



An Agricultural Law Research Article

Lessons from the Fields: Female Farmworkers and the Law

by

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LESSONS FROM THE FIELDS: FEMALE FARMWORKERS AND THE LAW

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LESSONS FROM THE FIELDS: FEMALE FARMWORKERS AND THE LAW

*Maria L. Ontiveros**

I. INTRODUCTION

In both the fields of labor law and gender studies, we learn the most from experience. The experience of workers coming together to demand equality and respect and the experience of women coming together to share their experiences has led to most of what we study in these fields. Unfortunately, too many times traditional legal doctrine does not fit these experiences. In those cases, we must struggle to change the law to be responsive to the lived experiences of women and workers. This Article explores the lived experiences of one particular group of workers—immigrant farmworking women in California. From their experience, there are many lessons we can draw to make the law more responsive for all workers, but especially for all female immigrant workers.

The study of immigrant women workers demands an understanding that issues of work, class, gender, race, and immigration status are all inextricably intertwined. The problems which a California female farmworker confronts on a daily basis are both a combination and a result of doing fieldwork, living in poverty, being a woman, having children, being a Mexican, and lacking work authorization. Analyzing only one of these issues misanalyzes her life. Unfortunately, the law in this area is very fragmented. The problems are analyzed independently, which usually prevents progress in solving these problems. Occasionally, however, the workers themselves and their advocates have crafted responses to these problems that draw on the multiple aspects of these workers' lives, finding strength and solutions using the same combination of identity factors.

One main lesson we can learn from the fields, then, is the importance of what I call identity-based organizing.¹ Identity-based organizing takes into account all the aspects of a person that are integral to his or her identity. These aspects include personal identity factors, such as a person's race, gender, ethnicity, national origin,

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1. I develop this theory in MARIA L. ONTIVEROS, A NEW COURSE FOR LABOUR UNIONS: IDENTITY-BASED ORGANIZING AS A RESPONSE TO GLOBALIZATION 417 (Joanne Conaghan et al. eds., 2002) [hereinafter A NEW COURSE FOR LABOUR UNIONS].

citizenship status, community, sexual orientation, and religion. They also include class identity factors, such as a person's job, social class, career, income, and wealth. For immigrants to the United States, their identity is also affected by their children's class identity and their own class identity in their country of origin. Identity-based organizing "means recognizing the personal as well as the class identity of workers, including workers of colour; and recognizing also that these two different types of identity are interrelated, both in defining the oppression faced by workers and in finding solutions to it."²

The first section of this Article describes farmworkers' lives, with an emphasis on female farmworkers in California. The second section discusses the variety of legal responses they have undertaken to try to improve their lives. The last section draws lessons from the lives of women in the fields that can be used to improve labor policy for all workers, especially immigrant women workers.

II. LIFE IN THE FIELDS

A. Demographics and Structure of California's Agricultural Industry

1. Demographic Information

California³ produces about 44% of the nation's labor intensive fruit and nut crops, vegetables and melons, and flowers and nursery products.⁴ For most of this century, workers have immigrated from Mexico, the Philippines, and Central America to harvest these crops. The number of farmworkers has grown steadily over the last twenty-five years. California witnessed a 25% growth in total hired farmworker employment between 1975 and 1999.⁵ In 1997, there were approximately 550,000 farmworkers in California.⁶ This increase in employment corresponds with an increase in the cash receipts from farm marketings, which has tripled from \$8.6 to \$27 billion,⁷ and a doubling in tons produced.⁸ Most of the increase

2. Id.

3. Farmworkers labor all over the country. Although this Article focuses on California farmworkers, much of the analysis applies to those men and women working in Texas, Florida, Washington, and other parts of the country. For more information on those workers, see Guadalupe T. Luna, "Agricultural Underdogs" and International Agreements: *The Legal Context of Agricultural Workers Within the Rural Economy*, 26 N.M. L. REV. 9 (1996); Guadalupe T. Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, 1 U. PA. J. LAB. & EMP. L. 487 (1998); DANIEL ROTHENBERG, *WITH THESE HANDS—THE HIDDEN WORLD OF MIGRANT FARMWORKERS TODAY* (1998). Immigrant workers are also increasingly found in other areas of food production, such as poultry and catfish farming and meat packing. *See generally*, e.g., ERIC SCHLOSSER, *FAST FOOD NATION* (2001).

4. These crops are generally grouped together as "FVH Agriculture." Philip Martin, *Labor Relations in California Agriculture: 1975-2000* (2000), at http://migration.ucdavis.edu/rmn/changingface/cf_ala25/9_2000_martin.html (last visited Aug. 27, 2002).

5. Don Villarejo, *California Farm Employers: 25 Years Later*, at http://migration.ucdavis.edu/rmn/changingface/cf_ala25/9_2000_villarejo.html (last visited Aug. 27, 2002).

6. *Id.* This brings the entire farmworker population (farmworkers, their spouses, and their children) to about 1.5 million people. *See infra* text accompanying note 18 and discussion *infra* note 109.

*7. Martin, *supra* note 4.*

8. The tonnage doubled from an average of 16.4 million tons during the 1969-71 period to an average of 32.8 million tons in 1996-98. Villarejo, *supra* note 5.

has taken place in the production of wine grapes, almonds, strawberries, green-house crops, bagged salad mixes, and dairy.⁹ Although some of these crops are seasonal, many are grown or tended year-round.

Currently 90-95% of California's farmworkers are foreign-born, with almost all having been born in Mexico.¹⁰ Most farmworkers (60-70%) are "undocumented," meaning they do not have legal authorization to work in the United States.¹¹ Since 1989, the percentage of undocumented workers has increased steadily, about 3-4% a year.¹² In 1989, only 8% of U.S. crop workers were undocumented,¹³ primarily because most agricultural workers at that time received the legal right to work in 1986 under the Special Agricultural Worker provision of the Immigration and Reform Control Act of 1986.¹⁴ After receiving the right to work in the United States, most workers left the field and took other types of jobs.¹⁵

About 80% of farmworkers are men, with a median age of thirty (63% are less than thirty-four years old).¹⁶ About 61% are married, and among those who are married, they have an average of three children.¹⁷ Most farmworkers (60%) have their children with them, while a significant minority (40%) leave their family in Mexico.¹⁸ Most do not speak English, and only 15% are considered more than "marginally literate," in terms of reading and writing in their own language.¹⁹ The statistics for female farmworkers are very similar, except female farmworkers are even less likely to speak English.²⁰

2. Structural Component: Undocumented Workforce

Two unique structural components of the agricultural industry create and maintain the snapshot of the industry presented above: the employment of undocumented workers and the use of farm labor contractors. Simply put, growers need undocumented workers to harvest their crops. Most workers with documentation find other employment. An undocumented worker, on the other hand, will work in the fields because she does not have as many other options.²¹ There are several

9. *Id.* In fact, California is now the largest milk producer in the United States. Most of the analysis here excludes work done in dairies. The production of field crops, such as cotton, hay, and grain, has dropped substantially.

10. California's Agricultural Labor Relations Board reports over 90% of current farmworkers as being born outside the United States. CALIFORNIA AGRICULTURAL LABOR RELATIONS BOARD, THE AGRICULTURAL LABOR RELATIONS BOARD IN THE 21ST CENTURY—A NEEDS ASSESSMENT OF THE ALRB'S ABILITY TO MEET ITS STATUTORY OBLIGATIONS 8 (2001). Interview data, from interviews with 1885 crop workers employed in nine California counties between 1995 and 1997 yields the 95% figure and found that 91% were born in Mexico. Martin, *supra* note 4.

11. Estimates on the rate of undocumented workers range from 42% to 70%. Martin, *supra* note 4; CALIFORNIA AGRICULTURAL LABOR RELATIONS BOARD, *supra* note 10, at 8.

12. Martin, *supra* note 4.

13. *Id.*

14. 8 U.S.C. § 1160 (2000).

15. Martin, *supra* note 4.

16. *Id.*

17. *Id.*

18. *Id.*

19. CALIFORNIA AGRICULTURAL LABOR RELATIONS BOARD, *supra* note 10, at 8.

20. Richard Kamm, *Extending the Progress of the Feminist Movement to Encompass the Rights of Migrant Farmworker Women*, 75 CHI.-KENT L. REV. 765, 769 (2000).

21. This is acknowledging of course that there are undocumented workers in other jobs who suffer similar types of oppression.

important realities faced by all undocumented workers. First, undocumented workers live with the constant risk of being deported. Deportation means loss of a job, separation from family, and the specter of an illegal border crossing to return to the United States. Second, undocumented workers hazard illegal border crossings to visit Mexico and return to the United States. These border crossings are extremely hazardous for at least two reasons: the United States policy known as Operation Gatekeeper and the smugglers (or *coyotes*) who often arrange the crossings.²² Third, undocumented workers do not have the right to recover the same remedies for labor abuses as do documented workers.²³

One alternative to an undocumented workforce that has been repeatedly suggested and tried is the development, through an immigration visa program, of a special class of agricultural workers who are allowed to legally work here for a short period of time.²⁴ These workers are called "guest workers" or "nonimmigrant workers" because there is no expectation that they will settle in the United States and become permanent residents or citizens. The historic version of this program was the *Bracero* program, created during World War II to help growers deal with the labor shortages caused by the war.²⁵ The program, under which the United States government contracted with the Mexican government for agricultural laborers, led to such widespread abuse that Lee G. Williams, a United States Department of Labor official who helped supervise the program, called it "legalized slavery."²⁶ The abuses included wages depressed by an oversupply of workers, the inability of workers to leave or change employers, too few hours to earn subsistence wages, low wages coupled with huge deductions for room and board, illegal payroll deductions for nonexistent services, and substandard housing.²⁷ In addition, the federal government withheld 10% of their paychecks, which was supposed to be paid upon the worker's return to Mexico as an incentive for the workers to return home.²⁸ The workers never recovered this money, and a movement has begun to recover that money, in partial reparation for the harms caused to the *Braceros*.²⁹

The more recent version of this alternative is the H-2A visa program,³⁰ dubbed by many as the New *Bracero* Program.³¹ The program is designed to allow growers to bring in nonimmigrant, temporary foreign agricultural labor when domestic workers are not available.³² In 1996, approximately 15,000 workers were hired

22. See discussion *infra* Part II.B.

23. See discussion *infra* Part II.B.

24. See generally Lorenzo A. Alvarado, Comment, *A Lesson From My Grandfather, the Bracero*, 22 CHICANO-LATINO L. REV. 55 (2001).

25. Alvarado, *supra* note 24, at 57-59; Maria Elena Bickerton, Note, *Prospects for a Bilateral Immigration Agreement with Mexico: Lessons from the Bracero Program*, 79 TEX. L. REV. 895, 896-905 (2001).

26. LINDA C. MAJKA & THEO J. MAJKA, FARM WORKERS, AGROBUSINESS, AND THE STATE 136 (1982).

27. Alvarado, *supra* note 24, at 62-64.

28. Laura Wides, *Braceros Rally for Drive to Recover Millions in Missing Wages Movement*, L.A. TIMES, Feb. 5, 2001, at B3.

29. *Id.* (discussing plans for the lawsuit); Paul Braverman, *The Opening Shots*, AM. LAW., June 2002, at 22 (comparing the *Bracero* movement to the reparations movement).

30. 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2000).

31. See Alvarado, *supra* note 24, at 67.

32. William M. Ross, *The Road to H-2A and Beyond: An Analysis of Migrant Worker Legislation in Agribusiness*, 5 DRAKE J. AGRIC. L. 267, 277 (2000).

under this program.³³ Although growers like the concept of the program because it helps guarantee a supply of agricultural workers, many growers perceive the existing program as being unworkable.³⁴ Within the last two years, a variety of different H-2A visa legislation has been proposed.³⁵

Many farmworkers and farmworker advocates, on the other hand, oppose this alternative because of the problems it causes for farmworkers. First, they argue that there is no shortage of agricultural workers.³⁶ Without an agricultural labor shortage, an increase in workers will depress wages and harm domestic farmworkers.³⁷ Second, many workers do not see their contracts until they arrive in the United States.³⁸ Third, such workers are easily exploited because they are only authorized to work for a single employer. If they are abused or cheated, they must either put up with the conditions or quit and go home.³⁹ Finally, since they immigrate temporarily without family or kinship ties, they are left without a social support system and must rely on their employer who thereby possesses undue control over their lives.⁴⁰ In short, they end up very much like modern day Braceros.

3. Structural Component: Farm Labor Contractors

Farmworkers can be employed in one of two ways: as a direct-hire employee or as a contract employee. A direct-hire employee is one who is hired by and works directly for the grower. A contract employee is a person employed by a farm labor contractor. The farm labor contractor has an agreement with the grower to provide labor. The grower negotiates a lump sum that is paid to the farm labor contractor for a certain number of workers. The grower does not negotiate with or pay the farmworkers individually. Any individual negotiation is done between the farm labor contractor and the farmworker. Currently, about two-thirds of farmworkers are direct hires and one-third are employed through a contractor.⁴¹ Most contract work is seasonal—either tending seasonal crops or performing seasonal or short-term work for growers with year-round crops.

The situation was summed up by Don Villarejo as follows:

33. *Id.*

34. Rain Levy Minns, *Registry Systems for Foreign and Domestic Farmworkers in the United States: Theory vs. Reality*, 15 GEO. IMMIGR. L.J. 663, 671-72 (2001); Cecilia Danger, Comment, *The H-2A Non-Immigrant Visa Program: Weakening its Provisions Would be a Step Backward for America's Farmworkers*, 31 U. MIAMI INTER-AM. L. REV. 419, 427 (2000).

35. Andrew Scott Kosegi, Note, *The H-2A Program: How the Weight of Agricultural Employer Subsidies is Breaking the Backs of Domestic Migrant Farm Workers*, 35 IND. L. REV. 269, 282-85 (2001); Theodore C. Simms II, Note, *A Fighting Chance: An Examination of Farmers' New Freedoms and Familiar Problems under the H-2A Guestworker Program*, 5 DRAKE J. AGRIC. L. 501, 507-08 (2000).

36. Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 576 (2001) (citing a 1997 study by the U.S. General Accounting Office).

37. Alvarado, *supra* note 24, at 64-66; Kimi Jackson, *Farmworkers, Nonimmigration Policy, Involuntary Servitude, and a Look at the Sheepherding Industry*, 76 CHI.-KENT L. REV. 1271, 1291-97 (2000).

38. Danger, *supra* note 34, at 426.

39. Holley, *supra* note 36, at 595.

40. *Id.* at 594-95; Jackson, *supra* note 37, at 1277.

41. Martin, *supra* note 4.

One of the most dramatic shifts in farm employment in California has been the sharp reduction in direct-hire seasonal workers, even though there has been a substantial increase in the number of regular direct-hire workers. . . . [C]ontract jobs now outnumber direct-hire "seasonal" jobs on California farms.

This is a remarkable finding. It shows that California farmers have found it important to hire significantly more year-round workers today as compared to the pre-ALRA period [before 1975], and, at the same time, now primarily rely on farm labor contractors for short-term or seasonal workers.

Not only are more contract workers utilized for seasonal jobs, more California farms than ever are turning to labor contractors to furnish laborers.⁴²

The farm labor contractor system has grown substantially since 1986.⁴³ According to a survey of California growers, they use contractors because they are a reliable source of labor, because they view them as a good way to handle short-term needs, because they have had trouble finding employees themselves, and because they can reduce the burden of paper work.⁴⁴ When a farmworker is hired, the law requires a variety of records be kept (i.e., employment taxes, income tax withholding, workers' compensation insurance).⁴⁵ Since 1986, all employers must also complete an I-9 form, which certifies that the employer has verified that an employee has the legal right to work in the United States.⁴⁶ When a farmworker is employed through a farm labor contractor, the contractor, not the grower, is the legal employer.⁴⁷ The grower does not have to keep this paperwork. In addition, the legal obligation to pay minimum wage, provide workers compensation insurance, etc., belongs to the farm labor contractor and not the employer. By securing labor through a farm labor contractor, the grower insulates himself from the legal (and, perhaps in his mind, moral) responsibility for the workers.⁴⁸

Farmworkers prefer direct-hire work for several reasons. First, this work tends to be year-round, rather than seasonal or short-term.⁴⁹ The pay is usually more and somewhat guaranteed.⁵⁰ The pay is usually hourly, as opposed to piece rate.⁵¹ Growers often see their regular workers more as people with whom they have a connection and treat them better.⁵² Finally, a grower tends to be more stable and have some resources, so that workers have the possibility of recovering compensation for legal violations.⁵³

42. Villarejo, *supra* note 5.

43. *Id.* Between 1978-1986, contract employees grew at about 2000 people per year; between 1986-1996, employment grew by about 4100 per year; and by about 5350 per year by 1999. *Id.*

44. *Id.*

45. *See id.*

46. *Id.*

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

48. DANIEL ROTHENBERG, *WITH THESE HANDS—THE HIDDEN WORLD OF MIGRANT FARMWORKERS TODAY* 117 (1998).

49. Villarejo, *supra* note 5.

50. Martin, *supra* note 4.

51. *Id.*

52. ROTHENBURG, *supra* note 48, at 117.

53. *See* Andrade, *supra* note 47, at 617.

Employment with a labor contractor, on the other hand, is less desirable. At the very least, farmworkers have fewer hours, have less stable employment, and make less money. From a structural standpoint, contractors, who are in competition with one another, often make a bid with a grower at a very low price in order to get the contract. If they cannot win the bid, they will go out of business. Once they have a low-ball contract, the only way for the contractor to make a profit is to pay the workers at substandard rates⁵⁴ or engage in some other illegal activity. A common practice among contractors is to keep a part of the payroll off of their records.⁵⁵ When a worker is kept off the payroll records, they contractor does not have to pay their taxes or social security deductions.⁵⁶ They pay those workers out of their pockets and keep the taxes.⁵⁷ Few contractors, most of whom are former farmworkers, get rich. Many feel paternalistic towards their employees and are simply glad to be out of the fields.⁵⁸ In addition, farmworkers find it harder to effectively assert their legal rights against contractors because they disappear and do not have the resources from which to collect an award.⁵⁹

The problems of working for a farm labor contractor can be much worse, though, than low pay and uncertain employment. Less scrupulous contractors make false promises when recruiting workers, provide substandard housing, transport workers in dangerous vehicles, refuse to pay wages, and loan money at exorbitantly high interest rates.⁶⁰ Penalties for these types of abuses, even if they can be collected, are not sufficient to outweigh the "years of cheap labor" from which they profited.⁶¹ Further, the paternalism can turn to cruelty when a contractor controls all aspects of the workers lives. As one interviewer described the situation:

Contractors often wield enormous authority over their workers, sometimes running their crews like small fiefdoms, hiring and firing at will, and displaying constant favoritism. They commonly play off of farmworkers' basic vulnerabilities—their poverty and limited options, their lack of working papers, their inability to speak English, their minority status, and their addictions.⁶²

Overall, from an employee's perspective, then, there is a two-tier system of employment, with direct-hire being preferred and contract employment being seen as marginal. Growers can be selective in their regular hiring and fill in with workers from a farm labor contractor. Those employees who are seen as undesirable or trouble makers because they complain, because they are undocumented, or because they seek to organize are least likely to be directly hired by a grower and must find employment, if at all, with farm labor contractors. As a result, as Marcos Camacho of the United Farm Workers wrote, "it is in this atmosphere that workers much choose whether to risk their jobs if they exercise their rights . . ."⁶³

54. *Id.*

55. ROTHEMBERG, *supra* note 48, at 94-97.

56. *Id.*

57. *Id.* at 97. The contractor, Manuel Gomez, states, "Ninety-nine percent of all contractors work outside of the law. Not one, not two—all of us. You have to break the law. Breaking the law is the only way you can make decent money." *Id.*

58. *Id.* at 105.

59. Andrade, *supra* note 47, at 617.

60. ROTHEMBERG, *supra* note 48, at 92.

61. Andrade, *supra* note 47, at 618.

62. ROTHEMBERG, *supra* note 48, at 92.

63. Marcos Camacho, *Making the ALRA/ALRB Effective* (2000), at http://migration.ucdavis.edu/rmn/changingface/cf_alra25/9_2000_camacho.html (last visited Aug. 29, 2002). See also Andrade, *supra* note 47, at 618.

B. The Transnational Lives of Farmworkers

Farmworkers have chosen to create homes and participate in communities in both the United States and Mexico. Their lives exist on both sides of the United States-Mexico border. As a result, their lives are constantly affected by the cultural border they have chosen to navigate and by the real, geographic border they are forced to cross. To truly understand the lives of female farmworkers, both of these dynamics must be taken into consideration.

Farmworkers, like many other immigrants today, refuse to choose between an identity that is defined as being based solely in Mexico or in the United States.⁶⁴ They create lives on both sides of the border. They may work and even acquire a home in the United States, while still maintaining land in Mexico.⁶⁵ While in the United States, their community is affected by people who refuse to assimilate completely. While in Mexico, their community is affected by the presence of people who have lived in the United States. Personally, in the words of a popular 1997 song by Los Tigres del Norte, "*caben dos patrias en el mismo Corazon*"—they make a place for two countries in the same heart.⁶⁶ Practically, they transform Mexican villages with money to fund public works such as churches, roads, plazas, and cemeteries.⁶⁷ Houses may be built; satellite dishes may appear; and, during holidays, there may be an influx of cars with California license plates and children speaking English.⁶⁸ Other times of the year, the villages are empty as many have gone north to work. Transformation is also taking place in the United States, where towns are affected by the huge presence of Latinos—churches may set up *quincinera* programs or a new high school may be named the "Home of the Aztecs."⁶⁹

In order to have homes and communities in both countries, however, undocumented immigrants must face the hazards of an illegal border crossing. The hazards are both human and natural. Most times, in order to cross the border, an immigrant will contract with a smuggler, called a *coyote*, *pollero*, or *patero*.⁷⁰ They take the person's money with the promise of helping him cross the border. Some are honest; others are not. A dishonest *coyote* may take everything a person has and leave him in Mexico. Worse yet, he may leave him to die in the mountains or desert along the border or locked in a car trunk or train car.⁷¹ In the lawless area of the border crossings, immigrants are often robbed or beaten. Female immigrants are often forcibly raped or must agree to have sex with a smuggler in order to be able to cross.⁷²

64. Maria L. Ontiveros, *Forging Our Identity: Transformative Resistance in the Areas of Work, Class, and the Law*, 33 U.C. DAVIS L. REV. 1057, 1062-71 (2000) [hereinafter *Forging Our Identity*].

65. *Id.* at 1067.

66. Los Tigres del Norte, *Mis Dos Patrias, on JEFE DE JEFES* (Fonorisa 1997).

67. In 1997, Mexican emigrants sent \$4.7 billion to Mexico. Sam Quinones, *No Se Puede Volver a Casa*, HEMISPHERES MAG., Dec. 1998, at 99.

68. *Forging Our Identity*, *supra* note 64, at 1067-68; ROTHENBERG, *supra* note 48, at 298-322.

69. *Forging Our Identity*, *supra* note 64, at 1068, 1068 n.42; Bettina Boxall, *Migrants' New Roots Transform Rural Life*, L.A. TIMES, Apr. 20, 1999, at A1; ROTHENBERG, *supra* note 48, at 181-205.

70. ROTHENBERG, *supra* note 48, at 129.

71. *Id.* at 127-35; Don Terry, *Seven Die in California Desert, Probably Left by Smuggler*, N.Y. TIMES, Aug. 14, 1998, at A12.

72. ROTHENBERG, *supra* note 48, at 127-35.

In addition to the dangers caused by smugglers, the United States government policy known as Operation Gatekeeper has also led to the death of approximately one person *every day* along the U.S.-Mexico border.⁷³ This policy, begun in late 1994, seeks to end the flow of undocumented immigrants across the U.S.-Mexico border in the *most visible, populated* areas. As a result, immigrants are attempting to cross the border at other, more isolated locales. These other locales are far more deadly because they are in the extreme cold of the mountains or the extreme heat of the desert. Phase I of Operation Gatekeeper, begun in October 1994, sealed the westernmost fourteen miles of the border, near San Diego, California, and pushed immigrants into the desolate and dangerous Otay Mountains, as well into the more hospitable Eastern San Diego County.⁷⁴ Phase II, begun in 1996, targeted Eastern San Diego County and pushed the illegal border crossings into the 6000 foot high, snow-covered Tecate Mountains.⁷⁵ Phase III focused on closing the El Centro corridor and has pushed migrants into the desert.⁷⁶ As the number of immigrants apprehended in the border towns has decreased, the number apprehended and perishing in the desolate and dangerous other areas has increased. Operation Gatekeeper has not decreased undocumented immigration. It has only shifted it to places where immigrants are much more likely to die of exposure and dehydration. This policy of the United States has made deportation and the possibility of reentering the United States a much more deadly threat for immigrant farmworkers.

C. Conditions of Work

1. Work, Hours, and Compensation

A farmworker's day starts early, often around 3:00 A.M. The exact time depends on whether the worker has a regular job to report to or whether he needs to try to find work with a labor contractor. If he arrives too late, the contractors will fill their spots with other workers. Distance to the job site and the availability of transportation also affect the time he gets up. Many farmworkers walk, bicycle, or take buses to jobs or to meet with contractors. These commutes routinely take several hours.⁷⁷ A female farmworker also has to allow time to get her family ready for the day. In most households, the woman is still expected to perform all the household chores and prepare meals for the family.⁷⁸ Farmworkers are then transported to their worksite for the day, often in overcrowded, unsafe vans.⁷⁹

73. AMERICAN FRIENDS SERVICE COMMITTEE, DEPORTEE MONITORING PROJECT Part II (2000), at <http://www.afsc.org/sandiego/brdr2kcr.htm> (on file with author); see also California Rural Legal Assistance Foundation, at <http://www.stopgatekeeper.org> (last visited Aug. 19, 2002) (an internet web site of the California Rural Legal Assistance Foundation's Border Project).

74. AMERICAN FRIENDS SERVICE COMMITTEE, *supra* note 73, at Part II.

75. *Id.*

76. *Id.*

77. ROTHENBERG, *supra* note 48, at 17-19.

78. *Id.* at 55.

79. In 1999, a van accident killed twelve workers in an overcrowded van without seatbelts. The accident led to some reforms, although problems still exist. Raul Hernandez, *Farm Law Aims to Halt Unsafe Travel for Workers*, VENTURA COUNTY STAR, Oct. 22, 2000, at B01. See also ROTHENBERG, *supra* note 48, at 113-17 (discussing the regulation of farmworker transportation and containing an interview with a driver of a ritero or shuttle van).

Once at the worksite, work begins. The work can be harvesting lettuce or strawberries, either requiring hours of crawling through muddy rows. Alternately, a farmworker might be climbing ladders, while carrying a large bag over her shoulder to pick nectarines or apples. In addition to harvesting, farmworkers weed, cultivate, and tie vines. Although women perform most all the same jobs as men, there is some segregation between "men's jobs" and "women's jobs," with the "men's jobs" paying more.⁸⁰ All of the jobs are physically demanding, dangerous work.⁸¹ The workday is long, and breaks are discouraged. The rate of work is regulated, either by foremen or "crew pushers," constantly walking among the workers and urging them on or by field-packing vehicles which lead the workers up the rows. As the produce is picked, it is put onto the conveyor belt to be processed so that the speed of the machine controls the pace of the work.⁸²

A farmworker must work fast to retain her job. The compensation structure ensures this. Originally, agricultural employees were excluded entirely from the provisions of the Fair Labor Standards Act (FLSA), including the payment of minimum wage.⁸³ Currently, the overtime provisions of the FLSA do not apply to agriculture, and small farms are excepted from the minimum wage requirement.⁸⁴ Instead, many workers are paid a piece-rate, which varies by how much they are able to pick. Although the piece-rate at large farms must comply with the minimum wage, growers still determine how fast they want workers to harvest and then set how much they will pay per piece based on that speed and the minimum wage. Philip Martin explained it this way:

After minimum wage laws were applied to agriculture, farmers were required to keep records of the hours each employee worked and how many units of work each employee accomplished. . . . Most farm employers terminated workers who did not work fast enough to earn the minimum wage at the piece rate offered, establishing an "iron triangle" between minimum wages, piece rates, and minimum productivity standards. For example, if the minimum wage is \$5 an hour, and the employer is paying a piece rate of \$10 a bin, then workers must pick an average one-half bin an hour to earn the minimum wage; slower workers may lawfully be terminated.⁸⁵

Those hired by farm labor contractors are paid by the contractors, with the compensation problems discussed above.

The result is a group of extremely hard-working, very poor people. In California, farmworkers average an annual farm income of \$5500, with 55% earning less than \$7500.⁸⁶ Nationwide, over three-fifths of farmworker households fall

80. Maria M. Dominguez, *Sex Discrimination & Sexual Harassment in Agricultural Labor*, 6 AM. U. J. GENDER & L. 231, 241-42, 245-50 (1997).

81. Farm work, construction, and mining are consistently found to be the three most dangerous occupations in the United States. Holley, *supra* note 36, at 577-78.

82. Martin, *supra* note 4.

83. Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1377 (1987).

84. Kosegi, *supra* note 35, at 296-97.

85. Martin, *supra* note 4.

86. *Id.* A different survey, done in 1996, estimated the average annual farm earnings at \$5500. This figure was based on an average forty-two hour workweek and twenty-six weeks of employment. Numbers were generated by interviews done by the National Agricultural Workers Survey. *Id.*

below the poverty line.⁸⁷ Farmworking women earn even less than their male counterparts because they are given fewer hours and are paid less per hour.⁸⁸

2. *Methods of Workplace Control*

Most employers use hiring and retention as a way to motivate workers. Just as work rate and pay, as traditional methods of workplace control are different for farmworkers, so is the area of retention. For farmworkers, the retention decision is affected by three things: the threat of deportation; the possibility of losing a direct-hire job and becoming a contractor; and the H-2A guest worker program. An employer who employs an undocumented worker possesses the incredibly powerful threat of contacting immigration officials to try to have a worker deported. This threat is used to prevent employees from complaining about wages that are too low or conditions that are unjust. Farmworkers fear deportation because of the hardships involved in the deportation process (including detention and transport), the separation from their family, and the specter of a dangerous bordering crossing to return to the Untied States. Growers and contractors realize this and use the threat to their advantage.⁸⁹

A less significant, though still powerful threat, is the loss of a direct hire job. This loss means that the workers must look for less desirable work with a farm labor contractor. As Marcus Camacho, General Counsel for the United Farm Workers of America, commented,

Many times the loss of a seasonal [direct-hire] job can mean no work for the rest of the year, or finding intermittent work through farm labor contractors that many times pay much lower wages and provide worse working conditions than their usual job. In addition farm labor contractors give little hope of continued employment. It is in this atmosphere that workers must choose whether to risk their jobs if they exercise their rights under the [Agricultural Labor Relations Act].⁹⁰

By firing a direct-hire worker and hiring a contract worker, the grower can retain the benefits of having an employee while still punishing the employee for asserting his or her rights. Many women do not report discrimination because they fear such negative economic repercussions.⁹¹

A different issue is unique to employment through Guest Worker programs. Under these programs, workers come to the United States to work with a specific employer.⁹² If that employer no longer wants the employee's services, either because of poor performance or because of an assertion of rights, the employer can simply terminate the employment and terminate the visa.⁹³ Although the programs theoretically have provisions to protect workers, workers do not have access to courts to enforce any of these provisions.⁹⁴ Finally, the "unwritten rules" for H-2A workers that they should keep silent, be productive, not complain, and

87. Kamm, *supra* note 20, at 768.

88. Dominguez, *supra* note 80, at 241.

89. *Id.* at 257.

90. Camacho, *supra* note 63.

91. Dominguez, *supra* note 80, at 257 (citing testimony of Dolores Huerta, First Vice President of the United Farm Workers).

92. Kosegi, *supra* note 35, at 288.

93. *E.g., id.* at 288-89.

94. *E.g., Holley, supra* note 36, at 597-616 (arguing that administrative and court decisions deny H-2A workers access to the legal system to enforce their rights).

not organize has led to the anomalous result in North Carolina that no H-2A worker has ever made a complaint with a government agency.⁹⁵

Female farmworkers are particularly subject to two other methods of workplace control: harassment and commodification. Ninety percent of female farmworkers report that sexual harassment is a major problem.⁹⁶ Female farmworkers are constantly badgered for dates and sexual favors. If they reject these requests, they are fired or find themselves with lower pay and inferior job assignments.⁹⁷ They are routinely touched, groped, and assaulted. If they complain or resist, their work assignments suffer.⁹⁸ While investigating harassment of farmworker women California, EEOC staff discovered that

hundreds, if not thousands, of women had to have sex with supervisors to get or keep jobs and/or put up with a constant barrage of grabbing and touching and propositions for sex by supervisors. A worker from Salinas, California eventually told us that farm workers referred to one company's field as the *field de calzon*, or "field of panties," because so many supervisors raped women there.⁹⁹

These women are targeted because of a combination of their sex, national origin, class, and immigration status.¹⁰⁰ All these factors are used to control how women behave in the workplace.

Growers and contractors also control female farmworkers, using their sex, national origin, class, and immigration status, in a process I have previously labeled commodification, but can also be understood as a form of identity-based exploitation.¹⁰¹ Under this theory, growers and contractors treat female farmworkers differently than others because they do not view them as human beings. They view them as something less—a commodity to be utilized or exploited. Labeling immigrants as "illegals" or "aliens" constructs them as a less-than-human other. Because of our socially held view of racial and gender hierarchies, certain types of exploitation and control are uniquely acceptable when applied to certain workers, especially women, immigrants, and workers of color. Therefore, growers and contractors feel free to provide housing and sanitation facilities that would better fit animals than people. In addition, in order to increase productivity, female farmworkers are bullied, threatened, and abused in ways that draw upon the hierar-

95. Jackson, *supra* note 37, at 1285-88 (stating that the only complaints have been made by worker advocate or church groups).

96. Dominguez, *supra* note 80, at 255.

97. Kamm, *supra* note 20, at 774-75 (discussing the facts of *Romero v. Santa Maria Berry Farms*, No. SM 098249, 1997 WL 743456, at *1 (Cal. App. Dep't Super. Ct. July 24, 1997)).

98. *Id.* at 775 (discussing the facts of *EEOC v. C & M Packing, Inc.*, C-98 20975 (N.D. Cal. 1988)).

99. William R. Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 U.C. DAVIS L. REV. 1075, 1080 (2000).

100. Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 818-21 (1993) [hereinafter *Three Perspectives*] (discussing the inseparability of race from sex in the sexual harassment experiences of women of color); Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607, 619-22 (1994) [hereinafter *To Help Those Most in Need*]; Maria L. Ontiveros, *Fictionalizing Harassment—Disclosing the Truth*, 93 MICH. L. REV. 1373, 1385-88 (1995) [hereinafter *Fictionalizing Harassment*].

101. Maria L. Ontiveros, *A Vision of Global Capitalism That Puts Women and People of Color at the Center*, 3 J. SMALL & EMERGING BUS. L. 27, 33-37 (1999); A NEW COURSE FOR LABOUR UNIONS, *supra* note 1, at 422.

chies that have their roots in the paternalism of Latino culture and anti-immigrant sentiment.

3. Health & Safety, Child Labor, & Other Workplace Conditions

Conditions in the field are rough, at best. Farmworkers are exposed to pesticides, either by handling the produce that has been sprayed, by applying the pesticide themselves, or, in particularly egregious situations, by being directly sprayed along with the crops.¹⁰² As a result, "farmworkers suffer the highest rates of chemical-related illnesses."¹⁰³ Female farmworkers face additional risks because of their smaller relative size and because the harmful effects of pesticides may be passed onto the fetus of a pregnant woman or to her baby through nursing.¹⁰⁴ The children of farmworkers, who are exposed either by their presence in the fields or through residue which their parents bring home with them, are particularly susceptible because of their immature immune system, smaller physical size, and lack of protective clothing.¹⁰⁵

Although required by law, fields often lack basic sanitation such as hand-washing facilities or bathrooms. The lack of facilities particularly hurts female farmworkers because they are at an increased risk for urinary infections if they are unable to use a bathroom.¹⁰⁶ A pregnant woman with a urinary infection has an increased likelihood of miscarriage, premature labor, and neonatal death.¹⁰⁷

Where there are farmworkers, there are children.¹⁰⁸ In California, there is roughly one child for every adult farmworker.¹⁰⁹ The education available for these children is sporadic and, often times, ineffective. Often, the children work in the fields under the same conditions as their parents. Children as young as twelve are allowed to work in the fields, and much younger children often accompany their parents if they lack childcare.¹¹⁰ As eleven-year-old Luisa Cervantes said, "We go to the fields and weed and pick. It's hard because we don't eat until we get home. Sometimes I like for school vacation to be over so we don't have to go to the fields."¹¹¹

The health of farmworkers and their children is tragic. In 1991, the average

102. See generally Victoria Clark, *Enforcement of Pesticide Regulation in California: A Case Study of the Experience with Methyl Bromide*, 31 GOLDEN GATE U. L. REV. 465 (2001); Shannon Adair Tool, Comment, *Farmworkers and FIFRA: Laboring Under the Cloud*, 31 SW. U. L. REV. 93 (2001).

103. Tool, *supra* note 102, at 99.

104. *Id.* at 110-11.

105. *Id.* at 110.

106. Kamm, *supra* note 20, at 769.

107. *Id.*

108. See generally ROTHENBERG, *supra* note 48, at 272-97.

109. This calculation is based on the numbers found below. Sixty percent of farmworkers are married. Of those, approximately 60% have children with them (about 36% of the total). They average three children each, for a total of one hundred children per one hundred total adults. Martin, *supra* note 4.

110. The General Accounting Office (GAO) reports that between 129,000 and 290,000 fourteen to seventeen-year-olds are hired to work on crops nationally. Tool, *supra* note 102, at 109. Human Rights Watch estimates the number of children working on crops at 800,000. *Id.* at 109 n.170.

111. NANCY BURSKI, EARTH ANGELS: MIGRANT CHILDREN IN AMERICA 44 (1994).

life expectancy in the United States was seventy-three years.¹¹² A migrant farmworker could expect to die before he or she was fifty.¹¹³ In the California farmworker population, 30 out of every 1000 infants die—more than twice the infant mortality rate for the overall United States population, and mortality rates among young California farmworking children was 50% higher than that.¹¹⁴ The rates of diabetes, parasitic and infectious diseases, as well as chronic disease for the farmworker population are also substantially above the national average.¹¹⁵

4. Work-Family Issues

At the end of a long day, the farmworker returns to her house. Her house may consist of a cardboard, plywood, or tin shack, which may be part of a camp nestled in the hills.¹¹⁶ She most likely does not have a telephone or other access to the world.¹¹⁷ If she lacks housing, she will make a home in the fields. After her long day at work, she is now expected to cook, clean, and take care of the children.¹¹⁸ Like so many women, she must perform double-duty.

At home, her behavior and future may be controlled by her husband or the other men in her household. Due to the cultural values of machismo, many female farmworkers subordinate their own desires, interests, and needs to the will of their husbands or fathers.¹¹⁹ Approximately one-third of female farmworkers are victims of domestic abuse.¹²⁰ Because of their cultural upbringing these women may not even recognize the treatment as domestic abuse.¹²¹ Once they do, these women face enormous obstacles to ending this abuse, including the lack of money, having nowhere to go, and not speaking English.¹²² In addition, lack of culturally-sensitive resources presents a problem.¹²³ For those women who are undocumented, fear of being reported to immigration also prevents them from escaping the abuse.¹²⁴

112. Henry G. Cisneros, *Introduction to Buirski*, *supra* note 111, at 9 (citing UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, 1993 RECOMMENDATIONS OF THE NATIONAL ADVISORY COUNCIL ON MIGRANT HEALTH 36 (1993)).

113. *Id.*

114. *Id.*

115. *Id.*

116. ROTHENBURG, *supra* note 48.

117. Less than 20% of California's farmworkers live in a household with a telephone. CALIFORNIA AGRICULTURAL LABOR RELATIONS BOARD, *supra* note 10, at 8.

118. ROTHENBERG, *supra* note 48, at 55; Kamm, *supra* note 20, at 770.

119. Cecelia M. Espenoza, *No Relief for the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersections*, 83 MARQ. L. REV. 163, 207 (1999).

120. Pat Swift, *Labor Official Will Reach Out to Female Farm Workers*, THE BUFFALO NEWS, Sept. 9, 2000, at 7C (citing a 1995 study). Studies on related populations have found 71% of Mexican women who are recipients of AFDC/CalWorks (study conducted by California-based Equal Rights Advocates) have been victims of domestic violence and 34% of Latina immigrants, in general (study conducted by California-based Immigrant Women's Task Force of the Coalition for Immigrant and Refugee Rights and Service). Both are cited in Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. POVERTY L. & POL'Y 245 (2000). See also Pamela Warrick, *A Life of Their Own*, L.A. TIMES, June 7, 1996, at E1.

121. Espenoza, *supra* note 119, at 196.

122. Dutton et al., *supra* note 120, at 278-79.

123. *Id.* at 299-302. See also Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001).

124. Dutton et al., *supra* note 120, at 293.

Finally, for female farmworkers, especially, the concerns of her children also affect her. She may be concerned about the tangible problem of lack of childcare, or she may be plagued by the intangible worry that affects women when they see their children suffering from illness, toiling in the fields, and going without education. Rafael Guerra, a migrant educator and former migrant worker summarized it as follows:

Let me give you an idea of how it was. You're getting ready to go up North. The father would make a decision with his compadre. We are going to go to Plainview, we are going to go to California. But as soon as the decision was made, the mother was the one that started putting things together, whatever we were going to take up North.

It was the mother that would cook the pinole or whatever she could take on the road. The mother was worried all the time. What do you do when you're in the truck and you're together with thirty or forty other people, and sometimes you don't even know the people. It was the mother who had to worry all day—I hope my son won't have diarrhea. And if he has diarrhea, how do you take care of it in the truck when the truck is driving and the crew leader is not going to stop.

And then we got to the place. It was the mother who was hoping for the best living area, which was not much, maybe a 12-by-12 little shack or together with everybody else. Sometimes they'd put three or four families in one long barrack, but she had to find a little corner where she was going to put her stove which was made out of kerosene.

But comes day to work, the mother would get up an hour before anybody else. She was the one who had to get the food ready. Cook the breakfast okay. Cook the breakfast early, so you could see that little burner, and you could see that kerosene, and you were under the covers because it was cold and you were hoping it wasn't time to get up. But it was time.¹²⁵

III. A RESPONSE FROM THE FIELDS

Female farmworkers, confronted with the conditions described above, have not sat idly by. Instead, they have actively challenged these conditions. In reviewing their response, two things stand out. First, the law, as it was interpreted before their challenges, was not ideally suited to address their problems. The "fit" between the problems that they experience as immigrant women workers and the solutions offered by the existing law was not very close. Second, the workers and their representatives created new ways to challenge the problems that did reflect their unique identities. In many ways, their response drew upon the strengths of these unique characteristics to forge a successful response. Each of the following responses will highlight a specific farmworker response, the limitations with the preexisting law, and how these responses worked around the existing law.

A. *Workplace Organization*

1. *The United Farm Workers*

The traditional method for working class people to unite and challenge op-

125. BUIRSKI, *supra* note 111, at 136.

pression at the workplace is through labor unions. Since 1935, the National Labor Relations Act¹²⁶ has protected the rights of workers in the United States to participate in labor unions by making it illegal for employers to discriminate against workers based on their union activity. The law, however, specifically excludes several classes of employees—including agricultural workers—from this protection.¹²⁷ Under federal law, an employer may fire an agricultural worker solely for her union activity. Thus, the traditional law offered little help for farmworkers seeking to organize.

In California, farmworkers responded by organizing anyway. The United Farm Workers, started in the 1960s, took on the growers even without legal protection.¹²⁸ The United Farm Workers, originally led by Cesar Chavez, have a rich history which cannot be fully covered in this article. This section will focus on four “moments” in the history of the United Farm Workers (UFW) to illustrate the importance of identity-based organizing: the formation of the UFW; the Delano strike and grape boycott; the election battle with the Teamsters and the UFW march from Delano to Sacramento; and the current work of the UFW.¹²⁹

In 1962, Cesar Chavez formed the United Farm Workers. Chavez had been strongly influenced by his work with Community Service Organization (CSO), and his community-based organizing strategy echoed the CSO approach, emphasizing nonviolence, community building, teaching the rights and responsibilities of citizenship, defining workers’ rights beyond traditional wage and benefit issues, and creating service programs. This departure from a more traditional union model aligned the interests of the UFW with other social justice movements of the early 1960s, and they garnered the support of liberals, social and religious activists, the civil rights movement, those in the anti-war movement, students, and prominent politicians, particularly Robert Kennedy. In sum, from the outset,

[t]he United Farm Workers was completely different. It did not focus solely on issues limited to the workplace; instead, it set up credit unions, schools, automobiles parts co-ops, and burial insurance funds. Further, its message went beyond simply asking for more money—it was a demand for dignity, respect and the right to participate in the workplace. It included a call to be treated as a human being.¹³⁰

Membership in the union meant membership in a community committed to similar goals.

The first labor action of the UFW was to strike the vineyards of table grape growers. The strike was called on September 16, 1965, Mexican Independence Day, technically in support of Filipino farmworkers, who had already started to strike. The UFW realized that picketing at vineyards was not likely to result in

126. 29 U.S.C. § 151 (2000).

127. *Id.* § 152(3); *A NEW COURSE FOR LABOUR UNIONS*, *supra* note 1, at 226, 417.

128. *Forging Our Identity*, *supra* note 64, at 1059-62.

129. The following account draws heavily from MARLYN EDID, *FARM LABOR ORGANIZING—TRENDS AND PROSPECTS* 36-41 (1994). For other accounts of Cesar Chavez and UFW history, see JACQUES E. LEVY, *CESAR CHAVEZ: AUTOBIOGRAPHY OF LA CAUSA* (1975); SAM KUSHNER, *LONG ROAD TO DELANO* (1975); MARK DAY, *FORTY ACRES: CESAR CHAVEZ AND THE FARM WORKERS* (1971); GEORGE D. HORWITZ, *LA CAUSA: THE CALIFORNIA GRAPE STRIKE* (1970); PETER MATTHIESSEN, *SAL SI PUEDES: CESAR CHAVEZ AND THE NEW AMERICAN REVOLUTION* (1969); JOHN GREGORY DUNNE, *DELANO: THE STORY OF THE CALIFORNIA GRAPE STRIKE* (1967); and EUGENE NELSON, *HUELGA: THE FIRST 100 DAYS OF THE GREAT DELANO GRAPE STRIKE* (1966).

130. *Forging Our Identity*, *supra* note 64, at 1060.

major social change, so, in October, they launched a major primary and secondary boycott of table grapes.¹³¹ The boycotts were very effective in bringing publicity to the UFW and the plight of the farmworkers. Further, because of the public pressure that resulted from the boycotts and the support of unions in the transportation, dock, and retail industries, the UFW began signing contracts with grape producers. The secondary boycott continued to emphasize the political, human rights, and social movement nature of the farmworkers, as opposed to a more limited vision of it as a traditional labor union.

By 1966, the Teamsters union realized that grape growers were willing to sign agricultural contracts, and it began courting growers to sign contracts with them, instead of the more democratic and demanding United Farm Workers. Recognizing a good deal, growers started signing sham, sweetheart contracts with the Teamsters, a union which worked vehemently against the United Farm Workers. The Teamsters intervention turned the struggle into an issue of democracy and the right of the workers to vote to choose their representative.¹³² The UFW organized a march from Delano to Sacramento to continue to publicize their issues and to emphasize the need to choose their own representatives. The march was inspired by Martin Luther King Jr.'s Selma, Alabama march and helped connect the UFW to the civil rights movement. The march, however, included symbols unique to the farmworker community. Held between Lent and Easter Sunday, it was patterned after the Lenten peregrinations of Mexico, whose themes were "Penitence, Pilgrimage, and Revolution." Images of the Virgin of Guadalupe were carried at the front of the march. The marchers also carried ballot boxes with "Vote" written on them to emphasize their call for participation. The UFW kept battling for ten long years and eventually won the right to organize and represent farmworkers.

The UFW today continues to face challenges. After a period of semi-dormancy, they have once again become active in organizing farmworkers. The most recent battlefield has been in the strawberry fields, involving the employees of the Coastal Berry Company. Between about 1995-2000, the UFW had been aggressively organizing in these fields, and the growers had been actively resisting their efforts. After a series of disputed elections,¹³³ the UFW has become the representatives for the workers in Ventura County, California.¹³⁴ A different union, the Coastal Berry Farmworkers Committee, has become the representative for the workers in Monterey and Santa Cruz Counties.¹³⁵ The Coastal Berry Farmworkers Committee is loosely affiliated with the strawberry growers. According to interviews with the United Farm Workers, those workers who voted for the UFW were generally second-generation immigrants and those who had been directly hired. Those voting for Coastal Berry Farmworkers Committee were generally recent immigrants who had been hired through farm labor contractors. In many instances,

131. Secondary boycotts, where strikers picket at a location other than the employer's place of business (i.e., strikers picketing a grocery store where grapes are distributed, rather than the vineyard) are generally prohibited under federal labor law. 29 U.S.C. § 158(b)(4) (2000).

132. The federal National Labor Relations Act prohibits the signing of contracts without an indication of majority support for a union. *Id.* § 159.

133. The legal history of the campaign is found in the following decisions of the Agricultural Labor Relations Board: Gargiulo, Inc., 23 A.L.R.B. No. 5 (1997); Coastal Berry Co., 25 A.L.R.B. No. 5 (1997); Coastal Berry Co., 25 A.L.R.B. No. 3 (Aug. 12, 1999); Coastal Berry Co., 26 A.L.R.B. No. 1 (Mar. 20, 2000); Coastal Berry Co., 26 A.L.R.B. No. 2 (Apr. 25, 2000); Coastal Berry Co., 26 A.L.R.B. No. 3 (May 10, 2000).

134. Coastal Berry Co., No. 99-RC-4-SAL (May 4, 2000).

135. *Id.*

the contractors (who themselves are dependent on the good will of the growers) strongly encouraged the workers to vote for the Coastal Berry Farmworkers Committee.¹³⁶ Although the UFW was successful with its traditional constituency, it still needs to learn how to negotiate the new rules of immigration and farm labor contractors to continue to be effective.

2. California's Agricultural Labor Relations Act

In 1975, in direct response to the work of the UFW, the California legislature passed and Governor Gerry Brown signed California's Agricultural Labor Relations Act (ALRA).¹³⁷ Although the ALRA was modeled after the federal National Labor Relations Act (NLRA), it contained several significant differences to take account of the unique nature of agricultural employment. The California Supreme Court summarized the differences this way:

- 1) the workforce is primarily migrant and cannot effectively be reached at permanent addresses; 2) workers move from site to site, often arriving at different times of the day; 3) there are usually no adjacent public areas where the workers congregate or through which they regularly pass; 4) substantial percentage of agricultural workers speak a language other than English; 5) many agricultural workers are illiterate; and 6) elections under the ALRA happen very quickly.¹³⁸

This section discusses those provisions of the ALRA that were tailored to meet the unique nature of farm labor and evaluates the decisions interpreting and applying these provisions. These areas include union organizer access to workers, make-whole remedies, strike replacements, secondary boycotts, elections, and the definition of an employer. This section argues that the ALRA is most successful when the Agricultural Labor Relations Board (ALRB) and the California courts recognize the unique characteristics of farm labor and apply the law accordingly. The ALRA is least effective when the Board and courts ignore these differences and interpret the ALRA more in line with the NLRA.

During a union election campaign, unions want access to the workforce in order to give them information about the union, to answer questions, etc. Under federal NLRA doctrine, nonemployee union organizers do not have the right to enter the employer's property to talk with the employees.¹³⁹ Under regulations promulgated by the ALRB,¹⁴⁰ a limited number of union organizers are allowed to enter the employer's workplace (usually a field) for one hour prior to the start of work, one hour at the end of the workday, and one hour during the day (which covers the lunch period). In addition, the Board and courts have allowed limited access to farm labor camps run by growers.¹⁴¹ The California Supreme Court upheld these regulations because of the difficulty of organizing farmworkers and the unique nature of their living situation. In this way, the law has been responsive

136. See also Maria Alicia Bavra, *Why Strawberry Fields Have Been Barren for UFW/Many Factors in Union's Loss Last Week in Watsonville Vote*, S.F. CHRON., June 7, 1999, at A1.

137. CAL. LAB. CODE § 1140 (West 2002).

138. Sam Andrews' Sons v. ALRB, 47 Cal. 3d 157, 187 n.1 (1988) (Broussard, J., concurring and dissenting). See also ALRB v. Superior Court, 16 Cal. 3d 392, 414-16 (1976).

139. Lechmere, Inc. v. NLRB, 502 U.S. 527, 540-41 (1992) (upholding an employer's right to exclude nonemployee union organizers from his or her property).

140. CAL. CODE REGS. tit. 8, § 20900 (2002).

141. Sam Andrews' Sons v. ALRB, 47 Cal. 3d at 174-80.

to the special circumstances of farmworkers.

The courts and the ALRB, however, have limited access in ways that fail to address the issues unique to farmworkers. First, the purpose of access has been strictly limited to a form of organizing approved by the ALRB. When a union employee entered an employer's field for the purpose of inspecting conditions and reporting health and safety violations as a way to advocate for the workers and eventually organize them, the employer protested. The ALRB agreed with the employer and stated that such activity shows an "intentional disregard for access rules" because "the union appears to have been motivated by an organizing tactic which the Board considers prohibited by the access regulations."¹⁴² The case reached this conclusion, despite a finding that the activity did not interfere with production. To truly serve farmworkers, access regulations should not be used to restrain the scope or tactical choices of organizing because farmworker needs are so broad that they do not fit within the narrow issues usually defined by the ALRB as union issues. Similarly, Board decisions limiting post-certification access¹⁴³ unduly limit the role that a union plays in workers' lives and the continuing difficulty of serving farmworkers because of their unique condition.

A second area where the ALRA attempts to create a new approach is through the use of make-whole remedies for refusals to bargain. Both the NLRA and ALRA require that, following a union election, both parties bargain in good faith to try and reach a contract. Under the NLRA, if no agreement is reached, either no contract is signed or the employer implements its "last best offer," often resulting in deunionization.¹⁴⁴ In the agricultural area, this has been a particular problem because of the temporary/seasonal nature of work. A delay in negotiations could mean that the work would end before a contract is signed. As a result, the ALRA included a provision which allows for the Board to award the pay and benefits to workers that they would have received under a contract, if the employer had not refused to bargain.¹⁴⁵ In many cases, however, the courts have overruled a Board's award of a make-whole remedy and have implemented strict requirements for the award.¹⁴⁶ As a result, growers' refusal to bargain continues to be such a problem that in 60% of the cases where a union wins an election, the grower never agrees to

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A similar fate has befallen two other provisions that offer unfulfilled promises for labor law tailored to a unique workforce: strike replacements and secondary boycotts. Under federal NLRA doctrine, an employee that is engaged in an economic strike may not be fired,¹⁴⁹ but she may be permanently replaced.¹⁵⁰ Under the ALRA, an employer may only use permanent replacements if it can show that it was necessary to offer permanent employment to secure replacements, and "permanent" generally only lasts as long as the current season.¹⁵¹ The ALRB departed from the NLRA because of the relative informality of the hiring process, a lower expectation of continuing employment, and the relative ease of replacing employees.¹⁵² While this departure from the NLRA and recognition of unique structural factors is admirable, the ALRB could easily have only allowed for temporary replacements. Such a move would be consistent with labor law in most other countries, with the make-whole remedies and power of the ALRA, and would prevent employers from hiring permanent replacements and using them to try to decertify the union.¹⁵³

The ALRA also included a provision allowing for secondary boycotts.¹⁵⁴ This provision recognizes the importance of the use of secondary boycotts in the history of the UFW, as well as its political utility in building a campaign for dignity and social justice.¹⁵⁵ In addition, it builds upon pre-ALRA findings by the California Supreme Court which recognized these activities as implicating First Amendment rights.¹⁵⁶ Unfortunately, the Board has limited the use of secondary boycotts.¹⁵⁷ A more expansive reading of the ALRA's language would allow for more equal bargaining power for farmworkers.

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148. Nick Madigan & John M. Broder, *Farm Workers in California Cheered by Meditation Law*, N.Y. TIMES, Oct. 2, 2002, at A18.

149. Laidlaw Corp., 171 N.L.R.B. 1366 (1968).

150. NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938).

151. Seabreeze Berry Farms, 7 A.L.R.B. No. 40 (1981).

152. *Id.* at 6-7.

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156. United Farm Workers of America v. Superior Court, 14 Cal. 3d 902 (1975).

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the grower is responsible for unfair labor practices committed by a contractor.¹⁵⁹ Because of the seasonal nature of work and out of fear that a long election campaign could result in employee coercion,¹⁶⁰ the ALRA provides for elections within seven days following the filing of a representation petition.¹⁶¹ The ALRA also emphasizes elections, prohibiting voluntary recognition of unions.¹⁶² This provision serves two purposes—it prevents sweetheart deals, such as those signed with the Teamsters during the early days of the United Farm Workers story, and it ensures that the workers engage in the political/citizenship work of voting. These provisions of the ALRA serve to recognize the unique nature of the farmworkers.

B. Individual Statutory Lawsuits

Female farmworkers struggling against harassment and discriminatory pay and work conditions should be able to file lawsuits under Title VII of the Civil Rights Act of 1964.¹⁶³ Unfortunately, several limitations of the law make this difficult. First, the problems faced by these women are a result of a combination of their sex, their national origin, and their immigration status,¹⁶⁴ however, the law focuses on discrimination based on one factor only.¹⁶⁵ Thus, the law has difficulty truly understanding and framing the problem. Second, for undocumented workers, the argument has been made that they are not protected by various statutes because they do not have the legal right to be here in the first place.¹⁶⁶ The United States Supreme Court recently stated that, even when undocumented work-

159. *Vista Verde Farms v. ALRB*, 29 Cal. 3d 307 (1981).

160. For a discussion of the latter problems in the National Labor Relations Act context, see PAUL WEILER, GOVERNING THE WORKPLACE 253-61 (1990).

161. CAL. LAB. CODE § 1156.3(a)(4) (West 2002). In strike situations, an election can be held within forty-eight hours of the filing of a representation petition.

162. CAL. LAB. CODE § 1153(f) (West 2002). Voluntary recognition is allowed under the National Labor Relations Act if a union can show that it has the support of over 50% of the bargaining unit.

163. 42 U.S.C. § 2000-e (2000).

164. A NEW COURSE FOR LABOUR UNIONS, *supra* note 1, at 12. This argument is also developed more fully in *Three Perspectives*, *supra* note 100 and *To Help Those Most in Need*, *supra* note 100, at 607, 617-22.

165. For a critique of this limitation as this applies to women of color, see *Fictionalizing Harassment*, *supra* note 100, at 1394-400.

166. For a discussion of cases which make this argument under Title VII, as well a refutation of that provision, see generally *To Help Those Most in Need*, *supra* note 100, at 619-22. For a discussion of cases and articles making this argument under the National Labor Relations Act see *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984); *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992); and *NLRB v. Apollo Tire Co.*, 604 F.2d 1180 (9th Cir. 1979). Articles include Daniel R. Fjelstad, Comment, *The National Labor Relations Act and Undocumented Workers: Local 512 v. NLRB After the Immigration Reform and Control Act of 1986*, 62 WASH. L. REV. 595 (1987); Christine Neylon O'Brien, *Reinstatement and Back Pay for Undocumented Workers to Remedy Employer Unfair Labor Practices*, 40 LAB. L.J. 208 (1989); and Myrna A. Mylius Shuster, Note, *Undocumented Does Not Equal Unprotected: The Status of Undocumented Aliens Under the NLRA Since the Passage of the IRCA*, 39 CASE W. RES. L. REV. 609 (1988-89). For a discussion of cases making this argument under the Fair Labor Standards Act, see *Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988). Articles include Richard E. Blum, Note, *Labor Standards Enforcement and the Realities of Labor Migration: Protecting Undocumented Workers After Sure-Tan, the IRCA, and Patel*, 63 N.Y.U. L. REV. 1342, 1342 n.2 (1988); and L. Tracy Harris, Note, *Conflict or Double Deterrence? FLSA Protection of Illegal Aliens and the Immigration Reform and Control Act*, 72 MINN. L. REV. 900 (1988).

ers are entitled to statutory protection, their remedies are severely limited.¹⁶⁷ Third, the prevalent view of much civil rights litigation has been around racial issues, especially those facing African Americans, as opposed to issues of nonblack minority workers, especially immigrant workers.¹⁶⁸ Fourth, the judicial system has tremendous difficulty in understanding the cultural differences associated with discrimination and harassment of immigrant women. This lack of understanding has resulted in erroneous conclusions about the credibility of female complainants,¹⁶⁹ as well as confusion about the relationships between immigrant men and women.¹⁷⁰ The simple reality of language differences also creates problems.¹⁷¹ Finally, female farmworkers are reluctant to bring complaints because they do not want to bring shame upon their community and because to bring such complaints could also bring shame upon themselves.¹⁷²

Despite these problems, female farmworkers have been moving forward with a variety of lawsuits. As early as 1988, female farmworkers challenged discriminatory hiring, job allocation, and promotion.¹⁷³ When Alicia Castrejon was fired after she became pregnant, she sued her employer under Title VII, and the court found that she was protected against such discrimination even though she was an undocumented worker.¹⁷⁴ More recently, female farmworkers have been bringing and winning sexual harassment cases. In *EEOC v. C. & M. Packing, Inc.*,¹⁷⁵ Patricia Valdes and Carolina Matias complained of sexual harassment and retaliation. Their efforts resulted in a consent decree that required the employer to pay \$90,000 in compensatory damages; to institute a sexual harassment and training policy that would be prepared and monitored by an independent consultant who would report to the EEOC; to present all future complaints of sexual harassment to the consultant for review; and to appear in person or on video at every training session "to underscore the importance of Defendants' sexual harassment policy, affirm that sexual harassment will not be tolerated, and to encourage employees who believe they have been sexually harassed to [file complaints]."¹⁷⁶ Significantly, the EEOC reserved the right to preview and approve the employer's statement.

167. Hoffman Plastics Compound Inc. v. NLRB, __U.S.__ (2002), 122 S. Ct. 1275, 1285 (2002).

168. Tamayo, *supra* note 99, at 1078-79.

169. *Three Perspectives*, *supra* note 100, at 824-25; Maria L. Ontiveros, *Rosa Lopez, David Letterman, Christopher Darden, and Me: Issues of Gender, Ethnicity, and Class in Evaluating Witness Credibility*, 6 HASTINGS WOMEN'S L.J. 135 (1995) [hereinafter *Rosa Lopez*]; see also Tamayo, *supra* note 99, at 1080-81.

170. *Three Perspectives*, *supra* note 100, at 826-27.

171. Maria L. Ontiveros, *Adoptive Admissions and the Meaning of Silence: Continuing the Inquiry into Evidence Law and Issues of Race, Class, Gender, and Ethnicity*, 28 SW. U. L. REV. 337, 342-43 (1999); *Rosa Lopez*, *supra* note 169, at 143-48 (1995) (discussing the difficulty of translation and loss of original Spanish testimony).

172. *Three Perspectives*, *supra* note 100, at 821-24; Dominguez, *supra* note 80, at 255-56. Survey evidence finds that although 90% of farmworker women report that sexual harassment is a problem, only 10% are willing to report that they themselves have been harassed. *Id.*

173. See, e.g., Sandoval v. Saticoy Lemon Ass'n, 747 F. Supp. 1373 (C.D. Cal. 1990); Guzman v. Oxnard Lemon Assoc., No. CV 91-6957 KN, 1992 WL 510094 (C.D. Cal. Aug. 28, 1992) (discussed in Dominguez, *supra* note 80, at 245-50).

174. EEOC v. Tortilleria La Mejor, 758 F. Supp. 585, 593-94 (E.D. Cal. 1991).

175. Civil Action No. C-98-20975 JW EAI (N.D. Cal. 1998) (complaint on file with author).

176. Civil Action No. C-98-20975 JW EAI (N.D. Cal. 1998) (consent decree on file with author).

In 1999, another remarkable consent decree was signed in a sexual harassment case. Blanca Alfara and others were awarded \$1.855 million from Salinas-based lettuce producer Tanimura & Antle.¹⁷⁷ The settlement is notable for several reasons. First, it is the largest farmworker settlement ever reached. Second, it came against one of the largest growers in the country. Finally, publicity surrounding the settlement put both farmworkers and growers on notice that farmworkers could successfully challenge sexual harassment.

These suits have been successful only because the farmworkers and their advocates have affirmatively taken steps to address the laws' limitations. In Castrejon's case, the attorneys squarely took on the issue of why undocumented workers were covered by Title VII, even after the passage of the Immigration Reform and Control Act of 1986.¹⁷⁸ In the *Alfara* case, the EEOC and two community organizations (California Rural Legal Assistance and *Lideres Campesinas*) engaged in two-way training sessions. The EEOC instructed the groups on sexual harassment law, and the community groups educated the EEOC about the unique structure of the agricultural industry and its major players.¹⁷⁹ In addition, these groups engaged in an education and outreach campaign, designed to increase the trust of the farmworkers in the EEOC. The EEOC brought in trainers from the San Francisco Police Department's Rape Unit to discuss methods of interviewing rape victims, with an emphasis on training in the area of credibility assessments.¹⁸⁰ The EEOC staff also received training in the area of dealing with non-English speaking immigrants. To deal with immigration concerns, the EEOC is working to ensure that immigration status is not reported, so it cannot be used to deport complainants, and the EEOC is now viewing threats of deportation as retaliation, which is an additional violation of the law.¹⁸¹ Looking to the future, the EEOC is working to keep farmworker women as a priority and is hiring more bilingual and bicultural attorneys.¹⁸² Without these efforts, the law could not be responsive to the needs of female farmworkers.

C. Community Participation and Empowerment

Farmworkers' determination to create transnational lives, with full community participation on both sides of the border,¹⁸³ is a powerful response to the challenges they face. Our laws have traditionally defined citizenship as a legal status, based on whether someone has completed certain legal requirements. Since most farmworkers are undocumented they would not be able to fully participate in the United States community without becoming citizens. Traditionally, to become a United States citizen meant a person severed cultural and geographic ties with his or her country of origin. This model did not fit the farmworkers' experience, so they are working to change it. By rejecting the notion that their presence in the United States must be transitory or that they must choose *either* a United States or a Mexican identity, they are fighting oppression in two ways. They are changing

177. Tamayo, *supra* note 99, at 1080-82.

178. See EEOC v. Tortilleria La Mejor, 758 F. Supp. 585 (E.D. Cal. 1991).

179. Tamayo, *supra* note 99, at 1080.

180. *Id.* at 1081.

181. *Id.* at 1083.

182. *Id.* at 1085 n.26.

183. See *supra* Part II.B.

the definition of citizenship,¹⁸⁴ and they are creating the types of communities from which they can become more powerful.¹⁸⁵

Transnational farmworkers are changing the definition of citizenship as something defined by legal status in both theoretical and practical ways. Scholars in the field of citizenship theory are now looking at new ways to define citizenship as something more than mere naturalization, focusing instead on participation in public institutions (such as schools and labor unions), use of public services, and the acceptance of cultural expression.¹⁸⁶ Many such scholars argue that citizenship is becoming denationalized or global/transnational.¹⁸⁷

The shift in definition also has practical consequences. Women's groups, for example, have advocated for the extension of social welfare benefits to noncitizens and to those who move frequently.¹⁸⁸ In California's central valley, the Citizenship Project, sponsored by Teamsters Local 890, works primarily with Mexican immigrants who work in the food industry.¹⁸⁹ Their motto is "Our citizenship is more than papers," and they pledge to "educate ourselves, participate in public life, and organize ourselves to defend . . . [our] rights."¹⁹⁰ Since 1995, approximately 2000 immigrant community volunteers have worked with 15,000 to 20,000 people on issues related to citizenship, broadly defined.¹⁹¹ Their current programs include a driver's license campaign; a campaign of former *braceros* seeking compensation and justice for past injustices; youth leadership development; defense of the indigenous Triqui in Oaxaca, Mexico; a freedom school teaching English, computer skills, and the importance of civic participation; immigration and naturalization services; women's rights advocacy; political campaigns focused on local policies; a labor institute focused on organizing immigrant workers through immigrant community organizing; and economic justice activism.¹⁹² They see all of this as acts of *citizenship*, regardless of the naturalization status of the participants.¹⁹³

Transnational citizenship also creates a more capable community.¹⁹⁴ When immigrants have a community in which they know more people and in which they can truly be themselves, they are better able to utilize social services and advocate for change. They have more human resources upon which to draw. Immigrants who are harassed, who must hide, or who cannot be themselves, on the other hand,

184. *Forging Our Identity*, *supra* note 64, at 1064-66.

185. *Id.* at 1068-71.

186. See, e.g., the essays in BORDERLESS BORDERS: U.S. LATINOS, LATIN AMERICANS, AND THE PARADOX OF INTERDEPENDENCE (Frank Bonilla et al. eds., 1998); LATINO CULTURAL CITIZENSHIP: CLAIMING IDENTITY, SPACE, AND RIGHTS (William V. Flores & Rina Benmaylor eds., 1997); CHALLENGING FRONTERAS: STRUCTURING LATINA AND LATINO LIVES IN THE U.S. (Mary Romero et al. eds., 1997). See also Paul Johnston, *Citizens of the Future: The Emergence of Transnational Citizenship Among Mexican Immigrants in California*, at www.newcitizen.org/english/p_publication/p_publications.htm (last visited Aug. 23, 2002).

187. Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 449 (2000).

188. Kamm, *supra* note 20, at 772-74 (discussing *Saenz v. Roe*, 526 U.S. 489 (1999)).

189. For information, visit the Citizenship Project's website at <http://www.newcitizen.org> (last visited Oct. 30, 2002).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Forging Our Identity*, *supra* note 64, at 1068-71.

are not as capable of working to improve their situation. Their time and effort are siphoned away from proactive efforts and into subsistence activities.

Farmworker women have also developed their own more formal community organizations to improve their lives. The *Organizacion en California de Lideres Campesinas, Inc.* (Farmworker Women's Leadership Network) was founded by director Mily Trevino-Sauceda in 1992.¹⁹⁵ Their initial work focused on domestic violence, since it was listed as one of the top five concerns among farmworker women. They have been very successful in this field.¹⁹⁶ While continuing its work on domestic violence, *Lideres Campesinas* also helps farmworker women develop leadership and job skills, and educates and advocates on AIDS, pesticide, workplace rights, and health and safety issues. *Lideres Campesinas* uses a peer-to-peer education model to empower farmworker women. It uses the strength and knowledge of female farmworkers to address their issues in a manner that understands and is designed to deal with the multifaceted realities of this group of workers.

D. Legislative Reform

Two particular problem areas of the law have been the ability of the growers to refuse to sign first contracts with labor unions and the use of farm labor contractors. The lack of first contracts occurs because the law contains no sanctions for bad faith refusal to bargain and the ALRB has refused to recognize the make-whole remedy.¹⁹⁷ The problems associated with farm labor contractors are low wages, lack of accountability, and abusive paternalism. These problems occur because the law allows contractors to negotiate low-ball contracts and then serve as the employer for purposes of labor and employment law.¹⁹⁸ Recently, farmworkers and their advocates have turned to the legislative arena to help remedy these problems.

On September 30, 2002, California Governor Gray Davis signed Assembly Bill 2596, a bill to amend the California Agricultural Labor Relations Act. It provides for binding mediation when contract negotiations stall. The bill addresses the problems of growers who negotiate in bad faith and gives greater meaning to the "make-whole" provisions of the ALRA.¹⁹⁹ In order to garner support for the bill, the United Farm Workers organized a march from Merced to Sacramento that retraced the steps taken by Cesar Chavez in 1966.²⁰⁰ Once again, the UFW used

195. This paragraph draws on the following: Three Success Stories, *at* http://www.transformcommunities.org/tctatsite/instigate/12sup/success_stories_lideres.pdf (last visited Oct. 30, 2002); Lideres Campesinas' Innovative Outreach, *at* http://www.safenetwork.net/news_archive/sp97_3.html (last visited Oct. 30, 2002); Organizacion en California de Lideres Campesinas, *at* <http://www.equalrights.org/about/spinoffs.htm> (last visited Oct. 30, 2002). *Lideres Campesinas* can be reached at Lideres Campesinas, 611 South Rebecca St., Pomona, CA 91766, (909) 865-7776. Their domestic violence model is discussed in Dutton et al., *supra* note 120, at 285.

196. See Espenoza, *supra* note 119, at 196. In 1995, the Family Violence Protection Fund awarded the organization its prestigious Marshalls Domestic Peace Prize.

197. See *supra* Part II.A.

198. See *supra* Part II.A.

199. H.D. 1736, 2002 Leg., Reg. Sess. (Cal. 2002); see *supra* Part III.A. Nick Madigan & John M. Broder, *Farm Workers in California Cheered by Mediation Law*, N.Y. TIMES, Oct. 2, 2002, at A18; Mark Martin, *Farm Workers Get Boost from Davis*, S.F. CHRON., Oct. 1, 2002, at A1.

200. Mark Martin, *Still Marching After All These Years*, S.F. CHRON., Aug. 23, 2002, at A1.

identity-based organizing to ensure that the law fits its specific needs.

The California Rural Legal Assistance Foundation and other cosponsors, supported by the United Farm Workers and other unions, managed to get another bill, California Senate Bill 1466, to the Governor's desk as well. The bill would have amended California's Labor Code to prohibit growers from entering into a farm labor contract where the grower "knows or should know that the contract or agreement does not include funds sufficient to allow the contractor to comply with all applicable local, state and federal laws or regulations governing the labor or services to be provided."²⁰¹ This bill attempted to ensure that growers do not benefit by using contracted labor that is treated at levels below that required by law and to give the contract workers an additional avenue for recovery. The bill was crafted to deal with the specific problems caused by the economic structure of the agricultural industry. Unfortunately, Governor Davis vetoed the legislation.²⁰²

E. International Law Challenges

One reason the law has not helped farmworkers is because of their exclusion from domestic labor and employment laws, either because of the policy of agricultural exceptionalism or because of a policy not protecting farmworkers as undocumented immigrants. Recently, a group of challenges to the treatment of farmworkers has arisen that comes from outside the domestic labor and employment law box. These challenges look at the workers as immigrants with certain human rights that may not be abridged simply because they have entered the United States to work.

The Alien Torts Claim Act establishes a cause of action and federal jurisdiction for "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."²⁰³ By its very terms, it provides an avenue for noncitizens to bring a tort claim in the United States. Courts have held that the Alien Torts Claim Act can be used to enforce international norms against private actors in the United States.²⁰⁴ Since the law of nations and treaties of the United States have been found to include international norms against forced labor and involuntary servitude, including work coerced by the threat of deportation,²⁰⁵ farmworkers could possibly bring actions under the Alien Torts Claim Act.²⁰⁶ Even if these claims are not successful, they can help describe the problems faced by farmworkers, they can be part of an overall organizing strategy, they can bring publicity, and they may even encourage criminal prosecution where appropriate.²⁰⁷

Another international law challenge involves a petition brought by four Mexican unions under the North American Agreement on Labor Cooperation (NAALC).²⁰⁸ Under the NAALC, which was signed as a side agreement to NAFTA,

201. H.D. 1466, 2002 Leg., Reg. Sess. (Cal. 2002). The bill also covers contracts for labor or services with construction, garment, janitorial, or security guard contracts. It also contains provisions which encourage farm labor contracts to be in writing, a practice which is very uncommon.

202. The veto message can be found at www.crlaf.org/L02_240_SB_1466_veto_message.htm.

203. 28 U.S.C. § 1330 (2000).

204. Michael J. Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Rights*, 4 U. PA. J. LAB. & EMP. L. 529, 534 (2002).

205. *Id.* at 535, 537-38.

206. *Id.* at 539 (describing other possible applications to domestic, immigrant workers).

207. *Id.* at 543.

208. North American Agreement on Labor Cooperation, Sept. 13, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499.

complainants from other countries can bring submissions alleging that the United States is not enforcing its own laws or is not promoting the labor principles set out in the agreement. The petition focused on Washington state apple workers who were allegedly denied "the right to organize, bargain collectively, receive minimum wages, and receive workers' compensation."²⁰⁹ Although the submission specified a particular group of workers, the gravamen of the complaint was the agricultural exceptionalism practiced in the United States by excluding agricultural workers from so many of its labor and employment laws.²¹⁰ The submission has been resolved, in conjunction with five other submissions, by an agreement whereby the United States Department of Labor plans to meet with Mexican labor officials to discuss the application of relevant United States laws and by conducting public forums and outreach sessions with migrant workers.²¹¹

The NAALC was also used to challenge a 1992 Memorandum of Understanding between the United States Department of Labor and the United States Immigration and Naturalization Service that committed each agency to share information.²¹² Since the immigration status of anyone bringing a claim to the Department of Labor would be shared with the INS, undocumented workers faced a powerful disincentive to complaining about workplace violations.²¹³ A group of Yale Law students challenged the Memorandum of Understanding under the NAALC alleging that it led to systematic underenforcement of United States wage and hour laws, a clear violation of the NAALC.²¹⁴ Partly as a result of the submission and partly as a result of a change in Department of Labor administration, the Memorandum of Understanding was reversed, and the Department of Labor declared it would neither inspect nor report immigration status to the INS.²¹⁵

Finally, the possibility exists to use international human rights law in state and federal courts. International human rights law can be used as guidance in interpreting civil rights law, or it can be used as substantive law, when the United States has signed a treaty or as customary international law.²¹⁶ Arguably, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights can be used to protect immigrant workers.²¹⁷ These two Covenants are considered by many to be an authoritative interpretation of the human rights clauses of the United Nations Charter.²¹⁸ The non-discrimination provisions in these covenants may be used to prevent discrimination against farmworkers because of their immigrant status.

209. Paul D. Lall, *Immigrant Farmworkers and the North American Agreement on Labor Cooperation*, 31 COLUM. HUM. RTS. L. REV. 597, 597 (2000).

210. *Id.*

211. *Id.* at 600.

212. Memorandum of Understanding Between INS and Labor Department on Shared Enforcement Responsibilities, *reprinted in Daily Lab. Rep. (BNA)* No. 113, at D-1 (June 11, 1992).

213. See Wishnie, *supra* note 204, at 547-48.

214. *Id.* at 549-51.

215. *Id.* at 550-51.

216. Kathryn Burke et al., *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L.J. 291, 295 (1983).

217. *Id.* at 327.

218. *Id.* at 308.

IV. LESSONS FROM THE FIELDS

A. *The Importance of Identity-Based Organizing*

The first thing we learn when looking at the lives of female farmworkers and their effective responses is that in order to be effective, labor policy must take into account both the workplace (or class) identities of these workers, as well as the nonworkplace or personal identity factors, such as race, gender, ethnicity, national origin, citizenship status, community, sexual orientation, and religion.

The United Farm Workers, as a union, was and is effective when it uses identity-based organizing. They provide services outside the workplace that the community needs. They meet with people at home and within the community. They utilize religious symbols and holidays to energize their campaigns. They base their call for workplace rights within a call for dignity and civil rights for immigrants and Latinos. They use bilingual, bicultural organizers. They negotiate the dynamics of farm labor contractors and first versus second-generation immigrants.

California's Agricultural Labor Relations Act is most effective when it recognizes how the unique characteristics of farmworkers and the agricultural industry affect the collective bargaining model. Access in the fields is necessary and effective because of the uncertain housing of employees, their long commutes, and their lengthy work hours. Quick elections take into account the short growing season and migrant nature of the workforce. Utilizing a definition of employer that includes both growers and farm labor contractors, as well as the definition of a wall-to-wall bargaining unit, prevents the grower from using contractors to avoid liability. The statutorily created, but unenforced, provisions allowing for make-whole remedies and secondary boycotts would help the workers balance their real inequality of power and the ability of growers to stall through the short work season and would allow them to create a political, civil rights issue rather than a strictly workplace issue.

The Equal Employment Opportunity Commission's recent sexual harassment cases were successful because they gained the trust of the community, used bilingual counselors, and undertook training in cultural and gender aspects of credibility. They also addressed the immigration concerns by refusing to inquire about immigration status and began to recognize discrimination beyond a black-white paradigm. Most importantly, they recognized that this type of workplace harassment, even though it involved sex, was also based on race, national origin, and citizenship status. Thus, the solution had to take into account all these factors.

Community groups, such as the Citizenship Project and *Lideres Campesinas*, draw on the transnational nature of farmworkers' lives to improve their conditions. They help farmworkers to realize that, even if they are not naturalized, they still have rights to participate in our society—at the workplace, in schools, in unions, and in social service offices. They utilize the strength of the communities formed in their home countries and the cultural values of caring and community to organize and help each other. These activities, which often take place in the home or community, are connected to their ability to have better workplace lives.

Finally, the international law challenges are working with the notion that workers rights, human rights, and civil rights are intertwined. These challenges all rest on the argument that the denial of basic rights in the workplace because of a person's

status as a migrant worker is a violation of international norms. Such an argument looks to both the workplace identity and the personal identity of workers because it recognizes the special oppression that has often been visited upon those least powerful because of their immigration status and ethnic origin.

This lesson can be extended to all workers, especially all women workers because all workers have both workplace and personal identities that affect them. Women workers, even those who are not immigrants or people of color, face treatment in the workplace that is influenced by their gender. Male workers also face a variety of constraints because of the gender roles they face. For example, men who choose to take parental leave from work are acting against their dominant gender role and are often penalized for their actions.²¹⁹ In order to craft effective labor policy, these identities must be taken into account.

Labor unions, for their part, are beginning to realize this and are crafting effective organizing campaigns among women workers, immigrant workers, and other workers of color. Women clerical workers in universities,²²⁰ female nurses in hospitals,²²¹ and women of color home-care and domestic workers²²² are building models of workplace organization that take into account both the unique structure of their industries and their personal identities. Immigrant janitors organized through the Justice for Janitors campaign,²²³ followed in the footsteps of successful organizing at the Camagua waterbed facility,²²⁴ and foreshadowed successful organizing in the yard maintenance sector.²²⁵ Each of these successful campaigns, as well as others involving immigrant workers,²²⁶ drew upon the personal identity of the workers and dealt explicitly with the unique characteristics of the workplace. Paul Johnston has argued that, in this regard, the United Farm Workers and their model of unionization chart a course for labor's future, as opposed to simply being a part of labor history.²²⁷

219. Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1049 (1994).

220. See generally JOHN HOERR, *WE CAN'T EAT PRESTIGE: THE WOMEN WHO ORGANIZED HARVARD* (1997).

221. See, e.g., Janelle M. Rettler, *Women's Work: Finding New Meaning Through a Feminist Concept of Unionization*, 22 GOLDEN GATE U. L. REV. 751, 772-75 (1992).

222. See generally Peggy R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45 (2000).

223. A NEW COURSE FOR LABOUR UNIONS, *supra* note 1, at 418-20.

224. See generally HECTOR L. DELGARDO, *NEW IMMIGRANTS, OLD UNIONS* (1993).

225. See generally Jennifer Gordon, *We Make the Road By Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995); Christopher David Ruiz Cameron, *The Rakes of Wrath: Urban Agricultural Workers and the Struggle Against Los Angeles's Ban on Gas-Powered Leaf Blowers*, 33 U.C. DAVIS L. REV. 1087, 1093-103 (2000).

226. Many of these are discussed in Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089 (1999) (discussing Los Angeles Manufacturing Action Plan, drywallers strike, American Racing, Inc. strike, and Mission Guerrero tortilla drivers strike). See also Paul Johnston, *The Basic Strike* (2002), available at http://www.newcitizen.org/english/p_publication/p_publications.htm (manuscript on file with author).

227. Johnston, *supra* note 226.

B. The Fragmentation Inherent in Current Labor Policy

The current approach to labor policy is not well suited to help female farmworkers or other marginalized workers for several reasons. First, the law continues to fragment and compartmentalize claims into various pigeonholes. We turn to labor law to address class-based, economic issues involving unions and collective bargaining. Employment discrimination examines claims of discrimination based on race *or* sex *or* national origin *or* religion *or* color. Employment law covers the various contract and tort claims of individual employees, as well as their wage and hour problems. Immigration law looks at problems affecting those coming from other countries. Environmental law focuses on the problems of pesticides. Workers Compensation and OSHA law cover issues involving occupational safety and health. Issues of domestic violence and childcare fall into the vast fields of criminal law or women and the law. By fragmenting these areas, the reality of a marginalized worker whose oppression is affected by all these different issues can never be adequately addressed.²²⁸

Second, each of the fields within the labor and employment law canon privilege certain workers, leaving those at the intersection or margin unprotected. Besides excluding certain marginalized workers entirely,²²⁹ traditional labor law focuses on a white, male manufacturing based model, to the detriment of women,²³⁰ people of color,²³¹ and especially women of color.²³² Labor law also has a narrow, wage-based, workplace focus that prohibits workers from organizing around community or political issues that would recognize the exploitation they experience based on their personal identity factors.²³³

Employment discrimination law, by focusing on protected classes separately, cannot adequately address the problems of those whose oppression is defined by more than one category, such as women of color²³⁴ or older women. A powerful metaphor for considering this problem is whether oppression is seen as a wall created by one factor, such as class or race or sex, or whether it is a cage, in which

228. *A NEW COURSE FOR LABOUR UNIONS*, *supra* note 1, at 427 (arguing that immigration law must not be designed to create a surplus of workers battling over a limited number of jobs and must encourage empowerment of workers by allowing them to settle with their families and participate in society). See also Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2 U. ILL. L. REV. 525 (arguing that current immigration law scholarship fails to fully grapple with the influence of race on immigration law).

229. *A NEW COURSE FOR LABOUR UNIONS*, *supra* note 1, at 426-27.

230. See generally Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903 (1994).

231. See generally Marion Crain & Ken Matheny, "Labor's Divided Ranks": Privilege and the United Front Ideology, 84 CORNELL L. REV. 1542 (1999).

232. See generally Elizabeth Igelisas, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA*. *Not!*, 28 HARV. C.R.-C.L. L. REV. 395 (1993).

233. *A NEW COURSE FOR LABOUR UNIONS* *supra* note 1, at 424-27 (arguing that court interpretations in the areas of defining union membership, the permissible use of union dues, mandatory topics of bargaining, protected concerted activity, and secondary boycotts prohibit workers from connecting with their nonworkplace identities).

234. See generally Judy Trent Ellis, *Sexual Harassment and Race: A Legal Analysis of Discrimination*, 8 J. LEGIS. 30 (1981); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policy*, 1989 U. CHI. LEGAL F. 139.

each of these factors is one of the bars in the cage. If oppression is caused by only one factor (if the one factor acts as a wall), than removing that problem will clear the path. For example, a white woman, who is only confronting a problem of sex discrimination, can move forward when the problem of sex discrimination is corrected. If, on the other hand, the oppression is caused by many factors (and each factor acts as one of many bars in a cage), then removal of one bar from a cage will not allow the occupant to escape.²³⁵ So, even if the sex discrimination problems facing a female farmworker are corrected, she still must battle the problems facing her as a working class, undocumented, Latina. Employment discrimination law also misses the unique problems caused by the intersection of more than one protected class.

The portion of employment law that deals with wrongful discharge focuses on workers as individuals, trying to address individual rights, generally through torts or contracts. This individualized approach misses the complexity of workers as a class addressing workplace problems as a group. It also focuses only on a privileged group of workers—those who earn enough money that a contract claim is worth litigating and those few employees who have an implied or written contract. Unfortunately, the courts have recently begun to bring the individual contract model into the other fields of employment (labor law and employment discrimination), allowing employers and employees to agree to arbitrate statutory disputes. This works to decontextualize these other areas of the labor and employment law canon. Finally, the portion of employment law that deals with wages, hours, and the use of independent contractors misses the key issues of farmworkers' lives by not fully recognizing the problems associated with these institutions or the huge costs to an undocumented worker who is deported.

Third, the law as written and generally interpreted offers no guarantee of a nuanced, identity-based approach to labor policy. The policy successes described in this Article were innovative interpretations of the law or new legislation passed during politically liberal times. If the Equal Employment Opportunity Commission did not have a lead attorney with a background in immigrant rights, the *Alfara* case would not have been approached in such a sensitive manner. The fate of California's Agricultural Labor Relations Act during Republican administrations shows that many gains may be transitory. Currently, anti-immigrant sentiment continues to be a huge problem for these workers,²³⁶ as evidenced by the continuation of Operation Gatekeeper.

With the political will, there are several important legislative changes that could be made to ensure more identity-based organizing. Law affecting union organization must help immigrant workers in general and female immigrant workers in particular to be able to organize. Organization efforts could be facilitated by allowing workers to discuss unionization on company property during the workday; protecting the rights of all workers to organize, including agricultural workers and domestic workers; and allowing workers to organize around broader issues than the narrowly construed "wages, hours and terms and conditions of employment."

235. MARILYN FRYE, THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 4-5 (1983).

236. See, e.g., Winnie Hu, *A Precarious Life Goes from Bad to Worse*, N.Y. TIMES, Aug. 18, 2002, at A36.

Immigration laws must no longer be designed to create a surplus of workers, battling over a limited number of jobs. These same laws must allow for empowered immigrant workers, by allowing immigrants to bring their families so they form the type of supportive communities and networks necessary to fully participate in society and that give them the human capital or capacity to participate. The legality of immigration status must not be tied to the decision of a single employer to continue their employment; otherwise, the employer simply retains too much control over the worker's life. Finally, the government's policy of pushing illegal immigration to the most dangerous regions, simply to keep the immigrants out of visible areas, must be stopped.

Employment discrimination laws, especially in the area of sexual harassment, job assignments, pay, hiring, and firing, must be stringently enforced, and those enforcing the laws must be bilingual and bicultural. The employment standards laws, dealing with minimum wage, overtime, health and safety, and child labor must be enforced without regard to immigration status. The laws that define employers as contractors or subcontractors, rather than the large identifiable business entities gaining from the exploitation of immigrant workers, need to be revised. Finally, some way must be found to value the work that women perform at home.

V. CONCLUSION

All workers, including female farmworkers, are people. As such, they must be afforded basic human rights in their communities and at their workplaces. Female farmworkers are workers. As such, they must be accorded the full rights and benefits of work, including a decent wage, the right to organize, and statutory protection against discriminatory treatment. We must strive to build a labor policy that acknowledges and guarantees these two simple principles. Such a policy will help all workers and the communities in which they live.