

Duncan Kennedy's Public/Private Divide Interpretation and Ag-Gag Laws: Who Are We Fooling?

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As an international jurist, I do not often engage with national law scholarly literature, except when I foray into the field of animal law. I happened to read the entertaining and enlightening 1982 Duncan Kennedy article *The Stages of the Decline of the Public/Private Distinction*¹ to prepare for a conference on this precise distinction; I laughed out loud when I read his introductory remark stating that “When people hold a symposium about a distinction, it seems almost certain that they feel it is no longer a success. Either people can't tell how to divide situations up between the two categories, or it no longer seems to make a difference on which side a situation falls.”² The same day, I stumbled upon a CNN Money video clip of North Carolina's newly introduced “Ag-Gag” law.³ The same day still, I encountered Unbound's call for papers for this special issue on the work of Duncan Kennedy. I felt compelled to share my thoughts as they interrelated through these concurrent episodes. I will firstly present an overview of Ag-Gag laws, and then reflect on the use of the public/private distinction in justifying this legal trend.

Mark Bittman is credited with first coming up with the term “Ag-Gag” to define laws that criminalize or subject to civil lawsuits whistleblowers in the agriculture industry, in his 2011 New York Times opinion piece, *Who Protects the Animals?*⁴ Kansas passed the *Farm Animal and Field Crop and Research Facilities Protection Act* in 1990, and Montana passed the *Farm Animal and Research Facilities Protection Act* in 1991. But the real trend started in 2011, which explains Bittman's column at that moment; many states since then, successfully or unsuccessfully, introduced such legislation, and are continuing to do so.⁵ The Animal Legal Defense Fund (ALDF) filed two lawsuits against such legislations, one in Utah, in 2013, and one in Idaho, in 2014, on the grounds that this violates constitutionally protected freedom of speech.⁶

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¹ Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction* 130 U. PA. L. REV. 1349 (1981).

² *Id.* at 1349.

³ Kate Trafecante, *North Carolina law could stymie undercover videos of animal abuse*, CNN MONEY, June 9, 2015, available at <http://money.cnn.com/2015/06/05/news/animal-abuse-law-north-carolina/>.

⁴ Mark Bittman, *Who Protects the Animals?*, THE NEW YORK TIMES, Apr. 26, 2011, available at http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/?_r=0

⁵ The American Society for the Prevention of Cruelty to Animals (ASPCA) keeps an up-to-date list of such attempts. See, e.g., ASPCA, *Ag-Gag Bills at the State Level*, available at <https://www.aspcanet.org/fight-cruelty/advocacy-center/ag-gag-whistleblower-suppression-legislation/ag-gag-bills-state-level>.

⁶ *Taking Ag Gag to Court*, ANIMAL LEGAL DEFENSE FUND, available at <http://aldf.org/cases-campaigns/features/taking-ag-gag-to-court/> (last visited Sept. 11, 2015).

North Carolina's recent attempt made headlines, namely because Senator Pat McCrory's veto on the *Act to Protect Property Owners from Damages Resulting from Individuals Acting in Excess of the Scope of Permissible Access and Conduct Granted to Them* was overridden by the Senate.⁷ Section 99A-2, paragraph (a), of this bill states that: "Any person who gains access to the nonpublic areas of another's premises and engages in an act that exceeds the person's authority to enter those areas is liable to the owner or operator of the premises for any damages sustained. For the purposes of this section, 'nonpublic areas' shall mean those areas not accessible to or not intended to be accessed by the general public."⁸ This overarching piece of legislation⁹ is quite dissuasive for anyone wishing to report abuse, as the maximum fee which can be imposed is \$5,000 *per day* during which "violations" occurred.¹⁰

What seems to be happening is that these laws are justified by relying on the private character of industrial farming facilities, or to use their terminology, on the fact that certain zones within them are 'nonpublic.' It seems that private property, of the facilities and of the animals, as a sacrosanct concept of Western culture and law, supersedes public interest, yet relies on public powers to legitimize it. Doesn't it seem absurd, though, in these circumstances? The public has to take the companies' word for it that the animals they will consume or from which they consume the products are not subject to cruelty, and if workers do become aware of such cruelty, they are to keep this information private within the workplace, as bound by law. But, who determines what is public and what is private? Who decides when private interests supersede (apparent) constitutionally protected rights? Most obviously, the powerful commercial interests of industrial farming are attacked when animal cruelty footage is released; surely I am aware of the motivation for their efforts in deterring such footage from ever being made, and their significant position in influencing law-making. What I am more baffled by is the brazen use of the mirage of private law, and the language that is consequently shamelessly used, in opposition to concerns of free speech, consumer information, and grave animal suffering. While houses are considered private grounds, you cannot abuse animals and prevent people from reporting these acts, under many laws; yet, for the 'different' private property of a moral being, in our case agricultural companies, this is most legitimate under Ag-Gag laws. How can this be legally possible, and more importantly, rationally and morally possible?

The public/private distinction as a justification for Ag-Gag laws obviously doesn't fool many consumers either; it is most clearly a fiction to preserve market interests. Yet these laws are still proposed and adopted, under the same disguised arguments related

⁷ Lindsay Abrams, *North Carolina's chilling new twist on 'ag-gag'*, SALON, Jun. 4, 2015, available at http://www.salon.com/2015/06/04/north_carolinas_chilling_new_twist_on_ag_gag/.

⁸ S.B. 433, *An Act to Protect Property Owners from Damages Resulting from Individuals Acting in Excess of the Scope of Permissible Access and Conduct Granted to Them*, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015).

⁹ Some have named it one of the worst yet, considering it not only applies to agricultural facilities, but to any workplace facility. See Rob Verger, *North Carolina's Ag-Gag Law Might Be the Worst in the Nation*, VICE NEWS, Jun. 9, 2015, available at <https://news.vice.com/article/north-carolinas-ag-gag-law-might-be-the-worst-in-the-nation>.

¹⁰ *Supra* note 8, at section 99A-2, ¶(d)(4).

to the private character of the workplaces of agricultural facilities. This sounds a lot, to me, like Professor Kennedy's fifth stage of the decline of the public/private distinction: "[S]tereotypification means that people come to see the overt, formally rational part of the argument about where an institution fits on the continuum, and about what mixed package of rules of procedure it should operate under, as involving the mechanical manipulation of balanced, pro/con policy arguments that come in matched pairs."¹¹ We can more or less predict the industry/legislators' legal reasoning in proposing an Ag-Gag bill, in the same way that we can predict the opposing parties' reasoning about such legislation. In the stereotypification phase, arguments for both sides can thus be predicted, and while they can be applied to any situation with similitudes, those same arguments can be accepted or rejected from a case to another.¹² This is very explicitly seen in the fact that Ag-Gag laws have failed or been defeated in some states, whilst being passed in others.

These laws also demonstrate the intertwined sixth stage of the decline, loopification, for which the concluding message is that "one simply loses one's ability to take the public/private distinction seriously as a description, as an explanation, or as a justification of anything."¹³ Any sphere can be looked at as private or public, as Professor Kennedy exemplifies through the state, market, and family spheres, which can be conceptualized in both ways.¹⁴ We could indeed argue that an agricultural facility is public based on the fact that it is a workplace subject to state regulation, in which the public has a clear interest in being aware of what goes on, considering that what is being produced is a consumer product, to which are related food safety (and thus public health) concerns. Yet, here again, politics of the dominant trumps all other interests; what an unfortunate useful tool law is in those circumstances.

Professor Kennedy's argument in *Sexy Dressing Etc. - Essays on the Power and Politics of Cultural Identity* that "not only the personal but also the professional is political,"¹⁵ in particular, resonates with my views on the legal academia. Perhaps rendering animal suffering visible will be one of the main topics of the emerging radical legal scholarship.

¹¹ Kennedy, *supra* note 1, at 1353.

¹² *Id.* at 1354.

¹³ *Id.* at 1357.

¹⁴ *Id.* at 1354-57.

¹⁵ DUNCAN KENNEDY, *SEXY DRESSING ETC. - ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* 28 (1993).