

# FROM FIELDS OF OPPORTUNITY TO FIELDS *DE CALZONES*: WORKPLACE SEXUAL VIOLENCE IN AMERICA’S AGRICULTURAL INDUSTRY

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## I. INTRODUCTION

There are half a million women working in the agricultural fields of America;<sup>1</sup> most are undocumented. Most are victims of sexual violence in the very fields that produce the food that ends up on our tables at home. In recent years, the “Me Too” movement generated significant media attention spanning across colleges to the entertainment business, and even to the political realm. What has been left in the shadows is the long-standing, rampant epidemic of sexual violence in the agricultural industry. “The history of agriculture in the U.S. [has] always been one of sexual violence . . . .”<sup>2</sup> Sexual violence is part of the work experience for most women farmworkers.<sup>3</sup> Despite its deeply rooted historical existence, coupled with the modern trend of the informed consumer, the pervasiveness of sexual violence against women farmworkers in America’s fields remains the nation’s biggest open secret.

The reality of workplace violence is prevalent today. Every year approximately two million workers are victims of violence at their place of employment.<sup>4</sup> The Occupational Safety & Health Administration (OSHA) defines workplace violence as “violence or the threat of violence against workers. It can occur at or outside the workplace and can range from threats and verbal abuse to physical assaults and homicide”<sup>5</sup> While workplace violence encompasses a wide range of violent acts and plagues a gamut of employment industries, sexual violence in the agricultural industry is an obscured epidemic. Women in agricultural work are “surely the most vulnerable of all workers in America.”<sup>6</sup> The nature of the industry largely contributes to keeping the issue hidden beneath the nation’s soil. Because “[s]exual violence doesn’t happen unless there’s an imbalance in power . . . . And in the agricultural industry, the imbalance of power between perpetrator, company and the worker is probably at its greatest.”<sup>7</sup> With an

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1. *Rape in the Fields*, FRONTLINE (June 25, 2013), <https://perma.cc/LE25-RPVX>.

2. Ariel Ramchandani, *There’s a Sexual-Harassment Epidemic on America’s Farms*, THE ATLANTIC (Jan. 29, 2018), <https://perma.cc/RUJ8-UTBA>.

3. See Robin R. Runge, Symposium, *Theory and Praxis in Reducing Women’s Poverty: Failing to Address Sexual and Domestic Violence at Work: The Case of Migrant Farmworker Women*, 20 Am. U.J. Gender Soc. Pol’y & L. 871, 885 (2012).

4. Sheryl L. Erdmann, Note, *Eat the Carrot and Use the Stick: The Prevalence of Workplace Violence Demands Proactive Federal Regulation of Employers*, 43 Val. U.L. Rev. 725, 729 (2009).

5. U.S. DEP’T OF LAB., OSHA FACT SHEET ON WORKPLACE VIOLENCE (2002), <https://perma.cc/E92R-B2PN>.

6. NSVRC, WHAT IS SEXUAL VIOLENCE? (2010), <https://perma.cc/LNM2-VJE8>.

7. Bernice Yeung & Grace Rubenstein, *Female Workers Face Rape, Harassment in US Agriculture Industry*, THE CTR. FOR INVESTIGATIVE REPORTING (June 25, 2013),

estimated three million migrant and seasonal farmworkers in the United States, over half of the workers are undocumented immigrants,<sup>8</sup> of which 25% are women laborers.<sup>9</sup> For a myriad of reasons, female undocumented agricultural workers who face workplace violence are often left in the dark without access to resources and support.

Sexual violence in the fields is an issue that spans across the United States; however, we do not have to look far. Ranking in the top five nationally in corn, soybean, egg, hog, and meat production, Iowa meat packing and egg production plants have been the center of attention for notorious immigration violations, deplorable working conditions, and sexual violence allegations.<sup>10</sup> As a leader in the agricultural industry, Iowa has a duty to promote improved working conditions for its workers and prevent and deter health and safety violations. Furthermore, promoting safe working conditions across the agricultural industry will prove desirable for employers to avoid or diminish federal and state fines, violations, lawsuits, and negative public relations resulting in increased work output and overall better work product.

Undocumented women in the agricultural workforce are at an increased risk of being victims of sexual violence due to their immigration status, significant language and cultural barriers, employer retaliation, fear of law enforcement, and isolated nature of their work. Considering the prevalent—yet hidden—nature of this issue, the current private and public regulations and enforcements are insufficient. Even when brave women choose to come forward and report, victims see little, if any, consequences for their perpetrators, and often suffer retaliation.<sup>11</sup>

This Note seeks to bring to light the problem of workplace sexual violence in the agricultural sphere among undocumented women. It will discuss the failed protections that allow this problem to continue and will suggest improved mechanisms for protecting farmworkers from sexual violence. This Note begins by introducing the concept of workplace violence. Part II will address the barriers undocumented women face in the workplace and the vulnerabilities that make them the perfect victim. Part III discusses the unique agricultural structure that heightens the risk and allows the perpetration of sexual violence. Part IV examines

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<https://perma.cc/6QUF-S453>.

8. NSVRC, *supra* note 6.

9. *Farm Labor*, USDA, <https://perma.cc/7MG5-R7B2> (archived June 29, 2020).

10. See Yeung & Rubenstein, *supra* note 7; Luis Argueta, *Abused: The Postville Raid-Trailer* (2011), <https://perma.cc/7T9U-J3RE>.

11. Ramchandani, *supra* note 2 (finding that more than three-quarters of sexual-harassment cases in low-wage service-sector jobs include an allegation of retaliation).

the existing remedies that fail to protect agricultural workers. Part V prompts employers to take note of the issue by examining the risks and consequences of failing to address sexual violence in the workplace. Lastly, Part VI proposes resolutions to prevent sexual violence against farmworkers.

To understand the issue of sexual violence in the agricultural industry, it is important to recognize the scope of the issue. The Center for Disease Control and Prevention (CDC) defines sexual violence as “sexual activity when consent is not obtained or freely given.”<sup>12</sup> Sexual violence includes rape or sexual assault, incest, intimate partner violence, unwanted contact/touching, sexual harassment, sexual exploitation, showing of genitals to others without consent, masturbating in public, and even watching someone in a private act without their consent.<sup>13</sup> While sexual violence is a criminal offense, the law also recognizes sexual harassment as a form of employment discrimination.<sup>14</sup> According to the United States Equal Employment Opportunities Commission (EEOC), “unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when” this conduct explicitly or implicitly affects an individual’s employment, unreasonably interferes with an individual’s work performance, or creates an intimidating, hostile, or offensive work environment,<sup>15</sup> and are unlawful conduct punishable by both criminal and civil penalties.

Further, when we speak of the agricultural industry, we recognize the array of labor that falls under this industry. Although agriculture is mostly associated with planting and harvesting crops, agricultural labor includes a much broader range of tasks, including: packing; canning; working in tree farms and nurseries; cultivating and tilling of soil; dairy, meat, or egg production; production, cultivation, growing and harvesting of any agricultural or horticultural commodity; raising, preparation, delivery, or transportation of livestock, bees, fur-bearing animals, poultry; and any practice performed on a farm or processing plant.<sup>16</sup> While the industry encompasses a wide assortment of employment positions, women workers in agricultural environments face similar challenges across the industry.

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12. *Violence Prevention*, CDC, <https://perma.cc/6438-EXHT> (archived June 29, 2020).

13. NSVRC, *supra* note 6.

14. 29 C.F.R. § 1604.11 (2016).

15. *Id.*

16. HUM. RTS. WATCH, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE U.S. TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT 14 (2012).

## II. CREATING THE PERFECT VICTIM

A discussion of sexual violence against women in the agricultural industry necessitates an understanding of sexism, racism, classism, and xenophobia and how the intersection of these ‘isms’ contribute to the creation and preservation of the issue. Undocumented agricultural women workers are uniquely vulnerable to increased sexual violence under structural, cultural, economic, work environment, and interpersonal factors.<sup>17</sup>

### A. Working in a Male Dominated Industry

Gender itself is a significant risk factor for sexual violence.<sup>18</sup> The agricultural industry is a male-dominated workforce with men making up more than 70% of the labor pool. In contrast, women only constitute about 20%-25% of the total farmworker population, leaving them “locked into low wage, low-prestige jobs, dependent on men for their employment, [to] perform tasks that [are] evaluated by men, and [to] work in crews and teams organized by men.”<sup>19</sup> Women are especially vulnerable to sexual violence where men are in positions of power and control over women’s employment. Male perpetrators of sexual violence include foremen leaders, supervisors, farm labor contractors, company owners, and coworkers who have “power to dictate work assignments and to determine who can make enough money to feed their children and keep a roof over [their] head.”<sup>20</sup> This gender imbalance is the classic *quid pro quo*.<sup>21</sup> Women are forced to engage in sexual favors in order to get a job, keep a job, or get a promotion.<sup>22</sup> Additionally, perpetrators are properly situated to foster women’s vulnerability. Perpetrators are often protected by the company, have lawful immigration status, and speak English—factors that women victims regularly lack.<sup>23</sup> Even when women find the courage to report the crimes, they face significant retaliatory repercussions. In fact,

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17. Nicole Kim, *Women Agricultural Workers’ Perceptions of Workplace Sexual Harassment in Yakima Valley 4* (2014) (unpublished M.P.H. thesis, University of Washington) (on file with the University of Washington Public Health Program).

18. S. POVERTY LAW CENTER, *SEXUAL VIOLENCE AGAINST FARMWORKERS: A GUIDEBOOK FOR CRIMINAL JUSTICE PROFESSIONALS 12* (2010).

19. SARA KOMINERS, *WORKING IN FEAR: SEXUAL VIOLENCE AGAINST WOMEN FARMWORKERS IN THE UNITED STATES 25* (2015).

20. *Id.* at 20.

21. Kim, *supra* note 17, at 6 (defining “*quid pro quo*” as “when employment is contingent on an employee’s submission or rejection of sexual acts”).

22. Laken Gilbert, Note, *Cultivating Justice for Survivors of Sexual Assault in America’s Agricultural Industry*, 6 Ky. J. Equine Agric. & Nat. Resources L. 347, 355 (2013-14).

23. KOMINERS, *supra* note 19, at 20.

more than four out of five workers who report are demoted, fired, or subjected to further abuse.<sup>24</sup> As such, complying with a perpetrator's orders can be a life or death situation. Women workers are cognizant that perpetrators in positions of power have unmatched control over their future in their employment and, ultimately, in their ability to remain in the United States, if they refuse to submit to sexual favors.

Additionally, the power imbalance is further complicated by cultural beliefs about gender norms which are exasperated in an industry largely dominated by Latino men.<sup>25</sup> With 83% of all farmworkers identifying as Hispanic/Latinx origin,<sup>26</sup> cultural attitudes of *machismo*, which prescribes a male supremacy and dictates separate roles for men and women, particularly in the realm of employment, contribute to the victimization of women.<sup>27</sup> Male workers target women who work outside the home and subject them to sexual violence as a way to preserve male supremacy and reinforce traditional gender roles.<sup>28</sup> Women also buy into this cultural framework and are often reluctant or afraid to speak out due to ingrained cultural beliefs of compliance.<sup>29</sup> Cultural customs that perpetuate submissiveness, inferiority, and victim-blaming are at the root of the birth and preservation of the problem.<sup>30</sup> While men have an interest in preserving these cultural attitudes, Latinx women often find themselves perpetuating this ideology. In fact, many women victims reported backlash from other women workers, blaming the victim for "instigating" the sexual violence or for reporting the crime.<sup>31</sup> Reporting crimes of sexual violence is particularly difficult for immigrant women due to structural and cultural beliefs that permit and reinforce male dominance. Women that challenge the male hierarchy in the workplace will face economic, social, and familial retaliation.<sup>32</sup>

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24. Yeung & Rubenstein, *supra* note 7.

25. KOMINERS, *supra* note 19, at 25.

26. TRISH HERNANDEZ & SUSAN GABBARD, JBS INT'L, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2015-2016: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS 1 (2018).

27. KOMINERS, *supra* note 19, at 25-26.

28. Kim, *supra* note 17, at 24.

29. KOMINERS, *supra* note 19, at 26.

30. Christa Conry, *Forbidden Fruit: Sexual Victimization of Migrant Workers in America's Farmlands*, 26 Hastings Women's L.J. 121, 131 (2015).

31. KOMINERS, *supra* note 19, at 26.

32. *See id.*

### *B. Agricultural Workforce is Predominantly Undocumented*

Immigration status plays a pivotal role in the victimization of women farmworkers. Approximately over half a million women work in the agricultural industry,<sup>33</sup> with about 80% indicating they've experienced some form of sexual violence on the job.<sup>34</sup> Even more surprising, according to the Bureau of Justice Statistics, only about 41% of women workers in agriculture who have been victims of workplace sexual violence have ever reported the crimes to police.<sup>35</sup> This disparity in reporting rates can be attributed to a multitude of reasons, the most decisive of which is that about half (49%) of all farmworkers are undocumented.<sup>36</sup> These figures are likely much higher considering many workers are hesitant to report their undocumented status. Some studies suggest that as many as 60%-70% of the farmworker population is undocumented.<sup>37</sup> One of the most challenging aspects to addressing sexual violence against women agricultural workers is quantifying and putting a face to the problem when victims know revealing their identity comes with risks of retaliation and deportation.<sup>38</sup>

While sexual violence has low report rates even among United States citizens and legally admitted immigrants, undocumented farmworkers are significantly less likely to report sexual violence in the workplace because of their undocumented status.<sup>39</sup> Undocumented workers face unique and substantial challenges as unauthorized employees. Reporting crimes requires victims to disclose their immigration status to law enforcement agencies who receive reports of the crimes. Those same agencies are very often tasked with enforcing immigration laws, or otherwise turn over undocumented immigrants to immigration officials for investigation and deportation, leaving victims at risk of deportation for simply reporting a crime.<sup>40</sup> Considering the political climate within the recent years, the fear of deportation is real. Immigration policies have historically been guided by an emphasis on prioritization of immigrants who have committed serious crimes or who pose a threat to the public.<sup>41</sup> However, under current policies, any

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33. Gilbert, *supra* note 22, at 347.

34. KOMINERS, *supra* note 19, at 13.

35. *Id.*

36. HERNANDEZ & GABBARD, *supra* note 26, at 5.

37. KOMINERS, *supra* note 19, at 13.

38. *Id.*

39. Gilbert, *supra* note 22, at 352.

40. 8 U.S.C. § 1357(g)(10)(A) (2006).

41. AM. IMMIGRATION COUNCIL, THE END OF IMMIGRATION ENFORCEMENT PRIORITIES UNDER THE TRUMP ADMINISTRATION 1 (Mar. 2018), <https://perma.cc/J3M7-GQE6>.

undocumented immigrant is subject to deportation, leading to significant increases in the deportation of undocumented immigrants, even victims of crimes.<sup>42</sup> Perpetrators and employers alike prey on victim's vulnerable lack of immigration status as a way to induce the victim to keep quiet, which permits perpetrators to continue abusing undocumented workers. The well-founded fear of deportation is paralyzing for undocumented women. "[T]he threat of deportation and the possible destruction of their families keeps [undocumented women farmworkers] from reporting workplace abuses - even when it means enduring sexual harassment and other indignities."<sup>43</sup> Additionally, because many undocumented women farmworkers come from "mixed-status" families, meaning some family members are legally present and others are not,<sup>44</sup> deportation literally tears victims away from their children and families who are able to remain in the United States while the victim is deported.<sup>45</sup> A victim should never have to choose between suffering violence but remaining in the country or reporting the abuse and risking permanent separation from her family.<sup>46</sup>

*C. Women Agricultural Workers Face Linguistic, Educational, and Economic Barriers that Predispose them to Sexual Violence in the Workplace*

Women farmworkers face additional intersectional challenges in reporting sexual violence in the workplace. With nearly seven in ten farmworkers born in Mexico<sup>47</sup> and 78% of farmworkers being foreign-born overall,<sup>48</sup> the agricultural workforce is a largely migrant one. Workers are often unfamiliar with the culture, traditions, and resources in the United States. Most farmworkers have little to no formal education, low literacy rates, and do not speak English.<sup>49</sup> These factors greatly contribute to the problem and present barriers to access resources. Unfamiliarity with the English language enables sexual violence towards workers and stalls efforts to stop or report the crimes they face.<sup>50</sup> Spanish is the predominant

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42. U.S. IMMIGRATION & CUSTOMS ENF'T, FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 1, <https://perma.cc/VE5K-DXA2> (archived June 29, 2020).

43. Gabriela Parra, Comment, *Immigration Policy for Workplace Violence and Undocumented Women: State-Based Solutions for Wisconsin*, 30 Wis. J.L. Gender & Soc'y 99, 108 (2015).

44. *Id.* at 109 (noting that "mixed-status" families are those which include at least one unauthorized adult and at least one U.S. born child).

45. *Id.*

46. *Id.*

47. HERNANDEZ & GABBARD, *supra* note 26, at 1.

48. KOMINERS, *supra* note 19, at 1.

49. *Id.*

50. Conry, *supra* note 30, at 131.

language of over 80% of farmworkers and only 24% claim to speak English well enough to be able to communicate.<sup>51</sup> Because of the language barrier, “women farmworkers tend to be almost invisible in our society.”<sup>52</sup> Speaking English is crucial to reporting and stopping the victimization of farmworkers because company owners, law enforcement, and prosecutors, particularly in rural areas, have very little resources, if any, for non-English speaking individuals and often lack the necessary interpreter and translators.<sup>53</sup> Non-English speaking workers are regularly unaware of protective laws and their rights as victims of sexual violence.<sup>54</sup> Not only are resources limited and out of reach to non-English speaking farmworker women, perpetrators hold control over women workers who are not fluent in English. Perpetrators are often a worker’s source of communication and bilingual offenders control the narrative if victims come forward and report.<sup>55</sup>

Poverty and economic instability of women farmworkers heightens their susceptibility to sexual violence in the workplace.<sup>56</sup> The need for financial security has forced many women into the workforce, particularly women who are the sole or primary breadwinners in the household, have children, or have to pay back debts to *coyotes*—smugglers who brought them into the United States. Additionally, agricultural workers are amongst the lowest paid and are not entitled to overtime pay, even though agricultural work calls for long hours in the field.<sup>57</sup> At least one-quarter of all farmworkers have family incomes below the federal poverty line,<sup>58</sup> with an average median annual wage of \$24,620 in 2018.<sup>59</sup> In particular, women farmworkers earn significantly lower wages than their male counterparts, making an average income of \$11,250 compared to male crop workers who average an income of \$16,250 according to 2004-2006 data.<sup>60</sup> The disparity in income can be partly attributed to the fact that farmworkers are exempt from most wage and labor laws under the federal Fair Labor Standards Act (FLSA) and state employment

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51. KOMINERS, *supra* note 19, at 28.

52. *Id.*

53. *Id.* at 29.

54. Parra, *supra* note 43, at 110.

55. Kim, *supra* note 17, at 16.

56. KOMINERS, *supra* note 19, at 26.

57. BON APPETIT MGMT. CO. FOUND., INVENTORY OF FARMWORKER ISSUES AND PROTECTIONS IN THE UNITED STATES iii (2011).

58. *Id.*

59. *Occupational Handbook: Agricultural Workers*, U.S. Dep’t of Lab., <https://perma.cc/MNF4-DZ69> (archived Sept. 4, 2019).

60. KOMINERS, *supra* note 19, at 26.

laws.<sup>61</sup> Agricultural work is temporary, seasonal work where women workers are often paid below minimum wage, assigned the least favorable work assignments, given fewer hours, and are among the first to be laid off during low work production cycles.<sup>62</sup> Women farmworkers face little opportunity and probability of advancing to higher paid positions that would entitle them to higher wages, better working conditions, and overall improved bargaining power to leverage a better economic sustainment.<sup>63</sup> Furthermore, because women agricultural workers have low education and literacy levels, with an average education at the seventh grade level, they face little prospects for obtaining other sources of income or employment.<sup>64</sup> Financial need subjects women farmworkers to sexual violence and forces women to submit to sexual favors or lose their only source of income.

### III. AGRICULTURAL INDUSTRY PRESENTS UNIQUE RISKS TO WOMEN FARMWORKERS

The agricultural industry presents unique risks for women farmworkers, heightening their vulnerability to sexual violence.<sup>65</sup> What are referred to as “fields of dreams” or “fields of opportunities” becomes known as “*fields de calzones*” (fields of panties) or “the green motel” for many women farmworkers.<sup>66</sup> The agricultural industry provides the perfect landscape for sexual violence to flourish—from its vulnerable workforce and nature of the work to the lack of regulation and enforcement of worker safety. While it is increasingly recognized that women experience sexual violence in the workplace, the issue is much more alarming in the agricultural industry where a startling 80% of women farmworkers experience some form of sexual violence compared to roughly 25%-50% of all women in the workforce.<sup>67</sup> Women farmworkers have fewer legal protections compared to other sectors of the United States economy, while also working in more risky conditions.<sup>68</sup> The Institute for Women’s Policy Research identifies particular structural risk factors that intersect and exacerbate high rates of sexual violence, such as harassment.<sup>69</sup> It is no surprise that factors such as working in an

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61. BON APPETIT MGMT. CO. FOUND., *supra* note 57, at iii.

62. KOMINERS, *supra* note 19, at 26.

63. *Id.*

64. Kim, *supra* note 17, at 5.

65. KOMINERS, *supra* note 19, at 26.

66. Yeung & Rubenstein, *supra* note 7.

67. KOMINERS, *supra* note 19, at 1.

68. BON APPETIT MGMT. CO. FOUND., *supra* note 57, at ii.

69. ELYSE SHAW ET AL., SEXUAL HARASSMENT AND ASSAULT AT WORK: UNDERSTANDING THE COST 3 (Oct. 15, 2018).

isolated environment, lacking legal immigration status, working in a male dominated job, and working in a setting with significant power imbalances, are all present in the agricultural industry, making it the perfect terrain for sexual violence to bloom.

#### *A. An Enabling Physical Environment*

Agricultural work is found in rural, isolated, and remote environments that facilitate rape and sexual violence and keep victims away from the resources needed to help them stop and report crimes of sexual violence. Women work in fields hidden by bushes and plants that often cover and hide them between the row of crops or orchards, enabling acts of sexual violence to go undetected.<sup>70</sup> Numerous reports of women farmworkers recount the distressing stories of being taken to desolate and isolated parts of the field where they were groped, raped, and screamed for help, but nobody heard them.<sup>71</sup> Furthermore, women are strategically separated from their husbands, family members, and even other coworkers to enable easier access to them and significantly hamper their attempt to defend themselves or call for help.<sup>72</sup> Moreover, women work in situations that expose their body in vulnerable positions that subject stares, lewd comments, and unwanted harassing behavior. Harvesting crops such as strawberries, lettuce, and broccoli require women to bend over with their rear end in the air and in plain view of their male supervisors and coworkers.<sup>73</sup> In processing plants, women workers are often tied to a specific task on high-speed lines where male perpetrators can “‘just walk down the line and run his hand along their buttock, make sexual comments,’ or worse.”<sup>74</sup> As a result of the unwanted sexual groping, many agricultural women workers have resorted to covering their face and hair and wear baggy male clothing as a way to deter exposure to perpetrators and repel accusations from other coworkers who “‘felt that other women wearing provocative or revealing clothing suggested the wrong idea.”<sup>75</sup>

#### *B. Exclusion of Farmworkers from Worker Protection Laws*

The agricultural industry is unique in that it is largely unregulated under United States labor laws regarding worker protection. Not only does the nature of

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70. KOMINERS, *supra* note 19, at 17.

71. Yeung & Rubenstein, *supra* note 7.

72. KOMINERS, *supra* note 19, at 17.

73. *Id.* at 18.

74. *Id.*

75. *Id.*

the industry itself contribute to the issue of sexual violence, but “[h]istorically, U.S. labor law has excluded agricultural workers from federal protections that apply to workers in nearly every other industry,” leaving agricultural workers exposed to unfair and dangerous labor practices and with little to no recourse.<sup>76</sup>

In theory, federal laws protect all workers, including undocumented immigrants, but the reality is undocumented agricultural workers have little protection under state and federal labor laws. The agricultural sector is often exempted from major laws in place to protect workers. The chart below gives a small glimpse into how agricultural employers are exempted from laws that are

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76. HUM. RTS. WATCH, *supra* note 16, at 14.

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required in most other labor sectors.<sup>77</sup>**Table 1--Fair Labor Standards Act of 1938: Summary of applicability to agriculture and penalties for violations**

Provisions	Exemptions for agriculture	Basis for agricultural exemptions	Enforcement
<p><b>Minimum wage</b> Requires employers, unless exempt, to pay any employee at least the legally established Federal minimum wage (\$5.15 an hour as of September 1, 1997).</p>	Partial	<ol style="list-style-type: none"> <li>1. Employer did not use more than 500 man-days of agricultural labor during any calendar quarter of the preceding calendar year.</li> <li>2. Employees are members of employer's immediate family.</li> <li>3. Employees are employed as hand-harvest laborers paid on a piece-rate basis; they commuted daily from their homes and were not employed in agriculture more than 13 weeks in the preceding calendar year.</li> <li>4. Employees are 16 years of age or younger and employed as hand-harvest laborers paid on a piece-rate basis equal to employees older than 16 years, and are employed on the same farm as parents or someone standing in place of parents.</li> <li>5. Employees are primarily engaged in range production of livestock.</li> </ol>	<p><b>Responsible agency</b> Wage and Hour Division Employment Standards Administration, U.S. Department of Labor.</p> <p><b>Penalties</b> \$10,000 fine or month imprisonment, or both, after a prior conviction for willfully violating provisions. Liable for unpaid wages and an additional equal amount as liquidated damages plus attorney fees and reasonable costs incurred by the plaintiffs when a party is convicted of violating minimum wage and maximum hour provisions.</p>
<p><b>Maximum hours</b> Requires employers, unless exempt, who employ any employee for a workweek in excess of 40 hours to pay the employee at least 1-1/2 times the employee's regular pay rate for the hours worked in excess of 40.</p>	Total	Employment in agriculture, except in a packing shed or processing plant that handles produce for more than one farm.	Same as above
<p><b>Child labor</b> Employing anyone under the legal minimum age (16 years of age unless otherwise specified) in a nonexempt occupation is considered "oppressive child labor."</p>	Partial (any employment permitted must be during nonschool hours).	<ol style="list-style-type: none"> <li>1. If employee is 14 or 15 years of age and not employed in a hazardous occupation as defined by the Secretary of Labor.</li> <li>2. If employee is 12 or 13 years of age and employed with the written consent of his or her parents, or a person standing in place of his or her parents, or if the prospective employee is employed on the same farm as the parents or person standing in place of the parents.</li> <li>3. If employees under 12 years of age are employed with written parental consent on farms where employees are exempt.</li> </ol>	Civil penalty of up to \$10,000 for each violation of child labor provision.

Source: Compiled by USDA, ERS from 29 Code of Federal Regulations and Title 29 United States Code.

77. *Id.* at 4.

Most agricultural workers are not guaranteed protections such as minimum wage, overtime pay, recordkeeping, and child employment standards guaranteed by the FLSA.<sup>78</sup> Originally enacted to guarantee minimum payment for every hour worked, the FLSA excluded farmworkers until 1966.<sup>79</sup> While FLSA technically applies to all workers today, most agricultural workers are exempt from the protections of this law. For example, under the FLSA, agriculture employers are not subject to minimum wage, overtime pay, or any other provision of the law if they pay their workers on an hourly basis and are considered a “small farm”<sup>80</sup>; or employers who contract labor out.<sup>81</sup> Agricultural employers can easily circumvent FLSA requirements by paying their workers on a piece-rate instead of hourly wages, employing family members or a small number of employees, or hiring farm labor contractors.<sup>82</sup> An overwhelmingly large percentage of United States farms are considered small farms, which are not subject to the FLSA.<sup>83</sup> Because most labor laws such as FLSA and OSHA exempt small farms from regulations, protection for farmworkers is seriously lacking with regard to ensuring fair labor standards.<sup>84</sup> Moreover, the FLSA excludes agricultural workers from other important and relevant provisions highly applicable to the agricultural industry, such as mandatory lunch, rest breaks, and overtime pay.<sup>85</sup> Considering the long hours in this industry, particularly during peak season, workers are on the fields for long hours, often without breaks for resting or mealtime, and are paid at a lower rate.

Because child labor laws in agriculture under the FLSA are largely relaxed, minor female workers are much more likely to become susceptible to workplace

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78. See generally *Wages and the Fair Labor Standards Act*, U.S. DEP’T OF LAB.: WAGE AND HOUR DIVISION, <https://perma.cc/6GCZ-PRUT> (archived July 20, 2020).

79. *U.S. Labor Law for Farmworkers*, FARMWORKER JUST., <https://perma.cc/XF2Y-WN5E> (archived June 29, 2020).

80. Jim MacDonald, *Small Farms, Big Differences*, USDA (Feb. 21, 2017), <https://perma.cc/NA9A-7W6V> (defining a “small farm” as an operation with gross cash farm income under \$250,000).

81. *U.S. Labor Law for Farmworkers*, *supra* note 79.

82. KOMINERS, *supra* note 19, at 21.

83. BON APPETIT MGMT. CO. FOUND., *supra* note 57, at 9 (finding that while “small farms” is classified based largely on annual revenue of the farm, major occupation of the principal operator, and family/nonfamily ownership of the farm, overall, these factors suggest a small number of employees, making it more likely that a “small farm” is not subject to Title VII. U.S.D.A.).

84. *Id.*

85. *Fact Sheet #12: Agricultural Employers Under the Fair Labor Standards Act (FLSA)*, U.S. DEP’T OF LAB.: WAGE AND HOUR DIVISION, <https://perma.cc/9NG2-AYKS> (archived June 29, 2020).

violence in the agricultural industry.<sup>86</sup> Children as young as ten years old can legally work in the fields as opposed to the minimum age of sixteen in other occupations.<sup>87</sup> Child workers become the perfect victims, not only because they are more vulnerable victims, but they are less likely to report crimes of violence.

Furthermore, agricultural workers are excluded from collective bargaining rights under the National Labor Relations Act (NLRA), ensuring that workers are unable to engage in protected, concerted activities to address or improve working conditions.<sup>88</sup> Moreover, agricultural workers cannot avail themselves to workers' compensation or unemployment protections. While the federal Social Security Act mandates unemployment insurance, individual states are tasked with administering and defining eligibility criteria. Many states, including Iowa, exempt the agricultural sector, temporary H-2A farm workers, and undocumented workers from coverage.<sup>89</sup> Considering that the agricultural industry is one of the most hazardous industries, this presents a major barrier to workers who are injured on the job and cannot afford to miss work.<sup>90</sup>

The agricultural industry also lacks fundamental protections against industry-specific risks, even though farmworkers suffer higher rates of toxic chemical injuries and skin disorders and have an overall higher risk of fatal and nonfatal injuries than any other workers in the country.<sup>91</sup> "Of the more than 100 safety and health regulations adopted by OSHA, only six address hazards specific to agriculture."<sup>92</sup> No federal law offers protection for industry specific hazards, such as heat stress, and while OSHA has promulgated pesticide regulations, enforcement is virtually non-existent.<sup>93</sup> Equally important, sexual harassment policies and trainings are not required in the agricultural industry, nor does OSHA

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86. See generally U.S. DEP'T OF LAB., *supra* note 5.

87. *Injustice on Our Plates*, S. POVERTY L. CTR. (Nov. 8, 2010), <https://perma.cc/A9M6-4QN6>.

88. BON APPETIT MGMT. CO. FOUND., *supra* note 57, at iv.

89. *Id.*; JACK L. RUNYAN, USDA, ECON. RESEARCH SERV., SUMMARY OF FEDERAL LAWS AND REGULATIONS AFFECTING AGRICULTURAL EMPLOYERS 33 (2000), <https://perma.cc/G5DF-YYPS>.

90. BON APPETIT MGMT. CO. FOUND., *supra* note 57, at iv (finding that the 2009 occupational fatality rate for farmworkers was five times the rate of the average workers, and between 2005 and 2009, less than one-half of U.S. farmworkers were covered by workers' compensation insurance by their current employers).

91. See HUM. RTS. WATCH, *supra* note 16, at 59.

92. *Improving Working Conditions for U.S. Farmworkers and Food Production Workers*, APHA (Nov. 7, 2017), <https://perma.cc/ZC7L-W9M4>.

93. BON APPETIT MGMT. CO. FOUND., *supra* note 57, at iv.

require employers to implement workplace violence prevention policies or initiatives, despite the pervasiveness of the issue in the industry.<sup>94</sup>

Overall, federal labor laws lack adequate protection for farmworkers due to the many exceptions for the agricultural industry. These exemptions allow for persistence of poverty and exploitation of farmworkers. “In industries . . . where legislative exemptions from labor and employment laws [are] common, . . . sexual assault of the workers can easily occur.”<sup>95</sup>

#### IV. CURRENT REMEDIES

A glimpse into the agricultural industry’s track record for farmworker protections can paint a grim picture, and the reality is that there is a lot of work to be done to afford farmworkers’ vital protections. However, over time, Congress has recognized the gaps in protection for farmworkers and has been proactive in efforts to pass legislation to remedy the shortfalls.

##### *A. Legislation*

Congress passed the Migrant and Seasonal Agricultural Worker Protection Act, also known as the Agricultural Worker Protection Act (AWPA) in 1983.<sup>96</sup> AWPA was enacted to protect migrant and seasonal agricultural workers by establishing industry specific employment standards in wages, housing, transportation, disclosures, and recordkeeping. In an effort to address the issue of agricultural employers circumventing labor laws and insulating themselves from being legally responsible for workers using contracted labor,<sup>97</sup> the AWPA specifically addresses farm labor contractors by requiring them to register with the Department of Labor (DOL), subjecting them to labor laws.<sup>98</sup> While a step in the right direction, the AWPA lacks the necessary protection and enforcement to become a useful tool for farmworkers to combat labor violations. The AWPA does not protect farmworkers in joining labor unions or accessing collective bargaining

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94. Erdmann, *supra* note 4, at 727.

95. KOMINERS, *supra* note 19, at 21-22.

96. 29 U.S.C. § 1801 (1983).

97. RUNYAN, *supra* note 89, at 25 (defining farm labor contractors as a person, other than an agricultural employer and agricultural association, or an employee of an agricultural employer or agricultural association, who receives a fee or other valuable consideration for performing farm labor contracting activities).

98. *Fact Sheet #49: The Migrant and Seasonal Agricultural Worker Protection Act*, U.S. DEP’T OF LAB.: WAGE AND HOUR DIVISION, <https://perma.cc/2V92-8DZ6> (archived June 29, 2020).

rights.<sup>99</sup> More importantly, while AWPAs ensure that employers, whether growers or farm labor contractors, are subject to legal obligations such as paying minimum wage and recordkeeping,<sup>100</sup> a lack of resources has led to little or no oversight and enforcement.<sup>101</sup> The FLSA and AWPAs both charge the DOL with investigating violations under the acts, yet laws are inadequately regulated and enforced. Data shows that wage theft, child labor, pesticide exposure, and other violations continue to occur with troubling frequency even with a state department tasked with oversight.<sup>102</sup> Additionally, even when employers are found to be in violation of labor and health and safety laws, the penalties imposed for those violations are typically very low. From 2002 to 2003, the average penalty assessed for a violation from the AWPAs was only \$342.<sup>103</sup>

Seemingly unrelated workplace violations make women farmworkers more vulnerable to sexual violence, both directly and indirectly. Substandard or overcrowded farmworker housing can force women workers to live with strangers in insecure and isolated places where they are more likely to be physically assaulted.<sup>104</sup> Similarly, not having access to bathrooms and having to relieve themselves in the fields or in isolated areas leaves women workers exposed to sexual assaults. A lack of regulation and enforcement of the few labor laws applicable to the agricultural industry is just as ineffective as having no labor laws, and leaves workers with less confidence in their ability to act on their rights.<sup>105</sup>

A lack of regulation and enforcement is not just an issue in health and labor laws. What could be perhaps the best tool for women farmworkers to denounce sexual violence on the job, anti-discrimination laws require significant resources and adaptations to the particular needs of women farmworkers to be an effective tool for combating sexual violence in agriculture. Title VII of the Federal Civil Rights Act of 1964 (hereinafter “Title VII”) prohibits employment discrimination based on race, color, religion, sex, and national origin.<sup>106</sup> Not only does Title VII recognize sexual harassment as a form of sex discrimination, the Act protects

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99. *U.S. Labor Law for Farmworkers*, *supra* note 79.

100. KOMINERS, *supra* note 19, at 21.

101. HUM. RTS. WATCH, *supra* note 16, at 60.

102. *Id.*; RUNYAN, *supra* note 89, at 7 (finding that in 1997, only about 9% of U.S. farms employed the required number of employees to be subject to OSHA regulations).

103. HUM. RTS. WATCH, *supra* note 16, at 60.

104. BON APPETIT MGMT. CO. FOUND., *supra* note 57, at 11.

105. HUM. RTS. WATCH, *supra* note 16, at 60.

106. 42 U.S.C. § 2000e (1964); *see also Title VII of the Civil Rights Act of 1964*, EEOC, <https://perma.cc/6JMU-Q4LR> (archived June 29, 2020).

victims from retaliation against those who report discrimination and allows victims to seek damages through civil suits.<sup>107</sup> The law allows the EEOC, the agency charged with enforcement of the law, to bring lawsuits on behalf of victims against their perpetrators. The law theoretically applies to all workers, even undocumented workers, however, the law has limited applicability in the agricultural sector because it only covers employers who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.<sup>108</sup> The 2007 Census of Agriculture found that a majority of farms using hired labor in the United States had ten or fewer employees.<sup>109</sup> Considering the temporal, seasonal nature of the work, and the fact that most farms in the United States are exempt from regulations because of their small size, protection for farmworkers is virtually non-existent.

Additionally, effective use of Title VII protections requires a cultural understanding of the specific challenges facing the farmworker workforce. “Title VII is often unable to provide women farmworkers with meaningful protections because it fails to address the combination of discrimination factors they face.”<sup>110</sup> Women farmworkers are highly vulnerable to discrimination because of their intersectionality of protected classes. Women agricultural workers face sex, class, national origin, and immigration status discrimination. Furthermore, “[e]mployment discrimination law, by focusing on protected classes separately, cannot adequately address the problems of those whose oppression is defined by more than one category.”<sup>111</sup> As a result, EEOC investigators and attorneys lack the understanding of the unique challenges faced by farmworkers, effectively making the EEOC process cumbersome, inefficient, and often re-traumatizing to the very victims it was meant to protect.<sup>112</sup>

Further, women farmworkers face significant procedural barriers in filing discrimination complaints. The process for filing a complaint is particularly difficult for the rural and migratory workforce. The filing of a complaint would require the worker to take time off from work, travel into the city, and enter a federal building where identification is required to even reach the EEOC.<sup>113</sup> Moreover, very little resources are available to workers in rural areas that can offer assistance in filing a Title VII complaint. Furthermore, undocumented women

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107. 42 U.S.C. § 2000e (1964); HUM. RTS. WATCH, *supra* note 16, at 65.

108. 42 U.S.C. § 2000e (1964); *see* RUNYAN, *supra* note 89, at 7.

109. BON APPETIT MGMT. CO. FOUND., *supra* note 57, at 11.

110. KOMINERS, *supra* note 19, at 22.

111. *Id.*

112. HUM. RTS. WATCH, *supra* note 16, at 67.

113. *Id.* at 69.

farmworkers who attempt to file discrimination complaints risk exposing their undocumented status as employees. While “U.S. law is clear that Title VII and its provisions prohibiting sexual harassment apply to unauthorized workers, the Supreme Court’s 2002 decision in *Hoffman Plastics v. National Labor Relations Board* (NLRB) has raised questions about which remedies are available to unauthorized workers.”<sup>114</sup> Without any explicit guarantee that undocumented workers are entitled to protection under federal laws, such as Title VII, and weighing the dangers of exposing their undocumented status, women farmworkers often discard any possibility of potential protection under laws intended to protect all workers.<sup>115</sup>

Even when workers can find a way to file a complaint under Title VII, the process is often difficult for women farmworkers and often leads to less than satisfactory results. For one, investigations often last several years and, considering the migratory and seasonal nature of the work and workforce, this negatively affects the quality of the investigation.<sup>116</sup> As an EEOC attorney admitted, “We lose track of our clients, they lose faith in the system, they think, ‘what’s the point of staying in touch?’ It’s a big, big problem.”<sup>117</sup> In addition to the difficulty in reaching victims either because of the location, work hours, language barriers, or fear in opening up to governmental agencies, the power of the agricultural employers that are sued often leads to dismissal of the case or low-payout settlements, resulting in suppression of the violations.<sup>118</sup>

#### *B. Positive Efforts in Civil Remedies*

But it has not been all bad news. Congress’s strides in protecting farmworkers has proved a step in the right direction, providing a glimpse of hope that when resources are made available to victims and laws are properly enforced, the adopted protections can curbe and eliminate workplace violence. The EEOC has been instrumental in helping victims find justice in the civil court system. Charged with enforcing Title VII and other anti-discrimination laws, the EEOC investigates complaints made by employees and is able to secure remedies for

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114. *Id.* at 66 (finding that NLRB had erred in awarding back pay to an unauthorized worker wrongfully terminating for participating in a union organizing campaign).

115. HUM. RTS. WATCH, *supra* note 16, at 66-67 (noting that “We can’t guarantee [unauthorized workers] that the employer won’t try to inquire into immigration status. Out of caution, she sometimes chooses not to seek certain remedies.”).

116. *Id.* at 69.

117. *Id.* at 70.

118. *Id.* (“the pressure to settle low and early is intense”).

victims.<sup>119</sup> In cases where the employer refuses to cooperate with the investigation, the EEOC can bring a lawsuit on behalf of an employee.<sup>120</sup>

The United States Supreme Court first recognized sexual harassment as an actionable claim under Title VII in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).<sup>121</sup> Since then, a string of civil lawsuits against agricultural employers have made small tides in the industry and has served as a warning to employers of the grave consequences resulting from federal violations.<sup>122</sup> In one of the first landmark cases, the EEOC filed a federal lawsuit against Tanimura & Antle, one of the largest lettuce producers in the United States, for the sexual harassment and rape of a group of women farmworkers who were fired after protesting against further harassment.<sup>123</sup> The case settled in 1999 for \$1.855 million.<sup>124</sup> Subsequently, in 2002, the EEOC, reached a \$1.5 million settlement with DeCoster, an Iowa egg farm that had a long history of workplace violations, including the repeated rape of female employees who were threatened with violence and deportation if they complained, violations of child labor laws, failure to pay overtime, failure to comply with health and safety laws, and employing undocumented workers.

It was not until 2004 that the first sexual harassment lawsuit against a grower reached a federal jury trial. *EEOC v. Harris Farms* exposed the repeated rapes at gunpoint of a female farmworker by her supervisor who threatened to kill her husband if she reported.<sup>125</sup> The jury found the grower's supervisor and other employees repeatedly subjected the victim to sexual harassment and retaliated against her by discharging her when she complained about the harassment.<sup>126</sup> The jury returned a verdict in favor of the victim by awarding her nearly \$1 million.<sup>127</sup> The next case to go in front of a jury would not happen for another six years when

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119. *Id.* at 67.

120. *Id.*

121. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (finding that under Title VII an employer is liable for workplace conduct that includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Further finding that under general agency principles, an employer is also liable for an employee supervisor's unwelcome, sexual harassment of another employee).

122. KOMINERS, *supra* note 19, at 23 (finding that between 1988 and 2012, 1,106 sexual harassment claims have been filed with the EEOC against agricultural-related industries, of which the commission filed 41 federal lawsuits).

123. *EEOC & Tanimura & Antle Settle Sexual Harassment Case in the Agricultural Industry*, EEOC (Feb. 23, 1999), <https://perma.cc/GQR7-F844>.

124. *Id.*; KOMINERS, *supra* note 19, at 23.

125. *EEOC v. Harris Farms, Inc.*, 2005 U.S. Dist. LEXIS 37399, at \*1 (E.D. Cal. 2005).

126. *Id.* at \*12.

127. KOMINERS, *supra* note 19, at 23.

the EEOC filed a lawsuit against Evans Fruit Company, one of the country's largest apple producers.<sup>128</sup> In 2010, the jury found that multiple victims' stories of repeated sexual harassment were "inconsistent" and ultimately sided with the grower.<sup>129</sup> While these cases represent the potential in reducing workplace sexual violence by imposing heavy financial penalties on the employers, they also represent the difficulty in exposing issues of sexual violence against farmworkers when the practice is to settle the case and silence victims with money damages that often remain unpaid.

The limited success farmworker women have found in the civil system can be an anchorage to some relief. However, the reality is that this kind of success is rare and only a reactive solution to the problem. Many farmworker women rely on federal lawsuits as a last resort after failed attempts to receive justice from their employer's wrongdoings. Civil lawsuits should not be used as the primary and only resolution to combating sexual harassment for farmworkers. Not only are they expensive solutions for employers, but they rarely alleviate the issue of workplace sexual harassment. Civil suits, because they are regularly settled outside of the court system, are often kept confidential between the parties, which prevents the issue from becoming a public policy concern that can be addressed properly.

### *C. A Failing Criminal Justice System*

Although the civil court system has offered some relief to farmworker victims, the fact remains that many of the acts of sexual violence and harassment experienced by farmworkers are crimes. Yet, very few perpetrators have been prosecuted for their criminal behavior.<sup>130</sup> Crime reports to police are already scarce due to the fear of deportation resulting from cooperation between local law enforcement agencies and Immigration and Customs Enforcement (ICE).<sup>131</sup> Deterrence in reporting crimes has increased since programs like Secure Communities were implemented, which check a person who comes into contact with law enforcement against an immigration database for documentation.<sup>132</sup> If the person is found to be undocumented, a referral to ICE for removal proceedings occurs.<sup>133</sup>

Aside from the fear of deportation, victims of sexual violence, regardless of

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128. *Id.* at 24.

129. *Id.*

130. HUM. RTS. WATCH, *supra* note 16, at 72.

131. *Id.* at 72-73.

132. *Id.* at 73.

133. *Id.*

ethnicity, occupation, or legal status, already face significant barriers in the investigation and prosecution of these crimes, but the rates of reporting are alarmingly lower within this particular group of victims.<sup>134</sup> The investigation and prosecution of sexual violence crimes are notoriously difficult on victims, police, and prosecutors to pursue due to the nature of the crime. Aside from the linguistic and cultural barriers of reporting, victims often are reluctant to report crimes and may wait long periods of time between the incidents of sexual violence and when they report. In these cases, evidence is often lost or difficult to gather. Additionally, “[r]ape and sexual assault cases often come down to the ‘he-said-she-said,’ which is difficult to prosecute.”<sup>135</sup> The challenges presented by the existing criminal justice framework deter victims from coming forward and hinder any real sense of protection.

## V. WHY EMPLOYERS SHOULD CARE

### A. Civil Penalties

In 2015, the EEOC announced a \$17 million judgement against a Florida vegetable farm for engaging in graphic acts of sexual harassment against female workers in the farm’s packaging house.<sup>136</sup> Likewise, in 2014, seven female farmworkers filed a federal lawsuit against their farm employer, C&C Farms, its owners, and the suspected supervisor, alleging various violations of federal laws relating to wages, sexual harassment, trafficking, and other state claims.<sup>137</sup> The lawsuit resulted in an undisclosed settlement with the employer and a \$3.5 million judgement against the supervisor.<sup>138</sup> These two lawsuits are among more than forty federal sexual harassment lawsuits filed against agricultural enterprises since 1998.<sup>139</sup> In 2018 alone, more than 7,500 sexual harassment claims were filed with the EEOC—a 14% increase from the prior year.<sup>140</sup> In the past, civil litigation was not a common solution to sexual harassment in the workplace, but there is an increasing trend of victims turning to civil remedies to alleviate their victimization. Because the EEOC has seen an increase in the number of complaints filed, in their Strategic Enforcement Plan they commit to protecting immigrant, migrant, and

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134. *Id.* at 77.

135. KOMINERS, *supra* note 19, at 77.

136. *Building a Future Without Violence in the Fields. . .*, COALITION OF IMMOKALEE WORKERS (Dec. 11, 2015), <https://perma.cc/H4BE-GNRL>.

137. Ramchandani, *supra* note 2.

138. *Id.*

139. Yeung & Rubenstein, *supra* note 7.

140. Kadija Murad, *Sexual Harassment in the Workplace*, NAT’L CONF. OF STATE LEG. (Feb. 17, 2020), <https://perma.cc/Q7MC-CJA9>.

other vulnerable workers as a top priority.<sup>141</sup> The lawsuits will consequently increase because of greater exposure and investigation into the issue, and the potential for employer sanctions will also result. Lawsuits can bring monumental costs to agricultural employers and can be especially devastating to small and medium-sized employers who cannot afford the hefty fines.<sup>142</sup>

### *B. Damaging Reputation*

Not only is litigation costly, unpredictable, and time consuming, but it can damage public relations, especially when dealing with sexual violence victimization. The power of grassroots mobilization cannot be underestimated in a movement with strong historic success. The rise of the United Farm Workers (UFW) movement began in 1962 in California with workers organizing for better pay and safer working conditions in the agricultural industry.<sup>143</sup> The Union found tremendous success through the art of social protest and targeting consumer action, leading to the most successful consumer boycott in the history of the United States.<sup>144</sup> The farmworkers grassroots movement, through labor activism, was able to secure the first labor union contracts, the right to bargain collectively, and overall increased labor rights for farmworkers.<sup>145</sup> Agricultural growers soon realized the catastrophic effect of the movement as they redirected their shipments to Europe in attempts to save their agricultural products.<sup>146</sup> The boycotting efforts, however, were international and after attempting to ship their products to Canada, Great Britain, Sweden, Finland, Norway, and numerous other countries, growers were unable to sell their product.<sup>147</sup> Realizing the power of the movement, many growers finally signed collective bargaining agreements, ending a five-year strike.<sup>148</sup> The farmworker social movement having paved the way for just and improved labor laws for agricultural workers, not just in California, but across the United States, left devastating consequences to agricultural growers. There is no need to default to extreme measures in today's time, where, arguably, the power of social protest is still impactful. The agricultural industry is among the most important industries in the United States and impeding its operations does not serve

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141. Conry, *supra* note 30, at 144.

142. See HUM. RTS. WATCH, *supra* note 16, at 68.

143. Matt Garcia, *Cesar Chavez and the United Farm Workers Movement*, OXFORD RES. ENCYCLOPEDIA (May 2016), <https://perma.cc/F8Z6-WYX2>.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

in the best interests of society.

*C. Imposed Duty to Provide Safe Working Environment*

Lastly, regardless of enforcement priorities, the agricultural industry is still subject to some federal and state laws that, if found in violation of, could bring negative consequences to an agricultural employer. Title VII still applies to agriculture when adequately enforced, just as some OSHA requirements are applicable and can be used against an employer in a civil suit. In recent years, OSHA has taken an interest in specific industries where workplace violence is notably problematic—such as the healthcare industry.<sup>149</sup> Increased exposure of sexual violence in agriculture is likely to come to the attention of federal and state agencies, resulting in increased protection and enforcement. While federal lawsuits have increasingly been the solution to violations of these laws, more states have moved to enact laws that impose liability on employers who fail to take proper steps to protect employees. States like Oregon and Illinois have adopted legislation that specifically prohibit employers from discriminating against employees that are victims of sexual violence, assures victims protection from retaliation or termination due to their victimization, and requires employers to make reasonable safety accommodations requested by the victim unless the employer can demonstrate that the request would impose undue hardship on the employer.<sup>150</sup> Similarly, in 2013 California enacted AB 263, SB 666, and AB 524, which were aimed at strengthening immigrant rights.<sup>151</sup> In conjunction, these laws expand protections against retaliation for workers who file complaints, whistleblowing claims, or participate in political activity or a civil suit against the employer.<sup>152</sup> The acts also protect workers against employers who retaliate by threatening to report immigration status.<sup>153</sup>

The increase in state legislation across the nation indicates a trend in the right direction. It can be argued that states may be better suited to target the issue of workplace violence in agriculture. For one thing, the agricultural industry is unique and certainly more applicable in states with a large agricultural immigrant labor workforce. States that have independently passed legislation to protect agricultural workers are those with large agricultural economies, such as California and

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149. See OSHA, *WORKPLACE VIOLENCE IN HEALTHCARE: UNDERSTANDING THE CHALLENGE 1* (2015), <https://perma.cc/D64Q-KBPA>.

150. Runge, *supra* note 3, at 890.

151. Parra, *supra* note 43, at 121.

152. *Id.*

153. NAT'L EMP'T LAW PROJECT, *CALIFORNIA'S NEW WORKER PROTECTIONS AGAINST RETALIATION 1* (Oct. 2013), <https://perma.cc/X8TT-L4SE>.

Florida. Second, federal laws are inherently more difficult to adopt due to partisan conflicts. Part of the issue with immigration reform is its controversial nature where agreement on even bipartisan issues, such as workplace violence, is an obstacle. “The failed attempts at passing immigration reform in 2014 and President Obama’s unsuccessful attempts via executive action is an indication that states are in a better position to address the needs of immigrant communities within state boundaries,” at least regarding workplace protections.<sup>154</sup>

Agricultural employers have an interest in mitigating the issue of workplace violence against its employees. Not only does the industry rely heavily on this vulnerable workforce, which, without it, the industry would suffer severe worker shortages, but agricultural employers can be susceptible to great economic and social harm when they, even unknowingly, allow sexual violence to occur on the job. The costs of workplace violence have been estimated as high as \$35 billion from lost workdays, litigation costs, recovery costs, and other expenditures.<sup>155</sup> Employers do not want to be caught in the crossfire for employees’ unlawful actions when they allow sexual violence. An employer risks liability under tort law, to not only its employees under the doctrine of *respondeat superior*, but also to customers and other third parties who enter the workplace.<sup>156</sup> Courts have not been reluctant to place fault in the hands of employers’ “deep pockets” as a way of motivating employers to practice increased oversight of their employees and cure their duty to a safe workplace environment.<sup>157</sup> Employers do not want to become breeding grounds for workplace violations. Not only is it economically detrimental, but it may lead to decreased worker availability and productivity and increased social stigma to the reputation of the industry. Overall, employers have a duty to advance a commitment to a safe, just, and sustainable workforce.

## VI. LOOKING TO THE FUTURE

The current structures in place to prevent workplace violence are insufficient, but efforts to reduce and eliminate workplace sexual violence against women farmworkers are not as dreary as they may seem. While no one industry or agency will solve the issue, revisions of federal laws, increased monitoring and enforcement activity, compliant employers, and stronger support systems can provide a strong basis for reducing and eradicating workplace sexual violence in agriculture.

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154. Parra, *supra* note 43, at 119.

155. Amy D. Whitten & Deanne M. Mosley, *Caught in the Crossfire: Employers’ Liability for Workplace Violence*, 70 Miss. L. J. 505, 507 (2000).

156. *Id.* at 507, 511.

157. *Id.*

### A. Revisiting Federal Laws Applicable to the Agricultural Industry

Congress has recognized the vulnerability of employees in the agricultural industry and has made great strides in addressing the issue. In addition to passing legislation addressing labor laws, Congress has allocated money and resources to the cause under the Violence Against Women Act (VAWA) of 1994.<sup>158</sup> Congress also passed the Victims of Trafficking and Violence Prevention Act of 2000, creating a U visa classification to protect certain undocumented immigrants who are victims of a qualifying offense and willing to assist in the investigation and prosecution of the crime.<sup>159</sup> A U visa grant results in permission to live and work in the United States. While the U visa provides victims a pathway to legalized status, the protections under this relief must be broadened to solve the many issues that arise with the process. First, the visa is limited to an annual cap of 10,000.<sup>160</sup> Because of the cap, the current processing time for a U visa is around fifty-four months, leaving thousands of victims out of protection or in limbo status for significant periods of time while law enforcement has access to easily turn them over to immigration officials.<sup>161</sup> Victims are often lost in the process of obtaining a U visa because of the prolonged wait times and the required assistance of law enforcement. If an officer is no longer available or if the case is settled or dismissed during the wait times, victims risk losing their opportunity to obtain the benefit. Because the U visa cap limit does not reflect the number of eligible victims, Congress should seek to increase the number of visas available.

Second, the process for obtaining a U visa requires law enforcement to certify, through a signature, that the victim of the crime was indeed a victim, suffered “substantial physical or mental abuse,” possessed information regarding the crime, and assisted law enforcement or prosecution with the investigation or prosecution of the crime.<sup>162</sup> The discretionary nature of this process disenfranchises victims that are legitimately entitled to such relief when the certifying law enforcement does not believe the victim has been truly victimized—a common issue when reporting sexual violence crimes. The overall lack of agency protocol, insufficient training, misunderstanding of law enforcement’s role in the process, and fear that certifying U visa petitions will cause a negative perception

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158. See Violence Against Women Act of 1994, 34 U.S.C. §§ 12291-2512.

159. AM. IMMIGRATION COUNCIL, *Violence Against Women Act (VAWA) Provides Protections for Noncitizen Women and Victims of Crime 2* (Nov. 2019), <https://perma.cc/7L3G-AG6N>.

160. Gilbert, *supra* note 22, at 358.

161. See *Check Case Processing Times*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://perma.cc/QJF8-2TX4> (archived July 21, 2020).

162. AM. IMMIGRATION COUNCIL, *supra* note 159, at 2.

of the agency has largely contributed to a decrease in pursuit of this relief among victims.<sup>163</sup> To ensure the congressional intent of the U visa is fulfilled, law enforcement agencies need increased training to better assist victims of these crimes and avoid judgment calls on the substantive issues of the visa—a determination to be made by the administrative immigration agency in charge. Further, granting U visas at the investigative stage ensures victims are available to testify at trial to help law enforcement and the prosecution. Lastly, continued reauthorization of VAWA ensures continued funds, resources, and avenues of relief, such as the U visa, are devoted to this important social issue.

Moreover, while the agricultural industry justly requires some exemptions from federal laws that other industries do not, an overhaul and reassessment of the current agriculture exemptions is due. The many exemptions resulted from the New Deal era as part of a compromise by President Franklin D. Roosevelt and Southern lawmakers who “wanted to preserve the social and racial order on which the South’s plantation system depended.”<sup>164</sup> The result was largely discriminatory and allowed for dangerous exemptions in the agricultural industry. While the vast majority of the agricultural workforce are minorities from lower socioeconomic status, today’s labor laws should reflect a just and equal protection for all employees, regardless of the industry in which they work.

#### *B. Steps Employers Can Take to Increase Support and Enforcement*

Employers can begin by creating a culture of compliance and zero tolerance. Despite the prevalence of workplace violence, more than 70% of workplaces in the United States do not have a program or policy addressing workplace violence and only 10% of employers that had workplace violence reported a change in their programs or policies to safeguard employees from further acts of violence.<sup>165</sup> Although no current federal law requires agricultural employers to train their employees in workplace violence, employers should independently provide and require such trainings. Requiring employers to adopt policies and provide trainings against workplace sexual violence will alert employees to recognize what conduct is prohibited and ensure perpetrators are put on notice for any potential violations. Victims will consequently recognize what behavior is actionable and allow them to seek assistance if they are subjected to these crimes. Additionally, preventative measures taken by employers can be a strong defense against the OSHA imposed duty to provide a safe working environment.<sup>166</sup> If employers can prove they

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163. Gilbert, *supra* note 22, at 349.

164. *Id.* at 356.

165. Erdmann, *supra* note 4, at 732-33.

166. *Id.* at 737.

adopted preventative and remedial measures to prevent sexual violence, they will be better equipped to rebut a presumption of a breach of duty or allow decreased or absolved penalties.

Additionally, existing agencies, such as the EEOC, can supplement the current system by expanding enforcement actions in this field. The increased number of complaints brought to the EEOC have already amounted to greater investigation efforts. However, it is indispensable that other agencies with enforcement power, such as OSHA, commit to increased oversight and enforcement of the current regulations. Just as OSHA has taken a more active role in addressing workplace violence in the health care and social services industries, increased oversight and enforcement in the agricultural industry can help lower instances of workplace sexual violence and hold perpetrators accountable. While employers may be concerned with increased oversight, OSHA already has regulatory authority. OSHA not only provides enforcement and penalties, but it also has taken an advisory role by offering employers information on best practices, rather than actively imposing sanctions.<sup>167</sup> Thus, increased enforcement of a long-standing, limited set of regulations applicable to the agricultural industry should come as no surprise or burden to the industry.

### *C. Local Efforts*

As discussed previously, states with agricultural sectors may be in a better position to address workplace sexual violence. Iowa, with its leading role in agriculture, is in a better position to address the needs of its agricultural landscape. Because of the significant agricultural workforce in the state, Iowa would benefit from legislation aimed at preventing workplace sexual violence. Unfortunately, Iowa has a history of grave incidents of workplace sexual violence.<sup>168</sup> This history suggests that employers need more than voluntary compliance with workplace violence practices and the need for accountability should be mandated through legislation. Requiring Iowa agricultural employers to address workplace violence ensures accountability from employers who fail to comply with mandatory rules

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167. *Id.* at 736.

168. KOMINERS, *supra* note 19, at 23 (noting that DeCoster Farms, a poultry plant located in Iowa, was involved in the trafficking of numerous Mexican women into the United States to work in DeCoster's poultry plants who were subsequently repeatedly raped by coworkers and supervisors); Yeung & Rubenstein, *supra* note 7 (finding that 41% of women working in Iowa meatpacking plants said they'd experienced unwanted touching on the job); Lynda Waddington, *Workers Tell Stories of Sexual Abuse at Iowa Plant*, REWIRE NEWS (June 3, 2008, 7:00 AM), <https://perma.cc/F4YL-E285> (reporting that multiple female workers reported sexual exploitation at the Agriprocessor meatpacking plant in Postville, Iowa).

and provides an avenue for consequences and relief.

In addition, any legislation intended to safeguard agricultural workers in Iowa must be cognizant of the undocumented workforce. Not only should states refrain from enacting laws that increase police fear and discourage reporting of crimes in immigrant communities, legislation should include provisions explicitly tackling the immigration-related tactics that perpetrators have relied on for many years to silence undocumented victims.<sup>169</sup> For example, California's legislature enacted a law safeguarding against employer retaliation by prohibiting the use of police or immigration officials as a way for intimidating or punishing victims who report workplace violence.<sup>170</sup> This proactively ensures victims are not held back in reporting abusive working conditions simply because of their immigration status.<sup>171</sup>

#### *D. Increased Social Services for Victims*

Lastly, expanding social services and resources to victims of sexual violence in rural agricultural communities is critical. Devoting increased congressional funds to victim service agencies ensures services are provided to victims who otherwise may not have sufficient means to travel to parts of the state where services are available. Furthermore, services must be culturally sensitive and linguistically appropriate to reach farmworkers who cannot communicate in English. Because of the long-lasting effects of sexual violence, access to bilingual therapists and mental health should be a priority for these victims. Lastly, a congressional grant devoted to investigation and research could shed light on the many issues surrounding workplace violence in the agricultural industry in hopes that increased resources can be committed to help curve the problem.

## VII. CONCLUSION

The agricultural industry is indispensable to the food system that sustains this country, but cannot survive without a workforce. Immigrant farmworkers play a vital role in this country's economy and deserve a workplace free of sexual violence. The future of the industry must integrate just and equitable labor standards and practices to be sustainable. Although the implementation and enforcement of the labor laws currently in place are inadequate, Congress has made great strides in attempting to bridge the gaps. However, Congress needs to implement and enforce increased regulation in the agriculture industry and an

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169. Parra, *supra* note 43, at 128.

170. *Id.* at 122-24.

171. *Id.*

overhaul of outdated exceptions to labor laws. The recommendations made in this note are necessary to end the epidemic of sexual violence in America's agricultural fields.