



PennState Law

Center for Agricultural
and Shale Law



Animal Welfare & the Dairy Industry

**QUARTERLY DAIRY
LEGAL WEBINAR**



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and Shale Law

April 26, 2022

(1st Q 2022)



Topic Introduction

- Growing role of the public – “Social License” concept
- Animal rights activism in all animal production agriculture
- Voluntary programs – F.A.R.M., etc.
- Private employer & property rights
- Legal structure to enforce criminal animal cruelty generally
- 3rd Party trespasser vs. “employee trespasser”



Google Search: “*Animal Activism in Dairy*”

- [Is Dairy Farming Cruel to Cows?](#) - *NYT 12/20/20*

Some of their claims are beyond dispute: Dairy cows are repeatedly impregnated by artificial insemination and have their newborns taken away at birth. Female calves are confined to individual pens and have their horn buds destroyed when they are about eight weeks old. The males are not so lucky. Soon after birth, they are trucked off to veal farms or cattle ranches where they end up as hamburger meat.

The typical dairy cow in the United States will spend its entire life inside a concrete-floored enclosure, and although they can live 20 years, most are sent to slaughter after four or five years when their milk production wanes.

- Joaquin Phoenix Oscar acceptance [speech](#) - 3:50 min mark.



Stakeholder Groups Emerging



FARM was created by the National Milk Producers Federation (NMPF) with support from Dairy Management Inc.™ (DMI) in 2009. Program participation is open to all U.S. dairy farmers, cooperatives, and processors. Participants follow rigorous guidelines to ensure the utmost social responsibility on our nation's dairy farms, while committing to continuous improvement. Strong farm management practices are ethical obligations of any dairy business and are vital to ensure long-term success of the dairy industry.

Find out more: nationaldairyfarm.com



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Educational Events Are Everywhere

- Hoard's Dairyman Webinar (June 2021) [Reimagining the Future Dairy – Maintaining our Social License by Improving Animal Welfare](#)
- [Come Together for Animal Ag](#) – 2022 Summit 5/10-12/22 (Kansas City)
- [2022 Dairy Cattle Welfare Symposium](#): *Promoting dairy cattle welfare and ethics through science and implementation of best practices* – 5/18-19/22 (Syracuse)



Dairy Farmers as Employers & Property Owners

- Farmers need to develop confidence in their knowledge of their rights as a private employer and a private property owner.
- First Amendment issues and animal “rights” = cause confusion.

Farmers need 100% clarity on:

1. Common Law of Private Property Rights
2. Employer/Employee Relationship
3. Privacy and Proprietary Rights
4. Statutory Laws Protecting Private Property Rights (trespassing)



“Common Law” of Private Property Rights

- Exclusive right to possession unless some form of “consent.”
- Right to exclude others (unless there is a superseding statutory law).
- Legal actions: negligence & common law “trespass”
- “trespassers” (with a small “t”).
- “known trespassers” – duty to refrain from willful, wanton, reckless acts.
- “licensees” and “invitees.”
- children & “attractive nuisance.”



Employer – Employee Relationship

- Invitee for mutual benefit of both – under common law.
- Statutory laws do apply (OSHA, EEOC, OT, etc.).
- What an employee can “do” in the workplace is defined by the employer (may be subject to a statutory law restricting).
- Workplace rules – ex: no phones, no photographs, no recordings (audio or visual)
- Unless there is an agreement for a defined term of employment, all employees are “at-will” and can be terminated without cause. This is only subject to discrimination laws.



Privacy & Proprietary Information

- Visual or audible “info” available from off-site is “public.”
 - Even from overhead. Ex: drones, GIS.
- All other “info” (sights, sounds, business practices, data, etc.): subject to privacy and/or proprietary rights of owner.
- “*Expectation of privacy*” is protected by U.S. Constitution.
- If you are consenting to public or employee access of any kind, the owner can create rules and workplace rules, signage, etc.



“Ag-Gag” Laws

- Let’s simplify: All state legislative attempts to criminally penalize image and/or audio recording by 3rd parties without consent, or with “invalid” consent (i.e. deception), have been ruled unconstitutional.
- Why? Because they have been viewed as NOT content neutral for one reason or another.
- Can this be solved? Wiretapping crime analogy?
- Has any reported opinion upheld any portion of one?



Ninth Circuit Case

ALDF, et al. v. Wasden, et al. (1/4/18) - Idaho

The panel held that Idaho's criminalization of misrepresentations to enter a production facility, § 18-7042(1)(a), could not survive First Amendment scrutiny. The panel held that the subsection criminalized innocent behavior, was staggeringly overbroad, and that the purpose of the statute was, in large part, targeted at speech and investigative journalists. The panel also struck down the statute's subsection which banned audio and video recordings of a production facility's operations, § 18-7042(1)(d). The panel held that the Recordings Clause regulated speech protected by the First Amendment and was a classic example of a content-based restriction that could not survive strict scrutiny.

The panel held that § 18-7042(1)(b)—which criminalizes obtaining records of an agricultural production facility by misrepresentation—protected against a legally cognizable harm associated with a false statement and therefore survived constitutional scrutiny under *United States v. Alvarez*, 567 U.S. 709 (2012). Finally, the panel upheld the constitutionality of § 18-7042(1)(c), which criminalizes obtaining employment by misrepresentation with the intent to cause economic or other injury.



Eight Circuit Case

ALDF, et al. v. Reynolds, et al. (8/13/21) - Iowa

Employment X

In this appeal, we consider whether an Iowa statute prohibiting accessing agricultural production facilities by false pretenses and making false statements as part of an employment application to an agricultural production facility violates the First Amendment. The district court ruled that both provisions are unconstitutional and enjoined their enforcement. We affirm in part and reverse in part.

Access

We consider first the Access Provision, which provides that a person is guilty of agricultural production facility fraud if he “obtains access to an agricultural production facility by false pretenses.” Iowa Code § 717A.3A(1)(a). The State argues that this provision is consistent with the First Amendment because it prohibits exclusively lies associated with a legally cognizable harm—namely, trespass to private property. We agree with this conclusion.

The plaintiffs also challenge the Employment Provision. This subsection provides that a person commits an offense if he “[m]akes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility,” if he “knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized.” Iowa Code § 717A.3A(1)(b). The district court ruled this provision unconstitutional on its face under the First Amendment on the ground that it restricts protected speech and cannot satisfy either strict scrutiny or intermediate scrutiny.

Given the breadth of the Employment Provision, it proscribes speech that is protected by the First Amendment and does not satisfy strict scrutiny. Insofar as the State has a compelling interest in preventing false statements made to secure offers of employment, a prohibition on immaterial falsehoods is not actually necessary to achieve the interest. There is a less restrictive means available: proscribe only false statements that are material to a hiring decision. *See Wasden*, 878 F.3d at 1201-02.



Kansas Writ of Cert. Denied by US Sup. Ct.

Kelly v. Animal Legal Defense Fund

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Petition for certiorari denied on April 25, 2022



Docket No.	Op. Below	Argument	Opinion	Vote	Author	Term
21-760	10th Cir.	N/A	N/A	N/A	N/A	OT 2021

Issue: Whether **Kan. Stat. Ann. § 47-1827(b), (c), and (d)** violate the free speech clause of the First Amendment by criminalizing trespass by deception at animal facilities with intent to damage the enterprise.

In the
Supreme Court of the United States

LAURA KELLY, *in her official capacity as Governor of Kansas*; DEREK SCHMIDT, *in his official capacity as Attorney General of Kansas*,
Petitioners,

v.

ANIMAL LEGAL DEFENSE FUND, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Date	Proceedings and Orders (key to color coding)
Nov 17 2021	Petition for a writ of certiorari filed. (Response due December 22, 2021)
Dec 22 2021	Brief amici curiae of Utah, et al. filed.
Jan 05 2022	DISTRIBUTED for Conference of 1/21/2022.
Jan 11 2022	Response Requested. (Due February 10, 2022)
Feb 01 2022	Motion to extend the time to file a response from February 10, 2022 to March 14, 2022, submitted to The Clerk.
Feb 02 2022	Motion to extend the time to file a response is granted and the time is extended to and including March 14, 2022.
Mar 14 2022	Brief of respondents Animal Legal Defense Fund, et al. in opposition filed.
Mar 28 2022	Reply of petitioners Laura Kelly, in her official capacity as Governor of Kansas, et al. filed. (Distributed)
Mar 29 2022	DISTRIBUTED for Conference of 4/14/2022.
Apr 18 2022	DISTRIBUTED for Conference of 4/22/2022.



Statutory Laws Protecting Private Property Rights

Pennsylvania Criminal Trespassing laws:

1. Simple Trespassing
2. Defiant Trespassing
3. Agricultural Trespassing
4. Agricultural Biosecurity Area Trespassing
5. Agricultural Vandalism
6. Agricultural Crop Destruction
7. Ecoterrorism (Criminal and Civil)



Simple Trespassing

(summary)

(1) A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place for the purpose of:

- (i) threatening or terrorizing the owner or occupant of the premises;
- (ii) starting or causing to be started any fire upon the premises; or
- (iii) defacing or damaging the premises.

(2) An offense under this subsection constitutes a summary offense.



Defiant Trespassing

(summary and misdemeanor grades)

(1) A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:

- (i) actual communication to the actor;
- (ii) posting in a manner prescribed by law or reasonably likely to come to the attention of intruders;
- (iii) fencing or other enclosure manifestly designed to exclude intruders;
- (iv) notices posted in a manner prescribed by law or reasonably likely to come to the person's attention at each entrance of school grounds that visitors are prohibited without authorization from a designated school, center or program official;
- (v) an actual communication to the actor to leave school grounds as communicated by a school, center or program official, employee or agent or a law enforcement officer; or
- (vi) subject to paragraph (3), the placement of identifying **purple paint marks** on trees or posts on the property which are:
 - (A) vertical lines of not less than eight inches in length and not less than one inch in width;
 - (B) placed so that the bottom of the mark is not less than three feet from the ground nor more than five feet from the ground; and
 - (C) placed at locations that are readily visible to a person approaching the property and no more than 100 feet apart.

(except in Phila. and Pittsburgh)



Agricultural Trespassing

(misdemeanor)

(1) A person commits an offense if knowing that he is not licensed or privileged to do so he:

(i) enters or remains on any agricultural or other open lands when such lands are posted in a manner prescribed by law or reasonably likely to come to the person's attention or are fenced or enclosed in a manner manifestly designed to exclude trespassers or to confine domestic animals; or

(ii) enters or remains on any agricultural or other open lands and defies an order not to enter or to leave that has been personally communicated to him by the owner of the lands or other authorized person.

(3) For the purposes of this subsection, the phrase "agricultural or other open lands" shall mean any land on which agricultural activity or farming as defined in section 3309 (relating to agricultural vandalism) is conducted or any land populated by forest trees of any size and capable of producing timber or other wood products or any other land in an agricultural security area as defined . . . the Agricultural Area Security Law, or any area zoned for agricultural use.



Agricultural Biosecurity Area Trespassing (S, M)

- (1) A person commits an offense if the person does any of the following:
 - (i) Enters an agricultural biosecurity area, knowing that the person is not licensed or privileged to do so.
 - (ii) Knowingly or recklessly fails to perform reasonable measures for biosecurity that by posted notice are required to be performed for entry to the agricultural biosecurity area.

- (2) It is a defense to prosecution under paragraph (1)(ii) that:
 - (i) no reasonable means or method was available to perform the measures that the posted notice required to be performed for entry to the agricultural biosecurity area;
 - (ii) entry is made in response to a condition within the agricultural biosecurity area that the person reasonably believes to be a serious threat to human or animal health as necessitating immediate entry to the agricultural biosecurity area; or
 - (iii) entry is made under exigent circumstances by a law enforcement officer to:
 - (A) pursue and apprehend a suspect of criminal conduct reasonably believed by the officer to be present within the agricultural biosecurity area; or
 - (B) prevent the destruction of evidence of criminal conduct reasonably believed by the officer to be located within the agricultural biosecurity area.



Agricultural Biosecurity Area Trespassing (cont.)

(c) Defenses.--It is a defense to prosecution under this section that:

- (1) a building or occupied structure involved in an offense under subsection (a) of this section was abandoned;
- (2) the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or
- (3) the actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him to enter or remain.

"Agricultural biosecurity area." Any of the following areas which has been identified by posted notice as an agricultural biosecurity area and for which the owner or other authorized person has established procedures to inhibit the transference of transmissible disease or hazardous substance:

- (1) Agricultural or other open lands as defined under 18 Pa.C.S. § 3503(b.2)(3) (relating to criminal trespass).
- (2) A building or animal or plant containment area fenced or enclosed in a manner manifestly designed and constructed to exclude trespassers or to confine domestic animals or plants used in research or agricultural activity or farming as defined in 18 Pa.C.S. § 3309 (relating to agricultural vandalism).

"Posted notice." Notice posted in a manner which is reasonably likely to come to the attention of a person.]



Agricultural Vandalism

(misdemeanor, felony grades)

(a) Offense defined.--A person commits the offense of agricultural vandalism if he intentionally or recklessly defaces, marks or otherwise damages the real or tangible personal property of another, where the property defaced, marked or otherwise damaged is used in agricultural activity or farming.

(c) Definition.--As used in this section, the terms “**agricultural activity**” and “**farming**” include public and private research activity, records, data and data-gathering equipment related to agricultural products as well as the commercial production of agricultural crops, livestock or livestock products, poultry or poultry products, trees and timber products, milk, eggs or dairy products, or fruits or other horticultural products.



Agricultural Crop Destruction

(a) Offenses defined.--A person commits a felony of the second degree if he intentionally and knowingly damages any field crop, vegetable or fruit plant or tree that is grown, stored or raised for scientific or commercial purposes or for any testing or research purpose in conjunction with a public or private research facility or a university or any Federal, State or local government agency.

(b) Restitution.--Any person convicted of violating this section shall, in addition to any other penalty imposed, be sentenced to pay the owner of the damaged field crops, vegetable or fruit plants or trees restitution. Restitution shall be in an amount equal to the cost of the financial damages incurred as a result of the offense, including the following:

- (1) Value of the damaged crop.
- (2) Disposal of the damaged crop.
- (3) Cleanup of the property.
- (4) Lost revenue for the aggrieved owner of the damaged crop.

(c) Exceptions.--The provisions of this section shall not apply to field crops, vegetable or fruit plants or trees damaged through research or normal commercial activity.

Ecoterrorism (criminal and civil)

(a) General rule.--A person is guilty of ecoterrorism if the person commits a specified offense against property intending to do any of the following:

(1) Intimidate or coerce an individual lawfully:

- (i) participating in an activity involving animals, plants or an activity involving natural resources;
or
- (ii) using an animal, plant or natural resource facility.

(2) Prevent or obstruct an individual from lawfully:

- (i) participating in an activity involving animals, plants or an activity involving natural resources;
or
- (ii) using an animal, plant or natural resource facility.

Specified offenses against property: arson, causing or risking a catastrophe, criminal mischief, institutional vandalism, ag vandalism, ag crop destruction, burglary and criminal trespass under certain circumstances, theft, forgery, identity theft.

This law is quite lengthy and not all its provisions are set forth. One additional interesting aspect is this defense:

(c.1) Immunity.--A person who exercises the right of petition or free speech under the United States Constitution or the Constitution of Pennsylvania on public property or with the permission of the landowner where the person is peaceably demonstrating or peaceably pursuing his constitutional rights shall be immune from prosecution for these actions under this section or from civil liability under 42 Pa.C.S. § 8319 (relating to ecoterrorism).



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CENTER MISSION AND BACKGROUND

The Center for Agricultural and Shale Law conducts research and educational programs to serve a wide variety of stakeholders including agricultural producers, landowners, mineral interest and royalty owners, business professionals, judges, attorneys, legislators, government officials, community groups, and the general public. Center programs are funded in part by the Commonwealth of Pennsylvania through the Pennsylvania Department of Agriculture. The Center for Agricultural and Shale Law is a partner of the National Agricultural Law Center (NALC) at the University of Arkansas System Division of Agriculture, which serves as the nation's leading source of agricultural and food law research and information.

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THANK YOU!

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