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Gag with Malice

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Abstract

This Article brings agriculture privacy and other commercial gagging laws into the ongoing debate on the First Amendment actual malice rule announced in New York Times v. Sullivan. *Despite a resurgence in contemporary jurisprudence, Justices Clarence Thomas and Neil Gorsuch have recently questioned the wisdom and viability of* Sullivan*, which originally applied actual malice to state law defamation claims brought by public officials. The Court later extended the actual malice rule to public figures*, *to claims for infliction of emotional distress, and—as discussed in this Article—to claims for invasion of privacy and to issues of public importance or concern.*

United States v. Alvarez *recently identified the significance of* Sullivan *and the actual malice rule when announcing First Amendment protection for false speech.* Alvarez *notably excluded defamation from the categories of protected false speech. No federal district or circuit court that has applied* Alvarez *to agriculture privacy laws has considered* Sullivan *or the actual malice rule. Agriculture privacy laws are a type of gag law that seek to: (i) prevent the use of misrepresentations to gain access, employment, or unauthorized entry; (ii) prevent unauthorized or nonconsensual use of video, audio, and photographic cameras or*

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recorders if there was an intent to cause harm to the enterprise; or (iii) impose a duty to submit recordings of animal or agriculture abuse. Some of the legislative histories of these laws demonstrate an intent to prevent undercover investigations into or exposés on the industry. Arkansas has applied a similar type of gag to all commercial businesses.

The Eighth, Ninth, and Tenth Circuits are currently split on the scope of Alvarez*'s protection against agriculture privacy and commercial gagging laws. This Article demonstrates how* Sullivan *and the actual malice rule also balance the First Amendment right of privacy and press to gather and disseminate information about public matters. Part I introduces agriculture privacy and commercial gagging laws. Part II deliberates the civil rights roots and recent resurgence of* Sullivan *in contemporary jurisprudence. Part III contemplates how* Sullivan *alleviates First Amendment deficiencies that gagging courts left unaddressed, particularly with regard to the effect of gagging laws on undocumented workers and others in the marketplace of ideas about commercial food production.*

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INTRODUCTION

Despite its relevance to contemporary civil liberties jurisprudence and current political questions, Justices Clarence Thomas and Neil Gorsuch have disfavored a "reflexive

application"[1] of *New York Times Co. v. Sullivan*,[2] which historically constitutionalized state law defamation claims brought by public officials.[3] *Sullivan* required that actual malice be shown in order to recover general and punitive damages, therefore eliminating strict liability and the availability of presumed damages.[4] After *Time, Inc. v. Hill*[5] applied *Sullivan* to invasion of privacy,[6] *Gertz v. Robert Welch, Inc.*[7] extended the actual malice rule to public figures.[8] *Dun & Bradstreet, Inc. v. Greenmoss Builder's, Inc.*[9] later extended *Sullivan* to some matters of public interest or concern.[10] *Synder v. Phelps*[11] recently upheld *Hustler Magazine, Inc. v. Falwell*[12] and the application of the actual malice rule to infliction of emotional distress.[13]

No doubt should exist about *Sullivan* and the actual malice rule's continued importance, especially given the 2020 presidential election. Dominion Voting Systems and Smartmatic, manufacturers of voting machines, recently brought multiple defamation lawsuits against former President Donald J. Trump's attorneys Rudy Giuliani and Sidney Powell and his supporter Mike Lindell, among others, for their statements disputing the results and claimed a total of $5.3 billion in damages.[14] These suits included a $2.7 billion

1. *See e.g.*, McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in denial of cert.) ("We should not continue to reflexively apply this policy-driven approach to the Constitution.").

2. 376 U.S. 254 (1964).

3. *See id.* at 264–65.

4. *Id.* at 283–84.

5. 385 U.S. 374 (1967).

6. *See id.* at 390–91.

7. 418 U.S. 323 (1974).

8. *See id.* at 335–37.

9. 472 U.S. 749 (1985).

10. *See id.* at 751.

11. 562 U.S. 443 (2011).

12. 485 U.S. 46 (1988).

13. *See Snyder*, 562 U.S. at 443–44.

14. *See* Andrew Westrope, *Election Tech Vendors File $5.3B in Defamation Lawsuits*, GOV'T TECH. (Feb. 12, 2021), https://perma.cc/H3L7-LKS6; Alison Durkee, *Dominion Lawsuits Against Sidney Powell, MyPillow CEO Mike Lindell and Giuliani Can Move Forward, Court Rules*, FORBES (Aug. 11, 2021, 6:09 PM), https://perma.cc/H6V8-NVSX.

defamation lawsuit against Fox News for statements made by hosts and guests about the reliability of voting machines.[15] Two Arizona lawmakers brought defamation claims against another state lawmaker who signed a letter urging a U.S. Department of Justice investigation for their possible connections with the U.S. Capitol riot on January 6, 2021.[16] Finally, claims for emotional distress have been filed against former President Trump, his son Donald Trump, Jr., and others including Giuliani following the riot.[17] *Sullivan* and the actual malice rule will likely apply to all of the above-mentioned claims given the public nature of the defendants and the election itself.[18] In fact, a state court in New York recently dismissed the Trump campaign's 2020 defamation lawsuit against the *New York Times* in part due to its failure to show actual malice.[19]

The protection for false speech announced in *United States v. Alvarez*[20] by its own terms yields to *Sullivan* and the actual malice rule.[21] Federal courts in Arkansas, Idaho, Iowa, Kansas, North Carolina, Utah, and Wyoming have relied upon *Alvarez* to strike down all or parts of agriculture privacy and other commercial gagging laws as content-based regulations on

15. Elie Mystal, *Fox News Should Pay for the Lies and Slander It Helped Promote*, THE NATION (Feb. 11, 2021), https://perma.cc/AMD7-X2UW.

16. *Arizona Republicans Target Democrat in Defamation Lawsuit*, ASSOCIATED PRESS (Mar. 3, 2021), https://perma.cc/7D64-QSUJ. An Arizona judge dismissed the lawsuit. Jonathan J. Cooper, *Arizona Judge Slaps Down Finchem, Gosar Over Defamation Suit*, YAHOO (Aug. 30, 2022), https://perma.cc/MU53-ENKT.

17. Eric Tucker, *Democratic Rep. Bennie Thompson Sues Donald Trump, Accusing Him of Inciting Riot at US Capitol, Conspiring with Extremists*, ASSOCIATED PRESS (Feb. 16, 2021, 7:50 PM), https://perma.cc/D2UC-786F; Spencer S. Hsu, *Rep. Eric Swalwell Sues Trump over Jan. 6 Riot, Alleging He Poses Risk of "Inciting Future Political Violence"*, WASH. POST (Mar. 5, 2021, 11:56 AM), https://perma.cc/597M-PHBK. Representative Thompson has since dropped his lawsuit. Press Release, Bennie Thompson, Member, House of Representatives, Congressman Thompson Dismisses Lawsuit Against Trump (July 21, 2021), https://perma.cc/SB8P-8SSZ.

18. *See supra* notes 7–10 and accompanying text.

19. Marc Tracy, *Court Dismisses Trump Campaign's Defamation Suit Against* New York Times, N.Y. TIMES (Mar. 9, 2021), https://perma.cc/RQA3-5M5Q (last updated Sept. 23, 2021).

20. 567 U.S. 709 (2012).

21. *See id.* at 719 (noting that "[t]he statement must be a knowing or reckless falsehood").

speech.[22] None have identified the relevance of *Sullivan* or the actual malice rule.[23] Agriculture privacy or ag-gag laws claim to balance business or organizational privacy with the right to gather and disseminate information about a business or its operations.[24] Ag-gag laws threaten civil or criminal penalties to prevent undercover investigations that negatively impact an animal business or agribusiness's operations or reputation.[25] Legislatures enacted ag-gag laws in Arkansas,[26] Alabama,[27] Idaho,[28] Iowa,[29] Kansas,[30] Missouri,[31] Montana,[32] North

22. *See infra* notes 26–36 and accompanying text.

23. *See, e.g.*, Animal Legal Def. Fund v. Kelly, 434 F. Supp. 3d 974 (D. Kan. 2020) (refraining from discussion or application of *Sullivan* and the actual malice rule), *aff'd* 9 F.4th 1219 (10th Cir. 2021).

24. *See* Shaakirrah R. Sanders, *The Corporate Privacy Proxy*, 105 CORNELL L. REV. 1171, 1199–1208 (2020) [hereinafter Sanders, *The Corporate Privacy Proxy*].

25. *See Ag-Gag Laws*, ANIMAL LEGAL DEF. FUND, https://perma.cc/S3GT-TQM9 ("Ag-Gag laws seek to 'gag' would-be whistleblowers and undercover activists by punishing them for recording footage of what goes on in animal agriculture.").

26. ARK. CODE ANN. § 16-118-113 (2022) (prohibiting an individual gaining access to a commercial operation, documenting commercial activities, and disclosing such activities to third parties).

27. ALA. CODE § 13A-11-153 (2022) (criminalizing gaining entry by use of false pretenses or obtaining documents without permission of the owner).

28. IDAHO CODE § 18-7042 (2022) (prohibiting interference with agricultural production), *invalidated by* Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195 (D. Idaho. 2015), *aff'd in part, rev'd in part sub nom.* Animal Legal Def. Fund v. Wasden, 878 F.3d. 1184 (9th Cir. 2018).

29. IOWA CODE § 717A.3A (2022) (criminalizing providing false information to gain access or employment for purposes of committing an unauthorized act), *invalidated by* Animal Legal Def. Fund v. Reynolds, 353 F. Supp. 3d 812 (S.D. Iowa 2019), *aff'd in part, rev'd in part*, 8 F.4th 781 (8th Cir. 2021); *see also* Animal Legal Def. Fund v. Reynolds, 297 F. Supp. 3d 901, 918–25 (S.D. Iowa 2018).

30. KAN. STAT. ANN. § 47-1827(c)(4) (2022) (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), *invalidated by* Animal Legal Def. Fund v. Kelly, 434 F. Supp. 3d 974 (D. Kan. 2020), *aff'd* 9 F.4d 1219 (10th Cir. 2021).

31. MO. REV. STAT. § 578.013.1 (2022) (imposing a duty to submit recordings of alleged farm animal abuse within twenty-four hours of recording).

32. MONT. CODE ANN. § 81-30-103(2)(e) (2021) (criminalizing entering an animal facility with the intent to record images or take pictures for purposes of criminal defamation).

Carolina,[33] North Dakota,[34] Utah,[35] and Wyoming.[36] Each state sought to (i) prevent the use of misrepresentations to gain access, employment, or unauthorized entry, (ii) prevent unauthorized use of video, audio, and photographic cameras or recorders if there was an intent to cause harm to the enterprise, and (iii) impose a duty to submit recordings made in violation of the law.[37] Arkansas and North Carolina are unique in that their gags apply to all commercial businesses, not just animal and agriculture businesses.[38]

The Eighth, Ninth, and Tenth Circuits are currently split on the scope of *Alvarez* false speech protection against agriculture privacy and commercial gagging laws. The Eighth Circuit ruled that *Alvarez* protects misrepresentations to gain employment but does not protect misrepresentations to gain access.[39] The Ninth Circuit ruled that *Alvarez* protects misrepresentations to gain access but does not protect misrepresentations to gain employment.[40] The Tenth Circuit agrees with the Ninth that *Alvarez* protections extend to false speech to gain access.[41]

This Article presents *Sullivan* and the actual malice rule as an alternative analysis for commercial gagging laws. Professor Justin Marceau briefly identified the lack of an actual malice

33. N.C. GEN. STAT. § 99A-2 (2022) (prohibiting unauthorized entry into nonpublic area of another's premises), *invalidated in part by* People for the Ethical Treatment of Animals, Inc. v. Stein, 466 F. Supp. 3d 547 (M.D.N.C. 2020).

34. N.D. CENT. CODE § 12.1-21.1-02.6 (2022) (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").

35. UTAH CODE ANN. § 76-6-112(2)(c)(i) (2022) (criminalizing applying for employment 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).

36. WYO. STAT. ANN. § 6-3-414 (2022) (prohibiting trespassing to unlawfully collect "resource data"), *invalidated in part by* W. Watersheds Project v. Michael, 353 F. Supp. 3d 1176 (D. Wyo. 2018).

37. *See* Sanders, *The Corporate Privacy Proxy*, *supra* note 24, at 1173–80.

38. *See Ag-Gag Laws*, *supra* note 25.

39. *See Reynolds*, 8 F.4th at 785–88.

40. *See* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1194–99, 1201–02 (9th Cir. 2018).

41. *See* Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1232–45 (10th Cir. 2021).

requirement for gag laws that apply to animal and agribusinesses.[42] The legislative histories of recently overturned gag laws demonstrate clear animus against undercover journalists and animal activists exercising their First Amendment rights. Some legislators wanted to shield agribusinesses from "the court of public opinion" by targeting those who "masquerade as employees to infiltrate farms in the hope of discovering and recording what they believe to be animal abuse."[43] Other legislators denounced investigators and activists as "marauding invaders," "terrorists," and "enemies."[44] At least one legislator wanted to impede release of audio and video recordings of suspected animal abuse.[45] One other wanted "to stop people who would go 'running out to a news outlet.'"[46]

This Author has previously discussed how agriculture privacy and commercial gagging laws impact undercover investigations into commercial food production by potentially chilling the speech of undocumented workers.[47] That Article identified how gagging laws heightened the coercive environment that exists for unauthorized animal and agribusiness workers, many of whom live at or below poverty thresholds and are at higher risk of injury or illness. More recently, this Author recognized the relevance of gagging laws to the First Amendment corporate privacy debate and theorized whether "security" acted as a proxy for "privacy."[48] That Article examined nationwide gagging challenges and pondered whether such laws, if ever successfully defended, could potentially expand business privacy to a degree that threatens the

42. *See* Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317, 1327–29 (2015).

43. Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1200–01 (D. Idaho 2015) (citing Declaration of Jo Ann Wall in Support of Plaintiffs' Motion for Partial Summary Judgment, Exhibit C at 145–46, Animal Legal Def. Fund v. Wasden, 312 F. Supp. 3d 939 (D. Idaho 2018) (No. 1:14-cv-00104-BLW)).

44. *Id.* at 1200–01.

45. *See id.* (quoting legislator Dan Steenson, who drafted the Idaho statute criminalizing undercover investigations of agricultural production facilities).

46. Editorial, *No More Exposés in North Carolina*, N.Y. TIMES (Feb. 1, 2016), https://perma.cc/49SF-YY2A.

47. *See generally* Shaakirrah R. Sanders, *Ag-Gag Free Nation*, 54 WAKE FOREST L. REV. 491 (2019) [hereinafter Sanders, *Ag-Gag Free Nation*].

48. *See generally* Sanders, *The Corporate Privacy Proxy*, *supra* note 24.

marketplace of nonproprietary information about the commercial food industry.

This Article now contributes to the *Sullivan* debate and argues that the actual malice rule combats how most agriculture privacy and commercial gagging laws exploit the interrelated elements of privacy (which protects against disclosure of embarrassing facts), defamation (which protects reputation), and trespass (which bars access). *Whalen v. Roe*[49] leaves in doubt the scope of constitutional rights to control information,[50] especially when weighed against other interests like the public nature of information about commercial food products. U.S. consumers, like those abroad, have long sought knowledge about the cleanliness and management of animal and agriculture farms of all types and sizes.[51] Given that agriproducts can cause foodborne illnesses[52] and given that some strains of pathogens have become drug-resistant,[53] recent trends suggest a lack of "progress in reducing foodborne infections."[54] "[E]ven infrequent contamination of commercially distributed products can result

49. 429 U.S. 589 (1977).

50. *See id.* at 605–06.

51. *See* Brief of Amici Curiae Food & Water Watch & Center for Biological Diversity in Support of Affirmance at 7–11, Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018) (No. 15-35960), 2016 WL 3537324, at *7–11 [hereinafter Food & Water Watch Brief]; *see also* 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); 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); Anastasia Telesetsky, *Community-Based Urban Agriculture as Affirmative Environmental Justice*, 91 U. DET. MERCY L. REV. 259, 261–62 (2014). *See generally* Becky L. Jacobs, *Urban Food Corridors: Cultivating Sustainable Cities*, 91 U. DET. MERCY L. REV. 215 (2014); 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).

52. *See* Food & Water Watch Brief, *supra* note 51, at 4; *see also* Jacobs, *supra* note 51, at 222–23 (discussing risks of soil contamination and remediation).

53. *See* Food & Water Watch Brief, *supra* note 51, at 5 (citing Ellen Silbergeld et al., *Industrial Food Animal Production, Antimicrobial Resistance, and Human Health*, 29 ANN. REV. PUB. HEALTH 151, 151–69 (2008)).

54. *Id.* at 5.

in many illnesses,"[55] an issue that has become of more importance in the present pandemic.

First Amendment protection has traditionally included that which agriculture privacy and commercial gagging laws sought to prohibit: undercover investigations about potentially dangerous or undesirable commercial food practices. "American journalists, including some of the most celebrated journalists in recent history, have 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."[56] Even beyond food safety issues, modern consumers expect transparency at every level of food production,[57] especially animal and agriculture farming practices.[58] Leading food law scholars point to how consumers look to the marketplace to form eating habits,[59] which influence conservation practices and food networks.[60] Modern consumers pay more for organic foods products that exclude unnatural ingredients.[61] "Preferences for fair trade and the movement against genetically modified

55. *Id.* 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, 411 (2013)).

56. Brief of Amici Curiae Professors Brooke Kroeger & Ted Conover in Support of Affirmance at 5, Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018) (No. 15-35960), 2016 WL 3537328 at *4.

57. *See* Brief of Amici Curiae Food Law & Policy Scholars in Support of Plaintiffs-Appellees Animal Legal Defense Fund, et al. at 12, *Wasden*, 878 F.3d 1184 (No. 15-35960), 2016 WL 3551434 at *12 [hereinafter Food Law & Policy Scholars Brief] ("'Research commissioned by the food industry confirms that consumers are demanding more transparency at every level of food production.'" (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))).

58. *Id.* at 5; *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).

59. Food Law & Policy Scholars Brief, *supra* note 57, at 11–12.

60. *See id.* at 14 ("Sustainable-food activists have 'convinced more Americans to watch what they eat' so as to 'encourage farmers to grow more diverse crops, reward conservation practices and promote local food networks.'" (quoting Andrew Martin, *Is a Food Revolution Now in Season?*, N.Y. TIMES (Mar. 21, 2009), https://perma.cc/FB4V-FV8R)).

61. *See id.* at 9.

('GMO') ingredients also motivate [growing and] buying practices."[62]

First Amendment protection should also extend to those who have the most relevant information about the industry. The interconnectivity of global food markets spotlights how privacy laws distort the marketplace of ideas about commercial food production.[63] In the context of this marketplace, "the right to hear—[and] the right to receive information—is no less protected by the First Amendment than the right to speak."[64] Government agencies lack sufficient resources to sufficiently monitor food production facilities.[65] The current system is inadequate "for enforcing farmworker safety."[66] Experts predict that "it would take [Occupational Safety and Health Administration] 115 years to inspect each workplace in the country just once."[67]

This Article spotlights agriculture privacy and commercial gagging laws to highlight *Sullivan* and the actual malice rule's contemporariness. Part I describes ag-gag laws and details the scholarship of Professors Alan Chen and Justin Marceau, as well as other food law scholars. This Part provides an update on nationwide litigation and confirms a circuit split on the scope of *Alvarez*'s protection for false speech. Finally, Part I previews how the application of *Sullivan* to agriculture and commercial gag laws alleviates other First Amendment deficiencies that *Alvarez* left unaddressed.

This Article reviews how *Sullivan*'s actual malice rule balances privacy with the idea that gathering and disseminating information is in the public's best interest to

62. Shaakirrah R. Sanders, *Ag-Gag Free Detroit*, 93 U. DET. MERCY L. REV. 669, 683 (2016) [hereinafter Sanders, *Ag-Gag Free Detroit*]; *see* Food Law & Policy Scholars Brief, *supra* note 57, at 8–9.

63. *See* Charlsie Dewey, *Ag-Gag Laws: Protecting Industrial Farms, But from What?*, GRAND RAPIDS BUS. J. (June 21, 2013), https://perma.cc/LS24-KNAK.

64. Food Law & Policy Scholars Brief, *supra* note 57, at 13 (quoting Conant v. Walters, 309 F.3d 629, 643 (9th Cir. 2002)).

65. *See* Brief of Amicus Curiae United Farm Workers of America Supporting Plaintiffs-Appellees Urging Affirmance at 15, *Wasden*, 878 F.3d 1184 (9th Cir. 2018) (No. 15-35960), 2016 WL 3537329 at *15 [hereinafter United Farm Workers of America Brief].

66. *Id.*

67. *Id.*

know, including the speech of those marginalized in society. Part II discusses the resurgence of *Sullivan* in contemporary jurisprudence, including Justices Thomas's and Gorsuch's judgment of *Sullivan*'s place within "modern" society. Building on this, Part II studies evolving viewpoints of *Sullivan* during its expansion beyond public officials to public figures and to matters of public concern. This Part also demonstrates a modern application of *Sullivan*, including the false speech analysis recently announced in *Alvarez*.

This Article highlights how agriculture privacy and commercial gagging laws ignore the importance of publicly available information about commercial food production and threaten the speech rights of marginalized speakers. Part III revisits how *Time, Inc. v. Hill* applied *Sullivan* to privacy, which is one of the interests that ag-gag laws sought to protect. Further, Part III also applies *Sullivan* to ag-gag laws that have escaped First Amendment scrutiny. This Part concludes by contemplating *Sullivan*'s application to the next generation of gag laws, one of which attempted to shield all commercial enterprises including those of public interest or concern.

I. GAG WITHOUT MALICE

Justices Thomas and Gorsuch recently dissented from a denial of certiorari[68] and advocated for reconsideration of *New York Times v. Sullivan*[69] and its subsequent jurisprudence that

68. *See* Berisha v. Lawson, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting from denial of cert.); *id.* at 2429–30 (Gorsuch, J., dissenting from denial of cert.).

69. In the 1960s, L.B. Sullivan was one of three elected commissioners for Montgomery, Alabama. New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964). Sullivan brought a libel claim against the *New York Times* after the newspaper published an editorial that alleged abuse of African-Americans who sought the right to vote. *Id.* at 256–61. None of the statements in the editorial mentioned the name of the commissioners, but Sullivan argued that the editorial could "be read as accusing the Montgomery police, and hence" Sullivan, of answering civil rights "protests with 'intimidation and violence,' bombing . . . home[s], assaulting . . . person[s], and charging [Dr. Martin Luther King] with perjury." *Id.* at 258. Sullivan "and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner." *Id.* After a trial, a jury awarded Sullivan $500,000 in damages, which was upheld by the Alabama Supreme Court. *Id.* at 256. *Sullivan*'s award constituted the largest defamation award in Alabama

spans five decades.[70] *Sullivan* fashioned a new "federal rule"[71] that prohibited a public official's recovery "for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with . . . knowledge that it was false or with reckless disregard of whether it was false or not."[72] The Court ultimately extended the actual malice rule "to a great variety of subjects" including "matters of public concern,"[73] public figures, and claims for invasion of privacy and infliction of emotional distress.[74]

Justices Thomas and Gorsuch question *Sullivan* and its actual malice rule despite agriculture privacy and commercial gagging laws that chill the speech of those who use misrepresentations to gain access and employment and those who take unauthorized images and video.[75] In this Part, this Article introduces ag-gag laws that prevent the dissemination of information of public interest or concern by punishing a speaker who uses misrepresentations to gain access or employment at an animal or agricultural production, facility, or operation, or an individual who records such operations without consent. Courts striking down ag-gag laws rely on *United States v. Alvarez*,[76]

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history. *See* Paul Horwitz, Symposium, *Institutional Actors in* New York Times Co. v. Sullivan, 48 GA. L. REV. 809, 820 (2014).

70. *See generally Sullivan*, 376 U.S. 254 (1964); Time, Inc. v. Hill, 385 U.S. 374 (1967); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Zurcher v. Stanford Daily, 436 U.S. 547 (1978); Herbet v. Lando, 441 U.S. 153 (1979); Wolston v. Reader's Dig. Ass'n, Inc., 443 U.S. 157 (1979); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986); Hustler Mag. v. Falwell, 485 U.S. 46 (1988); Milkovich v. Lorain J. Co., 497 U.S. 1 (1990); Masson v. New Yorker Mag., Inc., 501 U.S. 496 (1991); Snyder v. Phelps, 562 U.S. 443 (2011); United States v. Alvarez, 567 U.S. 709 (2012).

71. *Sullivan*, 376 U.S. at 264–65.

72. *Id*. at 279–80.

73. *Id*. at 281–82; *see also* Matthew Schafer, *Ten Years Later: Pleading Standards and Actual Malice*, COMMC'N LAW, Winter 2020, at 1, 32 (discussing how by 1966 courts agreed that "a plaintiff is not required to include in its complaints the facts upon which proof of actual malice can be based, it need only plead actual malice itself").

74. *See Hill*, 385 U.S. at 374; *Gertz*, 418 U.S. at 323; *Dun & Bradstreet*, 472 U.S. at 749; *Hustler Mag.*, 485 U.S. at 46; *Snyder*, 562 U.S. at 443.

75. *See generally* Sanders, *Ag-Gag Free Nation*, *supra* note 47.

76. *See* Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 86 VAND. L. REV. 1435, 1451–54 (2015) [hereinafter Chen & Marceau, *High Value Lies*].

which recognized First Amendment protection for false speech.[77] Amy Meyer remains the only reported person charged with violating ag-gag laws, but Meyer's violation did not involve false speech.[78] Meyer filmed cows through a barbed-wire fence from the side of the public road in Draper, Utah.[79] Meyer reported seeing "a live cow who appeared to be sick or injured being carried away from the building in a tractor . . . as though she were nothing more than rubble."[80] At the time, § 76-6-112 of the Utah Code, which applied only to facilities that were exclusively located on private property,[81] criminalized "bugging an agricultural operation,"[82] "obtaining access to an agricultural operation under false pretenses,"[83] "filming an agricultural operation after applying for a position with the intent to film,"[84] and "filming an agricultural operation while trespassing."[85]

77. *Alvarez*, 567 U.S. at 718–20. *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. *Id. at* 713. During his first public meeting as a water district board member, Alvarez claimed that he formerly played for the Detroit Red Wings, that he once married a starlet from Mexico, and that he received a Congressional Medal of Honor. *Id.* at 713. The Court frowned upon how the Stolen Valor Act allowed unlimited government control over one subject at any time or in any setting. *Id.* at 715–17. The Act did protect a compelling interest—recognizing and expressing gratitude for acts of heroism and sacrifice. *Id.* at 724–25. But the Act was insufficiently tailored. *Id.* 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 true speech. *Id.* at 725–26.

78. *See* Will Potter, *First "Gag" Prosecution: Utah Woman Filmed a Slaughterhouse from the Public Street*, GREEN IS THE NEW RED (Apr. 29, 2013), https://perma.cc/AWB4-SBK8.

79. *Id.*

80. *See id.* A slaughterhouse manager informed Meyer about restrictions on filming. *Id.* Meyer claimed she was on public land and resisted—at least until law enforcement responded to a claim of trespass. *Id.* Meyer faced charges even though the official report noted the lack of damage to any property. *Id*.

81. *See* UTAH CODE ANN. § 76-6-112(2)(c)(i) (2022).

82. Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1198 (D. Utah 2017).

83. *Id*.

84. *Id*.

85. *Id*.

After dismissal of criminal charges,[86] Meyer "reported the experience left a 'chilling effect'[87] and—along with others in federal court—successfully argued that Utah's ag-gag law violated the First Amendment."[88]

No court deciding the constitutionality of agriculture privacy and commercial gagging legislation has yet applied *Sullivan* or the actual malice rule. Advocates claim that agriculture privacy laws balance business or corporate security with the right to gather and disseminate news by punishing investigations that were harmful to an animal or agribusiness' reputation.[89] The following states have enacted these types of gag laws: Arkansas, Alabama, Idaho, Iowa, Kansas, Missouri, Montana, North Carolina, North Dakota, Utah, and Wyoming.[90] Some states seek to prevent the use of misrepresentations to gain access, employment, or unauthorized entry. Other states seek to prevent the unauthorized use of video, audio, and photographic cameras or recorders if there was an intent to cause harm to the enterprise. A minority of states impose a duty to submit recordings violations of the law within twenty-four hours. Federal courts have struck down gag laws in Idaho,[91]

86. John Glionna, *Video of Utah Slaughterhouse Draws Attention to 'Ag-Gag' Laws*, L.A. TIMES (May 3, 2013, 7:00 AM), https://perma.cc/C8VC-QYX9.

87. *See* Marissa Lang, *Judge Won't Toss Suit Challenging Utah's 'Ag-Gag' Law*, SALT LAKE TRIB. (Aug. 7, 2014 9:08 PM), https://perma.cc/7DCR-8YAH (explaining that even after Meyer's charges were dismissed, she remains fearful that the ag-gag law will infringe on her right to freedom of speech in the future).

88. Sanders, *The Corporate Privacy Proxy*, *supra* note 24, at 1201; *see Herbert*, 263 F. Supp. 3d at 1198.

89. *See* Alicia Prygoski, *Brief Summary of Ag-Gag Laws*, MICH. STATE COLL. OF L. (2015), https://perma.cc/5XW7-Q35V; *see also* CHIP GIBBONS, CTR. FOR CONST. RTS. AND DEFENDING RTS. AND DISSENT, AG-GAG ACROSS AMERICA: CORPORATE-BACKED ATTACKS ON ACTIVISTS AND WHISTLEBLOWERS 2 (2017), https://perma.cc/DRU4-4GMR (PDF).

90. *See supra* notes 26–36.

91. *See* Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1212 (D. Idaho 2015) (holding that the provision's content-based restriction on speech violated the First Amendment), *aff'd in part, rev'd in part sub nom.* Animal Legal Def. Fund v. Wasden, 878 F.3d. 1184 (9th Cir. 2018).

Iowa,[92] Kansas,[93] North Carolina,[94] Utah,[95] and Wyoming[96] as content-based restrictions on speech that fail under strict scrutiny.

Iowa was the first state to pass a gag law that punished the use of false information to gain access or employment at an animal or agribusiness[97]—a law that was partially ruled unconstitutional.[98] North Carolina's law imposed civil liability for unauthorized entry into nonpublic areas of another's premises.[99] Kansas prohibited "enter[ing] an animal facility to

92. *See* Animal Legal Def. Fund v. Reynolds, 297 F. Supp. 3d 901, 918–25 (S.D. Iowa 2018) (challenging the law's provisions as a content-based restriction on speech in violation of the First Amendment), *aff'd* 8 F.4d 781 (8th Cir. 2021).

93. *See* Animal Legal Def. Fund v. Kelly, 434 F. Supp. 3d 974, 999–1001 (D. Kan. 2020) (discussing the law as a potentially unconstitutional content-based restriction on speech), *aff'd* 9 F.4d 1219 (10th Cir. 2021).

94. *See* People for the Ethical Treatment of Animals, Inc. 466 F. Supp. 3d 547, 573–75 (M.D.N.C. 2020) (considering whether some of the law's provisions included content-based and unconstitutional restrictions on speech).

95. *See* Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1209–13 (D. Utah 2017) (ruling that the law's provisions were content-based and did not pass the requisite strict scrutiny).

96. *See* W. Watersheds Project v. Michael, 353 F. Supp. 3d 1176, 1191 (D. Wyo. 2018) (holding, on remand, that the provisions were content-based and did not pass strict scrutiny).

97. The law provides in part:

> A person shall not, without the consent of the owner, . . . [e]nter onto or into an animal facility, or remain on or in an animal facility, if the person has notice that the facility is not open to the public, if the person has an intent to . . . [d]isrupt operations conducted at the animal facility, if the operations directly relate to agricultural production, animal maintenance, educational or scientific purposes, or veterinary care.

IOWA CODE § 717A.2(1) (2022). Additionally, it provides that "'[a] person suffering damages resulting from an action which is in violation of [this statute] may bring an action in the district court against the person causing the damage to recover . . . [a]n amount equaling three times all actual and consequential damages . . . [and] [c]ourt costs and reasonable attorney fees." *Id.* § 717A.3A.(1)(a)–(b).

98. *See generally* Animal Legal Def. Fund v. Reynolds, 353 F. Supp. 3d 812 (D. Iowa 2018).

99. North Carolina's law states that:

> Any 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,

take pictures by photograph, video camera or by any other means" when done for the purpose of causing harm to the enterprise.[100] Montana also prohibited entering animal facilities for the purpose of recording images or taking pictures for criminal defamation.[101] North Dakota prohibited "enter[ing] an

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> 'nonpublic areas' shall mean those areas not accessible to or not intended to be accessed by the general public.

N.C. GEN. STAT. § 99A-2(a)–(b) (2022). An "act that exceeds the person's authority to enter" is further defined as:

> (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) 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.

Id. § 99A-2(b). Finally, the law allows a court to award the prevailing party:

> (1) Equitable relief[;] (2) Compensatory damages as otherwise allowed by State or federal law[;] (3) Costs and fees, including reasonable attorney's 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 [§ 99A-2(a)].

Id. § 99A-2(d).

100. KAN. STAT. ANN. § 47-1827(c) (2022). The statute provides, in part, that "'[n]o 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." *Id.* Section 47-1828 provides that "[a]ny 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." *Id.* § 47-1828.

101. *See* MONT. CODE ANN. § 81-30-103(2) (2021) ("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[.]"); *id.* § 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."); *id.* § 81-30-105 (imposing criminal penalties for violations of § 81-30-103).

animal facility and us[ing] or attempt[ing] to use a camera, video recorder, or any other video or audio recording equipment."[102] Missouri distinctively "imposes a duty to submit recordings of alleged farm animal abuse within 24 hours."[103]

Arkansas and Alabama are the most recent to pass commercial privacy laws, but Arkansas's law is not limited to animal and agriculture businesses.[104] In 2017, Arkansas criminalized gaining access to a commercial operation, documenting commercial activities, and disclosing such activities to third parties.[105] Alabama likewise criminalized gaining entry by use of false pretenses to perform unauthorized actions or to obtain documents without permission of the owner.[106] As of 2020, ag-gag laws failed in seventeen states:

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102. N.D. CENT. CODE § 12.1-21.1-02 (2022). Specifically, the statute provides that "'[n]o 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." *Id.*; *see* Sanders, *The Corporate Privacy Proxy*, *supra* note 24, at 1174.

103. *See* MO. REV. STAT. § 578.013.1 (2022)

> 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.

see also MO. REV. STAT. § 578.013.3 (describing recording farm animals for alleged abuse without submission of said recordings to law enforcement within twenty-fours as a "class A misdemeanor."); Sanders, *The Corporate Privacy Proxy*, *supra* note 24, at 1172.

104. *See* ARK. CODE ANN. § 16-118-113 (2021) (extending the statute to not just agricultural farms, but to virtually any commercial enterprise).

105. The Arkansas law defines commercial property as "business property," "[a]gricultural or timber production operations, including buildings and all outdoor areas that are not open to the public," and "[r]esidential property used for business purposes," and further criminalizes knowingly gaining "access to a nonpublic area of a commercial property" and engaging "in an act that exceeds the person's authority to enter the nonpublic area," the latter of which includes (i) capturing or removing data, paper, records, or any documents and use of the documents in a manner that damages the employer; (ii) nonconsensual recordings of images or sound and use of the recording "in a manner that damages the employer;" (iii) placing "on the commercial property an unattended camera or electronic surveillance device and uses the unattended camera or electronic surveillance device to record images or data for an unlawful purpose;" (iv) conspiring "in an organized theft of items belonging to the employer;" and, (v) committing "an act that substantially interferes with the ownership or possession of the commercial property." *Id.*

106. *See* ALA. CODE § 13A-11-153 (2021)

Washington, California, Arizona, New Mexico, Colorado, Nebraska, South Dakota, Minnesota, Illinois, Indiana, Kentucky, Tennessee, Florida, Pennsylvania, New York, Vermont, and New Hampshire.[107]

This Author has discussed how agriculture privacy and commercial gagging laws implicate the First Amendment by expanding business privacy to prevent undercover investigations into commercial food production.[108] This Article revisits previous themes, particularly how agriculture privacy laws operate uniquely to impact undocumented workers who often use misrepresentations to gain employment. Professor Shirley Lung has previously identified how the realities of low-wage work has hit undocumented workers especially hard and how criminalization already "lies at the crux of modern immigration laws regulating undocumented workers."[109] Even "[p]ost-Civil War, criminal laws proliferated to empower planters . . . to restrict the mobility of newly freed black men

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> It shall be unlawful for any person to do any of the following: (1) Intentionally release, steal, destroy, demolish, obliterate, or otherwise cause loss of any animal or crop from an animal or crop facility without the consent of the owner. (2) Damage, vandalize, or steal any property on or from an animal or crop facility. (3) Obtain access to an animal or crop facility by false pretenses for the purpose of performing acts not authorized by that facility. (4) Break and enter into any animal or crop facility with the intent to destroy, alter, duplicate, or obtain unauthorized possession of records, data, materials, equipment, animals, or crops. (5) Knowingly obtain control by theft or deception that is unauthorized, or to exert control that is unauthorized over any records, data, materials, equipment, animals, or crops of any animal or crop facility for the purpose of depriving the rightful owner or facility of records, materials, data, equipment, animals, or crops. (6) Possess or use records, materials, data, equipment, crops, or animals in any way to copy or reproduce records or data of an animal or crop facility knowing or reasonably believing that the records, materials, data, equipment, crops, or animals have been obtained by theft or deception, or without authorization of the rightful owners or administrators of the animal or crop facility. (7) Enter or remain on an animal or crop facility with the intent to commit an act prohibited under this section.

107. Todd Neeley, *Iowa Governor Signs 3rd Ag-Gag Law*, AGFAX (June 16, 2020), https://perma.cc/2T7Z-RLNJ?type=image; *see Ag-Gag Laws*, *supra* note 25.

108. *See generally* Sanders, *Ag-Gag Free Nation*, *supra* note 47; Sanders, *The Corporate Privacy Proxy*, *supra* note 24.

109. *See* Shirley Lung, *Criminalizing Work and Non-Work: The Disciplining of Immigrant and African American Workers*, 14 U. MASS. L. REV. 290, 293–94 (2019).

and women who sought to reject slavery's hours and . . . pace."[110] Lung hypothesizes how the current criminalization of undocumented work allows private employers to exercise the power of the state to "fracture worker unity, to sow division between workers, and to discipline workers."[111] Professor Jennifer Lee further developed Lung's theme to reveal how federal law's prohibition of undocumented work has facilitated exploitation due to a fear of deportation.[112] Lee reviews how the federal immigration framework "creates a distinct underclass of workers."[113] Lee points out numerous benefits of undocumented work and advocates redefining the legality of such work to overcome the worker's exclusion and to increase the worker's sense of belonging.[114]

The COVID-19 pandemic increased the necessity for truthful information about commercial productions, a trend that began some time ago in the food industry despite agriculture privacy laws.[115] Not only can agriproducts cause foodborne illnesses, but strains of pathogens have become drug-resistant.[116] The lack of "progress in reducing foodborne infections"[117] is concerning, given "even infrequent contamination of commercially distributed products can result in many illnesses."[118] Without doubt, the voices of undocumented workers are crucial to the marketplace of ideas

110. *Id.* at 294 (internal quotation omitted).

111. *Id.* at 339.

112. *See* Jennifer J. Lee, *Redefining the Legality of Undocumented Work*, 106 CALIF. L. REV. 1617, 1619 (2018).

113. *Id.* at 1628.

114. *See generally id.*

115. *See* Food & Water Watch Brief, *supra* note 51, at 13–16; *see also* Owley & Lewis, *supra* note 51, at 241–42; Bouvier, *supra* note 51, at 211 (discussing how "in 1920, approximately thirty percent of the United States population lived on a farm" as opposed to in 2012 when "only 1.1% of the population lives on a farm"); Telesetsky, *supra* note 51, at 261–62. *See generally* Jacobs, *supra* note 51; Sholander, *supra* note 51.

116. *See supra* notes 52–53.

117. Food & Water Watch Brief, *supra* note 51, at 7.

118. *Id.* at 8 (citing 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, 411 (2013)).

about agribusiness and other industries.[119] The importance of undocumented speech extends beyond the food industry and the impact of a universal gagging law like that passed in Arkansas is not speculative, especially such a law's potential to chill the speech of undocumented workers. Delmer Palma, an undocumented construction worker, survived the collapse of a building near New Orleans's French Quarter.[120] Three died and dozens were injured at the site of what the *Washington Post* described as "a mess of dangerous working conditions."[121] Palma's reports of safety issues were allegedly brushed aside by supervisors—including a report made the day before the accident.[122] Before Palma fully recovered from his injuries, U.S. Immigration and Customs Enforcement arrested him and threatened deportation.[123]

Professors Alan Chen and Justin Marceau are the leading scholars on agriculture privacy laws[124] and have interfaced such laws with the false speech analysis from *United States v. Alvarez*.[125] Chen and Marceau explain how *Alvarez* extended First Amendment protection to false speech that caused no legally cognizable harm,[126] like that which could result from true reports of animal and agriculture abuse. Chen and Marceau discuss how recordings, particularly video recordings, further

119. *See* Sanders, *Ag-Gag Free Nation*, *supra* note 47, at 529.

120. *See* Eli Rosenberg, *How a Worker Who Survived a Catastrophic Building Collapse Ended Up in ICE Detention*, WASH. POST (Nov. 25, 2019, 7:00 AM), https://perma.cc/J2AB-VY58; Derek Hawkins & Kim Bellware, *ICE Deports 'Crucial Witness' in Hard Rock Hotel Collapse*, WASH. POST (Nov. 30, 2019, 10:14 AM), https://perma.cc/J8S2-PQCP.

121. Rosenberg, *supra* note 120.

122. *Id.*

123. *Id.*

124. *See generally* Alan K. Chen & Justin Marceau, *Developing a Taxonomy of Lies Under the First Amendment*, 89 U. COLO. LAW REV. 655 (2018); Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991 (2016) [hereinafter Marceau & Chen, *Free Speech*]; Chen & Marceau, *High Value Lies*, *supra* note 76; Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317 (2015).

125. *See* Chen & Marceau, *High Value Lies*, *supra* note 76, at 1451–54.

126. *See* Chen & Marceau, *High Value Lies*, *supra* note 76, at 1451–54 ("*Alvarez*, then, reflects a turning point: an intentional lie of little or no value, which arguably caused some harm, was nonetheless deemed protected speech."); *Alvarez*, 567 U.S. at 724–30 (analyzing the First Amendment considerations and arguments for Alvarez's lie).

the First Amendment and democracy[127] by keeping agribusiness operations in the "view of a camera."[128] They advocate for constitutional protection for recordings that would prevent civil or criminal liability in appropriate circumstances.[129] Chen and Marceau identify recordings as a component of preparation for expression and speech instead of pure conduct.[130] According to Chen and Marceau, "nothing about the private setting fundamentally changes the conceptual understanding of the expressive nature of recording."[131] In the gag landscape, corporate "security" acts as a proxy for corporate "privacy" and recent jurisprudence makes establishing the scope of corporate security or privacy of utmost importance because neither "constitutional nor common law principals ground the type of 'right' to corporate security or privacy that ag-gag laws protect."[132] This "uncertainty over the scope of corporate privacy puts in doubt whether a compelling or important government interest exists," and, "as a result, ag-gag laws may be insufficiently justified regardless of whether they are content-based or content-neutral."[133]

A coalition of advocates that included Chen and Marceau have challenged agriculture privacy laws in the Eighth, Ninth, and Tenth Circuits. The Ninth Circuit partially overturned a federal district court[134] that struck down a section of the Idaho

127. *See* Marceau & Chen, *Free Speech*, *supra* note 124, at 999–1017 (examining how video recordings are covered and protected by the First Amendment); *see also* Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 180 (2017).

128. Brief of Amici Curiae Association of American Publishers et al. in Support of Plaintiffs-Appellees at 22, Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018) (No. 15-35960); *see also* Marceau & Chen, *Free Speech*, *supra* note 124, at 1009, 1024–25.

129. *See* Marceau & Chen, *Free Speech*, *supra* note 124, at 1026–41.

130. *See id.* at 1017–23; *see also* Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 427–28 (2016) (pointing out how the First Amendment protects the observation and open filming of police officers).

131. Marceau & Chen, *Free Speech*, *supra* note 124, at 1024.

132. Sanders, *The Corporate Privacy Proxy*, *supra* note 24, at 1175, 1208.

133. *Id.* at 1202.

134. *See generally* Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195 (D. Idaho 2015), *aff'd in part and rev'd in part sub nom. Wasden*, 878 F.3d. 1184 (9th Cir. 2018). The U.S. District Court of Idaho ruled on pretrial motions that § 18-7042 was a content-based restriction on speech. *Id.* at 1202. On summary judgment, Idaho argued that § 18-7042 should be limited apply only

Code that criminalized interference with production[135] at any animal or agricultural facility[136] and that criminalized misrepresentations to gain access,[137] records,[138] employment (if intended to cause economic or other injury),[139] or to make an unauthorized audio or video recording. [140] The Ninth Circuit upheld the parts of Idaho's law that prohibited misrepresentations to gain employment and records, but invalidated the parts of the law that prohibited misrepresentations to gain entry and nonconsensual audio and

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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.* at 1204. Section 18-7042 also prohibited the use of lies or misrepresentations to gain access to information relevant to a report on truthful activities. *Id.* 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." Sanders, *Ag-Gag Free Detroit*, *supra* note 62, at 676. 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 § 18-7042. *Otter*, 118 F. Supp. 3d 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 author Upton Sinclair were he subjected to Idaho's privacy legislation. *See id.* at 1201–02 (citing William A. Bloodworth, Jr., UPTON SINCLAIR 45–48 (1977)). *See generally* UPTON SINCLAIR, THE JUNGLE (1906) (exposing labor conditions in the meat-packing industry). Finally, the court reasoned that commercial agricultural operations were not an exclusively private matter because modern food production is a heavily regulated industry. *See Otter*, 118 F. Supp. 3d at 1202, 1207.

135. *See* IDAHO CODE § 18-7042(2)(a) (2022) (defining, for purposes of § 18-7042, animal and agricultural production as "activities associated with the production of agricultural products for food, fiber, fuel and other lawful uses").

136. *See id.* § 18-7042(2)(b) (defining animal or agricultural production facility as "any structure or land, whether privately or publicly owned, leased or operated, that is being used for agricultural production").

137. *Id.* § 18-7042(1)(a).

138. *Id.* § 18-7042(1)(b).

139. *Id.* § 18-7042(1)(c).

140. *Id.* § 18-7042(1)(d). Idaho also imposed the most restrictive penalties for violating its gag laws: possible punishment included up to one year in jail and damages measured up to twice the economic loss to a business. *Id.* § 18-7042(3), (4); *see also Otter*, 118 F. Supp. 3d at 1200–01 (recounting the legislative history of § 18-7042 and revealing that some members of the legislature wanted to prevent undercover investigations into Idaho's agricultural industry).

video recordings.[141] The Ninth Circuit did not consider the effects of Idaho's law on undocumented workers.

The Tenth Circuit examined ag-gag laws in Wyoming and Kansas.[142] The Tenth Circuit ultimately remanded the case discussing the ag-gag law,[143] which imposed criminal punishment and civil liability for trespassing on private land for purposes of gathering "resource data."[144] Following this

141. *See* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1194–99, 1203–05 (9th Cir. 2018). This prohibition also targeted journalistic and investigative reporters, which could chill lawful speech. *See id.* at 1195. Ultimately, this prohibition was so broad that it gave rise to suspicion of impermissible purpose. *Id.* at 1198. The prohibition against recording was deemed an obvious content-based restriction on speech that implicated the First Amendment right to film matters of public interest. *Id.* at 1204.

142. *See generally* W. Watersheds Project v. Michael, 869 F.3d 1189 (10th Cir. 2017); Animal Legal Def. Fund v. Kelly, 9 F.4d 1219 (10th Cir. 2021).

143. *See W. Watersheds Project*, 869 F.3d at 1191 (reversing the district court's decision in W. Watersheds Project v. Michael, 196 F. Supp. 3d 1231 (D. Wyo. 2016)).

144. *See* WYO. STAT. ANN. § 6-3-414 (2022)

> 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 land to collect the specified resource data.

Section 6-3-414 punishes 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." *Id.* § 6-3-414(d). 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.* § 6-3-414(e). 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(f). For a thorough analysis of Wyoming's gag law, see Carrie Scrufari, *A Watershed Moment Revealing What's at Stake: How Gag Statues Could Impair Data Collection and Citizen Participation in Agency Rulemaking*, 65 UCLA L. REV. DISCOURSE 2 (2017).

Resource data includes all data 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." WYO. STAT. ANN. § 40-27-101(h)(iii) (2022).

decision, Utah abandoned defense of its gag law.[145] The Tenth Circuit also reviewed a Kansas law that prohibited the use of deception (1) to gain control of a facility; (2) take pictures or video at an animal facility; or (3) access a facility.[146] All three provisions required an "intent to damage the enterprise," which the Tenth Circuit found to be viewpoint discriminatory.[147] Kansas failed to meet the strict scrutiny standard on all three provisions because according to the Tenth Circuit, the "intent to damage" element expanded the categories of relevant harm beyond injury to the facility to include releasing true information in violation of *Alvarez*.[148]

Most recently, the Eighth Circuit issued split decisions on agriculture privacy and commercial gagging laws in Arkansas and Iowa. A panel of the court reversed a dismissal on standing and ripeness grounds against a challenge to an Arkansas law that criminalized gaining access to a commercial operation, documenting commercial activities, and disclosing such

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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. *Id.* § 40-27-101(a). The circuit court found First Amendment protection for activities that supported "the creation and dissemination of information." *W. Watersheds Project*, 869 F.3d at 1196. Fact gathering constitutes "the beginning point" for conducting human affairs and is "most essential to advance human knowledge." *Id.* First Amendment scrutiny cannot be avoided by "simply proceeding upstream and damming the source of speech." *Id.* Speech-creation activities cannot face different punishment than activities that lead to no speech. *See id.* at 1196–97.

145. *See* Tiffany Caldwell, *Utah to Pay Animal Welfare Groups $349,000 to Settle 'Ag-gag' Lawsuit*, SALT LAKE TRIB. (Nov. 17, 2017, 8:22 PM), https://perma.cc/PC2W-GS9L (last updated Nov. 17, 2017, 8:31 PM).

146 Animal Legal Def. Fund v. Kelly, 9 F.4d 1219, 1224–25 (10th Cir. 2021); *see also* KAN. STAT. ANN. § 47-1827(b)–(d) (2018). KAN. STAT. ANN. § 47.1828 provides that "[a]ny 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." KAN. STAT. ANN. § 47-1828.

147 *Id.* at 1232-37.

148 *Id.*

activities to third parties.[149] Nonprofit organizations dedicated to the reform of "industrial animal agriculture" brought a First Amendment challenge and alleged a specific intent to investigate chicken slaughterhouses and pig farms.[150] The defendants also included the legislation's sponsor and the owner of one of the targeted pig farms.[151] The court found that the plaintiffs had sufficiently alleged the elements of Article III standing and rejected the defendants' claim the statute was unlikely to be enforced.[152]

The Eighth Circuit's decision on Iowa's agriculture privacy law caused a split among the circuits with regards to *Alvarez*'s scope of coverage.[153] Iowa punished the use of false information to gain access or employment at an animal or agribusiness through its ag-gag law.[154] The district court found that both provisions violated the First Amendment.[155] The Eighth Circuit held that the access provision survived the First Amendment while the employment provision did not, causing a split from the Ninth Circuit on both questions and a split with the Tenth Circuit on one question.[156] The Eighth Circuit characterized trespass as "an ancient cause of action that is long recognized in this country" and found that trespass by misrepresentation had a similar pedigree.[157] The court interpreted *Alvarez* to proscribe "false speech undertaken to accomplish a legally cognizable harm."[158] The fact that nominal damages could be awarded in such cases does not negate the cognizability of the legal harm caused by trespass.[159] Iowa's proscription of misrepresentation

149. *See* Animal Legal Def. Fund v. Vaught, 8 F.4th 714, 721 (8th Cir. 2021).

150. *See id.* at 717–18.

151. *See id.* at 717–21.

152. *See id.* at 718.

153. *See* Recent Case, Animal Legal Defense Fund v. Reynolds, *8 F.4d 781 (8th Cir. 2021)*, 135 HARV. L. REV. 1166, 1166 (2022).

154. *See* IOWA CODE § 717A.3A(1)(a)–(b) (2022) (providing that a person is guilty of agricultural production fraud if the person willfully tries to enter a production facility under false pretenses or by making false statements).

155. *See* Animal Legal Def. Fund v. Reynolds, 8 F.4th 781, 783 (8th Cir. 2021).

156. *See id.* at 785–87.

157. *Id.* at 786.

158. *Id.*

159. *See id.*

to gain employment was "not limited to false claims that are made 'to secure' an offer of employment; it allows for prosecution of those who make false statements that are not capable of influencing an offer of employment."[160] On this question the Eighth Circuit considered an issue that the Ninth Circuit did not: whether an agriculture privacy law must "require that false statements made as part of an employment application be material to the employment decision."[161] The panel found the employment provision failed under strict scrutiny because there was no such materiality requirement.[162] Like the Ninth Circuit, the Eighth Circuit did not evaluate the effects of Iowa's law on undocumented workers.

Despite the circuit split, agriculture privacy laws remain intact in Alabama, Missouri, Montana, and North Dakota even though such laws attempted to create a new right against nongovernment intrusions into truthful and nonproprietary information to prevent disclosure of embarrassing facts. These attempts ignored or discounted how the interconnectivity of commercial food production increased the need for a flow of information about the marketplace.[163] In the context of food, the First Amendment plays an important role because of the significance and importance of gathering and disseminating relevant news. Federal courts struggled to understand how the interest served by agriculture-focused gag laws outweighed the First Amendment, especially given how such laws more than innocently or incidentally hindered undercover investigations into the commercial food industry.[164]

Assuming agricultural privacy and other commercial gagging laws primarily protect privacy, the application of *Sullivan* and the actual malice standard may be underappreciated,[165] especially given the undocumented

160. *Id.* at 787.

161. *Id.*

162. *See id.*

163. *See* Dewey, *supra* note 63.

164. *See id.*

165. *See* Patrick M. Garry, *The Erosion of Common Law Privacy and Defamation: Reconsidering the Law's Balancing of Speech, Privacy, and Reputation*, 65 WAYNE L. REV. 279, 287–306 (2020) (discussing the erosion of common law remedies for invasion of privacy and defamation and pointing out the common law origin of the actual malice standard).

workers who could be targeted for deportation in states with these laws. Most gag laws seek to prevent intrusions on business or corporate "seclusion or solitude" and "public disclosure of embarrassing" facts about operations or production.[166] The relevance of *Sullivan* to agriculture privacy and commercial gagging litigation is more than remote given the upcoming substantive challenge to Arkansas' commercial gagging law,[167] which applied universally. Next, this Article revisits *Sullivan*'s actual malice rule.

II. *SULLIVAN* AND THE ACTUAL MALICE RULE

Multiple defamation lawsuits have been filed in the wake of the 2020 U.S. presidential election. Dominion Voting Systems and Smartmatic brought lawsuits seeking $5.3 billion in damages against former President Donald J. Trump's attorneys Rudy Giuliani and Sidney Powell and his supporter Mike Lindell, among others.[168] One of these suits was a $2.7 billion defamation lawsuit filed against Fox News for its anchors' commentary and guests' statements about the reliability of voting machines.[169] Arizona lawmakers brought defamation claims against a colleague who signed a letter urging an investigation into their possible connections to the U.S. Capitol riot that occurred on January 6, 2021.[170] Representatives Bennie Thompson and Eric Swalwell brought separate claims for emotional distress following the riot.[171]

The actual malice rule will apply to most of the above-mentioned defamation lawsuits, even though Justice Thomas—joined recently by Justice Gorsuch—urges resistance towards *Sullivan* and its progeny.[172] This Part identifies the

166. *See* Uranga v. Federated Pub'ns, Inc., 67 P.3d 29, 32–33 (Idaho 2003).

167. *See supra* notes 149–152 and accompanying text.

168. *See* Westrope, *supra* note 14.

169. *See* Mystal, *supra* note 15.

170. *See Arizona Republicans Target Democrat in Defamation Lawsuit*, *supra* note 16.

171. *See* Tucker, *supra* note 17; Alex Swoyer, *Eric Swalwell Sues Trump for Emotional Distress over Jan. 6 Riot*, WASH. TIMES (Mar. 5, 2021), https://perma.cc/J8JV-YZMC.

172. *See* Berisha v. Lawson, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting from denial of cert.); *id.* at 2429–30 (Gorsuch, J., dissenting from

resurgence of *Sullivan* in contemporary jurisprudence, including Justice Thomas's judgment of *Sullivan* and its importance within the First Amendment's framework. This Part contextualizes *Sullivan* and tracks its evolution from defamation claims involving public officials. The *Sullivan* Court prohibited a public official's recovery "for a defamatory falsehood relating to his official conduct" unless "the statement was made with . . . knowledge that it was false or with reckless disregard of whether it was false or not."[173] On multiple occasions the Court later extended the actual malice rule "beyond public officials."[174]

Professor Mary-Rose Papandrea declares *Sullivan* "the most important First Amendment case . . . ever decided."[175] Burt Neuborne's review of the Warren years points out the Court's hyperfocus on the state institutional failures related to racial injustice.[176] Neuborne highlights the conflict between federalism—which aims in part to protect out-of-step local majorities from national majorities—and the national consensus against legally enforced racism that the Warren Court began to dismantle in *Brown v. Board of Education*.[177] The intersection of race and the First Amendment first presented itself to the Warren Court in *NAACP v. Alabama*,[178] which recognized freedom of association as a right and rejected Alabama's attempt to obtain the membership lists of the state affiliate of the NAACP.[179] The Warren Court later protected the

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denial of cert.); McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in denial of cert.).

173. New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

174. *Id.* at 281–82; *see also* Schafer, *supra* note 73, at 1, 32.

175. Mary-Rose Papandrea, *Story of* N.Y. Times Co. v. Sullivan, *in* FIRST AMENDMENT STORIES, 229, 230 (Richard W. Garnett & Andrew Koppelman eds., 2012); *see also* Howard M. Wasserman, *A Jurisdictional Perspective on* New York Times v. Sullivan, 107 NW. U. L. REV. 901, 902 (2013).

176. Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 60 (2010).

177. 347 U.S. 483 (1954); *see id.* at 495; *see also* Neuborne, *supra* note 176, at 64–65.

178. 357 U.S. 449 (1958).

179. *See id.* at 463 (protecting freedom of association where a state fails to "demonstrate[] an interest . . . sufficient to justify the deterrent effect . . . on the free exercise by petitioner's members of their constitutionally protected right of association"); *see also* Neuborne, *supra* note 176, at 77–78; Bates v. Little Rock, 361 U.S. 516, 527 (1960) (denying a request for a NAACP member

anonymity of a sponsor of a handbill calling for the boycott of stores engaging in racially discriminatory hiring in *Talley v. California*.[180] In a number of cases, the Court upheld the right to engage in peaceful demonstrations, pickets, and parades and reversed the convictions of thousands of civil rights demonstrators.[181]

Papandrea contextualizes *Sullivan*'s nascent parallel with the Civil Rights Movement and how similar libel suits against newspapers aimed to inhibit the Civil Rights Movement.[182] Neuborne goes further and identifies how libel actions "tried before hostile southern juries . . . threatened to drive national media from covering . . . the civil rights movement."[183] *Sullivan*

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list); Louisiana v. NAACP, 366 U.S. 293, 294–97 (1961) (denying enforcement of a state statute requiring the NAACP to disclose its membership lists where "disclosure of membership lists [would] result[] in reprisals against and hostility to the members"); Gibson v. Fla. Legis. Investigative Comm., 372 U.S. 539, 558 (1963); Shelton v. Tucker, 364 U.S. 479, 490 (1960); NAACP v. Button, 371 U.S. 415, 444–45 (1963).

180. 362 U.S. 60 (1960). *See id* at 65

> We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified . . . . The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to the same infirmity.

(internal citations omitted); *see also* Neuborne, *supra* note 176, at 78 (describing *Talley v. California* as "the modern origin of the right to speak anonymously").

181. *See* Neuborne, *supra* note 176, at 78–79 (describing a number of cases that together reversed the convictions of over 2,000 peaceful protestors); *see also* Edwards v. South Carolina, 372 U.S. 229, 229, 238 (1963) (upholding the right to march and reversing convictions of 187 black students); Cox v. Louisiana, 379 U.S. 536, 540, 558 (1965) (reversing the convictions of 2,000 black student demonstrators); Gregory v. Chicago, 394 U.S. 111, 113 (1969) (reversing convictions of eighty-five civil rights marchers).

182. Papandrea, *supra* note 175, at 230–238; *see* Shaakirrah R. Sanders, *Defamation and Libel*, *in* MASS COMMUNICATION LAW IN IDAHO 60–63 (Rebecca Tallent et al. eds., 3d ed. 2017); Mary-Rose Papandrea, *Media Litigation in a Post-Gawker World*, 93 TUL. L. REV. 1105, 1120–32 (2019) (discussing the intersection between the First Amendment and tort liability for the publication of private facts, the right of publicity, and the issue of newsworthiness).

183. Neuborne, *supra* note 176, at 79. According to Neuborne, Dr. Martin Luther King, Jr., leader of the Civil Rights Movement, attended the *Sullivan* oral argument. *Id*. After argument, Justice Arthur Goldberg sought King's autograph. *Id*.

involved the largest defamation award in Alabama's history.[184] Sullivan's defamation lawsuit was one of many filed around the nation[185] as punishment for advertisements and news reports favorable to the Civil Rights Movement, which sought to end the post-Reconstruction regime of Jim Crow laws that economically, politically, and socially terrorized African Americans and other people of color.[186] Both Dr. Martin Luther King, Jr., and Rosa Parks garnered national and international attention and support for the boycott of buses in Montgomery, Alabama, which required African Americans and perhaps other people of color to give up their seats to white passengers (presumptively with no reduction in fare).[187] Yet, but many in Alabama labeled these publications libel.[188] Papandrea relates how a *New York Times* reporter in another case faced a forty-two-count indictment for criminal libel after reporting about racial conditions in Birmingham, Alabama.[189]

Justices Thomas and Gorsuch doubt *Sullivan*'s value even though an alternative result surely would have curbed press coverage of the Civil Rights Movement, especially given the segregationist and white supremacist leanings of the trial court judge assigned to the case.[190] Professor Herbert Wechsler, who argued the case on behalf of the *New York Times*, noted similarities between Alabama and other state defamation laws.[191] Encouraged by the Court's recent expansion of First Amendment protection, Wechsler also argued in favor of a

184. *See* Horwitz, *supra* note 69, at 820.

185. *See* Wasserman, *supra* note 175, at 909 (arguing that Southern officials devised a plan to utilize civil libel litigation as a tool for silencing reports on the Civil Rights Movement and reporting that, by the late 1960s, potential libel judgments in the South approached $300 million).

186. *See* Papandrea, *supra* note 175, at 230–34; Wasserman, *supra* note 175, at 903–04; Neuborne, *supra* note 176, at 63–64.

187. *See* Papandrea, *supra* note 175, at 230.

188. *See id.* at 230–36.

189. *See id.* at 237 (discussing the charges brought against Harrison E. Salisbury for reporting that "Birmingham officials had held civil rights activists incommunicado for days, [and] ignored bombing attacks on black churches [and] black homes"); *see also* Wasserman *supra* note 175, at 905–07.

190. *See* Papandrea, *supra* note 175, at 237–39 (discussing the controversial rulings by Judge Jones consistent with his "hostility to the civil rights movement" and African Americans as a whole); *see also id.* at 239–42.

191. *See id.* at 243.

special libel rule for public officials.[192] An ACLU amicus brief argued specifically in favor of the actual malice rule adopted in *Sullivan*.[193] Justice Brennan quickly determined there was state action given the application of a state law by the courts in the form of damages.[194] Justice Brennan also found it immaterial that the advertisement could have also been considered commercial speech, which the First Amendment left unprotected at the time.[195] Justice Brennan rejected arguments in favor of First Amendment protection for only truthful speech, and reasoned that error was inevitable in free debate.[196] The stain of previously upheld criminal "[p]rosecutions under the Sedition Act [of 1917] revealed that the availability of a truth defense offers only illusory protection in many cases given the difficulty of proving the truth of all the particulars of a challenged statement."[197] Justice Brennan and the majority declined to remand, concluding the record insufficient to support the conviction by the Alabama jury.[198]

Justice Thomas critiques how *Sullivan* invalidated most state defamation law as constitutionally deficient when weighed against the First Amendment's goal of encouraging the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[199] Justice Gorsuch appears to agree, pointing to the evolution of online

192. *See id.* at 243–45 (describing Wechsler's argument in "favor of absolute immunity" or alternatively the creation of a test that balances the "need to protect public officials from criticism against the First Amendment interest in free political debate").

193. Brief of the American Civil Liberties Union and the New York Civil Liberties Union as Amici Curiae at 23–32, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), 1963 WL 66443 at *23–32; *see also* Papandrea, *supra* note 175, at 245.

194. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964); *see also* Papandrea, *supra* note 175, at 247.

195. *Sullivan*, 376 U.S. at 266; *see also* Papandrea, *supra* note 175, at 247–48.

196. *See Sullivan*, 376 U.S. at 272; *see also* Papandrea, *supra* note 175, at 248.

197. Papandrea, *supra* note 175, at 248.

198. *See Sullivan*, 376 U.S. at 292; *see also* Papandrea, *supra* note 175, at 251.

199. Papandrea, *supra* note 175, at 230–38; *see Sullivan*, 376 U.S. at 269.

media and the demise of traditional print news.[200] *Sullivan* described the ability to speak one's mind as a "prized American privilege,"[201] which "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."[202] State libel statutes also impermissibly allowed a presumption of malice on the issue of general damages.[203] This presumption was inconsistent with the new federal rule,[204] which the Court applied to all libel actions for damages brought by public officials.[205]

Papandrea declares *Sullivan* "a great victory for the freedom of the press,"[206] but Justices Thomas and Gorsuch focus on the law of defamation.[207] Thomas discusses how at the Founding "defamation was 'almost exclusively the business of state courts and legislatures'" who adopted the common law of libel.[208] In the common law, "a defamed individual needed only to prove 'a false written publication that subjected him to hatred, contempt, or ridicule.'"[209] Even where "no reputational injury occurred, the prevailing rule was that at least nominal damages were to be awarded" to a defamed plaintiff.[210] At common law, libel was also a crime.[211] U.S. colonies followed

200. *See* Berisha v. Lawson, 141 S. Ct. 2424, 2427–28 (2021) (Gorsuch, J., dissenting from denial of cert.).

201. *Sullivan*, 376 U.S. at 269–70.

202. *Id*. at 270.

203. *See id*. at 283.

204. *See id*. at 283–84.

205. *See id*. at 283.

206. Papandrea, *supra* note 175, at 252.

207. *See* McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in denial of cert.) (suggesting that the Court should reconsider precedent in defamation cases); *Berisha,* 141 S. Ct. at 2424–25 (Thomas, J., dissenting from denial of cert.) (arguing for reconsideration of defamation precedents); *id.* at 2425–30 (Gorsuch, J., dissenting from denial of cert.) (same); *see also* Stuart Hargreaves, '*Relational Privacy' & Tort*, 23 WM & MARY J. WOMEN & L. 433, 440 (2017) (discussing how the right to privacy lies in U.S. law, not the common law).

208. *McKee*, 139 S. Ct. at 676.

209. *Id*. at 678.

210. *Id*.

211. *Id*.

suit,[212] but criminal libel served a different purpose from its civil counterpart.[213] Criminal libel's purpose was to "punish provocations to a breach of the peace" while civil libel's purpose was to compensate false statements.[214] Importantly, "[l]ibel of a public official was deemed an offense most dangerous to the people" but the common law recognized "a privilege to comment on public questions and matters of public interest."[215] Thomas ultimately concludes that the actual malice rule flows from no original understanding or meaning of the First Amendment.[216]

Unlike Justices Thomas and Gorsuch, Papandrea points out how *Sullivan* also rejected arguments related to the applicability of the Seventh Amendment and its prohibition against interference with jury verdicts.[217] By its text, the Seventh Amendment hinges the availability of a civil jury on whether an action was allowed at common law.[218] Brennan and the *Sullivan* majority declined to remand, concluding the record insufficient to support the conviction by the Alabama jury.[219] Justice Thomas describes common law defamation at the founding as a "core" privacy "right of . . . uninterrupted enjoyment of . . . reputation."[220] Thomas discusses how before

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212. *Id*.

213. *See id*.

214. *Id*.

215. *Id*. at 679 (internal quotation omitted).

216. *See id*. at 682.

217. *See* Papandrea, *supra* note 175, at 251.

218. *See* U.S. CONST. amend. VII.

219. *See* Papandrea, *supra* note 175, at 251.

220. McKee v. Cosby, 139 S. Ct. 675, 679 (2019) (Thomas, J., concurring in denial of cert.). Section 558 of the Restatement (Second) of Torts currently describes defamation as follows:

> (1) a false and defamatory statement concerning another;
> (2) an unprivileged publication to a third-party;
> (3) fault amounting at least to negligence on the part of the publisher; and
> (4) either actionality of the statement irrespective of special harm or the existence of special harm caused by the publication.

RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1975). Section 564A discusses defamation claims concerning a group or class of persons. *Id.* § 564A. Sections 561 and 562 provide for causes of action against corporations, partnerships, and associations. *Id*. §§ 561–562. The *Restatement* makes clear a false or defamatory statement can be a statement of fact or an expression of opinion. *See id*. §§ 565–66. Both are actionable if they "tend so to harm the reputation of another as to lower him in the estimation of the community or to

Sullivan, courts consistently "listed libel among the 'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional [sic] problem."[221] Justice Thomas omits how the Court made such pronouncements in the years after incorporating the First Amendment, when states widely criminalized conduct that today undoubtedly receives protection as expression.[222] Moreover, U.S. defamation law draws a distinction between publication and publicity and U.S. defamation scholars debate whether such distinction existed at common law.[223]

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deter third persons from associating or dealing with him." *Id*. § 559. Statements of fact can include "accusations of a particular act" or accusations of a particular omission. *Id*. § 565 cmt. a. Expressions of opinion are actionable only where they imply an "allegation of undisclosed defamatory facts as the basis for the opinion." *Id*. § 566. Sections 581A and 582 provide the only two defenses to defamation: truth and consent. *Id.* §§ 581A, 582. Sections 585 through 612 discuss the absolute and conditional privileges against an action for defamation. *Id.* at §§ 585–612.

221. *McKee*, 139 S. Ct. at 680.

222. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. a, § 577 (AM. L. INST. 1975) (noting that it is not an invasion of the right of privacy to communicate a fact concerning the plaintiff's private life to another person); *see also* Kenneth S. Abraham et al., *First Amendment Imperialism and the Constitutionalization of Tort Liability*, 98 TEX. L. REV. 813, 821–22 (2020) (summarizing early twentieth-century decisions affirming government power to criminalize or otherwise punish speech and the Court's current approach of categories of less protected speech).

223. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. a, § 577 (AM. L. INST. 1975). Publication is "any communication" by a defendant "to a third party." *Id*. § 652D cmt. a; *see also id*. § 577. Publicity involves making the matter "public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Id*. § 652D cmt a. According to the *Restatement*, the difference between publicity and publication is not "the means of communication" but instead whether the communication was private or public. *Id*. Any publicity constitutes a publication, but not all publications constitute publicity. *Id*. The *Restatement* makes clear that a single publication occurs when a communication is "heard at the same time by two or more third persons." *Id*. § 577A. A separate publication occurs for "each of several communications to a third person by the same defamer." *Id*. Only one action for damages can be maintained as to any single publication. *Id*. However, republishers—defined as those who repeat or republish defamatory materials—can be liable as if they were the original publisher. *Id*. § 578; *see also* Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L. J. 1577, 1581–91 (1979); Papandrea,

Papandrea declares defamation law's public/private status the threshold issue in most libel cases,[224] a debate which began after *Time, Inc. v. Hill* extended *Sullivan* to claims for invasion of privacy.[225] *Hill* concerned a New York judgement in favor of plaintiffs who were involved in a national news story.[226] The Court reasoned that "[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community."[227] This "risk of exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press."[228] Erroneous statements, both those that are innocent or merely negligent, must be protected if the First Amendment is to have the "breathing space" it "need[s] to survive."[229] In this respect, even a negligence test would place an "intolerable burden" on the press.[230]

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supra note 175, at 1120–32 (discussing tort of publication private facts, the right of publicity, and the issue of newsworthiness).

224. Papandrea, *supra* note 175, at 254; *see McKee,* 139 S. Ct. at 679–80; *see also* Felcher & Rubin, *supra* note 223*,* at 1578 (proposing abandonment of the distinction between privacy and publicity and noting that the latter emerged from the former).

225. *See* Time, Inc. v. Hill, 385 U.S. 374, 387–88 (1967) (requiring proof of knowing or reckless falsity for the constitutional application of a statute redressing invasion of privacy).

226. *Id.* at 377–78; *see also* Chen & Marceau, *High Value Lies*, *supra* note 76, at 1450. *Hill* involved a Life Magazine story about a family who was held hostage by three escaped convicts in their suburban Pennsylvania home for nineteen hours. *Hill*, 385 U.S. at 376–79. The family was released without mistreatment and the convicts were apprehended after a standoff that killed two of them. *Id.* at 378. Despite the family's attempt to stay out of the spotlight, their story was the subject of a 1953 Joseph Hayes novel. *Id.* In Hayes' account, the convicts physically abused and verbally sexually insulted family members. *Id*. Hayes's novel was ultimately adopted for the stage, which was covered by *Life*. *Id.* The Hill family brought an action for invasion of privacy. *Id.* at 378–79. The jury awarded $50,000 in compensatory damages and $25,000 in punitive damages. *Id.* After the appellate court ordered a new trial on damages, the court awarded $30,000 in compensatory damage with no award for punitive damages. *Id.* at 379.

227. *Hill*, 385 U.S. at 388.

228. *Id*.

229. *Id*.

230. *Id*. at 389. As a result, the press cannot be burdened with "verifying to a certainty the facts associated in news articles." *Id.* at 389.

Papandrea further details the private/public status that evolved after *Rosenblum v. Metromedia, Inc.*[231] *Hill* initially rejected the "unwilling public figure."[232] Three years later, *Gertz v. Robert Welch, Inc.* embraced the concept and established limited public figure status.[233] *Gertz* analyzed the following: (i) whether a matter of public controversy exists and (ii) whether the defamed individual deliberately thrust themselves "into the vortex of [a] public issue" or otherwise "engage[d] the public's attention in an attempt to influence its outcome."[234] *Gertz* vested states with "substantial latitude" to determine the extent of recovery for private individuals,[235] who have fewer opportunities to rebut falsity, are at increased risk of injury from falsehoods,[236] are more vulnerable to injury from defamation,[237] and thus are

231. 403 U.S. 29 (1971).

232. *Hill*, 385 U.S. at 384.

233. *See Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340–51 (1974) (explaining that a limited public figure is when "an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues"). *Gertz* involved the "*American Opinion*, a monthly outlet for the views of the John Birch Society," which published an article about "a Communist campaign against the police." *Id.* at 325–32. The article alluded that Elmer Gertz, an attorney who had been retained to represent the family of a murder victim, as being involved in a "frame-up" against the Chicago Police Department. *Id.* at 326. Gertz was alleged to have a criminal record and was called a "Communist-fronter." *Id.* The jury returned a verdict for Gertz. *Id.* at 329. The federal court trial judge reversed and held that the *Sullivan* privilege applied to media discussion of a public issue without regard to whether the person defamed was a public official or a public figure. *See id.* at 329–30. The Seventh Circuit agreed. *See id.* at 330–32.

234. *Id.* at 352. The First Circuit establishes this question as one of laws that could require a fact-sensitive determination. *See* McKee v. Cosby, 874 F.3d 54, 61 (1st Cir. 2017). The First Circuit had little doubt that comedian Bill Cosby's conduct was a matter of public controversy. *Id.* at 62. By purposefully disclosing Cosby's alleged rape to a reporter, Kathrine McKee thrust herself into the public controversy and sought to influence its outcome. *Id*. McKee thus had the burden to show the contents of Cosby's lawyer's letter were disclosed with knowledge that they were false or reckless disregard for their truth or falsity. *Id*.

235. *Gertz*, 418 U.S. at 345–46; *see also McKee*, 874 F.3d at 61; Papandrea, *supra* note 175, at 254 (explaining that *Gertz* required private-figure plaintiffs suing on public matters to satisfy the actual malice standard only for presumed or punitive damages).

236. *Gertz*, 418 U.S. at 344–45; *see also* Papandrea, *supra* note 175, at 253–55.

237. *Gertz*, 418 U.S. at 344–45; *see also* Papandrea, *supra* note 175, at 254.

more deserving of recovery.[238] To summarize, extending *Sullivan* to private persons would thwart the state's interest in protecting individual privacy.[239]

Justice Thomas describes Sullivan's public/private status as a "policy-driven" decision "masquerading as constitutional law."[240] Justice Gorsuch marvels how social media transforms private citizens to public figures overnight.[241] *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, reconsidered the lack of distinction between matters of purely private versus public concern.[242] *Dun & Bradstreet* did not involve a public figure or official and no issue of public interest was at stake.[243] Instead, the information constituted speech that was solely in the individual interest of the speaker and its specific business audience.[244] In such instances, a state has an interest to

238. *See Gertz*, 418 U.S. at 344–45; *see also* Papandrea, *supra* note 175, at 254 (explaining that private figures "do not voluntarily expose themselves to the increased risk of defamatory falsehoods as public officials and public figures do," justifying their differing treatment).

239. *See Gertz*, 418 U.S. at 344–45 (providing that since public figures voluntarily open their life up to public scrutiny based on their status, their claim to personal privacy is weaker than that of a private figure); *see also* Papandrea, *supra* note 175, at 254.

240. McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in denial of cert.).

241. *See* Berisha v. Lawson, 141 S. Ct. 2424, 2429 (2021) (Gorsuch, J., dissenting from denial of cert.) ("Individuals can be deemed 'famous' because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most.").

242. *See id.* at 759–61. Dun & Bradstreet, Inc., a non-media defendant, sent a report to five subscribers that falsely and grossly misrepresented Greenmoss Builders's assets and liability. *Id.* at 751. The report also indicated that Greenmoss voluntarily filed for bankruptcy protection. *Id.* Greenmoss notified Dun & Bradstreet that its report was false. *Id.* After verifying the report's falsity, Dun & Bradstreet "issued a corrective notice . . . to the five subscribers who had received the initial report. *Id.* at 751–52. Dun & Bradstreet denied Greenmoss's request for the names of those who had received the report. *Id.* at 752. Greenmoss brought an action for libel in Vermont state court. *Id.* A jury awarded Greenmoss $50,000 in compensatory or presumed damages and $300,000 in punitive damages. *Id.*; *see also* Papandrea, *supra* note 175, at 255.

243. *See Dun & Bradstreet*, 472 U.S. at 761–62; *see also* Papandrea, *supra* note 175, at 255.

244. *See Dun & Bradstreet*, 472 U.S. at 762; *see also* Papandrea, *supra* note 175, at 255 (discussing *Dun & Bradstreet*'s emphasis on protecting individual reputation and ensuring state autonomy to effectuate that end).

compensate "private individuals for injury to their reputation."[245] In short, a plaintiff does not have to show actual malice to recover actual, presumed, and punitive damages.[246]

Justice Thomas clearly struggles with *Sullivan*'s expansion to issues of public concern.[247] Thomas has lamented how criminal libel has "virtual[ly] disappear[ed]"[248] and has reflected upon the common law and its requirement that defamed plaintiffs prove only falsity to recover for harm to reputation even if damages were only nominal.[249] Thomas concludes that "little historical evidence" suggests the actual malice rule flows from the original understanding of the First or Fourteenth Amendments,[250] especially given the Court initially showed reluctance applying *Sullivan* to private individuals that become involved with an issue in the "public or general interest."[251]

Thomas and Gorsuch do not struggle alone. Professor Cynthia Estlund critiques *Sullivan*'s expansion to issues of public concern and warns how *Dun & Bradstreet*'s public concern test could undermine "the protection of speech that is important to public discourse."[252] Estlund traces the birth of the public concern test to jurisprudence limiting the speech of government employees,[253] the public forum doctrine,[254] and

245. *Dun & Bradstreet*, 472 U.S. at 749; *see also* Papandrea, *supra* note 175, at 254.

246. *Dun & Bradstreet*, 472 U.S. at 762–63; *see also* Papandrea, *supra* note 175, at 255.

247. *See McKee*, 139 S. Ct. at 678–79 (Thomas, J., concurring in denial of cert.) (opining that *Sullivan* and its progeny did not make a "sustained effort to ground their holdings in the Constitution's original meaning").

248. *Id.* at 682.

249. *See id.* at 678 (adding that, under the common law, malice was presumed if a privilege, right, or duty was not applicable).

250. *Id.* at 682.

251. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349–50 (1974) (rejecting Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) and its "public or general interest" test for determining the applicability of the *Sullivan* privilege).

252. *See* Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of An Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 2–3 (1990) (stating that the public concern test was the first time in modern First Amendment jurisprudence where the Court devised an explicitly content-based category of privileged speech that is afforded special protections).

253. *See id.* at 4–8.

254. *See id.* at 8–13.

Sullivan.[255] Estlund recognizes the significance of speech on public matters as relevant to self-governance, but labels the public concern test too elusive, "particularly clumsy," and a dangerous innovation or means to protect speech that holds the public's interest.[256] Estlund demonstrates how application of the public concerns test focuses on "political speech" and "concerned issues of momentous societal significance."[257]

Despite doubt about *Sullivan*'s contemporary utility, the actual malice rule has a great deal of relevance in First Amendment jurisprudence. Next, this Article demonstrates how *Sullivan* and the actual malice rule apply to agriculture privacy and other types of gagging laws that limit undercover investigations at commercial businesses. Ag-gag laws in many states followed sensational yet *truthful* reports of animal and agriculture abuse or undesirable practices. In 2012, Iowa began to punish the use of false information to gain access or employment at an animal or agribusiness.[258] Prior to that law, a 2009 undercover investigation in Iowa documented "hundreds of thousands of unwanted day-old male chicks being funneled by conveyor belt into a macerator to be ground up live."[259] Another

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255. *See id.* at 14–23.

256. *Id.* at 28–30; *see* Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) (stating that freedom of the press "assures the maintenance of our political system and an open society"); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("[S]peech concerning public affairs is . . . the essence of self-government."); Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) ("For speech concerning public affairs is more than self-expression; it is the essence of self-government.").

257. Estlund, *supra* note 252, at 33–34.

258. The law stated:

> A person shall not, without the consent of the owner, . . . [e]nter onto or into an animal facility, or remain on or in an animal facility, if the person has notice that the facility is not open to the public, if the person has an intent to . . . [d]isrupt operations conducted at the animal facility, if the operations directly relate to agricultural production, animal maintenance, educational or scientific purposes, or veterinary care.

IOWA CODE § 717A.2 (2022). Additionally, § 717A.2.2 provides that "[a] person suffering damages resulting from an action which is in violation of [this statute] may bring an action in the district court against the person causing the damage to recover . . . [a]n amount equaling three times all actual and consequential damages . . . [and] [c]ourt costs and reasonable attorney fees."

259. Glenn Greenwald, *The FBI's Hunt for Two Missing Piglets Reveals the Federal Cover-Up of Barbaric Factory Farms*, INTERCEPT (Oct. 5, 2017, 2:05 PM), https://perma.cc/7GFD-LEDM; *see also* Animal Legal Def. Fund v.

investigation in Iowa memorialized "hens with gaping, untreated wounds laying eggs in cramped conditions among decaying corpses."[260] Two years earlier, an undercover investigation in California revealed "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."[261] In Vermont, "similarly gruesome footage" exposed "days-old calves being kicked, dragged, and skinned alive."[262] Undercover investigations in Texas publicized "workers beating cows on the head with hammers and pickaxes and leaving them to die."[263]

III. GAG WITH MALICE

The application of *Hill* to invasion of privacy has contemporary importance. In early February 2021, a High Court of Justice in the United Kingdom determined that the Associated Newspapers, LTD, and two of its publications, *Mail on Sunday* and *MailOnline*, had violated the privacy rights of Meghan Rachel Markle, the Duchess of Sussex and wife of HRH Prince Henry of Wales, the Duke of Sussex,[264] by publishing a letter the Duchess wrote to her father.[265] The High Court found that the published contents of the letter were too personal to be newsworthy despite the Duchess' fame as a former actress, internationally recognized humanitarian, and mixed-race Black American spouse of Princess Diana's son.[266] The High Court curiously doubted whether the correspondence would retain private protection were it published in the United States[267]

Reynolds, 297 F. Supp. 3d 901, 908 (D. Iowa 2018) (discussing an investigation at an Iowa pig farm).

260. Greenwald, *supra* note 259; *see also* Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1197 (D. Utah 2017).

261. Greenwald, *supra* note 259.

262. *Id.*

263. *Id.*

264. *See* HRH The Duchess of Sussex v. Associated Newspapers Ltd. [2021] EWHC 273, [§§ 169]–[171] (U.K.).

265. *See id.* at [§§ 1]–[9], [45].

266. *Id.* at [§§ 28]–[127].

267. *See id.* at [§§ 77]–[80].

based on state tort law protection of privacy and publicity.[268] *Hill*, however, could be applied to protect privacy if the letter had not previously been disclosed.[269]

The question remains whether the invasion of privacy claim in *Hill* (and thus the actual malice rule's application in that context) extends beyond individuals to corporations and other types of organizations. This Part contemplates *Sullivan*'s application to commercial gagging laws. The claims before the High Court hinged on the Duchess' rights as an individual person, which, in the United States, are distinguished from that of commercial enterprises.[270] Gag laws attempt to create a new right against nongovernment intrusions into truthful and nonproprietary information to prevent disclosure of embarrassing facts about commercial enterprises.[271] This ignores or discounts the need for information about the marketplace. Gathering and disseminating news is an important and compelling interest and the corresponding interests served by gag laws are outweighed by the First Amendment. Moreover, gag laws do not innocently or incidentally hinder undercover investigations, gag laws directly target investigations and exposés.

The media has great leeway to disseminate information to the public and claims for invasion of privacy are subject to that leeway.[272] Media may be liable where publicity becomes a "morbid" and "sensational prying" simply for its own sake (or into matters that are not of public concern).[273] As established in

268. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 471 (1975) (discussing whether "a state may extend a cause of action for damages for invasion of privacy caused by the publication of the name of a deceased rape victim which was publicly revealed in connection with the prosecution of the crime"); *see also* Felcher & Rubin, *supra* note 223, at 1581–91; Papandrea, *supra* note 175, at 1120–32 (discussing civil and criminal liability of the press); Garry, *supra* note 165, at 287–306 (discussing adequacy of invasion of privacy by intrusion, invasion of privacy by publication of private facts, and defamation in current media environment and environment of video voyeurism and dataveillance); Abraham et al., *supra* note 222, at 837.

269. *See Cox Broad. Corp*., 420 U.S. at 471, 490–91.

270. *See* Sanders, *The Corporate Privacy Proxy*, *supra* note 24, at 1191.

271. *See* Dewey, *supra* note 63 ("[I]n a time where the public is demanding more transparency regarding food production, these laws seek to close the barn doors even further.").

272. RESTATEMENT (SECOND) OF TORTS § 562D cmt. g (AM. L. INST. 1975).

273. *Id*. at § 562D cmt. h.

Curtis Publishing Co. v. Butts,[274] "dissemination of opinions on matters of public interest . . . [is] an 'unalienable right,'" but not an unlimited one.[275] In the same way that a business is not generally immune from regulation, the "publisher of a newspaper has no special immunity" that grants authority "to invade the rights and liberties of others."[276] However, acceptable limits on the press "must neither affect 'the impartial distribution of news' and ideas . . . nor deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish."[277]

The intersection between the right to gather and disseminate news and *individual* privacy came into the public discourse in 2016, when a civil jury in California awarded Terry Bollea, also known as Hulk Hogan, $140 million in compensatory and punitive damages against the website Gawker.[278] Bollea's claim involved unauthorized publication of privately recorded sexual activity with the wife of Bollea's closest friend.[279] Bollea did not consent to the recording or the publication, which received over seven million online views.[280] The Bollea lawsuit devoted substantial energy to differentiating between the privacy rights afforded to private individuals and public figures. A more fundamental question also arose: what makes something newsworthy?[281] Bollea's extramarital affair

274. 388 U.S. 130 (1967).

275. *Id.* at 149–50.

276. *Id.* at 150.

277. *Id.* at 151.

278. *See generally* Bollea v. Gawker Media, 913 F. Supp. 3d 1325 (M.D. Fla. 2012); First Amended Complaint & Demand for Jury Trial, Bollea v. Gawker Media, No. 12012447-CI-011 (6th Cir. Fla. Dec. 28, 2012); Nick Madigan, *Jury Tacks on $25 Million to Gawker's Bill in Hulk Hogan Case*, N.Y. TIMES (Mar. 21, 2016), https://perma.cc/WAG8-QNAX.

279. *See* Julia Marsh, *Hulk Hogan Wants Every Cent of His $140M Verdict from Gawker*, N.Y. POST (Oct. 31, 2016), https://perma.cc/55UY-8X4B; Kayla Lombardo, *The Hulk Hogan vs. Gawker Legal Saga, Explained*, SPORTS ILLUSTRATED (May 3, 2016), https://perma.cc/EK89-55RN.

280. *See* Jeffrey Toobin, *Gawker's Demise and the Trump-Era Threat to the First Amendment*, THE NEW YORKER (Dec. 11, 2016), https://perma.cc/KK7G-QQ5H.

281. *See* Ryan McCarthy, *When a Sex Tape Is Newsworthy: Privacy in the Internet Era*, N.Y. TIMES (Mar. 4, 2016), https://perma.cc/PQJ7-N7JB.

with a friend's wife—and the fact that an unknown party filmed and disseminated the encounter—was of public interest because of Bollea's celebrity.[282] However, the publication of the recording provided little, if any, additional benefit to the public.[283] The jury's finding that the video recording lacked newsworthiness and the amount of the verdict itself established the public's shared role in defining the scope of privacy and what constitutes news.[284]

Commercial gagging laws lie at the intersection between the right to gather and disseminate news and *corporate* or *business* privacy, which remains unrecognized as a matter of both constitutional and common law.[285] The failure of gag laws to account for *Sullivan* and the public nature of many commercial activities may be fatal given *Hill*'s application to privacy torts. The actual malice rule syncs gag laws with First Amendment theory. None of the concepts of privacy discussed above provide support for concealment of matters of public concern or interest. Yet, West Virginia recently proposed to do for all businesses what many states unsuccessfully attempted to do for animal and agriculture businesses: privatize nonproprietary commercial operations and insulate them from undercover investigations that previously enjoyed First Amendment protection.[286] Two years prior, Arkansas had passed a similar universal gag law.[287]

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282. *See id*. (explaining how the company who published the sex tape said it had a "constitutionally-protected right to publish newsworthy information about a public figure").

283. *See id*.

284. *See* Toobin, *supra* note 280 ("'Courts are now viewing newsworthiness in a dangerously subjective way to show that today's Internet-based media sometimes doesn't have the same ethics constraints as more mainstream media, leading to a more judgmental bench eager to question news value . . . .'").

285. *See* Dewey, *supra* note 63.

286. *See* Mary Catherine Brooks, *Senate Bill Would Privatize State Parks*, THE REG. HERALD (Feb. 24, 2022), https://perma.cc/VEN4-HGLA ("'The bill means a private contractor could come in and build a casino, a racetrack, an amusement park, or anything else on state park property,' explained Walt Shupe, who recently retired after 33 years in West Virginia's state park system.").

287. *See* Husch Blackwell LLP, *Arkansas Ag Gag Update*, JD SUPRA (Aug. 12, 2021), https://perma.cc/Y4SL-UTBG ("The Arkansas statute is not typical

Gag laws envision control over nonproprietary information as a one-sided proposition where the owner or operator of a business holds an exclusive "right." *Whalen v. Roe* leaves in doubt the scope of any competing constitutional right to control information,[288] especially when weighed against other interests like the public nature of information about commercial food production.[289] Corporations do not control all flows of nonproprietary information about their business operations,[290] perhaps because *Whalen* limits the individual right to control information.[291]

Privacy in the context of commercial operations has many dimensions that limit a business's control over nonproprietary

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of other state ag gag laws. It covers all commercial property, not just agricultural facilities.").

288. *See* Whalen v. Roe, 429 U.S. 589, 605–06 (1977) (explaining how keeping "vast amounts of personal information in computerized data banks or other massive government files" is not an "invasion of any right or liberty protected by the Fourteenth Amendment"). New York created a special commission to evaluate the state's drug control laws in response to concerns of misuse. *Id.* at 591. That commission found deficiencies in existing law and that New York was unable to effectively: (i) prevent the use of stolen or revised prescriptions; (ii) prevent unscrupulous pharmacists from repeatedly refilling or overprescribing prescriptions; and (iii) prevent users from obtaining prescriptions from more than one doctor. *Id.* at 592. New York subsequently classified potentially harmful drugs in five schedules and enacted rules to prevent fraud by creating official forms, requiring a physician's signature and triplicate documentation including the prescribing physician, the dispensing pharmacy, the drug and dosage, and the name, address, and age of the patient. *Id.* at 592–93. The New York State Department of Health, which had certain security provisions, stored one of the copies for a period of five years after which they were destroyed. *Id.* at 593. Seventeen employees and twenty-four investigators could access the records, which were stored in a database located in a receiving room that was surrounded by a locked wire fence and protected by an alarm system. *Id.* at 594–95. The Court found that Whalen could not show a violation of one of the two types of recognized privacy interests: preventing disclosure of personal matters and independence to make important personal decisions. *Id.* at 599–600. New York's legislation was rational, New York had authority to regulate the industry, and New York provided adequate safeguards to protect privacy. *Id.* at 597–98, 601.

289. *Id.* at 599.

290. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

291. *See Whalen*, 429 U.S. at 598–600 (recognizing a constitutionally protected "zone of privacy" protecting unwanted disclosure of personal matters and personal independence in making certain decisions).

information.[292] Consumers have the right to know and chose what to purchase as a matter of health, religious belief, and conscience.[293] The public has the right to government accountability because tax dollars fund the regulation of the many industries.[294] Consumers and competitors have enforceable rights against unfair competition.[295] Gag laws fail to consider these factors—and more—in protection of the privacy over nonproprietary commercial information.[296]

Daniel J. Solove provides insight into conceptualizing the interest that commercial gagging laws seek to protect: control over information or the "ability to control the circulation of information."[297] Control over information as a concept normally applies to personal, not public, information and "is not simply a matter of individual prerogative."[298] "What society deems appropriate to protect" also defines the scope of privacy.[299] As a result, Solove describes this control over information as vague and notes its failure to define what categories of information should be controlled.[300] The concept also devalues how information is rarely formed or experienced in isolation but instead with others who have a claim or right of control over communication.[301] Information that is formed in relationship with others "rarely belongs to just one individual."[302] No legally protected right exists to "a reputation based on concealment of the truth," which would focus "too heavily on individual choice" and fails to recognize disparities in knowledge and bargaining

292. *See* Dewey, *supra* note 63, at 263.

293. *Id.*

294. *See, e.g.*, Guy Bentley, *D.C.'s Proposed Soda Tax Sounds Sweeter Than It Is*, WASH. POST. (Nov. 1, 2019), https://perma.cc/2WEJ-Y2MM.

295. *See Unfair Competition,* LEGAL INFO. INST., https://perma.cc/EDD6-EEVT (explaining how unfair competition "is primarily comprised of torts that cause economic injury to a business through deceptive or wrongful business practice").

296. *See* Dewey, *supra* note 63.

297. Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1101 (2002).

298. *Id.* at 1108.

299. *Id.* at 1111.

300. *Id.*

301. *See id.* at 1113.

302. *Id.* at 1114.

power.[303] Privacy constitutes social regulation of information within a broader architecture that includes some individual control.[304]

Solove's conceptualization of "limited access to self" also provides insight into the type of "right" that agriculture privacy and commercial gag laws sought to create for businesses and commercial enterprises.[305] But such a right relies on one's relationship with society and "not all access to the self-infringed upon privacy—only access to specific dimensions of the self or to particular matters and information."[306] In this respect, privacy exists on a "continuum between absolutely no access" and total access.[307] While solitude is a form of seclusion, it is not equivalent to privacy or the "right to decide how much knowledge" the public at large shall have about one's thought, feeling, doings, and affairs.[308] Control over the degree of isolation defines limited access.[309]

Commercial gagging laws also attempt to prevent public disclosure of nonproprietary information one may wish to conceal.[310] This formulation views privacy as avoiding disclosure and guaranteeing total secrecy.[311] Given concerns about economic self-dealing and the ability to conceal true but harmful facts for gain, privacy as secrecy could narrowly involve the concealment of only personal facts.[312] But this may fail to recognize the group privacy rights that come with free association.[313] The secrecy concept may also fail to appreciate or distinguish between secrecy and privacy.[314] What is secret is not

303. *Id.* at 1114, 1115.

304. *Id.*

305. *See id.* at 1108, 1114–15.

306. *Id.* at 1103–05, 1104.

307. *Id.* at 1104.

308. *Id.* at 1103.

309. *See id.* at 1103 ("Solitude is a component of limited-access conceptions as well as of the right-to-be-let-alone conception.").

310. *See id.* at 1105 (defining one privacy interest as the concealment of private information from parties to whom the information pertains).

311. *Id.* at 1106–07.

312. *See id.* at 1106.

313. *See id.* at 1108.

314. *See id.*

always private and private matters are not always secret.[315] Maintaining privacy could also involve selective disclosure rather than total nondisclosure.[316]

Idaho and Iowa's commercial gagging laws provide examples of how the actual malice rule applies.[317] The circuits are split on whether *Alvarez* protects misrepresentations to gain access or employment.[318] Assuming nonproprietary information was at issue, the actual malice rule could require a nexus between the misrepresentations and a purpose of producing false information or information about employment or business operations.[319] Limiting gag laws in this way means that legally cognizable harms rarely include injuries caused by truthful reporting of information that is in the public's interest to know.[320] Such a limiting rule could also shield undocumented populations from an "unintended" consequence of ag-gag laws—disclosures that heighten the threat or risk of deportation.[321]

The attractiveness of applying the actual malice rule against commercial gagging laws lie in its normative value. Most scholarship on gag laws, including this Author's scholarship, has yet to consider the recent wave of business or corporate privacy legislation. Passed in 2017, Arkansas' gag law applies to all business.[322] In 2019, West Virginia debated the Employer Property Protection Act,[323] which would have universally applied to any business in the state.[324] HB 2675 would have provided a civil remedy for "exceeding the scope of authorized access to an employer's property."[325] This gag law would have punished employees who (i) "intentionally gain access to the nonpublic areas of an employer's premises" and (ii) "engages in an act that exceeds the employee's authority to

315. *See id.*
316. *Id.*
317. *See supra* notes 309–316 and accompanying text.
318. *See supra* notes 153–164 and accompanying text.
319. *See supra* notes 47–48 and accompanying text.
320. *See* Sanders, *Ag-Gag Free Nation*, *supra* note 47, at 525.
321. *See id.* at 518.
322. *See supra* note 26.
323. Employer Property Protection Act, H.B. 2675, § 21–17–1 (2019).
324. *Id.*
325. *Id.*

enter those areas."[326] Acts that exceed the employee's authority include recording images or sound and using that recording in "breach" of the "duty of loyalty to the employer."[327] Other acts include the use of unattended cameras or electronic surveillance devises.[328] HB 2675 additionally sough to impose joint liability on any person who directs, assists, compensates, or induces the employee.[329] Finally, HB 2675 would have exempted government agencies and law enforcement officials engaged in lawful investigations.[330] West Virginia's attempt to extend gag laws beyond animal and agribusinesses would have provided "a private right of action for [any] employers against any employee who misappropriates the employer's property."[331] HB 2675 did not impose an actual malice requirement.

Applying *Sullivan* to commercial gagging laws reinforces the "trend in First Amendment law toward treating all individual speakers and their speech as similarly situated and entitled to equal status."[332] The interconnectivity of the U.S. and global food production industry increases the need for the First Amendment to protect the flow of information, much of which can only be obtained from unauthorized workers in the industry.[333] In the same way segregationists sought to use defamation and libel to silence dissent during the Civil Rights Era, gag laws silence vulnerable populations with damaging information about commercial food production.[334] The speech of unauthorized workers can counter false commercial speech of agribusinesses and gag laws undervalue the First Amendment speech rights of unauthorized workers on the subject of food production.[335] If the threat of arrest or deportation effectively silences the voices of unauthorized workers about unsafe working conditions or food production practices, gag laws provide little to mitigate those harms and instead make

326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. Horwitz, *supra* note 69, at 811.
333. *See* Dewey, *supra* note 63.
334. *See* Sanders, *Ag-Gag Free Nation*, *supra* note 47, at 523.
335. *See id.* at 52.

unauthorized workers unlikely to participate in the industry's marketplace of ideas.[336] Compliance with gag laws in some states requires disclosures that often lead to arrest or deportation if false documents were used to obtain employment.[337] Moreover, gag laws fail to distinguish between major and minor factual errors and allow presumed damages as a punishment for speech, which fatally afflicted the state defamation law before *Sullivan*.[338]

Of course, *Sullivan*'s contemporary value is not limited to commercial gagging laws. A federal judge in California recently ruled in favor of Vanessa Bryant, who sought the names of four Los Angeles County sheriff's deputies who allegedly shared graphic photos from the site of the helicopter crash that killed her husband and eight others, including one of the Bryants' daughters.[339] On the day of the crash, Bryant reportedly visited the sheriff's office and received assurances that the scene of the cash was secured.[340] Bryant later learned sheriff's deputies obtained graphic photos of the scene.[341] The same deputies may have internally and externally shared the images.[342] The sheriff admitted ordering the deputies to destroy the photos despite their importance as evidence.[343] Bryant brought a claim and alleged negligence as well as a violation of a state law that prohibits (i) intrusions into a person's private affairs and (ii) public disclosure of private facts.[344] Los Angeles County sought to keep the deputies' names under seal but their purported

336. *See id.* at 523.

337. *See id.* at 495 ("Compliance with an ag-gag law that requires a witness to report animal or agriculture abuse could force disclosure of unauthorized status.").

338. *See* Horwitz, *supra* note 69, at 830 ("The burdens and presumptions in libel law heavily favored the plaintiffs. Defamatory statements were presumed to be false, thus placing the burden on the defendant . . . [l]ittle if any distinction was made between major and minor factual error . . . .").

339. *Judge Rules in Favor of Vanessa Bryant in Kobe Bryant Crash Photos Suit*, ESPN (Mar. 9, 2021), https://perma.cc/JY7C-3SLT.

340. Jonathon Abrams, *Vanessa Bryant Uses Her Platform to Battle the Powerful*, N.Y. TIMES (Apr. 19, 2021), https://perma.cc/QG9R-TGWC.

341. *Id.*

342. *Id.*

343. *Id.*

344. *See Judge Rules in Favor of Vanessa Bryant in Crash Photos Suit*, *supra* note 339.

concerns were undermined when Sheriff Alex Villanueva promised to publicly release the internal report after the investigation.[345] The court also found a vested public interest in assessing the truth of Bryant's allegations of police misconduct.[346] Few would debate that *Sullivan* should not apply and reject the actual malice rule's application to Bryant's claim for invasion of privacy given the Bryant family's public status and the public nature of the events surrounding Bryant's lawsuit.

CONCLUSION

This Article identifies the importance of *New York Times v. Sullivan* and its actual malice rule to the agriculture privacy debate. This Article uniquely identifies the next wave of gagging legislation and demonstrates how *Sullivan* could apply. This Article advocates application of *Sullivan* to neutralize the threat gag laws pose to the First Amendment right to gather and disseminate news about commercial food production and other public matters.

345. *Id.*
346. *Id.*