In Iowa's SF 431, (2) is a loser because it similarly and blatantly targets the speech of the animal rights activist when the simple criminalization of trespass is a viable alternative.

Third, we have "animal facility fraud." This criminalizes making false statements or acting under false pretenses to access an animal facility. The typical example would be the animal rights activist who misleads an agribusiness employer in order to work undercover at the animal manufacturing plant. The James O'Keefe of the animal rights world. Criminalizing fraud in this manner may pass constitutional muster.

We can look to a Fourth Circuit case, *Food Lion, Inc. v. ABC.* You may remember the

scandal in the late 1990s in which two undercover ABC reporters, working at Food Lion, videotaped a variety of unsanitary meat-handling practices (such as bleaching rank meat to remove its odor). In an excellent example of how not to handle public relations, Food Lion chose to sue the reporters for fraud, breach of duty of loyalty (to the store, not to the consuming public), and misrepresentations. The Fourth Circuit held that the First Amendment did not bar recovery for fraud and breach of duty of loyalty, but threw out the misrepresentations claim under North Carolina law.

So criminalization of "animal facility fraud" may meet First Amendment scrutiny, given the *Food Lion* case. There are, however, two additional hurdles. First, the Fourth Circuit specifically relied on the fact that fraud and breach of duty of loyalty did not target nor single out the press. One could make a strong case that the Iowa law does in fact target and single out investigative reporters, and instead Iowa agribusinesses should rely on common law claims of fraud and breach of duty of loyalty. Second, SF 431 allows for civil consequential damages resulting from the fraud. (Consequential damages would include compensation for foreseeable lost profits.) *Food Lion* specifically rejected Food Lion's claim for *compensatory* damages, such as loss of good will and lost sales from ABC's investigative report. The Fourth Circuit noted that Food Lion would have had to sue for defamation, which it could not prove, and therefore "such an end-run around First Amendment strictures is foreclosed by *Hustler* [*Magazine v. Falwell*]." Depending on the circumstances, allowing consequential damages resulting from the fraud may also be barred by First Amendment restrictions.

The take-away here is quite simple. Iowa already has protections against trespass, theft, and fraud. Instead of looking to fix the problems of industrial agriculture, the Iowa legislatures are wasting resources trying to cover up the problems. In doing so, SF 431 is an obvious attack on our valuable First Amendment rights, rights that protect our ability to be informed about what we eat.