

**ESTABLISHING AND ENFORCING A RIGHT
TO TRUTHFUL INFORMATION ABOUT PIG FARMING
IN A FAKE NEWS ERA**

KELSEY EBERLY*

I.	INTRODUCTION	291
II.	WHAT WE KNOW ABOUT PIG FARMING	292
III.	THE SOURCES OF INFORMATION	299
IV.	A WAR OF NARRATIVES AND THE RISE OF AG-GAG LAWS	302
V.	FIGHTING THE GAG: ESTABLISHING AND ENFORCING THE RIGHT TO TRUTHFUL INFORMATION	305
VI.	THE FUTURE OF PIG FARMING AND PORK: ASSERTING THE RIGHT TO TRANSPARENCY	309

I. INTRODUCTION

This article stems from a 2018 panel discussion on the past, present, and future of “hog farming,” and attempts to grapple with a set of questions that may at first seem hopelessly broad: What do we know about pig farming in the United States, and how do we know it? What do we have a *right* to know about pig farming? How can that right be protected and exercised? And ultimately, how will this information shape the future—for pigs, for the public, and for the pork industry?

By “we,” I mean not only the U.S. consumer,¹ but more broadly, advocates, decision-makers, and stakeholders.² And by “pig farming,” I mean the breeding, raising, and slaughter in the United States of domesticated pigs for their meat.³ I will focus in particular about what we know, and have a right to know, about the welfare and experience of pigs who are farmed. However, comparable articles could (and should) be devoted to examining the state of and

* Staff Attorney, Animal Legal Defense Fund

1. For a discussion of the critical implications of this common term, see Frank Trentmann, *How Humans Became ‘Consumers’: A History*, THE ATLANTIC (Nov. 28, 2016), <https://www.theatlantic.com/business/archive/2016/11/how-humans-became-consumers/508700/>.

2. The most obvious stakeholders, of course, being the pigs themselves.

3. Although this article addresses pig farming in the United States, increasingly that activity exists to serve the export market. The pork export market is a large and growing sector of the industry, accounting for 26.6 percent of U.S. pork production in 2018 and reaching a record \$6.486 billion. Top consumers of U.S. pork include Japan, which purchased 31 percent of U.S. pork exports in 2017, followed by Mexico at 20 percent of exports. See *Pork International Markets Profile*, AGRIC. MARKETING RESOURCE CTR., <https://www.agmrc.org/commodities-products/livestock/pork/pork-international-markets-profile> (last updated Nov. 2018).

right to truthful information about myriad other related subjects—how pig farming affects our environment, rural economies, and the people who live near pig farms; how it affects the safety of our food and impacts public health; the experiences of pig farm and slaughterhouse workers.

Moreover, I include slaughter in this discussion of pig farming because, beyond being the obvious final experience of pigs raised for meat, it is a critical component of this discussion because of the tremendous political and economic sway held by the companies that purchase pigs to slaughter and process into meat and other products.⁴

A central thesis of this article is that words matter. I deliberately use the term “pig” rather than “hog” or “swine” because “pig” is a catch-all term encompassing all members of the domesticated species, while “hog” more commonly refers to grown animals who are reaching or have reached their “market” (or slaughter) weight.⁵ I will explain or avoid altogether industry jargon like “swine” and “finishers”⁶ that exists solely to commodify animals and obscure the critical fact that each pig being farmed is a living, feeling individual.

Finally, it would be fair to ask, who cares? If we aren’t pig farmers, why should we care about pig farming? The following sections should make abundantly clear that, for the tens of millions of pigs, and for the many Americans who care about animal welfare, pig farming matters a great deal.⁷

II. WHAT WE KNOW ABOUT PIG FARMING

While pig farming has existed in the United States since our earliest days as a nation,⁸ it has grown exponentially—in terms of

4. Elected leaders are subject to pitched lobbying by entities like the National Pork Producers Council, whose political clout is storied. Indeed, the Council was the top political contributor in Iowa in the 2016 election cycle. See *Iowa Top Contributors, 2016 Cycle*, OPENSECRETS.ORG, <https://www.opensecrets.org/states/donors.php?state=IA&cycle=2016> (last visited Mar. 23, 2019).

5. See, for example, Merriam-Webster’s definition of hog: a domesticated swine especially when weighing more than 120 pounds. *Hog*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/hog> (last visited Mar. 3, 2019).

6. For a glossary of common pig industry terms, see *Basic Pig Terms*, AM. ASS’N OF SWINE VETERINARIANS, <https://www.aasv.org/foundation/research/prevet/Appendix1.pdf> (last visited Mar. 3, 2019); see also *Swine Production Glossary*, UNIVERSITY OF PENNSYLVANIA SCHOOL OF VETERINARY MEDICINE, SWINE PRODUCTION, <http://cal.vet.upenn.edu/projects/swine/abc.html> (last visited Mar. 23, 2019).

7. Again, although I will not discuss it here, for those who care about our environment and climate change, about the treatment of those working in or living near hog farms, or about the safety of our meat, the effects pig farming has in these areas more than answer the question of why we should—and do—care.

8. See *History of Pigs in America*, MEDIUM (Feb. 21, 2018), <https://realpigfarming.com/history-of-pigs-in-america-7c4e8b837228>; Sherrie Webb, *Gestation Sow*

the number of animals raised and killed for their meat—in the last hundred years, and particularly since the 1960s, while the number of farms has simultaneously fallen precipitously.⁹ The United States is the world's second-largest producer of pork, ranking second only to China.¹⁰ As of March 1, 2018, there were an estimated 72.9 million pigs on U.S. farms, up 3% from 2017.¹¹ Americans' love of bacon is well-documented;¹² U.S. consumers ate over 64 pounds of pork per capita in 2017.¹³ Pig farming is, unsurprisingly, then, a major industry in the United States,¹⁴ concentrated in several states.¹⁵ Pig production has been booming in the United States in recent years, with so many pigs being raised for meat, and pig production increasing so quickly, that a glut of meat in the market now raises industry fears of lower prices.¹⁶

What does the average pig farm look like? Although in 2010 to 2012¹⁷ there were around 50,000 farms containing between 1 and 99

Housing: Producer Perspective, NORTH AM. MEAT INST., <https://www.meatinstitute.org/index.php?ht=a/GetDocumentAction/i/104555> (last visited Mar. 3, 2019).

9. See Webb, *supra* note 8 (charting the number of U.S. pig farms and their average number of animals from 1965 to 2012, as well as a current comparison of pig farm size versus number of animals).

10. See *Pork International Markets Profile*, *supra* note 3.

11. See Cheryl Day, *What Did Analysts Say About March Hogs & Pigs Report?*, FARM PROGRESS: SOUTHEAST FARM PRESS (Mar. 29, 2018), <https://www.farmprogress.com/hog/what-did-analysts-say-about-march-hogs-pigs-report/gallery?curr=139&slide=1>.

12. See, e.g., Kyle Nazario, *Americans Are Eating Bacon Faster Than Farmers Can Produce It*, ATLANTA J.-CONST. (July 20, 2017), <https://www.ajc.com/lifestyles/food-cooking/americans-are-eating-bacon-faster-than-farmers-can-produce/GKUHmMx2Atsx581d4gyCzO/>. For a more critical analysis of why and how Americans became so enamored of bacon, see Daron Taylor, *The Real Reason Why Americans Love Bacon for Breakfast*, WASH. POST (June 27, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/06/27/baconforbreakfast/?utm_term=.4ba48de218c1.

13. See PORK CHECKOFF, WORLD PER CAPITA PORK CONSUMPTION, <https://www.pork.org/facts/stats/u-s-pork-exports/world-per-capita-pork-consumption/>. The United States ranks eighth in per capita pork consumption. *Id.*

14. The National Pork Producers Council states that pork production has an estimated \$23.4 billion of gross output. *Pork Facts*, NAT'L PORK PRODUCERS COUNCIL, <http://nppc.org/pork-facts/> (last visited Mar. 3, 2019).

15. Iowa, North Carolina, and Minnesota are the top pork-producing states, with Iowa being far and above the largest pork producing state, with 23.6 million pigs as of Sept. 1, 2018. *Iowa Pig Population Reaches Record 23.6 Million*, U.S. NEWS & WORLD REP. (Sept. 27, 2018, 6:02 PM), <https://www.usnews.com/news/best-states/iowa/articles/2018-09-27/iowa-pig-population-reaches-record-236-million>.

16. Jacob Bunge, *Record Beef, Pork, Chicken Production Cuts Into Profits at U.S. Meat Companies*, WALL ST. J. (Aug. 6, 2018), <https://www.wsj.com/articles/record-beef-pork-chicken-production-cuts-into-profits-at-u-s-meat-companies-1533588182>; *Glut of U.S. Pork Dampens Global Outlook*, FARM JOURNAL'S PORK (Oct. 20, 2016, 7:00 AM), <https://www.porkbusiness.com/article/glut-us-pork-dampens-global-outlook>.

17. See U.S. DEPT OF AGRIC., NAT'L AGRIC. STATISTICS SERV., FARMS, LAND IN FARMS, AND LIVESTOCK OPERATIONS: 2010 SUMMARY 21 (2011) [hereinafter USDA, LIVESTOCK OPERATIONS SUMMARY], https://www.nass.usda.gov/Publications/Todays_Reports/reports/fnl0211.pdf; see also PORK CHECKOFF, NUMBER OF U.S. HOG OPERATIONS BY SIZE GROUPS AND PERCENT OF INVENTORY [hereinafter NUMBER OF U.S. HOG OPERATIONS], <https://www.pork.org/facts/stats/structure-and-productivity/number-of-u-s-hog-operations-by-size-groups-and-percent-of-inventory/#hpinventory>.

pigs, these account for only a tiny fraction—less than 1%—of the pigs being raised in the United States.¹⁸ Instead, around 3,100 mega-farms of over 5,000 pigs each accounted for over 60 percent of the U.S. pig inventory, with operations holding between 2,000 and 4,999 pigs accounting for another 25 percent.¹⁹ The vast majority of pigs raised for meat are housed indoors with thousands of their fellow animals, in facilities appropriately called “hog confinements.”²⁰ Pigs on these mega-farms, or Concentrated Animal Feeding Operations (CAFOs),²¹ live their lives entirely indoors, in long, low-slung sheds or warehouses containing a large number of pens holding groups of pigs or, in the case of breeding pigs, rows of metal crates or cages holding individual gestating or nursing mother pigs.²² The animals live in close confines with their pen-mates, on slotted concrete floors that allow their waste to fall into a roughly 8-foot pit below them.²³ These pits empty into large “lagoons”—literal cesspools—of fecal matter and urine, where the waste sits before being spread on nearby farm fields.²⁴

In the case of pig breeding facilities, gilts and sows,²⁵ or female pigs, are typically intensively confined for their entire lives in gestation and farrowing crates, as they are impregnated via artificial insemination over the course of several breeding cycles.²⁶ Gestation crates “remain the standard” on over three-fourths of U.S.

18. USDA, LIVESTOCK OPERATIONS SUMMARY, *supra* note 17, at 21; NUMBER OF U.S. HOG OPERATIONS, *supra* note 17.

19. USDA, LIVESTOCK OPERATIONS SUMMARY, *supra* note 17, at 21; NUMBER OF U.S. HOG OPERATIONS, *supra* note 17.

20. See e.g., Donnelle Eller, *Iowa's Largest Pork Producer is Adding 90,000 Hogs Amid Calls for Moratorium*, DES MOINES REG. (Oct. 26, 2017, 6:32 PM), <https://www.desmoinesregister.com/story/money/agriculture/2017/10/26/iowas-largest-pork-producer-adding-90-000-hogs-amid-calls-moratorium/800820001/>; Debra Chandler Landis, *Illinois Issues: Big Swine Operations Put Residents, Pig Farms at Odds*, NAT'L PUB. RADIO ILLINOIS (June 29, 2017), <http://www.nprillinois.org/post/illinois-issues-big-swine-operations-put-residents-pig-farms-odds#stream/0>.

21. See *Animal Feeding Operations*, U.S. DEP'T OF AGRIC., NAT. RESOURCE CONSERVATION SERV., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/plants/animals/livestock/afol/> (last visited Mar. 3, 2019) for AFO and CAFO definitions.

22. See *id.*; see also Tom J. Bechman, *See Inside Brand-New Confinement Hog Barn*, FARM PROGRESS: SOUTHEAST FARM PRESS (May 4, 2018), <https://www.farmprogress.com/hog/see-inside-brand-new-confinement-hog-barn/gallery?slide=1> for pictures of pig confinements.

23. For an animated tour of a pig confinement, see Jemal R. Brinson, *Data: Inside a Hog Confinement*, CHI. TRIB., <https://www.chicagotribune.com/news/watchdog/87985103-132.html> (last visited Mar. 3, 2019).

24. *Id.*

25. A gilt is a female pig who has not yet given birth, or “farrowed”, while a sow is one who has. See *Basic Pig Terms*, *supra* note 6.

26. The industry estimates that only 17.3 percent of female pigs spend even a portion of their gestation in open pens. *Survey Shows Few Sows In Open Housing*, NAT'L HOG FARMER (June 7, 2012), <https://www.nationalhogfarmer.com/animal-well-being/survey-shows-few-sows-open-housing>.

pig farms today.²⁷ These crates are little wider or longer than the pig's body, immobilizing her and preventing her from turning around or even lying down comfortably.²⁸ Even in supposedly "crate-free" or "group housed" facilities, breeding pigs are commonly confined in a gestation crate from the time they are inseminated until they are confirmed pregnant at 35–40 days, and then, after their pregnancy, confined in a farrowing crate while they nurse their piglets in a cage alongside the crate, separated by metal bars from their young.²⁹ This leaves even pigs in environments often described as "crate-free" or "group housed" in crates over half of each of the three or four years they are used to breed piglets before being sent to slaughter.³⁰

After being removed from their mothers, piglets are subjected to "processing"—a series of amputations and physical mutilations that typically include teeth clipping with a pair of side cutters, cutting off the animal's tail with scissors, and castration (of the males) with a surgical blade.³¹ Even though they are widely recognized to cause pain to the animals, these procedures are performed without any anesthesia or analgesic.³² Castration is done to prevent the pigs'

27. Lynne Curry, *After a Decade of Promises, Has the Food Industry Made Progress on Gestation Crates?*, CIV. EATS (Mar. 21, 2018), <https://civileats.com/2018/03/21/after-a-decade-of-promises-has-the-food-industry-made-progress-on-gestation-crates/>.

28. AM. VETERINARY MED. ASS'N, WELFARE IMPLICATIONS OF GESTATION SOW HOUSING (2015), <https://www.avma.org/KB/Resources/LiteratureReviews/Documents/WelfareImplicationsOfGestationSowHousing.pdf>; see also JOHN MCGLONE, GESTATION STALL DESIGN AND SPACE: CARE OF PREGNANT SOWS IN INDIVIDUAL GESTATION HOUSING (2013), <https://porkcdn.s3.amazonaws.com/sites/all/files/documents/2013SowHousingWebinars/Gestation%20Stall%20Design%20and%20Space.pdf> (describing dimensions of a common gestation crate as 24 inches wide by 7 feet long).

29. See Curry, *supra* note 27; Smithfield Foods, *The Group Housing System for Pregnant Sows on Company-Owned Farms at Smithfield Foods*, YOUTUBE (July 31, 2003), <https://www.youtube.com/watch?v=IDkadoJgkct&app=desktop> (describing crating of pigs after artificial insemination and until pregnancy is confirmed, and then use of farrowing stall or crate after piglets are born).

30. Smithfield Foods, *supra* note 29; see also Maisie Ganzler, *No Free Lunch: What "Gestation-Crate-Free" Pork Actually Means*, BON APPETIT MGMT. COMPANY (July 7, 2016), <http://www.bamco.com/blog/free-lunch-gestation-crate-free-pork-actually-means/>.

31. Christina Phillips, *How to Process Piglets*, PORK INFO. GATEWAY (Nov. 10, 2009), <http://porkgateway.org/resource/how-to-process-piglets/>; see also Allen Harper, *Piglet Processing and Swine Welfare*, VA. COOPERATIVE EXTENSION (May 2009), https://www.sites.ext.vt.edu/newsletter-archive/livestock/aps-09_05/aps-0513.html.

32. The Canadian Veterinary Medical Association (CVMA) has stated that castration causes pain to pigs at any age and recommends the use of analgesic. The Canadian National Farm Animal Care Council's Code of Practice for the Care and Handling of Pigs requires the use of analgesics during castration and tail-docking to help control post-procedure pain. See Jim Eadie, *Pain Control During Piglet Processing*, SWINEWEB.COM (Nov. 19, 2018), <http://www.swineweb.com/pain-control-during-piglet-processing/>; see also *Applegate Humanely Raised vs Typical Industry Practices*, APPLGATE, <https://applegate.com/mission/animal-welfare> (last visited Mar. 4, 2019) (prohibiting tail docking and teeth clipping and describing comparison of Applegate practices with these standard industry practices); see also third-party welfare certifier standards, e.g., HUMANE FARM ANIMAL CARE, HFAC STANDARDS FOR PIGS 19 (2018), http://certifiedhumane.org/wp-content/uploads/Std18.Figs_1A-3.pdf [hereinafter HFAC STANDARDS FOR PIGS] (discussing need for pain relief because "[s]cientific

meat from having an unpleasant taste and odor (“boar taint”), while teeth clipping and tail docking are performed to prevent the animals from biting and injuring each other and their mother in their confined spaces.³³ When pigs are not crowded together in the barren pens, and have ample living space and an enriched environment (including bedding of hay and straw), painful procedures like tail docking are not necessary.³⁴

After being “processed,” some piglets fail to grow, and may suffer from illness or injury, whether due to botched castration or tail docking, or for another reason.³⁵ These piglets are typically “euthanized” by manual blunt force trauma, a method by which a worker holds the piglet by its back legs and slams its head onto a hard surface like the concrete floor.³⁶ The effectiveness of this method, particularly with poorly trained or fatigued workers, has been broadly questioned, leading even many in the pork industry to conclude that it presents serious welfare issues for piglets.³⁷ In 2013, the American Veterinary Medical Association recommended producers phase out manual blunt force trauma because of these welfare concerns.³⁸

In these high-density conditions, in which animals live cheek by jowl, directly above pits of their own waste, antibiotics are commonly administered to prevent disease and keep the animals growing steadily towards their market weight.³⁹ A 2018 report from

data have shown that castration of piglets causes pain-related behavior during and following castration procedures.”).

33. See Sherrie Clark, *Castration of Piglets*, PORK INFO. GATEWAY (Nov. 10, 2009), <http://porkgateway.org/resource/castration-of-piglets/>; Phillips, *supra* note 31.

34. HFAC STANDARDS FOR PIGS, *supra* note 32, at 19 (prohibiting tail docking and stating that producers should take steps “to prevent tail biting such as environmental enrichment or reducing stocking densities.”).

35. See Animal Legal Def. Fund, *Investigation Reveals Cruelty and Neglect at Hormel Foods’ Pig Supplier*, YOUTUBE (May 25, 2016), <https://youtu.be/z5VitkAhM7Y> [hereinafter *Neglect at Hormel Foods’ Pig Supplier*] (showing botched castration of piglet resulting in intestinal hernia).

36. Larry Sadler et al., *Alternative Euthanasia Methods to Manually Applied Blunt Force Trauma for Piglets Weighing Up to 12 Pounds*, PORK INFO. GATEWAY (Nov. 14, 2014), <http://porkgateway.org/resource/alternative-euthanasia-methods-to-manually-applied-blunt-force-trauma-for-piglets-weighing-up-to-12-pounds/>; see also *Euthanasia Blunt force Trauma Standard Operating Procedure* (Method 2), COMMON SWINE INDUSTRY AUDIT MANUALS AND STANDARD OPERATING PROCEDURES, NATIONAL PORK BOARD, <https://www.pork.org/production/tools/common-swine-industry-audit/csia-manuals-standard-operating-procedures/> (last visited Mar. 23, 2019).

37. *Tyson Outlines Welfare Requirements for Hog Producers*, MEAT+POULTRY (Jan. 9, 2014), <https://www.meatpoultry.com/articles/10102-tyson-outlines-welfare-requirements-for-hog-producers>; see also *Neglect at Hormel Foods’ Pig Supplier*, *supra* note 35 (showing ineffective “euthanasia” of piglet leading to prolonged death).

38. Sadler et al., *supra* note 36.

39. See DAVID WALLINGA, *BETTER BACON: WHY IT’S HIGH TIME THE U.S. PORK INDUSTRY STOPPED PIGGING OUT ON ANTIBIOTICS* (2018) <https://www.nrdc.org/sites/default/files/better-bacon-pork-industry-antibiotics-ib.pdf> (describing rampant use of antibiotics in pork industry).

the Natural Resources Defense Council estimated that 27.1% of all “medically important”⁴⁰ antibiotics sold in the United States are used in pig production, compared with 27.6% being used in human medicine.⁴¹ The feeding of antibiotics to pigs who are not sick has contributed to the public health crisis of antibiotic resistance and the rise of “superbugs” that are resistant to even antibiotics of last resort.⁴²

As pigs enter their final phase of growth before slaughter (a period called “finishing” in the industry), a large majority—60 to 80 percent—are administered ractopamine hydrochloride (trade name Paylean®), a drug in the beta-agonist family that is used as a feed additive to speed lean muscle growth.⁴³ Ractopamine is restricted or banned in 160 countries due to concerns about the lack of scientific evidence establishing its safety in human food.⁴⁴ Feeding pigs ractopamine leaves residues of the drug in pork, yet the USDA does not routinely test pork destined for the U.S. market for these residues, the way it tests for antibiotic residues.⁴⁵

Ractopamine has also been reported to cause significant welfare problems for the pigs, resulting in nearly a quarter million documented “adverse event[s]” in pigs—the most of any animal

40. *Id.* at 3. “Medically important” antibiotics are classes of antibiotics used in both human medicine and animal agriculture. *Id.* at 1. The World Health Organization’s list of Critically Important Antimicrobials, last updated in 2017, is available at *WHO List of Critically Important Antimicrobials for Human Medicine (WHO CIA List)*, WORLD HEALTH ORG., <https://www.who.int/foodsafety/publications/cia2017.pdf> (last visited Mar. 4, 2019).

41. See WALLINGA, *supra* note 39, at 3; see also Chris Dall, *Report: US Pigs Consume Nearly as Many Antibiotics as People Do*, U. MINN., CTR. FOR INFECTIOUS DISEASE RES. & POL’Y (June 6, 2018), <http://www.cidrap.umn.edu/news-perspective/2018/06/report-us-pigs-consume-nearly-many-antibiotics-people-do>.

42. See WALLINGA, *supra* note 39, at 3–5; see also Jenny Luna, *The Pork Industry’s Stance on Antibiotics Totally Misses the Point*, MOTHER JONES (Apr. 13, 2017, 10:00 AM), <https://www.motherjones.com/environment/2017/04/pork-antibiotics-kfc/> (describing the 2016 discovery of bacteria on U.S. pig farm resistant to last-resort antibiotics carbapenems).

43. The minority of the pigs in the United States *not* fed ractopamine are almost exclusively raised for the export market, to serve countries like Russia and China, which ban the drug. Helena Bottemiller, *Dispute Over Drug in Feed Limiting US Meat Exports*, NBC NEWS (Jan. 25, 2012, 7:29 AM), <https://www.nbcnews.com/business/dispute-over-drug-feed-limiting-us-meat-exports-174014>; Dan Charles, *A Muscle Drug for Pigs Comes Out of the Shadows*, NAT’L PUB. RADIO: THE SALT (Aug. 14, 2015, 4:32 AM), <https://www.npr.org/sections/thesalt/2015/08/14/432102733/a-muscle-drug-for-pigs-comes-out-of-the-shadows>; Shruti Date Singh, *U.S. Is Missing Out On China’s Pork Boom Because Its Pigs Are on Muscle Drugs*, BLOOMBERG (Aug. 11, 2015, 7:00 PM), <https://www.bloomberg.com/news/articles/2015-08-11/pigs-using-muscle-drug-means-u-s-missing-china-pork-import-boom>.

44. *U.S. Is Missing Out On China’s Pork Boom Because Its Pigs Are on Muscle Drugs*, *supra* note 43; Emily Houghton, *Thailand urges US to stop threatening its consumer health*, THE PIG SITE (May 29, 2018, 12:00 AM), <https://thepigsite.com/news/2018/05/thailand-urges-us-to-stop-threatening-its-consumer-health-1>; Lisa O’Carroll, *Food fight: doubts grow over post-Brexit standards*, THE GUARDIAN (Mar. 6, 2019, 02:00 AM), <https://www.theguardian.com/politics/2019/mar/06/food-fight-doubts-grow-over-post-brexit-standards>.

45. Bottemiller, *supra* note 43 (discussing residues and the testing for such residues of meat for the export market only).

drug.⁴⁶ Ractopamine is associated with behavioral changes, along with cardiovascular, musculoskeletal, reproductive, and endocrine problems in pigs.⁴⁷ It has been particularly linked with heightened stress levels, broken bones, weakness, and trembling, and with increasing the risk that animals will become non-ambulatory (“downer” animals) and unable to stand, which can lead to further welfare problems in transit to slaughter.⁴⁸

When pigs are ready to be trucked to slaughter, they are loaded onto double-decker trucks and may be hauled long distances to the slaughterhouse. As with so many other parts of the industry, slaughter plants, too, have gotten more “efficient”—i.e., faster—in recent years, with some of the largest slaughterhouses running the fastest, killing approximately 1,100 pigs an hour.⁴⁹ Pigs are commonly stunned before slaughter by being lowered into a chamber that is filled with carbon dioxide.⁵⁰ Other stunning methods, including electrical stunning and the use of captive bolt guns,⁵¹ are less common at large slaughterhouses, but continue to be used throughout the industry. The purpose of the stunning is to render pigs insensible to pain during the slaughter process, as required by the Humane Methods of Slaughter Act.⁵² However, pigs can suffer during slaughter, particularly when they become “downed.” Downed animals may be shocked, prodded, or dragged in an effort to get them to stand and walk to slaughter.⁵³ Pigs improperly stunned, whether because of worker error, excessive slaughter speed, mechanical failure, or otherwise, may be slaughtered while still conscious and sensible to pain.

46. *Id.*

47. CTR. FOR FOOD SAFETY, RACTOPAMINE FACT SHEET: LEAN MEAT = MEAN MEAT (2013), https://www.centerforfoodsafety.org/files/ractopamine_factsheet_02211.pdf.

48. *Id.*; Bottemiller, *supra* note 43.

49. Deborah Berkowitz & Suzanne McMillan, *High-Speed Pig Slaughter Will Be Disastrous for Everyone Involved*, THE GUARDIAN (Apr. 17, 2018, 10:13 AM), <https://www.theguardian.com/commentisfree/2018/apr/17/trump-administration-usda-swine-slaughter-rule-pigs-pork>.

50. Temple Grandin, *Carbon Dioxide Stunning (Updated September 2018)* <https://www.grandin.com/humane/carbon.stun.html>; *Higher Welfare Method of Stunning Pigs Gains Ground*, ANIMAL WELFARE INSTITUTE, <https://awionline.org/awi-quarterly/2016-winter/higher-welfare-method-stunning-pigs-gains-ground> (describing prevalence of various stunning methods at small, mid-sized, and large pig slaughter plants). Video footage of CO₂ stunning of pigs can be seen at: <https://www.youtube.com/watch?v=EpS04mazPlw>.

51. *Id.*; see also 9 C.F.R. §§ 313.5-313.30 (describing approved methods of humane slaughtering of swine including carbon dioxide, electrical, captive bolt, and gunshot).

52. See 7 U.S.C. §§ 1901-1907 (2018).

53. The mistreatment of downed sows prompted California to pass a law requiring their immediate euthanizing rather than allowing them to be driven to slaughter. CAL. PENAL CODE ANN. § 599f (Deering 2018). This law was struck down as preempted by the Supreme Court, see *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452 (2012), and it remains legal to slaughter non-ambulatory disabled pigs.

III. THE SOURCES OF INFORMATION

While some of this information about pig farming is available through government and industry reports, much is also obscured from public view, leading to the obvious question, how has it become public knowledge? What are our sources of information about what goes on inside pig confinements and slaughterhouses?

Some information can be, and has been, gathered from public records, whether through the federal Freedom of Information Act (FOIA)⁵⁴ or analogous state public records laws. To be sure, FOIA has been instrumental in gathering information about the feeding of pharmaceuticals such as ractopamine to pigs,⁵⁵ or about the food safety and welfare consequences of high-speed pig slaughter⁵⁶ and broader trends in food safety and humane slaughter compliance in pig slaughterhouses nationwide.⁵⁷

However, there are severe limitations to the amount and type of information that may be gathered from public records. Because there are so few reporting requirements,⁵⁸ and no federal law (and few state laws) governing the treatment of animals on farms, there is little regulatory oversight of pig farms that would result in the creation of public records that could be obtained to gather

54. See 5 U.S.C. § 552 (2018).

55. See Press Release, Ctr. for Food Safety, Public Interest Groups Sue FDA Demanding Records on Controversial Animal Growth Drugs Under Freedom of Information Act (Oct. 7, 2013), <https://www.centerforfoodsafety.org/press-releases/2630/public-interest-groups-sue-fda-demanding-records-on-controversial-animal-growth-drugs-under-freedom-of-information-act> [hereinafter Ractopamine FOIA Suit] (describing FOIA lawsuit by the Center for Food Safety and Animal Legal Defense Fund, resulting in the disclosure of thousands of pages of public records relating to ractopamine adverse drug events).

56. Darcy Rakestraw, *New Documents Show Privatized Hog Inspection Scheme Rife with Food Safety Violations*, FOOD & WATER WATCH (Feb. 21, 2018), <https://www.foodandwaterwatch.org/news/new-documents-show-privatized-hog-inspection-scheme-rife-food-safety-violations> (describing collection through FOIA of records demonstrating safety performance of high-speed pig slaughter plants).

57. See, e.g., ANIMAL WELFARE INST., HUMANE SLAUGHTER UPDATE: FEDERAL AND STATE OVERSIGHT OF THE WELFARE OF FARM ANIMALS AT SLAUGHTER (2017), <https://awionline.org/sites/default/files/products/FA-HumaneSlaughterReport-2017.pdf>.

58. For example, the EPA has exempted animal (including pig) confinements from federal requirements to inform state and local officials about releases of dangerous levels of pollutants imposed by the Emergency Planning and Community Right-to-Know Act ("EPCRA"). *CERCLA and EPCRA Reporting Requirements for Air Releases of Hazardous Substances from Animal Waste at Farms*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/epcra/cercla-and-epcra-reporting-requirements-air-releases-hazardous-substances-animal-waste-farms> (last updated Feb. 15, 2019) [hereinafter *CERCLA and EPCRA Reporting Requirements for Animal Waste Pollution*]. Environmental groups have sued over this exemption. See Steve Davies, *Enviros Sue EPA Over Manure Emissions Reporting Exemption*, AGRI-PULSE (Oct. 3, 2018, 6:10 AM), <https://www.agri-pulse.com/articles/11498-enviros-sue-epa-over-manure-emissions-reporting-exemption>. Congress similarly amended the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 2018, to exempt air emissions from decomposing animal waste from CERCLA reporting. See *CERCLA and EPCRA Reporting Requirements for Animal Waste Pollution*, *supra* note 58.

information about such farms. The lack of affirmative reporting requirements often means data can only be collected on an industry-wide level, providing little clarity into any particular pig confinement, or even into the average such facility.⁵⁹

Second, industry has been aggressive in pushing back on what it deems “confidential” information that should not be disclosed to public records requesters,⁶⁰ while agencies themselves fail to respond to public records requests in a timely or complete manner. As a result, interested parties often must navigate byzantine administrative processes or sue to obtain public records.⁶¹

Into this relative void, a wealth of information has entered the public domain from a tried-and-true source: undercover investigations.⁶² In the last twenty years there have been over 20 such undercover investigations of pig breeding, raising, and slaughtering facilities.⁶³ In a typical undercover investigation, an investigator applies for and accepts a job at a pig confinement or

59. For example, antibiotic use on farms can only be assessed through sales data, since there exist no reporting requirements related to actual use on farms. Industry has strenuously objected to antibiotic use reporting. See *Trends in U.S. Antibiotic Use, 2018*, THE PEW CHARITABLE TRUSTS (Aug. 1, 2018), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/08/trends-in-us-antibiotic-use-2018>; see also Maryn McKenna, *How Pharma Hides Data About Farm Antibiotic Use*, WIRED (June 11, 2018, 12:45 PM), <https://www.wired.com/story/to-understand-antibiotic-abuse-we-need-data-from-farms/> (discussing difficulty of obtaining data on antibiotic use in animal agriculture).

60. The Supreme Court recently granted certiorari to hear *Food Marketing Institute v. Argus Leader Media*, Docket No. 18-841 (docketed Oct. 15, 2018), addressing the breadth of FOIA Exemption 4, which protects from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). An aggressive construction of the exemption was championed by animal industry amici including the American Farm Bureau Federation and the Animal Agriculture Alliance. See Brief of Amici Curiae in support of Petitioner, Food Marketing Institute, https://www.supremecourt.gov/DocketPDF/18/18-481/89207/20190222121338353_18-481%20Amici%20Brief.pdf.

61. See, e.g., *Ractopamine FOIA Suit*, *supra* note 55; see also Press Release, Farm Sanctuary, Animal Welfare Institute and Farm Sanctuary Sue USDA to Disclose Slaughterhouse Records (Aug. 23, 2018), <https://www.farmsanctuary.org/media/2018-press-releases/animal-welfare-institute-and-farm-sanctuary-sue-usda-to-disclose-slaughterhouse-records/>.

62. The history of undercover investigations of the agriculture industry dates back to the early 1900s, when Upton Sinclair’s *The Jungle* exposed horrific conditions in meat processing plants, leading to the passage of the Federal Meat Inspection Act and the Pure Food and Drug Act.

63. Facilities investigated include Belcross Farm, Seaboard Farms, Murphy Family Ventures, Hormel Foods, Country View Family Farms, Smithfield, Iowa Select, Prestage, Hawkeye Sow Centers, Wyoming Premium Farms, Christensen Farms, Southern Quality Meats, Rosewood Farms, Tyson Pork Group, Iron Maiden Hog Farm, The Maschhoffs, and Quality Pork Processors. See *Investigations*, ANIMAL VISUALS, <http://animalvisuals.org/projects/data/investigations> (listing 19 pig-specific investigations, not including those covering pigs and other species as well). See also *Neglect at Hormel Foods’ Pig Supplier*, *supra* note 35; *Hormel stops operations at supplier farm after video shows animal abuse*, REUTERS (Jan. 31, 2017, 4:22 PM), <https://www.reuters.com/article/us-hormel-foods-livestock-abuse/hormel-stops-operations-at-supplier-farm-after-video-shows-animal-abuse-idUSKBN15F2MW> (describing investigation of The Maschhoffs by Mercy for Animals).

slaughterhouse, and then wears a pinhole camera for the course of his or her employment, recording what the investigator is seeing and hearing as he or she performs job functions over the course of weeks or months.

Inside pig confinements and slaughterhouses, investigators have documented, in the uniquely telling medium of video,⁶⁴ what life is *really* like for the pigs (and workers). Some investigations reveal sadistic abuse or torture of pigs.⁶⁵ More often, investigations reveal standard practices that may be common and accepted in the conventional pig industry, but which shock and horrify the public, including castration and tail docking without anesthesia, manual blunt force trauma “euthanasia” of piglets,⁶⁶ and the confinement of pregnant pigs in gestation and farrowing crates.⁶⁷ Investigations have also revealed long-term neglect and lack of veterinary care for animals,⁶⁸ and the filthy, cramped environments in which pigs live in the confinements.⁶⁹ Investigations of pig slaughterhouses have revealed downed animals too sick or weak to walk to slaughter being shocked repeatedly with electric prods or beaten with paddles,⁷⁰ as well as incidents of pigs being stunned ineffectively and dismembered while still conscious.⁷¹

The information gained through undercover investigations has been amplified through broad media coverage and resulted in a cascade of consequences, including criminal prosecutions,⁷² legislative and administrative reforms,⁷³ civil lawsuits, corporate

64. Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1468 (2015) (explaining “there is no viable alternative to an undercover investigation of the commercial agricultural industry.”).

65. *22 Charges Filed Based on PETA Investigation at Hormel Supplier*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS (Oct. 22, 2018), <https://www.peta.org/blog/22-charges-filed-based-peta-investigation-hormel-supplier/>.

66. Mercy for Animals, *Exposed: Hormel Supplier Mutilates Pigs*, YOUTUBE (Feb. 2, 2017), https://www.youtube.com/watch?time_continue=8&v=QrOB8DsxLMI [hereinafter *Hormel Supplier Mutilates Pigs*]; *Neglect at Hormel Foods’ Pig Supplier*, *supra* note 35.

67. *Hormel Supplier Mutilates Pigs*, *supra* note 66; *see also Iowa Investigation: Hawkeye Sow Centers (Hormel Supplier)*, COMPASSION OVER KILLING, <http://cok.net/inv/iowa-pigs/> (last visited Mar. 5, 2019).

68. *Neglect at Hormel Foods’ Pig Supplier*, *supra* note 35; *see also Abuse of Pigs Caught on Tape: Mercy For Animals’ Undercover Investigation Exposes Pork Industry Abuse*, ABC NEWS (June 28, 2011), <http://abcnews.go.com/US/video/abuse-pigs-caught-tape-13951972>.

69. *See* Humane Soc’y of the U.S., *Undercover at Smithfield Foods*, YOUTUBE (Dec. 15, 2015), https://www.youtube.com/watch?v=L_vqIGTKuQE.

70. *See New COK Exposé: High-Speed Slaughter Hell at Hormel, Makers of SPAM*, COMPASSION OVER KILLING, <http://cok.net/inv/hormel/> (last visited Mar. 5, 2019).

71. *Id.*

72. *See, e.g., 22 Charges Filed Based on PETA Investigation at Hormel Supplier*, *supra* note 65 (leading to 22 charges of cruelty and neglect).

73. Investigations at gestation crate facilities spurred state legislation and ballot initiatives to ban these forms of intensive confinement and to establish some of the country’s first on-farm legislation, in Florida (*see* Article X, Sec. 21 of the Constitution of the State of Florida, <http://www.leg.state.fl.us/statutes/index.cfm?submenu=3#A10S21>), Arizona (*see* Proposition 204, the Humane Treatment of Farm Animals Act, Arizona Revised Statutes sec.

animal welfare reforms and pledges,⁷⁴ backlash against (and from) corporate purchasers,⁷⁵ and decreased consumer confidence.

IV. A WAR OF NARRATIVES AND THE RISE OF AG-GAG LAWS

Understandably, the rise of undercover investigations, revealing inhumane treatment that causes customers to flee in droves, has prompted hand-wringing throughout the animal agriculture industry and in the pig farming industry specifically. It has led many in the industry to go on the offense in a variety of ways. First, many have claimed or suggested, without evidence, that the conditions depicted in undercover investigations are fake, staged, or otherwise aberrant—the work of a saboteur, or a single “bad apple” not reflective of the broader industry.⁷⁶ Aside from the obvious implausibility that anyone could “stage” someone beating a pig, cutting off his tail with scissors, or trapping her in a gestation crate, this insinuation has never been supported by any evidence. Nor have there been civil suits for defamation against investigators or the animal protection organizations that send them to farms. As to “bad apples,” the regularity with which investigations reveal animal mistreatment and cruel industry practices belies any notion that investigators could, through random chance, have had the fortune to obtain employment and document conditions only at the “bad” farms.

Another way the pig industry has gone on the offensive against undercover investigations is by attempting to craft a competing narrative to the one illustrated so vividly through investigations. In this alternative narrative (or alternative reality), family farmers

13-2910.07, https://apps.azsos.gov/election/2006/info/PubPamphlet/Sun_Sounds/english/prop204.htm, and California (see Proposition 2, the Prevention of Farm Animal Cruelty Act, <https://vig.cdn.sos.ca.gov/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop2>). For a summary of such state measures, including gestation crate bans, see *Farm Animal Confinement Bans by State*, ASPCA, <https://www.aspc.org/animal-protection/public-policy/farm-animal-confinement-bans> (last visited Mar. 24, 2019).

74. In just a three-year period, from 2012 to 2015, over 200 food companies—from meat producers to food service providers to restaurant chains to retailers—have made commitments to phase out or move away from the sourcing of pork from facilities using gestation crates. See *Corporate Commitments on Farm Animal Confinement Issues*, CAGEFREEFUTURE.COM, <http://cagefreefuture.com/wp/commitments/> (last visited Mar. 5, 2019).

75. See, i.e., a prolonged, and ultimately successful, campaign against the use of gestation crates in Wal-Mart’s supply chain. *Walmart Cruelty*, WALMART CRUELTY, <http://www.walmartcruelty.com/learnmore.php> (last visited Mar. 5, 2019); Matt Rice, *Progress: Walmart Announces Sweeping Animal Welfare Policy*, MERCY FOR ANIMALS (May 22, 2015), <https://mercyforanimals.org/progress-walmart-announces-sweeping-animal>.

76. Anne-Marie Dorning, *Iowa Pig Farm Filmed, Accused of Animal Abuse*, ABC NEWS (June 29, 2011, 9:29 AM), <https://abcnews.go.com/Business/iowa-pig-farm-filmed-accused-animal-abuse/story?id=13956009> (discussing unfounded industry claim of part of investigation being “staged”).

ensure the pigs' health and well-being⁷⁷ through a carefully balanced diet and attentive veterinary care. The farmer is a careful steward of his environment, and adheres to good old-fashioned farmer values, doing the hard work of caring for animals because it's the "right thing to do," feeding families here and around the world. In this narrative, gestation crates become "individual stalls" or even "maternity pens."⁷⁸ Antibiotic use is "responsible,"⁷⁹ and ractopamine is akin to a health supplement given to pigs "as part of a healthy, balanced diet" and "made from ingredients that can be found in nature, including raspberry ketones."⁸⁰

The industry's narrative-offensive has been prompted by the realization that increasing numbers of people care and are curious about the way their food is produced, and specifically, about the way farmed animals are treated. Survey after survey has demonstrated that consumers want farmed animals to be treated humanely, and seek out animal products from sources they perceive as more humane.⁸¹

But the narrative shown by undercover investigations, of course, tells a starkly different story than the one the pig industry has tried to tell. Investigations reveal pigs raised not on "farms" but in industrial animal factories where they are treated as unfeeling cogs in a machine, subjected to unimaginable cruelty in the service of getting them to market as quickly and inexpensively as possible.

77. "Well-being" is a particular buzzword of the industry. See, e.g., *Animal Well-Being*, PORK CHECKOFF, <https://www.pork.org/animal-well-being/> (last visited Mar. 5, 2019).

78. *Getting the Right Message on Sow Gestation Stalls*, NAT'L HOG FARMER (July 3, 2012), <https://www.nationalhogfarmer.com/animal-well-being/getting-right-message-sow-gestation-stalls>.

79. *Responsible Use of Antibiotics*, PORK CHECKOFF, <https://www.pork.org/public-health/responsible-use-antibiotics/> (last visited Mar. 5, 2019).

80. *Beta-Agonists, Feed Additives and Ractopamine*, WE CARE INITIATIVE, <https://www.porkcares.org/our-practices/day-to-day-animal-health-on-pig-farms/beta-agonists-feed-additives-and-ractopamine/> (last visited Mar. 5, 2019); *Statement From Elanco on Ractopamine*, DR. OZ, <https://www.doctoroz.com/page/statement-elanco-ractopamine> (last visited Mar. 5, 2019).

81. For example, a recent survey research sampled 1,000 U.S. consumers of meat, eggs, and dairy on their attitudes towards the welfare of farm animals and the willingness to pay for products with trustworthy welfare certifications. Seventy-six percent of consumers surveyed said they are concerned about the welfare of that are raised for food for people to eat. Most respondents (71%) reported paying attention to labels that indicate how the animals were raised, and 86% believed there should be an objective third party to ensure farm animal welfare. In addition, 74% of consumers said that they would be likely to switch to meat, eggs, and dairy products with labels that guarantee that the products came from farm animals which were raised to a higher animal welfare standard. These findings suggest that many US consumers, particularly millennials, would be willing to seek out higher welfare products if they trusted the label claims. *Results from a Survey of American Consumers*, LAKE RESEARCH PARTNERS, Feb. 1, 2019, https://www.aspc.org/sites/default/files/aspc-2018_animal_welfare_labelling_and_consumer_concern_survey.pdf (describing results from July 2018 consumer survey commissioned by the ASPCA).

Recognizing that it was losing in the court of public opinion, then, given the blowback from undercover investigations, the industry adopted a new strategy that can only be described as shooting the messenger. Starting in the early 1990s in Kansas, and then continuing in 2012 in Iowa (after a hiatus of roughly twenty years), states began to pass laws criminalizing taking photos and videos or otherwise conducting undercover investigations on farms and slaughterhouses.⁸² Iowa's statute, which created the new crime of "agricultural production facility fraud," was soon dubbed an agricultural gag or "Ag-Gag" law.⁸³ Counting the earlier statutes passed in the 1990s in Kansas, North Dakota, and Montana,⁸⁴ by 2016 nine states had passed Ag-Gag laws, with many more states trying and failing.⁸⁵

Ag-Gag laws work in a variety of ways. Some contain explicit bans on photography and/or videography.⁸⁶ Others, like Utah's and Iowa's, criminalize gaining access to or employment with agricultural facilities by "false pretenses" or through misrepresentations.⁸⁷ Others criminalize causing damage to the "enterprise" of an animal facility.⁸⁸ Finally, others act as a general prohibition on entry and unauthorized access to non-public business premises, affecting not only animal facilities but childcare centers, nursing homes, and all other industries.⁸⁹

82. IOWA CODE § 717A.3A (2018).

83. The term "ag-gag" to describe statutes like Iowa's was first coined by Mark Bittman. See Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES, (Apr. 26, 2011, 9:29 PM) <https://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/>.

84. KAN. STAT. ANN. §§ 47-1825 to -27 (2018); N.D. CENT. CODE §§ 12.1-21.1-01 to -03 (2018); MONT. CODE ANN. §§ 81-30-101 to -103 (2018).

85. ARK. CODE ANN. § 16-118-113 (2018); IDAHO CODE § 18-7042 (2018); MO. REV. STAT. § 578.013 (West 2018); N.C. GEN. STAT. § 99A-2 (2018); UTAH CODE ANN. § 76-6-112 (LexisNexis 2018) (illustrating Ag-Gag statutes passed later in Arkansas, Idaho, Montana, North Carolina, and Utah).

86. See, e.g., KAN. STAT. ANN. § 47-1827(c)(4) (2018); UTAH CODE ANN. § 76-6-112(2)(a) (LexisNexis 2018); IDAHO CODE § 18-7042(1)(d) (2018).

87. See, e.g., IOWA CODE § 717A.3A(1)(a) (2018). The reason criminalizing misrepresentations or the making of false pretenses criminalizes undercover investigations is that many would-be investigators are forced to conceal the fact that they are affiliated with an animal protection organization, or their intent to record while on the premises, in order to secure employment with the farm or slaughterhouse. The constitutionality (or lack thereof) of criminalizing such falsehoods has been explored in depth elsewhere. See, e.g., Chen & Marceau, *supra* note 64; Alan K. Chen & Justin Marceau, *Developing A Taxonomy of Lies Under the First Amendment*, 89 U. COLO. L. REV. 655, 696 (2018).

88. KAN. STAT. ANN. §§ 47-1827 (2018); see also IOWA CODE § 717A.3A (2018).

89. See, e.g., N.C. GEN. STAT. § 99A-2 (2018); *Court Rejects States' Argument, Allows Federal Constitutional Challenge To N.C. 'Anti-Sunshine' Law to Proceed*, PUB. JUST. (Dec. 19, 2018), <https://www.publicjustice.net/court-rejects-states-argument-allows-federal-constitutional-challenge-to-n-c-anti-sunshine-law-to-proceed/> (discussing sweep of law); ARK. CODE ANN. § 16-118-113 (2018); Joe Fassler, *Arkansas's HB 1665 is Bigger Than "Ag-Gag"*, THE NEW FOOD ECON. (Mar. 21, 2017), <https://newfoodeconomy.org/arkansas-hb-1665-ag-gag/> (discussing reach of statute).

Although several Ag-Gag statutes have been struck down or limited by courts, after failing to pass constitutional muster,⁹⁰ statutes remain on the books in six states, deterring undercover investigations and chilling the broad swaths of speech—and thus information—they result in from reaching the public.⁹¹

V. FIGHTING THE GAG: ESTABLISHING AND ENFORCING THE RIGHT TO TRUTHFUL INFORMATION

Against this confluence of factors—a gag on undercover investigations, the lack of any public monitoring of farm animal husbandry despite widespread concern over it, a resulting dearth of public information about pig farming, and aggressive pork industry marketing messages—the public is left with an information vacuum or, worse, vulnerable to misinformation about pig farming. This prevents them from voting with their dollars for less cruel or more sustainable food choices, or from pushing for policy reforms to improve pigs' welfare or combat the ills of pig confinements. The relative inaccessibility of truthful information further leaves the average concerned consumer particularly susceptible to misleading advertising about pig farming. Given these factors, the acute need for truthful information about pig farming—for pigs' and the public's benefit—comes sharply into focus. What tools exist to combat misinformation about pig farming? Can they be fairly characterized as providing a right to truthful information and, if not, how can we work to establish and enforce that right?

One such class of tools are federal and state statutes that prohibit the use of false and misleading statements in pork product marketing, whether on product labels or in advertising for such

90. See *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812 (S.D. Iowa 2019) (finding violative of the First Amendment and enjoining enforcement of Iowa law prohibiting gaining access to or employment at animal agriculture facilities by false pretenses or misrepresentations); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1211-13 (D. Utah 2017) (finding facially unconstitutional under the First Amendment a Utah statute that criminalized acts of obtaining access to agricultural operations under false pretenses and recording images at such operations under false pretenses); *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1200-09 (D. Idaho 2015) (finding Idaho law criminalizing interference with agricultural production facilities facially unconstitutional under the First Amendment), *aff'd in part, rev'd in part sub nom.* *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) (reversing as to part of the law related to offers of employment).

91. Montana's, North Dakota's, Missouri's, and Arkansas's laws have not been yet challenged. Kansas's and North Carolina's are subject to ongoing constitutional challenges. See *Civil Rights Complaint, Animal Legal Def. Fund et al. v. Colyer et al.*, No. 2:18-cv-02657 (D. Kan.) (filed Dec. 4, 2018); *People for the Ethical Treatment of Animals, Inc. v. Stein*, 737 F. App'x 122, 130 (4th Cir. 2018).

products.⁹² At the federal level, the U.S. Department of Agriculture administers the Federal Meat Inspection Act's (FMIA) provisions prohibiting the "misbranding" of meat products, defined as the use of product labeling that is "false or misleading in any particular."⁹³ And the Federal Trade Commission (FTC), through its oversight of the Federal Trade Commission Act, is broadly empowered to take action to prevent "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."⁹⁴ Finally, the federal Lanham Act, 15 U.S.C. § 1125(a), can curb misleading pork industry advertising by providing a right of action to competitors⁹⁵ who allege an injury to a commercial interest in reputation or sales that is proximately caused by a defendant's misrepresentations.⁹⁶

Yet, these federal mechanisms suffer from several critical flaws. First, the Lanham Act, while a powerful tool, relies on competitors to take legal action to stop another's false advertising related to the treatment and/or raising of pigs. Competitors—those who compete in some way with companies that sell pigs and pig products⁹⁷—must thus open themselves up to the expense, risk, and intrusion of litigation in order to attempt to combat another's false statements, dampening the incentive to use this tool.

A second drawback of federal enforcement is the fact that, while broadly empowered to ensure truthful information in advertising, the FTC has to spread limited enforcement and investigatory resources to combat a wide array of deceptive business acts and practices. Further, the agency has no particular expertise in, resources devoted to, or responsibility for, meat product advertising. Thus, while it may, on occasion or request, step in to correct

92. For a detailed discussion on the use of false advertising law to prevent the false "humane"-washing of meat and other animal products, see Carter Dillard, *False Advertising, Animals, and Ethical Consumption*, 10 ANIMAL L. 25 (2004).

93. 21 U.S.C. §§ 601(n)(1), 607, 610(d) (2018).

94. 15 U.S.C. § 45(a)(1) (2018).

95. Another, non-statutory tool available to competitors, consumers, and other interested parties is the complaint procedures of the Better Business Bureau's National Advertising Division (NAD). NAD has taken somewhat frequent action on meat and poultry product advertising (see, i.e., *NAD Finds Line Claim in Ads for Perdue's Organic Chicken Brand, Recommends Advertiser Modify, Discontinue Broadcast, YouTube Spots; Perdue to Appeal*, ADVERT. SELF-REGULATORY COUNCIL (Apr. 27, 2018), <http://www.ascreviews.org/nad-finds-line-claim-in-ads-for-perdues-organic-chicken-brand-recommends-advertiser-modify-discontinue-broadcast-youtube-spots-perdue-to-appeal/>), although as of now, not in relation to pork products or advertiser statements about pig farming.

96. See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 140 (2014).

97. The *Lexmark's* Court's holding broadening Lanham Act standing beyond direct competitors potentially opens up the pool of litigants who suffer and can allege cognizable economic harm stemming from a pork seller's false statements about pig farming. *Id.* at 135 (rejecting *Lexmark's* request to adopt categorical rule allowing only direct competitors to sue, instead opting for a two-prong 'zone-of-interests and proximate cause' test when evaluating a 15 U.S.C. § 1125(a) cause of action).

misleading advertising used by meat producers,⁹⁸ its enforcement activities cannot properly be construed as establishing a right to truthful marketing statements about pig farming. They are instead solely an infrequent backstop against deception.

Finally, a chief flaw in federal tools policing truth in statements about pig farming can be traced to the USDA's liberal approach to regulating meat product labeling. The agency allows the use of the terms like "natural" to be used on the labels of pork products derived from industrial, pharmaceutical-dependent mega-farms that the average consumer would consider far from natural.⁹⁹ The agency further allows producers to use a wide array of other animal raising labeling claims, like "farm-raised", "free-roaming", or "raised without growth-promoting antibiotics", without any consistent standards for such claims, and based on whatever criteria the producer offers to justify the claim without regard to whether a reasonable consumer would understand the claim differently.¹⁰⁰ Given this, the agency's jurisdiction over meat labeling cannot plausibly be construed as guaranteeing a right to truthful information about the pig farming methods of the pork products bearing those labels.

The most pernicious aspect of USDA's permissive administering of its labeling mandate with regard to the messages conveyed to consumers about pigs and their meat, however, is the resulting partial co-opting by the agency of one of the more potent tools for ensuring access to truthful information: state Unfair and Deceptive Acts and Practices ("UDAP") statutes. These statutes prohibit deceptive practices in consumer transactions and, in many states, also bar unfair or unconscionable business practices.¹⁰¹ However, the USDA's approach to meat product labeling—requiring pre-market approval of meat labels¹⁰²—coupled with the FMIA's express

98. In July 2013, for example, Tyson Foods made substantial changes to its website after the Animal Legal Defense Fund submitted a complaint to the Federal Trade Commission challenging the company's deceptive animal welfare claims relating to its chicken. See *Legally Brief: Animal Legal Defense Fund Leads the Way in Farmed Animal Litigation*, ANIMAL LEGAL DEF. FUND (Apr. 2, 2015), <https://aldf.org/article/legally-brief-aldf-leads-the-way-in-farmed-animal-litigation/>.

99. See *Animal Legal Def. Fund v. Hormel Foods Corp.*, 249 F. Supp. 3d 53, 54 (D.D.C. 2017). Subsequent proceedings for *ALDF v. Hormel Foods* are also discussed *infra* note 111.

100. See FOOD SAFETY & INSPECTION SERV., U.S. DEP'T OF AGRIC., LABELING GUIDELINE ON DOCUMENTATION NEEDED TO SUBSTANTIATE ANIMAL RAISING CLAIMS FOR LABEL SUBMISSIONS (2016), <https://www.fsis.usda.gov/wps/wcm/connect/6fe3cd56-6809-4239-b7a2-bccb82a30588/RaisingClaims.pdf?MOD=AJPERES>.

101. See *Unfair & Deceptive Acts & Practices*, NATIONAL CONSUMER LAW CENTER, <https://www.nclc.org/issues/unfair-a-deceptive-acts-a-practices.html> (last visited Mar. 24, 2019).

102. See FOOD SAFETY & INSPECTION SERV., U.S. DEP'T OF AGRIC., A GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS FOR MEAT, POULTRY, AND EGG PRODUCTS 7 (R. Post et al. eds., 2007), <https://www.fsis.usda.gov/wps/wcm/connect/f4af7c74-2b9f-4484-bb16-fd8f982>

preemption clause prohibiting state “labeling . . . requirements” that are “in addition to, or different than, those made under” the Act,¹⁰³ means that false and misleading labeling claims brought under state UDAP statutes are generally preempted by the FMIA, and there is no redress when consumers are deceived by pork product labels the USDA has approved.¹⁰⁴

Notwithstanding this barrier, UDAP laws remain a potent, if uneven, way in which the public can secure access to truthful information about pig farming. California’s trio of consumer protection laws—the Unfair Competition Law,¹⁰⁵ False Advertising Law,¹⁰⁶ and Consumer Legal Remedies Act¹⁰⁷—have been used together to combat meat industry advertising.¹⁰⁸ Similarly, the District of Columbia Consumer Protection Procedures Act (CPPA)¹⁰⁹ establishes a broadly available and liberally “enforceable right to truthful information from merchants about consumer goods and services” available for purchase or lease in the District.¹¹⁰

For example, a suit brought under the D.C. CPPA by the Animal Legal Defense Fund, on behalf of itself and the general public, contends that Hormel Foods’ “Make the Natural Choice” advertising campaign for its Natural Choice line of lunchmeat (including ham) and bacon products misleads consumers by representing that the products, which are sourced from industrial, inhumane,

0012d/Labeling_Requirements_Guide.pdf?MOD=AJPERES (discussing pre-market label approval by USDA’s Food Safety and Inspection Service).

103. 21 U.S.C. § 678 (2018).

104. Cases upholding FMIA preemption of state law labeling claims or requirements include: *Phelps v. Hormel Foods Corp.*, 244 F. Supp. 3d 1312 (S.D. Fla. 2017); *Brower v. Campbell Soup Co.*, 243 F. Supp. 3d 1124 (S.D. Cal. 2017), appeal dismissed, No. 17-55406, 2017 WL 4349372 (9th Cir. Sept. 6, 2017); *People for the Ethical Treatment of Animals v. Whole Foods Mkt. California, Inc.*, No. 15-CV-04301 NC, 2016 WL 362229 (N.D. Cal. Jan. 29, 2016); *Del Real, LLC v. Harris*, 636 F. App’x 956 (9th Cir. 2016); *Trazo v. Nestle USA, Inc.*, No. 5:12-CV-2272 PSG, 2013 WL 4083218 (N.D. Cal. Aug. 9, 2013), on reconsideration, 113 F. Supp. 3d 1047 (N.D. Cal. 2015); *Kuenzig v. Hormel Foods Corp.*, 505 F. App’x 937 (11th Cir. 2013); *Meaunrit v. The Pinnacle Foods Grp., LLC*, No. C 09-04555 CW, 2010 WL 1838715 (N.D. Cal. May 5, 2010); *Am. Meat Inst. v. Leeman*, 180 Cal. App. 4th 728, 102 Cal. Rptr. 3d 759 (2009); *Kraft Foods N. Am., Inc. v. Rockland Cty. Dep’t of Weights & Measures*, No. 01 CIV. 6980 (WHP), 2003 WL 554796 (S.D.N.Y. Feb. 26, 2003).

105. CAL. BUS. & PROF. CODE §§ 17200-17210 (Deering 2018).

106. CAL. BUS. & PROF. CODE §§ 17500-17509 (Deering 2018).

107. CAL. CIV. CODE. § 1750-1784 (Deering 2018).

108. *See, i.e.*, *People for the Ethical Treatment of Animals v. Whole Foods Market California, Inc.*, No. 15-cv-04301 NC, 2016 WL 362229, at *1 (N.D. Cal. 2016) (claiming violation of California law including, inter alia, the Unfair Competition Law, the False Advertising Law, and the Consumer Legal Remedies Act). Similar cases have been filed concerning poultry product advertising. *See Organic Consumers Ass’n v. Sanderson Farms, Inc.*, 284 F. Supp. 3d 1005, 1009 (N.D. Cal. 2018) (filing claims under California’s Unfair Competition Law and False Advertising Law); *Direct Action Everywhere SF Bay Area et. al. v. Diestel Turkey Ranch*, Case No. RG17847475 (Cal. Sup. Ct. 2017); *Carol Leining v. Foster Poultry Farms, Inc. et. al.*, Case No. BC588004 (Cal. Sup. Ct. 2015).

109. D.C. CODE §§ 28-3901-3913 (2018).

110. *See id.* § 28-3901(c)

pharmaceutical-dependent pig confinements and high-speed pig slaughterhouses, are “natural” and otherwise superior to conventional products.¹¹¹ Yet the overly broad sweep of the FMIA’s preemption clause was made clear when the court granted summary judgment in Hormel’s favor in April 2019, notwithstanding the fact that the plaintiff’s claims challenged *only* Hormel’s print and digital advertising campaign, not the Natural Choice meat labels. Thus, even though the D.C. CPPA exists precisely to remedy misinformation campaigns, like Hormel’s Natural Choice one, pertaining to pig farming, exercising this right to truthful information is fraught with obstacles.¹¹²

Thus, UDAP laws, while perhaps the strongest tool yet to establish such an enforceable right to truthful information, also suffer from critical gaps and weaknesses in applicability and availability.¹¹³ Do these state, federal, and extrajudicial tools provide an enforceable right to truthful information about pig farming? Unfortunately, not nearly enough.

VI. THE FUTURE OF PIG FARMING AND PORK: ASSERTING THE RIGHT TO TRANSPARENCY

Given what we know about pig farming—how pigs are treated on massive factory farms, and the lives they lead before they become ham and bacon—along with the threats to and opportunities for gathering more truthful information about pig farming, where do we go from here? How will the information we have, and our ability to obtain the information we need, help steer the future of pig farming, and thus the future for pigs? Certainly, a steady stream of truthful information will be critical to obtaining greatly-needed legislative and corporate changes in the way pigs are raised and treated—for example, to outlaw or eliminate the worst forms of intensive confinement, such as gestation crates, and remove

111. See *Animal Legal Def. Fund v. Hormel Foods Corp.*, No. 2016 CA 004744 B, 2017 D.C. Super. LEXIS 9, at *1-3 (D.C. Sup. Ct. 2017).

112. The Animal Legal Defense Fund plans to appeal the court’s order granting judgment in Hormel’s favor.

113. According to Carolyn Carter of the National Consumer Law Center, “Legislation or court decisions in dozens of states have narrowed the scope of UDAP laws or granted sweeping exemptions to entire industries. Other states have placed substantial legal obstacles in the path of officials charged with UDAP enforcement, or imposed ceilings as low as \$1,000 on civil penalties. And several states have stacked the financial deck against consumers who go to court to enforce the law themselves.” CAROLYN L. CARTER, CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 3 (2009), http://www.nclc.org/images/pdf/udap/report_50_states.pdf (describing numerous exemptions and weaknesses in UDAP statutes).

exemptions in and exceptions to state anti-cruelty laws that allow for painful standard industry practices like tail-docking.¹¹⁴

But the information we have and need about pig farming calls for two commitments: to radical transparency, and to making bacon and ham without raising and killing tens of millions of living, feeling pigs. As explained below, these commitments go hand-in-hand. In the last few years, food technology has advanced dramatically, creating the very real possibility that, in the next five or ten years, we will no longer have to kill a pig to eat a sausage or strip of bacon. Specifically, well-funded start-up companies have set out to revolutionize the meat industry, producing meat by culturing animal cells in growth media and then harvesting them, a technology referred to as “cultured”, “cell-based”, “clean”, or “slaughter-free” meat.¹¹⁵ Start-up companies including New Age Meats, Higher Steaks, and Fork & Goode have specifically set their sights on pork products, with New Age Meats even offering the first public “taste-test” of a prototype of its pork sausage in September 2018.¹¹⁶

The sudden public emergence of the concept of “slaughter-free” meat, and the prospect of its imminent market entrée, has rocked the conventional meat industry and prompted many, particularly in the livestock community, to make broad assertions that these products will not actually be “meat” (or “pork”, as the case may be) at all,¹¹⁷ and thus, must not be allowed to be labeled as such.¹¹⁸

114. For a discussion of farmed animals’ lack of legal protections and state anti-cruelty law exemptions, see *Farmed Animals and the Law*, ANIMAL LEGAL DEF. FUND, https://aldf.org/focus_area/farmed-animals/ (last visited Mar. 6, 2019).

115. See Liz Specht, *Is the Future of Meat Animal-Free?*, INST. OF FOOD TECHNOLOGISTS (Jan. 2018), <http://www.ift.org/food-technology/past-issues/2018/january/features/cultured-clean-meat.aspx>.

116. See Erin Brodwin, *We Tasted the First Lab-Grown Sausage Made Without Slaughtering Any Animals – Here’s What It Was Like*, BUS. INSIDER (Sept. 18, 2018, 9:00 AM), <https://www.businessinsider.com/taste-test-first-cell-based-clean-sausage-meat-made-without-farm-2018-9>.

117. For the search for what to call meat alternatives, see Kory Stamper, *Fake meat needs a better name*, THE BOSTON GLOBE, <https://apps.bostonglobe.com/ideas/graphics/2018/11/the-next-bite/the-marketers/>. For an industry perspective on “fake” plant-based and “lab-grown” meat, see: Gregory Bloom, *Fake meat companies show their stuff in Paris*, MEATINGPLACE (Oct. 25, 2018), <http://www.meatingplace.com/Industry/Blogs/Details/82286> (subscription required).

118. See Petition for the Imposition of Beef and Meat Labeling Requirements: To Exclude Products Not Derived Directly From Animals Raised and Slaughtered from the Definition of “Beef” and “Meat”, U.S. Cattlemen’s Ass’n, <https://www.fsis.usda.gov/wps/wcm/connect/e4749f95-e79a-4ba5-883b-394c8bdc97a3/18-01-Petition-US-Cattlemen-Association-020918.pdf?MOD=AJPERES> (calling for restriction on use of “beef” and “meat” on products not derived from slaughtering livestock). Lawmakers in numerous states have proposed meat labeling censorship bills to stop meat other than that derived from slaughtered animals from being labeled “meat.” See Jessica Almy, *States attempt to criminalize using “meat” on cell-based meat labels*, Good Food Institute, <https://www.gfi.org/states-attempt-to-criminalize-using-meat>; Daniel Moritz-Rabson, *It’s Not Meat if it Doesn’t Come from an Animal: Missouri Law Takes Effect*, NEWSWEEK (Aug. 28, 2018, 3:35) <https://www.newsweek.com/missouri->

Indeed, a series of public meetings held by federal food regulators in the summer and fall of 2018 prompted discussions among the conventional and cultured meat industries of what consumers know and expect when they buy meat products, and what they should know.¹¹⁹ Several in the conventional meat industry contended, rather remarkably, that consumers know exactly what they are getting when they pick up a package of meat in the grocery store.¹²⁰ They thus demanded transparency from the new products, and stated that, to prevent consumer confusion (from what they called “fake” or “lab-grown” meat), slaughter-free meat products must be forced to disclose their production methods to consumers on their product labels.¹²¹ Having formally announced its jurisdiction over labeling of such products,¹²² USDA now stands poised to determine how it will carry out its mandate to ensure truthful labeling with regard to the new slaughter-free meat products.

For once, I am in agreement with the conventional meat industry. Production methods—the use of gestation crates, the use of antibiotics and ractopamine, the indoor confinement of pigs, and the culturing of animal cells and use of scaffolding to “grow” pork—*should* be disclosed to consumers on meat product labels, whether products come from slaughtering animals or not.¹²³ As a society, we

legally-limits-use-word-meat-1092888; AP, *Noem Signs Law That Targets Companies Marketing ‘Fake Meat’*, KTIC (Mar. 25, 2019), <http://kticradio.com/agricultural/noem-signs-law-that-targets-companies-marketing-fake-meat/>.

119. Press Release, U.S. Dep’t of Agric., USDA and FDA Announce Joint Public Meeting on Use of Animal Cell Culture Technology to Develop Products Derived from Livestock and Poultry (Sept. 10, 2018), <https://www.usda.gov/media/press-releases/2018/09/10/usda-and-fda-announce-joint-public-meeting-use-animal-cell-culture>.

120. Public comments in the docket are available at *Use of Cellular Agriculture to Manufacture Products Derived from Livestock and Poultry Stem Cells*, REGULATIONS.GOV, <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=FSIS-2018-0036> (last visited Mar. 6, 2019).

121. *Id.* This sentiment was most commonly offered by speakers from the cattle industry.

122. Press Release, U.S. Food & Drug Admin., USDA and FDA Announce a Formal Agreement to Regulate Cell-Cultured Food Products from Cell Lines of Livestock and Poultry (Mar. 7, 2019), <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm632916.htm> (last visited Apr. 13, 2019).

123. I will concede that this proposal would likely prompt a challenge from conventional producers alleging a First Amendment violation stemming from compelled speech. See *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). *Zauderer* found that “because disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech, warnings or disclaimers might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.” *Id.* at 651 (internal quotations and citations omitted). However, *Am. Meat Inst. v. U.S. Dep’t of Agric.*, held that *Zauderer*, which discussed government mandates requiring disclosure of “purely factual and uncontroversial information[,]” could “apply more broadly to factual and uncontroversial disclosures required to serve other government interests,” including those served by the USDA’s country-of-origin labeling on meat products. 760 F.3d 18, 21 (D.C. Cir. 2014). The interests here—preventing consumer confusion and providing critical information on issues of great importance to consumers, such as the use of antibiotics—are certainly compelling, and on a par with those interests served by country-of-origin labeling in *AMI v. USDA*. Thus, this proposal should pass constitutional muster.

care deeply about how our food is produced and want to know its origins—its narrative. At the same time, pig farming carries myriad consequences—for the pigs who suffer by the millions in confinements, to the distress of those who care about animal welfare, but also for food safety and public health. These matters are too important to be hidden from consumers,¹²⁴ disclosed only through the reactive mechanisms of false advertising lawsuits or the infrequent but horrifying glimpses into industrial pig production that we gain from undercover investigations.

The rise of pork without the pigs, then, leaves us at a crossroads. We might step forward into a future of radical transparency—in which pork at the grocery store is labeled as “slaughter-free” or “from slaughtered pigs”. For pigs and those who believe that they (and we) deserve better, it is a future that would be welcomed.

124. A somewhat similar proposal is outlined in Zak Franklin, *Giving Slaughterhouses Glass Walls: A New Direction in Food Labeling and Animal Welfare*, 21 *ANIMAL L.* 285, 328 (2015) (proposing “requiring a comprehensive list of understandable, common industrial agriculture practices on end-product food packaging” and indicating which such practices were used in the making of the meat products). It would likely face a similar *Zauderer* challenge.