

Invisible Behind a Bandana: U-Visa Solution for Sexual Harassment of Female Farmworkers

By JULIANA GARCIA*

Introduction

MARIA¹ IS A THIRTY-THREE YEAR-OLD separated mother of four children. She is a Mexican farmworker employed in the fields of California's Central Valley as a grape box puncher.² She staples grape boxes shut and places correct labels on them before they are taken by truck to cold storage for shipment. When Maria first started working as a puncher, her foreman insisted on taking her out on a date and would constantly make sexual passes at her. The foreman reviewed her work and always had an excuse to be near Maria's working area. If Maria accepted his sexual invitations, her foreman promised to make sure that Maria would be able to keep her job and never have to worry about having to find another job again. Maria feared calling attention to herself and felt that if she said "No," the foreman would complain about her to the boss. Maria had to think of her children first; she needed her job.

In another part of California, Virginia, a fifty-nine year-old farmworker from Mexico who worked in the vineyards in the Central Valley lost her job and was blacklisted by the industry after reporting

* J.D. Candidate, University of San Francisco School of Law, 2012; B.A., University of California, Los Angeles, 2008. Para mis padres, Alicia y Rafael Garcia: Ustedes son mi inspiración, gracias por sus enseñanzas. Su ejemplo de trabajo y sacrificio lo llevo conmigo todos los días. I also want to thank my soulmate, Gustavo Rios, for being my backbone throughout the years. Thank you Professor Ontiveros for your insight, guidance, and encouragement. A special thank you to Kevan Warren and the helpful editors of USF Law Review for your diligence in preparing this Comment for publication.

1. The report that recounts the story of this woman does not provide her name. This excerpt gives her a fictitious name for purposes of contextualizing her experience.

2. Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 VIOLENCE AGAINST WOMEN 237, 250 (2010).

the sexual harassment that she was subjected to for years.³ Virginia explained that women have to stay silent and allow the humiliation and harassment to occur or risk losing their job and being separated from their families. “No one sees the people in the fields,” she proclaimed.

Both Maria and Virginia are part of the farmworker labor pool that functions as the backbone of the U.S. food supply but whose plight is often ignored. Despite their contributions to our economy, these immigrant women live at the margins of U.S. society. Approximately 78% of farmworkers are Latino,⁴ and at least six in every ten of these farmworkers are undocumented immigrants,⁵ meaning they do not have legal authorization to live or work in the United States.⁶

The sexual harassment experienced by Maria and Virginia is a plaguing and systemic problem for female farmworkers, particularly undocumented women. Women in the fields have a drastically different workplace experience than the average American worker. A large majority of female farmworkers view sexual harassment as a major problem.⁷ Female farmworkers are more vulnerable to sexual harassment than other female workers.⁸ While the Equal Employment Opportunity Commission (“EEOC”) has increased its efforts to address this specific problem,⁹ female farmworkers continue to fall victims to the legal exclusion and marginalization of a traditional legal framework that ignores their unique position.

In 2000, as part of the Victims Protection and Trafficking Act, Congress enacted a new visa category, U-Visa, to provide relief in cases

3. MARY BAUER & MONICA RAMIREZ, S. POVERTY LAW CTR., *INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE U.S. FOOD INDUSTRY* 46 (2010), available at http://www.splcenter.org/sites/default/files/downloads/publication/Injustice_on_Our_Plates.pdf.

4. Waugh, *supra* note 2, at 239 (noting that although between 75% to 90% of California farmworkers are from Mexico, farmworkers also include those from Central America and Asian countries). R

5. BAUER & RAMIREZ, *supra* note 3, at 4. R

6. Maria L. Ontiveros, *Harassment of Female Farmworkers: Can the Legal System Help?*, in *WOMEN'S LABOR IN THE GLOBAL ECONOMY: SPEAKING IN MULTIPLE VOICES* 103, 104 (Sharon Harley ed., 2007).

7. See Maria M. Dominguez, *Sex Discrimination & Sexual Harassment in Agricultural Labor*, 6 AM. U. J. GENDER & L. 231, 255 (1997).

8. See William R. Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 U.C. DAVIS L. REV. 1075, 1079 (2000).

9. See WILLIAM R. TAMAYO, *SEXUAL HARASSMENT AND ASSAULT IN THE WORKPLACE: A BASIC GUIDE FOR ATTORNEYS IN OBTAINING RELIEF FOR VICTIMS UNDER FEDERAL EMPLOYMENT LAW* 16–18 (2007), available at <http://iwp.legalmomentum.org/cultural-competency/employment/18%20Employment.pdf> (providing a partial list of sexual assault cases litigated and resolved by the EEOC).

of serious crimes that tend to target vulnerable foreign individuals without immigration status.¹⁰ The U-Visa grants victims of certain crimes¹¹ permission to remain in the United States and to work¹² temporarily with the possibility of receiving permanent residency at the end of a three-year period.¹³ In order to qualify for the U-Visa, a person must provide evidence of the following: (1) substantial physical or mental abuse; (2) information concerning criminal activity; (3) helpfulness to law enforcement investigating or prosecuting the crime; and (4) a crime that violated the laws of the United States or occurred in the United States.¹⁴ The U-Visa provides temporary legal status to immigrants who suffered substantial abuse as a result of having been severely victimized by certain criminal activity if they help law enforcement in prosecuting the perpetrator of those crimes.¹⁵ Since the implementation of U-Visas, legal advocates and scholars have focused on the visa's protection of domestic violence victims.¹⁶ However, the U-Visa can serve as a powerful tool to protect against workplace abuses, including sexual harassment of female farmworkers.

This Comment argues that immigration, labor, and sexual harassment laws work together to exclude the voices and unique experiences of female farmworkers. Current legal doctrine ignores how the intersection between gender, race, and legal status works in favor of unscrupulous employers and strips female farmworkers of any agency. A framework that would remove barriers that handicap female farmworkers is critical to developing a response to the problem of sexual harassment in the fields. This Comment further argues that applying the U-Visa—which takes into consideration the layered oppression facing undocumented female farmworkers and removes the oppressor's most powerful tool—to female farmworkers is the most effective model to help empower female farmworkers to fully participate in society.

Part I of this Comment examines the living and working conditions of undocumented Mexican female agricultural workers. Specifi-

10. Victims of Trafficking and Violence Protection Act of 2000, Pub L. No. 106-386, § 1513(a), 114 Stat. 1464, 1533–34.

11. § 1513(b)(3), 114 Stat. at 1535 (adding 8 U.S.C. § 01(a)(15)(U)(iii)).

12. § 1513(c), 114 Stat. at 1535 (adding 8 U.S.C. § 1184(o)(3)(B)).

13. § 1513(f), 114 Stat. at 1536.

14. § 1513(b)(3), 114 Stat. at 1534.

15. 8 C.F.R. § 214.14(b) (2011).

16. See Anna Hanson, Note, *The U-Visa: Immigration Law's Best Kept Secret?*, 63 ARK. L. REV. 177, 177–79 (2010) (arguing that U-Visa serves as a “gap filler” to the Violence Against Women Act of 1994 because it provides relief for undocumented women victim of domestic violence, which the Act excluded).

cally, this section places emphasis on the problem of sexual harassment of female farmworkers in the fields. Part II addresses the lack of legal recourse for these workplace violations, rooted in the historical exclusion of agricultural workers, ineffective immigration laws, and inadequate sexual harassment protections for undocumented female workers of color. Part III explores the use of U-Visas as a vehicle to protect and empower female farmworkers faced with sexual harassment in the fields.

I. Work Life in the Fields and the Problem of Sexual Harassment

A. Who Are They?

Mexican women began migrating to the United States at the end of the *Bracero* Program in 1964 with significant waves of women settling in the United States in the 1980s.¹⁷ The United States' historical dependence on disposable Mexican labor, combined with the crippling economic impact of the 1994 North American Free Trade Agreement ("NAFTA") on the Mexican economy, locked low-income Mexicans into poverty and forced many in Mexico to venture across the border in search of a better life.¹⁸

Mexican born immigrants make up 62% of the country's 10.8 million undocumented immigrants.¹⁹ Four million of these undocumented immigrants are women.²⁰ Undocumented Mexican female immigrant workers are concentrated in low-paying industries in this country, such as private households, hotels, food manufacturing, agriculture, and textiles.²¹ It is not surprising that of the one million farmworkers living and working in Californian fields, the vast majority of them are foreign born from Mexico, and about 28% are women.²²

17. Waugh, *supra* note 2, at 240.

18. See Bill Ong Hing, *NAFTA, Globalization, and Mexican Immigrants*, 5 J.L. ECON. & POL'Y 87, 97–103 (2009) (arguing that NAFTA exasperated income inequalities in Mexico and forced labor migration from Mexico to the United States by increasing the number of low-wage manufacturing jobs in Mexico).

19. MICHAEL HOEFER, NANCY RYTINA & BRYAN C. BAKER, DEP'T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009 (2010), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf.

20. *Id.*

21. Maria L. Ontiveros, *Female Immigrant Workers and the Law: Limits and Opportunities*, in *THE SEX OF CLASS: WOMEN TRANSFORMING AMERICAN LABOR* 235, 240 (Dorothy Sue Cobble ed., 2007).

22. See Waugh, *supra* note 2, at 239 (reporting that about 75–90% of farmworkers from California are born in Mexico).

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The Department of Labor reports that 30% of farmworking families live below the poverty guidelines, with the average farmer earning only around \$10,000 per year.²³ More alarming is the fact that the average annual salary for female farmworkers is typically less than salary paid to their male counterparts.²⁴ About 62% of female farmworkers are married, and about 58% have children.²⁵ Most farmworkers have their children with them in the United States, but a sizable minority leave their respective families in Mexico.²⁶ Female farmworkers are also often the primary caregivers for their families, making female farmworkers less likely to assert their rights for fear of being deported and separated from their families.²⁷ An estimated 340,000 of the 4.3 million babies born in the United States in 2008 were the children of undocumented immigrants.²⁸ Deportation encompasses the difficult choice between taking away parents from their U.S. citizen children or uprooting children from their U.S. homes and schools. Additionally, most undocumented women have little or no formal education.²⁹ Many female farmworkers do not even know how to read and write.³⁰ They are also less likely than male migrants to speak English, making it more difficult for migrant women to seek out legal assistance.³¹

B. Workplace Conditions

As a result of the extreme poverty of farmworker families and their lack of legal status, farmworkers of both sexes face hazardous working conditions. Farmworkers are regularly exposed to pesticides

23. U.S. DEP'T OF LABOR, RESEARCH REPORT NO. 9, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY 2001–2002: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARM WORKERS (2005), *available at* http://www.doleta.gov/agworker/report9/naws_rpt9.pdf (reporting that the average individual farmworker's income is between \$10,000–\$12,499 per year and that total family income averages between \$15,000–\$17,499 per year).

24. BAUER & RAMIREZ, *supra* note 3, at 24 (reporting that in 2005, female crop workers earned an average income of \$11,250, as compared to \$16,250 for male crop workers). R

25. Richard Kamm, *Extending the Progress of the Feminist Movement to Encompass the Rights of Migrant Farmworker Women*, 75 CHI-KENT L. REV. 765, 768 (2000).

26. Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 158, 160 (2003).

27. BAUER & RAMIREZ, *supra* note 3, at 49. R

28. JEFFREY S. PASSEL & PAUL TAYLOR, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANTS AND THEIR U.S.-BORN CHILDREN (2010), *available at* <http://www.pewhispanic.org/files/reports/125.pdf>.

29. BAUER & RAMIREZ, *supra* note 3, at 22. R

30. Dominguez, *supra* note 7, at 256. R

31. Kamm, *supra* note 25, at 769.

when handling produce, while applying the pesticides themselves, and are even sprayed directly along with the crops.³² As a result, farmworkers suffer from the highest rates of toxic chemical injuries in the country.³³ A report measuring the scope of pesticide damage indicated that in California alone, from 1991 to 1996, there were nearly 4000 reported cases of occupational poisoning by agricultural pesticides.³⁴ Many of these incidents go unreported for a variety of reasons, including the fear of retaliation, lack of pesticide training, and lack of medical insurance.³⁵ These conditions are particularly injurious for female farmworkers because they face an increased risk of passing on the harmful effects of pesticides to their fetus or small children.³⁶ For example, an investigation into a case of a pregnant farmworker who was exposed to pesticides in the tomato fields of the grower Ag-Mart—resulting in her child subsequently being born without arms and legs—uncovered lax enforcement of pesticide regulations by the United States Department of Labor.³⁷

Farmworkers who are contracted by smaller agricultural employers are subject to poor sanitary conditions in housing and working facilities.³⁸ The Occupational Safety and Health Act requires growers to provide field sanitation, drinking water, and hand washing facilities in the fields.³⁹ However, this statutory regulation only applies to farms with eleven or more workers, leaving a sector of farmworkers vulnerable to poor sanitation in working facilities.⁴⁰ Such conditions can prove particularly harmful for women because urinary retention can lead to serious health risks, including infections, increased risk of miscarriages, premature birth, and neonatal death.⁴¹ Additionally, farmworkers also face inhumane housing conditions; many farmworkers endure contaminated water, sewage problems, fire hazards, lack of toilets, lack of heat, and inadequate windows in hous-

32. Ontiveros, *supra* note 26, at 170.

33. *Id.*

34. MARGARET REEVES, ANNE KATTEN & MARTHA GUZMÁN, FIELDS OF POISON 2002: CALIFORNIA FARMWORKERS AND PESTICIDES 4, (2002), *available at* http://www.ufw.org/white_papers/report.pdf.

35. *See id.*

36. BAUER & RAMIREZ, *supra* note 3, at 30.

37. *Id.* at 30–31.

38. *See* Ontiveros, *supra* note 26, at 170.

39. 29 C.F.R. § 1928.110(c) (2011).

40. *Id.* § 1928.110(a).

41. Ontiveros, *supra* note 26, at 170.

ing that fails to comport with the minimal requirements imposed by law.⁴²

The structural nature of farm work makes working conditions deleterious for farmworkers. About half of the farmworkers in the United States are temporary or seasonal workers, meaning they are either tending seasonal crops or performing short-term work for growers with year round crops.⁴³ Most of these seasonal workers work for farm labor contractors.⁴⁴ There are several problems with working for a farm labor contractor. Unscrupulous contractors take advantage of the vulnerability of farmworkers and continuously engage in practices such as providing substandard housing, transporting workers in dangerous vehicles, refusing to pay wages, and making monetary loans to workers at exorbitantly high interest rates.⁴⁵ Given that growers secure the labor through labor contractors, the growers are able to insulate themselves from the legal obligations that are due to workers and are frequently denied by the labor contractors.⁴⁶ Thus, it becomes difficult for farmworkers to assert legal rights against growers, and the only legal recourse against the contractor is meaningless because the contractors are often insolvent.⁴⁷

C. The Problem of Sexual Harassment in the Fields

The problem of sexual violence and harassment is a constant menace for female farmworkers. Immigrant women are more likely than immigrant men to be victims of employment discrimination and sexual harassment.⁴⁸ A study conducted in 2010 documenting the sexual harassment of female farmworkers found that 97% of the women interviewed reported experiencing sexual harassment.⁴⁹

42. Lori Nessel & Kevin Ryan, *Migrant Farmworkers, Homeless and Runaway Youth: Challenging the Barriers to Inclusion*, 13 LAW & INEQ. 99, 105 (1994).

43. *Id.* at 162 (“[A]bout two-thirds of farmworkers are direct hires and one-third are employed through a contractor. Most contract work is seasonal—either tending seasonal crops or performing sea-sonal [sic] or short-term work for growers with year-round crops.” (footnote omitted)).

44. *See id.* (explaining the way hiring works within this structure, i.e., that the contractor makes an agreement with the grower to provide a certain amount of labor and the contractor then recruits and hires the workers).

45. *Id.* at 164.

46. *Id.* at 163.

47. Sean A. Andrade, Comment, *Biting the Hand That Feeds You: How Federal Law Has Permitted Employers to Violate the Basic Rights of Farmworkers and How This Has Begun to Impact Other Industries*, 4 U. PA. J. LAB. & EMP. L. 601, 617 (2002).

48. Kamm, *supra* note 25, at 769.

49. Waugh, *supra* note 2, at 247.

The personal story of Maria Garcia describes these experiences.⁵⁰ Maria explains that women working in California strawberry fields are constantly subject to sexual harassment because most of the time they work bent over. Men would take advantage of this to touch the women's genitalia and buttocks or make lewd comments about their bodies. Maria recalls hearing stories about supervisors having a couch located in the back of a nearby shed where women were forced to have sex in exchange for a job. Maria and other women make attempts to protect themselves by covering their entire bodies with heavy shirts, baggy pants, hats, and wearing a bandana over their mouths. However, this is their only tool against this menace.

Female farmworkers report both experiences of hostility and unwanted sexual attention. These women are subject to insulting and degrading sexist comments and behavior, such as "You are all prostitutes," and "[W]omen aren't worth anything except for having children and cleaning the home."⁵¹ A majority of farmworkers reported instances of unwanted sexual attention ranging from inappropriate and offensive physical or verbal advances to gross sexual imposition, and even rape.⁵² Despite attempts to cover their entire bodies, one female farmworker described instances of her supervisor approaching her to check her work, getting very close to her, and then pulling down her face scarf to try to kiss her.⁵³ The same farmworker reports one occasion where she was bent down during work, and the same supervisor approached her and said, "Hey, I'm going to insert a very pleasurable stick into you."⁵⁴ This worker was subject to this type of harassment for over a year.

Women who report such abuses to their higher-ups risk retaliatory punishment, ranging from demotion, dismissal, or the denial of basic necessities needed to perform their jobs.⁵⁵ The experience of another farmworker that was harassed for seven years underscores the lack of institutional support for these women.⁵⁶ While pulling weeds on a berry farm, her supervisor, aware that this worker was alone and was the sole supporter of her family, made constant sexual advances

50. Xóchitl Castañeda & Patricia Zavella, *Changing Constructions of Sexuality and Risk: Migrant Mexican Women Farmworkers in California*, J. LATIN AM. ANTHROPOLOGY, June 2003, at 126, 126–27.

51. Waugh, *supra* note 2, at 247.

52. *Id.*

53. *Id.* at 248.

54. *Id.*

55. *Id.* at 253.

56. *Id.*

towards her, offering her money for sex. When she refused, her supervisor spread negative rumors about this worker to the other managers, who subsequently scrutinized her work. Further, when she approached the office secretary to report the harasser, the secretary insisted that this female worker remain silent because the worker's story would not be believed given that the perpetrator was one of the supervisors. Eventually, this farmworker was fired, and she later felt that she should have never complained about the abuse.

The harassment that these women experience in the fields parallels the sexual violence crime categories for which U-Visa protection is available. Women in the fields are raped, sexually assaulted, and experience abusive sexual contact by supervisors who use blackmail and extortion to get away with sexual abuse in the workplace.⁵⁷ The story of sixteen year-old Yazmin demonstrates how farmworker women are vulnerable to these particularly egregious crimes for which the U-Visa can provide relief.⁵⁸ Yazmin recalls that her supervisor would not only physically strain her and the other workers to exploit as much labor from them as possible, but also find ways to brush up against Yazmin when she was nearby. On one occasion, Yazmin had to fight off a sexual assault after accepting a car ride to work when the supervisor tried to rape her in his truck. The supervisor threatened Yazmin that if she told anyone, he would make sure she lost her job picking watermelons. Yazmin admits that she was afraid to report these incidents because she was undocumented. The stories of women like Yazmin show that the sexual exploitation occurring in the fields falls within the realm of crimes protected under the U-Visa regulations.

In order to understand the experience of women like Yazmin and Maria Garcia, it is important to explore the reasons why female farmworkers are the "perfect victims." The nature of farm work makes these women particularly vulnerable to sexual harassment. Unlike their experiences in Mexico, where most worksites are gender-segregated, immigrant women farmworkers work in close proximity to men.⁵⁹ Estimates of gender ratios of farmworkers show higher rates of male dominated field teams, with men compromising approximately 72% of laborers.⁶⁰ More importantly, men predominantly hold super-

57. See generally *id.* (describing instances of harassment experienced by women farmworkers).

58. BAUER & RAMIREZ, *supra* note 3, at 45.

59. Waugh, *supra* note 2, at 240.

60. *Id.* at 245.

visory roles.⁶¹ These women labor in an environment where they are dependent on men for their employment, perform tasks that mandatorily have to be evaluated by men, and work in crews organized by men.⁶² Working alongside men in male-dominated teams or groups increases the risk of sexual harassment, especially when these women are poor and undocumented.⁶³ Additionally, those women working in the fields often work in remote areas, isolated from their co-workers. Given the nature of the field work, these women might be required to assume exposing physical positions in order to perform their work.⁶⁴ To make matters worse, women farmworkers have in some cases reported being taken behind tall and leafy berry bushes or full-grown grapevines, concealing harassers' actions and concealing the women from the view of others.⁶⁵ Other women report that foremen take advantage of this situation and order work assignments for women in isolated areas.⁶⁶ These circumstances make women vulnerable to sexual stares, verbal comments, and unwanted grabbing.⁶⁷

Undocumented immigrant women are virtually powerless to protect themselves from such attacks. Because these women speak little English and are oftentimes illiterate, they remain uninformed of their legal and constitutional rights.⁶⁸ The fear of deportation significantly handicaps these women's ability to report sexual harassment.⁶⁹ For an undocumented woman, refusing sexual advances may result in that worker being deported and separated from her children.⁷⁰ These children might be older with established ties to the United States, or U.S. citizens, at which point she is confronted with the decision to leave them in the United States or take them with her. If these women are deported and subsequently chose to return to the United States, they face a daunting border crossing where they risk both their lives and the exposure to sexual abuse.⁷¹ Deportation is a very serious and dev-

61. This study found that from the sample of women interviewed, 92% documented that men held a supervisory role at their job site. *See id.*

62. *Id.*

63. *See id.* at 245–46.

64. *Id.* at 245.

65. *Id.*

66. *Id.*

67. *Id.*

68. BAUER & RAMIREZ, *supra* note 3, at 42.

69. *Id.* at 50.

70. *Id.* at 42.

71. Ontiveros, *supra* note 6, at 105–06.

astating consequence for undocumented women;⁷² this threat single-handedly handicaps these women from coming forward about labor abuses. Perpetrators of sexual harassment in the fields use the lack of status of these women against them, knowing that the women are not likely to report instances of sexual harassment or even violent attacks.⁷³

II. Current Legal Gaps

Labor, immigration, and sexual harassment laws work together to exclude the voices and unique experiences of female farmworkers. Race, gender, and immigration status structure the experiences of these women. Current legal frameworks place undocumented Mexican female farmworkers at the periphery and single-handedly ignore the intersectionality between race, gender, and immigration status.⁷⁴ These layers of inequality make undocumented Mexican female farmworkers invisible to any legal remedy. The following section focuses on how immigration and employment law affects female farmworkers' workplace rights.

A. Agricultural Exceptionalism

The exclusion of farmworkers from the most basic workplace rights is deeply rooted in our nation's history with race, national origin, and class biases. The long history of migration between the United States and Mexico has influenced the legal exclusion of agricultural workers from key labor laws.

1. Disposable Workforce

Throughout the twentieth century, the United States contradictorily sought to enforce restrictive immigration laws while concurrently it demanded an active temporary Mexican labor force be admitted. In the first quarter of the last century, agricultural interests pressured the U.S. government to facilitate the use of Mexican workers for farm

72. See Hanson, *supra* note 16, at 183 (noting that in 2006, the Department of Homeland Security apprehended over one million foreign nationals).

73. BAUER & RAMIREZ, *supra* note 3, at 42.

74. See Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 Mich. J. Race & L. 285, 307-09 (2001) (describing intersectionality theory as a response to the problems of essentialism in equality theory and jurisprudence). Specifically, intersectionality theory considers the intersection of forms of subordination as an important site of analysis.

work, mining, and railroad work.⁷⁵ During the Great Depression, as a result of hard economic times, pressures increased to restrict Mexican immigration, resulting in the deportation of thousands of individuals of Mexican descent.⁷⁶ In response to the World War II labor shortage, however, a bilateral agreement between Mexico and the United States created the *Bracero* Program in 1942, allowing for the importation of four to five million Mexicans to work in the United States.⁷⁷ However, legally-contracted *braceros* experienced widespread disregard for inadequate housing, food, health care, and even fair pay.⁷⁸ The alleged need for cheap labor in U.S. markets combined with the lack of protections afforded *braceros* made these Mexicans susceptible to exploitation by U.S. growers.⁷⁹ Growers took advantage of the vulnerability of this new labor group in order to make profit by importing an excessive number of *braceros*, giving them minimal work, over-charging them for meals of the poorest quality, and housing them in substandard quarters.⁸⁰ This program reflected the willingness of the U.S. government to utilize a disposable and vulnerable workforce in order to subsidize agriculture in the Southwest and California with cheap labor. Several immigration scholars find that the current surge in undocumented immigration is the logical continuation of the pattern of seasonal migration set in motion by the *Bracero* Program.⁸¹ In other words, the *Bracero* Program “institutionalized the process whereby many former *braceros* workers[,] having been exposed to the [U.S.] labor market[,] continued to seek work in the U.S. in subsequent years,” but now as undocumented workers.⁸²

Today, the H-2A guest-worker program has become the modern day equivalent to the *Bracero* Program because the same egregious exploitation of farmworkers continues under the H-2A framework. The H-2A program allows U.S. companies to recruit foreign workers, grants these workers authorization to enter the United States only for temporary work, and requires the growers to establish that domestic

75. HELENE HAYES, U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED: AMBIVALENT LAWS, FURTIVE LIVES 28 (2001).

76. *Id.* at 29 (noting that the “Repatriation” campaign lasted from 1929 to 1939).

77. *Id.* at 18. “*Bracero*” is a Spanish word for a person that works with his arms. *Id.*

78. BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY 127 (2004).

79. HAYES, *supra* note 75, at 28–29.

80. Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 585 (2001).

81. HAYES, *supra* note 75, at 29–30.

82. *Id.* at 29–30 (quoting Vernon M. Briggs, Jr., *The “Albatross” of Immigration Reform: Temporary Worker Policy in the United States*, 20 INT’L MIGRATION REV. 995, 998–99 (1987)) (internal quotation mark omitted).

workers cannot be found to perform the needed job.⁸³ The H-2A program has endured much criticism from immigrant rights advocates, who argue that the program is “essentially a system of mail-order workers” because the lack of enforcement has allowed growers to stop recruiting domestic workers and to never raise wages for foreign workers, who are forced to stay with the particular grower or return to Mexico.⁸⁴ Many scholars find that the H-2A visa program is as disadvantageous for farmworkers as the *Bracero* Program because it causes many problems for farmworkers.⁸⁵ One problem is that since there is no shortage of agricultural labor, an increase in workers depresses wages and harms domestic workers.⁸⁶ Exploitation of H-2A workers is rampant. Many workers do not see their contracts until they arrive in the United States, and they are only authorized to work for a single employer; this furthers such exploitation.⁸⁷ Additional criticism points to the lack of enforcement of H-2A workplace rights. For example, because the employee is required to pay the inbound traveling costs when they migrate to the United States, H-2A workers start off their employment with substantial debt owed to their employers.⁸⁸ The lack of visa portability and fear of being blacklisted are significant factors that exacerbate the lack of bargaining power between the employer and the agricultural worker.⁸⁹ Similar to the *Bracero* Program, the H-2A guestworker program maintains a working underclass outside the protection of the law and rooted in racial bias.

2. Exclusion from Labor Laws

The evolution of labor protections for farmworkers has mirrored the historic U.S. treatment of Mexican immigration, where the interests of the agricultural industry superseded the necessity for basic human and civil rights.⁹⁰ Federal labor laws have helped to render agricultural workers vulnerable, guaranteeing a silent and productive invisible working class. The New Deal legislation effectively preserved

83. *Id.* at 30.

84. Anne Shea, “Don’t Let Them Make You Feel You Did a Crime”: *Immigration Law, Labor Rights, and Farmworker Testimony*, MELUS, Spring 2003, at 125 (quoting DANIEL ROTHENBERG, WITH THESE HANDS: THE HIDDEN WORLD OF MIGRANT FARMWORKERS TODAY 232 (1998)).

85. See Ontiveros, *supra* note 26, at 162.

86. *Id.*

87. *Id.*

88. Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL’Y J. 125, 137 (2009).

89. *Id.*

90. See Holley, *supra* note 80, at 580–92.

the systematic abuse of farmworkers by institutionalizing a second-class status of agricultural workers. Under the National Labor Relations Act (“NLRA”), farmworkers were excluded from guaranteed employee organizing and collective bargaining rights.⁹¹ Currently, an employer is free to retaliate against an agricultural worker who engages in unionizing or organizing without any legal repercussions because agricultural workers do not fall within the scope of the NLRA.⁹² Similar to the NLRA, agricultural workers were also excluded from minimum wage and overtime rights under the Fair Labor Standards Act of 1938 (“FLSA”).⁹³ These exclusions were the product of racial discrimination, as New Deal legislators attempted to win the support of Southern Democrats by including these exclusions in the legislation.⁹⁴ The New Deal legislation, including the FLSA, sought to preserve the social and racial plantation system in the South, a system resting on the subjugation of blacks and other minorities.⁹⁵

The 1960s marked the end of the *Bracero* Program.⁹⁶ In 1966, an amendment was added to the FLSA to partially include agricultural workers under the Act’s minimum wage provisions.⁹⁷ In 1983, Congress passed the Migrant and Seasonal Agricultural Protection Act, allowing protections to agricultural workers, such as access to federal courts, protection from retaliation, and certain substantive rights governing worker recruitment, employment, housing, and transportation.⁹⁸ However, for many farmworkers, these are invisible protections because federal law continues to handicap these workers. Farmworkers remain excluded from overtime provisions in FLSA and they remain deprived of the right to engage in collective bargaining. Additionally, farmworkers’ extreme poverty and constant fear of deportation arising from their lack of status allows growers to continue

91. The NLRA excludes the following groups from the term “employee” for coverage: (a) agricultural laborers; (b) domestic servants; (c) independent contractors; (d) supervisors; and (e) employees subject to the Railway Labor Act. 29 U.S.C. § 152(3) (2006). Additionally, public employees, whether federal, state, or local, are not covered by the NLRA because the U.S. government, including federal, state, or any political subdivision, are not within the definition of an “employer.” *Id.* § 152(2).

92. *Id.* § 152 (3).

93. *Id.* § 213(a)(6).

94. Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1372 (1987).

95. *Id.* at 1336.

96. Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade, and the Democracy Deficit*, 10 J. GENDER RACE & JUST. 27, 46–47 (2006).

97. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, sec. 302, 80 Stat. 830, 838 (codified as amended at 29 U.S.C. § 206).

98. *See* 29 U.S.C. §§ 1821–1855.

hiring undocumented farmworkers, guaranteeing they remain a second-class workforce.

More recently, the Supreme Court decision in *Hoffman Plastic Compound, Inc. v. National Labor Relations Board* held that certain remedies were not available to undocumented workers.⁹⁹ Specifically, the court found that an employee could not receive back pay because, taking into consideration the intent of the Immigration Reform and Control Act of 1986 (“IRCA”), an undocumented person could not receive wages for an employment that could not have lawfully been earned and for a job obtained by criminal fraud in the first place.¹⁰⁰ Limiting the types of remedies available to undocumented workers has a chilling effect on the willingness of these workers to report abuses and labor exploitations. Particularly for the focus of this Comment, this chilling effect deters female farmworkers from pursuing sexual harassment claims, further discussed in Part II.C.

B. A Broken Immigration System

Federal immigration legislation has had a catastrophic impact on the labor rights of the immigrant worker, effectively creating an invisible class of people living and working in the United States. In 1986, Congress passed the IRCA.¹⁰¹ The IRCA focuses almost exclusively on addressing the immigration problem of undocumented immigrants.¹⁰² The IRCA imposes sanctions on employers and simultaneously legalizes the status of undocumented immigrants who had arrived prior to a certain priority date.¹⁰³ The employer sanctions provision of the IRCA requires employers to check an employee’s eligibility status for employment and extends civil and criminal fines for employers who knowingly hire undocumented workers.¹⁰⁴

The IRCA workplace-based immigration enforcement scheme creates barriers for the effective enforcement of workplace protections. The IRCA gives employers a proactive role in immigration enforcement and has the effect of punishing the employee rather than

99. *Hoffman Plastic Compound, Inc. v. NLRB*, 535 U.S. 137, 147–50 (2002).

100. *Id.* at 149.

101. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

102. See UNDOCUMENTED MIGRATION TO THE UNITED STATES: IRCA AND THE EXPERIENCE OF THE 1980’s, at 2 (Frank D. Bean, Barry Edmonston & Jeffrey S. Passel eds., 1990).

103. Immigration Reform and Control Act of 1986, §§ 101(a)(1), 201(a), 100 Stat. at 3360–74, 3394–95.

104. *Id.* § 101(a)(1), 100 Stat. at 3365–68.

the unscrupulous employer.¹⁰⁵ Employers actively seek out and hire undocumented workers, expecting them to work for lower wages in substandard working conditions and to remain silent about violations of workplace rights out of fear of losing their jobs and being reported to immigration authorities.¹⁰⁶ Many undocumented workers who have asserted their workplace rights report retaliation in the form of Immigration Custom Enforcement (“ICE”) raids, where the workers are detained and subsequently deported, and the employer is given only a slap on the wrist.¹⁰⁷ The IRCA facilitates employers’ use of the threat of an immigration workplace raid to maintain a silent and productive working underclass. It has become common for employers to actually contact immigration authorities, notifying them of the undocumented workers in their workplace.¹⁰⁸ The Southern Poverty Law Center represented a group of workers who were arrested for “trespassing” even though they were lawfully on the job during work hours and forced into removal proceedings after they asked to be paid wages that were withheld from them. While the prosecutor dropped the charges within twenty-four hours, these workers were already in deportation proceedings.¹⁰⁹ This type of retaliatory conduct is unlawful under both FLSA and Title VII; however, it is systematically used to maintain an invisible working subclass.¹¹⁰ Employers’ fines for hiring undocumented workers are slight and rarely imposed; for some employers it might be more cost-effective to respond to employee complaints by calling ICE on their own businesses than to give their undocumented workers the rights they are due.

105. See Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 1040 (discussing how IRCA has “shifted the calculus of costs involved in the workplace” to the detriment of the employee).

106. See Jack Sung, Note, *Killing Two Birds with One Stone: Giving Undocumented Workers All the Rights and Remedies Under the National Labor Relations Act Deters Employers from Hiring and Exploiting Them*, 13 SW. J.L. & TRADE AM. 155, 156 (2006).

107. Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 503 n.31 (2004).

108. *Id.* (stating that because INS fines under the employer sanctions provisions are slight and rarely imposed, for some employers it might appear cost effective to respond to employee complaints by calling INS on their own business).

109. BAUER & RAMIREZ, *supra* note 3, at 25.

110. 29 U.S.C. § 216(b) (2006) (stating that an employer who violates anti-retaliation provision of FLSA “shall be liable for such legal or equitable relief as may be appropriate”); 42 U.S.C. § 2000e-5(g) (listing remedies available when employer engaged in unlawful employment practice).

C. Inadequacy of Sexual Harassment Doctrine

Under Title VII of the Civil Rights Act of 1964, sexual harassment can be considered a form of sex discrimination.¹¹¹ The Supreme Court in *Meritor Savings Bank v. Vinson* established that plaintiffs must show four elements to bring a sexual harassment claim under Title VII: (1) that the sexual harassment was sufficiently severe or pervasive to alter the condition of the victim's employment; (2) the victim of harassment must indicate by her conduct that the sexual advances were unwelcome; (3) the victim must prove that the harassment occurred because of the victim's sex; and (4) the victim must establish employer liability by imputing the harassment actions of a supervisor or co-worker on the employer.¹¹² This workplace harassment framework fails to take into account the way racial, gender, and immigrant identities facilitate the sexual harassment and exploitation of female farmworkers.

1. Handicapped by Her Alien Status

Title VII looks at sexual harassment as discrimination arising solely "because of sex," meaning that the protection looks at harassment in isolation of any other factors, other than gender.¹¹³ Employment law, by focusing on protected classes separately, does not address the problems of those whose oppression is defined by more than one category, such as undocumented women of color.¹¹⁴ In the case of immigrant women, Title VII precludes consideration of immigration status, which is not a protected category under the statute. The Court in *Espinoza v. Farah Manufacturing Company, Inc.* held that discrimination based on citizenship when it has the purpose or effect of discriminating on the basis of national origin is prohibited.¹¹⁵ However, the Supreme Court found that citizenship discrimination—when an employer discriminates on the basis of an individual being a "citizen" versus an "alien"—is not actionable under Title VII.¹¹⁶ This becomes a problem for female farmworkers because they are predominately undocumented, and the constant fear of deportation single-handedly handicaps them.

111. *E.g.*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

112. *Id.* at 63–73.

113. 42 U.S.C. § 2000e-2(a) (2006).

114. Ontiveros, *supra* note 26, at 187.

115. 414 U.S. 86 (1973).

116. *Id.*

Female farmworkers experience sexual harassment not only because of their gender; their relatively low economic status, Mexican nationality, and lack of immigration status also influence and motivate the harassment of women farmworkers.¹¹⁷ Harassers view women of color as less powerful,¹¹⁸ and they believe undocumented women of color are less likely to complain for fear of deportation and separation of their family.¹¹⁹ Sexual predators view farmworker women as the 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.”¹²⁰ Farmworker women report that sexual predators “groom” them by starting to prey on the women with suggestive comments and unwanted compliments. Given that the harasser perceives a greater entitlement to make sexual advances towards female farmworkers, they use threats of deportation and threats of job loss to wear down these women and further isolate them and eventually complete their harassment.¹²¹ The harasser understands that alerting immigration authorities about female farmworkers’ unlawful status has devastating consequences, and the harasser subsequently uses this to his advantage.¹²²

Immigration status, poverty, and race all affect the way the harasser perceives an undocumented female farmworker. Consequently, undocumented female farmworkers become the perfect targets. For undocumented female farmworkers, their poverty is linked to their lack of status in this country. Because these women do not have the legal authorization to work in the United States, the nature of their immigration status systematically restricts them to bottom-earning wages. Sexual harassers are aware of the precariousness of the financial situation these women are in, and these women’s poverty is often used to leverage power against them.¹²³

117. See Waugh, *supra* note 2, at 244 (showing that women reported more incidents of hostility towards women because of their race, gender, and immigration status, than experiences of unwanted sexual attention). **R**

118. Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 818 (1993).

119. BAUER & RAMIREZ, *supra* note 3, at 42. **R**

120. *Id.*

121. *Id.*

122. See *id.* at 42 (emphasizing that women stay silent at sexual harassment because the consequences may be deportation, risking loss of family and community, including separation from their children, or a risky border crossing that exposes them to rape, abandonment or death).

123. Waugh, *supra* note 2, at 246. **R**

2. Powerless to Respond

A female farmworker's racial and immigrant identities affect her ability to respond to incidents of sexual harassment.¹²⁴ Title VII law places a burden on the female victim to make a reasonable effort to report the harassment and use the grievance procedures instituted by the employer.¹²⁵ The Supreme Court in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton* held that the employer has an affirmative defense if it can establish that it exercised reasonable care to prevent and promptly correct the harassing behavior.¹²⁶ In addition, as part of the affirmative defense, the employer must show that the employee acted unreasonably by failing to take advantage of the employer's preventative or corrective opportunities.¹²⁷

However, female farmworkers are already positioned at the margins of society; their language barrier and lack of knowledge regarding discrimination laws make it less likely that they will seek out assistance. More importantly, their unlawful status and the fear of deportation discourage these women from meeting the burden established by law. Even in the most egregious cases, such as when undocumented women are victims of rape, women do not follow the proper steps to rectify this harm due to their legal status.¹²⁸ Undocumented female farmworkers understand that the sexual harassment they are constantly exposed to is the rule, not the exception, because it happens incident to their status as women of color without legal status.

3. Invisible Remedy

The *Hoffman* holding—prohibiting back pay damages for undocumented victims of discrimination—complicates access to Title VII for undocumented female farmworkers.¹²⁹ The Supreme Court has previously acknowledged that undocumented workers are entitled to bring a Title VII action against their employer.¹³⁰ The remedies provided by Title VII, which include reinstatement and back pay, pro-

124. See Ontiveros, *supra* note 26, at 169.

125. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

126. *Id.* at 765; *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998).

127. *Burlington Indus.*, 524 U.S. at 765.

128. EITHNE LUIBHÉID, ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER 123 (2002) (noting that immigrant women who are victims of rape often cannot or do not report the rape due to “barriers such as legal status, cost, and shame”).

129. See *Hoffman Plastic Compound, Inc. v. NLRB*, 535 U.S. 137, 151 (2002).

130. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (“Title VII was clearly intended to apply with respect to the employment of aliens inside any State.”).

vide an incentive for workers to report Title VII violations, while at the same time discourage employers from violating labor laws.¹³¹ However, the *Hoffman* holding, which denies these remedies to undocumented workers, actually emboldens unscrupulous employers. The denial of damages to undocumented victims encourages retaliation by unscrupulous employers because post-*Hoffman* an incentive exists to threaten workers with exposure of their immigration status.¹³² *Hoffman* undermines the enforcement of immigration laws by encouraging employers to hire and take advantage of undocumented workers.¹³³ By extension, *Hoffman* makes harassment against undocumented women less costly for the employer. Denying the ability to recover damages in a sexual harassment case because of immigration status makes Title VII a fiction and Title VII remedies invisible to undocumented women farmworkers.

III. U-Visas Serve as a Tool to Address the Experience of Undocumented Female Farmworkers

The U-Visa framework, which recognizes women's position in society and values their active social and political participation, is better suited to remedy sexual harassment of female farmworkers.

A. U-Visa Overview

Congress created the U-nonimmigrant status in 2000 with the passage of the Victims of Trafficking and Violence Prevention Act ("VTVPA").¹³⁴ The U-nonimmigrant status was created under the Battered Immigrant Women Protection Act, Title V of the VTVPA.¹³⁵ Congressional findings with regard to the impact of criminal activity on immigrant communities prompted the creation of the U-Visa. Congress found that immigrant women and children are often targeted to be victims of crimes in the United States, including rape, torture, kid-

131. Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman* *Plastics Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 510–14 (2005).

132. Elizabeth R. Baldwin, Note, *Damage Control: Staking Claim to Employment Law Remedies for Undocumented Immigrant Workers After Hoffman* *Plastic Compounds, Inc. v. NLRB*, 27 SEATTLE U. L. REV. 233, 269–71 (2003).

133. Amanda Clark, Note, *A Hometown Dilemma: Addressing the Sexual Harassment of Undocumented Women in Meatpacking Plants in Iowa and Nebraska*, 16 HASTINGS WOMEN'S L.J. 139, 145 (2004).

134. Victims of Trafficking and Violence Protection Act of 2000, Pub L. No. 106-386, § 1513(a), 114 Stat. 1464, 1533–34.

135. § 1513(a)(2)(A), 114 Stat. at 1533–34.

napping, trafficking, incest, domestic violence, sexual assault, female genital mutilation, forced prostitution, involuntary servitude, being held hostage, or being criminally restrained.¹³⁶ Congress explained that all women and children who are victims of these crimes must be able to report them to law enforcement and fully participate in the investigation of the crimes and the prosecution of the perpetrators.¹³⁷

The U-Visa grants nonimmigrant status to victims who have “suffered substantial physical or mental abuse as a result of” being victims of criminal activity, or who have been, will be, or are being cooperative with law enforcement officials in the investigation of prosecution of the crime.¹³⁸ This new nonimmigrant status was created to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of immigrants, and other crimes described in § 101(a)(15)(U)(iii) of the Immigration and Nationality Act committed against immigrants, while at the same time offering protection to the victims of such offenses in keeping with the humanitarian interests of the United States.¹³⁹ An individual granted a U-Visa has four years of nonimmigrant legal status in the United States.¹⁴⁰ Additionally, Citizenship and Immigration Services (“CIS”) is required to provide employment authorization for the individual obtaining a U-Visa, allowing these individuals the opportunity to work lawfully in the United States.¹⁴¹ A U-Visa holder may seek permanent resident status after three years of continuous residency in the United States, eventually allowing a path to become a naturalized citizen.¹⁴²

In order to avoid extreme hardship and in recognition of the importance of family unity, the VTVPA authorizes CIS to provide U-nonimmigrant status to the spouses, children, and, when the victim is a child under the age of sixteen, the parents of U-nonimmigrants.¹⁴³ The regulations require that the requisite relationship between the principal U-Visa petitioner and the qualifying family member exist at the time of filing, and the relationship must continue to exist at the time that the qualifying family member’s status is adjudicated.¹⁴⁴ Addi-

136. § 1513(a)(1)(A), 114 Stat. at 1533.

137. § 1513(a)(1)(B), 114 Stat. at 1533.

138. 8 U.S.C. § 1101(a)(15)(U) (2006).

139. See Hanson, *supra* note 16, at 177.

140. 8 U.S.C. § 1184(p)(6).

141. Hanson, *supra* note 16, at 195.

142. 8 U.S.C. § 1255(m).

143. *Id.* § 1101(a)(15)(U)(ii).

144. 8 C.F.R. § 214.14(f)(4) (2011).

tionally, spouses, children, and parents of children under age sixteen who do not receive derivative U-visas may be granted legal permanent resident status if the U-Visa recipient has adjusted to legal permanent resident status, and it is necessary to avoid extreme hardship.¹⁴⁵

The statute lists a set of enumerated crimes for which victims can seek U-non-immigrant legal status, provided they meet the additional statutory requirements.¹⁴⁶ The enumerated crimes include the following:

[R]ape; 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 crimes¹⁴⁷

The statute also notes that “any similar activity” encompassed for related, non-enumerated crimes could also satisfy the statutory requirements for the U-Visa.¹⁴⁸

B. Extending U-Visas to Workplace Sexual Harassment

The heart of the problem arises when sexually harassed female farmworkers are unable to obtain a legal remedy. Federal laws that could provide a remedy, such as Title VII and the NLRA, are unavailable to these women because of their status as undocumented agricultural workers.¹⁴⁹ The failure of both labor and immigration law to provide an adequate legal remedy for female farmworkers pushes them further into the shadows.

U-Visas are an important tool that can be used to protect against workplace crimes, specifically sexual harassment. The U-Visa was developed not only to protect victims of domestic violence;¹⁵⁰ there is ample evidence that this nonimmigrant visa was also created to prevent labor exploitation and gendered violence. Several of the statute’s enumerated crimes—such as sexual assault, rape, sexual exploitation, involuntary servitude, and trafficking—relate specifically to crimes

145. 8 U.S.C. § 1255(m)(3).

146. Victims of Trafficking and Violence Protection Act of 2000, Pub L. No. 106-386, § 1513(b)(3), 114 Stat. 1464, 1533 (adding 8 U.S.C. § 1101(a)(15)(U)(iii)).

147. 8 U.S.C. § 1101(a)(15)(U)(iii).

148. *Id.*

149. *See supra* Parts II.B.2, II.C.1.

150. Hanson, *supra* note 16, at 177.

that occur in the workplace against women.¹⁵¹ The U-Visa regulations also grant authority to the Department of Labor and the Equal Employment Opportunity Commission to certify U-Visas.¹⁵² The fact that the aforementioned list of enumerated crimes often occur in tandem with other workplace-related crimes, combined with the inclusion of these employment law enforcement agencies, reflects the intent of Congress to enable U-Visas to serve victims of labor exploitation.¹⁵³

The U-Visa was created to protect victims within traditionally vulnerable immigrant communities, specifically female victims of sexual violence.¹⁵⁴ The victimization scheme presented by the U-Visa regulations is often gendered, as is evident from the types of gendered violence crimes listed as qualifying criminal activity, such as rape, sexual assault, abusive sexual contact, trafficking, and slavery.¹⁵⁵ The congressional findings emphasize a concern for the lack of protections for immigrant women when they face workplace crimes they are most vulnerable to because of their lack of status.¹⁵⁶ The U-Visa is concerned with protecting the victim who is forced into sex-related activities and violent practices through coercive methods, as evidenced by the inclusion of trafficking, extortion, blackmail, and involuntary servitude among the statute's enumerated crimes.

In the case of sexual harassment of female farmworkers in the workplace, these women are victims that the U-Visa was intended to protect from sexual violence. Female farmworkers are often exposed to the enumerated crimes, and harassment often occurs in tandem to these crimes.¹⁵⁷ The U-Visa can be used in situations where employers take advantage of the imbalance in power relations that immigration enforcement and labor laws have introduced into the immigrant workplace. In the most egregious cases, women in the fields are raped and sexually assaulted. In the 1990s an investigation by the EEOC found that "hundreds, if not thousands, of women had to have sex with supervisors to get or keep jobs."¹⁵⁸ As part of the investigation the EEOC found that in Salinas, California farmworkers referred to one

151. 8 U.S.C. § 1101(a)(15)(U)(iii).

152. 8 C.F.R. § 214.14(a)(2) (2011).

153. See Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 910–12 (2008).

154. *Id.* at 909.

155. *Id.*

156. Victims of Trafficking and Violence Protection Act of 2000, Pub L. No. 106-386, § 1513(a)(1)(A), 114 Stat. 1464, 1533.

157. See Saucedo, *supra* note 153, at 921–35.

158. Tamayo, *supra* note 8, at 1080.

company's field as the *field de calzon*, or "field of panties," because so many supervisors raped women there.¹⁵⁹ In these circumstances, because these workplace crimes are listed as enumerated crimes or similar crimes and because these women are the victims Congress intended to protect, this new visa status could serve as a tool to address the sexual harassment of undocumented female farmworkers.

Harassment also occurs through offensive comments, grabbing and touching, and humiliating and inappropriate propositions.¹⁶⁰ Given that the perpetrator knows that women are not likely to report this harassment, the perpetrator can easily use extortion or blackmail by threatening deportation and job loss in order to make sexual advances towards these women.¹⁶¹ Where harassment does not rise to the level of "rape" or "sexual assault," the perpetrator's use of deportation threats can rise to the level of other enumerated criminal activity such as "extortion" or "involuntary servitude." In fact, the Supreme Court affirmed in *United States v. Kozminski* that threats of deportation in the workplace could be considered a form of slavery or involuntary servitude.¹⁶² Additionally, courts have found that to the extent that an employer relies on immigration status to maintain a coercive, substandard, or subjugating workplace, its actions may rise to the level of extortion.¹⁶³ Both of these approaches to compulsion address the experiences of undocumented farmworker women as it relates to the factors that impede them from coming forward about sexual harassment.

C. U-Visa Removes Deportation Threat and Provides Membership

It is important to understand the role that work plays in creating community membership. Work is a "source of community," and its influence extends beyond the individual or the workplace and permeates and shapes the broader society."¹⁶⁴ Until immigration legislation understands the importance that work plays "in establishing membership in the community, the concept of workplace protections will remain fictional."¹⁶⁵ When undocumented farmworking women work in

159. *Id.*

160. BAUER & RAMIREZ, *supra* note 3, at 42, 44.

161. *Id.* at 42.

162. *See United States v. Kozminski*, 487 U.S. 931, 952-53 (1988).

163. *See Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894 (M.D. Tenn. 2009).

164. Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 397-98 (2001).

165. *Id.* at 399.

fear of sexual harassment and are further chained to threats of deportation, this trumps workplace justice and undermines any sense of national community. The exclusion of undocumented female farmworkers from labor and sexual harassment laws has ensured these workers are treated like a second class of citizens and commodities in all other legal and social spheres.

Removing the crippling threat of deportation for undocumented farmworker women who are constantly preyed on because of their vulnerability arising from their unlawful status would recognize that every worker should be ensured human dignity and self worth in the workplace. The U-Visa does just that by removing the most powerful tool used by harassers; the constant threat of deportation and separation of a family that does not allow undocumented victims to fully participate in society. Undocumented female farmworkers exposed to sexual harassment in the workplace remain silent when abused because of the severity of the consequences they face if they do not submit to the harassment of employers or supervisors.¹⁶⁶ These consequences include deportation, loss of family and community, separation from her children, and a risky border crossing that would expose them to rape, abandonment, or death.¹⁶⁷ The U-Visa structure allows for immigrant victims to receive lawful status for up to four years, employment authorization, and opens an opportunity to become legal permanent residents if the individual meets the statutory requirements. The U-Visa grants a quasi-legal residency status directly removing the threat of deportation that marginalizes workers and keeps them from reporting abuses and labor exploitations. The U-Visa confers rights upon the immigrant victim by allowing her to step out of the shadows; for undocumented farmworking women, the U-Visa confers agency upon them to challenge the sexual harassment they are exposed to in the fields.

The opportunity to live and work lawfully in the United States provides these women with membership in the labor community. The classification as “aliens” unauthorized to live and work here structures the lives of these immigrant workers at the bottom of the labor pool and furthers their social marginalization.¹⁶⁸ Removing the threat of deportation would change workplace power dynamics because female farmworkers would gain bargaining power when faced with labor

166. Ontiveros, *supra* note 6, at 105.

167. *Id.* at 105–06.

168. Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1054 (1994).

abuses. U-Visas counterbalance the void imposed by other labor and immigration laws that seek to disempower the undocumented worker. The creation of the U-Visa serves as an empowerment tool for the undocumented female farmworkers to have a voice against the unscrupulous, employer because the employer no longer can use her immigration status against her. Granting female victims of sexual harassment a path to legalization through U-Visa would open access to certain civil rights, such as back pay remedy in a Title VII action and retaliation protection under both Title VII and FLSA. Additionally, the U-Visa encourages victims to cooperate and be helpful in the investigation of the crimes would send a message to employers that law enforcement agencies are intensifying their efforts to crack down on abusive employment practices. This shift in priorities is critical to protect the workplace rights of undocumented farmworking women.

Conclusion

Undocumented female farmworkers are systematically marginalized by current immigration, labor, and sexual harassment laws that fail to consider their position in society as not only women, but as women of color without any legal status in the United States. This is particularly devastating when nearly all undocumented farmworker women are victims of sexual harassment in the fields and are preyed upon as a result of their vulnerable position at the bottom of the labor pool without any legal protections. The fresh tomatoes on our plates and the strawberries in our breakfast bowls are saturated in a backdrop of rape and sexual assault of women that are ignored and subjugated into a sexually-violent workplace by silence and inaction.

Congress can take steps to remedy this national crisis by allowing victims of sexual harassment to obtain a path to legalization through U-Visa petitions. The U-Visa framework allows for women of color without legal status to protect themselves against the threat of deportation and report crimes against them. Recognizing that the most powerful tool of the oppressor is holding women farmworkers hostage to the threat of removal, the U-Visa model serves to empower these women by removing this threat and ultimately allowing these women to become full members of our labor and national community.

In order to ensure that this remedy reaches the female farmworker community, it is important to consider grassroots strategies to increase awareness and effective access. The creation of coalitions between enforcement agencies and legal advocacy groups is critical to enable access of this remedy for undocumented female

farmworkers. First, encouraging enforcement agencies to set up U-Visa certification protocols will ensure that those who are victims of sexual harassment are informed about the opportunity to obtain a U-Visa. Second, outreach through community education for farmworking communities about sexual harassment is important to encourage female farmworkers to report incidents of sexual harassment. Lastly, training bilingual diverse legal and government advocates will help ensure that education and legal representation effectively reach farmworking communities. The U-Visa provides a foundation for undocumented female farmworkers, traditionally left out of many employment laws, to protect themselves from workplace sexual harassment. Using the U-Visa as a civil rights vehicle to challenge the traditional legal doctrine that excludes undocumented farmworking women is necessary to respond to the lived experiences of this marginalized group.

