

# AG-GAG FREE NATION

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*This Article identifies the threat that agriculture security legislation—or ag-gag laws—pose to unauthorized animal and agribusiness workers. This Article advocates full recognition of First Amendment speech rights to unauthorized workers, especially in the ag-ag context, to counter the threat of coercion. Part I of this Article profiles unauthorized workers in the U.S. animal and agriculture industry. Part II discusses nationwide First Amendment litigation on ag-gag laws and describes how the effects on unauthorized workers has been largely ignored in the ag-gag debate. Part III theorizes how the right that ag-gag laws seek to protect weighs against the First Amendment rights of unauthorized workers.*

## TABLE OF CONTENTS

|      |  |     |
|------|--|-----|
| I.   | INTRODUCTION.....  | 492 |
| II.  | UNAUTHORIZED WORKERS IN THE U.S. ANIMAL AND AGRICULTURE INDUSTRY ..... | 496 |
| III. | AGRICULTURE SECURITY LEGISLATION .....                                 | 507 |
| IV.  | AG-GAG FREE NATION .....   | 517 |
| V.   | CONCLUSION.....  | 529 |

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## I. INTRODUCTION

“In recent years, there has [been] . . . recognition that the industrial produce and animal production and processing systems in the United States would collapse without the immigrant and migratory workforce.”<sup>1</sup> State and federal agencies lack the resources to monitor the U.S. agriculture industry, an industry of historical significance when it comes to abuse against noncitizen workers.<sup>2</sup> Animal and agriculture work continues to rank among the most dangerous U.S. industries.<sup>3</sup> For example, fatalities and injuries among farm laborers are significantly higher when compared to all other workers.<sup>4</sup> The animal and agriculture industry is also especially prone to labor trafficking and wage theft.<sup>5</sup> The *Atlantic* recently detailed pervasive sexual harassment and discrimination against unauthorized female animal and agriculture workers.<sup>6</sup>

The 2015-16 National Agriculture Workers Survey (“NAWS”) reports that 69% of hired farm workers in the United States were born in Mexico,<sup>7</sup> the same country that Donald Trump repeatedly disparaged and vilified during the 2016 presidential election.<sup>8</sup> Currently, the percentage of Mexicans in agribusiness outweighs the percentage of Mexicans in most other industries. Members of the Latino community are 16.2% of the U.S. workforce and of those, 62.1%

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1. Claire Fitch et al., *Public Health, Immigration Reform and Food System Change*, CLF REPORT at 2 (2017), [https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-a-livable-future/\\_pdf/research/clf\\_reports/public-health-immigration-reform-and-food-system-change.pdf](https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-a-livable-future/_pdf/research/clf_reports/public-health-immigration-reform-and-food-system-change.pdf).

2. *Id.*

3. *Agricultural Safety*, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH (NIOSH) (Apr. 12, 2018), <https://www.cdc.gov/niosh/topics/aginjury/default.html>.

4. Brief of Amici Curiae United Farm Workers of America Supporting Plaintiffs-Appellees Urging Affirmance at 12, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2016) (No. 15-35960) (citing *OSHA Safety and Health Topics: Agricultural Operations*, DEP'T LAB., <https://www.osha.gov/dsg/topics/agriculturaloperations/>).

5. *Id.* at 24, 26 (citing N.M. CTR. ON LAW & POVERTY, HUMAN RIGHTS ALERT: NEW MEXICO'S INVISIBLE AND DOWNTRODDEN WORKERS 4 (July 2013), <http://nmpovertylaw.org/wp-content/uploads/2015/04/Report-FINAL-2013-07-23.pdf>).

6. Ariel Ramchandani, *There's a Sexual-Harassment Epidemic on America's Farms*, ATLANTIC (Jan. 29, 2018), <https://www.theatlantic.com/business/archive/2018/01/agriculture-sexual-harassment/550109/>.

7. TRISH HERNANDEZ & SUSAN GABBARD, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2015-16: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS, RESEARCH REPORT NO. 13 1, [https://www.doleta.gov/naws/pages/research/docs/NAWS\\_Research\\_Report\\_13.pdf](https://www.doleta.gov/naws/pages/research/docs/NAWS_Research_Report_13.pdf).

8. Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <http://time.com/4473972/donald-trump-/>.

are of Mexican descent.<sup>9</sup> From 1989 to 2000, the percentage of Mexicans who were farm workers increased from 40% to 53%.<sup>10</sup>

It is unclear whether then-candidate Trump's views about Mexicans and other members of the Latino community were influenced by historic U.S. immigration law and policy. Federal immigration law has long reflected U.S. racial biases,<sup>11</sup> even though Congress did not define "unauthorized alien" until 1986.<sup>12</sup> During the Great Depression, "over 400,000 Mexican nationals and [U.S.] citizens of Mexican descent were deported or repatriated."<sup>13</sup> Curiously, during much of President Trump's youth and early adulthood, the "cultural category of 'illegal alien'" may not have existed.<sup>14</sup> In 1952, Congress created the term "lawful permanent resident"<sup>15</sup> and instituted new categories of "nonimmigrant" visas.<sup>16</sup> By the late 1960s, Congress imposed its first numerical quota on Western Hemisphere immigration<sup>17</sup> and increased deportations by approximately 40%, despite an increasing need for labor.<sup>18</sup> In 1976, the United States issued a 20,000 person immigration quota per each Western Hemisphere nation, including Mexico.<sup>19</sup> There were 781,000 deportations to Mexico the first year that the quota was implemented, with less than 100,000 deportations for all other nations.<sup>20</sup>

Perhaps because of the high percentage of unauthorized persons, the conditions of animal and agriculture workers remain matters of significant public interest—even if the subject has largely been ignored by President Trump. Yet, some states have enacted laws that discourage undercover investigations into the industry. This Article identifies "agriculture security legislation" or the collective "ag-gag

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9. CHERRIE BUCKNOR, *HISPANIC WORKERS IN THE UNITED STATES* 4 (Nov. 2016), <http://cepr.net/images/stories/reports/hispanic-workers-2016-11.pdf>.

10. IDENTIFICATION & RECRUITMENT RAPID RESPONSE CONSORTIUM, *TO MIGRATE OR NOT TO MIGRATE? MOBILITY OF MIGRANT FARMWORKERS IN US AGRICULTURE AND ITS EFFECTS* 8 (2016), [http://www.idr-consortium.net/To%20Migrate%20or%20Not%20to%20Migrate%20\(Mobility%20in%20US%20Agriculture%20IRRC%20Lit%20Review\).pdf](http://www.idr-consortium.net/To%20Migrate%20or%20Not%20to%20Migrate%20(Mobility%20in%20US%20Agriculture%20IRRC%20Lit%20Review).pdf).

11. Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMMIGR. L.J. 243, 261 (2017).

12. Jennifer J. Lee, *Redefining the Legality of Undocumented Work*, 106 CALIF. L. REV. 1617, 1624 (2018). The Immigration Reform and Control Act of 1986's definition of "authorized alien" as one who with respect to their employment was not "either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General." 8 U.S.C. § 1324(h)(3) (1986).

13. Heeren, *supra* note 11, at 250–51.

14. *Id.* at 261.

15. *Id.* at 254.

16. *Id.* at 257.

17. *Id.* at 261.

18. *Id.* at 261.

19. *Id.* at 261.

20. *Id.* at 261–62.

laws”<sup>21</sup> as that which restrict—or “gag”—speech about the conditions and methods of commercial food cultivation, production, or distribution. Ag-gag laws fall into several broad categories. Most criminalize or impose civil penalties for attempts to gain access to farms and the use of cameras and video recorders at such facilities. Others mandate that witnesses report legal violations to law enforcement authorities. Legislatures have passed ag-gag laws in nine states, including Idaho,<sup>22</sup> Iowa,<sup>23</sup> Kansas,<sup>24</sup> Missouri,<sup>25</sup> Montana,<sup>26</sup> North Carolina,<sup>27</sup> North Dakota,<sup>28</sup> Utah,<sup>29</sup> and Wyoming.<sup>30</sup> Ag-gag laws have not entirely survived First Amendment scrutiny in Iowa,<sup>31</sup> Idaho,<sup>32</sup> Utah,<sup>33</sup> and Wyoming.<sup>34</sup>

Trump could support agriculture security legislation, which would align with his general dislike of regulation and the media and

21. Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES: OPINIONATOR (Apr. 26, 2011, 9:29 PM), [http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/?\\_r=0](http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/?_r=0).

22. IDAHO CODE § 18-7042 (2018) (prohibiting interference with agricultural production), *invalidated by* Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1212 (D. Idaho. 2015), *aff’d in part and rev’d in part by* Animal Legal Def. Fund v. Wasden, 878 F.3d. 1184, 1185 (9th Cir. 2018).

23. IOWA CODE § 717A.3A (2018) (criminalizing providing false information to gain access or employment for purposes of committing an unauthorized act), *invalidated by* Animal Legal Def. Fund v. Reynolds, No. 4:17-cv-00362-JEG-HCA, 2019 WL 140069 (S.D. Iowa 2019). *See also* Animal Legal Def. Fund v. Reynolds, 297 F. Supp. 3d 901 (S.D. Iowa 2018) (denying motion to dismiss).

24. KAN. STAT. ANN. § 47-1827(c)(4) (West 2018) (criminalizing “enter[ing] an animal facility to take pictures by photograph, video camera or by any other means” with the intent of causing harm to the enterprise).

25. MO. REV. STAT. § 578.013.1 (2018) (imposing duty to submit recordings of alleged farm animal abuse within 24 hours of recording).

26. MONT. CODE ANN. § 81-30-103(2)(e) (2017) (criminalizing entering an animal facility with the intent to record images or take pictures for purposes of criminal defamation).

27. N.C. GEN. STAT. § 99A-2 (2018) (prohibiting unauthorized entry into nonpublic area of another’s premises).

28. N.D. CENT. CODE § 12.1-21.1-02 (2017) (prohibiting entering “an animal facility and us[ing] or attempt[ing] to use a camera, video recorder, or any other video or audio recording equipment”).

29. UTAH CODE ANN. § 76-6-112(2)(c)(i) (West 2018) (criminalizing providing false information on an employment application with the intent to record images at a farm), *invalidated by* Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017).

30. WYO. STAT. ANN. § 6-3-414 (2018) (prohibiting trespassing to unlawfully collect “resource data”), *aff’d by* W. Watersheds Project v. Michael, 196 F. Supp. 3d 1231 (D. Wyo. 2016), *rev’d by* W. Watersheds Project v. Michael, 869 F.3d 1189 (10th Cir. 2017).

31. Animal Legal Def. Fund v. Reynolds, No. 4:17-cv-00362-JEG-HCA, 2019 WL 140069 (S.D. Iowa 2019); *see also* IOWA CODE § 717.A.3A; Animal Legal Def. Fund v. Reynolds, 297 F. Supp. 3d 901 (S.D. Iowa 2018) (denying motion to dismiss).

32. Animal Legal Def. Fund v. Wasden, 878 F.3d. 1184, 1185 (9th Cir. 2018).

33. Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d at 1195–96.

34. *W. Watersheds Project*, 869 F.3d at 1198.

his expressed views about immigrants from economically struggling countries. It is unclear whether or how Trump would respond to the unique threat ag-gag laws pose to unauthorized farm workers, whose rights lie at the intersection of immigration and civil rights law.<sup>35</sup> Trump could also choose to weigh in on the abandoned corporate privacy rationale for Idaho's ag-gag law.<sup>36</sup> However, Trump's attraction to corporate privacy might depend on whether he seeks to exercise power as a government actor or repel government power against private actors.

This Article recognizes how agriculture security legislation threatens the First Amendment rights of unauthorized workers. Threat of deportation remains a constant feature of life for unauthorized workers, many of whom live below the U.S. poverty line.<sup>37</sup> An unauthorized person who uses misrepresentations to gain employment could be found in violation of an ag-gag law if that worker engaged in unwanted speech about animal or agriculture production.<sup>38</sup> Compliance with an ag-gag law that requires a witness to report animal or agriculture abuse could force disclosure of unauthorized status.<sup>39</sup> Once a worker's unauthorized status is known, deportation is imminent—regardless of whether the ag-gag investigation moves forward.<sup>40</sup>

Part II reports on how the U.S. animal and agriculture industry contains many risks for coercion and exploitation of unauthorized workers. Part II profiles farm workers based on country of origin, language skills, education, wage, risk of injuries and fatalities, and access to health care and other public health benefits. This Part also discusses how the unavailability of labor remedies exacerbates the risk of coercion for those who are unauthorized.

Part III identifies how agriculture security legislation further heightens the risk of coercion. This Part examines the work of leading ag-gag scholars. This Part also reports on nationwide federal court litigation. Part III demonstrates how, thus far, legal scholars and courts have not scrutinized how ag-gag laws potentially force disclosure of unauthorized status. Part III also points out how ag-gag laws criminalize or impose civil penalties for misrepresentations that unauthorized workers use to gain employment.

Part IV then theorizes how agriculture security legislation undervalues the speech of unauthorized workers. This Part discusses how the public nature of food production informs the First

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35. Kevin R. Johnson, *The End of 'Civil Rights' as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1483 (2018).

36. Oral Argument at 8:14, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (2018) (No. 15-35960), [https://www.ca9.uscourts.gov/media/view.php?pk\\_id=0000030477](https://www.ca9.uscourts.gov/media/view.php?pk_id=0000030477).

37. See Lee, *supra* note 12, at 1619.

38. See discussion *infra* Part III.

39. See discussion *infra* Part III.

40. See discussion *infra* Part III.

Amendment's scope. This Part theorizes that ag-gag laws disrupt historic and normative understandings of privacy on public matters. Finally, Part IV advocates for an "ag-gag free" nation to mitigate the coercive nature of unauthorized work in the U.S. animal and agriculture industry.

## II. UNAUTHORIZED WORKERS IN THE U.S. ANIMAL AND AGRICULTURE INDUSTRY

The Pew Research Center ("Pew") estimates that as of 2014, unauthorized workers were approximately 5% of the U.S. labor force.<sup>41</sup> Pew also estimates 8 million unauthorized workers in the United States—a number that includes those working and those looking for work.<sup>42</sup> According to Pew, the percentage of unauthorized immigrants in the U.S. labor force is larger than the percentage of the total population of unauthorized immigrants, the latter which stands at 3.5%.<sup>43</sup> States with the top three highest shares of unauthorized workers were Nevada, California, and Texas.<sup>44</sup> Pew estimates 11.1 million persons reside in the United States without authorization, which accounts for approximately 26% of the U.S. foreign born population.<sup>45</sup>

There is no industry in the United States where unauthorized persons were a majority of the total population of workers, but the agriculture industry has the highest total percentage of unauthorized workers.<sup>46</sup> Pew estimates that unauthorized persons were 17% of the total workforce in the agriculture industry (compared to 5% for all industries).<sup>47</sup> In nineteen states, agriculture has the highest share of unauthorized workers when compared to all industries.<sup>48</sup> In nine states, agriculture ranks second.<sup>49</sup> By another measure, in thirty-two states farming is the occupation where unauthorized workers make up the highest share of the workforce.<sup>50</sup> Unauthorized workers hold the highest share, or 26%, of all U.S. farm jobs.<sup>51</sup> Further, unauthorized workers are approximately 22% of crop production

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41. JEFFREY S. PASSEL & D'VERA COHN, PEW RES. CTR. SIZE OF U.S. UNAUTHORIZED IMMIGRANT WORKFORCE STABLE AFTER THE GREAT RECESSION: DECLINES IN EIGHT STATES AND INCREASES IN SEVEN SINCE 2009 4 (Nov. 3, 2016), [http://www.pewhispanic.org/wp-content/uploads/sites/5/2016/11/LaborForce2016\\_FINAL\\_11.2.16-1.pdf](http://www.pewhispanic.org/wp-content/uploads/sites/5/2016/11/LaborForce2016_FINAL_11.2.16-1.pdf).

42. *Id.*

43. *Id.* at 7.

44. *Id.* at 5.

45. *Id.* at 7.

46. *Id.* at 7–8.

47. *Id.* at 8.

48. *Id.* at 13.

49. *Id.*

50. *Id.* at 16.

51. *Id.* at 8.

workers<sup>52</sup> and approximately 30% of miscellaneous agriculture workers.<sup>53</sup>

Reliable information about unauthorized animal and agriculture workers is limited, but NAWS provides a broad and comprehensive profile of U.S. crop workers.<sup>54</sup> NAWS is an “employment-based, random-sample survey . . . that collects demographic, employment, and health data in face-to-face interviews.”<sup>55</sup> NAWS interviewees must be currently employed in crop or crop-related work, must be hired by an eligible establishment, and must work an eligible task.<sup>56</sup> NAWS interviewees do not include crop workers with an H-2A visa, which is a temporary-employment visa for noncitizen agricultural workers.<sup>57</sup>

NAWS may have confirmed some assumptions about unauthorized animal and agriculture workers. NAWS revealed that most U.S. crop workers were foreign born and that many were not authorized to work. While 83% of NAWS interviewees identify as Hispanic,<sup>58</sup> 69% were born in Mexico.<sup>59</sup> Just more than half of all foreign-born interviewees, 51%, reported they were authorized to work in the United States.<sup>60</sup>

NAWS has perhaps disproved other assumptions. On average, foreign-born NAWS interviewees arrived in the United States eighteen years ago, but 58% arrived fifteen years ago or sooner<sup>61</sup> and 78% arrived within the last ten years.<sup>62</sup> Only 4% of interviewees arrived within the last year.<sup>63</sup> The vast majority of NAWS interviewees, 81%, self-characterized as “settled” workers.<sup>64</sup> The remaining 19% self-characterized as “migrant” workers.<sup>65</sup>

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52. *Id.* at 11–12.

53. *Id.* at 14.

54. HERNANDEZ & GABBARD, *supra* note 7, at i (Introduction); see also Yoon-Kyung Chung & J. Paul Leigh, *Medicaid Use by Documented and Undocumented Farm Workers*, 57 J. OCCUPATIONAL & ENVTL. MED. 329, 331 (2015) (describing National Agricultural Workers Survey, or NAWS, as perhaps the only “nationally representative sample of undocumented workers”).

55. HERNANDEZ & GABBARD, *supra* note 7, at i (Introduction).

56. *Id.*

57. *Id.*; see also Fitch et. al, *supra* note 1, at 6 (noting that “NAWS field interviewers must obtain permission from agricultural employers before interviewing workers” and hypothesizing that “interviews are likely not conducted with those working in the worst conditions”).

58. Hernandez et al., *supra* note 7, at i (Executive Summary), 1.

59. *Id.* (encompassing authorized and unauthorized workers).

60. *Id.* at i (Executive Summary), 1, 4. Farmworker Justice estimates that 50% to 75% of U.S. animal and agriculture workers were undocumented. Fitch et al., *supra* note 1, at 2.

61. HERNANDEZ & GABBARD, *supra* note 7, at i (Executive Summary), 3.

62. *Id.*

63. *Id.*

64. *Id.* at 1, 5.

65. *Id.*

NAWS revealed language disparities among foreign born U.S. crop workers. Approximately 97% of interviewees born in Mexico and Central America identified Spanish as their primary language.<sup>66</sup> Among all interviewees, 77% identified Spanish as their conversational language of most comfort, although 29% spoke English "well."<sup>67</sup> Among those interviewees who identified Spanish as their primary language, most spoke (98%) or read (81%) Spanish "well."<sup>68</sup> Approximately 30% of all interviewees could not speak English "at all," and 41% could speak "a little" (32%) or some English (9%).<sup>69</sup> A similar percentage read English "well" (28%), but 41% could not read English "at all."<sup>70</sup> A little over 30% read "a little" (24%) or some English (7%).<sup>71</sup>

Education disparities among foreign born NAWS interviewees also exist. The average grade of formal education was eighth grade but 37% completed only sixth grade or lower.<sup>72</sup> Only 10% attained some education beyond high school<sup>73</sup> and 35% completed at least one U.S.-based adult education class.<sup>74</sup> Among interviewees born in Mexico and other countries, seventh grade was the average highest grade completed, compared to twelfth grade for U.S.-born interviewees.<sup>75</sup> Only 10% of all interviewees reported some education beyond high school,<sup>76</sup> although 18% of Mexican born NAWS interviewees completed twelfth grade or higher.<sup>77</sup>

Little disparity exists among different types of employers. Most NAWS interviewees (80%) were directly hired by growers.<sup>78</sup> Only 20% were employed by farm labor contractors.<sup>79</sup> During the past twelve months, 80% had been hired by one employer, and the average length of employment with current employers was seven years.<sup>80</sup> "Unauthorized workers were more likely than authorized workers to have worked for more than 1 farm employer in the previous 12 months (27% compared to 14%)."<sup>81</sup> On average, within twelve months, interviewees reported an average of thirty-three weeks and

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66. *Id.* at 10.

67. *Id.* at ii (Executive Summary), 10.

68. *Id.* at 11.

69. *Id.* at ii (Executive Summary), 10.

70. *Id.*

71. *Id.*

72. *Id.* at ii (Executive Summary), 10, 12.

73. *Id.*

74. *Id.* at ii (Executive Summary), 10, 13.

75. *Id.* at 13.

76. *Id.* at ii (Executive Summary), 12.

77. *Id.* at 13.

78. *Id.* at ii (Executive Summary), 20.

79. *Id.*

80. *Id.* at iii (Executive Summary), 27.

81. *Id.* at 27.



192–196 days of farm employment.<sup>82</sup> Over three-quarters, or 76%, expected to continue farm work for at least five years.<sup>83</sup>

Language, education, and other disparities are not the only challenges for unauthorized U.S. animal and agriculture workers. Professor Kathleen Kim discusses how immigration policy has contributed to why “workplace coercion persists” among unauthorized workers.<sup>84</sup> Kim reveals how unauthorized workers may be unable to freely contract their labor, which in turn implicates the Thirteenth Amendment.<sup>85</sup> Kim looks to the work of free-labor advocates and labor jurisprudence that recognizes freedom from coercion as a structural element of freedom of contract.<sup>86</sup> For example, Professor Maria L. Ontiveros theorizes how the “debate and treatment of immigrant workers must be informed by the Thirteenth Amendment” and analogizes the treatment of unauthorized workers with slaves.<sup>87</sup> Ontiveros points to the U.S. political, economic, and legal systems that severely restrict an unauthorized worker’s labor, humanity, citizenship, and civil rights.<sup>88</sup> Reflecting on the “dehumanizing rhetoric reminiscent of that used to describe slaves,” Ontiveros identifies unauthorized workers as an “exploitable group” who “often labor beneath the floor.”<sup>89</sup>

Kim describes how unauthorized workers in the United States typically experience substandard wages,<sup>90</sup> which transforms vulnerability into coercion. One study Kim highlights estimates a 22% general wage penalty for unauthorized status.<sup>91</sup> NAWS interviewees lived at or near the poverty level even though the average work week for crop workers was five days and the average number of hours per week was forty-five.<sup>92</sup> NAWS interviewees worked an average of thirty-three weeks or 63% of the calendar year

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82. *Id.* at iii (Executive Summary), 28–29.

83. *Id.* at iii (Executive Summary), 32.

84. *See generally* Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558 (2018).

85. *Id.* at 1565–69; *see also* Maria Ontiveros, *A Strategic Plan for Using the Thirteenth Amendment to Protect Immigrant Workers*, 27 WIS. J. L. GENDER & SOC’Y 133, 135–43 (2012). *See generally* Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981 (2002); Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973 (2002); James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of “Involuntary Servitude,”* 119 YALE L.J. 1474 (2010); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989).

86. Kim, *supra* note 84, at 1567–68.

87. Ontiveros, *supra* note 85, at 135–37.

88. *Id.* at 139.

89. *Id.* at 140.

90. Kim, *supra* note 84, at 1570.

91. *Id.*; *see also* Nathalie Martin, *Survival in the Face of Scarcity: The Undocumented Immigrant Experience*, 58 ARIZ. L. REV. 103, 103 (2016).

92. HERNANDEZ & GABBARD, *supra* note 7, at iii (Executive Summary), 21, 27.

on farms.<sup>93</sup> Most were paid by the hour (88%),<sup>94</sup> and the average rate of pay for all was \$10.60 per hour.<sup>95</sup> Workers who had been with their current employer one or two years earned an average wage of \$9.89 per hour, while workers who had been with their current employer eleven years or more earned an average wage of \$11.92 per hour.<sup>96</sup> Mean and median personal income ranged between \$17,500 and \$19,999.<sup>97</sup> Only 14% earned more than \$30,000 of personal income.<sup>98</sup> Mean and median total family income ranged between \$20,000 and \$24,999.<sup>99</sup> Total family income also ranged: 27% reported less than \$20,000; 27% reported between \$20,000 and \$29,000; and 32% reported more than \$30,000.<sup>100</sup> Among NAWS interviewees, the likelihood of poverty increased with family size.<sup>101</sup>

Wage theft is particularly prevalent in farm work. The UCLA Labor Center broadly defines wage theft as “not paying workers for all of their work” and includes violating minimum wage laws, failing to pay overtime, and forcing work off the clock.<sup>102</sup> “[A] 2012 survey of New Mexico farm workers found that over two-thirds experienced wage theft in 2011, and nearly half were paid less than the minimum wage.”<sup>103</sup> Wage theft is exacerbated by widespread practices such as “piece-rating.”<sup>104</sup> Piece-rating occurs when workers are paid “a set amount for each piece of crop harvested[,]” which allows employers to undermine state and federal minimum wage laws.<sup>105</sup> “[A] 2009 study found that Oregon farm workers paid on ‘piece-rate’ basis earned less than the state minimum wage . . . [most] of the time and on average received 37% less than the minimum wage.”<sup>106</sup> Only 7% of NAWS interviewees were paid by the piece,<sup>107</sup> and they reported a slightly higher average rate of pay (\$10.58) than those paid by the hour (\$10.35).<sup>108</sup>

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93. *Id.* at 28.

94. *Id.* at iii (Executive Summary), 20, 21.

95. *Id.* at iii (Executive Summary), 20, 23.

96. *Id.* at 23.

97. *Id.* at iii (Executive Summary), 36.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 37.

102. *What is Wage Theft*, UCLA LAB. CTR. (May 6, 2015), <https://www.labor.ucla.edu/wage-theft/>.

103. Brief of Amici Curiae United Farm Workers of America, *supra* note 4, at 26 (citing N.M. CTR. ON LAW & POVERTY, *supra* note 5).

104. Brief of Amici Curiae United Farm Workers of America, *supra* note 4, at 26–27 (citing U.S. Department of Labor Enforcement in Agriculture, FARMWORKER JUST., <https://www.farmworkerjustice.org/sites/default/files/FarmworkerJusticeDOLenforcementReport2015%20%281%29.pdf> (last visited Apr. 1, 2019)).

105. *Id.*

106. *Id.*

107. HERNANDEZ & GABBARD, *supra* note 7, at 21.

108. *Id.* at 23.

Kim points out how the conditions for some unauthorized workers violate health and safety laws.<sup>109</sup> Animal and agriculture workers face an increased threat of fatalities and physical injuries from exposure to biological dangers caused by contamination, animal waste, and poor air quality. These health threats jeopardize the resiliency of U.S. food system “by maintaining an unstable and vulnerable workforce.”<sup>110</sup> An unstable and vulnerable workforce “threatens the supply and safety of food.”<sup>111</sup>

Animal and agriculture work is physically toiling.<sup>112</sup> The Center for Disease Control’s National Institute for Occupational Safety and Health reports that in 2012 “374 farmers and agricultural workers died from a work-related injury.”<sup>113</sup> Annually, an average of 113 persons under the age of twenty are the victims of farm-related fatalities.<sup>114</sup> Fatalities for agricultural workers are “7 times higher than . . . for all other workers.”<sup>115</sup> The injury rate is over 40% higher than for all other workers.<sup>116</sup> Each day, hundreds of “agricultural workers are injured to the extent that they become at least temporarily unable to work.”<sup>117</sup> Approximately 5% of injuries result in “permanent impairment.”<sup>118</sup> In 2012 alone, 14,000 youth were injured on farms.<sup>119</sup> Approximately 2,700 of these injuries were due to farm work.<sup>120</sup> Machinery, animals, and falls are the “major contributing factors” for injuries among animal production and processing workers.<sup>121</sup> However, researchers may have missed as many as 77% of injuries—74% in crop production and 82% in animal production.<sup>122</sup>

Air quality also negatively affects some agriculture workers.<sup>123</sup> Extreme environmental dynamics come into play, especially for crop workers.<sup>124</sup> Heat-related illnesses are four times more likely for agriculture than nonagricultural workers.<sup>125</sup> Pesticide exposure is

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109. Kim, *supra* note 84, at 1570.

110. Fitch et al., *supra* note 1, at 3.

111. *Id.*

112. Kim, *supra* note 84, at 1570–71.

113. Fitch et al., *supra* note 1, at 10.

114. *Id.*

115. Brief of Amici Curiae United Farm Workers of America, *supra* note 4, at 12 (citing *OSHA Safety and Health Topics: Agricultural Operations*, DEP’T LAB., <https://www.osha.gov/dsg/topics/agriculturaloperations/> (last visited Aug. 19, 2016)).

116. *Id.*

117. Fitch et al., *supra* note 1, at 10.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* Language barriers are also a contributing factor for injuries in animal production and processing. *Id.* at 11.

122. *Id.*

123. *Id.* at 12–13.

124. *Id.*

125. *Id.*

another type of illness related to air quality.<sup>126</sup> In 2011–12, 82% of NAWS interviewees received pesticide training.<sup>127</sup> Nevertheless, in 2011, agricultural use of pesticides was the source of exposure in 239 of the 1,067 reported cases of pesticide-related illnesses.<sup>128</sup> In California during that same year, 137 fieldworkers were injured as a result of pesticide exposure.<sup>129</sup> Over a two-year period from 1998–99, 54% of pesticide-related illnesses in California were attributed to the agriculture industry.<sup>130</sup> Over a seventeen-year period, farm workers constituted 71% of cases of acute pesticide poisoning in California.<sup>131</sup>

Air quality also significantly affects animal workers, who are exposed to “elevated concentrations of particulate matter, endotoxins, pathogens, pharmaceuticals, gases, and other health hazards.”<sup>132</sup> Animal and agriproducts may be the leading cause of foodborne illness.<sup>133</sup> Recent trends suggest a lack of “progress in reducing food borne infections.”<sup>134</sup> Some strains of pathogens that cause foodborne infection have become drug-resistant.<sup>135</sup> Experts at the Center for Disease Control and Prevention warn that “even infrequent contamination of commercially distributed products can result in many illnesses.”<sup>136</sup>

Some safety nets are available when harm befalls animal and agriculture workers. Many NAWS interviewees reported that if they were injured or sick as a result of their job, they would be covered by

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126. *Id.* at 20–21.

127. TRISH HERNANDEZ ET AL., FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2011-12: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS, RESEARCH REPORT NO. 11 33 (Dec. 2016), [https://www.doleta.gov/naws/pages/research/docs/NAWS\\_Research\\_Report\\_11.pdf](https://www.doleta.gov/naws/pages/research/docs/NAWS_Research_Report_11.pdf).

128. Fitch et al., *supra* note 1, at 9.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 13.

133. Brief for Food & Water Watch & Center for Biological Diversity as Amici Curiae Supporting Affirmance at 2–3, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2016) (No. 15-35960); *see also* Becky L. Jacobs, *Urban Food Corridors: Cultivating Sustainable Cities*, 91 U. DET. MERCY L. REV. 215, 222–23 (2014) (discussing risks of soil contamination and remediation).

134. Brief for Food & Water Watch & Center for Biological Diversity, *supra* note 133, at 5.

135. *Id.* (citing Ellen Silbergeld et al., *Industrial Food Animal Production, Antimicrobial Resistance, and Human Health*, 29 ANN. REV. PUB. HEALTH 151, 151–69 (2008)).

136. Brief for Food & Water Watch & Center for Biological Diversity, *supra* note 133, at 6 (quoting John A. Painter et al., *Attribution of Foodborne Illnesses, Hospitalizations, and Deaths to Food Commodities by Using Outbreak Data, United States, 1998-2008*, 19 EMERGING INFECTIOUS DISEASES 407, 441 (2013)). *See also* Laura Reily, *2018 Saw the Most Multistate Outbreaks of Foodborne Illness in More Than a Decade, CDC Says*, WASH. POST (Apr. 25, 2019), <https://www.washingtonpost.com/business/2019/04/25/cdc-releases-its-annual-report-card-foodborne-illness-did-not-have-passing-grade/>.

workers' compensation insurance (62%).<sup>137</sup> Fewer NAWS interviewees were covered by health insurance (47%).<sup>138</sup> Of those, 29% have employer provided health insurance, 43% have government provided health insurance, and 12% self-pay.<sup>139</sup> NAWS interviewees reported a spouse or child with health insurance at rates of 56% and 89%, respectively.<sup>140</sup> Approximately 14% reported a household member who received a benefit provided by disability and unemployment insurance or social security.<sup>141</sup> Of those, 10% received payments from unemployment insurance, 1% received payments from disability insurance, and 3% received payments from social security.<sup>142</sup>

Unauthorized persons disproportionately seek out federal and state publicly funded safety nets. NAWS reveals a disparity between authorized and unauthorized workers with regard to use of public benefits. A little over half of interviewees and their family members, an estimated 54%, received public assistance program benefits in the past two years.<sup>143</sup> Sources of benefits included Medicaid (44%), WIC (17%), and SNAP (18%).<sup>144</sup> In 2013-14, unauthorized NAWS interviewees used a higher percentage of three types of public benefits: (1) WIC benefits (27% for unauthorized workers versus 11% for authorized workers); (2) food stamps (19% for unauthorized workers versus 13% for authorized workers); and (3) public health clinics (12% of unauthorized workers versus 7% of authorized workers).<sup>145</sup> Another study found unauthorized persons use a lesser percentage of Medicaid benefits—by 10.4%—when compared to authorized farm workers.<sup>146</sup> “[T]he odds of childless unauthorized households receiving Medicaid benefits were 13% that of childless authorized households.”<sup>147</sup> Parenthood increases the odds of Medicaid use in all households, but the odds ratios were “strongly statistically significant” for unauthorized farm workers (8.4% greater) and authorized farm workers (6.57% greater).<sup>148</sup>

The unavailability of labor law remedies exacerbate other issues, including the language and education disparities, low wages, and

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137. HERNANDEZ & GABBARD, *supra* note 7, at iii (Executive Summary), 25.

138. *Id.* at iv (Executive Summary), 40.

139. *Id.* at iv (Executive Summary), 41.

140. *Id.* at iv (Executive Summary), 42.

141. *Id.* at iv (Executive Summary), 39.

142. *Id.*

143. *Id.*

144. *Id.*

145. TRISH HERNANDEZ ET AL., FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2013-14: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS, RESEARCH REPORT NO. 12 39 (Dec. 2016), [https://www.doleta.gov/naws/pages/research/docs/NAWS\\_Research\\_Report\\_12.pdf](https://www.doleta.gov/naws/pages/research/docs/NAWS_Research_Report_12.pdf).

146. Chung & Leigh, *supra* note 54, at 331.

147. *Id.* at 332.

148. *Id.*

health and safety risks that increase an unauthorized person's vulnerability to coercion.<sup>149</sup> In *Hoffman Plastic Compounds, Inc. v. NLRB*,<sup>150</sup> the Supreme Court declared that back pay awards to some unauthorized workers undermined federal immigration policy.<sup>151</sup> Kim describes *Hoffman* as imposing a "comparative culpability" theory of analysis.<sup>152</sup> The plaintiff's culpability "tends to show his complicity in the unauthorized work arrangement."<sup>153</sup> Likewise, the plaintiff's "freely given" consent to unlawful employment nullifies the right to a full statutory remedy.<sup>154</sup> In *Palma v. NLRB*,<sup>155</sup> the United States Court of Appeals for the Second Circuit extended *Hoffman* to "categorically exclude unauthorized workers from receiving back pay awards even if false documents were not used to obtain employment."<sup>156</sup>

So far *Hoffman* has been limited to the National Labor Relations Act,<sup>157</sup> but the effect would be particularly acute for female unauthorized workers if harassment and discrimination laws were also unavailable.<sup>158</sup> The majority of NAWs interviewees, or 68% of farm workers, identified as male.<sup>159</sup> Ontiveros has chronicled how female farm workers report a high rate of harassment and unwanted sexual attention.<sup>160</sup> A January 2010 study of 150 female workers in

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149. See Kim, *supra* note 84, at 1579–80; see also Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1366–71 (2009) (discussing the eroding labor rights of unauthorized immigrants); Jarod S. Gonzalez, *Employment Law Remedies for Illegal Immigrants*, 40 TEX. TECH L. REV. 987, 989–93 (2008) (surveying the current employment law remedies for illegal immigrants); Lee, *supra* note 12, at 1624–25 (discussing how the lack of legal remedies and threat of immigration enforcement "facilitates employer coercion").

150. 535 U.S. 137 (2002).

151. *Id.* at 151–52.

152. Kim, *supra* note 84, at 1579–80.

153. *Id.* at 1580.

154. *Id.*

155. 723 F.3d 176 (2d Cir. 2013).

156. *Id.* at 185.

157. See U.S. Dep't Labor, Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division, (2008), <https://www.dol.gov/whd/regs/compliance/whdfs48.pdf>.

158. See generally *Ambrosi v. 1085 Park Ave. LLC*, No. 06-CV-8163(BSJ), 2008 WL 4386751, at \*11–14 (S.D.N.Y. Sept. 25, 2008); *Hernandez-Cortez v. Hernandez*, No. Civ. A. 01-1241-JTM, 2003 WL 22519678, at \*5–7 (D. Kan. Nov. 4, 2003); *Veliz v. Rental Serv. Corp. USA*, 313 F. Supp. 2d 1317, 1334–37 (M.D. Fla. 2003); *Salas v. Sierra Chemical Co.*, 129 Cal. Rptr. 3d 263, 272, 275 (Cal. Ct. App. 2011), *rev'd in part*, 59 Cal. 4th 407 (Cal. 2014); *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1001–02 (N.H. 2005).

159. HERNANDEZ & GABBARD, *supra* note 7, at i (Executive Summary), 7.

160. Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 169 (2003); see also HUMAN RIGHTS WATCH, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT 3–5, 23–31 (2012), [http://www.hrw.org/sites/default/files/reports/us0512ForUpload\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf); Robin R.

central California revealed an 80% rate of sexual harassment.<sup>161</sup> Many of these women reported their supervisors constantly grabbed, touched, propositioned, or demanded sex as a requirement to keep their job.<sup>162</sup> The risks for female farm workers who share their experience of sexual harassment with other supervisors and managers are significant. Many reported reduced hours and termination after doing so.<sup>163</sup> “The socio-economic status of female farm workers and their desperate need for a job and an income cannot be overlooked” when discussing the risks for those who speak out against abuse.<sup>164</sup> Many women work with a spouse or other members of their family,<sup>165</sup> thus retaliation can extend broadly.<sup>166</sup>

Fear of deportation is a defining feature of existence for many unauthorized workers in the United States and can also contribute to a coercive environment.<sup>167</sup> Professor Jennifer Lee presents unauthorized workers as an “underclass” who are “trapped between” “illegal and legal spaces.”<sup>168</sup> Lee offers a number of immigration consequences besides deportation.<sup>169</sup> Eligibility for asylum can be denied, as can eligibility for an adjustment of status.<sup>170</sup> Federal immigration law prohibits employers from hiring workers without authorization<sup>171</sup> and prohibits the use of false documents to verify immigration status.<sup>172</sup> Employers are tasked with verifying an employee’s documents through the I-9 process.<sup>173</sup> Kim and others describe how the I-9 process has transformed private workplaces into offices of federal immigration enforcement.<sup>174</sup>

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Runge, *Failing to Address Sexual and Domestic Violence at Work: The Case of Migrant Farmworker Women*, 20 AM. U. J. GENDER SOC. POL’Y & L. 871, 877 (2012) (describing extent of sexual harassment and assault among female farm workers).

161. Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 VIOLENCE AGAINST WOMEN 237, 241 (2010).

162. Ontiveros, *supra* note 160, at 169.

163. Runge, *supra* note 152, at 877.

164. *Id.* at 885.

165. *Id.* at 877–78.

166. *Id.*

167. See Lee, *supra* note 12, at 1624–25; see also Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 L. & SOC. INQUIRY 561, 561 (2010) (examining the justifications that undocumented workers provide for not making work-related claims).

168. Lee, *supra* note 12, at 1624–28.

169. *Id.* at 1624–25.

170. *Id.*

171. *Id.* at 1624.

172. *Id.*

173. *Id.*; see also Kim, *supra* note 84, at 1576–77 (discussing the use of E-Verify as an enforcement tool).

174. Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1104–05 (2009); see also Julie Braker, *Navigating the Relationship Between the DHS and the DOL: The Need for Federal Legislation to Protect Immigrant Workers’ Rights*, 46 COLUM. J. L. & SOC. PROBS. 329, 329 (2013)

Kim discusses how fear of deportation increases self-censorship about work conditions.<sup>175</sup> Lee details how fear of deportation allows employers to exploit unauthorized workers “by paying them less than the legal requirements or employing them in unsafe conditions.”<sup>176</sup> Unauthorized workers are likely to experience 61,000% more workplace injuries and 300 more workplace fatalities than U.S. native born workers.<sup>177</sup> One survey reported that almost one half of unauthorized female workers experienced a minimum wage violation.<sup>178</sup>

Reflecting on this type of structural coercion, Kim urges consideration of how immigration laws “create and maintain power inequities between employers and their workers.”<sup>179</sup> *Hoffman* demonstrates how federal immigration law yields to federal labor law.<sup>180</sup> Kim also points out how immigration laws allow employers to contact local law enforcement or U.S. Immigration and Customs Enforcement<sup>181</sup> against an unauthorized worker who speaks out about workplace abuses.<sup>182</sup> The Trump Administration could further marginalize undocumented workers and prioritize deportation over investigation of possible workplace violations.

Power inequities that essentially prevent speech about work conditions run counter to the First Amendment. In *United States v. Alvarez*,<sup>183</sup> the Court reflected how the First Amendment encouraged “more speech, not enforced silence” on issues to promote the unfettered exchange of ideas.<sup>184</sup> Leading food law scholars recently joined to theorize about how the marketplace of ideas helps consumers “sort out” commercial messaging.<sup>185</sup> This marketplace functions inefficiently when there is a lack of “diversity of voices.”<sup>186</sup> Consumer interest about “where their food comes from” has

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(discussing the effect of immigration enforcement on workers’ rights); Kim, *supra* note 84, at 1576–77 (discussing “employer’s role as immigration officer”); Lee, *supra* note 12, at 1624 (describing the I-9 requirements imposed on employers).

175. Kim, *supra* note 84, at 1573–78; *see also* Lee, *supra* note 12, at 1625.

176. Lee, *supra* note 12, at 1625.

177. *Id.*

178. *Id.*

179. Kim, *supra* note 84, at 1582.

180. Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737, 746–52 (2003).

181. Lee, *supra* note 12, at 1625; *see also* Kim, *supra* note 84, at 1573–78.

182. Lee, *supra* note 12, at 1625; *see also* Kim, *supra* note 84, at 1573–78.

183. *United States v. Alvarez*, 567 U.S. 709 (2012).

184. *Id.* at 727–28 (Brandeis, J., concurring) (citing *Whitney v. California*, 274 U.S. 357, 377 (1927)).

185. Brief of Amici Curiae Food Law and Policy Scholars in Support of Plaintiffs-Appellees Animal Legal Def. Fund, et al. at 11–12, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2016) (No. 15-35960).

186. *Id.*



increased.<sup>187</sup> Research confirms demand for more transparency at every level<sup>188</sup> and consumer interest in the “free flow of commercial information” about food production is often sparked by exposés.<sup>189</sup> “[C]onsumers likewise recognize and appreciate the vital information that journalists, whistleblowers, and activists have to share about” the industry.<sup>190</sup>

Next, this Article identifies how “agriculture security legislation” or “ag-gag laws”<sup>191</sup> potentially restrict an unauthorized worker’s speech about the conditions and methods of food cultivation, production, or distribution. Many ag-gag laws criminalize or impose civil penalties for the use of misrepresentations to gain employment at a food production facility. Other ag-gag laws require witnesses to report animal or agriculture misconduct to law enforcement.<sup>192</sup> Trump could embrace ag-gag laws, especially given his general dislike of regulation and the media and his disparaging comments about unauthorized persons and members of the Latino community.

### III. AGRICULTURE SECURITY LEGISLATION

Agriculture security legislation gags the speech and press rights of food journalists and farm workers who have information about an animal or agribusiness’s production, operation, or work conditions. Neither the First Amendment nor the *Restatement (Second) of Torts* recognizes a “personal right of privacy” for corporations, partnerships, or unincorporated associations.<sup>193</sup> Without ag-gag

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187. *Id.* at 5; see also Jacobs, *supra* note 133, at 229–30 (discussing how approximately 15% “of the world’s food is grown in urban areas,” but how “the U.S. Department of Agriculture estimated that demand for locally grown food would rise from the \$4 billion market in 2002 to a \$7 billion market in 2012”).

188. Brief of Amici Curiae Food Law and Policy Scholars, *supra* note 185, at 5, 12 (quoting Nicole Negowetti, *Opening the Barnyard Door: Transparency and the Resurgence of Ag-Gag & Veggie Libel Laws*, 38 SEATTLE U. L. REV. 1345, 1373 (2015)); see also Peter Wendel, *Distressed Cities and Urban Farming: Are We Making a Mountain Out of a Molehill?*, 91 U. DET. MERCY L. REV. 277, 283–85 (2014) (discussing the overlap between urban farming and the environmental movement and describing urban farming as “the quintessential ‘locally grown’ food”).

189. Brief of Amici Curiae Food Law and Policy Scholars, *supra* note 185, at 13 (citing *Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976)).

190. Brief of Amici Curiae Food Law and Policy Scholars, *supra* note 185, at 18.

191. Bittman, *supra* note 21.

192. See, e.g., IDAHO CODE § 18-7042 (2016) (prohibiting interference with agricultural production), *invalidated by* Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1212 (D. Idaho. 2015), *aff’d in part and rev’d in part by* Animal Legal Def. Fund v. Wasden, 878 F.3d. 1184 (2018); MO. ANN. STAT. § 578.013.1 (2016) (imposing duty to submit recordings of alleged farm animal abuse within 24 hours of recording).

193. *FCC v. AT&T Inc.*, 562 U.S. 397, 406 (2011) (citing RESTATEMENT (SECOND) OF TORTS § 652I cmt. c (1976)).

laws, the corporate privacy rights of agribusinesses would be limited to the Fourth Amendment's protection against unreasonable government searches and seizures and state and federal laws that protect trade secrets and other proprietary information.<sup>194</sup> In contrast, with ag-gag laws an agribusiness potentially controls all information about their operation, production, and work conditions.<sup>195</sup>

So far, Amy Meyer appears to be the only person charged with violating any state's ag-gag law.<sup>196</sup> While driving near the Dale Smith Meatpacking Company in Draper City, Utah,<sup>197</sup> Meyer pulled to the side of the public road and took video of cows through a barbed-wire fence.<sup>198</sup> Meyer observed a sick or injured live cow being carried away in a tractor "as though she were nothing more than rubble."<sup>199</sup> A slaughterhouse manager saw Meyer and informed her she could not film.<sup>200</sup> Meyer resisted because she was on public land, at least until law enforcement responded to a claim of trespass.<sup>201</sup> The official report noted the lack of damage to any property.<sup>202</sup> A judge later dismissed Meyer's case,<sup>203</sup> yet Meyer reported the experience left a "chilling effect."<sup>204</sup> Meyer, along with others, later successfully argued in federal court that Utah's ag-gag law violated the First Amendment.<sup>205</sup>

Ag-gag laws can prevent an unauthorized worker from reporting a credible claim of animal or agriculture abuse or workplace and environmental violations. As previously noted, ag-gag laws fall into several broad categories. Most criminalize or impose civil penalties for the use of misrepresentations to gain access to or employment at an animal or agriculture farm or facility.<sup>206</sup> Others require reports of animal, agriculture, environmental, and other abuses to law

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194. Mary D. Fan, *Private Data, Public Safety: A Bounded Access Model of Disclosure*, 94 N.C. L. REV. 161, 173 (2015).

195. See Bittman, *supra* note 21.

196. Will Potter, *First "Ag-Gag" Prosecution: Utah Woman Filmed a Slaughterhouse from the Public Street*, GREEN IS NEW RED (Apr. 29, 2013), <http://www.greenisthenewred.com/blog/first-ag-gag-arrest-utah-amy-meyer/6948/>.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1200 (D. Idaho. 2015).

204. Marissa Lang, *Judge Won't Toss Suit Challenging Utah's 'Ag-Gag' Law*, SALT LAKE TR. (Aug. 7, 2014, 9:08 PM), <http://archive.sltrib.com/story.php?ref=/sltrib/news/58267614-78/law-animal-plaintiffs-utah.html.csp>.

205. *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1198–99, 1213 (D. Utah 2017).

206. Sonia Weil, *Big-Ag Exceptionalism: Ending the Special Protection of the Agricultural Industry*, 10 DREXEL L. REV. 183, 185–86 (2017) (discussing ag-gag legislation that criminalizes undercover investigations).

enforcement.<sup>207</sup> Another major group, and one that leads to extensive litigation, are those laws that prohibit the use of cameras and video recorders at facilities without permission.<sup>208</sup> State legislatures have passed ag-gag laws in Idaho,<sup>209</sup> Iowa,<sup>210</sup> Kansas,<sup>211</sup> Missouri,<sup>212</sup> Montana,<sup>213</sup> North Carolina,<sup>214</sup> North Dakota,<sup>215</sup> Utah,<sup>216</sup> and Wyoming.<sup>217</sup>

The interests that agriculture security legislation protect could be interpreted as relating to “securing” real and commercial property. But specific state laws highlight an intent to do more than “secure” real and commercial property. Iowa was one of the first states to pass an ag-gag law. Iowa criminalized providing false information to gain access or employment,<sup>218</sup> which could have directly implicated some

207. Chip Gibbons, CTR. FOR CONST. RTS. & DEFENDING RTS. & DISSENT, AG-GAG ACROSS AMERICA: CORPORATE-BACKED ATTACKS ON ACTIVISTS AND WHISTLEBLOWERS 2 (2017), <https://ccrjustice.org/sites/default/files/attach/2017/09/Ag-GagAcrossAmerica.pdf>.

208. *Challenging North Carolina's Ag-Gag Law*, ANIMAL LEGAL DEF. FUND (Dec. 19, 2018), <https://aldf.org/case/challenging-north-carolinas-ag-gag-law/>.

209. IDAHO CODE ANN. § 18-7042 (West 2016) (prohibiting interference with agricultural production), *invalidated by* Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1212 (D. Idaho 2015), *aff'd in part and rev'd in part by* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018).

210. IOWA CODE ANN. § 717A.3A (West 2016) (criminalizing providing false information to gain access or employment for purposes of committing an unauthorized act), *invalidated by* Animal Legal Def. Fund v. Reynolds, No. 4:17-cv-00362-JEG-HCA, 2019 WL 140069 (S.D. Iowa 2019).

211. KAN. STAT. ANN. § 47-1827(c)(4) (West 2015) (criminalizing “enter[ing] an animal facility to take pictures by photograph, video camera or by any other means” with the intent of causing harm to the enterprise).

212. MO. ANN. STAT. § 578.013.1 (West 2016) (imposing duty to submit recordings of alleged farm animal abuse within 24 hours of recording).

213. MONT. CODE ANN. § 81-30-103(2)(e) (West 2015) (criminalizing entering an animal facility with the intent to record images or take pictures for purposes of criminal defamation).

214. N.C. GEN. STAT. ANN. § 99A-2 (West 2015) (prohibiting unauthorized entry into nonpublic area of another’s premises).

215. N.D. CENT. CODE ANN. § 12.1-21.1-02 (West 2012) (prohibiting entering “an animal facility and us[ing] or attempt[ing] to use a camera, video recorder, or any other video or audio recording equipment”).

216. UTAH CODE ANN. § 76-6-112(2)(c)(i) (West 2012) (criminalizing providing false information on an employment application with the intent to record images at a farm), *invalidated by* Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017).

217. WYO. STAT. ANN. § 6-3-414 (West 2015) (prohibiting trespassing to unlawfully collect “resource data”), *aff'd by* W. Watersheds Project v. Michael, 196 F. Supp. 3d 1231 (D. Wyo. 2016), *rev'd by* W. Watersheds Project v. Michael, 869 F.3d 1189 (10th Cir. 2017).

218. IOWA CODE ANN. § 717A.3A (West 2016) (defining agriculture production facility fraud in part as follows: “a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person 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.”).

unauthorized workers. Kansas criminalizes “enter[ing] an animal facility to take pictures by photograph, video camera or by any other means” with the intent of causing harm to the enterprise.<sup>219</sup> Missouri imposes a duty to submit recordings of alleged farm animal abuse within twenty-four hours.<sup>220</sup> Montana criminalizes entering an animal facility with the intent to record images or take pictures for purposes of criminal defamation.<sup>221</sup> North Carolina imposes civil liability for unauthorized entry into nonpublic areas of another’s premises.<sup>222</sup> North Dakota prohibits entering an animal facility and

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219. KAN. STAT. ANN. § 47-1827(c) (2018) (“No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility . . . enter an animal facility to take pictures by photograph, video camera or by any other means.”). KAN. STAT. ANN. § 47-1828(a) (“Any person who has been damaged by reason of a violation of K.S.A. 47-1827 . . . may bring an action in the district court against the person causing the damage to recover: . . . [a]n amount equal to three times all actual and consequential damages . . . and court costs and reasonable attorney fees.”).

220. MO. REV. STAT. § 578.013.1 (2016) (“Whenever any farm animal professional videotapes or otherwise makes a digital recording of what he or she believes to depict a farm animal subjected to abuse or neglect . . . such farm animal professional shall have a duty to submit such videotape or digital recording to a law enforcement agency within twenty-four hours of the recording.” Intentional violations of this statute constitute a class A misdemeanor.). See also *id.* § 578.013.3.

221. MONT. CODE ANN. § 81-30-103(2)(e) (2017) (“A person who does not have the effective consent of the owner and who intends to damage the enterprise conducted at an animal facility may not: . . . enter an animal facility to take pictures by photograph, video camera, or other means with the intent to commit criminal defamation.”); MONT. CODE ANN. § 81-30-104 (“A person who has been damaged by reason of a violation of 81-30-103 may bring against the person who caused the damage an action in the district court to recover . . . an amount equal to three times all actual and consequential damages [] and . . . court costs and reasonable attorney fees.”). MONT. CODE ANN. § 81-30-105 imposes criminal penalties for violations of § 81-30-103.

222. N.C. GEN. STAT. § 99A-2(a) (2018) provides that:

“[a]ny person who intentionally 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.” Section 99A-2(b) defines “an act that exceeds a person’s authority to enter the nonpublic areas of another’s premises [as] any of the following: (1) An employee who enters the nonpublic areas of an employer’s premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization captures or removes the employer’s data, paper, records, or any other documents and uses the information to breach the person’s duty of loyalty to the employer; [or,] (2) An employee who intentionally enters the nonpublic areas of an employer’s premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization records images or sound occurring within an employer’s premises and uses the recording to breach the person’s duty of loyalty to the employer; [or,] (3)

using or attempting to use a camera, video recorder, or any other video or audio recording equipment.<sup>223</sup>

Professors Alan Chen and Justin Marceau are the leading scholars on agriculture security legislation,<sup>224</sup> but their research does not directly address how ag-gag laws implicate unauthorized workers. Instead, Chen and Marceau discuss how video recording furthers the First Amendment values of self-governance, the search for truth, and the promotion of public discourse.<sup>225</sup> They innovatively theorize about how ag-gag laws implicate democracy in the video age by keeping agribusiness “operations out of view of a camera.”<sup>226</sup> Their scholarship also advocates a constitutional right to record, and they discuss the need to protect individuals from civil or criminal liability for some recordings.<sup>227</sup> Their research identifies recording as a component preparatory to expression and speech, not mere conduct.<sup>228</sup> Finally, they distinguish between recording in public and private and conclude that “nothing about the private setting fundamentally changes the conceptual understating of the expressive nature of recording.”<sup>229</sup>

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Knowingly or intentionally placing on the employer’s premises an unattended camera or electronic surveillance device and using that device to record images or data.”

Section 99A-2(d) allows a court to:

award to a party who prevails in an action brought pursuant to this section one or more of the following remedies: (1) Equitable relief[;] (2) Compensatory damages as otherwise allowed by State or federal law[;] (3) Costs and fees, including reasonable attorneys’ fees[; and] (4) Exemplary damages as otherwise allowed by State or federal law in the amount of five thousand dollars (\$5,000) for each day, or portion thereof, that a defendant has acted in violation of [section 99A-2(a)].

223. N.D. CENT. CODE § 12.1-21.1-02 (2017) (“No person without the effective consent of the owner may . . . [e]nter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment.”).

224. See, e.g., Alan K. Chen & Justin Marceau, *Developing a Taxonomy of Lies Under the First Amendment*, 89 U. COLO. L. REV. 655 (2018) [hereinafter Chen & Marceau, *Developing a Taxonomy*]; Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435 (2015) [hereinafter Chen & Marceau, *High Value Lies*]; Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991 (2016) [hereinafter Marceau & Chen, *Free Speech*]; Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317 (2015) [hereinafter Marceau, *Ag Gag*].

225. Marceau & Chen, *Free Speech*, *supra* note 224 at 999–1017; see also Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 180 (2017).

226. Brief for Amici Curiae Association of American Publishers et al. in Support of Plaintiffs-Appellees at 16, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) (No. 15-35960); see also Marceau & Chen, *Free Speech*, *supra* note 224, at 1009, 1023–25.

227. Marceau & Chen, *Free Speech*, *supra* note 224, at 1026–41.

228. *Id.* at 1017–23.

229. *Id.* at 1023–24.

Chen and Marceau emphasize the false speech analysis from *Alvarez*, which places unauthorized workers in a precarious position because of the financial or material gain that results from misrepresentations used to gain employment.<sup>230</sup> In *Alvarez*, a plurality of the Court extended First Amendment protection to false speech.<sup>231</sup> *Alvarez* involved a prosecution under the Stolen Valor Act, which made it a federal crime to falsely claim receipt of a military honor or declaration.<sup>232</sup> During his first public meeting as a water district board member, Alvarez made three false claims: (1) that he formerly played for the Detroit Red Wings; (2) that he once married a starlet from Mexico; and (3) that he received a Congressional Medal of Honor.<sup>233</sup>

Chen and Marceau argue that under *Alvarez*, “high value lies” warrant more robust First Amendment protection.”<sup>234</sup> They identify investigative deceptions as a type of “high value lie”<sup>235</sup> and explain how *Alvarez* extended First Amendment protection to false speech that caused no legally cognizable harm.<sup>236</sup> *Alvarez* remarked how the Stolen Valor Act allowed unlimited government control over one subject at any time or in any setting.<sup>237</sup> The Act did protect a compelling interest—recognizing and expressing gratitude for acts of heroism and sacrifice—but was insufficiently tailored.<sup>238</sup> The government was unable to show that public perception of military honors and declarations had diminished or that the government was unable to counter Alvarez’s false speech with the truth.<sup>239</sup>

Chen, Marceau, and others, including local ACLU affiliates and animal rights groups, tested the *Alvarez* false speech analysis in several federal court challenges against agriculture security legislation. In the first of these cases, a federal district court found Idaho’s ag-gag law violated the First Amendment.<sup>240</sup> Section 18-7042

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230. *United States v. Alvarez*, 567 U.S. 709, 718–21 (2012); see also Chen & Marceau, *High Value Lies*, *supra* note 224, at 1451–54.

231. *Alvarez*, 567 U.S. at 709.

232. *Id.* at 715–17.

233. *Id.* at 713–15.

234. See Chen & Marceau, *High Value Lies*, *supra* note 224, at 1480–91; see also Chen & Marceau, *Developing a Taxonomy*, *supra* note 224, at 692–97.

235. Chen & Marceau, *High Value Lies*, *supra* note 224, at 1455–1506.

236. *Alvarez*, 567 U.S. at 724–30.

237. *Id.* at 722–24.

238. *Id.* at 724–25.

239. *Id.* at 726–28.

240. *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1202 (D. Idaho 2015), *aff’d in part and rev’d in part* by *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). The District of Idaho ruled on pre-trial motions that section 18-7042 was a content-based restriction on speech. *Id.* at 1202. On summary judgment, Idaho argued that section 18-7042 should be limited to apply only to false speech amounting to actionable fraud, defamation, conversion, or trespass. *Id.* at 1203. Idaho’s chief district judge disagreed. *Id.* Section 18-7042 prohibited all lies regardless of whether those lies caused any material harm. *Id.* Section 18-7042 also prohibited the use of lies or misrepresentations to gain

of the Idaho Code criminalized interference with production at any animal or agricultural facility, which included “any structure or land, whether privately or publicly owned, leased or operated, that is being used for agricultural production.”<sup>241</sup> For purposes of section 18-7042, animal and “[a]gricultural production” refers to activities associated with the production of agricultural products for food, fiber, fuel and other lawful uses.<sup>242</sup> Idaho prohibited using misrepresentations to (1) enter an agricultural facility,<sup>243</sup> (2) enter and make unauthorized audio or video recordings,<sup>244</sup> (3) obtain records,<sup>245</sup> or (4) obtain employment with an intent to cause economic or other injury.<sup>246</sup> Idaho also imposed the most restrictive penalties for violating ag-gag laws: punishment ranged up to one year in jail and damages measured up to twice the economic loss to a business.<sup>247</sup> The legislative history of section 18-7042 revealed that some members of the legislature wanted to prevent undercover investigations into Idaho’s agricultural industry.<sup>248</sup>

The United States Court of Appeals for the Ninth Circuit agreed with most of Chen and Marceau’s reasoning that *Alvarez* left false speech unprotected if “made ‘for the purpose of material gain’ or ‘material advantage,’ or if such speech inflicts a ‘legally cognizable harm.’”<sup>249</sup> On this basis, the Ninth Circuit invalidated section 18-7042(1)(a), which prohibited misrepresentations to gain entry, and section 18-7042(1)(d), which prohibited nonconsensual audio and video recordings.<sup>250</sup> The Ninth Circuit agreed that the prohibition against misrepresentations to gain entry potentially criminalized

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access to information relevant to a report on truthful activities. *Id.* at 1204. The court also found that “[e]ven where reporting was truthful (and thus, no action for fraud or defamation would apply), section 18-7042 would still impose criminal liability.” *Id.* at 1203–04. As a result, a report on the facility itself, not the representations made to gain access to that facility, was the most likely harm from activity in violation of section 18-7042. *Id.* at 1204. The court held that harm caused by truthful reporting is not a legally cognizable harm absent special circumstances and hypothesized that *The Jungle* would have triggered criminal charges against Sinclair were he subjected to Idaho’s privacy legislation. *Id.* at 1201–02 (citing WILLIAM A. BLOODWORTH, JR., UPTON SINCLAIR 45–48 (1977)); see also UPTON SINCLAIR, *THE JUNGLE* (1906). Finally, the court reasoned commercial agricultural operations were not exclusively private matters because modern food production was a heavily regulated industry. *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d at 1202, 1207.

241. IDAHO CODE § 18-7042 (2018).

242. *Id.* § 18-7042(2)(a).

243. *Id.* § 18-7042(1)(a).

244. *Id.* § 18-7042(1)(d).

245. *Id.* § 18-7042(1)(b).

246. *Id.* § 18-7042(1)(c).

247. *Id.* § 18-7042(3); see also *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1200–01 (D. Idaho. 2015).

248. See *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d at 1200–01.

249. *United States v. Alvarez*, 567 U.S. 719, 723 (2012); see *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1194 (9th Cir. 2018).

250. *Animal Legal Def. Fund v. Wasden*, 878 F.3d at 1194–99, 1203–05.

innocent behavior to a staggering degree and that no material benefit was always associated to the speaker.<sup>251</sup> Idaho's prohibition targeted journalists and other investigative reporters, which could chill lawful speech.<sup>252</sup> Idaho's prohibition against misrepresentations to gain access was so broad that it gave rise to suspicion of an impermissible purpose.<sup>253</sup> The Ninth Circuit also deemed Idaho's prohibition against recording an obvious content-based restriction on speech that ultimately implicated the First Amendment right to film matters of public interest.<sup>254</sup> In this respect, the recording prohibition was both under- and over-inclusive. Subsection (1)(d) prohibited only audio and video recordings but said nothing about photographs.<sup>255</sup> The prohibition also suppressed more speech than necessary, due to the vast number of available legal remedies that did not implicate the First Amendment.<sup>256</sup>

The Ninth Circuit's revival of subsections 18-7042(1)(b) and 18-7042(1)(c) offers a clue as to the types of misrepresentations *Alvarez* leaves unprotected. Subsection (b) prohibited misrepresentations to obtain records and subsection (c) prohibited misrepresentations to gain employment with intent to cause economic or other injury.<sup>257</sup> According to the Ninth Circuit, the use of misrepresentations to obtain records "wreaks actual and potential harm on a facility and bestows material gain on the fibber."<sup>258</sup> The use of misrepresentations to gain employment *and* with an intent to cause economic or other injury was not an overly broad prohibition on speech or speech creation activities.<sup>259</sup> Instead, the prohibition enforces the covenant of good faith and fair dealing that was implied in all of Idaho's employment agreements.<sup>260</sup>

Prior to the Ninth Circuit's decision in Idaho, the United States Court of Appeals for the Tenth Circuit remanded Wyoming's ag-gag law back to the federal district court for a First Amendment analysis, leaving open the question of whether *Alvarez* applied.<sup>261</sup> Wyoming

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251. *Id.* at 1195–96.

252. *Id.* at 1197–98.

253. *Id.* at 1198.

254. *Id.* at 1203–05.

255. *Id.* at 1204.

256. *Id.* at 1205.

257. *Id.* at 1199–1203.

258. *Id.* at 1199–1202.

259. *Id.*

260. *Id.*

261. *W. Watersheds Project v. Michael*, 196 F. Supp. 3d 1231, 1235 (D. Wyo. 2016), *rev'd by W. Watersheds Project v. Michael*, 869 F.3d 1189, 1198 (10th Cir. 2017). *See also* WYO. STAT. ANN. § 6-3-414(a) (2017) (providing "that [a] person is guilty of trespassing to unlawfully collect resource data if he [e]nters onto open land for the purpose of collecting resource data; and [d]oes not have [a]n ownership interest in the real property or, statutory, contractual or other legal authorization to enter or access the land to collect resource data or [w]ritten or verbal permission of the owner, lessee or agent of the owner to enter or access the



imposed criminal punishment and civil liability for trespassing on private land for purposes of gathering “resource data.”<sup>262</sup> Resource data included all that related “to land or land use, including but not limited to data regarding agriculture, minerals, geology, history, cultural artifacts, archeology, air, water, soil, conservation, habitat, vegetation, or animal species.”<sup>263</sup> Wyoming criminalized entering private land “for the purpose of collecting resource data” and crossing private land to collect resource data from adjacent or proximate land.<sup>264</sup> Elsewhere in the Tenth Circuit, a coalition of plaintiffs challenged an ag-gag law in Utah that more closely resembled the Idaho law.<sup>265</sup> Section 76-6-112 of the Utah Code applied only to facilities that were exclusively located on private property<sup>266</sup> and broadly criminalized interfering with an “agricultural operation.”<sup>267</sup> Section 76-6-112 contained one lying provision and three recording provisions.<sup>268</sup> Utah criminalized (1) “bugging an agricultural operation,”<sup>269</sup> (2) “obtaining access to an agricultural operation under

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land to collect the specified resource data”); Section 6-3-414(d) (punishing the unlawful collection of resource data by “imprisonment for not more than one (1) year, a fine of not more than one thousand dollars (\$1,000.00), or both” and by “imprisonment for not less than ten (10) days nor more than one (1) year, a fine of not more than five thousand dollars (\$5,000.00), or both, if the person has previously been convicted of trespassing to unlawfully collect resource data or unlawfully collecting resource data.”). Moreover, “[n]o resource data collected in violation of this section is admissible in evidence in any civil, criminal or administrative proceeding, other than a prosecution for violation of this section or a civil action against the violator.” *Id.* at § 6-3-414(f). Additionally, “[r]esource data collected in violation of this section in the possession of any governmental entity . . . shall be expunged by the entity from all files and data bases, and it shall not be considered in determining any agency action.” *Id.* § 6-3-414(g). For a thorough analysis of Wyoming’s ag-gag law, see generally Carrie Scrufari, *A Watershed Moment Revealing What’s at Stake: How Ag-Gag Statutes Could Impair Data Collection and Citizen Participation in Agency Rulemaking*, 65 UCLA L. REV. DISC. 2 (2017).

262. WYO. STAT. ANN. § 6-3-414 (2017); WYO. STAT. ANN. § 40-27-101 (2017).

263. WYO. STAT. ANN. § 6-3-414(e)(iv) (2017); WYO. STAT. ANN. § 40-27-101(h)(iii) (2017); *W. Watersheds Project*, 869 F.3d at 1192.

264. WYO. STAT. ANN. § 6-3-414(a)-(c); 40-27-101(a)-(c).

265. *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1199 (D. Utah 2017). See also UTAH CODE ANN. § 76-6-112 (2017), which provides that:

[a] person is guilty of agricultural operation interference if the person[,] without consent from the owner of the [] operation, or the owner’s agent, knowingly or intentionally records an image of, or sound from, the operation: (a) while the person is on the property where the agricultural operation is located; or (b) by leaving a recording device on the property where the agricultural operation is located.

Individuals who commit agricultural operation interference are guilty of a class A misdemeanor for the first offense. *Id.*

266. UTAH CODE ANN. § 76-6-112(1) (2012).

267. *Id.* at § 76-6-112(2).

268. *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d at 1198.

269. *Id.*

false pretenses;”<sup>270</sup> (3) “filming an agricultural operation after applying for a position with the intent to film;”<sup>271</sup> and (4) “filming an agricultural operation while trespassing.”<sup>272</sup>

The Tenth Circuit focused on how Wyoming’s agriculture security legislation, which regulated conduct on private property, implicated the First Amendment.<sup>273</sup> According to the Tenth Circuit’s examination of jurisprudence, the First Amendment protection for “the creation and dissemination of information”<sup>274</sup> applied even where only one aspect of the challenged legislation concerned private property.<sup>275</sup> The gathering of facts was deemed “the beginning point” for conducting human affairs and was “most essential to advance human knowledge.”<sup>276</sup> Wyoming could not escape First Amendment scrutiny by “simply proceeding upstream and damming the source of speech.”<sup>277</sup> Collecting samples, noting legal descriptions, and recording geographical coordinates informs advocacy and other forms of protected expression.<sup>278</sup> Wyoming also punished speech-creation activities differently than activities that created no speech.<sup>279</sup> Ultimately, the Tenth Circuit remanded Wyoming’s ag-gag law for a First Amendment analysis.<sup>280</sup> Utah abandoned its ag-gag law after the Tenth Circuit’s remand.<sup>281</sup> A federal district court had already barred enforcement on First Amendment grounds.<sup>282</sup>

Neither the Ninth or Tenth Circuits addressed how *Alvarez* applies to undocumented workers, many of whom gain employment through oral and written misrepresentations. While little in the legislative record of ag-gag laws reflects a desire to target unauthorized workers, the implications should not be ignored in light of the extreme coercive environment that exists for those who can be threatened with deportation. Next, this Article explores how a robust recognition of First Amendment rights for unauthorized workers can

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270. *Id.*

271. *Id.*

272. *Id.*

273. *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1194 (10th Cir. 2017). Wyoming supported the interpretation that its legislation regulated conduct on public land if “an individual first trespasses on private land.” *Id.*

274. *Id.* at 1196.

275. *Id.* at 1195.

276. *Id.*

277. *Id.*

278. *See id.* at 1196–97.

279. *Id.* at 1194.

280. *Id.* at 1198.

281. *See* Tiffany Caldwell, *Utah to Pay Animal Welfare Groups \$349,000 to Settle ‘Ag-Gag’ Lawsuit*, SALT LAKE TR. (Nov. 18, 2017), <https://www.sltrib.com/news/2017/11/18/utah-to-pay-animal-welfare-groups-349000-to-settle-ag-gag-lawsuit/>.

282. *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017).

help mitigate the coercive environment that exists for this often-ignored class of workers.

#### IV. AG-GAG FREE NATION

Not all agribusiness owners were in favor of agriculture security legislation, although none specifically mentioned the First Amendment implications for unauthorized workers in the industry. Hamdi Ulukaya urged Governor Butch Otter to veto Idaho's ag-gag law.<sup>283</sup> Ulukaya is the founder and chief executive officer of Chobani, which opened a major Greek yogurt plant in the Idaho in 2013.<sup>284</sup> Ulukaya publicly stated, in part: "A bill is up for approval in Idaho that, if passed, would limit transparency and make some instances of exposing the mistreatment of animals . . . punishable by imprisonment. This could cause the general public concern and conflicts with our views and values."<sup>285</sup> Ag-gag litigation has extended beyond the U.S. Mountain West. In 2018, a federal district court in Iowa denied a motion to dismiss a challenge to an ag-gag law.<sup>286</sup> In January 2019, that same court ruled Iowa's ag-gag law unconstitutional on First Amendment grounds.<sup>287</sup> The United States Court of Appeals for the Fourth Circuit revived on standing grounds an ag-gag lawsuit in North Carolina.<sup>288</sup> As discussed in Part III, federal courts were able to decide the constitutionality of ag-gag laws without discussing the effects on unauthorized animal and agriculture workers.<sup>289</sup> While avoiding the debate may be justified as a wise exercise of judicial reservation, questions remain.

Little jurisprudence or literature exists on the subject of First Amendment speech rights for unauthorized persons. Professor Cristina M. Rodriguez identifies the historic nexus between immigrant rights and the U.S. civil rights movements.<sup>290</sup> Rodriguez theorizes how current legal paradigms correlate unauthorized status with subordination and marginalization.<sup>291</sup> As a result, unauthorized

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283. MILK Editors, *Chobani Yogurt Opposes Idaho Ag Gag Law*, AG WEB (Feb. 28, 2014, 3:31 AM), [https://www.agweb.com/article/chobani\\_yogurt\\_opposes\\_idaho\\_ag\\_gag\\_law\\_naa\\_dairy\\_today\\_editors/](https://www.agweb.com/article/chobani_yogurt_opposes_idaho_ag_gag_law_naa_dairy_today_editors/).

284. *See id.*

285. *Id.*

286. *See* Animal Legal Def. Fund v. Reynolds, 297 F. Supp. 3d 901, 929 (D. Iowa 2018); *see also* IOWA CODE § 717A.3A (2012).

287. Animal Legal Def. Fund v. Reynolds, No. 4:17-cv-00362-JEG-HCA, 2019 WL 140069 (S.D. Iowa 2019).

288. People for the Ethical Treatment of Animals, Inc. v. Stein, No. 17-1669, 2018 WL 2714684, at \*7 (4th Cir. June 5, 2018); *see also* Court Restores Lawsuit Against North Carolina "Ag-Gag" Law, ASSOCIATED PRESS (June 5, 2018), <https://www.apnews.com/587c8986377840319ded7dc455869cdd>.

289. *See supra* text accompanying notes 231-72.

290. Cristina M. Rodriguez, *Immigration and the Civil Rights Agenda*, 6 STAN. J. C.R. & C.L. 125, 127-28 (2010).

291. *Id.* at 130.

persons “lack the capacity to be effective social actors.”<sup>292</sup> Unauthorized status also erases persons “from the political conversation and makes it difficult for them to advocate their interest to others.”<sup>293</sup> Rodriguez hypothesizes that “society feels justified in ignoring” unauthorized persons, who “are subject to almost unrestrained state power.”<sup>294</sup> “This power also facilitates exploitation by private actors,” including employers.<sup>295</sup> According to Rodriguez, the legal marginalization of unauthorized persons leads to a social marginalization that is exacerbated by socioeconomic status and race.<sup>296</sup>

The interconnectivity of the global commercial food production industry increases the need for the First Amendment to play an important role in ensuring the flow of information, especially from unauthorized workers.<sup>297</sup> *Plyer v. Doe*<sup>298</sup> suggests that due to status, unauthorized workers are ineligible for the type of heightened scrutiny that suspect classes receive.<sup>299</sup> Unauthorized status presumptively has no bearing on whether an infringement of the First Amendment receives heightened status. The Ninth and Tenth Circuits recognized how agriculture security legislation fell suspect under the First Amendment because of the potential to suppress certain ideas or prohibit discussion of an entire topic.<sup>300</sup> If an employer wanted to suppress an unauthorized worker’s speech about commercial food operations and production, an ag-gag law can help the employer do so.

Agriculture security legislation exacerbates the fear of deportation, which in turn could cause an unauthorized worker to exercise caution when exercising First Amendment rights. For those who have no reason to fear their legal status, line drawing begins when publicity ceases to concern information to which the public is entitled.<sup>301</sup> Liability lies where publicity becomes a “morbid” and “sensational prying” simply for its own sake (or into matters of which there is no public concern).<sup>302</sup> *Curtis Publishing Company v. Butts*<sup>303</sup> establishes an enduring First Amendment norm: that “dissemination

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. See Charlise Dewey, *Ag-Gag Laws: Protecting Industrial Farms, but from What?*, GRAND RAPIDS BUS. J. (June 21, 2013), <http://www.grbj.com/articles/77165-ag-gag-laws-protecting-industrial-farms-but-from-what>.

298. 457 U.S. 202 (1982).

299. See *id.* at 223.

300. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1205 (9th Cir. 2018); *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1195–96 (10th Cir. 2017).

301. RESTATEMENT (SECOND) OF TORTS § 652D, cmt. g & h (AM. LAW INST. 1977).

302. *Id.*

303. 388 U.S. 130 (1967).

of opinion on matters of public interest . . . [is] an ‘unalienable right.’”<sup>304</sup> However, there is “no special immunity” that grants authority “to invade the rights and liberties of others.”<sup>305</sup> Acceptable limits on the right to disseminate information “must neither affect ‘the impartial distribution of news’ and ideas . . . nor deprive our free society of the stimulating benefit of varied ideas.”<sup>306</sup>

A core tenant of the First Amendment is that speakers should not “fear physical or economic retribution solely because of what they choose to think and publish.”<sup>307</sup> But for unauthorized workers in some states, revealing truthful information about animal and agriculture production could require disclosure that misrepresentations were used to obtain employment.<sup>308</sup> Most ag-gag litigation and scholarship has focused on normative theories for First Amendment protection for undercover investigations. *The Jungle* was published in 1906 after seven weeks of undercover work at Chicago meatpacking plants.<sup>309</sup> Sinclair’s exposé was the catalyst for a federal investigation that prompted the Meat Inspection Act and the Pure Food and Drug Act.<sup>310</sup> In the years before and after *The Jungle*, commercial animal and agribusinesses were not the only targets of undercover investigations. Nelly Bly famously went undercover to write about mental hospitals and institutions in the 1890s.<sup>311</sup> Undercover filming and photographs in the latter half of the 1900s documented “the operations of bookie parlors in St. Louis,”<sup>312</sup> the brutal response to peaceful resistance in the Jim Crow South, and the Vietnam War.<sup>313</sup> William Sherman of the *New York Daily News* received a Pulitzer Prize in the 1970s after posing as a patient to report on Medicaid fraud<sup>314</sup> More recently, police shootings

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304. *Id.* at 149.

305. *Id.* at 150.

306. *Id.* at 151.

307. *Id.*

308. See *supra* notes 36, 158–65 and accompanying text (explaining the risks associated with immigrants using false documents to gain employment).

309. UPTON SINCLAIR, *THE JUNGLE* (1906).

310. *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1201–02 (D. Idaho 2016).

311. Diane Leenheer Zimmerman, *I Spy: The Newsgatherer Under Cover*, 33 U. RICH. L. REV. 1185, 1190 (2000) (citing LOUIS FILLER, *APPOINTMENT AT ARMAGEDDON: MUCKRAKING AND PROGRESSIVISM IN THE AMERICAN TRADITION* 234 (1976)).

312. Brief for Amici Curiae Association of American Publishers, *supra* note 226, at 24 (citing Zimmerman, *supra* note 311, at 1190) (citing JAMES H. DYGERT, *THE INVESTIGATIVE JOURNALIST: FOLK HEROES OF A NEW ERA* 166–67 (1976)).

313. Brief for Abrams Institute for Freedom of Expression and Scholars of First Amendment and Information Law et al. as Amici Curiae Supporting Respondents, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2016) (No. 15-35960).

314. See Zimmerman, *supra* note 311, at 1190 (citing DYGERT, *supra* note 312, at 66–67).

captured on cell phone videos have renewed public debate on racial profiling and the use of force by law enforcement.<sup>315</sup>

Like the speech of undercover investigators, the speech of unauthorized workers can counter the false commercial speech of animal and agribusinesses. Since *Whalen v. Roe*<sup>316</sup> rejected an absolute individual right to control information about oneself,<sup>317</sup> the new millennium has seen continued exercise of the First Amendment as authority to uncover harmful information about the food industry. A 2007 undercover investigation in California showed “workers forcing sick cows, many unable to walk,” into kill boxes “by repeatedly shocking them with electric prods, jabbing them in the eye, prodding them with a forklift, and spraying water up their noses.”<sup>318</sup> A 2009 investigation “in Iowa revealed hundreds of thousands of unwanted day-old male chicks being funneled by conveyor belt into a macerator to be ground up live.”<sup>319</sup> Another Iowa investigation documented “hens with gaping, untreated wounds laying eggs in cramped

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315. See Elliott C. McLaughlin, *We're Not Seeing More Police Shootings, Just More News Coverage*, CNN (Apr. 21, 2015, 7:26 AM), <http://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/>.

316. 429 U.S. 589 (1977).

317. *Id.* *Whalen* questioned whether New York may record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a prescription, certain drugs for which there is both a lawful and unlawful market. *Id.* at 591. In response to concerns that certain drugs were being diverted into unlawful channels, New York created a special commission to evaluate the state's drug control laws. *Id.* The commission found existing law deficient and that there was no effective way to prevent the use of stolen or revised prescriptions, to prevent unscrupulous pharmacists from repeatedly refilling or overprescribing prescriptions, or to prevent users from obtaining prescriptions from more than one doctor. *Id.* As a result, New York's drug statute classified potentially harmful drugs in five schedules and required prescriptions in certain categories be prepared by the physician in triplicate on an official form that identified the prescribing physician, the dispensing pharmacy, the drug and dosage, and the name, address, and age of the patient. *Id.* at 592–93. One of the forms was forwarded to the New York State Department of Health, which had certain security provisions. *Id.* at 593. Records were kept for a period of five years after which they were destroyed and only seventeen employees and twenty-four investigators had access to the records. *Id.* at 593–94. The records were stored in a database located in a receiving room surrounded by locked wire fence and protected by an alarm system. *Id.* at 594. The Court found two types of privacy interests were at stake, preventing disclosure of personal matters and independence to make important personal decisions, but that no infringement of a fundamental right occurred. *Id.* at 599–600. New York's legislation was a byproduct of rational legislative decision and did not pose a constitutionally sufficient threat to a privacy interest. *Id.* at 597. New York has regulated in an industry within which an invasion of privacy is accepted, and New York has provided adequate safeguards to protect privacy. *Id.* at 600–02.

318. *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1197 (D. Utah 2017).

319. *Id.*; see also *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 908 (S.D. Iowa 2018) (discussing a 2008 investigation at an Iowa pig farm).

conditions among decaying corpses.”<sup>320</sup> An undercover investigation in Vermont revealed “similarly gruesome footage of days-old calves being kicked, dragged, and skinned alive.”<sup>321</sup> Undercover investigators in Texas “filmed workers beating cows on the head with hammers and pickaxes and leaving them to die.”<sup>322</sup>

Agriculture security legislation undervalues the First Amendment right of unauthorized workers to speak about commercial food production. Industrial-scale animal factories dominate U.S. livestock production,<sup>323</sup> but small farms grow a lot of food too.<sup>324</sup> Yet, Open Secrets reported that in 2017 over one thousand lobbyists earned or billed over \$130 million in lobbying expenses or expenditures on behalf of 440 U.S. animal and agribusinesses.<sup>325</sup> Ag-gag laws show how businesses can lobby to potentially control much of the nonproprietary information the public receives about an industry.<sup>326</sup> Professors Brooke Kroeger and Ted Conover discuss how ag-gag laws criminalize the tools by which individuals seek to discover information,<sup>327</sup> specifically deceptive techniques that are “critical to American journalism.”<sup>328</sup> As discussed, “the most celebrated journalists in recent history have

320. Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d at 1197.

321. *Id.*

322. *Id.*

323. Brief for Food & Water Watch & Center for Biological Diversity, *supra* note 133, at 13–16; *see also* Anastasia Telesetsky, *Community-Based Urban Agriculture as Affirmative Environmental Justice*, 91 U. DET. MERCY L. REV. 259, 262 (2014) (arguing that “[h]ealthy food matters as an [issue of] environmental justice”); *cf.* Jacobs, *supra* note 133, at 222–23 (describing the obstacles of urban agriculture that are unlike industrial-scale rural agriculture); Jessica Owley & Tonya Lewis, *From Vacant Lots to Full Pantries: Urban Agriculture Programs and the American City*, 91 U. DET. MERCY L. REV. 233, 241–42 (2014) (explaining that urban agriculture is a way to improve abandoned urban lots rather than a replacement to industrial-scale agriculture).

324. The number of small farms counted in the 2012 Census of Agriculture amounted to 97% of the 2.1 million farms in the U.S. NAT’L AGRIC. STATISTICS SERV., U.S. DEPT OF AGRIC., 2012 CENSUS OF AGRICULTURE: SMALL FARMS 1 (Sept. 2016), <https://www.nass.usda.gov/Publications/Highlights/2016/SmallFamilyFarms.pdf>. Approximately 88% “of all farms were small family farms with less than \$350,000 in gross cash farm income.” *Id.* Almost 9% of farms are mid-size and large family owned and 3% were not family owned. *Id.* “Small family farms operated 48[%] of all farmland, owned 47[%] of the value of farm real estate (land and buildings), accounted for 20[%] of agriculture sales, and earned 5[%] of the country’s net farm income.” *Id.*

325. *Agribusiness Sector Profile, 2017*, OPEN SECRETS (Apr. 24, 2018), <https://www.opensecrets.org/lobby/indus.php?id=A&year=2017>.

326. *What Is Ag-Gag Legislation?*, AM. SOC’Y FOR PREVENTION CRUELTY TO ANIMALS, <https://www.aspc.org/animal-protection/public-policy/what-ag-gag-legislation> (last visited Feb. 11, 2019).

327. *See* Brief of Amici Curiae Professors Brooke Kroeger and Ted Conover in Support of Affirmance at 6–12, Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018) (No. 15-35960) (citing BROOKE KROEGER, UNDERCOVER REPORTING: THE TRUTH ABOUT DECEPTION 3 (2012)).

328. *Id.* at 10.

often relied on the use of deception, misrepresentation, and other practices associated with undercover investigation to uncover or observe facts and practices otherwise obscured from public view.”<sup>329</sup>

Agriculture security legislation heightens the threat of coercion due to unauthorized status. Largely due to the First Amendment’s broad protection, modern U.S. consumers expect transparency at almost every level of commercial food production<sup>330</sup>—ag-gag laws prevent transparency. This expectation “extends beyond food safety issues. Consumers want to know everything they can about food production,” especially animal and agriculture farming practices.<sup>331</sup> Within the marketplace of food, the consumer’s “interest in the free flow of commercial information”<sup>332</sup> includes exposés about agricultural or animal malpractice.<sup>333</sup> Leading food law scholars point to how consumers look to the marketplace to form eating habits.<sup>334</sup> Eating habits dictate what farmers grow and impact conservation practices and food networks.<sup>335</sup> Modern consumers pay more for organic food products that exclude unnatural ingredients.<sup>336</sup> “Preferences for fair trade and the movement against genetically modified (“GMO”) ingredients also motivate [growing and] buying practices.”<sup>337</sup>

Because of agriculture security legislation, many animal and agribusiness workers have another reason to fear discovery of unauthorized status. But consumers will want to know more about all aspects of food production, especially when government agencies fail to sufficiently monitor the industry.<sup>338</sup> Estimates largely describe an “inadequate system for enforcing farm worker safety.”<sup>339</sup> “According to one estimate, it would take [the Occupational Safety and Health Administration] 115 years to inspect each workplace in

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329. *Id.* at 5.

330. Brief of Amici Curiae Food Law and Policy Scholars, *supra* note 185, at 12 (quoting Negowetti, *supra* note 188, at 1373).

331. *Id.* at 5; see also Wendel, *supra* note 188, at 283–85 (discussing the overlap between urban farming and the environmental movement and describing urban farming as “the quintessential ‘locally grown’ food”).

332. Brief of Amici Curiae Food Law and Policy Scholars, *supra* note 185, at 13–14 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976)).

333. *Id.* at 15–16.

334. See *id.* at 11–12.

335. See *id.* at 11 (quoting Andrew Martin, *Is a Food Revolution Now in Season?*, N.Y. TIMES, Mar. 21, 2009, at BU1).

336. See *id.* at 9.

337. Shaakirrah R. Sanders, *Ag-Gag Free Detroit*, 93 U. DET. MERCY L. REV. 669, 683 (2016) (quoting Brief of Amici Curiae Food Law and Policy Scholars, *supra* note 185, at 9).

338. See Brief of Amici Curiae Food Law and Policy Scholars, *supra* note 185, at 15.

339. See Brief of Amici Curiae United Farm Workers of America, *supra* note 4, at 15.



the country just once.”<sup>340</sup> In this respect, ag-gag laws potentially prevent consumers from hearing from unauthorized workers about the conditions at animal and agriculture production facilities.<sup>341</sup> Ag-gag laws demonstrate how some businesses can operate in the political process even in the wake of the disclosure of damaging information.<sup>342</sup> “Agriculture [consistently] ranks among the most dangerous industries in the United States.”<sup>343</sup> The injury and fatality rate for agricultural workers are several times higher than for all other workers.<sup>344</sup> Agriculture and farm workers regularly lack “proper training or protective equipment.”<sup>345</sup> According to the United Farmworkers of America, “far too often industry employers set workplace policies that unduly add to and exacerbate” the inherent of risks of the industry.<sup>346</sup>

If the threat of arrest or deportation effectively silences the voices of unauthorized workers about unsafe work conditions or food production practices, agriculture security legislation provides little to mitigate those harms. Ag-gag laws distort the marketplace of ideas about the food production industry.<sup>347</sup> In this marketplace, like all marketplaces, “the right to hear—[and] the right to receive information—is no less protected by the First Amendment than the

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340. *Id.*

341. See Brief for Food & Water Watch & Center for Biological Diversity, *supra* note 133, at 13–16 (discussing abuses at facilities); see also Jaime Bouvier, *Why Urban Agriculture Can Be Controversial: Exploring the Cultural Association of Urban Agriculture with Backwardness, Race, Gender, and Poverty*, 91 U. DET. MERCY L. REV. 205, 211 (2014) (discussing how “in 1920, approximately [30%] of the [U.S.] population lived on a farm” as opposed to 2012 when “only 1.1% of the population live[d] on a farm”); Owley & Lewis, *supra* note 323, at 241–42; Telesetsky, *supra* note 323, at 261–62. See generally Jacobs, *supra* note 133, at 222–23; Lynn Sholander, *Green Thumbs in the City: Incentivizing Urban Agriculture on Unoccupied Detroit Public School District Land*, 91 U. DET. MERCY L. REV. 173 (2014).

342. See generally Roy Peled, *Occupy Information: The Case for Freedom of Corporate Information*, 9 HASTINGS BUS. L.J. 261, 270 (2013) (discussing how corporations are able to involve themselves in significant political decisions without being subject to freedom of information law which require disclosure of government records).

343. Brief of Amici Curiae United Farm Workers of America, *supra* note 4, at 12.

344. *Id.* (citing *Safety and Health Topics: Agricultural Operations*, OSHA, <https://www.osha.gov/dsg/topics/agriculturaloperations/>).

345. See Brief of Amici Curiae United Farm Workers of America, *supra* note 4, at 13; see also FARMWORKER JUSTICE, EXPOSED AND IGNORED: HOW PESTICIDES ARE ENDANGERING OUR NATION’S FARMWORKERS 6 (2013), <https://www.farmworkerjustice.org/sites/default/files/aExposed%20and%20Ignored%20by%20Farmworker%20Justice%20singles%20compressed.pdf>.

346. See Brief of Amici Curiae United Farm Workers of America, *supra* note 4, at 13.

347. See Dewey, *supra* note 297.

right to speak.”<sup>348</sup> Ag-gag laws envision control over nonproprietary information as a one-way proposition where the owner or operator of an agribusiness holds an exclusive “right.”<sup>349</sup> Privacy or security in the context of commercial food production has other dimensions. Consumers have the right to know and chose what to consume as a matter of health, religious belief, and conscience. The public has the right to government accountability because tax dollars fund regulation of the food industry. Consumers and competitors have enforceable rights against unfair competition.

The lack of clarity about the scope of the “right” that agriculture security legislation protects provides another reason to consider the First Amendment implications of ag-gag laws for unauthorized workers. These uncertainties also directly implicate whether any ag-gag state can claim a sufficient enough purpose under the First Amendment. *Reed v. Town of Gilbert*<sup>350</sup> requires more than a legitimate interest from both content-based and content-neutral restrictions. Content-based laws must meet strict scrutiny, which requires a compelling interest.<sup>351</sup> *Reed* describes content-neutral laws as receiving a “lesser scrutiny.”<sup>352</sup> This “lesser scrutiny” does not imply rational basis review and its requirement of a legitimate interest.<sup>353</sup> Content-neutral laws require an important or substantial government interest.<sup>354</sup> Thus, content-based and content-neutral regulations receive heightened scrutiny.

Agriculture security legislation gives agribusinesses a powerful threat against unauthorized workers who wish to provide nonproprietary information about commercial food production. Until ag-gag laws, agribusinesses lacked security or privacy rights besides laws that protected proprietary information.<sup>355</sup> Outside the context

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348. See Brief of Amici Curiae Food Law and Policy Scholars, *supra* note 185, at 13 (quoting *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002)).

349. See Lisa Sorg, *Federal Judge Tosses Ag-Gag Law as Unconstitutional, Could Invalidate North Carolina’s Statute*, NC POL’Y WATCH: PROGRESSIVE PULSE (July 26, 2017), <http://pulse.ncpolicywatch.org/2017/07/26/federal-judge-tosses-ag-gag-law-unconstitutional-invalidate-north-carolinas-statute/> (contradicting the notion that ag-gag laws are intended to protect proprietary information).

350. 135 S. Ct. 2218 (2015).

351. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641–42, 662 (1994).

352. *Reed*, 135 S. Ct. at 2232.

353. *Turner Broadcasting System, Inc.*, 512 U.S. at 662.

354. *Id.*

355. See generally Kayla Robinson, Note, *Corporate Rights and Individual Interests: The Corporate Right to Privacy as a Bulwark Against Warrantless Government Surveillance*, 36 CARDOZO L. REV. 2283, 2288 (2015) (discussing three premises for the creation of privacy rights for corporations). Robinson provides three premises for the type of corporate privacy right that ag-gag laws create. First, “corporations are legal persons and are entitled to bear legal rights, including constitutional rights.” *Id.* Second, “corporations have distinct privacy interests and property interests that are protected by a right to privacy.” *Id.*

of proprietary information, the Court recognizes corporate privacy in the criminal context but not the civil context.<sup>356</sup> Even if the recognition of Fourth Amendment privacy rights triggered an implication of First Amendment privacy rights, corporate privacy still remains a matter of state law.<sup>357</sup> State law must acclimatize to the First Amendment.<sup>358</sup>

It is unknown how the type of security or privacy that ag-gag laws protect outweighs the need to prevent coercion of unauthorized persons in the commercial food production workforce. Businesses in general have “a reduced objective expectation of privacy in the workplace” unless that information is of a “highly intimate nature.”<sup>359</sup> The method of gathering and disseminating information about food practices rarely causes public outrage. If the dissemination of information is distasteful, it is primarily because of the business practices that are exposed. Dissemination does not “seriously aggrieve” the public when publicity is a matter of legitimate public concern.<sup>360</sup> Ag-gag laws allow control over who gathers and disseminates nonproprietary information about animal and agriculture practices even where such information is in the public’s interest. This alters the common understanding that no corporation, partnership, or unincorporated association has a right to privacy except for “a limited right to the exclusive use of its own name or identity.”<sup>361</sup>

Agriculture security legislation removes the impediments to traditional common and constitutional law of trespass and defamation,<sup>362</sup> which causes special concerns about the application of ag-gag laws against unauthorized workers. The legislative histories of ag-gag laws do not explain why existing criminal and civil remedies inadequately protect animal and agriculture facilities. Perhaps because defamation does not protect against disclosure of truthful information and trespass does not always bar access for undercover investigations. Ag-gag laws borrow components of defamation law, which protects reputation, and components of trespass law, which

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Finally, “corporate rights relate to the rights of individuals involved in those corporations.” *Id.*

356. See generally Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 48 (2014) (discussing how a corporation is entitled to Fourth Amendment privacy rights against unreasonable search and seizure).

357. See *supra* notes 197–208 and accompanying text (discussing various state ag-gag laws).

358. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the First Amendment’s protection of free speech).

359. *Med. Lab. Mgmt. Consultants v. Am. Broad. Co., Inc.*, 30 F. Supp. 2d 1182, 1188 (D. Ariz. 1998), *aff’d*, 306 F.3d 806 (9th Cir. 2002) (internal quotation marks and citation omitted).

360. RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (AM. LAW INST. 1977).

361. *Id.* § 562I cmt. c.

362. Brief for Amici Curiae Association of American Publishers, *supra* note 226, at 23–24.

limits access, to create a statutory right against nongovernment intrusions into nonproprietary information.<sup>363</sup> Ag-gag laws also exploit the interrelatedness between privacy and trespass and privacy and reputational harms to prevent disclosure about truthful and nonproprietary information that a business prefers to keep private.<sup>364</sup>

Agriculture security legislation intersects with the emerging corporate privacy debate, further implicating the First Amendment rights of unauthorized workers. Professor Anita Allen is a leading scholar on rethinking the arguments against corporate privacy.<sup>365</sup> Allen describes tortious invasion of privacy as a "comparatively recent phenomenon in Anglo-American law"<sup>366</sup> and distinguishes privacy from publicity by describing the latter as a "heritable commercial" right that can be freely traded in the marketplace.<sup>367</sup> Allen demonstrates how courts rely on metaphysical and teleological grounds for denying corporate privacy.<sup>368</sup> Because corporations are creations of law, they metaphysically lack the traits necessary to ascribe privacy rights.<sup>369</sup> Corporations are also teleologically inconsistent with privacy rights.<sup>370</sup> The metaphysical ground therefore "reflects a theoretical conception of the fundamental essence of corporate existence,"<sup>371</sup> and the teleological ground "depends upon a view about the design or purpose of ascribing particular rights."<sup>372</sup>

How corporate privacy and the speech rights of unauthorized workers weigh against each other is unclear. Professor Elizabeth Pollman describes corporate privacy as an "open question" and hypothesizes that corporations for the most part do not enjoy a constitutional right to privacy.<sup>373</sup> Pollman interprets the Court's privacy jurisprudence for groups or organizations as including: (1) the right to make certain decisions without government interference; and (2) the right to avoid disclosure of personal or proprietary information.<sup>374</sup> Pollman examines how the First Amendment often identifies the public and its consumers as one of the beneficiaries of

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363. See Brief of Amici Curiae Professors Brooke Kroeger and Ted Conover, *supra* note 327, at 19.

364. *Id.* at 15.

365. Anita Allen, *Rethinking the Rule Against Corporate Privacy Rights: Some Conceptual Quandaries for the Common Law*, 20 J. MARSHALL L. REV. 607, 618, 621 (1987).

366. *Id.* at 612.

367. *Id.* at 611.

368. *Id.* at 611-17; see also *id.* at 611-12 nn. 29-30.

369. *Id.* at 613.

370. *Id.* at 615.

371. *Id.*

372. *Id.*

373. Pollman, *supra* note 360, at 33, 62.

374. *Id.* at 55-62.

commercial speech regulations.<sup>375</sup> This jurisprudence proscribes more, not less speech, to counter falsity.<sup>376</sup> Pollman distinguishes between public, private, and nonprofit private corporations, but points out how none enjoy a constitutionally protectable right to privacy.<sup>377</sup> Pollman concludes that each could have some privacy interests worth protecting but does not offer how governments should do so.<sup>378</sup>

No court has addressed whether corporate privacy outweighs the First Amendment rights of unauthorized workers to speak about unsafe food practices or any other issue related to work conditions. Professors Eric Orts and Amy Sepinwall echo Pollman's uncertainty about the recognition of corporate privacy "rights."<sup>379</sup> Orts and Sepinwall identify six aspects of privacy: (1) a right to be let alone; (2) a right to limited access to self; (3) a right to secrecy or concealment of certain matters; (4) control over personal information or information about oneself; (5) personhood; and (6) intimacy.<sup>380</sup> They acknowledge the link between corporate privacy rights and the individuals involved in those corporations.<sup>381</sup> Orts and Sepinwall distinguish between rights that originate with the corporation itself and rights that derive from the individuals who own, govern, and maintain the corporation.<sup>382</sup> Orts and Sepinwall categorize the former as primary rights that only the corporation can waive.<sup>383</sup> The latter are secondary rights, for which individual owners exercise control.<sup>384</sup> Orts and Sepinwall examine the scope of informational and decisional corporate privacy<sup>385</sup> and find the likelihood of strong protection for both unclear as a constitutional matter.<sup>386</sup>

Whether corporate privacy outweighs the public right to access information about food production seems to have been negatively answered by the Ninth and Tenth Circuits, but how these decisions relate to unauthorized workers is unknown. Professor Mary Fan offers a look at the "right" to corporate privacy that differs from Pollman and Orts and Sepinwall. Fan views corporate privacy as primarily grounded in statutory authority.<sup>387</sup> Businesses can

375. *Id.* at 72–77.

376. *United States v. Alvarez*, 567 U.S. 709, 727–28 (2012) (Brandeis, J., concurring) (citing *Whitney v. California*, 274 U.S. 357, 377 (1927)).

377. Pollman, *supra* note 360, at 64, 77–80, 84.

378. *Id.* at 84–88.

379. Eric Orts & Amy Sepinwall, *Privacy and Organizational Persons*, 99 MINN. L. REV. 2275, 2278 (2015).

380. *Id.* at 2281; *see also* Pollman, *supra* note 360, at 60.

381. Orts & Sepinwall, *supra* note 379, at 2287–92.

382. *Id.*

383. *Id.* at 2293–96.

384. *Id.*

385. *Id.* at 2305–13.

386. *Id.* at 2316–22.

387. *See* Fan, *supra* note 194, at 164, 171–77.

contractually keep their secrets intact.<sup>388</sup> State and federal court rules and statutes commonly authorize protective orders.<sup>389</sup> Trade secret laws, although rife with complications, indefinitely shield nonpublic information from public disclosure.<sup>390</sup> Patent laws shield information for a limited amount of time.<sup>391</sup> Outside of the above-mentioned categories, corporations generally have no right—statutory or otherwise—to control nonproprietary information simply because it is distasteful or would have a negative effect on the business or its profits.

Circumstances may govern whether the “law treats corporations as ‘persons’ deserving of constitutional rights”<sup>392</sup> and whether such rights would apply against unauthorized workers in the context of agriculture security legislation. The Court recently found in *Federal Communications Commission v. AT&T, Inc.*<sup>393</sup> that “personal privacy” . . . suggests a type of privacy evocative of human concerns—not [of that] usually associated with an entity.”<sup>394</sup> While *AT&T, Inc.* interpreted a definition of privacy under the Freedom of Information Act, it made clear that privacy rights, by their very nature, were intrinsically dependent on the human or corporate nature of the holder.<sup>395</sup> Ultimately, the Court found the case did not involve “the scope of a corporation’s ‘privacy’ interests as a matter of constitutional or common law.”<sup>396</sup>

The role of the corporate privacy debate as it relates to agriculture security legislation and unauthorized workers may seem to lack importance on the surface. Yet, an examination of modern U.S. tort and constitutional law reveals little basis for abandoning the protection the First Amendment has traditionally provided to those who gather and disseminate information about commercial activities.

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388. *Id.* at 171, 174–75.

389. *Id.* at 172–77.

390. *Id.* at 173.

391. *Id.*

392. Lucy L. Holifield, Comment, *Animal Legal Defense Fund v. Otter: Industrial Food Production Simply is Not a Private Matter*, 12 J. FOOD L. & POL’Y 16, 47 (2016); see also Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People’s Elusive “Right to Know,”* 72 MD. L. REV. 1, 29–30 (2012).

393. *FCC v. AT&T Inc.*, 562 U.S. 397 (2011).

394. *Id.* at 398. AT&T was part of an FCC program that provided telecommunications and information services to schools and libraries. *Id.* at 400. In 2004, AT&T voluntarily reported overcharges under the program and paid restitution. *Id.* One of AT&T’s competitors filed a FOIA request and a dispute emerged regarding whether AT&T had a privacy interest in any of the requested documents relinquished during the FCC investigation. *Id.* at 400–01. The Court found Congress did not intend to grant privacy rights to corporations and pointed to comment c to section 652I of the Restatement (Second) of Torts and section 97 of Law of Torts in its discussion of the lack of recognition for corporate privacy rights. *Id.* at 405–09.

395. See *id.* at 402–07.

396. *Id.* at 407.

No animal or agribusiness that operates in the commercial marketplace can hardly expect to “enjoy a life of reserve outside the public gaze.”<sup>397</sup> Moreover, commercial speech jurisprudence does not protect false or misleading communications.<sup>398</sup> Ag-gag laws upset First Amendment norms by threatening the search for true commercial speech. In the context of food production, ag-gag laws extend corporate privacy further than the individual right and allow for a previously unheard of degree of control over nonproprietary commercial information.

## V. CONCLUSION

From a First Amendment perspective, unauthorized workers play a unique role in diversifying the marketplace of information about the U.S. animal and agriculture industry.<sup>399</sup> Ag-gag laws create another method to threaten unauthorized workers with deportation, which exacerbates the coercive environment that disincentivizes an unauthorized worker’s exercise of First Amendment speech rights. This Article does not suggest that disclosure of information about unsafe food practices or work conditions should create a bar to immigration enforcement. Rather, this Article points out the discrete threat that ag-gag laws pose to unauthorized workers. Recognition of the First Amendment implications for unauthorized workers should prove helpful to a more holistic understanding of the broad scope of many ag-gag laws.

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397. Anita L. Allen, *Natural Law, Slavery, and the Right to Privacy Tort*, 81 FORDHAM L. REV. 1187, 1210 (2012).

398. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 557 (1980). The Public Service Commission of New York ordered electric utilities in the state to cease all advertising based on the finding that the state’s utility systems did not have sufficient fuel stocks to meet consumer demands for the winter of 1973-74. *Id.* at 558-59. The Commission continued the ban three years past the shortage. *Id.* at 559. The Court reversed decades of precedent and held that the First Amendment protects commercial speech from unwarranted government regulation based on the informational function of advertising. *Id.* at 561-63. Commercial speech that is more likely to deceive than inform the public may be banned. *Id.* at 563. The Court announced the government has the burden of proof on the following four-part test for commercial speech: (1) Does speech advertise illegal or unlawful activities or is it false or deceptive?; (2) Is the law justified by a substantial interest?; (3) Does the law directly advance the interest?; (4) Is the law no more extensive than necessary (i.e. narrow tailoring) to achieve the interest? *Id.* at 566.

399. Brief of Amici Curiae Food Law and Policy Scholars, *supra* note 185, at 11-12.

