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## Forbidden Fruit: Sexual Victimization of Migrant Workers in America's Farmlands

*Christa Conry\**

It was a thick Iowa snowfall. So thick Olivia's car was completely buried beneath a white mound of unmovable sludge and snow. The 3:00 a.m. hour was fast approaching and the labor of a twelve-hour shift lay heavy on the Mexican, migrant worker's tired shoulders. As she contemplated alternative transportation to return home to her young daughter and ailing, elderly parents, she saw her supervisor approaching from the distance. Olivia was wary of this man: a man who made unwanted and obscene sexual advances inside the meatpacking plant where she worked; a man who daily grew more aggressive and brazen with his behavior; a man whose torrent of sexually explicit and belittling comments punctuated each of her long working days. He strode up to her and offered a ride in his truck, looking at the inclement weather and promising he would behave like a gentleman. Olivia knew his gestures, though seemingly generous, were veiled in hidden motive. When she refused and insisted he go away, his sham promises of gentlemanly behavior disappeared, and he quickly turned violent. His savage response caught Olivia by surprise. The supervisor punched her in the face and as she crumpled to the floor, he pinned her down with his powerful arms. He grabbed and ripped her clothing, leaving her skin exposed in the harsh cold. A pick-up truck approached and shined its headlights at the pair. The driver shouted in English "Hey, what's going on?" The supervisor responded back, explaining the incident apparently to the driver's satisfaction. He drove away without another comment.

The supervisor continued his vicious attack, tightening his grip around Olivia's neck and striking her in the head until she lost consciousness. When she later awoke, she noticed tracks left in the snow from where the

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supervisor dragged her limp body and left her unconscious at a nearby bench. Shivering, Olivia was aware that her pants had been removed and her seat was bloodied. She also noticed a crumpled \$20 bill on the ground next to her. The supervisor had raped her and left her in the cold night to wake alone, unclothed, and violated.

Olivia sought medical attention the next day and the horrified doctor encouraged her to report the attack to the police. She refused, saying she was scared of both the attacker and the authorities. One could cost her a job, the other her home in the United States. Upon her return to work she tried to report the attack to the plant's other management personnel. Her complaint, however, was met indifferently. "What is so bad about that," another supervisor asked. "He left you in one piece, didn't he?"<sup>1</sup>

## I. INTRODUCTION: SEXUAL VIOLENCE ON OUR DINNER TABLES

There is a place in the booming agricultural fields of America's farmlands that carries a terrible history. The fields *de calzons*, or fields of panties, are where female farmworkers, mostly migrant employees residing in the United States for the harvest, are systematically violated by foremen, colleagues, and other superiors.<sup>2</sup> There are 1.4 million crop workers in the United States.<sup>3</sup> Twenty-four percent of these workers are estimated to be female.<sup>4</sup> A recent report suggests that as many as eighty percent of female

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1. Mary Bauer & Monica Ramirez, *Injustice on our Plates: Immigrant Women in the U.S. Food Industry*, SOUTHERN POVERTY LAW CENTER 42 (2010), [http://www.splcenter.org/sites/default/files/downloads/publication/Injustice\\_on\\_Our\\_Plates.pdf](http://www.splcenter.org/sites/default/files/downloads/publication/Injustice_on_Our_Plates.pdf). As part of a comprehensive effort to identify and investigate the victimization of female migrants and seasonal workers employed in the nation's agriculture industry, the Southern Poverty Law Center interviewed hundreds of women in the industry and compiled their experiences into a report that honestly presents the problems that occur in the production of agriculture. *Id.*

2. *Rape in the Fields* (Frontline Media broadcast June 25, 2013) (transcript available at <http://www.pbs.org/wgbh/pages/frontline/social-issues/rape-in-the-fields/transcript-46/>). This film depicts events leading to the EEOC's landmark loss *EEOC v. Evans Fruit Co., No. CV-10-3033-LRS, 2013 WL 3817372 (E.D. Wash., July. 22, 2013)*, a recently decided case that absolved a Washington state apple grower from liability to its female migrant workers who suffered extreme forms of sexual harassment and assault at the hands of their foreman. *Id.* It includes several interviews from not only the women involved in the suit and the EEOC attorneys who investigated, initiated, and litigated the suit, but also interviews from the alleged harasser and the farm's defense attorney. *Id.* The film additionally investigates the larger problem of sexual violence in America's agriculture industry. *Id.* The documentary additionally investigates other areas farms and agribusiness across the country where gross instances of sexual abuse and harassment occur. *Id.*

3. *National Agricultural Workers Survey, Part B*, U.S. DEP'T OF LABOR, <http://doleta.gov/agworker/pdf/Statistical%20Methods%20of%20the%20National%20Agricultural%20Workers%20Survey.pdf>; see also *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment*, HUMAN RIGHTS WATCH 6 (May 2012), [http://www.hrw.org/sites/default/files/reports/us0512ForUpload\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf) [hereinafter *Cultivating Fear*]. "The agricultural industry relies heavily on unauthorized immigrants, who make up about 50 percent of the workforce, if not more." *Id.*

4. *Cultivating Fear*, *supra* note 3, at 16.

farmworkers surveyed are regularly exposed to the same trauma as Olivia – episodes that range from continuous sexual advances over years of seasonal work to isolated, violent attacks.<sup>5</sup>

An immediate response to such staggering statistics might be a call for forceful prosecution against aggressors, holding them accountable for heinous crimes committed against their subordinates and coworkers. However, in cases involving migrant female farmworkers, criminal prosecutions for sexual assault and rape are not easy to successfully litigate. There are several factors that contribute to this fact, but in the migrant farmworker community, hesitance to report assaults is the single greatest hindrance to prosecuting perpetrators of violent sex crimes. Farmworkers fear being branded a troublemaker, are intimidated by a legal system carried out in English, and are bound to cultural norms that require obedience to male figures in positions of authority.<sup>6</sup> This hesitation to report can lead to destruction of the physical evidence of a sex crime or the medico-legal evidence that in some cases can prove to be the lynchpin in a criminal prosecution for rape or sexual assault.<sup>7</sup>

When the destruction of physical evidence makes prosecuting rape allegations difficult, civil suits against her employer are the best alternative for an aggrieved woman to secure legal relief. Title VII of the Civil Rights Act safeguards employees from discrimination based on membership in a protected class.<sup>8</sup> Title VII functions in part to protect women who suffer sexual harassment in the workplace based on their gender.<sup>9</sup> While Title VII's protections apply to all workers, including those who are not

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5. *Cultivating Fear*, *supra* note 3, at 23.

6. Pamela Warrick, *A Life of Their Own: They Have Been the Victims of Abusive Men – Husbands, Bosses – and Have Spent Years Laboring in the Fields. But Farm Worker Women are Learning How to Fight for Their Rights*, L.A. TIMES, June 7, 1996, at E1, available at [http://articles.latimes.com/print/1996-06-07/news/ls-12437\\_1\\_women-farmworkers](http://articles.latimes.com/print/1996-06-07/news/ls-12437_1_women-farmworkers); *All Things Considered: Silenced by Status, Farm Workers Face Rape, Sexual Abuse*, NATIONAL PUBLIC RADIO (Nov. 5, 2013), <http://www.npr.org/templates/transcript/transcript.php?storyId=243219199>.

7. JANICE DU MONT & DEBORAH WHITE, WORLD HEALTH ORGANIZATION, THE USES AND IMPACTS OF MEDICO-LEGAL EVIDENCE IN SEXUAL ASSAULT CASES: A GLOBAL REVIEW 1-2 (2007), available at <http://www.svri.org/medico.pdf>. According to the report, though the collection of biological/non-biological samples, including sperm or semen is related to the legal resolution of cases in fewer than a third of pertinent studies, the documentation of other medical injuries is the strongest predictor of positive legal outcome. Because bruises, fractures, and other general physical injuries heal over time, this report supports the proposition that delay in reporting sex crimes can lead to diminishment of the physical evidence most strongly associated with charging and conviction.

8. 42 U.S.C.A. § 2000e-2 (West 2014).

9. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (holding that plaintiff may establish a violation of Title VII's prohibition of discrimination based on sex with a showing of sexual discrimination that has created a hostile or abusive work environment sufficiently severe or pervasive to alter the conditions of the victim's employment). See also *Harris v. Forklift*, 510 U.S. 17, 21 (1993) (following *Meritor* and reinforcing that any disparate treatment of men and women, including requiring employees to work in a discriminatorily hostile or abusive environment, raises an actionable Title VII claim.)

authorized to work in the United States,<sup>10</sup> it does not provide comprehensive protection to migrant women whose unique status makes a successful Title VII complaint uncommon.

This note discusses the ways Title VII fails female farmworkers; it suggests a plan of action to implement stronger mechanisms protecting women and girls who face sexual violence in America's farmlands and fields and grounds that call for broader federal protection in a proposed amendment to the legislation meant to safeguard this group of laborers, the Migrant and Seasonal Workers Protection Act ("AWPA").

Part I of this note familiarizes the reader with the foundational issues of this problem, explaining why sexual harassment has risen to such a serious concern in the agriculture industry. Part II demonstrates why an amendment to the AWPA protecting women from sexual violence in agricultural work is a necessary addition to previously enacted legislation and regulations that intend to protect women from sexual harassment in the workplace. It suggests that Title VII's statutory provisions have failed to keep female farmworkers fully protected from the harms they suffer on the worksite. This section additionally highlights case law concerning civil actions brought by farmworkers against their employers. It investigates why these judicial decisions often find in favor of agribusiness employers and against female migrant workers. Part II concludes by suggesting that female farmworkers' lack of adjudicatory success stems not from courts' misapplication of existing sexual harassment laws, but from the inability of the law itself to adequately provide relief. Bridging off that argument, Part III suggests the new rule that need apply: an amendment to the AWPA. The AWPA, as it currently functions, does not make explicit protection part of its statutory provisions for agricultural workers who experience sexual harassment and violence. While the AWPA might be the solution for workers who use the legislation to enforce unpaid wage disputes or bring an action against employer-businesses for dangerous working and housing conditions, it does not grant a cause of action to women who are sexually violated by coworkers and superiors in the industry. The AWPA is modeled after a male norm and is fundamentally flawed in its ability to address female experiences.<sup>11</sup> An amendment to the AWPA is the only

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10. *EEOC v. Tortilleria La Mejor*, 758 F.Supp. 585, 590 (E.D. Cal. 1991) (holding that Congress intended the protections of Title VII to run to "aliens, whether documented or not, who are employed within the United States").

11. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 4 (1988). Feminist legal analysis has demonstrated "the separation thesis" that excludes women's experience from traditional legal theory, values autonomy over connectedness with the other, and makes male concerns the priority in legal dialogue. *See id.* Robin West highlights modern legal theory's exclusion of the feminine life experience in preference of a model of masculine jurisprudence in her influential article. *Id.* This exclusion stems from the omnipresence of patriarchy, a political structure that values men more than women, and makes impossible "a truly ungendered jurisprudence." *Id.* at 4. *See also* Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 822-826 (1988-1989) (expanding on the

way to ensure that Congress's concentrated attention, granted to all agricultural workers in the existing Act, be extended to the feminine experience while also promoting an overall goal of gender mainstreaming in legislation, policies, and programs.<sup>12</sup>

#### A. PERVASIVE VICTIMIZATION: SYSTEMS THAT CREATE AND PROMOTE HARASSMENT

"No one sees the people in the field. We're ignored. You have to let them humiliate you, harass the young girls entering the field. You allow it or they fire you."<sup>13</sup> The problem of sexual harassment and violence in the agriculture industry is not small scale. A California study published in January 2010 found that among 150 farmworking women interviewed, eighty percent reported experiencing some form of sexual harassment while at work.<sup>14</sup> While this harassment originates predominately from superiors and colleagues' notions of weakness associated with womanhood,<sup>15</sup> female farmworkers suffer a unique form of harassment based on layers of vulnerability created not just by their gender, but also by several other factors including national origin and socioeconomic status.<sup>16</sup>

As a preliminary matter, throughout this note, *sexual violence* and *sexual harassment* are used in conjunction because neither term alone fully defines the nature of the abuses farmworkers suffer, which can range from generic workplace teasing and mocking to extreme incidents of violence. Advocates have identified three broad categories that qualify as workplace harassment: "(a) gender harassment, which includes generalized sexist comments and behavior that convey insulting, degrading, sexist attitudes; (b) unwanted sexual attention ranging from unwanted, inappropriate and offensive physical or verbal sexual advances to gross sexual imposition like

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male norm theory in the employment context by demonstrating the premise of the ideal worker as one with no childcare responsibilities). This ideal worker is structured around a male norm and traditional life patterns, indifferent to the role women are required to play of familial caretaker and responsible for the "integrated system of power relations that systematically disadvantages women." *Id.* at 826.

12. U.N. Rep. of the Econ. and Soc. Council for 1997, U.N. DOC A/52/3; GAOR, 52d Sess., Supp. No. 3 (Sept. 18, 1997) (defining gender mainstreaming):

Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programs, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programs in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.

13. Bauer & Ramirez, *supra* note 1, at 46 (quoting Virginia Mejia, a farmworker interviewed by the Southern Poverty Law Center).

14. Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16(3) VIOLENCE AGAINST WOMEN 237, 241 (2010).

15. West, *supra* note 11.

16. *All Things Considered*, *supra* note 6.

assault, or rape; and (c) sexual coercion. . . .”<sup>17</sup> Additionally, though the majority of farmworkers are from Mexico, the agriculture industry’s workers also include those from Central America and Asia.<sup>18</sup> However, the following analysis will be largely exclusive to the problems facing Latina workers from Mexico.<sup>19</sup>

Female and male workers are both among the most exploited members of the American workforce.<sup>20</sup> While their work is most commonly associated with planting and harvesting crops, these farmworkers have duties that encompass a broader range of tasks, including packing, canning, working in nurseries, dairying, and the raising of livestock or poultry. Despite their essential role in the efficient function of America’s multi-billion dollar agriculture industry,<sup>21</sup> the individuals who plant, plow, and harvest America’s farmlands are generally susceptible to workplace abuses that employees in other industries do not suffer.<sup>22</sup> Several factors work to create an environment of tacit acceptance, where employers levy job stability, owed wages, and deportation to ensure undocumented workers do not complain of workplace mistreatment.<sup>23</sup>

This workforce is one that is largely unauthorized and made vulnerable by lack of documentation for their residence and employment in the United States.<sup>24</sup> Some of these workers came to the U.S. through a visa and stayed past its expiration date, while others came illegally through their own initiative or via *coyotes*, smugglers who bring individuals across the Mexican-U.S. border.<sup>25</sup> Often, immigrants may be authorized for work in the United States but only as guest workers under the H-2A visa system.<sup>26</sup>

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17. Waugh, *supra* note 14, at 240.

18. *Id.* at 239.

19. *But cf.* Thomas A. Arcury & Sara A. Quandt, *Delivery of Health Services to Migrant and Seasonal Farmworkers*, 28 ANNUAL REVIEW OF PUBLIC HEALTH 345 (2007) (discussing the unique problems facing farmworkers from areas other than Mexico); *EEOC v. Global Horizons Inc.*, 904 F.Supp.2d 1074 (D. Haw. 2012) (district court case brought by the EEOC on behalf of Thai workers who faced discrimination, mistreatment, and harassment based on their national origin while working in farms in Hawaii and Washington).

20. DANIEL ROTHENBERG, *WITH THESE HANDS: THE HIDDEN WORLD OF MIGRANT FARMWORKERS TODAY* 324 (1998).

21. *See* U.S. DEP’T OF AGRIC., CALIFORNIA AGRICULTURAL STATISTICS: CROP YEAR 2012 (2012), available at [http://www.nass.usda.gov/Statistics\\_by\\_State/California/Publications/California\\_Ag\\_Statistics/Reports/2012cas-all.pdf](http://www.nass.usda.gov/Statistics_by_State/California/Publications/California_Ag_Statistics/Reports/2012cas-all.pdf). California alone, one of the United States’ largest agricultural producers, generated \$44.7 billion in 2012. *Id.* at 1. According to University of California, Santa Cruz researcher Irma Morales Waugh, farmworkers do not share in this great wealth, living far below the poverty threshold with earnings at only \$6.15 per hour of labor. Waugh, *supra* note 14, at 239.

22. ROTHENBERG, *supra* note 20.

23. *Id.* at 218.

24. *Cultivating Fear*, *supra* note 3, at 3.

25. Bauer & Ramirez, *supra* note 1, at 14; *see also Cultivating Fear*, *supra* note 3, at 14.

26. Michael Holley, *Disadvantaged by Design: How the Law Inhibits Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 573, 573 (2001). Holley examines the H-2A visa that admits guest workers into the United States for picking periods at agricultural sites around the country. *See id.* He details specifically the difficulty these

While this visa program allows many workers legitimate legal status, and subsequently a defense against employers threatening to enforce deportation, labor and employment advocates estimate that across the nation, seventy-five percent to eighty percent of farmworkers are unauthorized and residing in the country without any formal government authorization.<sup>27</sup>

Another significant factor that increases the likelihood of abuse migrant and seasonal farmworkers suffer is their transient lifestyle. Migrant workers follow the harvest throughout an agricultural region and rarely have a fixed employer. Seasonal workers are those who are employed at the same agricultural enterprise but only on a seasonal basis; their employment is not permanent but rather bi-yearly or depends upon the needs of a business while in production.<sup>28</sup> These workers have largely traveled north from poor countries with few opportunities.<sup>29</sup> As a consequence, they are more willing than American workers to accept backbreaking working conditions and poverty level wages.<sup>30</sup> Without any contractual obligations to ensure their employment, temporary foreign workers can be denied a position or sent back to their home countries entirely — all at the employer's behest.<sup>31</sup> Because of their impermanent work status, and lack of supportive, permanent communities, these workers are "unlikely to complain and virtually impossible to organize," preferring to maintain the status quo than to cause trouble.<sup>32</sup>

This seasonal, migratory work is unique to the agriculture industry and is emblematic of the lack of standards that regulate this billion-dollar business.

The agricultural industry has long been treated differently than other industries under US labor law. Agricultural workers are excluded from such basic protections as overtime pay and the right to collective bargaining. The laws that do exist are not adequately enforced, and several studies . . . have found that wage theft, child labor, and pesticide exposure occur with troubling frequency. In such an environment, farmworkers are unlikely to have faith in the ability of authorities to rectify abuses.<sup>33</sup>

The industry flies under the radar in regards to the uniform administration of labor laws.<sup>34</sup> This is because its largely unauthorized

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workers have with recognition under U.S. laws and policies protecting employees in the workplace. *See id.*

27. *Cultivating Fear*, *supra* note 3, at 15.

28. 29 U.S.C.S. § 1802 (West 2014).

29. ROTHENBERG, *supra* note 20, at 218.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Cultivating Fear*, *supra* note 3, at 6.

34. *Id.*



workforce has had a difficult time succeeding on legal claims in the nation's courts, despite the fact that American law entitles unauthorized workers to workplace protection and governmental agencies advocate broad application of labor and employment laws to support the rights of all workers.<sup>35</sup> A 2002 Supreme Court decision confirmed the reality that unauthorized workers' claims are difficult to square in the American legal system. In *Hoffman Plastic v. National Labor Relations Board*, the Court cast doubt on the ability of unauthorized workers to recover the same remedies for workplace abuse as authorized workers.<sup>36</sup> The Court held that an unauthorized worker fired from his job for activity in a union could not recover lost wages and back pay under the National Labor Relations Act ("NLRA"). The U.S. government and many workers' rights advocates maintain that *Hoffman Plastic* is strictly limited to enforcement under the NLRA and its legal analysis does not extend to other labor and employment laws.<sup>37</sup> The decision limits the amount of relief that unauthorized workers can claim, despite the egregiousness of the harm they suffer. The decision additionally "forces lawyers to be cautious in the remedies they seek while also emboldening unscrupulous employers who may feel they have less to lose in mistreating unauthorized workers, including tolerating workplace sexual harassment."<sup>38</sup>

B. INTERSECTIONALITY THEORY: HOW PATRIARCHY, RACISM,  
ECONOMIC DISADVANTAGES, AND OTHER DISCRIMINATORY SYSTEMS  
CREATE LAYERS OF VULNERABILITY

Taken together, the above factors demonstrate that migrant farmworkers are vulnerable. Of that already exploited group, female farmworkers are even more vulnerable in the workplace than their male counterparts. Advocates have lent a different conceptual framework to describe the vulnerability of migrant farmworking women versus all other workers, and all other *women workers*, that makes the harms they suffer uniquely exacerbated.<sup>39</sup> Intersectionality theory highlights the differences amongst women in the larger movement for workplace equality and represents the need to conceptualize the "average" worker as something more universally accessible.<sup>40</sup> Because, while Title VII may provide

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35. *Cultivating Fear*, *supra* note 3, at 6.

36. *Hoffman Plastic v. Nat'l Labor Relations Bd.*, 535 U.S. 137, 137 (2002).

37. *Cultivating Fear*, *supra* note 3, at 6.

38. *Id.*

39. Waugh, *supra* note 14, at 237. Waugh's study examined sexual harassment experiences amongst 150 Mexican immigrant farmworkers employed on California farms. Waugh, *supra* note 14, at 237. Waugh's findings describe "[h]ow discrimination shapes women's experiences and demonstrate the need for institutional policies to protect them." Waugh, *supra* note 14, at 237.

40. See CATHERINE MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* 85-89 (2005) (discussing the law's tendency towards essentialism and categorizing women's experiences as shared). MacKinnon's model serves to disenfranchise a group of women who do not fit into the unspoken norm of white, middle to upper class, and educated professionals or

support to the white, middle-class female worker whose experiences are considered normative and universal, it does not offer the same level of protection for workers operating under the weight of sexism, racism, classism, and xenophobia.<sup>41</sup>

The discussion of sexual harassment and violence in the agriculture industry begins with an understanding that sex-based animus is not the only factor contributing to coworkers and supervisors' violent and unwanted treatment. It is essential to understand how each theory of sexism, racism, classism, and xenophobia work to disenfranchise female farmworkers. Discrimination against and institutionalized aversion to non-American workers is the greatest contributor and indeed the nucleus in the web of female migrant workers' susceptibility to harassment and unwillingness to report it.<sup>42</sup> Sexual harassment is a problem that burdens all farmworking women, including those who are citizens of the United States or have legal status to work and live in the country.<sup>43</sup> But migrant farmworkers authorized for employment and residence in the United States are uncommon. Aggressors use the social and political policy deeming immigrants unworthy of protection and advocacy to enable their sexual violence.<sup>44</sup> Unlike their male counterparts, women's fear of deportation or legal ramifications following report of workplace abuse is heightened by their familial roles as primary caregiver for children and elderly relatives.<sup>45</sup> "I'd rather not cause trouble. It would be worse to lose everything,"

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individuals working in professions that are socioeconomically higher than low-income farmworkers, for instance. *Id.* MacKinnon and other legal feminists have made a passionate call for the feminist movement to find a way to talk about gender and the law that resonates with all women. *See also* Richard Kamm, *Extending the Progress of the Feminist Movement to Encompass the Rights of Migrant Farmworker Women*, 75 CHI-KENT L. REV. 765, 782–83 (2000) (discussing how migrant women have systematically been excluded from the feminist movement). Kamm additionally makes suggestions to remedy these concerns, including broadening national feminist women's organization's role in aiding migrant women farmworkers and increasing education, funding, and support for farmworker women at the grassroots level. *Id.*

41. *See* Waugh, *supra* note 14, at 238.

42. *See Cultivating Fear*, *supra* note 3, at 6; *see also* Bauer & Ramirez, *supra* note 1, at 42 (describing how "sexual predators . . . view farmworker women and other undocumented women as 'perfect victims,' because they are isolated, thought to lack credibility, generally do not know their rights, and may be vulnerable because they lack legal status."); *see also* William R. Tamayo, *Forging our Identity: Transformative Resistance in the Areas of Work, Class, and the Law: The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 U.C. DAVIS L. REV. 1075, 1075 (2000) (discussing how the EEOC's San Francisco regional attorney takes a more instructive approach on the issue of harassment amongst female, migrant farmworker, explaining the traditional difficulties these women have faced in work and in exerting their legal rights, the agency's attempts to redress these harms, and providing a template for other organizations to follow in their goals of protecting women who are sexually harassed at the workplace).

43. Bauer & Ramirez, *supra* note 1, at 44.

44. *Id.*

45. *Id.* at 23.

reported one woman, interviewed by the Southern Poverty Law Center.<sup>46</sup> As this woman rightly understood, reporting claims of sexual harassment carries the possibility of retaliatory action, up to and including being reported to immigration authorities.<sup>47</sup> This threat is compounded by the reality that women may be deported while their children, some born in the United States, will remain behind.<sup>48</sup> Female farmworkers are therefore less likely to assert their rights than their male equivalents, at the risk of harming their families.<sup>49</sup>

The vulnerability of female migrant farmworkers, though, extends beyond their immigration status and begins well before their entry into America's fields and farmlands. For some, gender-based and domestic violence leads to their escape from their home countries.<sup>50</sup> For others, instances of sexual violence characterize their first experience in America.<sup>51</sup> Mexican female immigrants are often forcibly raped or must agree to have sex with border smugglers in order to cross into the United States.<sup>52</sup> Some "humanitarian organizations estimate that as many as six out of [ten] women and girls experience some sort of sexual violence during the journey through Mexico and into the United States."<sup>53</sup> This initial victimization can have an enormous impact on women and girls' lives in the United States by establishing early on an internalized sense of worthlessness.<sup>54</sup> This sexual violence lays out a pattern of conduct that female migrants endure in order to achieve the greater goal of a life in the United States; in this way, their journey into and through the U.S. agriculture industry is punctuated by several, separate instances of sexual violation that must be tolerated.<sup>55</sup>

Once in the United States, unfamiliarity with the dominant language

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46. Bauer & Ramirez, *supra* note 1, at 25.

47. *See, e.g.*, Bauer & Ramirez, *supra* note 1, at 25.

48. Bauer & Ramirez, *supra* note 1, at 49.

49. *Id.* at 23; *see also All Things Considered, supra* note 6; *see also Around the Nation: Female Farm Workers Speak Up About Sexual Harassment*, NATIONAL PUBLIC RADIO (Jan. 4, 2014), <http://www.npr.org/2014/01/04/259646787/female-farmworkers-speak-up-about-sexual-harassment> (A farm worker who was sexually assaulted by her supervisor related that her greatest concern was her children, "He was hurting me. Imagine his fingers were all dirty with pesticides. I wanted for him to stop and hope that it was all he wanted. I thought if he kills me, who will take care of my children?") [hereinafter *Around the Nation*].

50. Bauer & Ramirez, *supra* note 1, at 41–42. Olivia, from the opening narrative, originally came to the United States to escape her abusive husband. Bauer & Ramirez, *supra* note 2, at 41. She did not imagine the same gendered violence could await her in America, whose borders she crossed to ensure a life free from violence for herself and her young daughter. Bauer & Ramirez, *supra* note 1, at 41–42.

51. ROTHENBERG, *supra* note 20, at 127–35.

52. *Id.* at 130.

53. Bauer & Ramirez, *supra* note 1, at 11.

54. Patrick J. Hines, *Bracing the Armor: Extending Rape Shield Protections to Civil Proceedings*, 86 NOTRE DAME L. REV. 879, 886 (2011).

55. Bauer & Ramirez, *supra* note 1, at 23. "It's because of fear [that] we have to tolerate more," reported one farmworker to the Southern Poverty Law Center. *Id.*

stalls any efforts a female farmworker may exert to stop the harassment she faces in agribusiness.<sup>56</sup> “Women are less likely than men to speak English. Therefore, they are more likely to be underrepresented and more at risk of exploitation.”<sup>57</sup> Women with inadequate English comprehension and expression skills may be less motivated to seek advocacy or report harms they suffer without the ability to fully articulate their claim. And even when language barriers do not stall women’s ability to seek representation or report harassment to management, who are often non-Spanish speaking, the fear of economic repercussions that stem from reporting instances of sexual harassment paralyze female farmworkers from asserting their rights.<sup>58</sup> Because farmworkers are considered disposable labor with no long-term value, their place in the fields can be easily revoked. The financial consequences of reporting harassment can be disastrous, when a farmworker’s labor is replaceable and her value is measured exclusively by the speed and efficiency of her work. No such worker wants her employer to peg her a troublemaker and revoke her position, and thereby her ability to provide for herself and her family.<sup>59</sup>

Finally, distinctive to this group of workers and indicative of the way tradition and custom inform gender, is the cultural role of obedient female to which each migrant farmworker must strictly adhere.<sup>60</sup> The Mexican culture teaches male machismo and women’s submissiveness.<sup>61</sup> This gender role makes many female farmworkers less likely to voluntarily discuss any harassment suffered at the worksite based on an implicit understanding that women must not complain of mistreatment, regardless of its severity.<sup>62</sup> Social stigma is another mechanism that prevents reporting harassment and sexual violence at the workplace. Many Latinas, “ingrained with the culturally reinforced idea that a woman shares blame if she is sexually victimized,”<sup>63</sup> will fail to report sexual affronts for fear that others will accuse them of having “asked for it” or behaved in a manner that triggered the undesired behavior.<sup>64</sup> Many migrant workers, specifically those who come from Mexico or other Latin American countries, are not familiar with the concept of sexual harassment.<sup>65</sup> This unfamiliarity demonstrates the cultural notions that impede women from asserting their rights to freedom from sexual exploitation and the lack of

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56. Maria M. Dominguez, *Sex Discrimination & Sexual Harassment in Agricultural Labor*, 6 AM. U. J. GENDER & LAW 231, 235 (1997); see also Warrick, *supra* note 6, at E1.

57. Dominguez, *supra* note 56 (quoting Warrick, *supra* note 6).

58. *Id.* at 257; see also Bauer & Ramirez, *supra* note 1, at 28 (“I’m better off keeping quiet . . . They give me work. That’s what I want. I don’t want anything more.”).

59. *All Things Considered*, *supra* note 6; see also Kamm, *supra* note 40, at 769–70.

60. Dominguez, *supra* note 56.

61. Kamm, *supra* note 40, at 770.

62. *Id.*

63. Bauer & Ramirez, *supra* note 1, at 44.

64. *Id.*

65. *Id.*

training offered in the agriculture industry to apprise women of sexual harassment laws.<sup>66</sup> As Dolores Huerta, who along with Cesar Chavez was one of the founders of the National Farm Workers Association,<sup>67</sup> reported to PBS's investigative team, "[s]exual harassment is an epidemic in the fields, and it again goes back to the vulnerability that . . . farmworker women have. . . . They don't even know that they can report sexual harassment and that the employer can be responsible for that."<sup>68</sup>

## II. INCOMPLETE COVERAGE UNDER THE LAW: SURMOUNTING SUPREME COURT PRECEDENT ON TITLE VII'S REQUIREMENTS AND JURY SKEPTICISM OF SHE-SAID-HE-SAID LITIGATION

Congress implemented Title VII of the Civil Rights Act of 1964 to provide for straightforward litigation and resolution of a worker's claims of unlawful employment practices based on his or her race, color, religion, sex, or national origin.<sup>69</sup> Title VII's provisions meant "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group . . ." over another.<sup>70</sup> Congress added the prohibition against discrimination based on sex "at the last minute on the floor of the House of Representatives" but nevertheless made explicit that sex amounted to a protected category that enjoyed protection under the Act.<sup>71</sup> The legislation might have begun as an attempt to curb the favoritism "white employees [enjoyed] over other employees[,]"<sup>72</sup> but Title VII is also a means for female employees to secure relief against employers that attempt to use gender as reason for different terms and conditions of employment, or to deny employment all together.<sup>73</sup> In the late 1970s courts began recognizing sexual harassment as a workplace practice that could amount to violation of Title VII's anti-discriminatory purpose.<sup>74</sup> Since

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66. Bauer & Ramirez, *supra* note 1, at 44.

67. National Farm Workers' Association was founded in 1962, and would later become United Farm Workers. See *History: The Story of Cesar Chavez*, UNITED FARM WORKERS, [http://www.ufw.org/\\_page.php?menu=research&inc=history/07.html](http://www.ufw.org/_page.php?menu=research&inc=history/07.html) (last visited Sep. 27, 2014).

68. *Rape in the Fields*, *supra* note 2.

69. 42 U.S.C.A. § 2000e-2 (West 2014).

70. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

71. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63 (1986).

72. *Duke Power Co.*, *supra* note 70, at 430.

73. See *United Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (holding that a battery manufacturer's fetal-protection plan, even if meant to promote the health and well-being of the workforce, violates Title VII of the 1964 Civil Rights Act because it only bars the participation of women, and not men, in occupations that could impact fertility); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that discrimination on the basis of sex stereotyping may amount to violation of Title VII if the employer fails to show that negative employment action taken against an employee would have been the same absent the discriminatory motives).

74. Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 *FORDHAM L. REV.* 773,

then, and bolstered by the EEOC's guidelines on sexual harassment issued in 1983,<sup>75</sup> many female workers have seen recognition in federal courts, from the district to the appellate level, for the harassment they face in the workplace.<sup>76</sup>

A. SUPREME COURT AUTHORITY AND THE *ELLERTH-FARAGHER* AFFIRMATIVE DEFENSE

For the migrant female farmworker, however, Title VII's statutory language and courts' interpretation of its terms and requirements make recovery difficult. This is largely due to farmworkers' inability to demonstrate employer liability during litigation. The Supreme Court has articulated the standard for determining an employer's vicarious liability in sexual harassment complaints and supplemented the plain meaning of Title VII's "supervisor" language in two seminal cases: *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*.<sup>77</sup> Under Title VII and the *Ellerth-Faragher* standard, employers may only be vicariously liable for the actions of their employees when those employees hold a supervisory role over others.<sup>78</sup> Otherwise, the employer may only be liable if an aggrieved employee complained of mistreatment and the employer failed to take prompt corrective action.<sup>79</sup>

The pair of cases, handed down on the same day of the 1998 term, established a highly structured framework for determining the circumstances in which an employer may be held liable under Title VII for the acts of a supervisory employee whose sexual harassment of subordinates has created a hostile work environment. In *Ellerth*, a female employee of a textile producer filed suit against her employer, alleging that her supervisor's sexual harassment forced her constructive discharge.<sup>80</sup> The employee had suffered no adverse job consequences as a result of the mistreatment and allegedly failed to report the supervisor's harassment despite her knowledge of the company's policy against sexual

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778 (1993). See *Williams v. Saxbe*, 413 F.Supp. 654 (D.D.C. 1976); *Chrapliwy v. Uniroyal*, 670 F.2d 760 (7th Cir. 1982); see also *Harris v. Forklift Sys.*, 510 U.S. 17 (1993) (holding that workplace harassment on the basis of gender can violate Title VII so long as the environment would reasonably be perceived, and is subjectively perceived by the victim, as hostile or abusive).

75. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1992). These regulations, while not binding authority with the force of law, are persuasive rules that guide courts in sexual harassment cases.

76. See *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F.Supp. 1059 (C.D. Ill. 1998); *Jenson v. Eveleth Taconite Co.*, 824 F.Supp. 847 (D. Minn. 1993); see also *Shaw v. AutoZone, Inc.*, 180 F.3d 806 (7th Cir. 1999).

77. *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

78. *Faragher*, 524 U.S. at 800–01.

79. *Ellerth*, 524 U.S. at 745.

80. *Id.* at 747–48.

harassment.<sup>81</sup> In *Faragher*, the employee claimant resigned her position as a lifeguard citing her supervisors' unwanted touching and vulgar comments that created a sexually hostile work environment.<sup>82</sup> Like the female employee in *Ellerth*, the employee in *Faragher* did not complain to her higher management about the supervisors' conduct.<sup>83</sup> The Court in *Ellerth* and *Faragher* laid out a definitive analysis to vicarious liability suits, holding that employers are liable for supervisors who create hostile working conditions in cases where harassed employees suffer a tangible job-related consequence.<sup>84</sup> When a harassed employee suffers no job-related consequence, a defendant employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.<sup>85</sup> "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."<sup>86</sup> This standard requires the employee to exercise reasonable care to avoid her own harm, and if an employer demonstrates the aggrieved employee failed to exercise reasonable care, it can avoid liability.<sup>87</sup>

While these judgments offered guidance in the murky areas of sexual harassment law, the analytical methodology articulated in *Ellerth* and *Faragher* effectively limited the reach of a vicarious liability claim.<sup>88</sup> *Ellerth* and *Faragher*'s progeny, most notably the 2013 term's *Vance v. Ball State*, demonstrated that relief is not available to employees who cannot establish that aggressors meet the "supervisor" definition or for other employees who cannot curtail their employer's affirmative defenses.<sup>89</sup> Taken together, *Ellerth* and *Faragher* give guidance for employers to avoid or minimize potential liability for sexual harassment. Under the decisions, employers who put into practice a sexual harassment policy may tip the scales in favor of a defense verdict, especially where the employee does not have a viable reason for failing to use that policy and lodge a complaint about alleged sexual harassment.

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81. *Ellerth*, 524 U.S. at 747–48.

82. *Faragher*, 524 U.S. at 782.

83. *Id.*

84. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 744–45.

85. *Faragher*, 524 U.S. at 807.

86. *Id.*

87. *Id.* at 807–08.

88. *Id.*

89. *Vance v. Ball State*, 133 S.Ct. 2434 (2013) (holding that an employee is a "supervisor" for purposes of determining vicarious liability under Title VII *only if* he is empowered by the employer to take tangible employment actions against the alleged victim. All other nonsupervisor employees who inflict sexual harassment against another employee cannot, through their conduct alone, expose an employer to vicarious liability).

B. THE SHE-SAID-HE-SAID BAR: HOW THE VICARIOUS LIABILITY STANDARD FUNCTIONS BEFORE A JURY

Female migrant workers' legal claims have suffered from the stricter *Ellerth-Faragher* vicarious liability standard, since alerting their employers about sexual harassment and assault in the workplace is perhaps the most difficult undertaking for this group. As binding authority that the Supreme Court declined to revise, the vicarious liability standard is applied uniformly to all employees. It is not used on a case-by-case basis that takes into account each worker's life experiences and the unique circumstances that make her unlikely to report harms she has suffered. Instructed on this legal standard, jurors who decide questions of fact will be unlikely to find that a female employee who failed to alert her employer to the abuse she suffered reasonably mitigated her harm. This is especially true if the only evidence of harassment the plaintiff can offer is testimony from the aggrieved woman.

The blanket vicarious liability standard led to predictably disastrous results in the Eastern District of Washington when on April 3, 2013, a federal jury returned a verdict in favor of Evans Fruit, one of the largest apple producers in the United States. The jury's decision rejected the Equal Employment Opportunity Commission's (EEOC) claims on behalf of fourteen women who alleged they had been subjected to a sexually hostile work environment at the farm.<sup>90</sup> The fourteen women accused their foreman of hostile and vulgar remarks, assault, attempted rape, and groping a minor.<sup>91</sup> A jury of seven men and two women, however, ruled in favor of the grower, rejecting the charging parties' allegations.<sup>92</sup> The jury declared by special verdict that it did not find by a preponderance of the evidence

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90. EEOC v. Evans Fruit Co., *supra* note 2, at \*1; Press Release, EEOC, Major Washington Apple Grower Hit With Preliminary Injunction (Nov. 3, 2010), available at <http://www.eeoc.gov/eeoc/newsroom/release/11-3-10.cfm>; THE ASSOCIATED PRESS, *Federal jury rejects sexual harassment claims against Washington state fruit grower*, OREGON LIVE (Apr. 4, 2013), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2013/04/federal\\_jury\\_rejects\\_sexual\\_ha.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2013/04/federal_jury_rejects_sexual_ha.html). EEOC v. Evans Fruit Co. was only the second case filed by the agency on behalf of a farm-working woman to successfully make it to federal court. The first, *EEOC v. Harris Farms, Inc.* 2006 U.S. Dist. LEXIS 36903 (E.D.Cal., 2006), ended in a jury verdict awarding \$994,000 to the aggrieved farmworker. In *Harris Farms*, however, the worker suffered a tangible employment action when Harris Farms failed to prevent or end sexual harassment after the charging party reported it. In this way, the charging party's case was immune to the *Ellerth-Faragher* defense because she acted "reasonably" to mitigate her harm. The jury in *Evans Fruit* did not find the same in the Washington court. Press Release, EEOC, *Jury Orders Harris Farms to Pay \$994,000 in Sexual Harassment Suit by EEOC* (Jan. 21, 2005), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-21-05.cfm>.

91. *Rape in the Fields*, *supra* note 2.

92. Bernice Yeung & Grace Rubenstein, *Female workers face rape, harassment in U.S. agriculture industry*, S.F. GATE (June 25, 2013), <http://www.sfgate.com/news/article/Female-workers-face-rape-harassment-in-U-S-4619767.php>.



that any of the fourteen claimants had been subjected to a sexually hostile work environment while employed at Evans Fruit,<sup>93</sup> based largely on the fact that none of the employees complained while employed at the farm about the harassment they faced.<sup>94</sup> Although this verdict made it unnecessary to answer any further questions, the jury answered “No” to the question of whether it found by a preponderance of the evidence that the accused foreman was a “proxy” of Evans Fruit, and answered “No” to whether it found by a preponderance of the evidence that Evans Fruit crew leaders were “supervisors.”<sup>95</sup> The attorney for the defendant apple grower called the verdict a representation of “justice and a big dose of reality,” assailing the EEOC for what he called its “unreasonable investment in a narrative that was built on demonstrably false claims.”<sup>96</sup> The defense attorney alleged credibility issues amongst the claimant women that led to the verdict for Evans Fruit.<sup>97</sup> EEOC regional attorney William Tamayo identified the difficulty with claims brought by farmworking women and the reason for the Commission’s loss in Washington, saying, “the she-said-he-said nature of many sexual harassment claims are always going to be an issue in any case where there are no other witnesses.”<sup>98</sup>

On July 22, 2013, the district court for the Eastern District of Washington denied the federal agency’s Rule 59 motion for a new trial, finding that the verdict was not against the clear weight of the evidence.<sup>99</sup> The court determined that the jury’s conclusion “that not a single claimant satisfied her burden of proving by a preponderance of the evidence that she was subjected to a sexually hostile work environment was not contrary to the clear weight of the evidence.”<sup>100</sup> The jury is charged with making credibility determinations and the court refused to second-guess its grant of greater weight to the credibility of the alleged harasser than to the credibility of the alleged victims of harassment.<sup>101</sup> *Evans Fruit* confirmed

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93. EEOC v. Evans Fruit Co., *supra* note 2, at \*1.

94. *Wash. fruit grower wins sexual harassment case*, THE SEATTLE TIMES (Apr. 4, 2013), [http://seattletimes.com/html/localnews/2020708691\\_apwafuitgrowerharassment.html](http://seattletimes.com/html/localnews/2020708691_apwafuitgrowerharassment.html).

95. EEOC v. Evans Fruit Co., *supra* note 3, at \*1. The jury’s returned verdict demonstrates how a limited definition of “supervisor” can preclude farmworkers from claims against their employers. If a harasser is not considered a supervising employee, his or her conduct cannot confer liability on the employer who is only obligated to stop harassment if an employee files a complaint. This insulates the employer from proactive policing of harassment amongst its employees. This district court issued this decision before the Supreme Court turned down its decision in *Vance v. Ball State* where it seriously narrowed the definition of “supervisor,” setting precedent for all district court cases to follow *EEOC v. Evans Fruit*.

96. Chris Bristol, *Jury rejects claims of sexual harassment at Evans Fruit*, YAKIMA HERALD (Apr. 4, 2013), <http://www.yakimaherald.com/news/latestlocalnews/1006092-14/jury-rejects-claims-of-sexual-harassment-at-evans>.

97. *Id.*

98. *Id.*

99. EEOC v. Evans Fruit Co., *supra* note 2, at \*8.

100. *Id.* at \*2.

101. *Id.* at \*2. See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)

for all workers-rights advocates and employment attorneys that the road to a successful Title VII sexual harassment complaint for a female agriculture worker will be fraught with obstacles.

### III. THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT: FEDERAL LEGISLATION'S CONTINUOUS APPLICATION OF A NORM

Because Title VII makes strong defenses available to employers and the legislation's normative language best protects workers not burdened by membership in several disenfranchised classes, migrant farmworking women should be able to appeal 29 U.S.C.A. §1801, the Federal Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), to redress the gendered harm they face.<sup>102</sup> However, similar to Title VII's white-woman-normative enforcement, the AWPA is structured around and operates under a strict model: the male norm. AWPA's statutory provisions may represent a concerted effort by Congress to protect a group of workers it considers some of the most exploited in the country.<sup>103</sup> However, in framing the Bill, Congress failed to take into account the harms unique to female workers in the agriculture industry, including the threat of sexual harassment, assault, and intimidation. The Bill, like traditional legal theory, "is a synthesis of umpteen thousands of personal, subjective, everyday, male experiences."<sup>104</sup>

#### A. THE AWPA'S APPLICATION OF A MALE NORM

To understand this Congressional error, it is first necessary to understand the circumstances that lead to the creation of the AWPA. There is an important recognition essential to analyzing the troubles of migrant farmworkers out of which the AWPA was born: farmwork is difficult. It is "physically taxing, requiring the day-long performance of repetitive motions while stooping, kneeling, walking or crawling."<sup>105</sup> It is consistently ranked as one of the most dangerous occupations in the United States.<sup>106</sup> Exposure to pesticide, unwieldy machinery, harsh weather conditions, and substandard housing and healthcare contribute to the hazards of the workplace.<sup>107</sup>

The first major federal effort to improve the conditions of agricultural laborers saw birth in the Federal Farm Labor Contractor Registration Act ("FLCRA"). However, this precursor to the AWPA was largely inefficient

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(holding that "credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions . . .").

102. 29 U.S.C.A. § 1801 *et seq.* (West 2014).

103. H.R. REP. NO. 97-885, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4548 ("Evidence received by the committee confirms that many migrant and seasonal agricultural workers remain today, as in the past, the most abused of all workers in the United States.").

104. West, *supra* note 11, at 64.

105. Holley, *supra* note 26, at 575.

106. Holley, *supra* note 26, at 575-76.

107. Holley, *supra* note 26, at 576.

in actually applying legal protection to the migrant workers nurturing America's farmlands.<sup>108</sup> Congress enacted the Migrant and Seasonal Agricultural Worker Protection Act, "to redress perceived weaknesses in the implementation of its predecessor."<sup>109</sup> The AWPA provides a list of protections for migrant workers, from regulation of housing and safety conditions, to requirements for written disclosures of working environments and rates of pay.<sup>110</sup> The legislation places duties and responsibilities on agriculture employers and farm labor contractors, and ensures that few migrant workers fall outside the scope of the bill's protections because their employer's classification is not included in the category of enterprises subject to the AWPA.<sup>111</sup> The bill limits, however, those workers who can recover under its provisions, extending protections to "migrant agricultural workers" and "seasonal agricultural workers" only.<sup>112</sup> This definition excludes any temporary, nonimmigrant alien who is authorized to work in agricultural employment under the federal H-2A guest worker program.<sup>113</sup> Migrant and seasonal workers temporarily living in the United States under H-2A visas are protected, however, by regulations promulgated under that program.<sup>114</sup> They are able to file complaints through the Job Service Complaint System and enjoy many of the same protections as provided under the AWPA.<sup>115</sup>

The AWPA grants agricultural workers a private right of action if aggrieved by a violation of the statute.<sup>116</sup> It requires no showing of the defendant's specific intent to violate the law, only that its intentional actions, defined as "conscious or deliberate" acts, harmed an agricultural worker.<sup>117</sup> Under this common civil standard, individual employers and large businesses are subject to the Act and responsible for "the natural consequences of their acts."<sup>118</sup> Pursuant to §1854(c), courts that find an employer's actions violated the AWPA "have the discretion to award an amount equal to the amount of actual damages, statutory damages of up to \$500 per plaintiff per violation subject to limitation, and other equitable relief" capped at \$500,000.<sup>119</sup> Courts have additionally held that a plaintiff is not entitled to punitive damages upon a prevailing claim under the Act,

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108. See generally, Claudia G. Catalano, *Construction and Application of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA)*, 65 A.L.R. FED. 2d 339 (2012).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Work Authorization for Non-U.S. Citizens: Temporary Agricultural Workers (H-2A Visas)*, U.S. DEP'T OF LABOR (last updated Sept. 2009), [www.dol.gov/compliance/guide/taw.htm](http://www.dol.gov/compliance/guide/taw.htm).

115. *Id.*

116. Catalano, *supra*, note 108 at § 2.

117. *Id.*

118. *Id.*

119. *Id.*

although some have awarded liquidated damages, describing that relief as essentially punitive.<sup>120</sup>

Imposing liability on an employer for “the natural consequences of their acts” should be extended to those acts that subject female workers to sexual harassment. However, the canons of statutory interpretation halt the application of the AWP to female migrant workers’ claims of sexual misconduct in the workplace. This result excludes what eighty percent of female farmworkers say is a prevalent aspect of their employment: the threat and occurrence of sexual harassment and assault.<sup>121</sup> Despite this widespread concern, the complaints of female workers suffering sexual victimization do not fall within the Act’s enumerated protections if applying the doctrine of *ejusdem generis*, a canon of construction that may limit the otherwise broad meaning of a generally descriptive word — such as “protections” — to include only a class of words that immediately precedes it.<sup>122</sup> For instance, Title II through Title IV of the AWP details specific protections ensured under the Act. These include and are limited to: information and recordkeeping requirements, wages, supplies, and other working arrangements, safety and health of housing, motor vehicle safety, confirmation of registration, information on employment conditions, and compliance with written arrangements.<sup>123</sup> Nowhere are provisions protecting a worker’s sexual dignity listed. Based on *ejusdem generis*, women’s freedom from sexual harassment is not covered by the statute as it is explicitly left out of Title II through IV’s listed protections.<sup>124</sup> And even if the rules of construction did not preclude recovery for women’s claims of sexual harassment, the doctrine of *ejusdem generis* “is only applicable where the intent of the statute or the instrument under consideration is ambiguous and doubtful.”<sup>125</sup>

The AWP is decidedly clear as to Congressional intent. The bill purports to “remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; to require farm labor contractors to register under this Act; and to assure necessary protections for migrant and seasonal agricultural workers, agricultural associations and agricultural employers.”<sup>126</sup> This statement suggests that the AWP’s primary purpose was preserving farmworkers’ physical health to bolster the farmlands and fields that drive the U.S.’s lucrative agriculture industry. Congress likely invoked an economic theme primarily to stockpile its legislative authority in the Constitution’s Commerce Clause. However, by failing to include in the list of protections the physical health

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120. Catalano, *supra*, note 108 at § 2.

121. Waugh, *supra* note 14, at 255.

122. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001).

123. 29 U.S.C.A. § 1801-1879 (1983).

124. *Id.*

125. *Hackerman v. State*, 189 Tenn. 130, 137 (Tenn. 1949).

126. 29 U.S.C.A. § 1801-1879 (1983).

of workers aggrieved by sexual harassment in the workplace, Congress denied migrant, female farmworkers the ability to recover under the AWP.

B. CONGRESSIONAL PROTECTION FOR MIGRANT FARMWORKING WOMEN SHOULD EXTEND IN THE AWP

Female migrant workers should also benefit from the specialized attention Congress deemed necessary to protect agricultural workers when enacting the AWP. In light of the bill's denial of specific protections for women who seek to recover from their employer's creation of a hostile workplace, the AWP should be broadened to allow actionable claims to female workers who suffer harassment while employed by an agriculture enterprise. Federal legislation elsewhere recognizes the unique status and plight of undocumented women in the United States. Congress expanded coverage under the Violence Against Women Act ("VAWA") to protect immigrant and migrant women unfamiliar with their legal rights and made vulnerable by dependence on spouses for legal immigration status.<sup>127</sup> VAWA allows women who face barriers in their ability to access legal remedies for violent crimes and abuse gain access to relief. Specific provisions of VAWA give grounds for suit even for those women who may lack legal authorization to reside in the United States.<sup>128</sup> These provisions demonstrate Congress's intent to explicitly protect migrant women. We can infer similar protections should be extended in other areas of federal law, including agricultural labor.

As Congress broadened VAWA to allow for recovery for immigrant and migrant women, the AWP must also be broadened to include specific provisions protecting female workers from the unique harms they suffer in agribusiness. This amendment should include a detailed structure establishing what amounts to vicarious liability and differing from the *Ellerth-Faragher* standard announced by the Supreme Court in 1998. The amendment should include some of the following provisions in order to fully provide female agriculture workers the relief they are owed, recognizing their unique status in the eyes of the law. For instance, in cases where an employee alleges a hostile workplace based on sexual harassment, if the employer had an established anti-sexual harassment policy and complaint procedure, the general duty standard should apply.

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127. Robin R. Runge, *The Evolution of a National Response to Violence Against Women*, 24 HASTINGS WOMEN'S L.J. 429, 440 (2013). "The structure and language of VAWA 1994 expresses Congressional intent to provide protection and support to *all* victims of violence against women crimes[,] . . . and recognized the unique challenges facing battered immigrant women . . ." *Id.* (emphasis added).

128. *Id.* VAWA only covers violent crimes against women, a useful protection when levied against aggressors but not if used against employers who can only be civilly liable to female workers. These employers, however, bear some responsibility for the harm women suffer under their guardianship. VAWA's protections, then, are essential and welcome but only provide partial relief.

However, in cases where the employer has not created a policy, has not meaningfully disseminated it amongst its workers, or has failed to train its supervisors and other upper level employees, a higher duty of care should apply rather than the generic duty standard. This duty of care would mimic feminist analysts' ethic of care<sup>129</sup> by encouraging a workplace based on cooperation, relationship, and interdependent nurturance. "Some feminists argue that an ethic of care is crucial for the creation of a gender-equitable workplace. Women are disproportionately in positions of vulnerability in the workplace, and therefore could often benefit substantially from the implementation of an ethic of care."<sup>130</sup>

This elevated duty standard is necessary, as many employers do not give the issue of sexual harassment and violence on the worksite the serious attention it deserves. As Human Rights Watch reported,

Some employers have also failed to meet their obligation to protect their employees from sexual harassment. Few of the farmworkers we spoke with said they received training on sexual harassment or information on how to report harassment. Where farmworkers did report the abuses to employers, many supervisors and employers ignored their complaints or retaliated against them, including with threats of deportation.<sup>131</sup>

National Public Radio interviewed one farmworker who said that though she attended a number of trainings about equipment safety and farm policies, the sexual harassment training offered by her employer consisted of simply signing a paper.<sup>132</sup> Such shallow training on sexual harassment — whose many nuances employers fail to instruct on — is not enough to protect workers. Employers should be held to a higher standard of training to include a detailed explanation of sexual harassment, in its many forms, as well as a comprehensive complaint procedure for employees who feel they have been subjected to harassment. Under this heightened standard of care statutorily required by the AWP, the employer would be charged with enforcing its own policies and sanctioned for failing to do so. Some might argue this places too heavy a burden on employers to be apprised of all interactions amongst their employees. But the substantial government interest of protecting an especially vulnerable group of workers who contribute billions of dollars to the United States' agricultural industry<sup>133</sup>

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129. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982) (asserting that humans are inherently relational and responsive to the needs of others and the human condition is one of connectedness and support for others).

130. Francis Carleton & Jennifer Nutt Carleton, *An Ethic of Care and the Hazardous Workplace*, 10 WIS. WOMEN'S L.J. 283, 289 (1995).

131. *Cultivating Fear*, *supra* note 6, at 7.

132. *All Things Considered*, *supra* note 6.

133. See Kyle H. Landis-Marinello, Comment, *The Environmental Effects of Cruelty to Agricultural Animals*, 106 MIC. L. REV. FIRST IMPRESSIONS 147, 150 (2008), available at <http://www.michiganlawreview.org/assets/fi/106/landis-marinello.pdf> (explaining that the

justifies an elevated standard.

To further protect exceptionally vulnerable women, the *Ellerth-Faragher* affirmative defense made available to an employer opposing a hostile workplace claim should be altered. The reasonableness of the plaintiff victim may be considered, but female migrant farmworkers, who exhibit some of the characteristics that increase hesitance to report sexual harassment, should not be held to the “reasonable person,” nor even the “reasonable woman”<sup>134</sup> standard but rather a “reasonable undocumented, immigrant woman” standard. The standard she is required to meet should reflect the many components that characterize her life, including economic and emotional vulnerability; lack of a large, supportive community; unfamiliarity with legal protections in the United States; and minimal knowledge of English. In addition, the reasonableness of the employer, another component of the *Ellerth-Faragher* defense, should be applied differently. Reasonableness should be considered only once the court finds liability. If the employer has a meaningful sexual harassment policy distributed to all its employees, and is thus subject only to the lower standard of care, reasonableness of the employer in its treatment of sexual harassment in the workplace should be taken into account when awarding damages. This should be a fact-sensitive analysis assessing several possible factors including: (1) the extent of the plaintiff’s harm; (2) the extent to which the employer took steps to reduce the harm; (3) the nature of the employer’s Equal Employment Opportunity policy and training, with specific regard to sexual harassment and assault; (4) whether other, separate claims of hostile workplace based on sexual harassment have been lodged against the defendant; and (5) whether the accused aggressor individually had any accusations brought against him that the employer knew, or should have known, about.

As with any legislation, there are negative effects that could result from the implementation of a high legal duty of care on an entire industry. Those who would exploit the proposed higher standard could inculpate their employer in a suit where it could be liable for substantial relief. Additionally, if resolution of complaints is made easier in the legal system, some farmworkers might be further disincentivized from engaging in dialogue with their employers about any harassment they suffer and instead take their claims straight to court. Lastly, the express intent in Title VII to limit employer liability when reasonable would be impeded.<sup>135</sup>

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agriculture industry’s profits reach the billions thanks in large part to successful lobbying of legislatures and agencies to keep its practices unregulated).

134. See generally Adler, *supra* note 74, at 806 (examining the development of the “reasonable woman” standard that has gained acceptance as the appropriate gauge for measuring the offensiveness of conduct alleged to be sexual harassment creating a hostile workplace).

135. “The limitation of employer liability in certain circumstances” is a necessary objective of Title VII. *Vance v. Ball State*, 133 S.Ct. 2434, 2449 (2013) (quoting

The positive effects of a higher standard of care more aligned to women's point of view, however, outweigh the negatives and can lead to greater redress of the severe harm many farmworking women suffer.<sup>136</sup> An elevated standard of care may equate to a streamlined judicial process — if a defending employer is held to a standard that requires its attention to possible threats to its vulnerable workforce, a presumption of negligence will be immediately applied to those employers who fail to detect, mitigate, or remedy harassment. Such a streamlined process may require fewer appearances from the aggrieved woman in a court of law. This functions to protect victimized women from the trauma and intrusiveness of litigation<sup>137</sup> and the stress of coming before a jury to face potentially hostile cross-examination on their lives and conduct, including sexual conduct.<sup>138</sup> Above all, the higher standard of care applied to a profitable American industry could encourage large-scale change, both in modern legal theory and employment law.<sup>139</sup> Injecting a statutorily required ethic of care into the AWPA's provisions could lead to legislation that requires such a standard in other areas of law, from tort liability to criminal sentencing.

This ethic of care may lead to what legal analysts such as Daniel Rothenberg believe is the only way to eliminate the severe marginalization farmworkers suffer and to significantly improve their lives: “challeng[e] the structure of our nation's farm labor system” as a whole.<sup>140</sup> According to Rothenberg, the detachment American consumers perceive between items of commerce and those who produce them creates a lack of empathy

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Burlington Indus. v. Ellerth, 524 U.S. 742, 764 (1998)).

136. West, *supra* note 11, at 64 (explaining the folly of failing to incorporate women's values in legal rhetoric and discourse, “we need to show what the exclusion of women from law's protection has meant to both women and law, and we need to show what it means for the Rule of Law to exclude women and women's values”).

137. See *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004) (holding that discovery concerning the immigration status of complainant employees could have a chilling effect on other employees' pursuit of workplace rights, in view of the potential for criminal prosecution and deportation for those employees discovered to be undocumented). Though the court granted a protective order in *Rivera* to prohibit a defendant from discovering a charging party's immigration status, Federal Rules of Evidence 403 may indicate that where immigration status is relevant, it will be admissible in trial proceedings. FED. R. EVID. 403.

138. FED. R. EVID. 412(b)(2). “In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.” *Id.*

139. West, *supra* note 11, at 65–66 (asserting that community, nurturance, responsibility, and the ethic of care are values worthy of protection that need not replace autonomy, self-reliance, and individualism but rather should supplement these traditional legal ideals). West depicts a grim outlook otherwise — “the refusal of the legal system to protect those values has weakened this community, as it has impoverished our lives.” West, *supra* note 11, at 66. See also Robin West, *The Difference in Women's Hedonic Lives*, 3 WIS. WOMEN'S L.J. 81 (1987). The law values a masculine set of ideals to the detriment of the needs of women. To remedy this, legal theory must take seriously those values considered traditionally feminine, including care and compassion for others in need. *Id.* at 115–16.

140. ROTHENBERG, *supra* note 20, at 324.



and concern.<sup>141</sup> Legislative reform is not the solution to remedy this indifference — changing the entire farm labor system is the better alternative. Government assistance programs and legislation protecting laborers all “reflect a basic vision that the poverty and powerlessness of farmworkers is inevitable. None of these programs or policies seeks to transform the farm labor system itself and none address the economic structure that defines farm laborers as the epitome of America’s working poor.”<sup>142</sup> In this country, enormous material wealth and the consequent unbridled consumerism are encouraged by “a diverse array of commodities whose production seems automatic and effortless.”<sup>143</sup> Indeed, “[t]he growing divide between the rich and the poor is marked by a separation between producers and consumers and the increasing invisibility of production.”<sup>144</sup> If American consumers continue to believe their products come from an invisible source, there is no accountability or sympathy truly necessary to protect marginalized workers. These workers need to be seen as individuals participating in a larger system, not just faceless, nameless laborers valued only for their production numbers. Offering the workforce producing our food the fullest protection under the law is the first step to changing the farm labor system. But what will lead to lasting change is the creation of responsibility and accountability that comes with empathy for the problems that befall the lesser fortunate. Such accountability will demonstrate that American society values farmworkers’ health and wellbeing, not because they are necessary to the smooth functioning of an industry, but because these workers are fellow humans who deserve dignity and support.

#### IV. CONCLUSION – A FIGHT FOR THE FUTURE

The situation, though burdened by setbacks, may not be as bleak as it may seem. Female farmworkers are increasingly finding a voice to denounce the victimization they face in the fields. In February 1999, the EEOC signed a significant consent decree providing for \$1.85 million for a class of farmworkers who claimed they had been sexually harassed and retaliated against by their employer.<sup>145</sup> The agency has additionally investigated a large number of complaints in the agriculture industry in the past ten years and has listed protecting immigrant, migrant, and other vulnerable workers as a top priority for its Strategic Enforcement Plan of 2013-2016.<sup>146</sup> Local and state governments have also taken up the cause of

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141. See ROTHENBERG, *supra* note 20, at 208.

142. ROTHENBERG, *supra* note 20, at 225.

143. *Id.* at 325.

144. *Id.*

145. EEOC v. Tanimura & Antle, Inc., No. 5:99-cv-20088-JW (N.D. Calif. 1999), available at <http://www.clearinghouse.net/chDocs/public/EE-CA-0221-0002.pdf>.

146. EEOC, STRATEGIC ENFORCEMENT PLAN FY 2013-2016 8 (2012), <http://www.eeoc.gov/eeoc/plan/upload/sep.pdf>.

the vulnerable farmworker. California Rural Legal Assistance, Inc. has initiated an assistance project to provide agriculture workers who suffer sexual violence with the technical, legal, and emotional aid necessary to become whole again.<sup>147</sup>

Above all, female farmworkers themselves have come to see that justice is attainable. Despite formidable obstacles before them, these women want to meet their aggressors and indifferent employers before a court of law and seek the remedy they are owed. Farmworker Guadalupe Chavez brought suit against her supervisor who raped her violently in a pistachio orchard. The jury acquitted the supervisor but Chavez still believes she found justice because “the man she accused of raping her had to face her in court. And she says now supervisors like him may think twice about how they treat women in the fields.”<sup>148</sup> As part of their investigative report, PBS interviewed Maricruz Ladino, a woman who courageously sued her employer and finally won settlement after four years. Ladino’s bravery and understanding of the justice inherent in America’s legal system demonstrates the rising tide of farmworking women ready to assert their right to freedom from sexual harassment and violence in America’s agricultural heartlands.

It wasn’t about the money because that does not give you back the integrity you lost as a woman, your self-worth as a woman. I was heard. That’s why I think there was justice. But a part of me died, and no one can give that back to me. This type of thing did not only happen to me. It was happening to many, many more women. And if I stay quiet, then it is going to keep happening. That’s why I want to talk about it now, so that everybody can see themselves in me, so that they won’t stay quiet anymore. They must react, not with violence but with the laws that protect them. Documented or undocumented, you have to speak.<sup>149</sup>

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147. *Farmworker Sexual Violence Technical Assistant Project*, CRLA.ORG, <http://www.crla.org/farmworker-sexual-violence-technical-assistance> (last visited Sept. 21, 2014).

148. *Around the Nation*, *supra* note 49.

149. *Rape in the Fields*, *supra* note 2.

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