

CULTIVATING JUSTICE FOR SURVIVORS OF SEXUAL ASSAULT IN AMERICA'S AGRICULTURE INDUSTRY

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I. INTRODUCTION

In America, over 500,000 women work in the agriculture industry cultivating, planting, growing, and harvesting our food.¹ Most of those women are undocumented immigrants,² which subjects them to increased vulnerability to unwanted sexual advances³ by farm supervisors.⁴ It is uncertain how many women working in America's agriculture industry have been sexually harassed or assaulted,⁵ as it is a scarcely reported epidemic. There are many reasons for this lack in reporting, including fear of deportation and lack of alternative work.⁶ Indeed, since 1998, not one agriculture industry supervisor accused of assault or rape in an Equal Employment Opportunity Commission ("EEOC") lawsuit has been tried in criminal court.⁷ The lack of criminal convictions indicates a perverse disregard for the safety and well-being of survivors of sexual assault in America's agriculture industry. Before justice can be cultivated for survivors,⁸ America's laws and policies must recognize and address the culture of fear and silence that deprives these women of the ability to realistically seek criminal convictions of their perpetrators.

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¹ *Frontline: Rape in the Fields* (PBS television broadcast June 25, 2013) [hereinafter *Rape in the Fields*], (transcript available at <http://cironline.org/rapeinthefields>); *Transcript: Rape in the Fields*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/social-issues/rape-in-the-fields/transcript-46/> (last visited Feb. 27, 2014) [hereinafter *Rape in the Fields* transcript].

² *Who are the Victims?*, RAPE, ABUSE, & INCEST NAT'L NETWORK, <http://www.rainn.org/get-information/statistics/sexual-assault-victims> (last visited Feb. 27, 2014).

³ The terms "sexual assault," "sexual advances," "unwanted sexual advances," and "sexual harassment" will all be used to denote unwanted sexual advances and/or violence.

⁴ Sasha Khokha, *Silenced By Status, Farm Workers Face Rape, Sexual Abuse*, NAT'L PUB. RADIO (Nov. 5, 2013, 5:26 PM), <http://www.npr.org/2013/11/05/243219199/silenced-by-status-farm-workers-face-rape-sexual-abuse>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ The author acknowledges that men are also often the victims of sexual violence; however, women constitute nine of every ten instances of sexual violence. *Who are the Victims?*, *supra* note 2. Therefore, although this problem is prevalent across gender, ethnic, and age lines, this Note will generically refer to survivors as women. Furthermore, for the purpose of this Note, individuals who have encountered a sexual assault will be generally referred to as "survivors" rather than "victims;" however, deference should be given to how an individual self-identifies.

Many extenuating circumstances contribute to the culture of fear and silence and discourage survivors of sexual assault from reporting these crimes. Housing, transportation, lack of alternative work, language barriers, cultural and geographic isolation, fear of retaliation, and uncertainty of legal rights, can all influence a survivor's decision to report.⁹ One very significant factor is the fear that reporting such a crime will result in the survivor's deportation because of her immigration status.¹⁰ Perpetrators understand and exploit these vulnerabilities by exerting power and control over the survivors.¹¹ Thus, a perpetrator can position the survivor in a manner that forces her to be economically dependent on him. For example, if the perpetrator is the survivor's supervisor, his power and control is exacerbated by the economic barriers she faces that force her to depend on him for her next paycheck. When a survivor is an undocumented immigrant, the perpetrator gains even more leverage by convincing her that she will either be deported or discredited in court because of her immigration status.¹² Targeting women with the aforementioned vulnerabilities enables perpetrators to exert power and control over them in hopes they will not report the crime.

One way to lessen the perpetrator's power and control is to minimize the survivor's vulnerabilities. Recognizing this, Congress took steps to decrease the risk of survivors being deported. In 2000, Congress enacted the Victims of Trafficking and Violence Prevention Act ("VTVPA").¹³ This Act was a concerted effort to strengthen the ability of law enforcement agencies to prosecute sexual assaults against immigrants, while providing survivors protection from immediate risk of deportation. The Act provides temporary legal status in the form of a non-immigrant visa ("U-visa") for a survivor of qualified crimes cooperating with a law enforcement agency.¹⁴ The survivor must petition for a U-visa which requires, among other things, certification from an appropriate law enforcement agency that the survivor is cooperating.¹⁵ Such agencies have

⁹ S. POVERTY LAW CTR., *SEXUAL VIOLENCE AGAINST FARMWORKERS: A GUIDEBOOK FOR LEGAL PROVIDERS* 1, 7, available at <http://www.splcenter.org/get-informed/publications/sexual-violence-against-farmworkers-a-guidebook-for-legal-providers>.

¹⁰ *Id.* at 8, 14.

¹¹ *Id.*

¹² *Id.* at 9.

¹³ U.S. DEP'T OF HOMELAND SEC., *U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE* 1, available at http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf.

¹⁴ RODOLFO ESTRADA, VERA INSTITUTE OF JUSTICE, *HOW LAW ENFORCEMENT IS USING THE U-VISA* 1 (2011), available at <http://www.vera.org/sites/default/files/resources/downloads/U-visa-practice-brief.pdf>.

¹⁵ Requirements are: they have suffered "substantial physical or mental abuse" as a result of being a victim of one or more specified criminal activities; they possess information about those criminal activities; they help—or are willing to help—with the detection, investigation, or prosecution of the criminal activities; and they were victims of criminal activities that occurred in the United States or that violated the country's laws. *Id.*

broad discretion when it comes to granting the required certification.¹⁶ In 2011, however, the Vera Institute of Justice reported that many law enforcement agencies use U-visas irregularly and inefficiently.¹⁷ The Vera Institute of Justice points to several factors for the disparate and minimal use, including: lack of agency protocol, insufficient training, misunderstanding of law enforcement's role in the process, and fear that certifying U-visa petitions will cause a negative public perception of the agency.¹⁸

Law enforcement agencies would benefit from the regular and efficient use of U-visas because they increase the availability and willingness of a survivor's testimony at trial. The survivor's testimony is crucial to the prosecution of the perpetrator because many farm workers do not get rape exams following assaults, which can hinder the investigative process.¹⁹ Not only are rape exams physically invasive, but many sexual assault survivors are not focused on the preservation of physical evidence immediately following the assault. Rather, fear, intimidation, and economic barriers keep them from pursuing these exams.²⁰ Kris Zuniga, a police sergeant in rural California, explained the implications; "a week goes by, two weeks go by, three weeks go by, and you've lost that physical evidence, so now you're down to a 'he said, she said' and those are tough, tough to prosecute."²¹ Lack of physical evidence creates an even greater need for the survivor's cooperation, as the success of such prosecutions will inevitably depend on victim testimony.

Congress must take more steps to increase the reporting, and subsequent prosecution, of sexual assault in America's agriculture industry. Although Congress provides survivors the ability to petition for a U-visa, access to its protection must be broadened. Providing the security offered through the U-visa would encourage more assault victims to come forward. Furthermore, by providing U-visas at the investigation stage, law enforcement could ensure that the survivor would be present to testify at trial. To guarantee witness availability, agencies need to increase training on the benefits of the U-visa, such as how providing its protection early can benefit the procurement of evidence. Additionally, Congress could curb the current epidemic of unreported sexual assault in the agriculture industry through comprehensive immigration reform through the Agricultural Job Opportunities, Benefits, and Security Act of 2013 ("AgJobs Bill"). If justice is to be cultivated for these sexual assault survivors, the imbalance of power

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 2-3.

¹⁹ See Khokha, *supra* note 4.

²⁰ *Reporting Rape, RAPE, ABUSE, & INCEST NAT'L NETWORK*, <http://www.rainn.org/get-information/legal-information/reporting-rape> (last visited Mar. 1, 2014).

²¹ See *id.*

in the agriculture industry must be upset. Providing survivors temporary legal status is a necessary step.

Part II of this Note considers the significant contribution to the U.S. economy that undocumented immigrants provide through their participation in the agriculture industry. It will also highlight the deleterious impact that sexual assault on female farm workers has on the country as a whole. Part III discusses why female immigrant women in the agriculture industry are especially vulnerable to unwanted sexual advances by coworkers and farm supervisors. Next, Part IV addresses the protections currently in place for these survivors of sexual harassment, assault, and rape. Part V examines whether these current protections are adequate for the prosecution of criminal offenders and the safety of the survivors. Finally, Part VI provides an analysis of different ways that current protections can be strengthened and suggests new policies to cultivate the justice needed for survivors of sexual assault in America's agriculture industry.

II. UNDOCUMENTED IMMIGRANTS CONTRIBUTE SIGNIFICANTLY TO THE AMERICAN ECONOMY

Because Americans generally do not pursue employment in the agriculture industry, undocumented workers fill the majority of these positions.²² Between 2007 and 2009, seventy-one percent of all agriculture workers were immigrants, and most were undocumented.²³ Undocumented immigrants constitute over fifty percent of the agriculture workforce.²⁴ Planting, harvesting, and processing food is labor intensive and relies on vast numbers of low-wage workers.²⁵

Americans clearly benefit from the exploitation of these undocumented immigrant farm workers because their labor reduces food costs for consumers.²⁶ However, the exploitation of immigrant workers does not stop at wage discrimination. Undocumented immigrants work at their own risk in one of the most hazardous industries.²⁷ Agriculture labor is

²² *Will Immigration Reform Benefit the Agriculture Industry?* US-IMMIGRATION.COM (Aug. 6, 2012, 1:42 AM), <http://www.us-immigration.com/blog/will-immigration-reform-benefit-the-agricultural-industry>.

²³ *Id.*

²⁴ *US: Sexual Violence, Harassment of Immigrant Farmworkers*, HUMAN RIGHTS WATCH (May 16, 2012), <http://www.hrw.org/news/2012/05/15/us-sexual-violence-harassment-immigrant-farmworkers> [hereinafter *US: Sexual Violence*].

²⁵ *Will Immigration Reform Benefit the Agriculture Industry?*, *supra* note 22.

²⁶ See STEVEN ZAHNISER ET AL., U.S. DEP'T OF AGRIC., ECON. RESEARCH REPORT NO. 135, THE POTENTIAL IMPACT OF CHANGES IN IMMIGRATION POLICY ON U.S. AGRICULTURE AND THE MARKET FOR HIRED FARM LABOR (2012), available at <http://www.ers.usda.gov/publications/err-economic-research-report/err135.aspx>.

²⁷ HUMAN RIGHTS WATCH, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE U.S. TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT 59 (2012) [hereinafter

consistently ranked in the top three occupations for workplace hazards.²⁸ Aggravating the situation further, these workers cannot receive benefits in the case of workplace injury or death.²⁹ The workers endure all of this for a meager average individual annual income of \$10,000 to \$12,499.³⁰ Furthermore, most of these immigrant workers are paid less than minimum wage and are not provided the benefits of holidays, vacations, and health care, and most importantly, are without a practical way to organize to redress their employment grievances.³¹

Many immigrant rights groups have questioned why the government allows immigrant workers to be treated so unfairly. Bill Tamayo, the regional attorney for the EEOC, has posed the issue bluntly: “[o]ver a century after slavery had ended, why do we still have these conditions in the fields?”³² While the answer remains unclear, it cannot be denied that undocumented immigrants lack the political power necessary to change their work conditions. Before these work conditions can be changed, undocumented immigrants need to be given a voice in the political arena or have their voices represented by those with such political power.

In sum, the American economy benefits greatly from the contributions of undocumented immigrants in the agriculture industry through the reduced cost of food for consumers. However, many of these immigrants are being mistreated and sexually assaulted. They have no voice in the political arena, no way to organize and address their employment grievances, and enjoy neither health insurance nor death benefits. The poor treatment of undocumented immigrants is an epidemic that affects us all. Cultivating justice for sexual assault survivors is not only the humane thing to do, but it is also economically sound.

III. WHY ARE IMMIGRANT WOMEN IN THE AGRICULTURE INDUSTRY ESPECIALLY VULNERABLE TO UNWANTED SEXUAL ADVANCES?

Undocumented immigrant women in the agriculture industry are dependent on their employers for their entire livelihood and thus, suffer in many ways.³³ First, many undocumented immigrant workers victimized by sexual assault never come forward because of fear they will lose their job or

CULTIVATING FEAR], *available at* http://www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf.

²⁸ SOUTHERN POVERTY LAW CENTER, *supra* note 9, at 15 (citing D. Villarejo & S.L. Barohn, *The Occupational Health Status of Hired Farmworkers*, 14 OCCUPATIONAL MED.: STATE OF THE ART REVIEWS 613 (1999)).

²⁹ See SOUTHERN POVERTY LAW CENTER, *supra* note 9, at 43.

³⁰ SOUTHERN POVERTY LAW CENTER, *supra* note 9, at 13.

³¹ SOUTHERN POVERTY LAW CENTER, *supra* note 9, at 35-36.

³² *Rape in the Fields*, *supra* note 1.

³³ See SOUTHERN POVERTY LAW CENTER, *supra* note 9, at 12-15.

be deported.³⁴ Factors such as embarrassment, cultural isolation, and lack of knowledge of their rights and remedies also play significant roles in the survivor's decision not to file a complaint against their perpetrator.³⁵ Second, the perpetrators of assaults on agriculture laborers usually retain positions of power over survivors, which enable them to exert force and coercion to keep these survivors from coming forward.³⁶ These perpetrators understand the importance of a job to female agriculture workers and exploit that dependency to their advantage. Third, agriculture jobs are typically in geographically isolated areas and are characterized by lax governmental regulations from the Department of Labor; this is particularly true with regard to exceptions in wage and hour laws and the lack of collective bargaining power, all of which make it easier for employer abuse to go unnoticed and unreported.³⁷ All of these circumstances create an environment of increased risk for sexual assault among undocumented immigrant women in the agriculture industry.

A. Undocumented Immigrant Workers in Agriculture Fear the Repercussions of Reporting a Sexual Assault

Sexual assault is a crime that often goes unreported, even among lawful U.S. citizens. According to the Rape, Abuse, and Incest National Network Organization ("RAINN"), a sexual assault is perpetrated every two minutes and sixty percent of these assaults are never reported to police.³⁸ Specifically, 14.8% of American women have been raped (not including attempted rape, sexual assault, or sexual harassment),³⁹ while ninety-seven percent of rapists will never spend a day in jail.⁴⁰ Additionally, female, Hispanic rape survivors are significantly less likely to report the crime than non-Hispanic women.⁴¹

Of the seventy-one percent of agriculture workers who are immigrants,⁴² many have limited English proficiency and fear that complaining about their work environment will result in termination.⁴³ Since many undocumented immigrants rely on the agriculture industry as

³⁴ *See id.*

³⁵ *See id.*

³⁶ *Id.* at 32.

³⁷ CULTIVATING FEAR, *supra* note 27, at 32.

³⁸ *Statistics, RAPE, ABUSE, & INCEST NATIONAL NETWORK*, <http://www.rainn.org/statistics> (last visited Mar. 16, 2014).

³⁹ *Who are the Victims?*, *supra* note 2.

⁴⁰ *Statistics, supra* note 38.

⁴¹ PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCE OF VIOLENCE AGAINST WOMEN iv (2000), *available at* <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

⁴² *Will Immigration Reform Benefit the Agriculture Industry?*, *supra* note 22.

⁴³ CULTIVATING FEAR, *supra* note 27, at 6.

their sole source of income, employment termination would be devastating. Maricruz Ladino, a sexual assault survivor who has worked in the fields for eighteen years explained how farm supervisors use their position of power to silence workers:

There are supervisors who try to, who use their power to mistreat and abuse people. One day, we went to do an inspection in a field. He took the opportunity to abuse me. It happened in a place far from other people. If I said anything I would lose my job. I couldn't lose my job because I was the one taking care of my daughters.⁴⁴

Approximately 1,400 people are deported from the United States every day.⁴⁵ Given this significant number, many undocumented workers are fearful they will be deported. Many undocumented immigrant sexual assault survivors feel they have two choices: endure the pain and suffering or be forced to leave the United States.⁴⁶ Furthermore, immigrant women working in the fields are unlikely to have the money necessary to take time off of work to report the crime.⁴⁷ Going to the hospital, seeing a counselor, and receiving any type of medical attention is often difficult, if not impossible, due to cost and work constraints and often leads to decreased evidence in such cases.⁴⁸ Thus, the survivor's testimony becomes even more imperative, since forensic evidence is frequently unavailable due to the delay in receiving these services.⁴⁹

Dolores Huerta, one of the founders of United Farm Workers, claims that sexual harassment is an epidemic in the fields resulting from the vulnerability that many farm worker women feel.⁵⁰ Of note, she identifies a number of reasons these crimes persist as an epidemic: (1) farm work is done in isolated places, (2) these women have limited English proficiency, and (3) they feel helpless because they do not know the laws in America.⁵¹ In addition, Sonia Parras, an immigration attorney who works with survivors of sexual harassment suggests that these women are aware of the ever watchful eye of immigration officials:

⁴⁴ *Rape in the Fields* transcript, *supra* note 1, at 2.

⁴⁵ *See id.*

⁴⁶ *CULTIVATING FEAR*, *supra* note 27, at 19.

⁴⁷ *See SOUTHERN POVERTY LAW CENTER*, *supra* note 9, at 9.

⁴⁸ *See CULTIVATING FEAR*, *supra* note 27, at 41, 79.

⁴⁹ *See id.* at 79.

⁵⁰ *See Frontline: Dolores Huerta: An "Epidemic in the Fields,"* (PBS television broadcast June 25, 2013) (transcript available at <http://www.pbs.org/wgbh/pages/frontline/social-issues/rape-in-the-fields/dolores-huerta-an-epidemic-in-the-fields/>).

⁵¹ *Id.*

I remember one of them saying, 'I'm just tired of having sex at work.' So I said, 'Well, what do you mean?' And she said, 'I want to keep my job, but I don't want to have sex at work anymore.' And that was when I realized the magnitude of the situation. The women are being raped and sexually assaulted and they know that immigration is outside. They're also seeing law enforcement working with them. So if you're seeing law enforcement coming into your plant and taking your- your co-workers, you're not going to go to them the next day to say, 'By the way, can you help me?'⁵²

For many years, these women were without any support. However, this changed in 2002, when the EEOC brought its first case against Harris Farms in California, one of the largest integrated farming operations in the Central San Joaquin Valley and one of the largest agribusinesses in the nation.⁵³ The survivor in that case was Olivia Tamayo, a married mother with five children.⁵⁴ Ms. Tamayo experienced multiple episodes of rape in addition to verbal harassment and intimidation.⁵⁵ She also experienced threatening gossip from coworkers and was "constructively discharged" with suspension.⁵⁶ The jury found in favor of Ms. Tamayo and awarded her \$994,000 in compensatory and punitive damages.⁵⁷ She stated:

For a long time I remained silent about what my supervisor did and said to me. He carried a gun and a knife and bragged that he had fought another woman's husband before and gotten away with it. Only later, after he attacked me out of jealousy for speaking with another male supervisor, I decided I had to speak out. This was very hard and very frightening for me, but I finally reported his attacks . . . That's why it was so devastating when the company failed to protect me, let me work alone in the fields, and instead punished me with a suspension. I thank the EEOC and my attorney, William Smith, for all their

⁵² *Rape in the Fields*, *supra* note 1.

⁵³ Press Release, U.S. Equal Emp't Opportunity Comm'n, Jury Orders Harris Farms to Pay \$994,000 in Sexual Harassment Suit by EEOC (Jan. 21, 2005), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/1-21-05.cfm>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

work on my case. I hope that today's result will help other women fight their fears and break their silence.⁵⁸

Ms. Tamayo's words highlight just how deeply ingrained the fear of coming forward is for many immigrant women. It also demonstrates just how pervasive the culture of silence is. Furthermore, no criminal charges were ever brought against Ms. Tamayo's assailant.⁵⁹ The perpetrator was allowed to retire and never answered for his crimes.⁶⁰ The perpetrator contended it was a consensual relationship and said the two were "going out."⁶¹ When the Sheriff was asked why there was never a criminal case, he simply replied, "I don't have an answer."⁶²

B. Farm Supervisors are in a Special Position to Exert Power and Control over Undocumented Immigrant Workers

Bill Tamayo of the EEOC explains, "[s]exual violence doesn't happen unless there's an imbalance of power. And in the agricultural industry, the imbalance of power between perpetrator, company and the worker is probably the greatest."⁶³ Immigrant women often call the fields "fil de calzon," or "fields of panties" because it is where they go to get a job, keep a job, and get a promotion.⁶⁴ The fields are also referred to as the "green motel" because it is where they have to go and have sex with a hiring official.⁶⁵ According to Tamayo, it is "the classic quid pro quo."⁶⁶ This highlights the severity of the problem among undocumented immigrants and how very real this "epidemic" is, in part, because of the ability of perpetrators to target those most vulnerable. Perpetrators are likely to have increased power over immigrants in the agriculture industry because of the geographic isolation that allows more one-on-one opportunities to commit the sexual assault. Furthermore, agriculture employees often rely on farm supervisors for transportation and housing. Lastly, and more practically, farm workers often do not have access to restrooms when out in the fields and therefore incur less privacy than in other occupations. Such dependency creates an environment that facilitates the risk of sexual assault.

⁵⁸ *Id.*

⁵⁹ *Rape in the Fields*, *supra* note 1.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Bernice Yeung & Grace Rubenstein, *California Agriculture Workers Grapple With Sexual Assault by Bosses*, KQED BLOG (Sept. 4, 2013), <http://blogs.kqed.org/newsfix/2013/09/03/draft-rape-in-the-fields/>.

⁶⁴ *Rape in the Fields*, *supra* note 1.

⁶⁵ *Id.*

⁶⁶ *Id.*

C. The Agriculture Industry Experiences Decreased Federal Governmental Regulations

In addition to the power imbalance that exists between female immigrant farm workers and their supervisors, the structure and operation of the agriculture industry, which is highly unregulated, contributes to the frequency of sexual assault. Principally, undocumented immigrants lack political power because they cannot vote. This impedes their ability to influence the political system or encourage working condition reform.

A glaring example of under-regulation in the agriculture industry is the exceptions for the agriculture industry that have been made to the federal wage and hour laws.⁶⁷ Provided an agriculture employer meets certain requirements under the Fair Labor Standards Act ("FLSA"), they are exempt from the time-and-a-half requirement for overtime pay.⁶⁸ Employers may also be exempt from paying the federal minimum wage under FLSA.⁶⁹ Both of these exceptions are available when the employer "use[s] less than 500 'man-days' of farm labor in any calendar quarter of the preceding calendar year."⁷⁰ These farm laborers do not fare much better under state law, which often exclude workers' compensation benefits for agriculture workers.⁷¹ Furthermore, concerns surrounding agriculture workers' safety and health are rarely regulated.⁷²

These agriculture exceptions in governmental regulations date back to the New Deal era.⁷³ The exemptions were part of a compromise by President Franklin D. Roosevelt and Southern lawmakers who "wanted to preserve the social and racial order on which the South's plantation system depended."⁷⁴ The impetus behind these exceptions was largely discriminatory:

Because of this controlling concern in southern politics,
New Deal economic proposals posed unacceptable dangers.
First, welfare provisions such as the minimum wage and
overtime provisions of the FLSA would benefit primarily

⁶⁷ WAGE AND HOUR DIVISION, U.S. DEP'T OF LABOR, FACT SHEET #12: AGRICULTURAL EMPLOYERS UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2008), *available at* <http://www.dol.gov/whd/regs/compliance/whdfs12.pdf>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Wages and Hours Worked: Minimum Wage and Overtime Pay*, U.S. DEP'T LABOR (Sept. 2009), <http://www.dol.gov/compliance/guide/minwage.htm>.

⁷¹ *US: Sexual Violence*, *supra* note 24.

⁷² *Id.*

⁷³ S. POVERTY LAW CTR., INJUSTICE ON OUR PLATES 29 (2010), *available at* http://www.splcenter.org/sites/default/files/downloads/publication/Injustice_on_Our_Plates.pdf.

⁷⁴ *Id.* at 29 (citing Marc Linder, *Farm Workers and the Fair Labor Standards Act*, 65 TEX. L. REV. 1335, 1336 (1987)).

the lower socioeconomic strata. A large number of blacks, most of whom lived in the South, consequently stood to gain from the federal legislation—a dangerous step toward equality. Equally important, however, was the potential economic harm to white employers, especially plantation owners. The FLSA, for example, would impose the higher wage costs they had successfully avoided for so long. As one commentator noted, ‘cheap labor has been the life-blood of the plantation system and an attack on low labor incomes in the South would be interpreted . . . as a mortal blow.’⁷⁵

As discussed above, immigrant women, particularly undocumented workers, face extreme risk of sexual harassment, assault, and rape in the agriculture industry. The only way to end these atrocious crimes is by holding perpetrators accountable. This can be done by effectuating convictions and providing safe avenues for survivors to end this culture of silence.

IV. IN AN EFFORT TO BRING THESE PERPETRATORS TO JUSTICE, CONGRESS ENACTED PROTECTIONS ENABLING SURVIVORS TO ASSIST IN PROSECUTION

In recognition of the plight of immigrant women, Congress has made several attempts to effectuate change through encouraging prosecutions of these heinous crimes. In October 2000, Congress enacted the VTVPA, which included the Violence Against Women Act (“VAWA”). Essentially, VAWA was designed to assist law enforcement agencies in prosecuting sexual violence.⁷⁶ VAWA provided undocumented immigrant survivors the opportunity to seek U-visas, which shield undocumented immigrants from deportation while assisting in prosecutions.⁷⁷ There are four statutory requirements for U-visa eligibility.⁷⁸ First, the survivor must have suffered substantial physical or mental abuse as a result of having been victimized.⁷⁹ Second, the survivor must have information concerning

⁷⁵ Marc Linder, *Farm Workers and the Fair Labor Standards Act*, 65 TEX. L. REV. 1335, 1336 (1987) (citing E. E. Lewis, *Black Cotton Farmers and the AAA*, 13 OPPORTUNITY: J. NEGRO LIFE 72, 72 (1935)).

⁷⁶ *Questions & Answers: Victims of Criminal Activity, U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGRATION SERVICES (Nov. 5, 2013) [hereinafter *Questions & Answers*], <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/questions-answers-victims-criminal-activity-u-nonimmigrant-status>.

⁷⁷ *Id.*

⁷⁸ 8 C.F.R. § 214.14(b) (2013).

⁷⁹ 8 C.F.R. § 214.14(b)(1) (2013) (“qualifying criminal activity” includes one or more of the following or any similar activities in violation of Federal, State or local criminal law of the United

that criminal activity.⁸⁰ Third, the survivor must have been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of a crime.⁸¹ And fourth, the matter must involve a “qualified criminal activity” as defined by the statute.⁸²

Survivors can petition for a U-visa, free of charge, through I-918 forms.⁸³ Unfortunately, Congress has capped the distribution of U-visas to 10,000 a year.⁸⁴ Furthermore, U-visas last no more than four years without an exception.⁸⁵ In addition to the petition for a U-visa, Supplement B of Form I-918 requires a petitioner to file a statement from a certifying agency assuring that they are, or are likely to be, helpful in the investigation.⁸⁶ As explained on the official form, “[a]n agency’s decision to provide a certification is entirely discretionary; the agency is under no legal obligation to complete a Form I-918, Supplement B, for any particular alien. However, without a completed Form I-918, Supplement B, the alien will be ineligible for U nonimmigrant status.”⁸⁷

Furthermore, the Supplement B certification is not conclusive evidence that the survivor has been helpful. The form states that even if an agency signs off on the certification, the United States Citizen and Immigration Services (“USCIS”) will look at the totality of the circumstances to determine whether the victim qualifies for U-Visa protection.⁸⁸ Furthermore, a great deal of discretionary power is vested in local law enforcement agencies. These agencies have the discretion to decide, among other things, the meaning of “been helpful, is being helpful, or is likely to be helpful.”⁸⁹ Should the law enforcement agency choose not to sign the Supplement, the survivor cannot receive U-visa protection.

States: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. The term “any similar activity” refers to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities. 8 C.F.R. § 214.14(a)(9) (2013)).

⁸⁰ 8 C.F.R. § 214.14(b)(2) (2013).

⁸¹ 8 C.F.R. § 214.14(b)(3) (2013).

⁸² 8 C.F.R. § 214.14(b)(4) (2013).

⁸³ *Questions & Answers*, *supra* note 76; U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., OMB NO. 1615-0104, INSTRUCTIONS FOR FORM I-918 PETITION FOR U NONIMMIGRANT STATUS (2013) [hereinafter INSTRUCTIONS FOR FORM I-918], available at <http://www.uscis.gov/sites/default/files/files/form/i-918instr.pdf>.

⁸⁴ *Questions & Answers*, *supra* note 76.

⁸⁵ *Id.*

⁸⁶ *Id.*; U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., OMB NO. 1615-0104, FORM I-918 SUPPLEMENT B, U NONIMMIGRANT STATUS CERTIFICATION (2013), available at <http://www.uscis.gov/sites/default/files/files/form/i-918supb.pdf>.

⁸⁷ See INSTRUCTIONS FOR FORM I-918, *supra* note 83.

⁸⁸ *Id.*

⁸⁹ *Id.*

V. THE PROTECTIONS IN PLACE FOR IMMIGRANT SURVIVORS OF SEXUAL
ASSAULT IN THE AGRICULTURE INDUSTRY ARE INADEQUATE

Congress has taken great strides to assist survivors of sexual harassment, assault, and rape in America's agriculture industry. However, these efforts have proven inadequate in the face of an overwhelming problem.⁹⁰ There is an obvious disconnect between law enforcement agencies trying to help these survivors and the deportation fears the survivors experience. This disconnect is demonstrated by the fact that law enforcement agencies are signing the Form I-918, Supplement B certifications at very low rates.⁹¹ There are three main reasons why law enforcement agencies are not signing these certifications: (1) "fundamental schizophrenia,"⁹² (2) lack of prosecutions, and (3) deficiencies in law enforcement officers' training in regards to U-visas.

The first major barrier to the increased utilization of Form I-918, Supplement B certification is what Robert Reich, former U.S. Secretary of Labor, calls "fundamental schizophrenia" in the law.⁹³ The law presents conflicting interests for local law enforcement agencies when it comes to their job duties. Reich traces this issue to the competing interests of enforcing immigration laws and protecting survivors; he states, "[h]ow can sheriffs carry out both missions? The answer is that they can't."⁹⁴ This problem has become more evident as more local law enforcement agencies get involved in the enforcement of immigration laws. Accordingly, these law enforcement agencies' interest in protecting survivors of sexual assault is directly at odds with laws that require them to report immigration violations.

A second major barrier is the inability of law enforcement agencies to identify the survivors they could potentially help. This is due to infrequent reporting by survivors and the hesitance by prosecutors because "victimless" crimes are extremely difficult to prosecute. This second barrier is a consequence of the first. Survivors are less likely to report crimes when local law enforcement agencies have competing interests. According to a recent survey, forty-four percent of Latinos stated they are unlikely to report a crime against them because of fear that the police will use the

⁹⁰ ESTRADA, *supra* note 14, at 2.

⁹¹ *Id.*

⁹² Hannah Mintz, *Why Have There Been So Few Sexual Assault Prosecutions In the Agriculture Industry?*, FRONTLINE (June 25, 2013, 9:25 PM), <http://www.pbs.org/wgbh/pages/frontline/social-issues/rape-in-the-fields/why-have-there-been-so-few-sexual-assault-prosecutions-in-the-agriculture-industry/>.

⁹³ *Id.*

⁹⁴ *Id.*

interaction as an opportunity to inquire into their immigration status.⁹⁵ Among undocumented immigrants, the number unwilling to report rises to seventy percent.⁹⁶ Increased involvement of local law enforcement agencies in immigration matters encourages the silence of the survivors. Since more local officials have become involved in immigration, the Latino community claims that criminal activity is becoming more prevalent in their neighborhoods because crimes are less likely to be reported.⁹⁷

A third major barrier to the use of U-visas is the lack of training among law enforcement agencies. The U-visa is foreign to many law enforcement officers. They do not know how to interpret the statute, nor its benefits. This is mainly due to the wide range of discretion given to law enforcement agencies, which prevents uniform application of the protection. Specifically, some agencies are simply unsympathetic to the plight of undocumented farm workers. As petitioning for a U-visa is dependent on obtaining Form I-918, Supplement B certification from qualified local law enforcement agencies, the process is both cumbersome and inconsistent. Furthermore, interpretation of the statute varies by agency. Susan Bowyer, the directing attorney of the Immigration Center for Women and Children explains:

A person can be a victim of a violent crime and cooperate fully with the police in one city but have no chance of getting a certification, while someone in a neighboring city can get the certification easily. It's hugely unfair, arbitrary, irrational, and inconsistent – but it sure is better than not having it at all.⁹⁸

Even if a survivor decides to risk it all and report an assault, she is unlikely to receive counseling or medical assistance because services like Medicaid do not usually cover undocumented immigrants.⁹⁹

If the United States is going to combat sexual violence in the agriculture industry, it needs to strengthen the protections afforded to undocumented immigrant workers. To do this, the United States must implement a policy aimed at encouraging the signing of the Form I-918, Supplement B certification. To do this effectively, this policy must combat

⁹⁵ NIK THEODORE, UNIV. OF CHICAGO, INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT (2013), available at http://www.uic.edu/cuppa/gci/documents/1213/Insecure_Communities_Report_FINAL.pdf.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Cristina Costantini, *The Problem With The 'Victim Visa,'* FUSION.NET, <http://fusion.net/justice/story/visas-problem-victim-visa-11324> (last updated Oct. 14, 2013, 2:57 PM).

⁹⁹ *Id.*

the U-visa's three major barriers: (1) fundamental schizophrenia, (2) lack of prosecutions, and (3) deficiencies in law enforcement officer training.

VI. CONGRESS MUST TAKE ACTION TO STRENGTHEN PROTECTIONS FOR
IMMIGRANT WOMEN IF AMERICA IS GOING TO CURB SEXUAL VIOLENCE IN
THE AGRICULTURE INDUSTRY: A SURVIVOR-FOCUSED APPROACH

To rectify the sexual assault epidemic in America's agriculture industry, Congress must provide adequate incentives for survivors to come forward. Survivors must be able to report assaults without fear of deportation, termination, or further mistreatment. There are a number of ways to increase survivor participation in the prosecution of these crimes. Most importantly, the protections must be designed with the survivor's interests as the ultimate goal. The first way to curb the fear of deportation is to implement comprehensive immigration reform designed to create a path to citizenship for undocumented immigrants meeting certain requirements. Additionally, Congress needs to increase funding for rape services organizations and shelters, as survivors are more likely to report sexual violence when they have spoken with an advocate.¹⁰⁰ Even after sexual assaults are reported, they are nearly impossible to prosecute without a cooperating survivor.¹⁰¹ To increase prosecution success, survivors must not be fearful that they too will be prosecuted. Law enforcement agencies must adopt better training and promote increased knowledge of the U-visa process so that they can utilize it for the benefit of prosecuting the perpetrator.

Furthermore, there must be an intensified focus on preventing these crimes before they happen through increased governmental regulation and training of farm supervisors. Comprehensive immigration reform remains a hot topic. If sexual assault survivors are ever going to come forward, the law must eliminate the threat of deportation for these individuals and pave their way towards citizenship. The United States' immigration policy should reflect a desire to provide residency for those who contribute significantly to our agriculture industry and economy, especially when their contribution has also made them a victim of sexual assault.

The proposed AgJOBS Bill demonstrates that some members of Congress recognize the value undocumented immigrants contribute to the nation's agriculture industry.¹⁰² The AgJOBS Bill, if enacted, would provide a path to "blue card status" for undocumented immigrants working

¹⁰⁰ SOUTHERN POVERTY LAW CENTER, *supra* note 9, at 21.

¹⁰¹ *Reporting Rape*, *supra* note 20.

¹⁰² Agricultural Job Opportunities, Benefits, and Security Act of 2013, H.R. 3162, 113th Cong. (1st Sess. 2013), available at <http://beta.congress.gov/bill/113th-congress/house-bill/3163/text>.

in the agriculture industry who meet certain requirements. The Bill would create a pilot program designed to provide undocumented immigrants with the opportunity to work legally provided they: (1) pay a fine, (2) are current on their taxes, (3) have a clean criminal record, and (4) commit to working in the American agriculture industry for the next five years.¹⁰³ It would also revise the work visa H2-A program, which currently provides legal status for immigrants working in agriculture or seasonal services, by reducing the certification requirement to attestation.¹⁰⁴

If the United States creates this path to legal status for undocumented immigrants in the agriculture industry, it would greatly reduce instances of fundamental schizophrenia. Local law enforcement agencies would no longer have concurrent conflicting interests in protecting survivors and enforcing immigration laws. In addition, the relationship between local law enforcement agencies and the immigrant community would be strengthened. As such, a survivor's ability to report a crime would not be impeded by a fear of deportation. If survivors no longer fear local law enforcement agencies, they will be more likely to come forward sooner when the potential for preserving physical evidence of a sexual assault is greater.

Legal status through the AgJOBS Bill creates a win-win scenario for both the undocumented immigrant survivor and the American economy. By eliminating this fundamental schizophrenia, the agriculture industry can continue to fuel the economy while lessening external pressure on the survivor to remain silent. While this approach is important for undocumented immigrants, there must be additional measures to protect survivors of sexual assault in America's fields. One way to accomplish this is by strengthening the policies already in place.

In addition to providing legal status for undocumented immigrants in the agriculture industry, the United States must strengthen the support systems for survivors. Funding for rape services organizations should be increased because these organizations are well trained in handling sexual assaults and can be used to inform survivors of their legal rights.¹⁰⁵ In some states, these organizations are able to provide specially trained advocates who provide services with legally-protected confidentiality.¹⁰⁶ These organizations also work closely with law enforcement and may be of assistance in obtaining Form I-918, Supplement B certification, should a survivor decide to report the crime to police. These organizations also provide survivors necessary services, which they might otherwise be

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See generally SOUTHERN POVERTY LAW CENTER, *supra* note 9, at 16-19.

¹⁰⁶ See generally *id.* at 26.

ineligible for, such as shelter, clothing, counseling, and more.¹⁰⁷ Providing these services would strengthen the relationship between law enforcement agencies and the immigrant community.

Moreover, the protection of U-visas must be strengthened and broadened to better accommodate a large number of undocumented immigrant survivors. During the reauthorization of VAWA, the House did not reauthorize the Senate's version, SB 1925, which sought to increase the limit of U-visas from 10,000 to 15,000 annually.¹⁰⁸ The version of the bill that passed in 2013 retained the 10,000 U-visa limit. This cap has been consistently met every fiscal year for the past five years since its implementation.¹⁰⁹ Thousands more apply each year only to be waitlisted or rejected.¹¹⁰

A statutory maximum for U-visas is at odds with a survivor-focused remedy to under-reporting and under-prosecution of sexual violence. The USCIS already has the ability to turn down a petition if it deems it insufficient and unpersuasive. Therefore, the statutory maximum on justice does nothing more than render the protection afforded ineffective and unpredictable. The visa limit creates an arbitrary method of rejecting petitions based on when and how early they were submitted. Therefore, it is imperative for Congress to reconsider raising the statutory limit of U-visas.

Limiting local law enforcement's discretion in granting Supplement B certifications would bolster the reporting process. While these agencies do not have the power to grant or deny a U-visa petition, they do have the power to decide whether or not the USCIS will receive the petition.¹¹¹ When the local law enforcement agency decides not to pursue U-visa certification, the survivor is left without protection. Congress should provide survivors an alternative means to satisfy the Supplement B requirement. For instance, the required certification could be optional, or the law could permit survivors to petition the USCIS for a certification waiver.

To remedy the inconsistencies of Supplement B certification, there must be a uniform training process for the agents providing these certifications. In particular, the training should educate the officers on the dynamics of sexual violence in the agriculture industry, explain the effects

¹⁰⁷ See generally *id.* at 50-51.

¹⁰⁸ Violence Against Women Reauthorization Act of 2012, S. 1925, 112th Cong. (2012), available at <https://www.govtrack.us/congress/bills/112/s1925#summary>.

¹⁰⁹ USCIS Approves 10,000 U Visas for 5th Straight Fiscal Year, U.S. CITIZENSHIP & IMMIGR. SERVICES (Dec. 11, 2013), <http://www.uscis.gov/news/alerts/uscis-approves-10000-u-visas-5th-straight-fiscal-year>.

¹¹⁰ Sarah Childress, *For Shadow Victims of Violence, the "U Visa" Can Help*, FRONTLINE (June 24, 2013, 7:17 PM), <http://www.pbs.org/wgbh/pages/frontline/social-issues/rape-in-the-fields/for-shadow-victims-of-violence-the-u-visa-can-help/>.

¹¹¹ INSTRUCTIONS FOR FORM I-918, *supra* note 83.

of not issuing certification, and provide information on the advantages of prosecuting with a cooperating survivor. Part of this training should include model protocols and policies regarding how to use a U-visa proactively whenever an officer encounters an immigrant who meets the definition of victim.¹¹² Many protocols and policies used by local law enforcement agencies contain requirements not in the federal statute and, sometimes, are completely at odds with the federal requirements.¹¹³ Therefore, adequate training must be supported with model protocols and policies that ensure nationwide consistency.

Just as important as protecting survivors of sexual assault is the prevention of future assaults. Currently, three states require farm supervisors to receive sexual harassment training.¹¹⁴ With the epidemic scale of sexual violence in the agriculture industry, all farm supervisors should be required to undergo sexual harassment training. Additionally, employers should be required to provide training and information to all employees regarding their legal rights; particularly in regard to workplace violence. Employers should provide their employees with information about local crisis centers and law enforcement agencies. Furthermore, agriculture companies should implement clear and conspicuous company policies regarding sexual violence. Sexual harassment training would put potential perpetrators on notice that the government and companies are serious about ending sexual violence. The training could also alleviate some farm worker fear, and encourage victims to come forward. Such training and policies would create an avenue for workers to report violence.

The agriculture industry is essential to our country's economy. Accordingly, government regulation should be increased to protect those who work in the industry. The exceptions in governmental regulations for the agriculture industry are outdated and unnecessary. Farms should not be excluded from wage and hour laws. Workers in the agriculture industry deserve to be paid at a rate consistent with the minimum wage. Furthermore, they should not be deprived of overtime pay. The continued reliance on discriminatory New Deal regulations sends the message that agriculture workers are in a lower class.

Lastly, Congress should provide a special grant to further investigate what can be done to curb sexual violence in the agriculture industry. This could be done in conjunction with the Office on Violence against Women, the U.S. Department of Agriculture, and the U.S. Department of Labor. A comprehensive study on the violence against women in the agriculture industry would likely shed light on potential problems, which have yet to be uncovered. The study could develop a

¹¹² ESTRADA, *supra* note 14, at 2.

¹¹³ *Id.*

¹¹⁴ *Rape in the Fields*, *supra* note 1.

system of “immigration reform” for the many undocumented immigrant women who fall victim to the abuses of lax governmental regulation. Lastly, the study could also help address labor issues in terms of wage and hour exceptions that may strike an appropriate balance between affordable farm labor and economic fairness to these workers who contribute so much to the American economy.

VII. CONCLUSION

The modern-day slavery of immigrant women in the agriculture industry deserves the attention of the federal government to investigate the “epidemic.”¹¹⁵ Undocumented immigrants play a vital role in the agriculture industry and its contribution to the U.S. economy.¹¹⁶ However, the nation, as a whole, is failing to provide these workers with adequate protection. Consequently, they are regularly the victims of egregious crimes. On top of this, the United States does not afford sufficient avenues of redress for those who have been victimized. To secure agricultural economic soundness while addressing sexual assault, Congress should pass the AgJOBS Bill. This Bill will provide temporary legal status for undocumented immigrants working in the agriculture industry who (1) pay a fine, (2) are current on their taxes, (3) have a clean criminal record, and (4) commit to working in the American agriculture industry for the next five years.¹¹⁷ Congress also needs to strengthen U-visa protection by passing the Senate version of VAWA, which raises the annual U-visa limit. Training needs to be developed to educate law enforcement agencies on the benefits of U-visas. Additionally, Congress needs to provide funding for rape service organizations to address many of the non-legal needs of survivors, and finance a study on the plight of the immigrant worker. Finally, Congress needs to increase regulation in the agriculture industry and eliminate outdated exceptions to wage and hour laws.

The changes in law and policy proposed by this Note are necessary to end to the fundamental schizophrenia that has driven a wedge between sexual assault survivors and law enforcement agencies preventing and prosecuting the crimes. These proposed changes will strengthen the federal government’s role in preventing sexual assault of undocumented immigrants in America’s agriculture industry and, hopefully, encourage state legislatures to follow suit. Cultivating justice for survivors of sexual assault in America’s agriculture industry is a necessary step to harvesting social equality.

¹¹⁵ *Id.*

¹¹⁶ ZAHNISER ET AL., *supra* note 26.

¹¹⁷ Agricultural Job Opportunities, Benefits, and Security Act of 2013, H.R. 3162, 113th Cong. (1st Sess. 2013), *available at* <http://beta.congress.gov/bill/113th-congress/house-bill/3163/text>.