

AGRICULTURAL DISPARAGEMENT STATUTES: AN OVERVIEW

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## **I. INTRODUCTION**

Since 1991, thirteen states have enacted agricultural disparagement statutes that allow agricultural producers the ability to bring a cause of action against any person who disseminates false information regarding the safety of their food products. The statutes were enacted as a response to the Alar crisis and the resulting litigation, which prompted the agricultural industry to search for a tailor-made cause of action that would lower the heightened pleading standards of the common law torts of defamation and product disparagement, which, at the time of Alar, were the only available legal vehicles from which agricultural producers could seek redress. While many commentators argue that the lower pleading standards of the agricultural disparagement statutes are a violation of constitutional free speech requirements, not one case brought under these statutes has ever expressly ruled upon the constitutionality issue, with the last case being brought in 1998. Since then, there has been little movement within neither the judicial nor legislative arenas suggesting the lack of prevalence of agricultural statutes today. However, if cases do arise, it will be left to the courts to determine whether the agricultural disparagement statutes can be reconciled with or survive constitutional scrutiny.

## **II. ORIGINS OF AGRICULTURAL DISPARAGEMENT STATUTES**

### **A. Purpose**

Beginning in the early 1990's, agricultural disparagement laws were being introduced to state legislatures.<sup>1</sup> Labeled differently depending by state, whether "food

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<sup>1</sup> Eileen Gay Jones, *Forbidden Fruit: Talking About Pesticides and Food Safety in Agricultural Product Disparagement Laws*, 66 Brook L. Rev. 823, page cite (2001).

disparagement laws,” “agricultural disparagement laws,” or “veggie libel laws,” states that have enacted such legislation have done so with the overarching purpose of protecting the agricultural and aquaculture industries, with the intention of “ensuring that farmers and fisherman have a means of protecting themselves against false or misleading reports about the safety of the food they produced.”<sup>2</sup> While some commentaries argue that these statutes were enacted in order to “insulate a particular economic sector from criticism”<sup>3</sup> and silence public opinion,<sup>4</sup> others argue that they were enacted “to ensure that claims critical of a state’s agricultural industry are not merely false creations by the media, designed to produce a public scare and increase ratings.” In other words, these statutes are designed to protect agricultural producers from unsubstantiated “scientific” reports that their products are unsafe for human consumption.<sup>5</sup> Whatever the underlying criticisms or rationales regarding their enactment, agricultural disparagement laws are a new breed of legislation that give food producers a cause of action against anyone who disseminates false information to the public regarding the safety of their product.<sup>6</sup>

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<sup>2</sup> Margot S. Fell, *Agricultural Disparagement Statutes: Tainted Beef, Tainted Speech, and Tainted Law*, 9 *Fordham Intell. Prop. Media & Ent. L.J.* 981, 984 (1999).

<sup>3</sup> David J. Bederman, *Limitations on Commercial Speech: The Evolution of Agricultural Disparagement Statutes*, 10 *DePaul Bus. L.J.* 191, 228-29 (1998).

<sup>4</sup> Jones, *supra* note 1, at 845.

<sup>5</sup> Fell, *supra* note 2, at 985.

<sup>6</sup> See, Megan W. Semple, *Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws*, 15 *Va. Envtl. L.J.* 403, 413 (1996).

## **B. Alar Controversy and *Auvil v. CBS***

Agricultural disparagement laws first emerged as a response to the Alar incident and the resulting *Auvil v. CBS* “60 Minutes” litigation.<sup>7</sup> The Alar incident involved the airing of a television news report detailing the uses, dangers and consequential harmful effects of Alar, a chemical that was commonly utilized by apple growers as a growth regulator.<sup>8</sup> The chemical, when sprayed on the apple trees<sup>9</sup>, allowed the apples to stay on the trees longer, improved the fruit’s cosmetic appearance, reduced fruit disorders, increased the apples’ size, and enhanced storage life.<sup>10</sup> However, in 1989, the National Resources Defense Council released a report entitled, “Intolerable Risk: Pesticides in Our Children’s Food,” which examined and illuminated the potential harmful effects resulting from the use of the chemical, specifically arguing that children were at risk of developing cancer later in life because Alar was known to be a potent carcinogen. According to the report, children were at a greater risk of developing cancer than were adults because they consume more food per unit of body weight and because they retain more food they eat,

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<sup>7</sup> David J. Bederman, Scott M. Christensen, and Scott D. Quesenberry, *Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes*, 34 Harv. J. on Legis. 135, 137 (1997); *see also*, Jones, *supra* note 1, at 826-27.

<sup>8</sup> *See Auvil v. CBS* “60 Minutes”, 800 F.Supp. 928, 930 (E.D.Wa.1992); *see also*, Bederman, *supra* note 7, at 137.

<sup>9</sup> Fell, *supra* note 2, at 986.

<sup>10</sup> *See Auvil*, 800 F.Supp. at 930.

among other factors.”<sup>11</sup> In sum, the overall message of the report was that Alar caused cancer and that risk of cancer was especially great in children.<sup>12</sup>

Later that year, CBS Television News broadcasted a segment entitled “A is for Apple,”<sup>13</sup> on their television program, *60 Minutes*, which, based largely on the NRDC report, critically detailed the harmful effects of the Alar chemical.<sup>14</sup> The news program, relying on this report, as well as other expert medical testimony, asserted that the chemical was “indeed a health hazard and noted that under today’s rigorous certification standards, the chemical would not be approved for use.”<sup>15</sup> This message was sent out to millions of tuned-in Americans.<sup>16</sup>

American consumers responded almost instantly.<sup>17</sup> National and worldwide apple demand dropped dramatically,<sup>18</sup> with estimated losses to apple growers reaching as much as \$75 million dollars.<sup>19</sup> These losses contributed to great economic damages to

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<sup>11</sup> L. Murray, *Burger Bashing and Sirloin Slander: Food Disparagement Laws in the United States*. Encyclopedia Britannica’s Advocacy for Animals Written by L. Murray. (November 16, 2009). <http://advocacy.britannica.com/blog/advocacy/2009/11/burger-bashing-and-sirloin-slander-food-disparagement-laws-in-the-united-states/>.

<sup>12</sup> Bederman et al., *supra* note 7, at 143.

<sup>13</sup> Murray, *supra* note 11.

<sup>14</sup> *Auvil*, 800 F. Supp. at 930.

<sup>15</sup> *Id.*

<sup>16</sup> Bederman et al., *supra* note 7, at 142.

<sup>17</sup> *Auvil*, 800 F. Supp. at 930.

<sup>18</sup> David Granastein, *Trends in Organic Tree Fruit Production*, Washington State University, Center for Sustaining Agriculture and Natural Resources (Dec. 2000), <http://www.docstoc.com/docs/22967772/trends-in-organic-fruit-production>

<sup>19</sup> *Auvil*, 800 F. Supp. at 931.

the apple industry, with many apple growers forced to file bankruptcy, foreclose on their homes, and suffer dramatic decreases in their property values.”<sup>20</sup> In addition, economies that were dependent upon the apple market suffered as well, with many communities experiencing signs of depression as a result of consumer reaction.<sup>21</sup>

In response to these unnerving events, a class action suit was filed by a group of Washington state apple growers representing approximately 4,700 apple growers against CBS, its local affiliates, the NRDC and Fenton Communications, NRDC’s public relations firm.<sup>22</sup> Because there were no agricultural statues in existence at the time of filing, the apple growers relied on the common law tort of product disparagement to bring their claim.<sup>23</sup> The Eastern District Court of Washington granted the NRDC, Fenton Communications and CBS’s local affiliates’ motion for summary judgment, holding that the plaintiff failed to show that the statements at issue by the defendants were “of and concerning” the plaintiff, that is, the statements made in the report and the subsequent news program were not made in particular reference to the growers’ apples, but instead referenced any apple sprayed with the Alar chemical.<sup>24</sup>

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<sup>20</sup> *Auvil*, 800 F.Supp. at 931.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*; see also, Bederman et al, *supra* note 7, at 142; Fell, *supra* note ( ), at 986; Ethan Carson Eddy, *Privatizing the Patriot Act: The Criminalization of Environmental and Animal Protectionists as Terrorists*, 22 Pace Env’tl. L. Rev. 261, 311 (2005).

<sup>23</sup> See *Auvil*, 800 F.Supp. 928; see also Restatement (Second) of Torts, § 623(A) (This section states that: “One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication to result in harm to interests of the other having pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity).

<sup>24</sup> *Auvil*, 800 F. Supp. at 945.

Furthermore, in a separate order, the federal district court also granted CBS's motion for summary judgment, holding that the plaintiff not only failed to prove the "of and concerning" element of the product disparagement claim, but also failed to prove that the information conveyed in the *60 Minutes* news segment was false.<sup>25</sup> The court also stated that free speech, protected under First Amendment jurisprudence, required a high burden of proof in order to satisfy the "falsity" prong.<sup>26</sup> Finding that CBS' statements were protected by free speech, the trial court stated that, "[t]o hold as plaintiffs request would have required CBS to take the NRDC report and perform a highly technical scientific study before issuing a public broadcast about that report. A news reporting service is not a scientific testing lab and these services should be able to rely on scientific government report when they are relaying the reports' results. The duty plaintiffs propose would so chill debate that the freedom of speech would be at risk."<sup>27</sup> Thus, the court imposed on a heightened standard for proving falsity for product disparagement, relying upon the constitutional protections afforded to free speech rights.

The Ninth Circuit Court of Appeals affirmed the motions granting summary judgment to all defendants.<sup>28</sup> In addition to agreeing with the lower court's ruling, the Ninth Circuit also commented on the fundamental protections of free speech, rejecting the growers' argument that CBS' motion for summary judgment should be reversed

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<sup>25</sup> *Auvil*, 836 F.Supp.740, 743 (E.D. Wa. 1993).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Auvil v. 60 Minutes*. 67 F.3d 816, 820-22 (9<sup>th</sup> Cir. 1995).

because even though the statements themselves were not proven false, the “overall message” of the news broadcast was false.<sup>29</sup> The court noted that, “because a broadcast could be interpreted in numerous, nuanced ways, a great deal of uncertainty would arise as to the message conveyed in the broadcast. Such uncertainty would make it difficult for broadcasters to predict whether their work would subject them to tort liability. Furthermore, such uncertainty raises the spectre of a chilling effect on speech.”<sup>30</sup> These holdings ultimately led to the conclusion that, “scientific uncertainty over food safety risks should thus be construed in favor of openness and free speech, and should not be made actionable.”<sup>31</sup>

The decision in *Auvil* thus prevented any future plaintiff from prevailing on a common law cause of action of product disparagement unless he could meet the burden of proving the falsity of the disparaging statements made by the defendant.<sup>32</sup> This burden was especially difficult in any type of media context, such as news reports or even non-profit organization that disseminate information to the public, because “the accuracy of such reports is hard to verify in the sense that scientists may hold conflicting views about the safety of certain agricultural practices.”<sup>33</sup>

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<sup>29</sup> *Id.* at 822.

<sup>30</sup> *Auvil v. 60 Minutes*, 67 F.3d 816, 822 (9<sup>th</sup> Cir. 1995).

<sup>31</sup> Bederman, et al., *supra* note 7, at 143.

<sup>32</sup> *See, Auvil*, 67 F.3d 816.

<sup>33</sup> Eric Hansum, *Where’s the Beef? A Reconciliation of Commercial Speech and Defamation Cases in the Context of Texas’ Agricultural Disparagement Law*, 19 Rev. Litig. 261, 265 (2001).

As a result, many plaintiffs within the agricultural industry seeking redress for statements that proved to economically harm their products moved away from the common law tort of disparagement and turned to defamation.<sup>34</sup> This common law tort, too, proved unsatisfactory for this specific group of plaintiffs, as it also placed upon the plaintiff the burden of proving the falsity of the disparaging statements.<sup>35</sup> Proving to be a too difficult burden to meet, a movement began by the within the agricultural and agribusiness industries to create a new statute that would eliminate this heightened burden of proof for plaintiffs and would provide a “tailor-made cause of action for agricultural disparagement.”<sup>36</sup>

### III. AGRICULTURAL DISPARAGEMENT STATUTES

As of 2010, thirteen states have enacted some type of an agricultural disparagement statute, including Alabama,<sup>37</sup> Arizona,<sup>38</sup> Colorado,<sup>39</sup> Florida,<sup>40</sup> Georgia,<sup>41</sup>

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<sup>34</sup> Hansum, *supra* note 33, at 265.

<sup>35</sup> *Restatement (Second) of Torts* 629 (1977); *see also*, Semple, *supra* note 6, at 417-418; Lisa Dobson Gould, *Mad Cows, Offended Emus, and Old Eggs: Perishable Product Disparagement Law and Free Speech*, 73 Wash. L. Rev. 1019, 1022 (1998) (Explaining the common law notions of a defamation claim. Defamation is generally defined as “an unprivileged publication of false and defamatory statements concerning a plaintiff.” One of the requirements under a defamation claim is that the plaintiff has the burden of proving that the disparaging statement was “of and concerning” him, meaning that the statements specifically concerned the plaintiff. However, unlike the “falsity” prong for product disparagement, a plaintiff pursuing a defamation claim need not prove that the statement the defendant made was false, lessening the burden of proof for a defamation plaintiff).

<sup>36</sup> Bederman, et al., *supra* note 7, at 144

<sup>37</sup> ALA. CODE § 6-5-620 (Supp. 1996).

<sup>38</sup> ARIZ. REV. STAT. ANN. § 3-113. (West Supp. 1995).

<sup>39</sup> COLO. REV. STAT. ANN. (Criminal) § 35-31-101 (West Supp. 1996).

<sup>40</sup> FLA. STAT. ANN. § 865.5065 (West Supp. 1996).

<sup>41</sup> GA. CODE ANN. § 2-16-1. (Supp. 1996).

Idaho,<sup>42</sup> Louisiana,<sup>43</sup> Mississippi,<sup>44</sup> North Dakota,<sup>45</sup> Ohio,<sup>46</sup> Oklahoma,<sup>47</sup> South Dakota,<sup>48</sup> and Texas.<sup>49</sup> While only thirteen states have passed such legislation, over thirty states have considered such bills.<sup>50</sup>

### A. History

The first state to enact agricultural disparagement legislation was Louisiana in 1991. Interestingly, though, the efforts to implement these statutes did not emerge in Louisiana, nor in the state of Washington after the Alar crisis; instead, efforts began in Colorado with State Representative Steve Aquafresca being the first to introduce agricultural disparagement legislation bills,<sup>51</sup> stating that because the Alar scare was “unfounded,” these statutes would be designed to protect agriculturalists from future unfounded reports regarding their products.<sup>52</sup> Unfortunately, the bill did not originally pass; however, the agricultural industry caught wind of Colorado’s initiatives and, in conjunction with the then-recent *Auvil* outcome, agricultural lobbying groups began

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<sup>42</sup> *IDAHO CODE* § 6-2001. (Supp. 1996).

<sup>43</sup> *LA. REV. STAT. ANN.* §§ 4501-4504. (West Supp. 1996)

<sup>44</sup> *MISS. CODE ANN.* § 69-1-251 to - 257 (Supp. 1994)

<sup>45</sup> *N.D. CENTURY CODE*, § 32-44-02. (1997).

<sup>46</sup> *OHIO REV. CODE ANN.* § 2307.81 (Banks-Baldwin Supp. 1996).

<sup>47</sup> *OKLA. STATE ANN.* § 2-41A-3010 (West Supp. 1996)

<sup>48</sup> *S.D. CODIFIED LAWS* § 20-10A- 1 to -4 (Michie 1995)

<sup>49</sup> *TEX. CIV. PRAC. & REM. CODE ANN* § 96.0001-.004. (West Supp. 1996)

<sup>50</sup> Jones, *supra* note 1, at 823 n.3.

<sup>51</sup> *Id.* at 832.

<sup>52</sup> Semple, *supra* note 6, at 412.

incorporating this type of legislation into their agendas<sup>53</sup> with the goal of fashioning a statute specifically for use by the agricultural industry that would ultimately lower the burden of proof set out by the common law torts of disparagement and defamation claims.<sup>54</sup> Throughout the next six years, twelve more states would enact some type of agricultural disparagement statute.<sup>55</sup> Since 1997, though, no state has enacted any such type of legislation.

## **B. Goals and Purposes**

As a whole, these agricultural statutes allow agricultural and aquacultural producers to bring a cause of action “against anyone who disparages their product.”<sup>56</sup> While the statutes themselves have striking differences between them, taken as a whole, each contains 6 main elements.<sup>57</sup> These are: (1) dissemination to the public in any manner; (2) of false information the disseminator knows to be false; (3) stating or implying that a perishable food product is not safe for consumption by the consuming public; (4) information is presumed false when not based on reasonable or reliable scientific inquiry, facts or data; (5) disparagement provides a cause of action for damages; and (6) any action must be filed within one or two years.<sup>58</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> Carson Eddy, *supra* note 22, at 312 (2005).

<sup>55</sup> Semple, *supra* note 6, at 413.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *See* Bederman, *supra* note 3, at 195.

There are, too, similarities amongst the statutes, especially regarding the purpose, with eight of the thirteen statutes containing similar if not verbatim language of Idaho's statute: "...that it is beneficial to the citizens of this state to protect the vitality of the agricultural and aquacultural economy by providing a cause of action for producers of perishable agricultural food products to recover damages for the disparagement of any perishable agricultural food product."<sup>59</sup> This exemplifies the states' legislative general concerns that it is necessary to protect their agricultural economies.

### C. "Producer" Defined

Ten states provide that the person who has standing to bring an agricultural disparagement action is a "producer," which is generally defined as "the person who actually grows or produces perishable agricultural food products."<sup>60</sup> However, three statutes broaden the standing requirement. For example, the agricultural disparagement statute of Alabama provides that only "producers" may bring a cause of action, but then goes on to define "producer" as "any person who produces, markets or sells a perishable food product."<sup>61</sup> Going even further, the Georgia legislature allows "any party in the entire chain from grower to consumer" to bring a cause of action.<sup>62</sup> Another example is the Arizona statute, which includes not only producers, but also "shippers," defining

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<sup>59</sup> *IDAHO CODE* § 6-2001. (Supp. 1996).

<sup>60</sup> *COLO. REV. STAT. ANN. (Criminal)* § 35-31-101 (West Supp. 1996); *FLA. STAT. ANN.* § 865.5065 (West Supp. 1996); *IDAHO CODE* § 6-2001. (Supp. 1996); *LA. REV. STAT. ANN.* §§ 4501-4504. (West Supp. 1996); *MISS. CODE ANN.* § 69-1-251 to - 257 (Supp. 1994); *N.D. CENTURY CODE*, § 32-44-02. (1997); *OHIO REV. CODE ANN.* § 2307.81 (Banks-Baldwin Supp. 1996); *OKLA. STATE ANN.* § 2-41A-3010 (West Supp. 1996); *S.D. CODIFIED LAWS* § 20-10A- 1 to -4 (Michie 1995); *TEX. CIV. PRAC. & REM. CODE ANN* § 96.0001-.004. (West Supp. 1996)

<sup>61</sup> *ALA. CODE* § 6-5-620 (Supp. 1996).

<sup>62</sup> *GA. CODE. ANN.* § 2-16-1. (Supp. 1996).

“shippers” as “any person who ships, transports, sells or markets a perishable food product.”<sup>63</sup>

#### **D. Standard of Proof**

The statutes vary significantly with regard to an individual’s level of intent that would give rise to an agricultural disparagement claim. All but one of the statutes expressly requires some proof of fault from the defendant.<sup>64</sup> Six states require that the defendant “knowingly” disseminated false information to the public regarding a perishable food item, meaning that the defendant had actual knowledge of the falsity of his statements, or that he “knew or should have known” that the information was false.<sup>65</sup> There are two states that have a low standard of culpability, imposing strict liability upon a product disparagement defendant.<sup>66</sup> Rather than requiring any level of intent, these statutes allow a plaintiff to bring an agricultural disparagement action against an individual who merely disseminates false information regarding a perishable product.<sup>67</sup> On the other end of the spectrum, however, there are three states that impose a high level

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<sup>63</sup> *ARIZ. REV. STAT. ANN.* § 3-113. (West Supp. 1995).

<sup>64</sup> See *LA. REV. STAT. ANN.* §§ 4501-4504. (West Supp. 1996); *MISS. CODE ANN.* § 69-1-251 to - 257 (Supp. 1994); *OHIO REV. CODE ANN.* § 2307.81 (Banks-Baldwin Supp. 1996); *N.D. CENTURY CODE*, § 32-44-02. (1997); *S.D. CODIFIED LAWS* § 20-10A- 1 to -4 (Michie 1995); *TEX. CIV. PRAC. & REM. CODE ANN* § 96.0001-.004. (West Supp. 1996)

<sup>66</sup> See, *ALA. CODE* § 6-5-620 (Supp. 1996); *OKLA. STATE ANN.* § 2-41A-3010 (West Supp. 1996).

<sup>67</sup> See *ALA. CODE* § 6-5-620 (Supp. 1996); *OKLA. STATE ANN.* § 2-41A-3010 (West Supp. 1996).

of intent, requiring that the defendant willfully or maliciously disseminated false information to the public.<sup>68</sup>

### **E. Burden of Proof and “Falsity”**

The party who has the burden of proving the falsity of the disseminated information is uniformly unclear amongst the statutes. Unlike the common law defamation and disparagement requirements, which expressly place the burden of proof on the plaintiff, all but the Idaho statute do not assign which particular party bears this burden.<sup>69</sup> Furthermore, each statute imposes a “falsity” requirement, meaning that the disseminated information must be proven false. “False information” is generally defined the same amongst the statutes, with language consistent with the Arizona statute: “False information” means information that is not based on reliable scientific facts and reliable scientific data.<sup>70</sup> However, the Arizona and North Dakota statutes presume falsity if there is no showing of reasonable scientific evidence,<sup>71</sup> while Louisiana and Mississippi deem the statement false if not based on reasonable and reliable scientific evidence.<sup>72</sup>

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<sup>68</sup> See *GA. CODE ANN. § 2-16-1*. (Supp. 1996); *ARIZ. REV. STAT. ANN. § 3-113*. (West Supp. 1995); *FLA. STAT. ANN. § 865.5065* (West Supp. 1996)

<sup>69</sup> See *ALA. CODE § 6-5-620* (Supp. 1996); *ARIZ. REV. STAT. ANN. § 3-113*. (West Supp. 1995); *COLO. REV. STAT. ANN. (Criminal) § 35-31-101* (West Supp. 1996); *FLA. STAT. ANN. § 865.5065* (West Supp. 1996); *GA. CODE ANN. § 2-16-1*. (Supp. 1996); *LA. REV. STAT. ANN. §§ 4501-4504*. (West Supp. 1996); *MISS. CODE ANN. § 69-1-251 to - 257* (Supp. 1994); *N.D. CENTURY CODE, § 32-44-02*. (1997); *OHIO REV. CODE ANN. § 2307.81* (Banks-Baldwin Supp. 1996); *OKLA. STATE ANN. § 2-41A-3010* (West Supp. 1996); *S.D. CODIFIED LAWS § 20-10A- 1 to -4* (Michie 1995); *TEX. CIV. PRAC. & REM. CODE ANN § 96.0001-.004*. (West Supp. 1996)

<sup>70</sup> *ARIZ. REV. STAT. ANN. § 3-113*. (West Supp. 1995).

<sup>71</sup> *ARIZ. REV. STAT. ANN. § 3-113*. (West Supp. 1995); *N.D. CENTURY CODE, § 32-44-02*. (1997).

<sup>72</sup> *LA. REV. STAT. ANN. §§ 4501-4504*. (West Supp. 1996); *MISS. CODE ANN. § 69-1-251 to - 257* (Supp. 1994).

## F. Remedies

The remedy in all but one of these statutes is compensatory damages,<sup>73</sup> with Colorado being the only state to impose criminal liability on a convicted agricultural disparagement defendant.<sup>74</sup> Besides Idaho, the statutes provide recovery beyond compensatory damages, allowing for “other relief,” which could be implied to include punitive damages.<sup>75</sup> Idaho is the only state that caps damages to actual pecuniary damages.<sup>76</sup> Furthermore, Arizona permits that in some circumstances, court costs and attorney’s fees may also be available to the prevailing party.<sup>77</sup>

## IV. CONSTITUTIONAL CONCERNS REGARDING AGRICULTURAL DISPARAGEMENT STATUTES

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<sup>73</sup> *ALA. CODE* § 6-5-620 (Supp. 1996); *ARIZ. REV. STAT. ANN.* § 3-113. (West Supp. 1995); *FLA. STAT. ANN.* § 865.5065 (West Supp. 1996); *GA. CODE ANN.* § 2-16-1. (Supp. 1996); *IDAHO CODE* § 6-2001. (Supp. 1996); *LA. REV. STAT. ANN.* §§ 4501-4504. (West Supp. 1996); *MISS. CODE ANN.* § 69-1-251 to - 257 (Supp. 1994); *N.D. CENTURY CODE*, § 32-44-02. (1997); *OHIO REV. CODE ANN.* § 2307.81 (Banks-Baldwin Supp. 1996); *OKLA. STATE ANN.* § 2-41A-3010 (West Supp. 1996); *S.D. CODIFIED LAWS* § 20-10A- 1 to -4 (Michie 1995); *TEX. CIV. PRAC. & REM. CODE ANN* § 96.0001-.004. (West Supp. 1996)

<sup>75</sup> *ALA. CODE* § 6-5-620 (Supp. 1996); *ARIZ. REV. STAT. ANN.* § 3-113. (West Supp. 1995); *COLO. REV. STAT. ANN. (Criminal)* § 35-31-101 (West Supp. 1996); *FLA. STAT. ANN.* § 865.5065 (West Supp. 1996); *GA. CODE ANN.* § 2-16-1. (Supp. 1996); *LA. REV. STAT. ANN.* §§ 4501-4504. (West Supp. 1996); *MISS. CODE ANN.* § 69-1-251 to - 257 (Supp. 1994); *N.D. CENTURY CODE*, § 32-44-02. (1997); *OHIO REV. CODE ANN.* § 2307.81 (Banks-Baldwin Supp. 1996); *OKLA. STATE ANN.* § 2-41A-3010 (West Supp. 1996); *S.D. CODIFIED LAWS* § 20-10A- 1 to -4 (Michie 1995); *TEX. CIV. PRAC. & REM. CODE ANN* § 96.0001-.004. (West Supp. 1996)

<sup>76</sup> *IDAHO CODE* § 6-2001. (Supp. 1996).

<sup>77</sup> *ARIZ. REV. STAT. ANN.* § 3-113. (West Supp. 1995).

Critics of the existing food disparagement laws argue that these laws work to undermine constitutional guarantees by working to chill free speech by eliminating the “of and concerning” requirement, lacking a sufficient intent standard, and upsetting the burden of proof.<sup>78</sup>

### **A. First Amendment Jurisprudence: *New York Times v. Sullivan***

In *New York Times v. Sullivan*, the Supreme Court addressed the constitutional requirements imposed on a plaintiff bringing a defamation claim and the protections afforded to a defamation plaintiff.<sup>79</sup> While this case dealt with defamation, many scholars argue that the principles set forth in the *Sullivan* case will be applied to disparagement actions, as exemplified by the Supreme Court case, *Bose Corp v. Consumers Union, Inc.*<sup>80</sup> For example, Megan Semple states,

“Although the Court did not address whether defamation jurisprudence applies to product disparagement generally, the Court held that the product disparagement issue in *Bose* ‘fit[s] easily within the breathing space that gives life to the First Amendment.’ Because speech regarding the safety of agricultural food products is ‘speech that matters,’ and because potential errors in that speech may ‘fit easily within the breathing space that gives life to the First Amendment,’ the constitutionality of the veggie libel laws should be assessed according to defamation jurisprudence.”<sup>81</sup>

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<sup>78</sup> See Gould, *supra* note 35, at 1037.

<sup>79</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>80</sup> See Fell, *supra* note 2, at 1001; Semple, *supra* note 6, at 422; *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

<sup>81</sup> Semple, *supra* note 6, at 422-423, quoting *Bose*; see also, Fell, *supra* note 1, at 1001 (arguing that defamation standards will apply to constitutional issues regarding the agricultural disparagement statutes because the standards required by the common law of product disparagement have not be “constitutionalized.” Furthermore, the “constitutionalization,” and ultimate modernization of defamation law have “eased the distinction between disparagement and defamation.” Fell goes on to argue that, “More importantly, courts have slowly begun to apply the *New York Times Co. v. Sullivan* constitutional disparagement cases, thereby bring these two torts closer together.”

Thus, the Supreme Court in *New York Times v. Sullivan* heightened the pleading requirements for plaintiffs wishing to bring a defamation claim in order satisfy minimum First Amendment standards.<sup>82</sup> The *Sullivan* Court established three constitutional standards that a plaintiff must meet in order to succeed on a defamation claim as precedent for any future court adjudicating on such a claim.<sup>83</sup> The three standards include that (1) the plaintiff is faced with the burden of proving (2) the “of and concerning” requirement, and (3) that the defendant acted with “actual malicious intent.”<sup>84</sup> Eliminating the once strict liability standard, the *Sullivan* Court requires that a defamation plaintiff had the burden of proving actual malice with clear and convincing in order to succeed with the claim.<sup>85</sup> The rationale behind this heightened standard was that “breathing space” was necessary in order to protect a “free marketplace of ideas” because “erroneous statement is inevitable in free debate.”<sup>86</sup>

### **1. Elimination of the “Of and Concerning” Requirement**

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<sup>82</sup> *Sullivan*, 376 U.S. at 280.

<sup>83</sup> *Id.* at 279-280, 285 (According to the *Sullivan* opinion, there were actually four constitutional standards. Besides the three articulate above, the court also created a standards relating to de novo review of defamation claims. Justice Brennan stated that the court must “make an independent examination of the whole record, so as to assure itself that the judgment does not constitute a forbidden intrusion on the field of free expression.”); *see also*, Fell, *supra* note 2, at 995 (explaining that this standard “requires the Court to make an independent inspection of the record to ensure that constitutional principles are applied correctly.”)

<sup>84</sup> *See Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Sullivan*, 376 U.S. at 271-272.

The heightened pleading standard imposed by the *Sullivan* Court requires the plaintiff prove the “of and concerning” requirement.<sup>87</sup> The “of and concerning” requirement, which is also known as the “specific reference,” requirement grants a cause of action for defamation or disparagement to individuals who are the “direct object of criticism,” and denies it to those who “merely complain of nonspecific statements that they believe cause them some hurt.”<sup>88</sup> The Court in *Sullivan* stated that, “The ‘of and concerning’ requirement is one of the central safeguards to our constitutional framework protecting the free flow of ideas on matters of public concern,”<sup>89</sup> and is necessary to ensure “the vigor and... the variety of public debate.”<sup>90</sup> The Court concluded that a defamation plaintiff must satisfy the “of and concerning” requirement, or his claim will be deemed constitutionally deficient.<sup>91</sup> If he cannot prove that the statements were “of and concerning” him, then his case will be dismissed.<sup>92</sup>

Many scholars argue that the agricultural disparagement statutes are unconstitutional because they work to eliminate the constitutionally mandated “of and concerning” requirement, with many of the statutes broadening the category of individuals who have standing to bring suit.<sup>93</sup> As stated above, the person who has

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<sup>87</sup> *Sullivan*, 376 U.S. at 288.

<sup>88</sup> *Blatty v. New York Times*. 728 P.2d 1177, 1183 (1986)

<sup>89</sup> *Sullivan*, 376 U.S. at 279

<sup>90</sup> *Id.* at 279.

<sup>91</sup> *Id.* at 288

<sup>92</sup> *Id.*

<sup>93</sup> *See Semple*, supra note 6, at 430.

standing to bring an agricultural disparagement claim is a “producer.”<sup>94</sup> However, even though the definitions vary by statute, the term connotes that “any producer” may seek redress for disparaging statements.<sup>95</sup> On top of this, “producer” is defined by many of the statutes to include any person involved at any stage of the productions process, from grower to marketer.<sup>96</sup> Thus, an agricultural disparagement plaintiff need not show that the disparaging statement was made about him; instead, once a disparaging statement is made about a perishable food item, any “producer” may seek damages for the losses incurred by the damaging statement.<sup>97</sup>

Because the statutes arguably work to eliminate the “of and concerning” requirement, commentators suggest that these statutes “invite the kind of free speech abuses long deemed violative of common law and constitutional principles. The notion that products can be defamed and that anyone in the production and distribution chain can sue for alleged generalized ‘wrongs’ wars with such principles.”<sup>98</sup> Therefore, the argument is that the well-settled principles of free speech protection contradict the standing requirements of the agricultural disparagement statutes, and thus could potentially be held as unconstitutional.<sup>99</sup>

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<sup>94</sup> See *supra* note 62-63.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*; see also, *ARIZ. REV. STAT. ANN. § 3-113*. (West Supp. 1995).

<sup>97</sup> Semple, *supra* note 6, at 430.

<sup>98</sup> Ronald K.L. Collins, *Free Speech, Food Libel, & the First Amendment*, 26 Ohio N.U.L. Rev. 1, 30 (2000).

<sup>99</sup> *Id.* at 31.

## 2. Lower Standard of Proof

Constitutional attacks upon agricultural disparagement statutes have been raised regarding the statutes' standard of proof.<sup>100</sup> *Sullivan* requires the intent standard to be actual malicious intent, thus placing upon the plaintiff the burden of proving that the defendant made the false statements "with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>101</sup> Although the meaning of malice under common law defamation is "usually referred to the speaker's attitude toward the defamed person,"<sup>102</sup> *Sullivan* defines "actual malice" to refer to the "defamer's attitude toward the defamatory remark, connoting knowledge of or indifference to its falsity."<sup>103</sup>

Numerous critiques of the statutes question their constitutionality because of the statutes' requisite level of intents.<sup>104</sup> Some statutes impose the constitutionally required malicious intent standard,<sup>105</sup> while others impose a lower level of intent,<sup>106</sup> such as negligence,<sup>107</sup> while a few omit an intent standard altogether.<sup>108</sup>

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<sup>100</sup> See Fell, *supra* note 2, at 992.

<sup>101</sup> *Sullivan*, 376 U.S. at 279-80; see also Eddy at 314.

<sup>102</sup> Fell, *supra* note 2, at 992.

<sup>103</sup> *Sullivan*, 376 U.S. at 278.

<sup>104</sup> See Jones, *supra* note 1, at 838.

<sup>105</sup> See IDAHO CODE § 6-2001. (Supp. 1996); N.D. CENTURY CODE, § 32-44-02. (1997).

<sup>106</sup> See FLA. STAT. ANN. § 865.5065 (West Supp. 1996); OHIO REV. CODE ANN. § 2307.81 (Banks-Baldwin Supp. 1996); OKLA. STATE ANN. § 2-41A-3010 (West Supp. 1996).

<sup>107</sup> See FLA. STAT. ANN. § 865.5065 (West Supp. 1996); OHIO REV. CODE ANN. § 2307.81 (Banks-Baldwin Supp. 1996); OKLA. STATE ANN. § 2-41A-3010 (West Supp. 1996).

<sup>108</sup> ALA. CODE § 6-5-620 (Supp. 1996).

Besides the few statutes that require the level of intent that is constitutionally required malicious standard or actual knowledge, many scholars argue that because the remaining statutes impose either a lower standard of proof or none at all, they will not pass “constitutional muster” if ever subject to judicial review.<sup>109</sup>

### 3. Upsetting the Burden of Proof

Another constitutional impediment that has been raised is that all but two of the agricultural disparagement statutes unconstitutionally place the burden on the defendant, shifting it from the plaintiff, to prove that the veracity of the disparaging statements.<sup>110</sup> As required by the *Sullivan* court, as well as recognized by settled notions of common law defamation and disparagement principles, the burden of proving the falsity of the statement is placed upon the plaintiff.<sup>111</sup>

The Supreme Court in *Philadelphia Newspapers, Inc. v. Hepps* reiterated this constitutional requirement, stating that “the plaintiff bear the burden of proving falsity before recovering damages.”<sup>112</sup> However, it is argued that these statutes contradict this by imposing some type of scientific measure to prove the veracity of the statements, with some going far to as to create a presumption of falsity.<sup>113</sup> Thus, this scientific measure

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<sup>109</sup> See Jones, *supra* note 1, at 838; Eddy, *supra* note 22, at 315

<sup>110</sup> Bederman et al., *supra* note 7, at 158.

<sup>111</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); Bederman, *supra* note 3, at 212.

<sup>112</sup> 475 U.S. at 776

<sup>113</sup> See *ARIZ. REV. STAT. ANN. § 3-113*. (West Supp. 1995). (For example, typical language mimics the Arizona statute that states that “statements not based on reliable scientific facts and reliable scientific data are false.”); *LA. REV. STAT. ANN. §§ 4501-4504*. (West Supp. 1996) (While the Louisiana statute is exemplary of a presumption of falsity: “a statement is presumed false when not based upon reasonable and reliable scientific inquiry facts and data.”)

required by the statutes to either prove veracity or rebut a presumption of falsity (rather than the constitutional standard of proving falsity) inevitably shifts the burden of proof onto the defendant.<sup>114</sup>

The more policy-driven constitutional criticism of the burden shifting requirements of the agricultural disparagement statutes is that they work to undercut First Amendment rights.<sup>115</sup> Bederman, et al., state that “[b]y placing the burden of proof on the speaker to prove the truth of what was said or written, the speaker’s free speech rights are violated.”<sup>116</sup> Furthermore, the burden on the defendant to prove the truth of his statements using “reasonable and reliable scientific facts, data and inquiries is potentially onerous because of the inherent subjectivity and often uncertainty of ‘scientific’ methodologies.”<sup>117</sup> Therefore, critics of this inevitable burden shifting to the defendant in an agricultural disparagement action argue that unless the statutes are reformed to uphold the free speech demands that place the burden of proof on the plaintiff, they will be deemed unconstitutional.

#### **4. Falsity**

The “reasonable and reliable scientific” measurement to determine “falsity” also raises constitutional eyebrows.<sup>118</sup> Under common law defamation and disparagement

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<sup>114</sup> Jones, *supra* note 1, at 839.

<sup>115</sup> Bederman et al., *supra* note 7, at 159.

<sup>116</sup> *Id.*

<sup>117</sup> Jones, *supra* note 1, at 839.

<sup>118</sup> *See Id.* at 840.

principles, if a statement could be reasonably true, then it was deemed not to be false.<sup>119</sup>

According to one critic, the falsity requirements of the agricultural disparagement laws

turn the common law and constitutional requirement “on its head.”<sup>120</sup> Jones states,

“What is only possibly true may be legally false. Indeed, unless a statement can be supported by reasonable scientific evidence (whatever that is), it is presumed false.”<sup>121</sup>

Thus, unless there is some “truth” within the reasonable scientific evidence, which in and

of itself raises a variety of issues, then the plaintiff will have satisfied this statutory

requirement.<sup>122</sup> As a result, it is argued that because many of the statutes lack a

requirement to prove “true” falsity, they are insufficient to meet constitutional

standards.<sup>123</sup>

Furthermore, it is argued that the “reasonable and reliable” scientific measurement is unconstitutional because it creates no safe harbor for the voicing of honest opinions, thoughts and free expressions.<sup>124</sup> In *Milkovich v. Lorain Journal Co.*, the Supreme Court held that opinions that do not contain any provable factual falsities will be protected by First Amendment safeguards.<sup>125</sup> According to Bederman, “[t]he ‘reasonable and reliable scientific inquiry’ test for falsity does not allow for the occasional failure of

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<sup>119</sup> *Id.*

<sup>120</sup> Jones, *supra* note 1, at 840.

<sup>121</sup> *Id.*

<sup>122</sup> *See Id.*

<sup>123</sup> *See Id.*

<sup>124</sup> David J. Bederman, *supra* note 3, at 211.

<sup>125</sup> *Milkovich v. Lorrain Journal Co.*, 497 U.S. 1, 20 (1990).

‘reasonable and reliable’ science to reach a public consensus. Because of this failure in the statutes and the scientific community, food safety advocates will not know what standard they will be held to. Thus, their speech is chilled.”<sup>126</sup>

However, it is argued that the statutes do not fall below the constitutional standards in terms of falsity. Lisa Gould argues that because all of the statutes require the plaintiffs to, at least initially, prove that the disparaging statement was false, regardless of the scientific measurement, they are still constitutionally valid.<sup>127</sup> Furthermore, even the four statutes that “presume” or “deem” the statement to be false do not fall below *Hepp*’s constitutional mandates because these provisions “are based on some type of evidence a court would look to in drawing an inference of falsity.”<sup>128</sup>

These critical arguments illuminate some of the constitutional concerns regarding the agricultural disparagement statutes. While the arguments seemingly provide a valid ground for potential constitutional attacks upon these statutes, only time will tell whether their constitutionality will ever become an issue before judicial review.

## **V. JUDICIAL REVIEW OF AGRICULTURAL DISPARAGEMENT STATUTES**

Whether these statutes will ultimately withstand constitutional attacks is still a lingering question amongst scholars. As of today, there have only been five cases that

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<sup>126</sup> Bederman, *supra* note 3, at 213.

<sup>127</sup> Gould, *supra* note 35, at 1041.

<sup>128</sup> *Id.* at 1042.

involved an agricultural disparagement claim, with only two, coming out of Texas and Georgia, resulting in published opinions.<sup>129</sup> None of these cases ever reached the issue of whether the agricultural disparagement statutes are constitutional; rather they were dismissed or withdrawn prior to adjudication.<sup>130</sup> Of the two published claims, the first that was brought under these statutes was the infamous Oprah Winfrey case, which involved a claim brought against her by Texas cattle ranchers alleging disparagement against their food products.<sup>131</sup>

#### **A. *Texas Beef Group v. Winfrey***

In 1996, Texas cattle ranchers filed the very first agricultural disparagement action against Oprah Winfrey, her production company, and a guest speaker on her television program, alleging that the plaintiffs had made false, disparaging statements about their products during a segment entitled “Dangerous Foods.”<sup>132</sup> The statements were regarding Bovine Spongiform Encephalopathy (BSE), which is also known as “mad cow” disease, in which the guest speaker, an animal rights activist named Howard Lyman, stated that BSE “could make AIDS look like the common cold.”<sup>133</sup> As a response

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<sup>129</sup> See *Texas Beef Group v. Winfrey*, 11 F. Supp 2d 858 (N.D. Tex. 1998), aff’d, 201 F.3d 680 (5th Cir. 2000); *Action for a Clean Env’t v. Georgia*, 457 S.E. 2d 273 (1995).

<sup>130</sup> See *Id.*; *Action for a Clean Env’t v. Georgia*, 457 S.E. 2d 273 (1995); *Anderson d/b/a A-1 Turf Farm, and d/b/a A-1 Grass Co. v. McAfee* No. 96-12667 (Dallas County Dist Ct., 134th Judicial Dist., April 24, 1998); *Burleson Enterprises, Inc. v. American Honda Motor Co., Inc.*, (No. 2-97-CV-398 (N.D. Tex. Nov. 7, 1998); *Agricultural General Co. v. Ohio Public Interest Research Group*, No. 397CV7262 (N.D. Ohio filed March 25, 1997).

<sup>131</sup> See *Texas Beef Group v. Winfrey*, 11 F. Supp 2d 858 (N.D. Tex. 1998), aff’d, 201 F.3d 680 (5th Cir. 2000);

<sup>132</sup> See *Texas Beef Group*, 11 F. Supp. at 860.

<sup>133</sup> *Id.*

to this, Oprah exuberantly exclaimed, “It has just stopped me cold from eating another burger.”<sup>134</sup>

The cattle ranchers responded with claims of alleged monetary losses as a result of Oprah’s show.<sup>135</sup> The ranchers described the resulting effects of the broadcast as the “Oprah Crash,” with financial losses reaching into the millions, as well as temporary and permanent goodwill losses.<sup>136</sup> Shortly thereafter, the cattle ranchers filed suit in the Northern District Court of Texas seeking relief under the Texas agricultural disparagement statute.<sup>137</sup>

The Texas agricultural statute provides that an agricultural disparagement defendant will be found liable if they (1) disseminated false information to the public, (2) about perishable food products, (3) stating or implying that the food product is not safe for human consumption, (4) knowing that the information was false, and (5) causing damage to the plaintiffs.<sup>138</sup>

The defendants’ motions to dismiss were denied; but, they ultimately prevailed when their motion for a directed verdict on the agricultural disparagement claim was

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<sup>134</sup> *Texas Beef Group*, 11 F. Supp. at 860.

<sup>135</sup> Bederman, *supra* note 3, at 218.

<sup>136</sup> *Id.* at 219.

<sup>137</sup> *See Texas Beef Group*, 11 F. Supp. at 862. (The plaintiffs not only sought relief under the agricultural disparagement statutory claim, but also filed claims under common law theories of business disparagement, slander, and liable.

<sup>138</sup> *TEX. CIV. PRAC. & REM. CODE ANN § 96.0001-.004.* (West Supp. 1996); see also, Bederman, *supra* note 3, at 220.

granted.<sup>139</sup> Upon granting the motion for a directed verdict, the district court only focused on two elements of the Texas disparagement statute: the perishability element and the level of intent.<sup>140</sup> The court declared that the cattle were not “perishable” within the meaning of the act and that the plaintiffs failed to meet their burden of proving that the defendants knowingly made false statements.<sup>141</sup>

Under the Texas statute, a “perishable” product is one that “is sold or distributed in a form that will perish or decay beyond marketability within a limited period of time.”<sup>142</sup> The cattle ranchers argued that the live cattle were considerable “perishable” within the meaning of the statute because they were “affected by extended stays on feed lots,”<sup>143</sup> The district court disagreed and concluded that this evidence was insufficient because live cattle did not fit within the carefully worded language of the statute.<sup>144</sup> Instead, the court stated that, “although live fed cattle may decay by passing into a state of less perfection or become less profitable, the plaintiffs’ cattle are still marketable, although they may be less profitable, and in some cases not marketable to every buyer,

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<sup>139</sup> See *Texas Beef Group*, 11 F. Supp. at 865. (The defendants’ motions to dismiss under the common law claims were denied and they ultimately went to the jury. The jury found in favor of the defendants).

<sup>140</sup> *Id.* at 882-63.

<sup>141</sup> *Id.*

<sup>142</sup> *Tex. Civ. Prac. & Rem. Code* §§ 96.002(a) (West 1997)

<sup>143</sup> *Texas Beef Group*, 11. F. Supp. at 863; see also, *Bederman*, *supra* note 3, at 221.

<sup>144</sup> *Id.*

and thus plaintiffs do not produce a food product that will perish or decay beyond marketability within a limited period of time.”<sup>145</sup>

While this holding alone was sufficient to grant defendants’ motion for a directed verdict, the district court also ruled on the statutory standard of conduct element.<sup>146</sup> The standard of conduct required under the Texas statute that makes an agricultural disparagement claim actionable is “actual knowledge” that the information disseminated to the public was false.<sup>147</sup> The district court held that the plaintiffs “wholly failed” to meet their burden of proving that the defendants knowingly made false statements regarding the cattle ranchers’ product.<sup>148</sup> Rather than making any definitive ruling on the constitutionality of the Texas statute, the district court circumvented the issue and removing all First Amendment issues by stating, “The requirement of a knowing mental state is the strictest standard in First Amendment jurisprudence. In crafting this standard, the Texas Legislature exceeded even the constitutionally required ‘actual malice’ standard of knowledge or reckless disregard established in *New York Times v. Sullivan*...”<sup>149</sup> With this heightened standard of pleading, the court was easily able to find that the defendants failed to carry their burden of proving that the plaintiffs had actual knowledge that the disparaging statements they made were false.<sup>150</sup>

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<sup>145</sup> See *Texas Beef Group*, 11 F. Supp. 858.

<sup>146</sup> *Id.* at 864.

<sup>147</sup> *Tex. Civ. Prac. & Rem. Code* §§ 96.001 (West 1997)

<sup>148</sup> *Texas Beef Group*, 11 F. Supp at 862.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

## **B. Constitutional Implications (or Lack Thereof) Resulting from *Oprah*.**

The constitutional implications of the Texas agricultural disparagement statute, as well as any of the agricultural statutes for that matter, are still issues that were left open by the *Texas Beef Group* court. Because the court decided not to rule upon the constitutionality of the statute itself by “interpret[ing] it in such a way as to remove any First Amendment concerns,”<sup>151</sup> it is difficult to predict whether other agricultural statutes will be able to withstand constitutional scrutiny if they ever do come under judicial review. However, some proponents of the statutes argue that because the Texas legislature imposed the heightened level of intent to require actual knowledge of falsity, rather than the *Sullivan* standard of “actual malice,” the statute exceeds constitutional requirements and will be given “great weight by courts rejecting constitutional challenges.”<sup>152</sup> Even assuming this prediction is true, many commentators argue that this still leaves open other constitutional concerns that were discussed above, such as standing requirements, proving falsity and the shifting of the burden of proof. Though, according to Bederman, one thing is for sure: “[T]he Texas Beef Group ruling insures that statutory food libel actions will be given an exceedingly narrow ambit.”<sup>153</sup>

## **C. Other Cases Involving Agricultural Disparagement Claims**

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<sup>151</sup> Bederman, *supra* note 3, at 222.

<sup>152</sup> Kevin A. Isern, *Limitations on Commercial Speech: The Constitutionality of Agricultural Disparagement Statutes*, 10 DePaul Bus. L.J. 233, 255 (1998).

<sup>153</sup> Bederman, *supra* note 3, at 222.

The second published case brought under an agricultural disparagement statute involved two grass-roots organizations: Action for a Clean Environment and Parents for Pesticide Alternatives.<sup>154</sup> The two groups filed suit against the state of Georgia seeking declaratory judgment regarding the constitutionality of the state’s agricultural disparagement statute. The suit was ultimately dismissed because the trial court found that there was no actual dispute or controversy between the parties.

Another case that was filed under the Texas agricultural statute has become known as the “lawn libel” case and has been pronounced as “pure frivolity, almost the reductio ad absurdum of veggie libel.”<sup>155</sup> In this case, an agricultural state agent was sued by the owner of a grass farm because of a statement he made in an article in a local newspaper.<sup>156</sup> He stated that “Texturf 10,” a certain type of grass, was “very susceptible to disease” and not suitable for the humid conditions of the Texas climate.<sup>157</sup> Ms. Anderson, the owner of a grass farm that grew eighty percent of the Texturf in Texas, sued under the state’s agricultural disparagement statute.<sup>158</sup> The defendant’s motion for summary judgment was granted because he was free from liability under the doctrine of sovereign immunity;<sup>159</sup> however, Bederman adds to this by stating, “[it was dismissed] presumably on the ground that (not even in Texas) is grass considered an agricultural

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<sup>154</sup>Action for a Clean Env’t v. Georgia, 457 S.E. 2d 273 (1998).

<sup>155</sup> *Anderson d/b/a A-1 Turf Farm, and d/b/a A-1 Grass Co. v. McAfee*, No. 96-12667 (Dallas County Dist Ct., 134th Judicial Dist., April 24, 1998); *see also*, Bederman, *supra* note 3, at 223-24.

<sup>156</sup> *See Collins supra* note 101, at 17 n. 85; Jones, *supra* note 1, at 844 (explaining the details of the facts).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

product consumed by human beings.<sup>160</sup> Much like the two cases discussed above, this suit was summarily dismissed before ever reaching the constitutional merits of the statute.<sup>161</sup>

A third case involving the Texas agricultural statute involved emus and the Honda Motor Company.<sup>162</sup> The plaintiffs in this case were a group of Texas emu ranchers who sued Honda because of an arguably “disparaging” television advertisement that cast emus in a negative light.<sup>163</sup> As a result of this ad, the emu ranchers alleged a loss in emu sales from approximately \$25,000 to \$30,000 a bird (at its highest market value) to \$30 after the airing of Honda’s advertisement.<sup>164</sup> Despite the alleged pecuniary loss, the case was dismissed because the “disparaging” statements did not suggest that emus were unsafe for human consumption.<sup>165</sup>

The fifth case and final case to be brought under an agricultural disparagement statute involved, not emus this time, but eggs.<sup>166</sup> In *Agricultural General Co. v. Ohio*

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<sup>160</sup> Bederman, *supra* note 3, at 224.

<sup>161</sup> *Id.*

<sup>162</sup> *Burleson Enterprises, Inc. v. American Honda Motor Co., Inc.*, (No. 2-97-CV-398 (N.D. Tex. Nov. 7, 1998)).

<sup>163</sup> See Jones, *supra* note 1, at 844; see also, Bederman, *supra* note 3, at 224 (describing the television ad: Joe[,] who bounces from dubious career opportunity to another, is shown considering a sales job in home siding: “Joe, plastics last forever.” Then [he is] standing before a wiener stand in the middle of a desert... [He then] discusses an unspecified opportunity with a man who worriedly insists: “Joe, let’s not call it a pyramid scheme.” Finally, ... Joe appears with a man described by Honda as an actual emu rancher, missing teeth and all. The old-timer has his own sage advice: “Emu, Joe, it’s the pork of the future.”

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Ohio Public Interest Group v. AgriGeneral Co.*, No. 397CV7262 (N.D. Ohio filed March 25, 1997); see also, Bederman, *supra* note 3, at 226; Jones, *supra* note 1, at 845.

*Public Interest Research Group*, the plaintiffs sued a public interest group for statements made during a press conference regarding the re-processing of old eggs.<sup>167</sup> The plaintiffs, AgriGeneral Company (which has since changed its name to “Buckeye Egg Farms”), was the largest egg producer in Ohio and allegedly had a practice of taking expired eggs and “re-processing” them by putting them in cartons with newer eggs, without making the distinction between the old eggs and new eggs known to the consumer.<sup>168</sup> Not only did a representative of the public interest group report this practice at a press conference, but she also specifically stated that, “We have no idea how many, if any, consumers have been made ill by consuming these eggs.”<sup>169</sup> However, just like the other four cases, this case never reached the constitutionality of the agricultural statute because the plaintiffs dismissed the suit before it could be fully litigated.<sup>170</sup>

## **VI. AGRICULTURAL DISPARAGEMENT STATUTES EXAMINED AGAINST THE BACKDROP OF FOOD SAFETY AND “JUNK SCIENCE.”**

Opponents of the agricultural disparagement statutes argue that the true goal of these statutes is to silence critics of the agricultural industry and its products.<sup>171</sup> While

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<sup>167</sup> *Ohio Public Interest Group v. AgriGeneral Co.*, No. 397CV7262 (N.D. Ohio filed March 25, 1997); *see also*, Bederman, *supra* note 3, at 226; Jones, *supra* note 1, at 845.

<sup>168</sup> *Id.*

<sup>169</sup> Jones, *supra* note 1, at 845.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 856.

Oprah Winfrey could afford to fight the agricultural producers against meritless suits, the goal of these statutes has the potential problematic affect of restricting the free speech of more economically vulnerable individuals and groups.<sup>172</sup> Although no case has been filed in over a decade, there have been numerous instances in which individuals have been compelled to restrict their free speech with the threat of a lawsuit.<sup>173</sup> These instances are exemplary of the opponents' position that "the less we rely on the marketplace of ideas to regulate the debate about food safety, and the more we use coercive legal restrictions, public discourse about food and eating becomes less and less civil, and less and less informative."<sup>174</sup> Thus, it could be argued that the agricultural statutes are achieving their desire result.<sup>175</sup> However, one commentator soothingly eases the minds of potential infringers of the theses statutes by stating, "Given the limited use of agricultural disparagement statutes to date, and their limited potential for future use, there is little basis for fearing that these statutes will be used widely to chill free speech."<sup>176</sup>

Furthermore, it is worthy to note the larger cultural context regarding "scientific certainty" of which to examine the agricultural disparagement movement. Today, rather than believing in the full certainty of "science," scholarship and public discourse are

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 858 (For example, an environmental group received a letter from an attorney representing the United Fresh Fruit and Vegetable Association stating that if they should cease distributing information regarding the safety of irradiating fruits and vegetables).

<sup>174</sup> Bederman, *supra note 3*, at 192.

<sup>175</sup> *Id.* at 859.

<sup>176</sup> Gould, *supra note 35*, at 1048.

beginning to break away from this traditional conception and are starting to make a distinction between good science and junk science.<sup>177</sup> This distinction within the context of agricultural disparagement is most aptly exemplified with the Alar scare and the daunting aspects that could result from dissemination of alleged junk science.<sup>178</sup> However, the legal remedy to combat junk science is uncertain and a constant struggle between Alar-type scares and free speech rights is consistently in the works, with the agricultural disparagement statutes being a part of this negotiation.<sup>179</sup> While the individual agricultural disparagement statutes themselves can come under both constitutional and public scrutiny, one commentator explains that, “The larger picture here is the story of how we deal as lawyers, as policy-makers, in the face of scientific uncertainty.”<sup>180</sup>

## VII. CONCLUSION

The future prevalence and force of agricultural statutes is difficult to ascertain. Although many scholars argue that many of these statutes will not withstand constitutional scrutiny, since 1998, no agricultural disparagement cause of action has arisen in our courts. Theoretically, these scholars make valid arguments; however, it is left only to the judiciary to determine their constitutionality. Furthermore, there has been little movement in the last few years within state legislatures to enact such type of statutes. Whether the agricultural disparagement movement has merely lost steam, or

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<sup>177</sup> Bederman, *supra* note 3, at 178.

<sup>178</sup> Jones, *supra* note 1, at 859.

<sup>179</sup> Bederman, *supra* note 3, at 178.

<sup>180</sup> *Id.*

whether the industry is awaiting another Alar-type scare to reinvigorate state legislatures to continue with enacting such legislation is anyone's prediction.