AN EQUITABLE PROPOSAL FOR INJUNCTIVE RELIEF TO END CASUALTIES IN CULTIVATION

I. INTRODUCTION

Maria Isabel Vasquez Jimenez was seventeen years old and two months pregnant when she collapsed in a Central Valley field in California while tying grape vines in ninety-five degree heat.[1] She arrived at the hospital in a coma with a 108-degree fever and died days later.[2] Although Vasquez Jimenez's death received widespread publicity in 2008, her case is not entirely unique.[3] Even though California implemented the first-of-its-kind heat illness prevention regulation, fourteen farm workers have died from heat exposure,[4] and most of those workers labored at worksites that did not provide sufficient water and shade per the state regulations.[5] Although farm worker safety has increased since the California Division of Occupational Safety and Health ("Cal/OSHA") implemented the heat illness prevention regulation, there is still some room for improvement.[6]

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[1] Sasha Khokha, *Teen Farmworker's Heat Death Sparks Outcry*, NPR (June 6, 2008, 11:50 AM), http://www.npr.org/templates/story/story.php?storyId=91240378 (on file with the *San Joaquin Agricultural Law Review*).

[2] *Id.*

[3] *See id.* (stating that former Governor Arnold Schwarzenegger was one of the observers at Vasquez Jimenez's funeral); *Salinas Farmworker Dies in Near 100-Degree Heat*, CBS S.F. (Oct. 3, 2012, 6:37 PM), http://sanfrancisco.cbslocal.com/2012/10/03/salinas-farmworker-dies-after-picking-lettuce-in-near-100-degree-heat (on file with the *San Joaquin Agricultural Law Review*) (stating that, as of 2005, fourteen farm workers have died from heat exposure).

[4] *Salinas Farmworker Dies in Near 100-Degree Heat*, *supra* note 3.

[5] *UFW Heat Bills of 2012*, UNITED FARM WORKERS, http://www.ufw.org/_board.php?mode=view&b_code=org_key&b_no=11876&page=1&field=&key=&n=8 (on file with the *San Joaquin Agricultural Law Review*).

[6] *See* Letter from Governor Edmund G. Brown, Jr., Governor of Cal., to the Members of the Cal. State Assemb. (Sep. 30, 2012) (on file with the *San Joaquin Agricultural Law Review*) (stating that Governor Brown was returning the bill without his signature).

Agriculture in California is a $43.5 billion dollar industry.[7] The bulk of California's agriculture cash receipts come from fruits, nuts, vegetables, melons, and field crops.[8] Harvesting these crops involves extensive exposure to nature's elements, and heat in particular.[9] It is understandable that regulations that are aimed at curbing heat-related death and injury among farm workers are subject to a fierce debate because they impact one of California's most important economic sectors and place a lot of money at stake.[10] Above all, farm workers' lives are invaluable and worth protecting.[11] Farm workers, like Vasquez Jimenez, play a critical role in keeping California's agricultural sector economically viable.[12] However, protective measures must not unduly burden agribusiness since any adverse effects on the industry will also have a negative economic impact on farm workers.[13]

This Comment will explore the various reasons why the California legislature should allow farm workers to seek statutory-based injunctive relief to compel their employers to comply with the heat

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[7] *Agricultural Statistical Overview*, CAL. DEP'T OF FOOD AND AGRIC., *available at* http://www.cdfa.ca.gov/statistics/ (on file with the *San Joaquin Agricultural Law Review*).

[8] *Id.*

[9] *See Occupational Heat Exposure*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., http://www.osha.gov/SLTC/heatstress/ (stating that farm labor that involves working outside in the heat and sun may increase a person's chances of heat illness) (on file with the *San Joaquin Agricultural Law Review*).

[10] *Agricultural Overview*, supra note 7; *see also* Gosia Wozniacka, *Farmworkers Sue Over Heat Rules*, THE FRESNO BEE, October 19, 2012, at A10 (noting that United Farm Workers brought a lawsuit against Cal/OSHA for failing to enforce heat regulations).

[11] *See* Sasha Khokha, *Teen Farmworker's Heat Death Sparks Outcry*, NPR (June 6, 2008, 11:50 AM), http://www.npr.org/templates/story/story.php?storyId=91240378 (on file with the *San Joaquin Agricultural Law Review*) (describing the friends and family members that Vasquez Jimenez left behind).

[12] *See* Ken Smith, *The Heat is On*, CHICO NEWS AND REVIEW (Aug. 6, 2012), http://www.newsreview.com/chico/heat-is-on/content?oid=7508379 (on file with the *San Joaquin Agricultural Law Review*) (citing Assemblyman Dan Logue's opposition to AB 2676 on the grounds that the bill would force businesses to move to "more accommodating states like Texas.").

[13] Jim Sanders, *California Bills Aimed at Better Worker Conditions Head to Gov. Jerry Brown*, THE SACRAMENTO BEE (Aug. 31, 2012, 12:00 AM), http://www.sacbee.com/2012/08/31/4774460/california-bills-aimed-at-better.html (on file with the *San Joaquin Agricultural Law Review*) (noting opponent's argument against recent legislation on the grounds that it would hurt agribusiness because the penalties were so harsh).

illness prevention regulation. The statute should require the employer to comply with the heat illness prevention regulation, and the sole remedy under this statute should be injunctive relief.[14] When determining whether the employer has complied with the statute in a particular case, the courts should apply the same standard that the court in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012) ("*Brinker*") applied to the employer's obligation to provide the employees with meal breaks.[15] Part II of this Comment discusses the employer's obligations related to meal and rest breaks for agricultural workers and Cal/OSHA's heat illness prevention regulation. The analysis in Part III examines whether farm workers could exercise the private right to injunctive relief, addresses the gaps in the legal protections for farm workers that a statutory right to injunctive relief would fill, and argues that injunctive relief is the most appropriate remedy in this context. Finally, Part IV discusses why the *Brinker* standard is the most appropriate one for the new private right to injunctive relief, examples of situations that would and would not satisfy the *Brinker* standard, and the inadequate approaches that the California legislature has taken so far.

II. RELEVANT REGULATORY SCHEMES

Two regulations are most relevant to heat illness prevention for farm workers.[16] First, Wage Order 14-80 sets forth the rules that govern agricultural workers' rest and meal breaks.[17] There is some contention

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[14] A mandatory injunction requires the party to perform an action and is therefore applicable to this situation because the statute would require the employer to comply with the Cal/OSHA heat illness prevention regulation. *See* CAL. CIV. CODE § 3367 (2) (West 1997). The plaintiff does not need to meet the common law requirements for injunctive relief if the defendant violates a statute that provides for an injunction as a remedy. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 172, 194–95 (1978) (stating that the court would enjoin defendant's bridge project because the statute at issue required it and to do otherwise would create a separation of powers dilemma). If the employer disobeys the injunction, the court can hold them in contempt. CAL. CIV. PROC. CODE § 1209 (a)(5) (West 2007). If the court holds the defendant in contempt, the court can punish the defendant with jail time. *Id*. at § 1218 (a) (West 2007).

[15] Brinker v. Superior Ct., 53 Cal. 4th 1004, 1038-39 (2012).

[16] *See generally* CAL. CODE REGS. tit. 8, § 11140 (2013); CAL. CODE REGS. tit. 8, § 3395 (2013).

[17] *See* CAL. CODE REGS. tit. 8, § 11140(12) (2013) (stating that employers must "authorize and permit" their employees to take rest and meal breaks).

about the language in the Wage Order 14-80, but it is generally thought that the language is intended to create flexibility for agribusiness.[18] The second regulation, Cal/OSHA's heat illness prevention regulation, requires employers to take measures to prevent their outdoor employees from overheating.[19]

A. Wage Order 14-80: Rest and Meal Periods for Agricultural Workers

The Industrial Welfare Commission ("IWC")[20] adopted Wage Order 14-80 in 1979 to govern rest and meal periods for agricultural workers.[21] It states that employers must "authorize and permit" rest and meal periods.[22] As defined in Wage Order 14-80, agricultural workers perform a wide variety of tasks, including planting and harvesting crops.[23]

1. Rest and Meal Periods

Employers must "authorize and permit" agricultural workers to take a ten-minute break for every four hours that they work.[24] The break is supposed to be as close to the middle of the shift as possible, and the

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[18] *See* Doe v. D.M. Camp & Sons, No. CIV-F-05-1417 AWI SMS, 2009 WL 921446, at *5–6 (E.D. Cal. Mar. 31, 2009) (on file with the *San Joaquin Agricultural Law Review*) (quoting statements from the Industrial Welfare Commission regarding the revision of Wage Order 14-80).

[19] *See* CAL. CODE REGS. tit. 8, § 3395 (2013) (requiring employers of outdoor workers to make drinking water, shade, and rest breaks readily available to their employees).

[20] The IWC was a board comprised of five appointed members. Indus. Welfare Comm'n v. Super. Ct. of Kern Cnty., 27 Cal. 3d 690, 700 (1980). Their authority gives them the power to ensure the overall well-being of California employees who fall within its scope. *Id.* Generally, the board achieved these goals by regulating wages, hours, and working conditions. *Id.*

[21] *See* CAL. CODE REGS. tit. 8, § 11140(1) (2013).

[22] *Indus. Welfare Comm'n*, 27 Cal. 3d at 697–98; CAL. CODE REGS. tit. 8, § 11140(12) (2013); *see also* Letter from Anne Stevason, Acting Chief Counsel of the Cal. Div. of Labor Standards, to Robyn A. Babcock, Sidley Austin Brown & Wood (Jan. 28, 2002) (on file with the *San Joaquin Agricultural Law Review*) (noting that the "authorize and permit" language is present in all Wage Orders).

[23] CAL. CODE REGS. tit. 8, § 11140(2)(D) (2013). Some examples of agricultural workers include employees that harvest fish, tend to livestock, and repair pipelines and farm equipment. *Id.*

[24] *Id.* § 11140(12).

worker still gets paid for that ten-minute break.[25] Workers whose shifts are less than three and a half hours do not need to take a rest period.[26]

Under Wage Order 14-80, employers must also provide their employees with a minimum of thirty minutes for a meal break after the employee works for five hours.[27] However, if the employee will finish his work within six hours, then Wage Order 14-80 does not require the employer to give the worker a meal break so long as both parties agree to forego the break.[28] Meal breaks can be either on duty or off duty: the distinction determines whether or not the employer will pay the worker for those thirty minutes.[29] The employer must completely free the employee from his work responsibilities for thirty minutes for the break to be considered off duty.[30] Wage Order 14-80 requires employers to give their employees off duty meal breaks unless the type of work does not allow the employees to be completely free of responsibility and both parties agree to on duty meal breaks in writing.[31]

B. Authorize and Permit? Interpretation of Wage Order 14-80

Before the IWC adopted Wage Order 14-80, the governing Wage Order stated that "no employer shall employ any person for a work period of more than five hours without a meal period. . . ."[32] The IWC changed the language so that rest and meal period requirements would exist in harmony with the realities of work in the agricultural sector.[33] Namely, agricultural work is subservient to changing weather and seasons, so it requires flexibility on the part of workers and employers.[34] While it is not entirely certain what the IWC means by

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[25] *Id.*
[26] *Id.*
[27] *Id.* § 11140(11).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] Doe v. D.M. Camp & Sons, No. CIV-F-05-1417 AWI SMS, 2009 WL 921446, at *5 (E.D. Cal. Mar. 31, 2009) (on file with the *San Joaquin Agricultural Law Review*).
[33] *See id.* (quoting a statement from the IWC regarding their revision of 14-80).
[34] *See* ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF SB 1121, at 3 (June 23, 2010) (stating that opponents disagreed with a proposed revision in overtime requirements for agricultural workers because they argued that

"authorize and permit," testimony from some IWC officials suggests that the "authorize and permit" language is supposed to create flexibility in meal and rest periods.[35]

The requirements regarding meal periods impose a stricter standard than the requirements that govern rest periods.[36] Although both provisions state that employers must "authorize and permit" the breaks, meal periods can only be waived if both the employer and the employee consent and if the employee's shift is six hours or less.[37] That requirement is not present in the rest period provision.[38] Additionally, the portion of the meal period provision that restricts "on duty" meal periods also suggests that the regulations hold meal periods to a higher standard than rest periods.[39] Employers are not legally required to enforce rest periods; if an employee "freely chooses without any coercion or encouragement to forego or waive a rest period," the employee cannot penalize the employer.[40]

C. Cal/OSHA's Heat Illness Prevention Regulation

Heat illness poses a serious threat to outdoor workers.[41] All human beings have their own built-in heat regulation system, but they still

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employers were forced to schedule workers around weather conditions and seasonal production).

[35] *See Doe*, *supra* note 32, at *6 (quoting IWC Commissioner Howard Wackman III's response to a question about whether the IWC intended that the new language in Wage Order 14-80 would give the employer greater flexibility).

[36] Letter from Anne Stevason, Acting Chief Counsel of the Cal. Div. of Labor Standards, to Robyn A. Babcock, Sidley Austin Brown & Wood (Jan. 28, 2002) (on file with the *San Joaquin Agricultural Law Review*); *Doe*, *supra* note 32, at *5 (on file with the *San Joaquin Agricultural Law Review*) (comparing and contrasting the meal period provision with the rest period provision).

[37] CAL. CODE REGS. tit. 8, § 11140(11) (2013).

[38] *See id.* § 11140(12) (lacking any discussion of a requirement for mutual waiver of rest periods).

[39] *Id.* § 11140(12); *id.* § 11140(11); *see also Doe*, *supra* note 32, at *5 (on file with the *San Joaquin Agricultural Law Review*) (noting the distinctions between the rest period provision and the meal period provision).

[40] Letter from Anne Stevason, *supra* note 22.

[41] *E.g.* Occupational Safety and Health Admin., *Campaign to Prevent Heat Illness in Outdoor Workers*, U.S. DEP'T OF LABOR, http://www.osha.gov/SLTC/heatillness/index.html (on file with the *San Joaquin Agricultural Law Review*).

need shade, water, and rest to work effectively.[42] After a certain point, the human body cannot effectively fight off the heat, and heat illness sets in.[43] Cal/OSHA's heat illness prevention regulation aims to prevent workers from reaching the point where they can no longer regulate their internal temperatures by requiring employers to have water and shade on site and to allow their employees full access to it.[44]

1. Heat Stroke: Symptoms and Consequences

The human body's first line of defense against heat is through sweating.[45] However, when the weather is especially hot and humid, sweating alone is not sufficient to keep the body's internal temperature at a safe level.[46] Workers must also seek shade, drink water, and take breaks to avoid heat illness.[47] Heat illness at its most severe level is referred to as heat stroke.[48] At this point, the body is no longer able to regulate its internal temperature.[49] Symptoms include nausea, dizziness, and a body temperature in excess of 103 degrees.[50] Heat stroke is a life-threatening condition, and if the victim does not receive immediate medical care, heat stroke can result in permanent disability or death.[51]

2. Preventing Heat Stroke in Outdoor Occupations

California was the first state in the nation to implement regulations that are aimed at protecting outdoor workers from heat illness.[52] The

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[42] *See* Ctr. for Disease Control and Prevention, *Frequently Asked Questions (FAQ) About Extreme Heat*, http://emergency.cdc.gov/disasters/extremeheat/faq.asp (on file with the *San Joaquin Agricultural Law Review*).
[43] *See id.*
[44] *Id.*; CAL. CODE REGS. tit. 8, § 3395 (2013).
[45] Occupational Safety and Health Admin, *supra* note 41.
[46] *Id.*
[47] *Id.*
[48] CTR. FOR DISEASE CONTROL AND PREVENTION, *supra* note 42.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *See* Press Release, Dep't of Indus. Relations, Cal/OSHA Moves to Strengthen Heat Illness Prevention Regulations (July 31, 2009), http://www.dir.ca.gov/DIRNews/2009/IR2009-26.html (on file with the *San Joaquin Agricultural Law Review*) (stating that the heat illness prevention regulation was "first of its kind").

heat illness prevention regulations require employers to provide their workers with shade and water.[53] Specifically, the employer must provide ready access to shade when the temperature is over eighty-five degrees.[54] The employer must also allow his employees to rest in the shade whenever the employees "feel the need to do so to protect themselves from overheating."[55] Each rest break must be at least five minutes long.[56] Simply creating a structure that blocks the sun is not sufficient to constitute shade when the "heat in the area of shade defeats the purpose of shade, which is to allow the body to cool."[57]

Additionally, the employer must provide his employees with potable drinking water.[58] The employer must supply the water through either a plumbed source or in a storage unit that holds enough water so that an employee can drink one quart per hour for his or her entire shift.[59] Employers must encourage their employees to drink water regularly.[60] If an employer violates the heat illness prevention regulations,[61] Cal/OSHA will assess civil penalties against the employer and will issue a date by which the employer must correct the violation.[62] The amount of the penalty will depend on what type of violation the employer committed.[63] For example, general violations can cost an employer $7,000 per violation.[64]

Cal/OSHA takes a two-part approach to correct a violation.[65] If the employer corrects the violation on time, then the agency reduces their

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[53] CAL. CODE REGS. tit. 8, § 3395 (2013).
[54] *Id.* § 3395 (d)(1). If the temperature is less than eighty-five degrees Fahrenheit, the employer still has to be ready to provide shade if an employee asks for it. *Id.* § 3395(d)(2). The shade structure must be either "open to the air or provided with ventilation or cooling." *Id.* § 3395(d)(1) (2013). It has to be big enough to fit twenty-five percent of the employer's on duty work force at any given time. *Id.*
[55] *Id.* § 3395(d)(3).
[56] *Id.*
[57] *Id.* § 3395(b).
[58] *Id.* § 3395(c).
[59] *Id*. The employer needs to either bring the entire supply of water at the beginning of the shift, or may start with smaller amounts and refill the water so that each employee still gets one quart per hour. *Id.* § 3395(c).
[60] *Id.*
[61] Cal/OSHA classifies violations as either regulatory, general, serious, repeat, or willful. *Id.* § 334.
[62] *Id.* § 336.
[63] *See generally id.*
[64] *Id.*
[65] *Id.* § 336(e); *id.* § 336(f).

penalty by fifty percent.[66] However, if the employer fails to correct the violation by the abatement date, the employer loses the opportunity for a reduced fine, and Cal/OSHA may fine them up to $15,000 for each day after the abatement date that the violation continues to exist.[67]

III. Factors in Favor of a Private Right of Action

Injunctive relief is the most appropriate remedy available to farm workers to address the problem of heat illness.[68] A statutory right to injunctive relief would efficiently cure several problems at the same time.[69] First, it would fill in the current gaps in protection that the law affords to agricultural workers.[70] Additionally, it would directly address an employer's noncompliance without contributing to California's lawsuit abuse problem,[71] and undocumented immigrants could exercise the new private right of action without the court taking their immigration status into evidence.[72] Second, it would save time and money for everyone involved: farm workers, employers, non-profit legal advocacy groups, and government regulators alike.[73] In determining whether the farm worker is entitled to injunctive relief, the *Brinker* standard would be a good fit based on the language in Wage Order 14-80 and the nature of agricultural work.[74] Additionally, the *Brinker* standard would work well in practice,[75] and this proposal would be more sensible than the ideas that the California legislature has proposed so far.[76]

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[66] *Id.* § 336(e).
[67] *Id.* § 336(f).
[68] *See infra* Part III.C.
[69] *See infra* Part III.A–B.
[70] *See infra* Part III.B.
[71] *See infra* notes 118–120 and accompanying text.
[72] *See infra* Part III.A.
[73] *See infra* notes 120–126 and accompanying text.
[74] *See infra* Part IV.A.
[75] *See infra* Part IV.A.1.
[76] *See infra* Part IV.B.

A. Right to Sue, Right to Deportation?

The majority of all farm workers are undocumented.[77] An undocumented farm worker is one that is unlawfully present on United States soil and faces the possibility of deportation.[78] Since the undocumented worker is not supposed to be on United States soil in the first place, one might conclude that the farm worker is prohibited from bringing a lawsuit.[79] Whether undocumented farm workers have the right to bring a lawsuit is an essential threshold matter to consider to ensure the effectiveness of the new private right of action.[80]

The Due Process clause of the Fourteenth Amendment[81] applies to all "persons," not just citizens of the United States.[82] The United States Supreme Court has determined that "persons" include undocumented immigrants, and that the Court's focus is not on the person's citizenship or lack thereof, but on their physical presence in the United

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[77] *See Who are Farmworkers*? S. POVERTY LAW CTR., http://www.splcenter.org/sexual-violence-against-farmworkers-a-guidebook-for-criminal-justice-professionals/who-are-farmworke (last updated Apr. 13, 2013) (on file with the *San Joaquin Agricultural Law Review*) (stating that 53% of farm workers are undocumented). The terms "undocumented immigrant" and "illegal alien" are often used interchangeably in today's society and are generally just two different ways to convey the same idea, *i.e.,* that the person's presence in the United States is unlawful. *E.g.*, *Fox Uses "Undocumented Immigrant" Term it Has Criticized*, MEDIA MATTERS FOR AMERICA (Apr. 12, 2013, 6:13 PM), http://mediamatters.org/blog/2013/04/12/fox-uses-undocumented-immigrant-term-it-has-cri/193615 (on file with the *San Joaquin Agricultural Law Review*) (noting that a Fox News host referred to a person who was illegally present in the United States as "undocumented" during their show but also used the terms "illegal alien" and "illegal immigrant"). For purposes of uniformity and to avoid using loaded terminology, this Comment refers to a person who is unlawfully present in the United States as an "undocumented immigrant".

[78] *See* 8 U.S.C. § 1227(a)(1)(B) (2006) ("Any alien who is present in the United States in violation [of the law] . . . is deportable."); Amanda M. Kjar, Comment, *U-Visa Certification Requirement is Blocking Congressional Intent Creating the Need for a Writ of Mandate and Training – Undocumented Immigrant Female Farmworkers Remain Hiding in the Fields of Sexual Violence and Sexual Harassment*, 22 SAN JOAQUIN AGRIC. L. REV. 141, 144 (2012–13).

[79] *See id.*

[80] *Id.*; *Who are Farmworkers*?, *supra* note 77.

[81] "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[82] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the constitution is not confined to the protection of citizens.").

States.[83] The undocumented immigrant can exercise this right to sue in both state and federal court.[84]

Regardless of whether an undocumented immigrant *can* bring a lawsuit, one who does so would undoubtedly be concerned about the possibility of alerting government authorities to his immigration status and, consequentially, being deported.[85] These concerns are not unfounded, especially in the civil context where the privilege against self-incrimination is inapplicable.[86] Thus, the undocumented immigrant who brings a civil action would not be able to invoke the privilege to avoid disclosing their immigration status.[87]

However, the undocumented immigrant might still avoid disclosing their immigration status if the court determines that the immigrant's status is irrelevant.[88] For example, in *Rodriguez v. Kline*, 186 Cal. App. 3d 1145 (1986) ("*Rodriguez*"), the plaintiff was an undocumented immigrant who sued for damages in a personal injury action.[89] The court determined that the plaintiff's immigration status was relevant to his future earnings in light of the potential that the United States could initiate and prevail in a deportation proceeding against him.[90] If the plaintiff was deported, then his earnings in Mexico would be dramatically lower than they were in the United States.[91] Unlike the circumstances in *Rodriguez*, in a private right of action to compel a farm worker's employer to comply with Cal/OSHA, the immigration status of the farm worker would never be

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[83] Johnson v. Eisentrager, 339 U.S. 763, 771 (1950).

[84] Gibson v. Mississippi, 162. U.S. 565, 591 (1896). This analysis does not take legal aliens and citizens into account because their legal presence in the United States essentially makes their right to sue a non-issue, and the same provisions that allow illegal aliens to bring a lawsuit apply to them as well. *E.g.*, Peter S. Muñoz, *The Right of an Illegal Alien to Maintain a Civil Action*, 63 CALIF. L. REV. 762, 767 (1975) ("There is little doubt that an alien lawfully present in the United States has a right of access to the courts equal to that possessed by citizens.").

[85] *E.g.*, Muñoz, *supra* note 84, at 763 (noting that some people exploit an immigrant's undocumented status and treat the immigrant poorly because they know the immigrant will not risk deportation to bring a complaint).

[86] *E.g.*, Metalworking Mach., Inc. v. Sup. Ct., 69 Cal. App. 3d. 791, 794 (1977) (stating that the petitioner could not invoke the privilege against self-incrimination because he was involved in a deportation proceeding, which is civil).

[87] *Id.*

[88] If a party's immigration status is irrelevant, then the court will not admit it. *See, e.g.*, CAL. EVID CODE § 210 (West 2011).

[89] Rodriguez v. Kline, 186 Cal. App. 3d 1145, 1147–48 (1986).

[90] *Id.*

[91] *Id.*

relevant.[92] The action would simply circulate around whether the employer failed to comply with the heat illness prevention regulations.[93] A person's immigration status is not relevant to the employer's behavior, and the farm worker is no less deserving of shade or water simply because he lacks the proper documentation to be in the United States.[94]

Although the law looks favorable for undocumented farm workers, the groups that would enforce and exercise the private right of action still need to use education and outreach to address the fears that undocumented immigrants might have.[95] Additionally, despite the fact that farm workers can bring a lawsuit, it is unlikely that the farm workers themselves will be walking down to the courthouse to file legal paperwork on their own, but an organization like California Rural Legal Assistance ("CRLA") or United Farm Workers ("UFW") will enforce and exercise the private right of action on the farm worker's behalf.[96] Additionally, private firms may also use their pro-bono funds to assist farm workers in these cases.[97]

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[92] *Id.*; EVID. § 210. A prudent employer in this situation might also wish to avoid the subject of the worker's immigration status to avoid exposure to liability. Under the Immigration Reform and Control Act of 1986, an employer is prohibited from hiring undocumented workers. 8 U.S.C. § 1324a (2006). The statute provides civil and criminal penalties for employers who violate it. *Id.*

[93] EVID. § 210.; *see also* CAL. CODE REGS. tit. 8, § 11140.

[94] *See Rodriguez,* 186 Cal. App. 3d at 1147–49; EVID. § 210.

[95] *See, e.g.*, *supra* note 85 and accompanying text.

[96] *E.g.*, CAL. RURAL LEGAL ASSISTANCE, http://ww.crla.org/about-us (last updated Apr. 13, 2013) (on file with the *San Joaquin Agricultural Law Review*) (stating that the mission of CRLA is "[t]o fight for justice and individual rights alongside the most exploited communities of our society.").

[97] *See, e.g.*, *Farmworkers' Lawsuit Claims Cal OSHA Failed to Enforce Regulations*, L.A. TIMES BLOGS (Oct. 18, 2012, 11:18 AM), http://latimesblogs.latimes.com/lanow/2012/10/farmworkers-lawsuit-claims-calosha-failed-to-enforce-regulations.html (on file with the *San Joaquin Agricultural Law Review*). For example, Munger, Tolles & Olson recently filed a lawsuit against Cal/OSHA in conjunction with Public Counsel. *Id.* Public Counsel is a pro-bono law firm, but Munger, Tolles & Olson is a private firm whose practice areas include Corporate Law, Financial Restructuring, and Litigation. *See id.*; *Practices & Industries*, MUNGER, TOLLES & OLSON, http://mto.com/practices-industries (last visited Mar. 21, 2014) (on file with the *San Joaquin Law Review*). However, the firm encourages attorneys to spend time on pro-bono matters and has established its own non-profit corporation to provide legal services to underserved populations. *Activities*, MUNGER, TOLLES & OLSON, http://www.mto.com/pro-bono/pro-bono-activities (last visited Mar. 21, 2014) (on file with the *San Joaquin Agricultural Law*

B. Fleshing Out Current Remedies and Providing Heightened Protection

Farm workers or their survivors may bring a civil lawsuit against their employer if they suffer a heat related injury or death, but this may occur only after the injury occurs and only if the employer does not carry worker's compensation insurance.[98] Worker's compensation in California operates on a no-fault basis, which states that employees who are injured during the course of their employment can recover regardless of the negligence of either party.[99] If the employer carries the insurance and the employee and employer meet the requirements, then worker's compensation is the only remedy for the injury or death.[100]

The criminal justice system may also begin to play a role in the remedy that the legal system offers to a farm worker's surviving family members if the farm worker's injury results in death.[101] For example, the San Joaquin District Attorney filed involuntary manslaughter charges against the labor contractor and the farmer who Maria Isabel Jimenez Vasquez worked for.[102] The defendants pled guilty in exchange for community service, fines, and probation.[103] This was the first time that a district attorney ever filed criminal charges against an employer based on the heat-related death of a farm worker in the United States.[104]

Review). For more information regarding the details of the lawsuit, *see infra* notes 126–128 and accompanying text.

[98] *See* CAL. LAB. CODE § 3602 (West 2011 & Supp. 2013) (stating that individuals may not bring civil or criminal actions against employers who carry Worker's Compensation insurance, but that they may bring actions against employers who do not).

[99] *Id.* § 3600 ("Liability for the compensation provided by this division . . . shall, without regard to negligence, exist against an employer for any injury sustained . . . .").

[100] *Id.*; *id.* § 3602.

[101] *See* Fernando Gallo, *Two Charged in Wrongful Death of Lodi Farmworker Agree to Plea Deal*, LODI NEWS-SENTINEL (Jan. 20, 2011, 11:49 AM), http://www.lodinews.com/news/article_ 953a90d4-24ce-11e0-90c6-001cc4c002e0.html (on file with the *San Joaquin Agricultural Law Review*) (discussing the San Joaquin County criminal case related to the death of Maria Isabel Jimenez Vasquez).

[102] *Id.*

[103] *Id.*

[104] Gosia Wozniacka, *Plea Bargain for Supervisors in Farmworker's Death*, THE SEATTLE TIMES (Mar. 9, 2011, 12:20 AM),

Worker's compensation recovery and criminal charges are similar because they only occur after a farmer's noncompliance results in a worker's injury or death.[105] With regard to criminal charges, a county district attorney is only likely to bring them in the most egregious cases because these types of cases usually result in death.[106] Even then, it is difficult for prosecutors to prevail in criminal cases against employers.[107] There is no private remedy for farm workers whose employers are currently noncompliant but where no injury or death has resulted.[108] It is more economically feasible for farmers to become compliant with Cal/OSHA than it would be for the same farmer to deal with a criminal action if one of his workers dies because of heat stroke.[109] Additionally, a private right of action with an injunction as the sole remedy would allow farm workers to compel their employers to comply with the Cal/OSHA regulations before physical injury or death occurs.[110] Thus, the private right of action with an injunction would serve as a stronger preventative measure than criminal actions or Worker's Compensation claims.[111]

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http://www.seattletimes.com/html/nationworld/2014438386_apusfarmworkerdeath.html (on file with the *San Joaquin Agricultural Law Review*).

[105] *See* CAL. LAB. § 3600 (providing for compensation after a worker is injured on the job); Gallo*, supra* note 101 (discussing the involuntary manslaughter charges that the San Joaquin County District Attorney levied against Maria Isabel Jimenez Vasquez's employers after her death).

[106] *See* Wozniacka, *supra* note 104 (describing the facts in the Vasquez case, including the fact that the teen was two months pregnant, that nobody called 911, and that Vasquez was placed in a hot van after she collapsed).

[107] *See id.* (citing Professor Michael Vitiello as stating that authorities often do not prosecute employers because it is difficult to prove gross negligence).

[108] *See* CAL. LAB. § 3600 (providing for compensation after a worker is injured on the job); Gallo*, supra* note 101 (discussing the involuntary manslaughter charges that the San Joaquin County District Attorney levied against Maria Isabel Jimenez Vasquez's employers after her death).

[109] *See* Gallo*, supra* note 101 (stating that the labor contractor involved in the Vasquez case faced a fine of more than $262,000 because of the death before the state forced them to end the business).

[110] *See supra* notes 98–108 and accompanying text.

[111] *See* Comfort v. Comfort, 17 Cal. 2d 736, 741 (1941) ("An injunction . . . operates on the person of the defendant by commanding him to do or desist from certain action."); Scripps Health v. Marin, 72 Cal. App. 4th 324, 332 (1999) (stating that the purpose of injunctive relief is to prevent injury); LAB. CODE § 3600 (providing for compensation only after a worker is injured).

C. The Case for Injunctive Relief

The foremost reason to allow farm workers a private right of action with injunctive relief as the exclusive remedy is that the injunctive relief would address the farmer's noncompliance directly.[112] If the farmer is not complying with the heat illness prevention regulations, the injunction would order the farmer to become compliant.[113] Although Cal/OSHA's civil fines might serve as a deterrent to farmers who would otherwise not comply with the regulations, they do not compel the farmer to correct his behavior by himself, especially if the farmer was never planning on paying Cal/OSHA to begin with.[114] In that case, threatening the farmer with additional fines will probably be futile, and the farmer may just decide that it is easier to go out of business.[115] Failure to comply with an injunction results in contempt, which could result in jail time.[116] Time in jail is more likely to dissuade a noncompliant farmer than fines from a government agency whom the farmer has a history of failing to respect and obey.[117] Likewise, giving a farm worker money damages if he shows that his employer does not comply with the regulations might have the same effect, but that money will be useless to the farm worker when he is back in the field without water to drink.[118] Instead, it is more sensible to simply compel the farmer to correct the problem and use the court's

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[112] *See Comfort*, 17 Cal. 2d at 741 ("An injunction . . . operates on the person of the defendant by commanding him to do or desist from certain action.").
[113] *Id.*; CAL. CODE REGS. tit. 8, § 3395 (2012) (requiring employers to allow employees to take rest breaks and to supply water and shade).
[114] CODE REGS. tit. 8, § 336 (setting forth Cal/OSHA's penalty assessment scheme); *see also* Susan Ferriss, State Shuts Down Merced Farm Labor, THE MODESTO BEE (June 13, 2008), http://www.modbee.com/2008/06/13/327746/state-shuts-down-merced-farm-labor.html (on file with the *San Joaquin Agricultural Law Review*) (stating that Cal/OSHA shut down Merced Farm Labor after the agency determined that the labor contractor did not disclose previous citations and failed to pay the outstanding fines).
[115] *See Proposition 37 and Assembly Bills 2676 and 2346*, TERRA FIRMA FARMS, http://www.terrafirmafarm.com/proposition-37-and-assembly-bills-2676-and-2346/ (on file with the *San Joaquin Agricultural Law Review*) (stating that large scale farmers can mitigate the risk that is involved in harsh regulations by firing farm workers, while small scale farms deal with the problem by going out of business).
[116] CAL. CIV. PROC. CODE § 1218(a) (West 2007).
[117] *Id.*; *see also* CAL. CODE REGS. tit. 8, § 336 (2012) (setting forth Cal/OSHA's penalty assessment scheme).
[118] *See* CAL. CODE REGS. tit. 8, § 3395 (2012) (requiring employers to allow employees to take rest breaks and to supply water and shade).

power to hold the farmer in contempt as motivation for the farmer to comply.[119]

Additionally, limiting a farm worker's remedy to injunctive relief would also ensure that the private right of action does not contribute to California's lawsuit abuse problem.[120] Many frivolous lawsuits are spurred by the prospect of monetary gain.[121] If injunctive relief was the sole remedy for a farm worker's action against his employer, it would ensure that only plaintiffs who truly take issue with an employer's real failure to comply with OSHA regulations would bring the action.[122]

By allowing the employee to bring a claim for injunctive relief directly against the farmer, the Legislature would also redirect legal efforts to their most productive purpose and would save Cal/OSHA time and money.[123] Cal/OSHA does have the power to compel employers to correct violations after they become aware of the violation and conduct an investigation.[124] However, Cal/OSHA is understaffed and underfunded, so keeping up with noncompliance is difficult: based on Cal/OSHA's current staffing levels and the number of worksites that exist in California, it would take the agency 189 years to inspect all the worksites.[125]

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[119] *See Comfort*, 17 Cal. 2d at 741 ("An injunction . . . operates on the person of the defendant by commanding him to do or desist from certain action.").
[120] *Id.*;Tom Scott, *CA Named #1 Judicial Hellhole*, CAL. CITIZENS AGAINST LAWSUIT ABUSE (Dec. 13, 2012), http://www.cala.com/news/calablog4/512-ca-named-1-judicial-hellhole (on file with the *San Joaquin Agricultural Law Review*) (describing California's new title as the nation's "#1 judicial hellhole").
[121] *See* Scott, supra note 120 (noting that California's infamous legal climate is the result of various types of lawsuits that involve money damages).
[122] *Id.*; *see also Comfort*, 17 Cal. 2d at 741 ("An injunction . . . operates on the person of the defendant by commanding him to do or desist from certain action.").
[123] *See Comfort*, 17 Cal. 2d at 741 ("An injunction . . . operates on the person of the defendant by commanding him to do or desist from certain action."); Gosia Wozniacka, *Farmworkers Sue Over Heat Rules*, THE FRESNO BEE, October 19, 2012, at A10 (noting that United Farm Workers brought a lawsuit against Cal/OSHA for failing to enforce heat regulations).
[124] *See* Wozniacka, *supra* note 123, at A10 (noting that United Farm Workers brought a lawsuit against Cal/OSHA for failing to enforce heat regulations).
[125] *See id.*; *Agency Oversight: Division of Occupational Safety and Health* (Feb. 10, 2010), WORKSAFE, http://www.worksafe.org/2010/02/division-of-occupational-safety-and-health-dosh-or-calosha.html (on file with the *San Joaquin Agricultural Law Review*) (stating that with current staff levels, it would take Cal/OSHA 189 years to inspect all of California's worksites).

UFW sued Cal/OSHA in October of 2012, alleging that the agency failed to respond to various farm workers' complaints.[126] In the suit, UFW asked the court to declare that Cal/OSHA had failed to perform its duties and to compel the agency to investigate the alleged noncompliance.[127] Cal/OSHA has noted that the lawsuit threatens to divert limited resources away from the agency's enforcement efforts.[128] If a private right of action with injunctive relief existed, advocates like UFW could help farm workers bring an action directly against the farmer and obtain direct relief without waiting for a Cal/OSHA investigation.[129] Cal/OSHA might also be able to save money by reducing the potential lawsuits that advocacy groups could bring against them.[130]

IV. CREATING A HEALTHY HARVEST

The standard that the Court set forth in *Brinker v. Superior Court* would be appropriate for future courts to apply to these claims and demonstrates what that application might look like. The Analysis concludes with examples of why Legislative action has not and will not be effective.

A. Brinker Restaurant Corp. v. Superior Court

The California Supreme Court provided some clarification to employers regarding their meal period obligations in *Brinker*.[131] *Brinker* involved a group of restaurant employees who took their meal breaks about an hour or two into their shifts.[132] The workers would complete some preliminary preparations, take their breaks, and then work through the rest of their shift.[133]

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[126] Wozniacka, *supra* note 123, at A10.
[127] Compl. at 42, Bautista v. State of CA Division of Occupational Safety and Health, No. BC494056 (Cal. Super. filed 2012), 2012 WL 5305185 (on file with the *San Joaquin Agricultural Law Review*).
[128] Wozniacka, *supra* note 123, at A10.
[129] *See id.* (noting that United Farm Workers brought a lawsuit against Cal/OSHA for failing to enforce heat regulations); *Comfort*, 17 Cal. 2d at 741 ("An injunction . . . operates on the person of the defendant by commanding him to do or desist from certain action.").
[130] Wozniacka, *supra* note 123, at A10.
[131] Brinker v. Superior Court, 53 Cal. 4th 1004, 1021 (2012).
[132] *Id.* at 1019.
[133] *Id.*

In its decision, the court interpreted Section 512 of the Labor Code, which requires the employer to "provide" the employee with a meal period.[134] The court also looked to Wage Order 5.[135] The plaintiff restaurant employees asserted that their employers were obligated to ensure that the employees took their meal breaks.[136] Thus, the employer would be liable if an employee missed a meal period regardless of whether the employee voluntarily decided to forego the meal period.[137] The court held that employers do not need to force their employees to take their meal periods or continuously monitor their employees to make sure that they take meal breaks.[138] Instead, the employer fully complies with the Labor Code and Wage Order 5 when it "relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted thirty-minute break, and does not impede or discourage them from doing so."[139]

The *Brinker* decision does not apply to agricultural employees because the court's decision only interprets Section 512 of the Labor Code and Wage Order 5 and is inapplicable to agricultural workers, who instead fall solely within Wage Order 14-80.[140] The court did not give any guidance as to the standard that courts should apply to agricultural employees' rest and meal periods.[141] For several reasons, the standard that the court set forth in the *Brinker* decision is appropriate for courts to apply in a case where an agricultural worker seeks an injunction.[142]

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[134] *Id.* at 1034.
[135] *Id.* Wage Order 5 states that employers "shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period." CAL. CODE REGS. tit. 8, § 11020 (12)(A) (2012).
[136] *Brinker*, 53 Cal. 4th at 1038.
[137] *See id.*
[138] *Id.* at 1038–39.
[139] *Id.* at 1040.
[140] *See id.* at 1034 (interpreting Wage Order 5 and Section 512 of the California Labor Code); CAL. CODE REGS. tit. 8, § 11140 (12) (2012) (governing meal breaks of agricultural workers).
[141] *See Brinker*, 53 Cal. 4th at 1034-41 (lacking any discussion of applicability to agricultural workers); Anthony Raimondo, *California Supreme Court Issues Long Awaited Meal Period Decision*, MCCORMICK BARSTOW LLP, http://www.mccormickbarstow.com/california-supreme-court-issues-long-awaited-meal-period-decision (on file with the *San Joaquin Agricultural Law Review*) (stating that the *Brinker* decision's application to the agricultural sector is unclear).
[142] *See infra* notes 143–53 and accompanying text.

First, *Brinker*'s flexible nature is compatible with the needs of the agricultural sector and makes sense in light of the fact that agricultural workers may voluntarily forego their rest periods.[143] So long as a farmer makes the required amount of shade and water available to the farm worker, he should not need to force the worker to take rest breaks or drink a quart of water per hour.[144] The farmer should only be required to make the *opportunity* for shade, rest, and hydration available.[145] If the farmer acts accordingly, then injunctive relief is not necessary.[146]

A second reason the *Brinker* standard should apply is based on the nature of the heat illness prevention regulations.[147] The regulations state that employees should rest whenever they feel that they need rest in order to prevent their bodies from overheating.[148] The employee is in the best position to gauge the effects of the heat on his own body.[149] Thus, it would make little sense for a court to require employers to force an employee to take rest breaks, drink water, or continuously

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[143] *See Brinker*, 53 Cal. 4th at 1040 ("[T]he employer is not obligated to police meal breaks."); ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF SB 1121, at 3 (noting that agricultural employers need flexibility because they must schedule workers around weather conditions and seasonal production); Letter from Anne Stevason, Acting Chief Counsel of the Cal. Div. of Labor Standards, to Robyn A. Babcock, Sidley Austin Brown & Wood (Jan. 28, 2002) (on file with the *San Joaquin Agricultural Law Review*) (stating that agricultural employees may opt out of the rest period).

[144] *See* CAL. CODE REGS. tit. 8, § 3395 (2012) (requiring employers to allow employees to take rest breaks and to supply water and shade); *Brinker*, 53 Cal. 4th at 1040 (requiring the employer to provide employees with a "reasonable opportunity" to take a break).

[145] *See* CAL. CODE REGS. tit. 8, § 3395 (2012) (requiring employers to allow employees to take rest breaks and to supply water and shade); *Brinker*, 53 Cal. 4th at 1040 (requiring the employer to provide employees with a "reasonable opportunity" to take a break).

[146] *See* CODE REGS. tit. 8, § 3395 (requiring employers to allow employees to take rest breaks and to supply water and shade); Comfort v. Comfort, 17 Cal. 2d 736, 741 (1941) ("An injunction . . . operates on the person of the defendant by commanding him to do or desist from certain action.").

[147] *See generally* CODE REGS. tit. 8, § 3395 (codifying California's heat illness prevention measures).

[148] *Id.* § 3395 (d)(3).

[149] *E.g.*, Ctr. for Disease Control and Prevention, *Frequently Asked Questions (FAQ) About Extreme Heat*, http://emergency.cdc.gov/disasters/extremeheat/faq.asp (on file with the *San Joaquin Agricultural Law Review*) (listing the symptoms that a person might experience when they are having an adverse reaction to the heat).

monitor all of their employees.[150] As long as the opportunity to rest in shade and drink water exists and the employer does not discourage breaks, then the employee should not be granted injunctive relief.[151]

Finally, the standards that the court set forth in the *Brinker* decision interpret Wage Order 5, which generally offers higher protection to workers than Wage Order 14.[152] Since the *Brinker* standard applies to a Wage Order that gives workers heightened protection when compared to Wage Order 14, it would make little sense to say that the *Brinker* standard is not stringent enough and does not offer sufficient protection to farm workers.[153] Arguably, a court could apply a lower standard than *Brinker* to Wage Order 14, so advocates for farm workers should be satisfied that *Brinker* will provide agricultural workers with sufficient protection.[154]

1. Brinker at Work: What does a "reasonable opportunity" look like?

Perhaps the best way to illustrate what the "reasonable opportunity" standard looks like in relation to Cal/OSHA's heat illness prevention regulation is to begin with an obvious example of what it is *not* a reasonable opportunity by focusing on shade standards.[155] Guimarra Vineyards Corporation's ("Guimarra") approach to shade structures

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[150] *See id.*; CODE REGS. tit. 8, § 3395 (d)(3) (requiring employers to allow employees to rest in the shade whenever the employee believes that they "need to do so to protect themselves from overheating.").

[151] *See* CODE REGS. tit. 8, § 3395 (requiring employers to allow employees to take rest breaks and to supply water and shade); *Comfort*, 17 Cal. 2d at 741 ("An injunction . . . operates on the person of the defendant by commanding him to do or desist from certain action."); *Brinker*, 53 Cal. 4th at 1040 (requiring the employer to provide employees with a "reasonable opportunity" to take a break).

[152] *See Brinker*, 53 Cal. 4th at 1034–1035 (2012) (interpreting Wage Order 5); Anthony Raimondo, *California Supreme Court Issues Long Awaited Meal Period Decision*, MCCORMICK BARSTOW LLP, http://www.mccormickbarstow.com/california-supreme-court-issues-long-awaited-meal-period-decision (on file with the *San Joaquin Agricultural Law Review*) (noting that Wage Order 14 stands apart from the other Wage Orders because of its more relaxed standards).

[153] *See id.* (discussing Wage Order 14's relaxed standards.)

[154] *Id.*

[155] CODE REGS. tit. 8, § 3395; *See* Brinker Restaurant Corp. v. Superior Court, 53 Cal. 4th 1004, 1040 (2012) (requiring the employer to provide employees with a "reasonable opportunity" to take a break).

failed to meet the reasonable opportunity standard.[156] The employer's shade structure consisted of a black tarp that was casually tossed over several rows of grape vines.[157] Employees preferred to stand in the direct sunlight instead of seeking shade under the tarp because it was hotter under the tarp.[158] This shade structure would therefore "defeat the purpose of shade" because an employee is going to heat up, not cool down, under Guimarra's shade structure.[159] Since the structure would violate Cal/OSHA's standards, the employer would not be providing the employees with a "reasonable opportunity" to seek shade.[160]

But suppose Guimarra instead provided each employee with a large beach umbrella and chair that complied with Cal/OSHA's requirements regarding the purpose of shade.[161] However, the vineyard employed an informal anti-shade policy and carried out the policy by reprimanding or ridiculing farm workers who took breaks under their umbrellas.[162] In this case, a court would not find that Guimarra afforded the employees a "reasonable opportunity" under *Brinker* because the court in *Brinker* did not find that an employer gave the employee a reasonable opportunity to take a break if they "impede or discourage them from doing so."[163] Additionally, this behavior would violate Cal/OSHA's heat illness prevention regulation, so the farm workers in this case would not have a "reasonable opportunity" to seek shade.[164]

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[156] *Brinker*, 53 Cal. 4th at 1040 (2012); *see also* CODE REGS. tit. 8, § 3395(b) ("Shade is not adequate when heat in the area of shade defeats the purpose of shade, which is to allow the body to cool."); *Landmark Lawsuit Accuses State of Failing to Protect Farm Workers from Heat-Related Death and Illness*, ACLU (July 30, 2009), http://www.aclu.org/human-rights/landmark-lawsuit-accuses-state-failing-protect-farm-workers-heat-related-death-and-illn (on file with the *San Joaquin Agricultural Law Review*) (stating that the tarp on the worksite was hotter underneath than standing in the sun).

[157] *Landmark Lawsuit Accuses State of Failing to Protect Farm Workers from Heat-Related Death and Illness*, *supra* note 156.

[158] *Id.*

[159] *Id.*; CODE REGS. tit. 8, § 3395(b).

[160] CODE REGS. tit. 8, § 3395(b); *Brinker*, 53 Cal. 4th at 1040; *Landmark Lawsuit Accuses State of Failing to Protect Farm Workers from Heat-Related Death and Illness*, *supra* note 156.

[161] *Id.* §§ 3395(b), (d).

[162] *Brinker*, 53 Cal. 4th at 1040.

[163] *Id.*

[164] *See* CODE REGS. tit. 8, § 3395(d)(3) (stating that employers must "encourage" employees to rest in the shade).

This final example involves the same facts as the previous example.[165] However, this time the employer does not have the informal anti-shade policy.[166] In fact, the employer tells the employees that they should take a break in the shade whenever they think that they are getting too hot.[167] Suppose the farm worker knows that he can take a break under the umbrella and he feels like he is overheating, but he keeps working anyway.[168] The employer notices that the farm worker looks like he is getting hot but does not say anything.[169] In this case, the farm worker still had a "reasonable opportunity" to seek shade.[170] According to *Brinker*, the employer is not required to "police meal breaks," and likewise the farm worker's employer should not have to monitor its employees.[171] In this case, the employer provides a reasonable opportunity to the farm worker to seek shade and complies with Cal/OSHA regulations, so the farm worker should not prevail if he brings an action against the employer.[172]

B. Inadequacy of Legislative Measures: Sacramento's Responses are Bad for Farmers and Workers

The Legislature's most recent attempts to curb heat related illness among farm workers involved imposing criminal liability and massive fines on farmers.[173] Assembly Bill 2676, which was authored by Democrat Charles Calderon, would have required farmers to provide their workers with "ready access to an area of shade sufficient to allow the body to cool, and potable water that is suitably cool. . . ."[174] The bill punished violators with up to six months in jail or a $10,000 fine.[175] Opponents argued that measures like these would push

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[165] *See supra* notes 161–164.
[166] *See Brinker*, 53 Cal. 4th at 1040.
[167] *Id.*; CAL. CODE REGS. tit. 8, § 3395(d)(3).
[168] *Id.*
[169] *See Brinker*, 53 Cal. 4th at 1040 (stating that employers do not need to monitor their employees to make sure that they are taking their break).
[170] *Id.*
[171] *Id.*; CODE REGS. tit. 8, § 3395(d)(3).
[172] *See Brinker,* 53 Cal. 4th at 1040; CODE REGS. tit. 8, § 3395(d)(3).
[173] AB 2676, 2012 Leg., 2011–2012 Sess. (Cal. 2012) (as enrolled on September 11, 2012 but not enacted).
[174] *Id.*
[175] *Id.* If the farmer's noncompliance ended up causing a worker's injury, then the court could fine the farmer up to $25,000, impose a sentence of up to a year in jail, or both. *Id.*

agribusiness out of California because farmers would take refuge in states with more friendly laws.[176] Additionally, these opponents note large-scale farm operations can attempt to reduce their exposure by eliminating workers and using robots in their stead, while small-scale farms would simply go out of business.[177] While these measures might have had a powerful deterrent effect, Governor Jerry Brown determined that the punishment would be too harsh on farmers, and thus he vetoed the bill.[178] In his veto message, Governor Brown acknowledged that regulatory agencies could improve their enforcement of heat prevention measures but that imposing criminal liability is not the proper course of action.[179] Ultimately, if lawmakers imposed criminal liability and fines on farmers, the result would not only be unduly burdensome, but it would not require farmers to change their behavior.[180] Thus, the punishment would not directly address the farm worker's concerns.[181] Additionally, criminal liability and steep fines might persuade a cautious farmer to take steps to mitigate risk,

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[176] Ken Smith, *The Heat is On*, CHICO NEWS AND REVIEW (Aug. 6, 2012), http://www.newsreview.com/chico/heat-is-on/content?oid=7508379 (on file with the *San Joaquin Agricultural Law Review*) (citing Assemblyman Dan Logue's opposition to AB 2676 on the grounds that the bill would force businesses to move to "more accommodating states like Texas.").

[177] *Proposition 37 and Assembly Bills 2676 and 2346*, TERRA FIRMA FARMS, http://www.terrafirmafarm.com/proposition-37-and-assembly-bills-2676-and-2346/ (on file with the *San Joaquin Agricultural Law Review*); Jim Sanders, *California Bills Aimed at Better Worker Conditions Head to Gov. Jerry Brown*, THE SACRAMENTO BEE, (Aug. 31, 2012, 12:00 AM), http://www.sacbee.com/2012/08/31/4774460/california-bills-aimed-at-better.html (on file with the *San Joaquin Agricultural Law Review*) (quoting Assemblyman Bill Berryhill as saying "the penalties in this bill, if you're a 40-acre farmer, it puts you out of business.").

[178] *See* Letter from Governor Edmund G. Brown, Jr., Governor of California, to the Members of the California State Assembly (Sep. 30, 2012) (on file with the *San Joaquin Agricultural Law Review*) (stating that Governor Brown was returning the bill without his signature).

[179] *Id.*

[180] *See* AB 2676, *supra* note 173 (requiring violators to pay a fine, serve jail time, or both, but not requiring compliance); Smith, *supra* note 176 (citing Assemblyman Dan Logue's opposition to AB 2676 on the grounds that the bill would force businesses to move to "more accommodating states like Texas.").

[181] *See, e.g.*, *Smith*, *supra* note 176 (stating that AB 2676 was meant to "ensure that the state's agricultural workers are provided shade and cool water.").

but those steps might ultimately result in the farm worker's unemployment.[182]

Injunctive relief, unlike criminal liability and hefty fines, would address the concerns of both parties to the debate over heat illness prevention.[183] First, injunctive relief would directly address workers' concerns: farmers who do not comply with OSHA's existing regulations must become compliant.[184] The injunction would give the farmer the opportunity to comply with the judicial order before criminal penalties (i.e., contempt) ever take effect.[185] At the same time, the prospect of injunctive relief would be less likely to drive the risk adverse farmer to take extreme measures like moving operations out of state, eliminating worker jobs, or going out of business altogether.[186]

V. CONCLUSION

Although California's heat-illness prevention regulation is revolutionary, the Legislature can still do more to prevent needless heat-related deaths.[187] If a statutory right to injunctive relief existed back in the summer of 2008, perhaps a group like UFW could have obtained a statutory injunction based on the conditions at the farm that

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[182] *See, e.g.*, *Proposition 37 and Assembly Bills 2676 and 2346*, *supra* note 177 (noting that AB 2676's requirements would be impossible for their small farm to comply with, and stating that larger farms would put robotic devices to work in place of humans).

[183] *See* Comfort v. Comfort, 17 Cal. 2d 736, 741 (1941) ("An injunction . . . operates on the person of the defendant by commanding him to do or desist from certain action."); Sanders, *supra* note 177 (noting that the opposition to the criminal penalties in AB 2676 argued that the harsh penalties would force farmers to go out of business); Letter from Governor Edmund G. Brown, Jr., Governor of California, to the Members of the Cal. State Assemb. (Sep. 30, 2012) (on file with the *San Joaquin Agricultural Law Review*) (noting that the state could do more to prevent heat illness, but that criminal penalties are not appropriate).

[184] *See Comfort*, 17 Cal. 2d at 741 (1941) ("An injunction . . . operates on the person of the defendant by commanding him to do or desist from certain action.").

[185] *See supra* notes 112–113, 116 and accompanying text.

[186] *E.g.*, Sanders, *supra* note 177 (noting opponent's argument that AB 2676 would hurt agribusiness because the penalties were so harsh).

[187] *See* Letter from Governor Edmund G. Brown, Jr., *supra* note 6; *see also* Press Release, DEP'T OF INDUSTRIAL RELATIONS, Cal/OSHA Moves to Strengthen Heat Illness Prevention Regulations (July 31, 2009), http://www.dir.ca.gov/DIRNews/2009/IR2009-26.html (on file with the *San Joaquin Agricultural Law Review*) (stating that the heat illness prevention regulation was "first of its kind").

Maria Isabel Vasquez Jimenez was working at and could have forced the employer to provide access to shade and water.[188] Maybe she would now be a twenty-three year-old woman raising a six year-old child with her husband.[189] By allowing outdoor workers to obtain injunctions when their employers do not comply with the regulations, the Legislature would ensure that employers actually obey the regulation.[190] If employers obey the regulation, then preventable heat related deaths would be eliminated or drastically reduced.[191] At the same time, agribusiness can continue to thrive in California alongside its workers.[192]

KATHERINE L. PANKOW[193]

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[188] *Family of Teen Heat Stroke Death Victim Launching Campaign to Demand Judge Reject Plea Bargain Deal*, UFW (Feb. 10, 2011, 10:30 AM), http://www.ufw.org/_board.php?mode=view&b_code=news_press&b_no=8888 (on file with the *San Joaquin Agricultural Law Review*) (asserting that Vasquez Jimenez died because she worked in the summer heat for nine hours without ready access to shade or water); CAL. CODE REGS. tit. 8, § 3395 (2012) (requiring employers to make drinking water, shade, and rest breaks readily available to their employees); *Comfort*, 17 Cal. 2d at 741 ("An injunction . . . operates on the person of the defendant by commanding him to do or desist from certain action.").

[189] Sasha Khokha, *Teen Farmworker's Heat Death Sparks Outcry*, NPR (June 6, 2008, 11:50 AM), http://www.npr.org/templates/story/story.php?storyId=91240378 (on file with the *San Joaquin Agricultural Law Review*) (stating that Vasquez Jimenez was 17 years old, two months pregnant, and engaged to her childhood sweetheart from Mexico when she died in 2008).

[190] *See Comfort*, 17 Cal. 2d at 741 ("An injunction . . . operates on the person of the defendant by commanding him to do or desist from certain action.").

[191] *Id.*

[192] *Agricultural Statistical Overview*, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, *available at* http://www.cdfa.ca.gov/statistics/ (on file with the *San Joaquin Agricultural Law Review*).

[193] J.D. Candidate, University of the Pacific, McGeorge School of Law, 2014; B.S., Criminal Justice, California State University, Sacramento, 2010. I would like to thank Professor Gerald Caplan for his advice on earlier drafts of this Comment. I am also eternally grateful for John Sandberg's unwavering support, for the constant companionship of my two cats during the writing process, and the Editors of the *San Joaquin Agricultural Law Review* for furthering scholarship related to agricultural law.