

Indiana Law Blog Newsletter

Thank you for subscribing to the ILB Newsletter. Invite your friends and colleagues to [sign up to receive this free weekly newsletter](#), emailed every other Monday morning. Because it is a weekly, the **ILB Newsletter** (unlike the blog) will not be able to bring you the news *as it happens*. But it will highlight news you may have missed, and provide some depth on news you may have had questions about. Because it is a newsletter, length will be limited to what I believe the normal reader can tolerate. (BTW, feedback and suggestions are encouraged - send to [ilb.newsletter at indianalawblog.com](mailto:ilb.newsletter@indianalawblog.com).)

Idaho's "ag-gag" law "recordings" prohibition violates 1st amendment, per 9th Circuit panel

Here is the 56-page, Jan. 4, 2018, 2-1 opinion in [Animal Legal Defense Fund v. Idaho](#). From the staff summary to the opinion:

The Interference with Agricultural Production law was enacted after a disturbing secretly-filmed expose of operations at an Idaho dairy farm went live on the internet. The statute —targeted at undercover investigation of agricultural operations —broadly criminalizes making misrepresentations to access an agricultural production facility as well as making audio and video recordings of the facility without the owner's consent.

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. The panel rejected plaintiffs' argument that the statute would reach "a person who overstates her education or experience to get a job for which she otherwise would not have qualified,

whether the person is an undercover investigator or not,” because in such a case, the law’s requisite intent to injure would not be satisfied.

From the opinion itself:

After the film went live on the Internet, both the court of public opinion and the Idaho legislature responded, with the latter eventually enacting the Interference with Agricultural Production law. Idaho Code § 18- 7042. That legislation —targeted at undercover investigation of agricultural operations — broadly criminalizes making misrepresentations to access an agricultural production facility as well as making audio and video recordings of the facility without the owner’s consent. Statutes of this genre — dubbed by some as Ag-Gag laws —have been passed in several western states.

This appeal highlights the tension between journalists’ claimed First Amendment right to engage in undercover investigations and the state’s effort to protect privacy and property rights in the agricultural industry. Idaho challenges the district court’s determination that four subsections of the statute —§ 18- 7042(1)(a) –(d)—are unconstitutional on First Amendment and Equal Protection grounds. The Animal League Defense Fund and various other animal rights organizations (collectively “ALDF”) urge us to uphold the district court’s injunction against enforcement of the statute, arguing that the law criminalizes whistleblower activity and undercover investigative reporting —a form of speech that has brought about important and widespread change to the food industry, an arena at the forefront of public interest.

Our analysis is framed by the Supreme Court’s decision in *United States v. Alvarez*, which addressed the First Amendment and false speech. 567 U.S. 709 (2012). We conclude that Idaho’s criminalization of misrepresentations to enter a production facility, § 18- 7042(1)(a), and ban on audio and video recordings of a production facility’s operations, § 18- 7042(1)(d), cover protected speech under the First Amendment and cannot survive constitutional scrutiny. In contrast, in accord with *Alvarez*, Idaho’s criminalization of misrepresentations to obtain records and secure employment are not protected speech under the First Amendment and do not violate the Equal Protection Clause. § 18- 7042(1)(b) –(c). Thus, we affirm in part and reverse in part the district court’s entry of summary judgment in favor of ALDF and vacate in part its permanent injunction against enforcement of the statute.

We are sensitive to journalists’ constitutional right to investigate and publish exposés on the agricultural industry. Matters related to food safety and animal cruelty are of significant public importance. However, the First Amendment right to gather news within legal bounds does not exempt journalists from laws of general applicability. For this reason, we uphold the provisions that fall within constitutional parameters, but strike down those limitations that impinge on protected speech

Reason has a [January 13, 2018 article](#) on the opinion, headed "*Court Kills Most of Idaho's Law Against Secret Farm Recordings: A likely-fatal blow to the state's censorious 'ag gag' law,*" and includes a number of links.

Indiana in 2014 enacted similar legislation, but without the audio/video prohibition. From a (no longer available online) January, 2014 editorial in the *Muncie Star-Press*:

Legislators wasted no time getting to business on unneeded legislation that likely violates the First Amendment.

Case in point: the return of the so-called "ag gag" bill, once again introduced by state Sen. Travis Holdman of Markle. His bill creates a new kind of crime, "agriculture mischief." Unlike last year's version that prohibited photographing or videotaping farming activity, this year's version is a name-your-own-crime bill that allows farmers to prohibit any kind of activity that might cause monetary damage to a farm.

The genesis of this bill comes courtesy of the American Legislative Exchange Council, which distributes model legislation. Similar bills unfortunately have been enacted in other states.

And from a January 2014 story in the *Bloomington Herald-Times*:

Most of the bills follow a similar mold, based on the Animal and Ecological Terrorism Act; part of the American Legislative Exchange Council's "model legislation" that the conservative policy group circulates to lobbyist and lawmakers. The ALEC act was drafted in 2002.

A similar bill in the Indiana Legislature died at the last minute in 2013. It was withdrawn after a lengthy debate and criticism of the broadness of the criminal charges.

The *Food Safety News* [reported on March 4, 2014](#): "*Indiana General Assembly Passes Tough New Ag Property Trespass Law.*" The story begins:

Call it farm protection, Hoosier-style. The Indiana General Assembly has sent farm protection legislation without any "gags" to Gov. Mike Pence for his signature.

The bill does not ban taking pictures or making videos, does not change existing law on reporting animal abuse, and contains no penalties for getting creative on a job application. Those are the elements contained in agricultural protection bills that animal-rights activists have come to label "ag-gag" measures.

However, Senate Bill (SB) 101 does give agricultural property the same protection against trespass that's now afforded to schools, churches and private homes. Trespass and do damages of more than \$750 to agricultural property, and the offender will be charged with a felony carrying jail time of up to three years.

Two Lake County judges were not retained -- decades ago

With the addition last year of Marion County, five Indiana counties - Marion, Allen, Lake, St. Joseph and Vanderburgh - select judges through a merit process, similar to the way our appellate judges are selected. Once appointed to the bench, these judges are periodically subject to retention elections.

Has a jurist ever failed to be retained? Not at the appellate level. But at the county level, specifically Lake County, the *ILB* recently learned, the failure of a seated judge to be retained by the voters has happened twice. (big h/t to Bill Dolan and Dan Carden of the *NWI Times*)

Lake County reporter Bill Dolan recalls that in the late 1970s Lake Criminal Court Judge Andrew Giorgi lost his retention election. Somewhat more recently, in 1992 Lake Juvenile Judge Darlene Wanda Mears lost her retention election. Here is the still available [NWI Times story](#), from Nov. 4, 1992 - some quotes:

Juvenile Court Judge Darlene Wanda Mears on Tuesday became the second Superior Court judge in Lake County to be ousted from the bench since the public began voting on retentions in 1973.

The first was Andrew Giorgi, a criminal court justice, who was voted off the bench in 1977.

Despite fund-raisers, public appearances and campaign signs posted throughout the county, Mears did not rally enough support to retain her judicial seat. Mears could not be reached for comment.

Mears was the target of media attention last week when the Lake County Democratic Central Committee publicly opposed her retention and that of Superior Court Judges James Danikolas and Morton B. Kanz. Nevertheless, voters chose to retain Danikolas and Kanz. * * *

The central committee dropped its campaign against Danikolas and Kanz, who filed a lawsuit against the committee claiming its action violated state law prohibiting political organizations from getting involved in judicial retention contests. The suit was resolved by an agreement as soon as it was filed last Thursday.

And here is the [March 30, 1993 NWI Times story](#) re Mary Beth Bonaventura's selection by the then-Governor to fill the vacancy, via the Lake County merit process. Some quotes from the long story:

Surrounded by flowers and answering calls from well-wishers Monday afternoon, Mary Beth Bonaventura was beginning to adjust to the news that she will in three days be the newest judge in the Lake Superior Court system. At 1 p.m. Monday, Bonaventura took a call from Jane Magnus, special counsel to Gov. Evan Bayh, who told her Bayh had picked her from a field of three to

succeed Darlene Wanda Mears as judge in the court's Juvenile Division. * * *

Unlike the other Superior Court judges, the juvenile court judge is responsible for the administration of the center to which detainees from the court system are confined. Tula Kavadias, incoming Lake County Bar Association president and an advocate for greater gender equality on the bench, said Monday she is "always pleased to see qualified women ascending to judicial positions. She's young, she has fresh ideas and I hope she brings that youth, vigor and innovation to the bench."

Bonaventura comes to the bench following the removal by voters last November of Mears, who had served since 1978 and who was embroiled in a controversy surrounding her alleged use of juvenile court employees for personal services. A two-year grand jury consideration of a state police probe of the allegations ended Dec. 18 with Mears' indictment on 12 felony counts of ghost employment and theft. * * *

Some were surprised that Bayh, a Democrat, would appoint Bonaventura, a Republican, to the high-profile juvenile court judgeship. But Bonaventura said the subject of politics did not come up in her interviews, and she never spoke with Bayh. "I applied because I felt I was qualified," she said. "I never thought, and maybe this is naive, that because I have a Republican voting record, even though I've voted for Democrats, that would have any effect. No one (in Indianapolis) ever raised that issue with me."

More on: Upcoming Vacancy on the Indiana Court of Appeals

Updating the [Jan. 15 ILB story](#) on the upcoming retirement this summer of Judge Michael P. Barnes, the Indiana Courts website has now made the [applications and instructions](#) available. From the [announcement](#):

A candidate for the vacancy must be an Indiana resident living in the third appellate district and must have been a member of the Indiana Bar for at least ten years or an Indiana judge for five years. The application, which will be submitted through the Indiana Courts Portal and the Judicial Nominating Commission Office, requires providing pertinent background information, writing samples, references and educational transcripts.

The Commission will conduct public interviews of qualified candidates at the State House on a date to be determined. After the interviews and Commission deliberations in an executive session, the Commission will publicly vote to send the three most qualified names to Governor Eric Holcomb. The Governor will have 60 days to select Indiana's next Court of Appeals Judge from the three names submitted by the Commission.

The application deadline is noon on Monday, April 2, 2018. The *ILB* anticipates that the first rounds of interviews will be set to follow later in April,

Are Felons Fit to Be Lawyers? Increasingly, the Answer Is Yes

That was the headline to a long story in the [January 19, 2018 *NY Times*](#). Some quotes:

Tarra Simmons, a former drug addict who had been incarcerated twice, earned a law degree with honors. Then she went through a moral character and fitness review to become a licensed lawyer in Washington State, where she lives.

The licensing panel voted to block her from taking the bar licensing exam. While the committee's rationale is under seal, it likely had something to do with the fact that she had committed felonies and gone bankrupt.

Ms. Simmons, 40, has appealed the ruling successfully. * * *

Whether people like Ms. Simmons should be allowed to practice law is a hot question these days. Acceptance for those with less-than-impeccable pedigrees seems to be rising.

Since the 1930s, states routinely applied character and fitness tests in order to guard against licensing attorneys who might misuse client funds or who have substance abuse problems. * * *

After her release [from prison] in 2013, Ms. Simmons graduated magna cum laude from Seattle University School of Law. She later won a fellowship from Skadden Arps, Slate, Meagher & Flom, a law firm based in New York, to spend two years providing civil legal services to the poor.

After the bar licensing panel rejected her application last spring, she appealed to the Washington State Supreme Court. It agreed to hear her case — the first such character and fitness screening case on its docket in more than three decades.

Ms. Simmons arranged for Shon R. Hopwood to represent her. Mr. Hopwood is an ex-felon, too. Convicted of a series of bank robberies in Nebraska, he spent a decade in federal prison, where he began writing legal appeals. After his release, he graduated from the University of Washington Law School in Seattle and later clerked for a federal judge. He now teaches law at Georgetown University.

Arguing before the state Supreme Court at a one-day hearing last November, Mr. Hopwood acknowledged Ms. Simmons's prior misconduct. But, he noted, "character is not static." He urged the justices to decide that it "cares about rehabilitation and values that over prior misconduct."

The *Times* story links to [its earlier story](#) on Shon Hopwood, from 2010. And here is his [page on Wikipedia](#).

What about Indiana? See this lengthy [Indianapolis Monthly](#) story from December 2015, headed "*The Indy Lawyer with a Manslaughter Conviction.*"

1/ Do you enjoy this Newsletter? Do you miss the ILB? I'm looking for support for an all-new and even better Indiana Law Blog.

2/ Could your organization or firm use some help with a challenging short or long-term project? Then let's talk.

Oral arguments (so far) scheduled before the Indiana Supreme Court for February, 2018

Thursday, Feb. 8th:

- 9:00 AM - ***In the Matter of the Supervised Estate of Gary Kent v. Cynthia Kerr*** ([55A01-1612-ES-02907](#); [55S01-1712-ES-00747](#)) (Morgan) A month before Gary Kent died, his adult children, Cynthia Kerr and John David Kent, signed a family settlement agreement to divide Gary's assets. After Gary's death, Cynthia asked the probate court to enforce the settlement agreement. The Morgan Superior Court dismissed Cynthia's petition, finding that pre-mortem family settlement agreements were not enforceable and John David had rescinded his acceptance of this agreement before Gary's death. The Court of Appeals reversed and instructed the trial court to enter judgment for Cynthia. [Matter of Estate of Kent](#), 82 N.E.3d 326 (Ind. Ct. App. Aug. 25, 2017), *vacated*. The Supreme Court has granted a petition to transfer the case and has assumed jurisdiction over the appeal.

The briefs and lower court opinions may be accessed via the links above. Webcasts of the Supreme Court's oral arguments are [available here](#).

Recommended this week

- ***How To Encrypt Your Devices.*** "The ability to encrypt all the data on a device is now usually built-in to its operating system, meaning there is no good excuse not to protect your privacy in this manner." [DuckDuckGo Blog](#).
- ***Seven apps and tools to organize your life.*** "Restore order to your days." [Popular Science](#).

- ***The Beginner's Guide to VPNs.*** "Everything you need to know to understand and use virtual private networks." [Lifehacker](#).
 - ***Create a bot of yourself with Watson.*** "To see how easy it is to build your chatbot ..., keep reading..." [IBM Blog](#).
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