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Failing to Address Sexual and Domestic Violence at Work: The Case of Migrant Farmworker Women

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FAILING TO ADDRESS SEXUAL AND DOMESTIC VIOLENCE AT WORK: THE CASE OF MIGRANT FARMWORKER WOMEN

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INTRODUCTION

The concept of work life as family life and the blurring of the lines of the two are not new.¹ Legal scholars have argued that our family and work

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1. See Laura A. Rosenbury, *Working Relationships*, 35 WASH. U. J.L. & POL'Y

lives are not as separate as laws lead us to believe.² Legal regulation of the workplace does not generally acknowledge the myriad relationships that exist or develop at work.³ The failure to recognize these relationships has led to gaps in meaningful protections for women who are sexually assaulted at work.

It is increasingly recognized that women experience a continuum of gender-based violence in their lives.⁴ Often raised in violent homes, girls and women are also the target of violence at school, at work, and in their communities.⁵ The violence women experience is frequently committed by an intimate partner or someone otherwise known to the victim.⁶ Domestic

117, 126 (2011) (“[s]ome workplace relationships have come to resemble relationships within the home”).

2. See *id.* at 119 (arguing that the home and the workplace are both sites of intimacy and production, “even though the law assigns production to the workplace and intimacy to the home”).

3. See *id.* at 117 (arguing that the law has only recognized personal relationships in the home and thus regulations of personal relationships have been limited to the home); see also, e.g., Kerri Lynn Stone, *Consenting Adults?: Why Women Who Submit to Supervisory Sexual Harassment Are Faring Better in Court than Those Who Say No . . . And Why They Shouldn't*, 20 YALE J.L. & FEMINISM 25, 27 (2008) (“[i]t has long appeared to be the popular consensus that intimate affairs in the workplace are private matters that arise between ‘consenting adults’—usually beyond the purview of employer regulation and past the reach of law”).

4. See AM. ASS'N OF UNIV. WOMEN, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 2 (2011), available at http://www.aauw.org/learn/research/upload/CrossingTheLine_ExecSummary.pdf (recounting that fifty-six percent of girls in 7th through 12th grades experienced sexual harassment in school, including unwelcome sexual comments, jokes, gestures, and physical harassment); see also Beverly Balos & Mary Louis Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220, 1230 (1999) (defining the continuum of violence women experience in their lives: “Violence is pervasive in all the places where they live their lives—in their homes, their workplaces, and in public spaces.”); Marjorie W. Leidig, *The Continuum of Violence Against Women: Psychological and Physical Consequences*, 40 J. AM. C. HEALTH 149, 149-55 (1992).

5. See Balos & Fellows, *supra* note 4, at 1230.

6. See M.C. BLACK ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 SUMMARY REPORT 18, 43 (2011) [hereinafter NATIONAL SURVEY], http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf (nearly one in five women have been raped in their lifetime; one in four women have been the victims of severe physical violence by an intimate partner); MICHAEL R. RAND, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION 2008 at 6 (2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv08.pdf> (nearly one in four female victims of violent crime, or 24%, was victimized by an intimate partner); Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 116 (2000) (defining domestic violence, sexual assault and stalking as forms of gender-based violence); Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L. J. 123, 151-52 (1999) (exploring the legal definition of gender-motivated violence under the civil rights remedy of the Violence Against Women Act of 1994, including a discussion of whether sexual assault or domestic violence are presumptively acts of gender-motivated violence).

violence and sexual assault are the forms of violence most frequently experienced by women.⁷ The most recent national study on violence against women indicates that nearly one in five women in the United States has been raped in her lifetime.⁸ Seventeen percent of female victims of rape report being raped by an intimate partner, and forty-eight percent report being raped by a friend or acquaintance.⁹

The continuum of violence that women experience is gaining attention in social science literature, but laws and policies have failed to effectively address it. To be more effective, laws intended to prevent violence against women must recognize that women are victims of sexual assault and domestic violence in all aspects of their lives, not just in their homes or personal lives. Women often experience forms of sexual assault and domestic violence in the workplace because the relationships and power structures that exist in other places, such as the home, can exist in the workplace as well.¹⁰ For example, family and family-like relationships may develop or exist between supervisors and subordinates and between coworkers. Those relationships may give rise to behaviors consistent with our legal definitions of domestic violence, such as mental and psychological abuse, threats of harm, and sexual and physical abuse.¹¹

Current employment laws fail to recognize the family-like relationships and power dynamics that exist in the workplace. The requirements that must be met by employees in order to access available employment-based legal protections create insurmountable barriers for victims and the protections themselves are inappropriate for many victims of domestic violence and sexual assault in the workplace.

The identification of the home as private, and thus not to be intruded upon by the government, has been criticized for allowing violence to be perpetrated against mothers, wives, and children.¹² By limiting our legal

7. See BLACK ET AL., *supra* note 6, at 1-2.

8. See *id.* at 1.

9. JENNIFER L. TRUMAN, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION 2010, at 9 (2011), available at <http://www.bjs.gov/content/pub/pdf/cv10.pdf> (64% of violence crimes committed against women were committed by an intimate partner, other relative, or friend or acquaintance; 17% of the violent crime committed by an intimate partner was rape or sexual assault, 8% by other relative, and 48% by a friend or acquaintance).

10. See, e.g., Kristi L. Graunke, "Just Like One of the Family": Domestic Violence Paradigms and Combating On-the-Job Violence Against Household Workers in the United States, 9 MICH. J. GENDER & L. 131, 156-161 (2002) (describing the power and control dynamics present for domestic workers in the U.S. that result in economic vulnerability, isolation, and abuse that is similar to domestic violence).

11. See, e.g., *id.* at 163-64 (observing that the constant interaction between domestic workers and their employers is similar to a traditional domestic violence situation and that this creates opportunities for abuse, though also arguing that this situation is unique to domestic working environments).

12. See generally Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L.

understanding of the workplace as a place where individuals work without personal relationships, we run a similar risk of permitting sexual assault and domestic violence against women to persist unfettered.¹³ In theory, progress has been made in addressing violence against women by recognizing that sexual assault and domestic violence are crimes.¹⁴ Nonetheless, unwillingness to recognize that these crimes occur in the workplace by people with whom the victim has family or family-like relationships and to create effective legal remedies and theories to address them has allowed violence against women in the workplace to continue.

A perpetrator of sexual assault or domestic violence in the workplace may be a friend of the victim's, someone with whom she previously had a relationship, someone who is close friends with her family, or a family member. Sexual violence committed by a coworker or supervisor against a fellow employee may be domestic violence and/or sexual assault as well as sexual harassment, and thus requires different thinking when seeking meaningful remedies for the victim. This overlap of professional and familial relationships is particularly apparent in the migrant farmworker community in the United States and provides a unique opportunity to begin to consider these issues.

I. BACKGROUND

A. Migrant Farmworkers in the U.S.

It is difficult to obtain a truly accurate account of the situation of migrant farmworkers because a high percentage of farmworkers in the United States are undocumented,¹⁵ but it is estimated that there are approximately

REV. 973 (1991) (analyzing how constitutional law has permitted and even encouraged violence against women in the home).

13. See generally Rosenbury, *supra* note 1, at 126.

14. See, e.g., 18 U.S.C. § 2242 (2006) (defining sexual abuse as a federal crime); 18 U.S.C. § 2261 (2006) (defining the crime of interstate domestic violence); The Violence Against Women Act of 1994, 42 U.S.C. § 13925(a)(6) (2006) (“[t]he term ‘domestic violence’ includes felony or misdemeanor crimes of violence committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction”); ARIZ. REV. STAT. ANN. § 13-1404 (2012) (defining the crime of sexual abuse, a class five felony for those over fifteen or a class three felony for those under fifteen, as “intentionally or knowingly engaging in sexual contact with any person who is fifteen or more years of age without consent of that person or with any person who is under fifteen years of age if the sexual contact involves only the female breast”); ARIZ. REV. STAT. ANN. § 13-1406 (2012) (defining the crime of sexual assault as “intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person”).

15. A thorough discussion of the undocumented workforce in the United States is

1.8 million migrant and seasonal farmworkers in the United States.¹⁶ Forty-two percent of farmworkers are migrant farmworkers, having traveled at least seventy-five miles within the previous year to obtain a farm job.¹⁷ Thirty-five percent travel back and forth from a foreign country, primarily Mexico.¹⁸ Twenty-six percent travel only within the United States.¹⁹ Sixty-nine percent of farmworkers found their jobs through friends or relatives.²⁰

Many of these workers are literally following in the footsteps of their parents and grandparents. They are born into families of farmworkers, and, when they are old enough, join their family members, working side by side in the fields. They grow up in communities and homes with children who become their coworkers and supervisors.²¹ They work together, live together, and some migrate together season after season, year after year, in jobs that require hard labor, in exploitative conditions, with minimum breaks and pay.²² It is common for extended families to work at the same industrial farm, orchard, or field, and to live together in the same community with their coworkers. For many migrant farmworkers, the distinction between work life and family life is blurred because the underlying relationships are the same. Moreover, the migrant and exploitative nature of their work and lives make these relationships even more important.

Most farmworkers harvesting fruits and vegetables in the United States are immigrants living in poverty.²³ Migrant and non-migrant farmworkers are paid poverty wages, regularly experience wage theft, and struggle to

beyond the scope of this paper. For the purposes of this paper, I define a migrant farmworker woman as a woman whose first language is Spanish, whose family has immigrated to the United States from Mexico, and who has legal immigration status in the United States. I also recognize that because of the type of work that she does and the workforce of which she is a part, her appearance and her preferred language, a documented worker may be perceived to be undocumented, and faces exploitation similar to those who are undocumented.

16. See DANIEL ROTHENBERG, *WITH THESE HANDS: THE HIDDEN WORLD OF MIGRANT FARMWORKERS TODAY* 6 (2000).

17. DANIEL CARROLL ET AL., U.S. DEP'T OF LABOR, *FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2001-2002: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARM WORKERS* ix (2005) [hereinafter 2001-2002 NAW STUDY].

18. *Id.*

19. *Id.*

20. *Id.* at 34.

21. ROTHENBERG, *supra* note 16, at 7, 10.

22. *Id.*

23. See *id.* at 6-7, 16 (over two-thirds of migrant farmworkers and eighty percent of migrant children live below the poverty line; approximately half of all farmworkers are undocumented; farmworkers receive little pay for extremely hard work, often piecemeal).

maintain an income in the face of immigration raids or other immigration-status related retaliation, based upon actual or perceived immigration status.²⁴ Seventy-nine percent are paid by the hour, with an average wage of \$7.25 per hour.²⁵ Farmworkers work an average of forty-two hours per week.²⁶ Sixty percent of farmworker work is seasonal.²⁷ On average, farmworkers are employed in agriculture for less than half of a year.²⁸ In 1997 to 1998, fifty-two percent of all farmworkers were married, and the majority had incomes below the poverty level.²⁹ Throughout the 1990s, the median income of individual farmworkers was less than \$7,500 per year, while that of farmworker families was less than \$10,000.³⁰ “In 1997-98, most farmworkers had learned about their current job through informal means, such as through a friend, a relative or a workmate.”³¹ The poverty in which migrant farmworkers live contributes to an environment of desperation in which it is critical to maintain good relationships at work and at home with family members and friends.

The majority of farmworkers in the United States are men, creating a male-dominated workforce.³² Seventy-nine percent of farmworkers are male and twenty-one percent are female.³³ Fifty-one percent of farmworkers are parents.³⁴ The connection to family is important for female farmworkers, as they are more than twice as likely to live with their nuclear family than men.³⁵ Moreover, ninety-seven percent of farmworker mothers live with their children.³⁶ The role of family in the workplace is

24. See *id.* at 12; MARY BAUER & MONICA RAMIREZ, S. POVERTY LAW CTR., *INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE U.S. FOOD INDUSTRY* 24 (2010) (describing how the most common complaint among the women interviewed was wage theft).

25. 2001-2002 NAW STUDY, *supra* note 17, at 62.

26. *Id.*

27. *Id.* at 35.

28. KALA MEHTA ET AL., U.S. DEP'T OF LABOR, *FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 1997-1998: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARM WORKERS*, at vii (2000) [hereinafter 1997-1998 NAW STUDY] (stating that workers are employed about twenty four weeks a year).

29. *Id.* (sixty-one percent of workers had incomes below the poverty level).

30. *Id.*

31. *Id.* (noting that sixty percent of farmworkers held only one farm job per year and seventy percent learned their job informally).

32. See Vicki Shultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1789, 1832-33 (1990) (discussing the harassment that tends to arise when women enter male-dominated jobs).

33. 2001-2002 NAW STUDY, *supra* note 17, at ix.

34. *Id.*

35. *Id.* at 13 (seventy-five percent versus thirty-five percent, respectively).

36. *Id.*

significant in that many mothers work with their children in the same workplace and take extra care to protect them and ensure they have opportunities to maintain employment. In addition, the work experiences of individual members of a family are inextricably linked in ways that may not be present in other workplaces. As a result, many female farmworkers subordinate their own desires, interests, and needs to the will of their husbands, fathers, or children.³⁷

In this male-dominated, exploitative, poor workplace setting, a high percentage of farmworker women are sexually assaulted.³⁸ Eighty percent of female farmworkers working in the fields in central California reported that they had experienced sexual harassment.³⁹ “Hundreds, if not thousands of women had to have sex with supervisors to get or keep jobs and/or to put up with a constant barrage of grabbing and touching and propositions for sex by supervisors.”⁴⁰ Farmworker women have been called “the perfect victims” because they are isolated, not considered credible, often do not know their rights, and may lack legal status.⁴¹ In addition, approximately one-third of female farmworkers are victims of domestic abuse.⁴² Thus, many farmworker women experience a continuum of violence in their family life and their work life simultaneously, blurring the lines between the two. The impact of the sexual harassment and violence on farmworker women includes depression, physical pain, and damage to their relationships with their partners and families.⁴³ Farmworker women who report the abuse to their employers have experienced retaliation for doing so. Retaliation includes being assigned fewer hours or being fired.⁴⁴ Because many farmworker women work with their families, their family members may also be fired in retaliation for

37. See Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 171 (2003).

38. See James Gruber, *The Impact of Male Work Environments and Organizational Policies on Women’s Experiences of Sexual Harassment*, 12 GENDER & SOC’Y 301, 314 (1998) (finding that “predominantly male environments are more physically hostile and intimidating than other work environments. Women are more apt to be touched, grabbed, or stalked.”).

39. See Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 VIOLENCE AGAINST WOMEN 237, 241 (2010) (citing a study published in January 2010 that surveyed 150 Mexican women and women of Mexican descent who were working in the fields of California’s Central Valley).

40. See Ontiveros, *supra* note 37, at 169.

41. See BAUER & RAMIREZ, *supra* note 24, at 42-45.

42. See Ontiveros, *supra* note 37, at 171.

43. See HUMAN RIGHTS WATCH, *CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT* 5 (2012), http://www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf.

44. *Id.*

their complaint.⁴⁵

B. Maria

Maria is a twenty-five year-old woman who was born in Mexico and legally immigrated to the United States before her tenth birthday.⁴⁶ Prior to immigrating, her parents, sister, and brother all worked as migrant farmworkers in the United States. Each summer, the family travels north for the harvest season, then each winter the family travels south where they live off of the money they make during the harvest. Maria's friends are the children of other migrant farmworkers whom she met as a child, migrating, working, and living together.

When Maria became old enough, she joined her parents, her siblings, and her friends working as a migrant farmworker. She commutes with her coworkers and supervisors to and from her home and the farm during harvest season and lives in the same neighborhood with her coworkers and supervisors. Thus, her work community consists of the same people she lives with, all of whom are like an extended family, some related by blood. The community also shares a first language, Spanish, and a life experience, living and working the same jobs in difficult working conditions, with minimal pay and almost no benefits. Like many farmworkers, Maria met the man who would become her husband when they were children. He is the son of a migrant farmworker who worked with her parents and whom she's known her whole life. They married, and continued to work together at the same farm during the season. She has two daughters with her husband, and their children play and go to school with the children of other migrant farmworkers with whom they work and live.

Like many farmworker women, Maria is sexually harassed by one of her supervisors during the harvest season. He says things of a sexual nature to her, and touches her breasts and buttocks. She tells him to stop, but she has known him her whole life, he is a neighbor, and he is close to her family and her friends so she does not want to make him angry. She needs to keep this job because there is no other option, and she doesn't want to make trouble. She also blames herself for his behavior. As he does these things to her more and more frequently at work, he jokes with her that they are

45. *Id.*

46. Maria's story combines the experiences of women represented by the author over the past fifteen years in California, Washington, D.C., and North Dakota. Names and details have been changed to protect confidentiality. Studies indicate that approximately one-half of farmworkers in the United States are undocumented, and many others, like Maria, are legally living and working in the United States. See HUMAN RIGHTS WATCH, *supra* note 43, at 5. Although Maria is legally working in the United States, the fact that many of her coworkers are undocumented contributes to a creating an exploitative workplace that impacts her work and family life.

like family because he has known her since she was a child. In many ways, he is like an uncle to her. He comes regularly to her parents' home for meals, and he looks out for her friends on the job, letting them know about changes in policies or opportunities for better positions. Maria increasingly feels uncomfortable because of his sexual assaults, but she tells no one, trying instead to avoid being alone with him, recognizing that he does it less when other people are around.

However, one day, they are alone in one of the farm buildings, and he puts his hands up her shirt, undoes her bra, pulls down her pants, and rapes her. She tells him no and tries to shove him off of her, but he is larger and stronger, and it all happens very quickly. While he is doing it, he tells her not to make a sound. When he puts his hand over her mouth, she bites it, so he removes it, but no one hears her calls for help. While he is zipping up his pants, he tells her quietly how nice that was, and how he has wanted to do that for years, and he is so glad that they are close so that she will not tell anyone because he is married and she is married and their families are intertwined at work and home. He reminds her that if she tells anyone, he will deny it, or tell them that she has been flirting with him and everyone will believe him and no one will believe her. Moreover, if she complains, he will report that she is not doing her work and that she has to work more closely with him to do better. He also threatens that he will tell the big boss that her father and brother are causing trouble and should be fired if she mentions anything to anyone. When she protests that he would not do that because her father is a good friend of his, he explains that it would ultimately be her fault if she were to tell anyone. He tells her he looks forward to their next time together and leaves her there, her clothes still undone.

Over the next few months, he rapes her two more times at work. After one episode, her sister finds her crying and Maria tells her what has been happening. Her sister tells Maria she must report it. She must tell her parents and complain to the company. Her sister tells her it is wrong and that Maria should complain. Maria understands what her sister is saying, but she is afraid that if she complains, nothing will change; he will continue to rape her, but be even more aggressive, or worse, he will fire her and have her family fired. After much urging from her sister, Maria decides to tell her parents about the sexual assaults. When she does so, she is very clear that he rapes her, that it is not consensual, and that she is increasingly afraid and does not know what to do to stop it, but she cannot endure going to work knowing that he will continue to rape her. Her father immediately accuses her of flirting with her supervisor, essentially encouraging him to have sex with her. He states that he knows her supervisor and that he would only be doing this with her consent. Her mother begins to cry and states that Maria must tell no one because it is not true and starting such a

rumor would bring shame on the family. Her father agrees with her mother and yells at Maria for mentioning such a thing, warning her that her actions could cost them all their jobs, friends, and livelihoods.

Because of her fear of retaliation from the perpetrator of the sexual assault and her family members, Maria struggles with her decision to report the sexual assaults to her employer. Only with significant prompting from her sister after a particularly brutal assault does Maria agree to file a sexual harassment complaint with her employer. By this time, it has been almost two months since the last rape. Not long after she files the complaint, rumors fly about what she has done. Her parents and friends stop talking to her and stop inviting her and her family to their homes for dinner. In addition, her husband becomes increasingly angry at her, accusing her of being a slut and bringing shame on the family. He threatens that he will leave her and take their children with him when he does, saying the court will not let their children stay with her since she is cheating on him. Her mother periodically calls her and begs her to stop being such a troublemaker, asking her why she is making all of this up. In addition, the perpetrator of the assault alternates between ignoring her and threatening her at work and in the community. Her supervisor also talks with many of their mutual friends and her family members, convincing them that she is making this up to cause him trouble. He also starts to move her into more demanding work, and when that is not possible, stops recommending her for shifts so that she is working fewer hours. Finally, she hears that her father's hours were recently cut.

II. THE APPLICATION OF EMPLOYMENT LAW TO THE SEXUAL ASSAULT OF MIGRANT FARMWORKERS

Maria's sexual assault took place in the workplace and the perpetrator is her supervisor, so her primary source of protection is federal anti-discrimination employment law, with possible alternatives in state and local anti-discrimination employment law.⁴⁷ An analysis of Title VII's anti-discrimination and retaliation provisions when applied to the sexual violence that Maria has experienced demonstrates its limitations.

47. For the purposes of this paper, I am focusing exclusively on federal employment law remedies; however, a woman in Maria's circumstances would most likely have a claim under state and/or local anti-discrimination employment statutes and under state criminal statutes. Although outside the scope of this paper, it has been reported that few victims of rape in general and workplace rape in particular report it to the police, and when those reports are made the investigation conducted is minimal in most instances. See HUMAN RIGHTS WATCH, *supra* note 43, at 77. The author's experience representing victims of sexual assault and domestic violence at work is that very few women report the crimes to the police and when they do, the police frequently fail to file a report or conduct an investigation because, as they explain, it is a "workplace issue."

A. Title VII as a Failed Remedy

1. Anti-Discrimination Provisions

Title VII prohibits an employer from refusing to hire, to fire, or to otherwise discriminate against an individual in the terms and conditions of employment because of one's sex.⁴⁸ Sexual assault is recognized as a form of sex discrimination prohibited by Title VII.⁴⁹ In *Meritor Savings Bank FSB v. Vinson*, a woman sued her former employer because her supervisor subjected her to ongoing sexual advances, up to and including forcible rape on several occasions.⁵⁰ She did not report the rapes or sexual harassment to her employer nor did she use the employer's complaint procedure because she was afraid of her supervisor and of losing her job.⁵¹ The Court found that "sexual misconduct constitutes prohibited 'sexual harassment,' whether or not it is directly linked to the grant or denial of an economic quid pro quo, where 'such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'"⁵² Later, the Court clarified that a plaintiff may establish a hostile environment sexual harassment claim if she can demonstrate that the environment is both subjectively and objectively offensive, meaning that both the individual who experienced it and a reasonable person would find the work environment to be hostile or abusive and therefore in violation of Title VII.⁵³

The critical question in successfully establishing a claim under Title VII for sexual assault committed by a supervisor against a subordinate, regardless of any familial relationship, is whether a "tangible employment action" has occurred.⁵⁴ Courts have been inconsistent on whether rape or sexual assault itself constitutes a tangible employment action.⁵⁵ If the court finds that the plaintiff experienced a tangible employment action as a result

48. See 42 U.S.C. § 2000e-2(a)(1) (2006).

49. See, e.g., 29 C.F.R. § 1604.11(a) (2012) (defining sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."); *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 94 (2d Cir. 2002) (stating that sexual assault is a recognized form of sexual harassment under Title VII by noting that "[r]equiring an employee to engage in unwanted sex acts is one of the most pernicious and oppressive forms of sexual harassment that can occur in the workplace").

50. *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 60 (1986).

51. *Id.*

52. *Id.* at 65 (citing 29 C.F.R. § 1604.11(a)).

53. See *Harris v. Forklift Sys.*, 510 U.S. 17, 21-22 (1993).

54. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760-62 (1998).

55. See *Stone*, *supra* note 3, at 41-44 (discussing Title VII cases in which the courts held that rape is not a tangible employment action or chose not to address it).

of the sexual assault, then the defendant employer is vicariously and strictly liable for the actions of the supervisor against its employee.⁵⁶ When “a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor’s sexual demands,” she can establish “that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII.”⁵⁷ Where the court finds that sexual assault has occurred and yet no tangible employment action was taken against the employee, either because she acquiesced or the supervisor failed to follow through on his threats on his own accord, the employer is subject to vicarious liability.⁵⁸ However, the employer may raise an affirmative defense that it “exercised reasonable care to prevent and promptly correct any sexually harassing behavior” and “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”⁵⁹ If a plaintiff is successful in establishing her prima facie claim and overcoming the employer’s defenses, the remedies available under Title VII are generally limited to injunctive relief, up to and including training for employees on sexual harassment, termination of the harasser, and reinstatement and backpay if the plaintiff was fired or constructively discharged as a result of the harassment.⁶⁰

The limits of Title VII’s anti-discrimination provisions as applied to women who experience sexual harassment are a thoroughly explored academic topic.⁶¹ Scholars have focused specifically on the unrealistic

56. See *Ellerth*, 524 U.S. at 765.

57. *Id.* at 753-54.

58. *Id.* at 765.

59. *Id.*

60. See 42 U.S.C. § 2000e-5(g) (2006) (describing the enforcement remedies available if the court finds that the respondent has intentionally engaged in or is intentionally engaging in employment practices made unlawful under Title VII, including enjoining the respondent from engaging in the unlawful employment practice, reinstatement or hiring of employees, with or without back pay or any other equitable relief as the court deems appropriate); see also Am. Ass’n of Univ. Women, *Title VII of the Civil Rights Act of 1964*, AAUW.ORG, http://www.aauw.org/act/laf/library/workplaceharassment_TitleVII.cfm (last visited May 23, 2012) (listing available relief and noting that punitive damages are only possible “if an employer acted with malice or reckless indifference”).

61. See, e.g., Kerri Lynn Bauchner, *From Pig in a Parlor to Boar in a Boardroom: Why Ellerth Isn’t Working and How Other Ideological Models Can Help Reconceptualize the Law of Sexual Harassment*, 8 COLUM. J. GENDER & L. 303, 317-18 (1999) (criticizing the distinction between incurring a tangible employment action and working under constantly looming threats); Stone, *supra* note 3, at 26-31 (arguing that the development of the affirmative defense and tangible employment action requirements created two tiers of protection for employees depending upon whether the employee submitted to a requirement to have sex with a supervisor as a condition of employment); Martha S. West, *Preventing Sexual Harassment: The Federal Courts’ Wake-Up Call for Women*, 68 BROOK. L. REV. 457, 461 (2002) (questioning the “viability of the affirmative defense in actually preventing hostile environment sexual

requirement that a woman who experiences sexual harassment must complain immediately to her employer using the employer's complaint process to overcome the employer's affirmative defense.⁶² Deborah Blake, among others, has argued that the reporting requirements of Title VII particularly limit access to rights for women and persons of color by ignoring the racial and cultural contexts in which sexual harassment occurs.⁶³ Many women do not report sexual harassment or discrimination publicly, conducting a cost benefit analysis based upon their own experiences and perceptions, and "instead make strategic decisions about when to confront, challenge, or ignore prejudice based primarily on the anticipated consequences to their actions."⁶⁴ Studies indicate that women who are sexually harassed tend not to use the internal complaint processes or otherwise promptly report the harassment, regardless of their race, cultural, or professional background.⁶⁵ Women's responses to harassing behavior tend to be informal, including addressing the harasser directly, or developing coping mechanisms to avoid the circumstances that they perceive gave rise to the harassment, such as wearing specific clothing or being alone with the harasser.⁶⁶ These same studies consistently indicate that the decision by women not to publicly report sexual harassment is based upon their accurate perception that complaining will not stop the behavior, and instead will result in direct negative consequences to them.⁶⁷ Importantly, women and people of color who challenge discrimination are often ostracized and perceived to be overly sensitive or troublemakers by members of their community when they complain about discrimination.⁶⁸

Although women who have been sexually assaulted at work have articulated claims under Title VII's anti-discrimination provisions because sexual assault has been legally recognized as a form of sexual harassment,

harassment").

62. See, e.g., Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 896-900 (2008).

63. *Id.* at 889-91. See generally Andrew Tae-Hyun Kim, *Culture Matters: Cultural Differences in the Reporting of Employment Discrimination Claims*, 20 WM. & MARY BILL RTS. J. 405 (2011).

64. See Brake & Grossman, *supra* note 62, at 895.

65. See Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 28-30 (2005).

66. *Id.* at 27-29.

67. See *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 964-65, 968 (9th Cir. 2002) (stating that an employer may be liable for harassment by failing to act after one of its employees reported being raped by a client); Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 681 (2005); see also Jane Adams-Roy & Julian Barling, *Predicting the Decision to Confront or Report Sexual Harassment*, 19 J. ORG. BEHAV. 329, 334 (1998) (finding that those who formally reported harassment perceived a more negative outcome than those who did nothing).

68. See Brake, *supra* note 65, at 32-36.

most are unsuccessful.⁶⁹ Maria's experience is illustrative of the challenges women who are sexually assaulted at work face when attempting to bring a Title VII claim. The perpetrator's sexual assaults of Maria and his threats to fire her if she tells anyone may be sufficient to establish a prima facie claim of sexual harassment against her employer.⁷⁰ However, her delay in reporting the sexual assaults to her employer—for the reasons described above—and the arguable lack of a clear tangible employment action may jeopardize any protections available to her under Title VII. As a migrant farmworker woman whose only job in her life, and the only job anyone in her family has ever known, is working as a farmworker, she could reasonably perceive costs of reporting the sexual assault to be significant. It was reasonable for her to believe that the perpetrator would follow through with his threats, leading to her losing her job and possibly her family members' jobs as well. Moreover, the perpetrator is someone with whom she had family-based and community-based relationships as well as a work-based relationship. He is someone she has known her entire life and he is close to her family. As a result, she is likely reluctant to report the assault because that would be perceived as a betrayal of a member of her community. She may also fear that if she reports the assaults to her employer, they will not believe her, since they know that the perpetrator is a family friend who has known her for most of her life. Moreover, they are likely to believe his side of the story because he is senior to her. She might fear that she will be ostracized in her workplace and in her community for accusing him of doing something so horrible. Like many victims of rape at the hands of a family member, she may want him to stop raping her but not lose his job or go to jail because of his behavior which is why she decides not to report it to her employer initially nor tell the police.⁷¹ As a result,

69. See, e.g., *Walton v. Johnson & Johnson*, 347 F.3d 1272, 1281 (11th Cir. 2003) (noting that an employer is not necessarily liable under Title VII when an employee who was repeatedly raped by her supervisor did not suffer any tangible employment action and failed to report the assaults); *Smith v. Sheahan*, 189 F.3d 529, 533-34 (7th Cir. 1999) (holding that a single incident of sexual assault would be enough to establish a claim); *Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir. 1995) (stating that "every rape committed in the employment setting is also discrimination based on the employee's sex"); *Cooper v. City of Roanoke*, No. 702-CV-00673, 2003 WL 24117704, at *4 (W.D. Va. Jan. 10, 2003) (finding that an employee raped at knifepoint by her supervisor did not constitute a "tangible employment action" so the employer could successfully raise the Faragher/Ellerth defense).

70. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 766 (1998) (holding that an employee who suffered a threat from her supervisor if she denied sexual liberties may have established a tangible employment action and thus the employer could be subject to vicarious liability).

71. Another critical factor influencing women like Maria in their decision not to report sexual assaults to the police is related to their concerns about immigration status and deportation. Although she is documented, she may believe that she would be arrested for reporting the assault, or that he would be arrested and deported, neither of which is her goal in reporting. See HUMAN RIGHTS WATCH, *supra* note 43, at 72.

she may also believe that there is nothing anyone can do to stop the sexual assaults. Finally, in the unlikely occurrence that Maria's employer believes her and decides to take action, the most likely course of action will include an investigation, followed by a firing of the perpetrator—an outcome for which Maria will most likely be blamed and retaliated against by her family and her community. Similarly, the chances that she would be able to obtain an attorney to represent her in a Title VII claim are low, and even if she did, it would take years for the case to come to a resolution during which time she would continue to experience retaliation from the perpetrator and her family and community.⁷²

Sexual assault is a part of the work experience for many farmworker women.⁷³ Due to the merging of work life and family life, a perpetrator of sexual assault in a migrant farmworker workplace has even more power with which to threaten to harm the victim if she tells anyone about the assault, including firing her, spreading rumors about her in their community, and taking action against her family members.⁷⁴ Typical employer responses when these victims complain include failing to conduct an investigation, refusing to punish or address the alleged perpetrator, accusing the victim of lying, and refusing to believe her,⁷⁵ thereby placing the victim at risk for additional violence once the perpetrator learns he or she will not be punished. All of this contributes to a culture where sexual assault is permitted and even encouraged. The socio-economic status of employees, and the desperate need for a job and an income cannot be overlooked when discussing the decision-making of migrant farmworker women regarding whether to assert their right to be free from sexual violence at work. The very real fear of the economic, social, and family implications of being fired from a job, or of otherwise being ostracized if coworkers learn of the complaint against a friend or family member, is significant.

Because the person who assaulted her is a member of her family and community, the literature about how people react to sexual assault more broadly is instructive in understanding Maria's decision-making in this

72. See Sharon M. Dietrich, *When Working Isn't Enough: Low-Wage Workers Struggle to Survive*, 6 U. PA. J. LAB. & EMP. L. 613, 623-624 (2004) (describing how government agencies charged with enforcement of federal employment laws have insufficient resources for adequate enforcement and the fact that private attorneys rarely represent low wage workers in employment matters, in spite of attorneys' fees provisions, due to the workers' inability to pay for attorneys and a lack of legal aid programs serving low wage workers).

73. See Rebecca Clarren, *The Green Motel*, MS. MAGAZINE, Summer 2005, at 42 (describing how women in Iowa said they had been raped so often that they believed it was a common practice in the United States to exchange sex for job security).

74. BAUER & RAMIREZ, *supra* note 24, at 42-45.

75. *Id.*

situation.⁷⁶ The decision not to report that a farmworker woman might make in this circumstance is legitimate, not the reflection of a weak woman, but a rational, reasonable decision in light of a rape culture that blames the victim. Reporting the sexual assaults requires challenging male hierarchy in the workplace and the family while fearing economic, social, and family retaliation. It is clear that the existing legal structures are intended to prevent sexual assault in the workplace and to provide protections to women who experience sexual assault in the workplace, but they fail to effectively respond to the experiences of this group of minority, low-income women and thus perpetuate their poverty and exploitation. Moreover, the remedies available to an employee, including firing the perpetrator, are out of the victim's control, largely ineffectual, and may not be the form of protection she is seeking. In fact, removing the perpetrator from the workplace may place her in greater fear for her safety at home. In this way, the risks she faces if she reports the sexual assaults to her employer parallel those that she would face if she were to report them to law enforcement.⁷⁷

2. Application of the Anti-Retaliation Provisions of Title VII

Feminist legal scholars have also extensively criticized the limitations of the anti-retaliation provisions of Title VII for victims of sexual harassment, including sexual assault.⁷⁸ The fear of retaliation is especially acute and thus a very powerful deterrent for women in a male-dominated workforce who experience sexual harassment.⁷⁹ The anti-retaliation provision seeks to prevent employer interferences with "unfettered access" to Title VII's remedial mechanisms by prohibiting employer actions that are likely to deter discrimination victims from complaining to the United States Equal

76. See *infra* Section III for a more detailed discussion.

77. See, e.g., Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817 (2000) (noting that reporting a domestic abuse claim to the police can actually increase a woman's exposure to violence); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 840-41, 858-60 (2001) (observing that women weigh a number of factors in determining whether to pursue prosecution of an abuser).

78. See generally Brake & Grossman, *supra* note 62, at 896-900.

79. See Brake, *supra* note 65, at 40 ("[t]he fear of retaliation is particularly debilitating for persons with low-institutional power across multiple dimensions. For example, women who are especially isolated and tokens in their jobs, women in nontraditional employment, and women who are especially vulnerable in their jobs are more likely to be silenced by the threat or fear of retaliation"); see also Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 122-23 (1995) (identifying fear of retaliation as the explanation most commonly provided by harassment victims for their decision not to take formal action challenging their experience of discrimination).

Employment Opportunity Commission (EEOC), the courts, and employers.⁸⁰ Section 704 of Title VII contains two separate clauses prohibiting retaliation against employees: the opposition clause protects employees from retaliation if they have opposed a practice, such as sexual harassment, made unlawful by Title VII, including informal methods of complaining,⁸¹ and the participation clause protects employees from retaliation if they have filed a charge with the EEOC, or workers who have testified, assisted, or participated in any manner in an investigation, proceeding or hearing under Title VII.⁸²

To establish a retaliation claim via the opposition clause of Title VII, an employee must establish that she has engaged in a protected activity, has suffered an adverse employment action, and that there is a causal connection between the protected activity and the adverse employment action.⁸³ A plaintiff need not prove the underlying discrimination to successfully bring a retaliation claim.⁸⁴ Recently, the United States Supreme Court considered Title VII's retaliation provision and held that "the actions and harms [Title VII] forbids" are not limited "to those that are related to employment or occur at the workplace."⁸⁵ The Court reasoned that the anti-retaliation provision does not contain limiting language that is found in the anti-discrimination provisions of Title VII and that Congress intended this difference to reflect the differing goals of the provisions.⁸⁶ The Court stated that the anti-retaliation provision could not effectively achieve its goal of preventing harm to individuals based on their conduct "by focusing only upon employer actions and harm that concern employment and the workplace."⁸⁷ It acknowledged that an employer could effectively retaliate against an employee by taking actions not directly related to one's employment or by causing one harm away from the workplace.⁸⁸ In these ways, the Court acknowledged that the

80. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

81. 42 U.S.C. § 2000e-3(a) (2000).

82. *Id.*

83. See *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000) (citing *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994)).

84. See *Wright v. CompUSA, Inc.*, 352 F.3d 472, 477 (1st Cir. 2003) (noting that "an ADA plaintiff need not succeed on a disability claim to assert a claim for retaliation"); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1139 (5th Cir. 1981); *Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981) (holding that the opposition clause can be extended to situations where the employee reasonably believed he or she had been discriminated against).

85. *Burlington N.*, 548 U.S. at 57, 61-67.

86. *Id.* at 63-64.

87. *Id.*

88. See, e.g., *Rochon v. Gonzales*, 438 F.3d 1211, 1213 (D.C. Cir. 2006) (alleging that the FBI's discrimination and retaliation against an employee "took the form of the FBI's refusal, contrary to policy, to investigate death threats a federal prisoner made

context in which the acts that form the basis of retaliation occur is significant: “[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.”⁸⁹ However, the Court’s holding was limited; the anti-retaliation provision covers only those employer actions that would have been materially adverse to a reasonable employee or applicant. Materially adverse was defined as harmful to the point that they could well “dissuade a reasonable worker from making or supporting a charge of discrimination.”⁹⁰ In this way, the Court adopted an objective standard for determining whether an employer’s actions are “materially adverse.”⁹¹

Applying the Court’s interpretation of the anti-retaliation provision to Maria’s situation, she could establish a claim of retaliation against her supervisor based upon his cutting of her shifts and moving her into harder jobs after she complained about the assaults. Similarly, applying the Court’s reasoning that retaliation need not be limited to the workplace, it could be argued that her supervisor’s harassment of her by telling lies to her family and friends in the community constitutes retaliation. It could also be persuasively argued that the harassment and victim blaming that her family members who are also her coworkers subjected her to are sufficient to establish a retaliation claim under Title VII. However, if Maria’s fear of retaliation prevents her from complaining or delays her complaint about the sexual assault, it could be more challenging to establish her retaliation claim. In order to justify failing to immediately complain about the violation of law because of a fear of retaliation, an employee must show specific credible threats of retaliation or tangible evidence of the employer’s prior unresponsiveness to harassment complaints.⁹² Courts have held that, absent a credible threat of retaliation, subjective fears of reprisal do not excuse an employee’s failure to report sexual harassment.⁹³

against [the agent] and his wife”); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (10th Cir. 1996) (finding an employer liable for retaliation when the employer filed false criminal charges against former employee who filed a discrimination complaint with the EEOC).

89. See *Burlington N.*, 548 U.S. at 69 (reasoning that “a schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children” (citing *Oncale v. Sundowner Offshore Svcs., Inc.*, 523 U.S. 75, 81-82 (1998))); EEOC Compl. Man. (BNA) § 8, at 8-14 (1998).

90. *Burlington N.*, 548 U.S. at 68.

91. *Id.* at 68-69.

92. See, e.g., *id.* at 68 (2006) (holding that actions covered by the anti-retaliation provision of Title VII are not limited to actions related to employment at the workplace).

93. See *id.*

Thus, Maria would need to argue that the threats of retaliation not just from the perpetrator, who is her supervisor, but also from her family members, who are also her coworkers, are sufficient to establish her credible belief that if she complained she would experience retaliation from her employer.

3. *Anti-Retaliation Protection for Family Members/Coworkers*

If the perpetrator's threats against Maria's family members were cognizable retaliation under Title VII it could neutralize the power of those threats, but it could also undermine her claim for retaliation against her employer. In 2011, the Supreme Court held in *Thompson v. North American Stainless* that Title VII's retaliation provisions prohibit retaliation against third parties in certain circumstances.⁹⁴ A third party has standing to file a Title VII anti-retaliation claim if he can establish that he is within the "zone of interest."⁹⁵ In reaching its decision, the Court recognized that an employer might retaliate against the family member of an employee who files a sexual harassment complaint.⁹⁶ In doing so, the Court acknowledged the experiences of many workers such as Maria, stating that a reasonable worker might not report sexual harassment if she believed that her fiancé or a close family member would be fired as a result. The Court in *Thompson* did not provide specific guidance regarding the necessary relationship to the person filing the complaint of sexual harassment to qualify for standing.⁹⁷

Applying the holding in *Thompson* to Maria's situation, it could be argued that Maria's father would have standing to file a charge for retaliation under Title VII for the reduction in his hours after his daughter filed her complaint regarding the sexual assaults. However, her father might not complain about the retaliation he experienced as a result of his daughter's complaint because he views Maria as the problem. In fact, her supervisor's retaliation against her father is more likely to result in increased harassment of Maria by her family and community. In these ways, existing anti-retaliation employment law falls short because of the role that family and family-like relationships play in employees' decisions regarding whether to assert their rights, assuming they know that they have a right to be free from the retaliation they are experiencing.

The efficacy for migrant farmworkers of these rights is also substantially

94. *Thompson v. N. Am. Stainless LP.*, 131 S. Ct. 863, 870 (2011) (holding that the Administrative Procedure Act establishes the authority where a plaintiff may not sue unless he falls within the "zone of interests" sought to be protected by the statutory provision whose violation is the legal basis of the complaint).

95. *Id.*

96. *Id.* at 867, 870.

97. *Id.* at 870.

limited by the lack of knowledge most low-wage workers, including migrant farmworkers, have regarding their rights to be free from sexual harassment and sexual assault in the workplace.⁹⁸ Moreover, even if Maria and her father were aware that it is illegal for an employer to retaliate against them for Maria's complaint regarding the sexual assaults, it is unlikely that this protection would lead Maria's family to encourage her to complain to her employer about the sexual assaults. Further, even if the *Thompson* decision causes employers to curtail their retaliation against coworkers who are family members of an employee who has filed a complaint regarding sexual assault, *Thompson* will not necessarily cease the retaliation Maria experiences from her family members at home.

*B. State Legislation Prohibiting Discrimination
Against Sexual Assault Victims*

In response to identified discrimination that victims of domestic violence and sexual assault experience in employment, Illinois and Oregon recently adopted legislation that specifically prohibits employers from discriminating against employees because they are victims of sexual violence or assault.⁹⁹ Under these laws, discrimination is defined to include firing or penalizing a victim because of actions of her abuser.¹⁰⁰ The Illinois law prohibits an employer from discriminating against employees who are, or are perceived to be, victims of sexual violence.¹⁰¹ It also makes it illegal for employers to discriminate against employees who have a family or household member who is, or is perceived to be, a victim of sexual violence.¹⁰² Moreover, the employer must make reasonable accommodations related to the sexual violence.¹⁰³ The Oregon law prohibits employers from refusing to make reasonable safety accommodations requested by the victim unless the employer can demonstrate that the accommodation would impose an undue hardship on the employee.¹⁰⁴ Under both statutes, an employee may be required to provide certification of victimization and an employee has a private right of action.¹⁰⁵ These laws were pushed by advocates for victims of domestic violence and sexual assault who had attempted to assist people who had

98. See generally HUMAN RIGHTS WATCH, *supra* note 43.

99. 820 ILL. COMP. STAT. 180/15 (2012); OR. REV. STAT. ANN. § 659A.003 (West 2012).

100. 820 ILL. COMP. STAT. 180/30(b) (2009).

101. *Id.* at 180/30(a)(1)(A).

102. *Id.* at 180/30(b)(1)(B)(ii).

103. *Id.*

104. OR. REV. STAT. ANN. § 659A.030.

105. 820 ILL. COMP. STAT. 180/20(c) (2009).

been fired by their employers because of their status as victims.¹⁰⁶

If Maria worked in one of these states when the sexual assault occurred, these statutes could provide her and her family members with claims against their employer if the employer took actions that could be construed as illegal discrimination based upon her status as a victim of sexual assault after Maria reported the sexual assault. To successfully state a claim under one of these statutes, Maria would need to establish that she is a victim of sexual assault, that the employer knew that she was a victim of sexual assault, and that the employer discriminated against her based on this status. These statutes do not specify the perpetrator of the sexual assault or that it take place away from the workplace so the fact that Maria was assaulted at work by a supervisor would not limit her access to the protections available under these statutes. Moreover, an employee could establish a claim even if she failed to report the sexual assault to her employer. For example, the employee could establish that the employer learned about the sexual assault from other coworkers and then retaliated against Maria for the victimization. However, the employee must establish that she is a victim of sexual assault, which might require her to seek medical attention or a police report. These are steps that Maria may not be willing to take because of her concerns for her safety and that of her family, or because she does not have health insurance. Finally, to establish that any negative actions taken against her and her family were based upon her status as a victim, Maria would need to demonstrate she experienced some form of discrimination as a result of her status. Her supervisor's decision to change her work, assigning her fewer hours and harder work, may be sufficient to establish discrimination.

III. WHERE TO GO FROM HERE: DEFINING AND RESPONDING TO DOMESTIC VIOLENCE AND SEXUAL ASSAULT AT WORK

The experiences of migrant farmworker women like Maria who are sexually assaulted at work highlights the limitations of the legal framework in which she is expected to seek protection. The commingling of Maria's work life and family life at her workplace creates additional barriers for her to overcome in seeking assistance from the legal system. The recognition of sexual assault as prohibited sexual harassment under federal and state employment law is intended to prevent its perpetration against women at work by creating civil liability. In addition, sexual assault, regardless of

106. From 1997-2003, the author ran legal aid programs that provided representation to victims of domestic violence and sexual assault who were fired or whose employers otherwise discriminated against them based upon their status as victims of these crimes. The author led efforts to pass state and federal legislation prohibiting discrimination in employment on these bases.

whether it takes place at work perpetrated by a supervisor or at home by a parent or boyfriend, is a crime. Thus, in theory, women like Maria have both civil and criminal remedies available to pursue. However, rape victims rarely report the assaults to the police, and very few rapes are successfully prosecuted. The failure of the criminal justice system to meet the needs of rape victims has been widely recognized.¹⁰⁷ As a result, there has been an increased focus on the need for improving meaningful access to civil remedies.¹⁰⁸

Recognition of the family and community relationships that exist in the workplace, as well as the impact of rape culture on victim, perpetrator, family, and employer behavior, would improve the effectiveness of existing protections for victims of sexual assault in the workplace. Rape culture recognizes that we live in a society in which rape and sexual violence against women is common, and prevalent attitudes, norms, and media condone, normalize, excuse, tolerate, and ignore sexual violence against women.¹⁰⁹ Examples of behaviors commonly associated with rape culture include victim blaming, sexual objectification, and rape apologetics.¹¹⁰

The term rape culture has been traced to the feminist movement in the 1960s and 1970s, and has recently been reaffirmed by feminist legal scholars.¹¹¹ Classic manifestations of rape culture in current American society include blaming a woman for the rape because of how she acted or dressed.¹¹² Recent examples of rape culture include: media coverage of multiple allegations of rape against the Pittsburgh Steelers quarterback Ben

107. See generally Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 467-69 (2005) (discussing the reasons why various rape law reforms have been highly unsuccessful and proposing a new agenda to help address the needs of rape victims).

108. *Id.* at 469 (discussing the establishment of the right to civil representation for rape victims and the need to focus on victims' well-being during the immediate period after an assault).

109. See Peggy Miller & Nancy Biele, *Twenty Years Later: The Unfinished Revolution*, in *TRANSFORMING A RAPE CULTURE* 47, 49 (Emilie Buchwald et al. eds., 1993) ("Rape in all its forms—sexual assaults on children, incest, date rape, the manufacture of pornography, and stranger rape—is an act of violence, a violation of the victim's spirit and body, and a perversion of power, a form of control exercised over more than half of the population.").

110. See generally *id.* (defining a rape culture as "a complex of beliefs that encourages male sexual aggression and supports violence against women").

111. See Patricia Donat & John D'Emilio, *A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change*, in *THE LEGAL RESPONSE TO VIOLENCE AGAINST WOMEN* 259 (Karen J. Maschke ed., 1997) (crediting the feminist movement of the 1960s for reshaping the modern understanding of rape and sexual assault because it transformed rape as being the plight of "fallen women" into a mechanism used to exacerbate violence against women).

112. See Jane E. Brody, *The Twice-Victimimized of Sexual Assault*, N.Y. TIMES (Dec. 12, 2011), <http://www.nytimes.com/2011/12/13/health/the-twice-victimimized-of-sexual-assault.html> (explaining that rape victims are reluctant to report rape because they often think that their actions provoked the attack).

Roethlisberger, including one made by a women who worked for a hotel where he stayed as a guest;¹¹³ media coverage of the allegations of rape against Dominique Strauss-Kahn by a hotel maid in New York City;¹¹⁴ and media coverage of the rape of an 11-year old girl in Texas by several men, all of which focused on the girl's clothing, her appearance, and how her allegations have divided the community.¹¹⁵ In each of these examples, the media re-victimizes the victim of sexual assault by questioning the motives of the victim in reporting the rape, beginning from the assumption that the victim is lying, exaggerating, or has mental issues, or implying that the lifestyle or mental state of the victim made her somehow culpable for the rape.

The impact of rape and rape culture on victims is exemplified in their virtual inability to successfully bring claims under Title VII for sexual assaults committed by coworkers or supervisors. Rape is a unique crime of power and violence, with unique physical, psychological, and emotional impacts on its victims.¹¹⁶ Moreover, many sexual assault victims fear that they will not be believed if they report the assault. Media coverage of high-profile rape cases, such as the ones cited above, reinforce victims' fears that their complaints will not be believed, that the treatment by the criminal justice system will re-victimize them by focusing on their behavior rather than the perpetrators, and that the perpetrator will not be punished.¹¹⁷ It is unsurprising that only sixteen to nineteen percent of rapes

113. See Jaclyn Friedman, *This Is What Rape Culture Looks Like*, YES MEANS YES! VISIONS OF FEMALE SEXUAL POWER & A WORLD WITHOUT RAPE (July 23, 2009), <http://yesmeansyesblog.wordpress.com/2009/07/23/this-is-what-rape-culture-looks-like/> (describing rape culture as a culture where society poses no consequences for rapists but rather blames women for instigating their attacks).

114. See, e.g., Jill Filipovic, *There Are No Perfect Accusers*, FEMINISTE (July 1, 2011, 1:51 PM), <http://www.feministe.us/blog/archives/2011/07/01/there-are-no-perfect-accusers/> (commenting on the media's portrayal of Dominique Strauss-Kahn's victim as a liar).

115. See Marina DelVecchio, *Rape Culture and How It Betrays Women*, HUFFINGTON POST (Mar. 21, 2011, 9:51 PM), http://www.huffingtonpost.com/marina-delvecchio/post_1849_b_838788.html (discussing how society ostracizes women for reporting rape and finds reasons to excuse their attackers, thus promoting to the cycle of violence against women).

116. See Eugene J. Kanin, *Date Rape: Unofficial Criminals and Victims*, 9 VICTIMOLOGY 95, 104-05 (1984) (recognizing that date rapists may use power for the acquisition of sexual gratification); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 218-21 (1979) ("The radical distinction between rape and intercourse—rape is violence, intercourse is sexuality—is both the most basic and the least examined premise."); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN CULTURE & SOC'Y 635, 649-50 (1983) (discussing the emotional trauma women experience as a result of rape).

117. See Seidman & Vickers, *supra* note 107, at 472 (noting that the criminal justice process is poorly equipped to protect victims of rape because it is the least reported crime and many victims do not believe the criminal justice system will afford them adequate redress from their perpetrators).

are reported to the police.¹¹⁸ Thus, a legal framework that requires a victim to immediately report a sexual assault to an authority figure determined by the employer in order to obtain protection or relief is impracticable. Moreover, some women who have been sexually assaulted blame themselves and experience guilt for not having been able to prevent it.¹¹⁹ This explains why a woman may delay reporting a rape or sexual assault in the workplace. Additional reasons for delayed reporting of sexual violence may include the stigma related to sexual violence, fear of her partner's response, fear of upsetting her children, pressure to be the source of emotional support and stability for her family, and concern about how she will be perceived in her community. These aspects of the impact of sexual assault on its victims are not currently recognized or incorporated in the courts' evaluation of complaints of sexual assault in the workplace.

Additionally, the treatment of sexual assault in the workplace as a form of sexual harassment minimizes its seriousness. Although sexual assault is a crime, it is rarely reported to the police. When sexual assaults take place in the workplace, they are considered first to be sexual harassment, and often are not even recognized as a crime such as domestic violence or sexual assault. When victims do report rape by a supervisor, the police may tell a victim that they cannot help the victim and to report it to the human resources department.¹²⁰ In this way, the workplace is treated as the home was for many years, a place where the government is not to interfere. However, without a police report, the employee's credibility may be questioned if she does complain to her employer. Therefore, increasing awareness among police officers that sexual assault frequently occurs in workplaces and that it needs to be taken seriously could improve the available protections for victims. Moreover, it could become a standardized part of sexual harassment training for employers and human resource professionals that sexual assault is cognizable sexual harassment and thus a violation of Title VII, so educational posting and workplace

118. See NAT'L VICTIM CTR., *RAPE IN AMERICA: A REPORT TO THE NATION* 6 (1992) (noting study findings showing that eighty-four percent of rape victims do not report the crime to the police, thus causing a threat to public safety in America). See generally PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, *FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN* (2000); Kathleen C. Basile et al., *Prevalence and Characteristics of Sexual Violence Victimization Among U.S. Adults, 2001-2003*, 22 *VIOLENCE AND VICTIMS* 437 (2007).

119. See Dianne Herman, *The Rape Culture*, in *WOMEN: A FEMINIST PERSPECTIVE* 20, 33-34 (J. Freeman ed., 3d ed. 1984) (discussing how law enforcement often blames victims of rape for bringing about their assault and doubts their credibility); Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 *MINN. L. REV.* 395, 424-32 (1985) (describing phases of rape trauma syndrome and public attitudes about rape victims).

120. See *supra* note 47.

policies should include references to sexual assault so that employees know their rights. In particular, the Violence Against Women Act has increased funding for training police about domestic violence and sexual assault, and incorporating into this training that sexual assault also occurs in the workplace could be effective. Similarly, trainings for human resource professionals on how to respond appropriately to an allegation of sexual assault in the workplace could be effective.¹²¹ There is evidence that human resource staff, when faced with an allegation of sexual assault by one of their coworkers, accuse the victim of lying or otherwise attempt to minimize the situation.¹²² Our discomfort with rape as a culture, in contrast to domestic violence, allows sexual assault to continue unfettered in our workplaces, and only through training and education may we overcome this issue.

Recognition of the family and community relationships that exist in the workplace would also enable better identification of behaviors that constitute domestic violence as well as sexual harassment and sexual assault, leading to additional, more appropriate remedies. In the majority of states, perpetrators of domestic violence may include a spouse or former spouse, a cohabitant or former cohabitant, a person with whom the victim is living or has lived, a person with whom the victim has a dating or engagement relationship, or a person with whom the victim has had a child.¹²³ In California, domestic abuse is defined as “intentionally or

121. The Violence Against Women Act of 2005 included funding for a workplace resource center to provide free training and resources for employers regarding responding to sexual assault and domestic violence in the workplace. For more information, see *Employers Address Domestic & Sexual Violence*, FUTURES WITHOUT VIOLENCE, <http://www.futureswithoutviolence.org/content/features/detail/1596/> (last visited Mar. 9, 2012); WORKPLACES RESPOND TO DOMESTIC & SEXUAL VIOLENCE: A NATIONAL RESOURCE CENTER, <http://www.workplacesrespond.org/> (last visited Mar. 9, 2012).

122. The author counseled several women who were victims of workplace sexual assault and whose claims were not believed by human resources representatives. These representatives told the women that they needed to have photographic or video proof of the incidents and thus refused to even conduct an investigation.

123. See AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (CPOS) BY STATE (2009), http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/dv_cpo_chart.authcheckdam.pdf; see also, e.g., CAL. FAM. CODE § 6211 (West 2012) (listing the various persons domestic violence may be perpetrated against); COLO. REV. STAT. ANN. § 13-14-101(2) (West 2012) (defining domestic abuse as “any act or threatened act of violence that is committed by any person against another person to whom the actor is currently or was formerly related, or with whom the actor is living or has lived in the same domicile, or with whom the actor is involved or has been involved in an intimate relationship”); IND. CODE ANN. § 34-6-2-44.8 (West 2011) (listing the various kinds of individuals who may constitute a “family or household member” as a former or current spouse, a current or former person residing in an intimate relationship, persons with a child together, relatives by blood or adoption, persons who have dated or are currently dating and/or in a sexual relationship, and a present or former relative by marriage, guardian, ward, custodian, or foster parent).

recklessly causing or attempting to cause bodily injury, sexual assault, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.”¹²⁴ It could easily be argued that the assaults, intimidation and threats that Maria experienced from her supervisor and her family who are also her coworkers constitute domestic violence under this definition, if it is determined that they have the requisite relationship. If Maria is able to establish the requisite relationship, she could petition a civil court for a civil protection order that requires the perpetrator to stay a certain distance from her at all times (a stay-away order), and to refrain from contacting her, threatening her, or otherwise harming her.¹²⁵ If she chose to seek such an order, she might also seek economic relief for any damages caused as a result of the assaults.¹²⁶ These remedies may include lost wages and medical costs if she sought health care for physical or mental injuries caused by the rapes. These remedies may be more consistent with Maria’s interests in protecting herself without risking her job. Enforcement of civil protection orders in workplaces has posed challenges for employers and victims if the victim and the perpetrator regularly see each other as a part of their job duties and there are limited options for transfer or alternate shifts. Nonetheless, this brief exploration of the application of remedies frequently utilized for victims of domestic violence at home to behaviors at work that fit within the definition of domestic violence demonstrates the ways in which acknowledging that sexual and domestic violence is taking place at work may lead to more appropriate and effective protections for employees.

CONCLUSION

Sexual assault of women in the workplace continues unabated, due to our existing legal structure’s failure to discourage or prevent it. By recognizing that family and community relationships exist in workplaces, we can learn from efforts to prevent and punish the crimes of domestic violence and sexual assault in the home and create meaningful remedies for victims when they are committed at work. This article begins to explore the issues raised by these behaviors, recognized as the crimes of domestic violence and sexual assault, including the possible benefits and unintended consequences. In future articles, I plan to further explore the implications of importing our understandings of domestic violence and sexual assault,

124. CAL. FAM. CODE § 6203 (West 2012); *see also* CAL. PENAL CODE § 13700(a) (West 2012) (employing the same definition of abuse as that found in the California Family Code).

125. *See* CAL. FAM. CODE § 6218 (West 2012) (describing the various types of restraining orders that may be issued against an individual).

126. *See* CAL. FAM. CODE § 6342 (West 2012) (allowing action for damages suffered as a result of domestic violence).

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including the impact of these crimes on its victim's and society's cultural responses.