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Accountability for Pesticide Poisoning of Undocumented Farmworkers

By *Elizabeth Lincoln*

Abstract

The illness burden experienced by farmworkers from exposure to pesticides is unparalleled in any other workforce in the United States. This paper explores current, specific legal protections available to undocumented farmworkers in California who suffer from pesticide poisoning. Despite efforts to regulate, use of dangerous pesticides remains rampant nationwide. Considering at least half of farmworkers are undocumented immigrants, the risk of retaliation is a central concern for reporting. Using California as a case study, this paper looks at both state and federal remedies for farmworkers. Exploring these various legal frameworks, this paper will weigh the pros and cons to each approach, considering at the forefront the particularly vulnerable situation in which undocumented immigrants find themselves: vulnerable to exploitation, retaliation, and deportation. In conclusion, the author advocates for federal protection from deportation for undocumented farmworkers who suffer from pesticide poisoning in the form of expanded eligibility for the U-visa. This will lead to more accurate reporting of the issue, increased support for criminal prosecutions for the criminal misuse of pesticides, and, hopefully, accountability for pesticide poisoning of undocumented farmworkers.

Introduction

Headaches, migraines, allergic reactions, nausea, asthma, vomiting, diarrhea, skin conditions, seizures, shortness of breath, cancer, infertility, respiratory problems, neurological issues, tumors, lung failure, leukemia, hypertension, diabetes.¹ These are all health effects linked to pesticide exposure, which “causes farmworkers to suffer more chemical-related injuries and illnesses than any other workforce in the nation.”² Of the approximately 1.4 million farmworkers in the

1. *Exposed and Ignored: How Pesticides are Endangering our Nation's Farmworkers*, FARMWORKER JUSTICE (2013); see also Keith Cunningham-Parmeter, *A Poisoned Field: Farmworkers, Pesticide Exposure, and Tort Recovery in an Era of Regulatory Failure*, 28 N.Y.U. REV. L. & SOC. CHANGE 431, 443, 491 (2015).

2. *Pesticide Safety*, FARMWORKER JUSTICE (2017), <https://www.farmworkerjustice.org/content/pesticide-safety> [<https://perma.cc/BL5J-BQ3U>].

United States,³ the Environmental Protection Agency (“EPA”) estimates that up to 20,000 farmworkers are poisoned by pesticides annually.⁴ For a variety of reasons explored in this Note, pesticide poisoning likely occurs at a much higher rate than this reported estimate. Farmworkers and their children experience exposure to pesticides at work, at home, and at school because pesticides move beyond the targeted areas for application as dust or droplets through the air during and after application.⁵ This process, called “pesticide drift,” poses health risks to the non-targeted adjacent areas such as “nearby homes, schools, and playgrounds” and “farm workers in adjacent fields.”⁶ Lack of data regarding farmworkers generally, and pesticide misuse and resulting illness specifically, works to the advantage of farmers who use pesticides to increase crop yield and economic gain.⁷ The farmworker population suffers in this non-transparent system, where regulations vary greatly state by state.⁸

Compounding the difficulty of reporting, symptoms of pesticide poisoning may also resemble symptoms of the flu and are hard to detect.⁹ If symptoms are detected, farmworkers face barriers to medical care due to immigration status and language barriers.¹⁰ The majority of farmworkers speak little English,¹¹ and at least half of the farmworker population is undocumented (meaning the workers do

3. BON APPÉTIT MGMT. CO. FOUND. & UNITED FARM WORKERS, INVENTORY OF FARMWORKER ISSUES AND PROTECTIONS IN THE UNITED STATES 1 (2011); *see also Unfinished Harvest: The Agricultural Worker Protection Act at 30*, FARMWORKER JUSTICE (2013) (estimating the number of farmworkers in the United States as two million workers).

4. 40 C.F.R. § 170.2.

5. ENVTL. PROT. AGENCY, Introduction to Pesticide Drift <https://www.epa.gov/reducing-pesticide-drift/introduction-pesticide-drift>

6. BEYOND PESTICIDES, *Farmworkers Push for Long Overdue Protections*, <https://beyondpesticides.org/dailynewsblog/2013/07/farmworkers-arrive-in-d-c-to-push-for-long-overdue-protections/> [<https://perma.cc/X8FM-BTZE>]; *see also* ENVTL. PROT. AGENCY, Introduction to Pesticide Drift <https://www.epa.gov/reducing-pesticide-drift/introduction-pesticide-drift> (defining pesticide drift as “the movement of pesticide dust or droplets through the air at the time of application or soon after, to any site other than the area intended. Pesticide droplets are produced by spray nozzles used in application equipment for spraying pesticides on crops, forests, turf and home gardens. Some other pesticides are formulated as very fine dry particles (commonly referred to as dust formulations).”)

7. BON APPÉTIT, *supra* note 3, at 1 (“No data, no problem.”).

8. *Id.* (“Labor law investigations and record keeping of regulatory enforcement are poor and the monitoring efforts at both the federal and state levels are typically untraceable and non-transparent.”); *see also Exposed and Ignored, supra* note 1, at 14 (“Regulatory Isolation: Pesticide Exposure Reporting Map”).

9. *Exposed and Ignored, supra* note 1, at 8.

10. Michael A. Celone, *Undocumented and Unprotected: Solutions for Protecting the Health of America’s Undocumented Mexican Migrant Workers*, 29 J. CONTEMP. HEALTH L. & POL’Y 117, 117–18 (2013).

11. *Breaking Down the Barriers: A National Needs Assessment on Farmworker Health Outreach*, HEALTH OUTREACH PARTNERS, 4th ed., 31 (Apr. 2010) (“Regarding language fluency, the majority (75%) of U.S. farmworkers primarily speak Spanish followed by English (21%).”).

not have a legal immigration status or permission to work in the United States).¹² The proportion of undocumented farmworkers has more than tripled in the past thirty years, and some estimate the number to be as high as seventy percent.¹³ Another twenty-one percent of farmworkers are permitted to work with temporary visas or as lawful permanent residence status.¹⁴ Farmworkers without legal status or with temporary permission to work in the United States risk deportation as retaliation for reporting illegal use of pesticides.¹⁵

This Note will ask if and how undocumented immigrant farmworkers themselves can hold parties responsible for pesticide poisoning, what risks that litigation would bring, and contemplate possible solutions. Proceeding through possible solutions, the maze of statutes purporting to protect farmworkers at a federal and state level is exposed as insufficient and ineffective, largely favoring farmers and manufacturers. An immigration-related solution to the problem of pesticide poisoning is an opportunity to make progress towards redressing physical ailments and improving the lives of farmworkers. California is used throughout this Note as a case study to compare protections to those in other states. California is among the few states which provide additional, comprehensive protections for agricultural workers and has a comprehensive reporting scheme.¹⁶ Additionally,

12. *Id.* (“According to the Pew Hispanic Center, there are approximately half a million unauthorized workers within U.S. agricultural industry, more than any other sector in the country. This estimate is thought to be even higher due to seasonal workforce fluctuations. Moreover, the percentage of unauthorized hired crop farmworkers in the U.S. has quintupled since 1989.”).

13. U.S. DEP’T OF LABOR, EMP’T & TRAINING ADMIN., DATA TABLES (1989-2014) (Table 1. National Demographic Characteristics), <https://www.doleta.gov/naws/pages/research/data-tables.cfm> [<https://perma.cc/QME9-8NPJ>]; see also Alfonso Serrano, *Bitter Harvest: U.S. Farmers Blame Billion-Dollar Losses on Immigration Laws*, TIME MAG. (Sept. 21, 2012), <http://business.time.com/2012/09/21/bitter-harvest-u-s-farmers-blame-billion-dollar-losses-on-immigration-laws/> [<https://perma.cc/3XFF-7P7W>]; Margaret Gray & Emma Kreyche, *The Hudson Valley Farmworker Report: Understanding the Needs and Aspirations of a Voiceless Population*, BARD COLL. MIGRANT LABOR PROJECT (2007) (seventy-one percent of workers were undocumented in this study of New York workers); Philip Martin & Richard Mines, *Alien Workers and Agriculture: The Need for Policy Linkage*, 1 YALE L. & POL’Y REV. 255, 260 (1983).

14. U.S. DEP’T OF LABOR, *supra* note 13 (twenty percent of workers have Legal Permanent Residency and one percent are “other work authorized”).

15. See, e.g., Lisa Peck Lindefel, *California Farmworkers: Legal Remedies for Pesticide Exposure*, 7 STAN. ENVTL. L.J. 72, 85 (1988) (“[M]igrant farmworkers, especially undocumented ones, may resist seeking medical services for fear of retaliation, or loss of jobs. . . . [F]armworkers are not likely to initiate lawsuits for redress for pesticide-related illness.”).

16. See, e.g., BON APPÉTIT, *supra* note 3, at 31, 58 (citing California as protecting workers in the several of the primary issues affecting U.S. farmworkers today: wage and hour standards, protection for children and youth farmworkers, regulation of farm labor contractors, heat stress regulations, and pesticide exposure. California also requires mandatory pesticide applicator certification renewal at two year intervals, which is more frequent than most states (asides from Washington)); see also Cal. Env’tl. Prot. Agency, Environmental Justice Program, *What is Environmental Justice?* (Dec. 14, 2017, 3:28 PM),

the California Labor Code protects undocumented workers by prohibiting inquiry into immigration status in certain situations, such as workplace injury liability for employers.¹⁷ However, because of the nature of pesticide poisoning and the overlap with immigration law, this author advocates for a federal response to protect agricultural workers who report illegal use of pesticides resulting in pesticide poisoning from deportation by expanding the U-visa eligibility to include this population.

Section I of this Note provides a history and framing of the issue of pesticide use. Section II discusses the population that suffers most from pesticide misuse and illegal use. The information presented in Sections I and II offers some reasons why data on pesticide-related illnesses is sparse and likely underestimates the problem. Sections III and IV turn to the federal and state remedies for a farmworker who is poisoned by illegal use of pesticides and seeks legal recourse or compensation. The Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) and the Worker Protection Standards (“WPS”) govern the registration of pesticides that outline permissible use, as well as protections for workers who handle pesticides.¹⁸ Section V contemplates possible state claims in California, including the strengths and weaknesses of possible tort claims. Section VI presents an argument for the enactment of federal protections from deportation for undocumented agricultural workers who report illegal use of pesticide resulting in poisoning of workers.

There is no single solution to the problem of pesticide poisoning of farmworkers in the United States. While lawmakers have proposed different forms of visas for agricultural workers—some protecting the workers, and others that solely protect the economic interests of the industry—none of the proposed legislation specifically responds to the problem of pesticide poisoning. The U-visa was created to protect and encourage victims of crime in the United States to come forward, thus increasing the availability of data and opportunity for a comprehensive resolution to the problem. U-visas require certification from a law enforcement agency, which currently “includes agencies that have criminal investigative jurisdiction in their respective areas of expertise, including, but not limited to, child protective services, the Equal Employment Opportunity Commission, and the Department of Labor.”¹⁹ Expanding the current U-visa statute to allow the EPA to certify petitions for U-visas based on the criminal use of pesticides resulting in harm to workers would help both the workers and the EPA in successfully regulating pesticides under FIFRA and WPS. Including the EPA as a certifying agency is both feasible—it was done with the Department of

<https://calepa.ca.gov/EnvJustice/> [<https://perma.cc/8NZW-SG4E>] (“California was one of the first states in the nation to codify Environmental Justice in Statute.”); Alan Ramo, *Environmental Justice as an Essential Tool in Environmental Review Statutes: A New Look at Federal Policies and Civil Rights Protections and California’s Recent Initiatives*, 19 HASTINGS W.-N.W. J. ENVTL. L. & POL’Y 41–42 (Winter 2013).

17. Cal. Labor Code § 1171.5(a).

18. 40 C.F.R. § 170 (WPS); 7 U.S.C. § 136 et seq. (1996).

19. 8 C.F.R. §214.14(a)(2).

Labor in 2015²⁰—and comports with the purpose of the U-visa. With more information, FIFRA prosecutions will be more effective, and the criminal statutes in place can be put to use. Thus, this solution has the possibility of increasing reporting, s those who have been affected by pesticide poisoning, and allowing for more evidence to be used in prosecutions against farm owners who are misusing pesticides to the severe detriment of this vulnerable workforce.

How Pesticides Make Farmworkers Sick, and Why Cases of Pesticide Poisoning Are Underreported

How could intelligent beings seek to control a few unwanted species by a method that contaminated the entire environment and brought the threat of disease and death even to their own kind?²¹

(u) Pesticide

The term “pesticide” means (1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer, except that the term “pesticide” shall not include any article that is a “new animal drug”²²

Each year, 5.1 billion pounds of pesticides are applied to crops in the United States.²³ Pesticides are used to increase yields in farms, protect crops from weeds and invasive species, and control vector-borne diseases.²⁴ However, pesticides present a double-edged sword: the same aspects that benefit farm owners are hazardous to the worker, consumer, and anyone within the range of exposure. Documented effects of pesticides include “contaminated land and water; decreased soil quality; ecological harm to nontarget animals, aquatic organisms, and beneficial insects; increased resistance among pests (resulting in super pests); and poisonings and chronic health problems among human beings who suffer exposure.”²⁵

In the 1940s, hundreds of new chemicals were produced “for use in killing insects, weeds, rodents, and other organisms described in the modern vernacular

20. 8 C.F.R. § 214.14(a)(2).

21. RACHEL CARSON, *SILENT SPRING* 8 (First Mariner Books ed., 2002) (1962).

22. 7 U.S.C. § 136(u).

23. *Exposed and Ignored*, *supra* note 1, at 8.

24. Md. Wasim Atkar, Dwaipayan Sengupta, & Ashim Chowdhury, *Impact of Pesticide Use in Agriculture: Their Benefits and Hazards*, 2 INTERDISCIP. TOXICOL. 1, 2–3 (2009).

25. Danica Li, *Toxic Spring: The Capriciousness of Cost-Benefit Analysis Under FIFRA’s Pesticide Registration Process and Its Effect on Farmworkers*, 103 CALIF. L. REV. 1405, 1408 (2015).

as ‘pests.’”²⁶ The use of pesticides increased after World War II, when scientists discovered dichlorodiphenyltrichloroethane (“DDT”) could be used to kill body lice and mosquitos causing malaria in soldiers overseas.²⁷ The success of DDT led to the introduction of more pesticides, encouraged by the United States Department of Agriculture (“USDA”), which taught farmers about this new, effective means of pest control.²⁸ This paralleled the increased involvement of the federal government in regulation of pesticides, and led to the passage of FIFRA in 1947.²⁹ Control of pesticide regulations affecting the agricultural industry at that time was in the hands of pesticide manufacturers, users, and regulators to the exclusion of farmworkers.³⁰ This three-pronged grip empowered special interests “at the expense of sound environmental policy.”³¹

Public opinion shifted in the 1950s as pesticides were revealed as the cause of deaths of nontarget species and animals, and various crises in which huge crops were contaminated with pesticides or herbicides known to cause cancer.³² The public became increasingly involved in the politics of pesticide use after failures in the 1950s to hold the government responsible for the effect on consumers and workers, rather than favoring special interests, and eventually efforts turned away from the courts and towards Congress. Consciousness of this harm also increased in the 1960s with the publication of Rachel Carson’s *Silent Spring*.³³ Carson’s book exposed the “cumulative poisoning” effect of pesticides to humans and the environment, and alerted the public to the presence of pesticides in land, air, and water.³⁴ More than the acute symptoms of pesticide poisoning, Carson urged readers to consider evidence of the “delayed effects of absorbing small amounts of pesticides that invisibly contaminate our world.”³⁵ This seminal book inspired a generation of activists, and yet, use of pesticides has not diminished.

26. Carson, *supra* note 21, at 7.

27. Andrew P. Morriss & Roger E. Meiners, *Property Rights, Pesticides, & Public Health: Explaining the Paradox of Modern Pesticide Policy*, 14 FORDHAM ENVTL. L.J. 1, 6–9 (Fall 2002).

28. *Id.* at 9.

29. *Id.*

30. See section II *infra* for the discussion of the disenfranchisement of farmworkers.

31. Morriss & Meiners, *supra* note 27, at 8; Donald T. Hornstein, *Lessons from Federal Pesticide Regulation on the Paradigms of Environmental Law Reform*, 10 YALE J. ON REG. 369, 410 (Summer 1993); see also Guadalupe T. Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, 1 U. PA. J. OF LABOR & EMP’T L. 487, 488 (1998) (discussing how the “lack of study” of conditions of farm workers aids the agricultural industry by disincentivizing accountability, promoting the “exclusion of workers,” and perpetuating a system where “the isolation of workers remains entrenched without opportunity for beneficial change.”).

32. Morriss & Meiners, *supra* note 27, at 16.

33. Carson, *supra* note 21.

34. *Id.* at 173.

35. *Id.* at 88.

Thus, for the past half century, evidence has shown that pesticides have at least some negative effect on those who come into contact with them. The harm caused by the “substance or mixture of substances” that forms a pesticide is due to three factors: persistence, formulation, and toxicity.³⁶ Based on these factors, many pesticides have restrictions on how they can be used or the time after application that workers must wait before returning to the field.³⁷ But these restrictions may not fully anticipate the variety of ways a farmworker can be exposed to pesticides. Farmworkers most commonly experience pesticide exposure from drift in air and residues on crop plants during routine activity, where exposure is not expected or protective gear is not worn.³⁸

A study of farmworkers’ exposure to pesticides between 2005 and 2009 found that, of the farmworkers exposed to pesticides, only sixteen percent “had mixed, loaded, or applied pesticides in the last 12 months . . .” concluding that “all farmworkers have a risk of exposure to pesticides directly and/or to pesticide residues, sometimes days after pesticides have been applied to their work areas.”³⁹ Even after farmworkers leave their jobs for the day, “there is a *constant* risk of indirect exposure for farmworkers and others who work or live near farms.”⁴⁰ In fact, a study showed that in all reported agricultural exposures between 2002 and 2006, fifty-two percent of the exposures occurred while the worker was doing “routine work: not applying pesticide.”⁴¹

Pesticide exposure can cause both acute and chronic illness. Farmworkers experience “headaches, nausea, shortness of breath, or seizures” in the short term, and “cancer, infertility (and other reproductive problems), neurological disorders, and respiratory conditions” in the long term.⁴² Chronic illness linked to pesticide exposure is difficult to detect and connect to a particular incident or pesticide in order to, for instance, succeed in proving causation in a personal injury claim. Thus, the chronic effects of pesticide exposure are distinct from other “signature diseases” that can more easily be linked to a particular toxin, such as mesothelioma in asbestos litigation.⁴³

Despite increased protection through new laws and incorporation of federal standards in the state, pesticide illnesses continue to plague workers in California. However, there is reason to believe that increased protection for workers does in

36. Lindelef, *supra* note 15, at 79.

37. See part III *infra* for a discussion of federal registration and regulation of pesticides under FIFRA.

38. CAL. ENVTL. PROT. AGENCY, DEP’T OF PESTICIDE REG., SUMMARY OF RESULTS FROM THE CA PESTICIDE ILLNESS SURVEILLANCE PROGRAM 2014, HS-1900, at 5 (2016) (hereinafter CEPADPR); Li, *supra* note 25, at 1414–15.

39. BON APPÉTIT, *supra* note 3, at 31, 58.

40. *Id.* at 44.

41. *Id.*

42. *Exposed and Ignored*, *supra* note 1, at 4.

43. Cunningham-Parmeter, *supra* note 1, at 491.

fact increase reporting.⁴⁴ In 2014, the California Pesticide Illness Surveillance Program of the Department of Pesticide Regulation reported that “148 agricultural field workers were injured by pesticide exposure in 25 separate episodes.”⁴⁵ In the database, there were 1,073 reported illnesses that were considered “pesticide associated cases.”⁴⁶ Of those cases, 117 had a “high degree of correlation between the pattern of exposure and resulting symptomatology,” based on “physical evidence of exposure and medical evidence of consequent ill health.”⁴⁷ Another 603 cases found a “probable” relation to a pesticide exposure, and another 353 with a “possible” relation to a pesticide exposure.⁴⁸

Workers, as compared to consumers, are at much higher risk of pesticide illnesses. In California, workers accounted for 247 cases of pesticide related illness in the database mentioned above.⁴⁹ Occupational incidents of pesticide exposure account for about half of the associated cases.⁵⁰ The illness may be attributed to misuse of pesticides or violation of safety requirements or not associated with any violations. The “PISP epidemiologists concluded that 630 (59%) of the 1,073 associated cases contained evidence to indicate a violation of safety requirements that contributed to the exposure.”⁵¹ In a single incident, forty field workers were injured;⁵² however, single episodes are not the only cause of illness, and evidence shows that “[p]esticide drift . . . was associated with 132 (90%) of the 148 field worker cases in 15 separate episodes.”⁵³ Again, not only are workers exposed throughout their work day, but also usually live nearby and can be exposed to pesticides overnight, or on days off.⁵⁴ In a testimony on Capitol Hill, Virginia Ruiz of Farmworker Justice told Congress, “[t]he close proximity of agricultural fields

44. See, e.g., Calvert GM, Beckman J, Prado JB, et al. Acute Occupational Pesticide-Related Illness and Injury—United States, 2007-2011. *MMWR Morb Mortal Wkly Rep* 2016;63:11–16. <https://www.cdc.gov/mmwr/volumes/63/wr/mm6355a3.htm> [<https://perm.a.cc/74EX-WQAH>] (“Although the incidence rates for acute occupational pesticide-related illness and injury were highest in Washington, this finding might not necessarily mean that pesticide exposures are more hazardous or more prevalent in that state. Washington has stronger protections for agricultural workers and a larger and more robust pesticide illness and injury surveillance program when compared to other states, which likely accounts for some of the differences in incidence rates.”).

45. CEPADPR, *supra* note 38, at 5.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 14.

50. CEPADPR, *supra* note 38, at 14 (showing 524 cases of “occupational status” and 542 cases of “non-occupational status.” Occupational status is defined as whether the individual was on the job at the time of the incident).

51. *Id.* at 15.

52. *Id.* at 21.

53. *Id.*; see also PAN/CRLA, *Fields of Poison* at 5 (“Fifty-one percent of poisoning cases from 1998 to 2000 occurred when pesticides drifted from the site of application onto workers.”).

54. CEPADPR, *supra* note 38, at 19.

to residential areas and schools makes it nearly impossible for farmworkers and their families to escape exposure because pesticides are in the air they breathe and the food they eat, and the soil where they work and play.”⁵⁵

Despite this data, the “use of hazardous agricultural pesticides in California increased by 23 million pounds (12%) in 2015 over the prior year to a staggering 213 million pounds,” amounting to the “second highest use recorded since 1990.”⁵⁶ Of the 213 million pounds, 100 million pounds were used in four counties in the San Joaquin Valley.⁵⁷ This increase includes pesticides with severe, well-documented, negative effects. One such pesticide, chlorpyrifos, which is linked to autism, IQ loss, and ADHD, was recently approved as safe to use by the Trump Administration’s EPA Administrator, Scott Pruitt.⁵⁸ The pervasive use of pesticides in California is likely to continue in the face of this Administration’s alliances with companies like Dow Chemical, which produces chlorpyrifos.⁵⁹

The Farmworker Population in California and Nationally, and Risk of Reporting due to Immigration Status

This section discusses the profile of farmworkers in California and nationally, emphasizing the theories of environmental justice and agricultural exceptionalism at the forefront of understanding the historical and current position of farmworkers in the political sphere. Generally, legal disputes are linked to the social process through the determination of how injuries are perceived, how an injury becomes a grievance, and how an injured person seeks redress. These issues, and the basis of the article “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .” inform the conversation regarding the interaction between the environmental justice movement, agricultural exceptionalism, and farmworkers today.⁶⁰ The first factor which influences the personal decision to pursue dispute resolution, or legal action, is the detection of injustices

55. Beyond Pesticides, *Farmworkers Push for Long Overdue Protections*, DAILY NEWS BLOG (July 16, 2013, 12:02 AM), <https://beyondpesticides.org/dailynewsblog/2013/07/farmworkers-arrive-in-d-c-to-push-for-long-overdue-protections/> [https://perma.cc/X8FM-BTZE].

56. Jane Sellen, *Pesticide Use Up Sharply in California, According to New DPR Data*, CALIFORNIANS FOR PESTICIDE REFORM, (May 4, 2017), <http://www.pesticideform.org/2017/05/04/pesticide-use-up-sharply-in-california-according-to-2015-dpr-data/> [https://perma.cc/YH9X-V3TP]; see also CEPADPR, *supra* note 38.

57. Sellen, *supra* note 56.

58. *Id.*; see also Eleanor Sheehan, “In Trump’s America, People Sue the EPA to Block a Toxic Pesticide”, MOTHER JONES (July 9, 2017), <http://www.motherjones.com/environment/2017/07/in-trumps-america-people-sue-the-epa-to-block-a-toxic-pesticide/> [https://perma.cc/J3ZB-8SQ9].

59. Michael Biesecker, *EPA Chief Met With Dow CEO Before Deciding On Pesticide Ban*, ASSOCIATED PRESS (July 3, 2017), <https://www.foxbusiness.com/markets/correction-epa-dow-chemical-story> [https://perma.cc/4T8D-AKSC].

60. William L.F. Felstiner, Richard L. Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC’Y REV. 631 (1980-81).

themselves.⁶¹ The article contemplates a community living downwind from a nuclear testing site whose exposure results in cancer, analogous to the farmworker community living and working in an area with aerial pesticide applications.⁶² Ultimately, the authors find that “factors of class, education, work situation, social networks” determine who is aware of their cancer and who is not.⁶³ The article focuses on the early stages of “naming, blaming, and claiming” as crucial to inequality or access to justice, and how seeking legal relief usually encompasses a high degree of uncertainty and cost.⁶⁴ Similarly, this section looks at the multitude of reasons that a farmworker will not bring a claim against his or her employer for pesticide exposure.

Undocumented Farmworkers and Environmental Justice

The American Farm Bureau Federation estimates that there are about 2.4 million farm workers in the United States as of 2014.⁶⁵ Farmworkers are hired directly by growers, through Farm Labor Contractors (“FLCs”), or through a guest worker program by growers or FLCs on an H-2A immigrant visa.⁶⁶ Hiring may be done for a short- or long-term period and payment may be hourly, by piece-rate, or daily.⁶⁷ The 2007 Census data estimates that one third of all farmworkers, or about 471,000 individuals, work in California.⁶⁸ The majority of the workers started working in United States agriculture between the ages of fourteen and eighteen, and less than a quarter have graduated from high school.⁶⁹ The average annual personal income of a farmworker in the United States is \$15,000-\$17,499.⁷⁰

In California, the numbers are similar, but the United States Department of Labor, Employment and Training Administration (“ETA”) estimates that about fifty-six percent of California’s farmworkers are undocumented compared to forty-

61. *Id.*

62. *Id.* at 631.

63. *Id.* at 633.

64. *Id.* at 653.

65. Patrick O’Brien, John Kruse & Darlene Kruse, “*Gauging the Farm Sector’s Sensitivity to Immigration Reform Via Changes in Labor Costs and Availability*”, AM. FARM BUREAU FED’N & WORLD AGRIC. ECON. & ENVTL. SERVS. 27 (Feb. 2014).

66. BON APPÉTIT, *supra* note 3, at 4 (“Farm Labor Contractors (FLCs) act as intermediaries between growers and laborers and are licensed by the U.S. Department of Labor and regulated by the Migrant and Seasonal Agricultural Worker Protection Act The use of FLCs varies by state, and it is estimated that FLCs supply 50 to 75 percent of farmworkers in California alone.”).

67. *Id.*

68. *Id.* (However, as discussed in this paper, these numbers may be inaccurate due to the various factors which contribute to the difficulty in estimating the number of farmworkers.).

69. U.S. DEP’T OF LABOR, *supra* note 13.

70. *Id.*

seven percent nationally.⁷¹ About thirty percent are Legal Permanent Residents, and fourteen percent are United States citizens by birth or naturalization.⁷² In California, forty percent of farmworkers reported to the ETA that their English speaking ability was “not at all,” thirty-four percent reported “somewhat,” and thirteen percent reported that they speak English “well.”⁷³

There is also a plethora of child labor in U.S. agriculture.⁷⁴ In 2010, Human Rights Watch reported that in the United States “children farmworkers as young as twelve years old often work for hire for ten or more hours a day, five to seven days a week” and that “[s]ome start working part-time at age six or seven.”⁷⁵ The Center for Disease Control’s National Institute for Occupational Safety and Health calls agriculture “the most dangerous work open to children in the United States.”⁷⁶ Aside from the dangers inherent in this employment, children are vulnerable to the harms of pesticides in their communities during sensitive developmental years.⁷⁷

These statistics are important because they shed light on the increased vulnerabilities of farmworkers due to immigration status, lack of economic power, language barriers, and age, leading farmworkers to be considered an environmental justice community. At the First National People of Color Environmental Leadership Summit in Washington D.C. in 1991, seventeen principles of environmental justice were adopted, among them “environmental justice affirms the right to political, economic, cultural and environmental self-determination of all peoples,” and “demands the cessation of the production of toxins, hazardous wastes, and radioactive materials.”⁷⁸

California has codified environmental justice in statute, defining the term as “the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.”⁷⁹ For documented and undocumented farmworkers—

71. *Id.*

72. *Id.*

73. *Id.*

74. *US: Child Farmworkers’ Dangerous Lives*, HUMAN RIGHTS WATCH (May 5, 2010), <https://www.hrw.org/news/2010/05/05/us-child-farmworkers-dangerous-lives> [<https://perma.cc/PQ8Q-R6CA>].

75. *Id.*

76. *Id.* (citing Centers for Disease Control National Institute for Occupational Safety and Health (NIOSH)).

77. Emily C. Marquez & Kristin S. Schafer, *Kids on the Frontline: How Pesticides are Undermining the Health of Rural Children*, PESTICIDE ACTION NETWORK (2012) <http://www.panna.org/sites/default/files/KOF-report-final.pdf>.

78. Principles of Environmental Justice, 1991 First National People of Color Environmental Leadership Summit (Oct. 24-27, 1991), *available at* <http://www.ejnet.org/ej/principles.pdf> [<https://perma.cc/RL6K-JK2Z>].

79. Cal. Gov’t Code § 65040.12 (West 2013); *see also* Joan D. Flocks, *The Environmental and Social Injustice of Farmworker Pesticide Exposure*, 19 *GEO. J. ON POVERTY L. & POL’Y* 255, 256 (2012).

”historically one of the most exploited groups of people”⁸⁰—the effect of the FIFRA and WPS cost-benefit standards is described as “the dilemma of inadequately protective standards, in this case ultimately resulting in farmworkers literally laboring under a standard that does not account for the economic, political, social, cultural and medical reality of their daily lives.”⁸¹

The California EPA’s “Fresno Initiative Report,” sheds light on the multitude of environmental harms encountered by the farmworker population in an area that “leads in the state’s agricultural production value” and “faces air quality and pesticide issues” not present anywhere else in the state.⁸² The report identified Fresno as “an area that disproportionately experiences pollution burden and vulnerabilities.”⁸³ The environmental justice movement is important to issues affecting farmworkers, particularly those in areas such as California’s Central Valley, because it draws attention to the need for multipronged solutions to address the problems faced by this community. One way to do that is to address immigration status as a barrier to reporting pesticide poisoning.

Agricultural Exceptionalism and Historical Disenfranchisement of Farmworkers

Compounding the issues facing farmworkers that has led to their status as an environmental justice community is the historical discrimination against agricultural workers, regardless of immigration status. “Agricultural exceptionalism” is a term used to describe the “structural bars” of racial and gender equality, and the institutional discrimination against agricultural workers, which began with the exploitation of African-American labor, and continues today with a largely Latinx agricultural worker population.⁸⁴ Historically, agricultural workers were exempted from the National Labor Relations Act of 1935 and the Fair Labor Standards Act of 1938—laws that are said to have been enacted with great influence from Southern plantation owners.⁸⁵ The result is “agriculture’s unique status in law and society,” where “[t]he farm sector has been and remains the nation’s *most significant industry* with a special need and with its own set of

80. Eileen Gauna, *Farmworkers as an Environmental Justice Issue: Similarities and Differences*, 25 ENVIRONS ENVTL. L. & POL’Y J. 67, 72 (2001).

81. *Id.* at 68.

82. CAL. ENVTL. PROT. AGENCY, ENVTL. JUSTICE COMPLIANCE & ENF’T WORKING GRP., FRESNO INITIATIVE REPORT (2015), <https://calepa.ca.gov/wp-content/uploads/sites/62/2016/10/Enforcement-Publications-2015yr-FresnoReport.pdf> [<https://perma.cc/28WB-CA35>].

83. *Id.*

84. Li, *supra* note 25, at 1414–15; *see also* Luna, *supra* note 31, at 488; BON APPÉTIT, *supra* note 3, at 5.

85. Kamala Kelkar, *When Labor Laws Left Farm Workers Behind – and Vulnerable to Abuse*, PBS NEWS HOUR (Sept. 18, 2016), <https://www.pbs.org/newshour/nation/labor-laws-left-farm-workers-behind-vulnerable-abuse> [<https://perma.cc/U7J3-S8WS>].

interest groups.”⁸⁶ Unsurprisingly, that industry operates to safeguard its own interests, not that of its laborers.

The concept of agricultural exceptionalism was first identified by Carey McWilliams, and today the perpetuation of the “unequal and disparate treatment of farm laborers” continues in many forms.⁸⁷ As protections for labor unions and organizers increased, farmworkers were left out. Farmworkers could not organize and were excluded from fair labor standards until 1966.⁸⁸ This change in the 1960s and 1970s came despite large resistance to the movements led by Dolores Huerta and Cesar Chavez to organize farmworkers in California as the United Farm Workers, which continued for years to come.⁸⁹ Notwithstanding the victories of the United Farm Workers, “FLSA continues to regulate the employers of farmworkers more leniently than employers in other occupations,”⁹⁰ and small employers are still exempt.⁹¹ The Occupational Safety and Hazards Act (“OSHA”) is another federal regulation that does not target pesticides generally, and exempts farmworkers on small farms.⁹² California, Washington, and Oregon have enacted state occupational safety and hazards regulations to make up for the gap in federal protections, which have had an impact in increased reporting in those states.⁹³

86. Luna, *supra* note 31, at 489 (emphasis added) (internal citations omitted) (citing Donald B. Pederson, *Introduction*, 23 U.C. DAVIS L. REV. 401, 403).

87. *Id.* (citing ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* 106 (1964)).

88. Li, *supra* note 25, at 1414.

89. Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LABOR & EMP'T L. 1, 11 (2005) (“As decades of sporadically successful strikes had shown, farm workers were not completely without power. But until the UFW, no farm worker organizing effort had been able to create an organization of farm workers with the creativity, persistence, and stability to fight for on-going union representation and win, much less to negotiate multi-faceted con-tracts and administer them over several seasons.”); *see also* Louis Sahagun, *After 36 Days, Chavez Halts Protest Fast*, L.A. TIMES, (Aug. 22, 1988), http://articles.latimes.com/1988-08-22/news/mn-556_1_fernando-chavez [<https://perma.cc/4JFA-EGSD>] (describing Chavez’s 36-day fast “to seek an end to the use of pesticides that he said endanger farm workers, consumers and the environment”).

90. Li, *supra* note 25, at 1414–15.

91. FARMWORKER JUSTICE, *UNFINISHED HARVEST: THE AGRICULTURAL WORKER PROTECTION ACT* AT 30, at 6 (2013), <https://www.farmworkerjustice.org/sites/default/files/FarmworkerJusticeUnfinishedHarvest.pdf> [<https://perma.cc/7RZ6-AA5V>].

92. Philip D. Somervell & George A. Conway, *Does the Small Farm Exemption Cost Lives?*, 54 AM. J. OF INDUS. MED. 461 (2011), <https://onlinelibrary.wiley.com/doi/abs/10.1002/ajim.20931> (defining small farms as those with fewer than eleven employees and finding that “fatality rates were approximately 1.6 to 3 times as high in both groups of states observing the small farm exception as in the group of three states [California, Washington, and Oregon] not observing it”).

93. *Id.*, *see also* CAL. DEP’T OF PESTICIDE REGULATION, <http://www.cdpr.ca.gov> [<https://perma.cc/RN54-XYR6>]; *see also* Geoffrey M. Calvert et al., *Acute Occupational Pesticide-Related Illness and Injury: United States, 2007-2011*, 63 MORBIDITY &

OSHA, like FIFRA, is similarly under-enforced in its protection of farmworkers and defers to WPS for pesticide safety issues.⁹⁴

The Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”), passed in 1983, was seen as an important step forward in the recognition of the need for wage and working condition regulation for farmworkers under the U.S. Department of Labor.⁹⁵ Protections afforded to farmworkers under MSPA include regulation of FLCs,⁹⁶ accountability to FLCs and employers, provision of information to workers regarding wage and hour details of work, as well as health and safety standards relating to housing and transportation of farmworkers.⁹⁷ However, as Farmworker Justice reports in the thirty year review of the Act, “Unfinished Harvest,” enforcement efforts of MSPA are also “limited and often ineffective.”⁹⁸

Federal statutes such as MSPA, FIFRA, and OSHA, often embrace the concept of agricultural exceptionalism through their exclusion of undocumented workers from laws that otherwise protect the health of American workers. However, these statutes have been upheld by the United States Supreme Court.⁹⁹ In 2002, the Supreme Court held in a five-to-four decision that undocumented immigrants were not entitled to back pay from the National Labor Relations Board in *Hoffman Plastic Compounds, Inc. v. NLRB*.¹⁰⁰ While courts have interpreted *Hoffman* narrowly to preserve an undocumented workers’ cause of action for retaliation and other employment claims, courts can also deny a claim if it “runs counter to immigration policy.”¹⁰¹ Applying this principle, the court in *Singh v. Jutla* contemplated the Immigration Reform and Control Act (“IRCA”), which stated as a primary goal to crack down on employers of undocumented workers.¹⁰² Running “counter” to immigration policy does not always weigh in favor of an employer in a claim. For example, it was considered counter to immigration policy

MORTALITY WEEKLY REPORT 11 (Oct. 14, 2016), available at <https://www.cdc.gov/mmwr/volumes/63/wr/mm6355a3.html> [<https://perma.cc/LW72-6EE8>].

94. Li, *supra* note 25, at 1414–15; see also *OSHA Agricultural Operations: Hazards & Controls* <https://perma.cc/B89A-T753> (“The Environmental Protection Agency (EPA) oversees pesticide use through the Worker Protection Standard (WPS).”).

95. 29 U.S.C. § 1801 *et seq.*; FARMWORKER JUSTICE, UNFINISHED HARVEST, *supra* note 91, at 7.

96. BON APPÉTIT, *supra* note 3, at iii.

97. FARMWORKER JUSTICE, UNFINISHED HARVEST, *supra* note 90, at 7.

98. *Id.* at 10.

99. Celone, *supra* note 9, at 117–18.

100. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144–49 (2002).

101. *Singh v. Jutla & C.D. & R’s Oil, Inc.*, 214 F. Supp. 2d 1056, 1061 (N.D. Cal. 2002).

102. PL 99-603 (S 1200), Nov. 6, 1986, 100 Stat 3359 (Section 101. Control of unlawful employment of aliens).

to preclude a claim of retaliation where the employer reported the employee to INS.¹⁰³

In *Singh v. Jutla*, an undocumented employee who sought unpaid wages claimed that his employer reported him to Immigration and Naturalization Services (“INS”) in retaliation.¹⁰⁴ The Court in *Singh v. Jutla* recognized, “[i]ndeed, every remedy extended to undocumented workers under the federal labor laws provides a marginal incentive for those workers to come to the United States. It is just as true, however, that every remedy denied to undocumented workers provides a marginal incentive for employers to hire those workers.”¹⁰⁵ *Singh* reconciled this “tension” by “balance[ing] competing considerations.”¹⁰⁶ This exposes the difficult relationship between the reality of shifting immigration policy and employment laws and protections for workers—here, the Court worked hard to avoid any holding which would encourage employers to hire undocumented employees who had no form of relief in the case of retaliation.

The rights granted under *Hoffman* and *Singh* allow undocumented workers to file claims against their employers.¹⁰⁷ Thus, these cases represent a carve out to the otherwise exclusionary federal protections that expose farmworkers to workplace abuses. These claims are not specific to pesticide poisoning, but for all complaints of any type of workplace abuse. Nonetheless, doing so exposes the employee to the risk that the employer will call Immigration and Customs Enforcement (“ICE”). If the employer does call ICE, and the employee does not have work authorization, it does not matter that the employer acted in retaliation (even though it is illegal to do so) because ICE may still use the information against the worker, place him or her in deportation proceedings, and even subject the worker to criminal charges.¹⁰⁸ It is for this reason that one study of dairy workers in New York found that “workers identified immigration status as an *occupational hazard*, making them more vulnerable and putting them at further risk at the

103. *Contreras v. Corinthian Vigor Ins. Brokers, Inc.*, 25 F.Supp.2d 1053 (N.D. Cal. 1998).

104. *Singh*, 214 F. Supp. 2d at 1061.

105. *Id.* at 1062; *but c.f.* *Reyes v. Van Elk, Ltd.*, 148 Cal. App. 4th 604, 616 (2007) (finding that while back pay and lost wages are not available to undocumented workers under *Hoffman*, IRCA did not preempt plaintiff’s claims under California’s state wage law); *Incalza v. Fendi N. America, Inc.*, 479 F.3d 1005, 1010 (9th Cir. 2007) (holding for employee who was discharged based on immigration status, IRCA did not preempt California law because “there were remedies short of discharge that were permissible under federal law”).

106. *Singh*, 214 F. Supp. 2d at 1062.

107. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (holding that undocumented employees can bring an action under the NLRA); *see also* *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988) (extending *Sure-Tan v. NLRB* to the FLSA).

108. LEGAL AID AT WORK, “*Undocumented Workers: Employment Rights*,” <https://legalaidatwork.org/factsheet/undocumented-workers-employment-rights/> [https://perma.cc/7E55-ZC8Z] (last visited Mar. 11, 2018) (note that this applies to all employment complaints, not just those related to environmental harm).

workplace.”¹⁰⁹ Another trend documented by National Public Radio and ProPublica is undocumented immigrants being “flagged by insurers or their private detectives,” turned over to state fraud investigators, and charged with “fraud or willful misrepresentation in connection with any official matter or application before a governmental agency” for the unauthorized use of a false social security number (used in order to work).¹¹⁰

Considering the history of agricultural exceptionalism, and the current classification as an environmental justice community, it is easy to understand that underreporting of pesticide-related illness is common among farmworkers.¹¹¹ Additionally, underreporting is due to a lack of a system to track illnesses relating to poisoning, cultural and linguistic barriers, fear of retaliation (employment or immigration), and lack of medical options.¹¹² Compounding these factors, as discussed in this paper, farmworkers may experience symptoms similar to the flu without realizing that their illness is due to the chemicals in their work environment.”¹¹³ The following sections explore the potential remedies for a farmworker who, despite the obstacles enumerated in this section, decides to move forward and report pesticide poisoning.

Federal Enforcement for Farmworkers Who Report Pesticide Poisoning

The EPA, through FIFRA and the WPS, is tasked with setting standards for the use of pesticides by farm owners and manufacturers, and the protection of workers from dangerous exposure to those same chemicals.¹¹⁴ The Environmental Protection Agency (“EPA”) is also in charge of criminal and civil enforcement of FIFRA. FIFRA’s role is to govern the registration of pesticides, and includes a requirement to submit data to the EPA and the WPS.¹¹⁵ The statute’s scope is limited; FIFRA does not “regulate a waste stream, such as hazardous waste, created by the manufacturing or use of a product, nor the ‘negative externalities’ such as

109. Amy Liebman, *Dairy Workers’ Immigration Status: An occupational Safety Hazard?*, HARVESTING JUSTICE: A BLOG BY FARMWORKER JUSTICE (Feb. 22, 2016), <https://www.farmworkerjustice.org/fj-blog/2016/02/dairy-workers-immigration-status-occupational-safety-hazard> [https://perma.cc/SWL4-UYJN].

110. Michael Grabell & Howard Berkes, *They Got Hurt at Work—Then They Got Deported*, NAT’L. PUB. RADIO: NPR INVESTIGATIONS (Aug. 16, 2017), <https://www.npr.org/2017/08/16/543650270/they-got-hurt-at-work-then-they-got-deported> [https://perma.cc/T2KG-4VAQ].

111. *Exposed and Ignored*, *supra* note 1, at 6 (“Several factors contribute to the underestimation of the problem, including the inability and apprehension of affected workers to get medical care, medical misdiagnosis, and the absence of a coordinated national incident reporting system.”).

112. *Id.* at 8 (“Less than 20% of hired farmworkers receive employer-provided health insurance.”).

113. *Id.*

114. 7 U.S.C. §§ 136-136(y) (2012).

115. *Id.*

air or water pollution, from manufacturing or other activities.”¹¹⁶ FIFRA has been called the “weakest environmental statute.”¹¹⁷ This Note argues that FIFRA and WPS, despite their weaknesses, cannot function even for their stated purpose with the current indications that farmworkers themselves are deterred from reporting violations of these statutes.

The FIFRA statute lays out the requirements, exemptions, and the procedure for pesticide registration.¹¹⁸ The registration requirement states: “to the extent necessary to prevent unreasonable adverse effects on the environment, the Administrator may by regulation limit the distribution, sale, or use in any State of any pesticide that is not registered.”¹¹⁹ The EPA describes the evaluation process on its website as a “scientific, legal and administrative procedure.”¹²⁰ This process includes a risk assessment based on an evaluation of the “harm to humans,”¹²¹ but has been criticized for abusing the “cost-benefit” analysis interpretation and weighing economic factors higher than the effects on human life.¹²²

The federal EPA and state affiliates are tasked with enforcement, inspection, and compliance with the WPS.¹²³ These standards set the baseline for health and safety standards and regulations for employers with regards to pesticides. WPS requires employers post information regarding pesticide restrictions, limit employee contact with restricted-use pesticides, provide employees with knowledge of those restrictions for particular pesticides, safety training, protective gear, decontamination sites, and emergency assistance in the event of pesticide poisoning.¹²⁴

Significantly for the farmworker seeking redress for injuries procured from an illegally used pesticide, FIFRA does not have a citizen enforcement provision.¹²⁵ Thus, all claims must be filed by the Administrator, not the

116. Michael J. McClary & Jessica B. Goldstein, *FIFRA at 40: The Need for Felonies for Pesticide Crimes*, 47 ENVTL. L. RPTR. 10767–768 (2017).

117. *Id.* at 10770 (2017).

118. 7 U.S.C. § 136(a)-(c) (2012).

119. *Id.* 136(a) (2012).

120. U.S. ENVIRONMENTAL PROTECTION AGENCY, PESTICIDE REGULATION, *About Pesticide Registration*, <https://www.epa.gov/pesticide-registration/about-pesticide-registration> [<https://perma.cc/A7FP-4J9W>] (last accessed Dec. 16, 2017).

121. U.S. ENVIRONMENTAL PROTECTION AGENCY, PESTICIDE REGULATION, *About Pesticide Registration*, <https://www.epa.gov/pesticide-registration/about-pesticide-registration> [<https://perma.cc/A7FP-4J9W>] (last accessed Dec. 16, 2017).

122. Li, *supra* note 25, at 1424 (discussing other factors that undermine “accuracy of the cost-apprehension process”). It is beyond the scope of this paper to discuss the particular criticisms of the FIFRA registration process, but increased reporting under this proposed course of action may allow FIFRA to better apply the cost-benefit analysis in light of these criticisms.

123. 40 C.F.R. § 170.

124. *Id.*

125. *Arnold v. Dow Chemical Co.*, 91 Cal. App. 4th 698, 708 (2001) (“The penalties for violation of FIFRA can only be imposed by the Administrator. Private parties . . . have no recourse for recovery for their injuries under FIFRA.”).

farmworker. On one hand, this makes sense because FIFRA only governs licensing and regulation of pesticide products. However, injured farmworkers are left without any recourse after reporting to the agency. In the 1990s, advocates such as the National Coalition Against the Misuse of Pesticides (NCAMP) and the Agricultural Resources Center (ARC), challenged the lack of a private cause of action under FIFRA, and were met with fierce opposition by industry groups such as the American Farm Bureau, the Chemical Producers and Distributors Association, as well as lobbyists with the National State Departments of Agriculture.¹²⁶ The EPA's Assistant Administrator Lyn Goldman testified "that under the current FIFRA, 'if someone were literally killed by the misuse of a pesticide, the maximum penalty for a first-time, private applicator would be a letter of warning.'¹²⁷ Indeed, a study by the Pesticide Action Network of North America found that "in fiscal year 1996-97, a total of 657 fines were issued statewide.¹²⁸ The majority of the 5,153 actions were 'notices of violation' and 'letters of warning' which carry no fine and are not recorded in permanent statewide records.¹²⁹ The report also noted a startling fact: that no county in California's Central Valley, the state's agricultural heartland, issued more than an average of twenty five fines per year."¹³⁰

The inability to pursue a private cause of action deprives farmworkers suffering from pesticide poisoning of a crucial legal tool that has been employed in the "air pollution, water pollution and hazardous waste regulation [contexts where] private citizen suits have been the engines that drive the regulatory agenda forward, as conventional environmental groups sued the EPA to meet statutory deadlines and routinely sue polluters directly to enforce requirements of the environmental statutes."¹³¹ Instead, farmworkers' only option under FIFRA is to file a complaint "alleging or indicating a significant violation of the pesticide use provisions" of FIFRA, which the Administrator then sends to state officials to investigate.¹³² In *Arnold v. Dow Chemical Co.*, where consumers challenged chemical manufacturers and distributors of pesticides, the court instructed plaintiffs to use California common law to redress pesticide exposure-related illnesses.¹³³ The plaintiffs were permitted to move forward with their state law claims, but had no cause of action under FIFRA.¹³⁴

126. See McClary & Goldstein, *supra* note 116 at 10771 (discussing the History of FIFRA Penalty Proposals, beginning in 1989, where "the primary focus of industry opposition to the enforcement provisions . . . was the citizen suit provision").

127. *Id.* at 10774.

128. Gauna, *supra* note 80, at 73.

129. *Id.* at 73.

130. *Id.* at 72.

131. *Id.* at 73.

132. 7 U.S.C. §§ 136(w).

133. *Arnold v. Dow Chemical Co.*, 91 Cal. App. 4th 698, 708 (2001).

134. *Id.* at 746.

Claims that are investigated by the EPA, thus, can have a wide range of outcomes. Criminal prosecutions are rare, but FIFRA criminally punishes “any registrant, applicant for a registration, or producer,” who knowingly violates the pesticide regulations by with a penalty of up to \$50,000 or up to one year in prison, or both.¹³⁵ FIFRA also criminally punishes commercial applicators with a lower penalty of \$25,000 or one year in prison, or both.¹³⁶ A third category of “private applicators” are subject to a lesser fine (\$1,000) and reduced prison time (not more than thirty days).¹³⁷ An additional felony prosecution under FIFRA is reserved for “disclosure of information,” defined as “[a]ny person, who, with intent to defraud, uses or reveals information relative to formulas of products acquired under the authority of section 136a of this title.” Violators of this felony provision may be subject to a fine up to \$10,000 or up to three years in prison, or both.¹³⁸

In 2016, defendants were sentenced to the maximum of one year in prison for knowingly, illegally applying pesticides (in this case, a pesticide used to kill termites) resulting in permanent injuries to a nine-year-old boy.¹³⁹ The principle defendant pled guilty to illegally applying the pesticide, contrary to label requirements, which led to a family entering their home too soon after application.¹⁴⁰ Recognizing that “nobody set out that day to cripple a little boy,” the United States District Judge Jose E. Martinez, when presented with the evidence, still lamented the one-year maximum in light of the evidence of the defendants’ actions.¹⁴¹ Also classified as FIFRA misdemeanor offenses investigated by the EPA are “FIFRA crimes in which people have died or been incapacitated; land has been contaminated; wildlife indiscriminately poisoned; and false information submitted to the government.”¹⁴²

Because of the minimal penalties, among other issues discussed in this Note, it is not surprising that there are few criminal prosecutions under FIFRA. In fact, since 1998, the EPA reports fourteen criminal prosecutions in California under FIFRA.¹⁴³ Since 2012, the EPA reports just six prosecutions in the state, all for

135. 7 U.S.C. §136l(b)(1)(A) (emphasis added).

136. *Id.* §136l(b)(1)(B); *see also* 7 U.S.C. 136(e)(3) (defining commercial applicator as one who “uses or supervises the use of any pesticide which is classified for restricted use for any purpose, or on any property” (excluding private property)).

137. *Id.* §136l(b)(2).

138. *Id.* §136l(b)(3).

139. McClary & Goldstein, *supra* note 116, at 10767.

140. EPA ENFORCEMENT, SUMMARY OF CRIMINAL PROSECUTIONS: FISCAL YEAR 2016, <https://www.justice.gov/opa/pr/fumigation-company-and-two-individuals-sentenced-connection-illegal-pesticide-application> [<https://perma.cc/36DH-GXZ6>].

141. McClary & Goldstein, *supra* note 116, at 10767.

142. *Id.*

143. U.S. ENVTL. PROT. AGENCY, SUMMARY OF CRIMINAL PROSECUTIONS, https://cfpub.epa.gov/compliance/criminal_prosecution (filtered by the state of California and the FIFRA statute).

pesticides used in marijuana cultivation,¹⁴⁴ despite a record of 662 incidents between 2012 and 2014 in farm settings and agricultural usage documented by the California Environmental Protection Agency Department of Pesticide Regulation (“DPR”).¹⁴⁵

This is perhaps why Michael J. McClary and Jessica B. Goldstein call FIFRA “the weakest federal environmental statute” in the article “FIFRA at 40: The Need for Felonies for Pesticide Crimes.”¹⁴⁶ McClary and Goldstein, both of whom work at the EPA Office of Criminal Enforcement, Forensics and Training, discuss cases “which expose the inadequacy of the current FIFRA criminal penalty provisions,” arguing that misdemeanor penalties do not “effectively deter pesticide crimes.”¹⁴⁷ Prosecutions under FIFRA are particularly difficult given the nature of the pesticide industry, where misconduct is primarily motivated by financial gain.¹⁴⁸ As Paul Correa points out, the “Circle of Poison” of pesticide use dictates that “[i]t is not your health that determines how much of a chemical pesticide can be on your lettuce and tomatoes—it is the economy.”¹⁴⁹

For parties prosecuted under FIFRA provisions, a \$1,000 fine is unlikely to deter the illegal behavior. Relatively small fines and prison sentences do not encourage prosecutors or judges to take FIFRA crimes seriously, or spend their time litigating claims with relatively small penalties that require complex legal or factual issues.¹⁵⁰ Additionally, compared to other federal environmental crime enforcement statutes, FIFRA penalizes as misdemeanors what other statutes consider felonies—yet another reason FIFRA lacks deterrent force.¹⁵¹ Further reducing opportunity for prosecution is the memo sent by the EPA guiding investigative discretion in the Office of Criminal Enforcement, which guides expenditures of resources based on cases “worthy of criminal investigation.”¹⁵² The guiding principles in this memo tell prosecutors to exercise discretion to choose cases where there is “significant environmental harm” and “culpable conduct.”¹⁵³ This begs the question of whether FIFRA today is fulfilling its

144. *Id.* (Defendants served between seventeen months and ten years in prison and paid up to \$4,294 in restitution, but FIFRA prosecutions were in conjunction with other criminal charges related to controlled substance cultivation in all cases.).

145. CEPADPR, *supra* note 38, at 5.

146. McClary & Goldstein, *supra* note 116, at 10770.

147. *Id.*

148. *Id.*

149. Paul Correa, *Tort and the U.S.-Mexican Circle of Poison*, 12 ARIZ. J. INT’L & COMP. L. 653 (1995).

150. McClary & Goldstein, *supra* note 116, at 10770 (noting also that the fine is often reduced where a plea bargain is struck).

151. *Id.*

152. Memorandum from Earl E. Devaney, Director, EPA Office of Criminal Enforcement, to All EPA Employees Working in or in Support of the Criminal Enforcement Program 3 (1994), <https://www.epa.gov/sites/production/files/documents/exercise.pdf> (the Exercise of Investigative Discretion).

153. *Id.*

purpose of “protecting man and the environment,”¹⁵⁴ particularly where the 1972 amendments explicitly included farmworkers in the definition of “man.”¹⁵⁵

The effectiveness of FIFRA prosecutions are thus impeded by the low penalties, compounded by the difficulty of overcoming financial incentives, compounded again by the EPA directive to implement narrow case selection criteria. McClary and Goldstein go on to discuss EPA criminal cases for “farm misapplications,” noting the immense vulnerability of agricultural workers to pesticide misuse and illegal use.¹⁵⁶ In one case, the owner and operator of Casa Famoso Packing in California was charged and pleaded guilty to one misdemeanor count after he ordered the spraying of the pesticide Agri-Mycin 17 while his workers were in the field thinning Asian pear trees.¹⁵⁷ The “restricted use” regulation of the pesticide recommended that workers keep out of the field for twelve hours after application. Nevertheless, the owner and operator of the company ordered they work during and immediately after application.¹⁵⁸ Unsurprisingly, workers experienced pesticide-related symptoms—“headaches, rashes, sore throats, and burning eyes.”¹⁵⁹ The court’s remedy for these workers was to penalize their employer under FIFRA with one misdemeanor count and a \$1,000 fine.¹⁶⁰ This remedy, which awards the fine to the government, not the workers themselves, shows the relatively small penalty for an employer versus the potential impact on a laborer with an average annual salary of \$15,000-\$17,499.¹⁶¹

State Statutes and Remedies for Farmworkers Who Report Pesticide Poisoning

Many states also exempt agricultural workers, in whole or in part, from workers’ compensation schemes.¹⁶² States primarily exclude farmworkers who perform seasonal work, those who work on small farms, or children—populations

154. S. REP. 92-838 (1972) (“The new bill would[:] (A) regulate the use of pesticides to protect man and his environment; and (B) extend Federal pesticide regulation to actions entirely within a single State.”).

155. *Id.*

156. McClary & Goldstein, *supra* note 116, at 10767.

157. *Id.* at 10770.

158. *Id.*

159. *Id.* at 10778.

160. *Id.*

161. U.S. DEP’T OF LABOR, *supra* note 13.

162. FARMWORKER JUSTICE, HEALTH AND SAFETY RESOURCES, WORKERS’ COMPENSATION GUIDES WITH FORMS, <https://www.farmworkerjustice.org/sites/default/files/State%20Workers%20Comp%20Information%20for%20Health%20Centers%207-2016.xlsx> (showing that the workers’ compensation scheme in Alabama, Arkansas, Delaware, Georgia, Indiana, Kansas, Kentucky, Mississippi, Missouri, Nevada, North Dakota, South Carolina, and Texas all consider coverage for agricultural workers “elective,” meaning agricultural workers are exempt from labor code requirements. Additionally, another 23 states have limited requirements for employers).

that also do not have mandatory minimum wage or overtime pay requirements.¹⁶³ Some states, like California, have increased legal protections for farmworkers—including the provision in the California Labor Code including all farmworkers in workers compensation regulation, regardless of immigration status.¹⁶⁴ However, as I will discuss, a federal response is necessary due to the unique migratory population and the risks that farmworkers face in other states.¹⁶⁵

Because there is no private right of action under FIFRA, and few prosecutions, an individual farmworker may choose instead to pursue a state remedy. First, one must consider the preemption doctrine under FIFRA to ensure that the state claim is not preempted by the federal act. The preemption clause in FIFRA states, “such state shall not impose or continue in effect any requirement for labeling or packaging in addition to or different from those required under this subchapter.”¹⁶⁶ Preemption under FIFRA is restricted to a small class of claims, however, and will not affect all claims concerning liability for pesticide poisoning.¹⁶⁷ In essence, claims that are preempted are those that “boil[] down to an assertion that a pesticide’s label failed to warn of the damage plaintiff allegedly suffered.”¹⁶⁸

The next step for a farmworker pursuing a state claim, then, is to consider tort remedies. But proving a case can expose obstacles specific to the issue of pesticide poisoning and the population affected. These obstacles include, but are not limited to, having a sophisticated understanding of the regulatory process and where it may have been violated, deciding on a proper defendant for the action, a successful theory of liability, and proving causation. These questions require knowledge of the defendant’s knowledge of the dangers of a particular pesticide, the pests to be eradicated, and in some cases, whether the defendant’s conduct

163. Li, *supra* note 25, at 1414–15; *see also* Joan D. Flocks, *The Environmental and Social Injustice of Farmworker Pesticide Exposure*, 19 GEO. J. ON POVERTY L. & POL’Y 255, 269-70 (2012); Somervell & Conway, *supra* note 91.

164. Cal. Labor Code § 1171.5(a).

165. *See, e.g.*, Grabell & Berkes, *supra* note 110 (discussing multiple cases where reporting injuries, receiving workers’ compensation medical treatment, and insurance company involvement led to undocumented worker deportations in Florida).

166. 7 U.S.C. §136 et seq.

167. *Id.* §136(v) (the preemption statute); Cunningham-Parmeter, *supra* note 1, at 486 (2015); *see also* Bates v. Dow Agrosiences, LLC, 544 U.S. 431, 444 (2005) (finding that Texas peanut farmers’ claims for defective design, defective manufacture, negligent testing, and breach of express warranty were not preempted by FIFRA because they rested on the manufacturer’s responsibility “to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments” which “plainly do not qualify as requirements for ‘labeling or packaging.’”); *see also* Etcheverry v. Tri-Ag Service, Inc., 22 Cal. 4th 316, 337 (2000) (holding that a Plaintiff’s claim is not preempted “where off-label statements address matters outside of the scope of the label”).

168. *Etcheverry*, 22 Cal. 4th at 335.

deviated from industry standards.¹⁶⁹ While the defendant is responsible for knowing the laws and regulations, the plaintiff in this hypothetical case would need to show that the defendant knew the dangers and disregarded them.

These questions are difficult to answer for any layperson, and particularly a farmworker who does not speak English, who is afraid of retaliation, and wants to keep his or her job.¹⁷⁰ In the event that a claim is not preempted under FIFRA, there are three main theories under which farmworkers can challenge pesticide poisoning at a state level: 1) product liability, including manufacturing defect, design defect, and warning defect; 2) strict liability, for abnormally dangerous activities; and 3) negligence or negligence per se.¹⁷¹

Tort liability for growers might incentivize prioritization of farmworker safety, especially because growers usually do not employ the workers directly and are thus not ordinarily legally responsible for workers' compensation.¹⁷² However, each of these theories are vulnerable to potential problems that are exacerbated in the context of pesticide poisoning, such as a statute of limitations, contributory or comparative negligence, and assumption of the risk.¹⁷³ Statute of limitations issues arise primarily because the health impacts of pesticide poisoning may only manifest themselves long after the exposure. Causation, contributory or comparative negligence, and assumption of the risk can be difficult to prove because farmworkers often work with multiple pesticides at once.

Causation may be eased if a farmworker has an immediate reaction from single pesticide, but that is rarely the case. As a "physician who oversees farmworker health clinics observes, 'I've never known a farmworker who was exposed to only one pesticide.'"¹⁷⁴ While some pesticides, such as organophosphates, that can be detected through laboratory testing, making documentation of exposure possible through a blood or urine test,¹⁷⁵ this is further complicated by the difficulty of timing urine or blood test, assessing what level in the body actually causes damage.¹⁷⁶ Ultimately, for these reasons, tort recovery has the potential to improve safety for farmworkers, but protections are imperfect and vary state by state.¹⁷⁷

169. Anne M. Payne, *Causes of Action for Damage from Pesticides*, 39 CAUSES OF ACTION 579 (2017).

170. Although, there are legal organizations that represent farmworkers in employment adjudications. See, e.g., Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment*, 31 COMP. LABOR L. & POL'Y 125 (2009) (Section III, Migrant Worker Advocacy, discussing worker groups, non-profit legal groups and attorneys, and policy advocacy groups who provide crucial advocacy to individual migrant workers and migrant workers as a whole.).

171. Cunningham-Parmeter, *supra* note 1, at 472–82.

172. *Id.* at 505.

173. *Id.* at 482–90.

174. *Id.* at 443, 491.

175. *Id.* at 472–82.

176. Cunningham-Parmeter, *supra* note 1, at 472–82.

177. *Id.* at 505.

In California, workers' compensation insurance coverage is mandated for agricultural workers, regardless of immigration status.¹⁷⁸ Only thirteen states require "unqualified" workers' compensation coverage for agricultural workers (meaning that farmworkers are provided with insurance coverage without exception for those with short-term jobs, fewer employees, etc.), and California is not among them.¹⁷⁹ In order to secure benefits, a worker or their attorney must prove by a preponderance of the evidence that:

- 1) The worker suffered a work-related injury or an occupational illness;
- 2) The worker notified the employer of the ailment within 30 days of its occurrence or of learning of it;
- 3) The worker is an employee of the entity identified as the employer;
- 4) The worker has followed all the health care providers' instructions, including when to return to work and any work restrictions; and,
- 5) The worker's degree of remaining permanent disability [after the alleged injury], if any, after reaching a permanent and stationary level.¹⁸⁰

The California labor code includes farmworkers in general workers' compensation schemes without inquiry into immigration status.¹⁸¹ Worker's compensation coverage can provide substantial aid to workers harmed by pesticides. In the event of a job-related injury or illness, coverage in California will provide rehabilitation, medical services including any needed hospitalization, laboratory tests, medications, payment in the event of a disability, and some monetary support for disabled workers or surviving dependent family members, however that rehabilitation is limited and difficult to obtain.¹⁸² As discussed above, farmworkers remain at risk of pesticide poisoning in California and nationally, and there are many challenges to documenting disability from pesticide poisoning and other occupational illnesses through the workers' compensation system. California can serve as a model for the rest of the country by including farmworkers in workers' compensation and OSHA protections, but because the agricultural industry is nationwide and workers often move between states, a national response is necessary.

Increasing Reporting, Safety, and Accountability with Federal Leadership

Considering the widespread use of pesticides and the disenfranchised population most vulnerable to suffer from illegal use, protection from deportation for poisoned farmworkers who report illegal pesticide use is one way to increase reporting of this crime, and ultimately, accountability. If farmworkers do not

178. FARMWORKER JUSTICE, *supra* note 162.

179. *Id.*

180. Shelly Davis, *A Guide to Workers' Compensation for California Clinicians Serving Farmworkers*, FARMWORKER JUSTICE, <https://www.farmworkerjustice.org/sites/default/files/documents/California%20WC%20guide%20%28Part%201%20of%202%29.pdf>.

181. Cal. Labor Code § 1171.5(a).

182. Shelly Davis, *supra* note 180; *see also* Cal. Labor Code § 1171.5(a).

report pesticide poisoning, it affects not only the workers' own ability to access medical care and improve conditions, but also diminishes the effectiveness of advocacy tools and the FIFRA balancing analysis discussed in section III. Currently, an undocumented immigrant in the United States can qualify for a special visa, and thus avoid deportation, if he or she is the victim of a violent crime in the United States, contingent on helping law enforcement investigate or prosecute the criminal activity.¹⁸³ This visa, called the U-visa, was enacted as codified in the Immigration and Nationality Act with the passage of the Trafficking Victims and Violence Protection Act in 2000, amending the Violence Against Women Act of 1994.¹⁸⁴ The U-visa was promulgated "to remove immigration laws as a barrier that kept battered immigrant women and children locked in abusive relationships."¹⁸⁵ Despite the original intent that the visa be used by female victims of domestic violence, eligibility has been expanded to other crimes as well.¹⁸⁶ In order to qualify for the U-visa, a petitioner must show that he or she 1) "suffered substantial physical or mental abuse," 2) has information about the crime alleged, 3) will be helpful to law enforcement in investigation, and 4) the crime occurred in the United States, or can be prosecuted in a U.S. Federal Court.¹⁸⁷ Currently, the statute specifies twenty-six "qualifying criminal activities" for U-visa eligibility.¹⁸⁸ Also listed is the category of "other related crimes" which "refers to criminal offenses in which the nature and elements of the

183. 8 U.S.C. § 1101(a)(15)(U).

184. *Id.*

185. Victims of Trafficking and Violence Protection Act Of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

186. 8 C.F.R. § 214.14(9) (2016) ("Qualifying crime or qualifying criminal activity includes one or more of the following or any similar activities in violation of Federal, State or local criminal law of the United States: Rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. The term 'any similar activity' refers to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities.").

187. 8 C.F.R. § 214.14 (2016).

188. *Id.* §214.14(a)(9) ("Qualifying crime or qualifying criminal activity includes one or more of the following or any similar activities in violation of Federal, State or local criminal law of the United States: Rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. The term 'any similar activity' refers to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities.").

offenses are substantially similar to the statutorily enumerated list of criminal activities.”¹⁸⁹

While documented abuses of agricultural workers have led to federal investigations of forced labor and visas relating to situations of human trafficking,¹⁹⁰ U-visas have not been sought as an individualized remedy for reporting criminal activity and assisting in criminal prosecutions of illegal pesticide use. This is not surprising, given the difficulty of obtaining a U-visa for any individual, and the difficulty of fitting pesticide poisoning into the established categories of eligibility. However, the U-visa eligibility has previously been expanded by Congress to respond to a perceived need, such as underreporting of another serious crime.¹⁹¹ For example, a 2011 Senate Report added “fraud in foreign labor contracting” to the list of U-visa crimes.¹⁹² The Report based its decision on the fact that this particular crime has been difficult to prosecute due to victims’ fear of deportation.¹⁹³ The goal of the addition was to increase reporting and prosecution.¹⁹⁴ Additionally, the Department of Labor Wage and Hour Division was conferred statutory authority to certify U-visa applications in 2015.¹⁹⁵ The Environmental Protection Agency, through FIFRA and WPS, as an agency responsible for investigating violations of workplace laws, could also be conferred this statutory authority by Congress.

189. *Id.* § 214.14 (2016).

190. BON APPÉTIT, *supra* note 3, at 58 (“Farmworkers in Forced Labor”); *see also* Claire Wilkins, *Using Drones to Fight Slavery in the Fields: An Examination of the Practicality and Constitutionality of Applying 21st Century Technology to a 21st Century Problem*, 24 HASTINGS ENV’T L. L.J. 157 (2018).

191. *See, e.g.*, Trafficking Victims Protection Reauthorization Act of 2011, S. REP. 112-96, 7 (2011) (“The bill adds ‘fraud in foreign labor contracting,’ as defined by 18 U.S.C. S 1351, to the list of crimes for which victims may be eligible to apply for a ‘U’ visa. Fraud in foreign labor contracting is difficult to prosecute because victims are often reluctant to come forward and report the crime for fear of being deported. Including this crime as a qualifying criminal activity for a ‘U’ visa will encourage greater reporting, victim cooperation, and prosecution of this serious offense.”).

192. Trafficking Victims Protection Reauthorization Act of 2011, S. REP. No. 112-96, at 7 (2011).

193. *Id.* at 6

194. *Id.*

195. U.S. DEP’T OF LABOR, *The Department of Labor Expands Its Support of Victims of Human Trafficking and Other Crimes*, <https://www.dol.gov/dol/fact-sheet/immigration/20150402U&TFactSheet.htm> [<https://perma.cc/W8FE-5BKC>]; *see also* U.S. DEP’T OF LABOR, *U-Visa and T-Visa FAQ*, <https://www.dol.gov/whd/immigration/utvisa-faq.htm#2> [<https://perma.cc/A2XF-ZSXX>] (“Department of Homeland Security regulations (8 C.F.R. § 214.14(a)(2)) expressly list certain federal law enforcement agencies that may certify U visa applications, including the Department of Labor. In doing so, the Department of Homeland Security recognized that Department of Labor investigators may detect evidence of qualifying criminal activity during the course of investigating violations of workplace laws. The Department of Labor’s authority to complete U visa certifications (Form I-918, Supplement B) is based on its role as a law enforcement agency that has detected the crimes.”).

Outside of the U-visa, other efforts have been made in California to provide legal status to farmworkers specifically in response to the recent labor shortage, widely attributed to the rhetoric and policies of the Trump Administration.¹⁹⁶ Specifically, Senators Dianne Feinstein and Kamala Harris of California proposed the “Agricultural Worker Program Act of 2017” which would provide a pathway to citizenship for eligible farmworkers.¹⁹⁷ The Bill is supported by Senator Patrick Leahy of Vermont, Michael Bennet of Colorado, and Mazie Hirono of Hawaii, and co-sponsored by the United Farm Workers.¹⁹⁸ The legislation would create a “blue card” for eligible agricultural workers, which would last for eight years.¹⁹⁹ The legislation is framed in terms of the need for labor to support the economy, but has not specifically addressed the problem of pesticide poisoning of farmworkers.²⁰⁰ Although Senator Harris cited a lack of “decent working conditions” as a motivating factor for the Agricultural Worker Program Act of 2017, pesticides were not specifically mentioned in the bill.²⁰¹ This represents a federal effort to address some of the obstacles that the undocumented population faces in the agricultural industry, however, in light of the evidence regarding pesticide poisoning, the difficulty of reporting, and the need for federal leadership, this is insufficient to address an urgent problem.²⁰²

196. Chris Morris, *California Crops Rot as Immigration Crackdown Creates Farmworker Shortage*, FORTUNE (Aug. 8, 2017), <http://fortune.com/2017/08/08/immigration-worker-shortage-rotting-crops/> [https://perma.cc/L32L-BEY9]; Tom Philpott, *Trump's Crackdown on Immigration is Terrible News for Anyone Who Eats Food*, MOTHER JONES (June 26, 2017), <https://www.motherjones.com/environment/2017/06/immigration-farmworkers-employment-trump/> [https://perma.cc/H3FT-X9B6]; and see also O'Brien, Kruse, & Kruse, *supra* note 65, at 2 (discussing how “the farm sector’s heavy dependence on undocumented workers in its hired farm workforce makes agriculture particularly sensitive to the changes possible with immigration reform depending on the nature and extent of the reform.”). Note that while immigration policy is generally seen as requiring federal action, states are now challenging those bounds. See, e.g., California AB-450 Employment Regulation: Immigrant Worker Protection Act (approved by Governor Oct. 5, 2017), https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB450 [https://perma.cc/Q2RP-XNAH].

197. S. 1034, 115th Cong. (2017–18).

198. Bartholomew D. Sullivan, “*Feinstein Bill Would Provide Farmworkers Path to Citizenship*,” DESERT SUN (May 10, 2017), <http://www.desertsun.com/story/news/politics/2017/05/11/farmworker-blue-card-immigration-bill/317093001/> [https://perma.cc/8HXZ-ZPXG].

199. Trafficking Victims Protection Reauthorization Act of 2011, S. REP. 112–96, 7.

200. Sarah D. Wire, “*California’s Senators Just Proposed a Path to Legal Status and Citizenship for Farmworkers*,” L.A. TIMES, CALIFORNIA IN CONGRESS (May 3, 2017) (last visited Dec. 17, 2017), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-feinstein-harris-file-legislation-to-1493846889-htmstory.html> [https://perma.cc/77DF-XPWL].

201. *Id.*

202. It should also be noted that in light of the Trump Administration’s harsh immigration policies, California lawmakers have enacted the Immigrant Worker Protection Act (AB 450). The law, passed October 5, 2017, “prohibit[s] an employer or other person acting on the employer’s behalf from providing voluntary consent to an immigration

On the other side of the aisle is the Agricultural Guestworker Act (“AGA”) of 2017, introduced by Republican Representative Bob Goodlatte of Virginia.²⁰³ The AGA would create a new H-2C work visa program for farmworkers,²⁰⁴ as a solution to the “expensive, flawed” H-2A program that proponents of the AGA argue is “plagued with red tape.”²⁰⁵ The AGA caters towards the agriculture industry, farmers, and employers of farmworkers generally. Workers are required to go back to their home country for forty-five days in what is called a “touchback requirement,” where they can then participate in an “E-verify” system, come back to the U.S., and then may seek jobs during their visa period, which lasts eighteen months.²⁰⁶ The H-2C program leaves provision of housing and transportation to workers as “optional,” and also contains provisions that “discourage abusive litigation.”²⁰⁷ Another selling point of this program is that “protects U.S. taxpayers” and it “ensures Guestworkers return home.”²⁰⁸

This program provides no protections for farmworkers without legal status and no protections for farmworkers in the event of labor abuse or pesticide poisoning. This program would potentially further the abuse suffered by farmworkers and favor farmers without addressing the current labor shortage.²⁰⁹ Farmers across the country are demanding federal immigration reform to address the shortage.²¹⁰

Conclusion

The solution contemplated in this Note would be modeled after the U-visa in three ways: 1) increase reporting of a crime that is underreported through protection from deportation for undocumented victims of this crime; 2) ensure the victim’s continued participation with the investigation as a condition of reporting

enforcement agent to enter nonpublic areas of a place of labor unless the agent provides a judicial warrant, except as specified.” AB 450 (Cal. 2017).

203. Agricultural Guestworker Act of 2017, H.R. 4092, 115th Cong. (2017).

204. *Id.*

205. Chairman Bob Goodlatte, “Agricultural Guestworker Act of 2017,” H.R. JUDICIARY COMM. <https://judiciary.house.gov/wp-content/uploads/2017/10/102017-AG-Act-OnePager.pdf>.

206. *Id.*

207. *Id.*

208. *Id.*

209. Kathleen Sexsmith & Rossana Coto-Batres, *Farmworkers Deserve Better than Guestworker Act*, TIMES UNION (Nov. 23, 2017), <http://www.timesunion.com/opinion/article/Farmworkers-deserve-better-than-Guestworker-Act-12380515.php> [<https://perma.cc/PF4X-A8US>].

210. Rick Barrett, *Wisconsin Dairy Farmers Push for Immigration Reform*, J. SENTINEL (July 20, 2015), <http://archive.jsonline.com/business/wisconsin-dairy-farmers-push-for-immigration-reform-b99541375z1-317681341.html/> [<https://perma.cc/9ZZEQ CG>] (“Wisconsin dairy farmers are pushing for immigration reform, saying they need a federal labor policy that guarantees they will have enough employees to maintain and expand their businesses.”); *see also* Philpott, *supra* note 196.

and a pathway to citizenship; and 3) assist in generally combatting an issue that primarily affects an undocumented population. This program would increase reporting of pesticide-related illnesses nationally, instead of the current state-by-state solutions that can vary widely and leave farmworkers exposed when they move from one state to another. This must be coupled with an increase in funding for investigations, to ensure that victims' reports are supported by a thorough investigation.

With a more complete picture of the issue of pesticide poisoning of agricultural workers, the EPA can increase accountability of farmers and manufacturers who are misusing pesticides. Additionally, increasing data on the effect of pesticides will allow the government to make a more informed decision in the FIFRA analysis and a better balance between parties' interests, and provide advocates with more leverage when challenging the balancing analysis. With this data, the EPA can pursue FIFRA prosecutions more effectively, thus increasing both the safety of farmworkers and deterrence of misuse and illegal use for farm owners, pesticide manufacturers, registrants, and applicators.

This Note outlines what meaningful remedies are available to California farmworkers who suffer from pesticide poisoning. This question is particularly important in the current political climate, and will require a multi-pronged solution. The fear of retribution and deportation that suppresses reporting of pesticide poisoning must be addressed by any proposed solutions. With sufficient federal protection against deportation in place, state claims will be more accessible for farmworkers, and there will be more accurate reporting on pesticide-related illnesses. Providing protection from deportation for farmworkers will increase reports of pesticide-related illness, misuse in the workplace, and exposure to vulnerable communities. More data on the issue will assist in criminal prosecutions under FIFRA and allow for the tools already in place to do work effectively. This must all be done alongside advocacy for farmworkers themselves, especially in an anti-immigrant political climate, as they continue to provide the labor which sustains the food system in this country.
