

**ENGAGING FARMWORKERS IN ENFORCEMENT OF
ENVIRONMENTAL POLICY: THE CASE FOR A NEW
COOPERATIVE VISA**

By Sarah Zelcer

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INTRODUCTION

In Immokalee, Florida, around Christmas of 2005, three pregnant farmworkers experienced tragedy. They each bore a child with severe

deformities, which they believe may have been caused by the pesticides sprayed on the fields in which they labored.¹ The first baby, Carlitos, was born with an extremely rare condition called tetra-amelia syndrome, which left him without arms or legs.² The second baby, Jesus, was born with Pierre Robin Sequence, a deformity of the lower jaw, resulting in constant danger of his tongue falling back into his throat and choking him to death.³ Jorge, the third baby, born just days later, “had one ear, no nose, a cleft palate, one kidney, no anus, and no visible sex organs.”⁴ Hours after birth, doctors determined Jorge was in fact a girl and she was renamed Violeta. Violeta’s birth defects were so severe she survived for only a few days.⁵ The babies, all born in the United States, were American citizens; their parents were not.⁶ Ultimately, with significant help from the community, social workers, and a dedicated lawyer, Carlitos’ parents won an undisclosed settlement after bringing a lawsuit against the corporate farm where they worked.⁷ The family brought no action against the chemical company that made the pesticide used on the tomato farm.⁸ Carlitos’ parents remain in the United States to care for their sick child; without documentation, they could be deported at any time.

Agricultural chemical use poses enormous risks to farmworkers and the environment. Current legal protections against pesticide exposure are inadequate and under-enforced. By design, pesticides are toxic substances

1. John Lantigua, *Why Was Carlitos Born This Way?*, PALM BEACH POST (Mar. 13, 2005), <http://www.mypalmbeachpost.com/news/carlitos/>.

2. BARRY ESTABROOK, TOMATOLAND: HOW MODERN INDUSTRIAL AGRICULTURE DESTROYED OUR MOST ALLURING FRUIT 35 (2011).

3. *Id.*

4. *Id.* at 36.

5. *Id.*

6. *See id.* at 35–36 (explaining that all three babies were born in the United States); Laura Layden, *Ag-Mart Sued over Birth Defects*, NAPLES DAILY NEWS (Mar. 2, 2006), http://www.naplesnews.com/news/crime/agmart_sued_birth_defects_nap.

7. Joan D. Flocks, *The Environmental and Social Injustice of Farmworker Pesticide Exposure*, 19 GEO J. ON POVERTY L. & POL’Y 255, 278 (2012).

8. *See id.* at 277–78 (explaining the relationship between the attorney and the child’s parents, their immigration status, and the choice not to bring the case as a toxic tort). “Before he could proceed with litigation, Yaffa [the attorney] had to convince Carlitos’ parents that they had legal rights despite their undocumented status . . . He quelled their fears of employer retaliation and deportation by convincing them to leave Ag-Mart and move to an undisclosed location for the duration of the lawsuit. In February 2006, Yaffa filed suit against Ag-Mart in Hillsborough County, Florida Circuit Court on behalf of Carlitos and his parents, seeking damages for medical and hospital costs, lifetime care costs, disability, disfigurement, pain and suffering, mental anguish, and, eventually, punitive damages. The case was based on premises liability, which allowed the plaintiffs to avoid the complicated burden of proving the elements of causation required in toxic tort cases.” *Id.*

that kill or control living organisms.⁹ Pesticides can adversely affect human health by increasing the risk of cancer and neurological disorders, and may even cause death.¹⁰ Pesticides also harm the environment by inadvertently killing or causing reproductive abnormalities in non-target species, including fish, birds, and other wildlife.¹¹

Environmental statutes and regulations are insufficient to protect farmworkers and wildlife from the harmful effects of pesticides. In response to the growing environmental movement in the United States, Congress passed a variety of environmental statutes in the 1970s, such as the Clean Air Act and the Clean Water Act. Yet, most of these statutes provide exemptions for agricultural activities and, therefore, fail to adequately protect farmworkers' health and surrounding wildlife. Additionally, statutes regulating pesticide use on farms are often not enforced, due in large part to the fact that their investigative programs rely on complaints from the public.¹² Reliance on voluntary reporting, instead of inspections and investigations, results in many unreported pesticide-related illnesses every year.¹³

To compound the issue, farmworkers receive little legal protection under federal labor laws. For instance, farmworkers are explicitly excluded from protection under the National Labor Relations Act ("NLRA"), which prohibits employers from firing employees for joining labor unions and engaging in labor union activity.¹⁴ Furthermore, under the Fair Labor Standards Act, which guarantees minimum wage and overtime pay to most employees, farmworkers are not entitled to overtime pay and, in some

9. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-00-40, PESTICIDES: IMPROVEMENTS NEEDED TO ENSURE THE SAFETY OF FARMWORKERS AND THEIR CHILDREN 3 (2000) [hereinafter IMPROVEMENTS NEEDED], available at <http://www.gao.gov/archive/2000/rc00040.pdf>.

10. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-145, PESTICIDES: EPA SHOULD TAKE STEPS TO IMPROVE ITS OVERSIGHT OF CONDITIONAL REGISTRATIONS 1 (2013), available at <http://www.gao.gov/products/GAO-13-145>.

11. *Id.*

12. See CAL. DEP'T OF PESTICIDE REGULATION, A COMMUNITY GUIDE TO RECOGNIZING AND REPORTING PESTICIDE PROBLEMS (2014), available at http://cdpr.ca.gov/docs/dept/comguide/commty_guide.pdf (detailing the complexities of reporting a pesticide complaint).

13. See Flocks, *supra* note 7, at 259, 262–64 (explaining the reasons why occupational injuries and illnesses are undetected and unreported for undocumented workers, and further explaining that regulations that are supposed to protect farmworkers from pesticide exposure are often "nonexistent, ineffective, or unenforced").

14. 29 U.S.C. § 152(3) (1978). The term employee includes:

[A]ny employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer. *Id.*

circumstances, minimum wage.¹⁵ Accordingly, employers often take advantage of farmworkers and subject them to long hours with low wages. Moreover, the power balance is further enhanced to favor growers over farmworkers who are undocumented.¹⁶ In the absence of lawful status, deportation fears outweigh the benefits of taking legal action.

The use of non-citizen labor in United States agriculture is nothing new. Historically, farmworkers have been paid below-market wages, suffered from abusive work conditions, and worked extraordinarily long hours.¹⁷ Modern agriculture continues to depend on the systematic use of non-citizen labor because employers can pay these workers next to nothing and demand they work long hours with minimal legal protections. Until Congress addresses this issue, the agricultural workforce will continue to be dominated by undocumented workers, who have little power to enforce their rights.

Undocumented farmworkers would be more likely to report these injustices, including the misuse of pesticides by their employers, if Congress offered them some legal protection from deportation during that process.¹⁸ The Senate has already accepted this rationale for protecting victims of serious violations of labor and employment law.¹⁹ Congress already grants temporary visas to undocumented immigrants if they are victims of human trafficking under the T visa program.²⁰ Likewise, Congress provides temporary visas to undocumented immigrants who are victims of explicitly enumerated crimes under the U visa program.²¹ The rationale for all of these programs is twofold: first, the programs protect

15. 29 U.S.C. § 213(a)(6) (2012).

16. Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247, 252 (2009).

17. Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 TEX. HISP. J.L. & POL'Y 79, 95 (2004).

18. See Protect Our Workers from Exploitation and Retaliation Act of 2011, S. 1195, 112th Cong. (2011), available at <https://www.congress.gov/bill/112th-congress/senate-bill/1195> (offering an example of legal protection by Congress); see also Protect Our Workers from Exploitation and Retaliation Act of 2011, H.R. 2169 112th Cong. (2011), available at <https://www.govtrack.us/congress/bills/112/hr2169> (offering an example of legal protection by Congress).

19. Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S.744, 113th Cong. § 3201(a) (2013), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113s744es/pdf/BILLS-113s744es.pdf>.

20. *Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status> (last updated Oct. 3, 2011) [hereinafter *T Nonimmigrant Status*].

21. SAMEERA HAFIZ ET AL., TOOL KIT FOR FEDERAL LAW ENFORCEMENT USE OF THE U-VISA (2010), available at [https://www.victimsofcrime.org/docs/Toolkit%20Bulletins/u-visa-toolkit-final-\(2\).pdf?sfvrsn=0](https://www.victimsofcrime.org/docs/Toolkit%20Bulletins/u-visa-toolkit-final-(2).pdf?sfvrsn=0).

society from criminal wrongdoing; and second, they assist United States officials in the prosecution of the offenses by securing the witness' location within the United States. Under this same logic, Congress should expand these protections to farmworkers who are the victims of over-application or misapplication of pesticides and other toxic chemicals on farms. Congress created relevant environmental laws for public benefit, and the laws' enforcement systems necessitate complaints from those who are in the best position to witness abuse—in this case, farmworkers.

In this note, I critique the agricultural exemptions to all major federal labor, employment, union, and environmental laws. I argue for narrowing agricultural exemptions to environmental statutes and the engagement of farmworkers in the enforcement of the more defined law. To incentivize this partnership and remedy the problematic exposure farmworkers suffer from agricultural chemicals, I argue farmworkers should be offered an immigration benefit similar to that currently existing under the U visa for their cooperation in civil law enforcement. This rationale was embraced in the Protect Our Workers from Exploitation and Retaliation Act (“POWER Act”), introduced in both the Senate and the House of Representatives beginning in 2010 and 2011.²² While the legislation was not enacted, several key provisions were taken up in the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013 in the Senate's approved immigration reform bill in 2013.²³

Section I discusses the health implications associated with overexposure to pesticides. Section II provides background information on the demographics of modern farmworkers, the agricultural guest worker program, and the limited legal protections available to undocumented farmworkers. Section III examines the limited utility of environmental statutes to farmworkers. Section IV explains the history and policy rationale behind the United States' cooperative visa programs. Section V proposes that Congress create a new cooperative visa program for undocumented farmworkers who are victims of pesticide abuse or misuse on farms by their employers, and who report such abuse to, and cooperate with, law enforcement.

22. Protect Our Workers from Exploitation and Retaliation Act of 2011, S. 1195, 112th Cong., *available at* <https://www.congress.gov/bill/112th-congress/senate-bill/1195>; Protect Our Workers from Exploitation and Retaliation Act of 2011, H.R. 2169 112th Cong., *available at* <https://www.govtrack.us/congress/bills/112/hr2169>.

23. Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong. § 3201(a) (2013), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-113s744es/pdf/BILLS-113s744es.pdf>.

I. PROFILE OF THE RISK

Pesticides cause enormous harm to human health and the environment. Among those at risk to pesticide exposure are consumers, those who live on or near farms, and farmworkers. There are significant social, environmental, and moral interests in ensuring that such chemicals are used safely.

A. *Health Effects from Pesticide Exposure*

Farmworkers are one of the primary populations exposed to pesticides.²⁴ Consequently, farmworkers suffer the highest rate of illness caused by chemical exposure across industries.²⁵ According to the General Accounting Office (“GAO”), many pesticide-related illnesses go unreported.²⁶ In 1993, the GAO released a report stating there were no comprehensive data on the occurrence of chronic health effects of pesticide exposure and called for implementation of a program to monitor pesticide illnesses.²⁷ As of 2000, the GAO found the lack of comprehensive information remained largely unaddressed.²⁸ Farmworker advocates know this underreporting is due in large part to the fact that farmworkers depend on the employer for employment, housing, and, most significantly, often the visa through which they are permitted to come to the United States to earn a living and support their families.²⁹ Additionally, many of the harms of pesticides are unknown to non-English speaking communities, or, there is nowhere to report injuries and no way to effectively communicate with health care providers.

Despite the fact that pesticide-related illnesses are sometimes difficult to diagnose and are underreported, the Environmental Protection Agency (“EPA”) estimates that between 10,000 to 20,000 farmworkers suffer from

24. Laura Lockard, *Toward Safer Fields: Using AWPAs Working Arrangement Provisions to Enforce Health and Safety Regulations Designed to Protect Farmworkers*, 28 N.Y.U. REV. L & SOC. CHANGE 507, 510 (2004).

25. Keith Cunningham-Parameter, *A Poisoned Field: Farmworkers, Pesticide Exposure, and Tort Recovery in an Era of Regulatory Favor*, 28 N.Y.U. REV. L & SOC. CHANGE 431, 442 (2004); Shannon Adair Tool, *Farmworkers and FIFRA: Laboring Under the Cloud*, 31 SW. U. L. REV. 93, 99 (2001).

26. IMPROVEMENTS NEEDED, *supra* note 9, at 10.

27. *Id.*

28. *Id.* at 11.

29. See Flocks, *supra* note 7, at 259 (“They rarely have insurance or the private resources to pay for health care, they may not have transportation, and they may risk losing their jobs if they take time off to seek health care.”).

acute or chronic illnesses due to pesticide exposure annually.³⁰ As noted in the introduction, acute exposure to pesticides can cause a wide range of illnesses, such as headaches, fatigue, nausea, skin rashes, eye irritation, flu-like symptoms, chemical burns, paralysis, and death.³¹ Exposure to pesticides during pregnancy has been linked to severe birth defects.³² Chronic illnesses and illnesses with delayed onsets, including cancer, neurological disorders, and reduced cognitive skills, also occur as a result of pesticide exposure.³³ Given the serious, sometimes fatal, nature of pesticide-related illnesses, environmental and immigration statutes should protect farmworkers' health from overexposure to pesticides, and farmworkers should be entitled to functional legal remedies that provide them with compensation for their injuries.

B. Demographics of Farmworkers

Approximately 83% of farmworkers in the United States identify themselves as members of a Hispanic ethnicity group.³⁴ Seventy-one percent of those Latino farmworkers in the United States were born in Mexico or Central America.³⁵ These statistics demonstrate the extent to which immigrant workers dominate the farming industry of the United States.

The use of Mexican laborers in farming began during World War II with the Bracero Program. "The Bracero Program was a bilateral accord between the United States and Mexico, under which Mexican workers were brought to the United States to perform seasonal agricultural labor, and then returned to Mexico."³⁶ Despite the program's success, it was subsequently abolished and many full-time farmworkers in the United States today are undocumented immigrants.

According to a United States Department of Agriculture ("USDA") Economic Research Service survey, approximately half of the 1.1 million

30. FARMWORKER JUSTICE, STEPS TO PROTECT: THE IMPORTANCE OF PESTICIDE INCIDENT REPORTING 1 (2012), *available at* <http://www.farmworkerjustice.org/sites/default/files/documents/FJ%20Health%20Policy%20Bulletin.pdf>.

31. IMPROVEMENTS NEEDED, *supra* note 9, at 5.

32. *See generally* ESTABROOK, *supra* note 2 at 35–40 (summarizing the experience of the three female farmworkers in Florida whose babies were born with severe deformities).

33. IMPROVEMENTS NEEDED, *supra* note 9, at 5.

34. *Nat'l Agric. Workers Survey*, U.S. DEP'T OF LABOR, <http://www.doleta.gov/agworker/report9/chapter1.cfm#ethnicity> (last updated Jan. 11, 2010).

35. NAT'L CTR. FOR FARMWORKER HEALTH, INC., FARMWORKERS HEALTH FACTSHEET 1 (2012), *available at* <http://www.ncfh.org/docs/fs-Facts%20about%20Farmworkers.pdf>.

36. Baker, *supra* note 17, at 84.

full- and part-year farmworkers and agricultural service workers in the United States are undocumented laborers.³⁷ Other studies suggest that roughly 60% of the nation's noncitizen farmworkers are undocumented workers.³⁸ Moreover, according to a report by the Executive Office of the President, "[a]mong new entrants to farm-work (those having worked on a farm for less than two years), fully 72% of farmworkers in crop agriculture reported working without authorization—with shares of 97% in fruit production and 90% in vegetable production."³⁹ Demographic information gathered from the 2007–2009 National Agriculture Workers Survey indicates "48% of farmworkers do not have legal authorization to work in the United States and only 33% are U.S. citizens."⁴⁰ From these reports and studies, it is clear that undocumented farmworkers now make up a significant portion of the farming industry.

One reason so many farmworkers are undocumented immigrants is because of the lax requirements under the Immigration Reform Control Act ("IRCA") of 1986.⁴¹ Congress enacted IRCA in 1986 to revise and reform the Immigration and Nationality Act.⁴² Despite the fact that IRCA section 101 made it a crime to knowingly employ an undocumented person, section 101(a)(3) continues to permit an employer's good faith effort to ascertain the employee's immigration status as an affirmative defense, therefore, providing employers shelter from criminal enforcement of IRCA.⁴³ The importation of immigrant labor to work in domestic agriculture continues, although it is largely unregulated because of deficits in immigration policy and enforcement.

II. LABOR LAWS—INADEQUATE BY DESIGN

The inadequacy of legal protections for farmworkers makes them vulnerable to employment abuses and extraordinarily reluctant to complain about pesticide exposure. The fact that farmworkers' ability to work and be physically present in the United States is tied to a host employer under the H-2A visa system, combined with the lack of a protected right to unionize under the NLRA, low wages, and less than ideal physical living

37. *Farm Labor Background*, ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., <http://www.ers.usda.gov/topics/farm-economy/farm-labor/background.aspx> (last updated Oct. 30, 2014).

38. EXEC. OFFICE OF THE PRESIDENT, *FIXING OUR BROKEN IMMIGRATION SYSTEM: THE ECONOMIC BENEFITS TO AGRICULTURE AND RURAL COMMUNITIES* 5 (2013), available at <http://www.whitehouse.gov/sites/default/files/docs/agruralreport07292013emb.pdf>.

39. *Id.* at 4.

40. NAT'L CTR. FOR FARMWORKER HEALTH, INC., *supra* note 35, at 2.

41. Cunningham-Parameter, *supra* note 25, at 463.

42. 8 U.S.C. § 1324a (2012).

43. *Id.* §§ 1324a(a)(1)(A)–(B), (a)(3).

arrangements provided by the employer all contribute to the realistic impracticalities of farmworkers being able to make good faith complaints about pesticide misuse.

A. H-2A Temporary Agricultural Guest Worker Visa Program

Under current immigration law, noncitizens working in agriculture with immigration authorization work under the H-2A temporary agricultural guest worker program. It is the only program that authorizes foreign-born workers to enter the United States and perform agricultural labor.⁴⁴ “The H-2A temporary agricultural program establishes a means for agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the United States to perform agricultural labor or services of a temporary or seasonal nature.”⁴⁵ Importantly, the H-2A program grants temporary seasonal work visas. It does not extend to year-round agriculture production and therefore does not cover dairy production and related activities.

The Office of Foreign Labor Certification certified 76,824 H-2A temporary workers in the fiscal year (“FY”) 2013.⁴⁶ This number is up from 62,743 in FY 2012.⁴⁷ This program allows noncitizen laborers to obtain jobs that they could not otherwise obtain in their native countries and provides employers with inexpensive labor.

Critics of the program note that H-2A workers are often exposed to abusive work environments.⁴⁸ Moreover, H-2A workers receive below-market wages and work extremely long hours. While the H-2A program provides noncitizen workers an avenue to legally work in the United States, it does not sufficiently protect their well-being. Instead, it excludes H-2A workers from the Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”), the one statute that exists to protect farmworker health, and ties the workers to one employer.

44. The H-2A program is found at section 1101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2013); 8 U.S.C. § 1184(c)(1) (2012).

45. *H-2A Temporary Agricultural Program Details*, U.S. DEP’T OF LABOR, http://www.foreignlaborcert.doleta.gov/h_2a_details.cfm (last updated Nov. 12, 2013).

46. OFFICE OF FOREIGN LABOR CERTIFICATION, EMP’T & TRAINING ADMIN., U.S. DEP’T OF LABOR, H-2A TEMPORARY AGRICULTURAL LABOR CERTIFICATION PROGRAM—SELECTED STATISTICS FY 2013 YTD (2013), *available at* http://www.foreignlaborcert.doleta.gov/pdf/H-2A_Selected_Statistics_FY%202013_YTD_Q4_final.pdf.

47. *Id.*

48. FARMWORKER JUSTICE, NO WAY TO TREAT A GUEST: WHY THE H-2A AGRICULTURAL VISA PROGRAM FAILS U.S. AND FOREIGN WORKERS 7 (2013), *available at* <http://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20No%20Way%20To%20Treat%20A%20Guest%20H-2A%20Report.pdf>.

B. Labor Law and Agriculture—A Brief Historical Synopsis

Agriculture is largely exempt from the Fair Labor Standards Act (“FLSA”).⁴⁹ Temporary workers who migrate to the United States to pick fruits and vegetables, under the H-2A program, are exempt from AWP. ⁵⁰ Additionally, farmworkers are also excluded from the NLRA.⁵¹

FLSA barely extends to agriculture.⁵² Originally, the FLSA of 1938 excluded all farmworkers.⁵³ It was amended in 1966 to include farmworkers under limited circumstances.⁵⁴ The 1966 amendments “raise[d] minimum wages and extended protection to employees not previously covered under the Act, including agricultural workers.”⁵⁵ Most notably, the amendments removed growers from the agricultural exemption list when the grower reached 500 or more man-days of labor in the previous year's peak quarter.⁵⁶ In practice, the 500-man-day exemption continues to shield most agricultural operations from FLSA's reach.⁵⁷

49. 29 U.S.C. § 213(a)(6).

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family. *Id.*

50. 29 U.S.C. § 1802(8)(B)(ii) (2013). Practitioners use “AWPA” not “MAWPA” to refer to this section. “The term ‘migrant agricultural worker’ does not include—(i) any immediate family member of an agricultural employer or a farm labor contractor; or (ii) any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 1101(a)(15)(H)(ii)(a) and 1184(c) of title 8.” *Id.*

51. 29 U.S.C. § 152(3).

The term ‘employee’ includes: [A]ny employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor, practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer. *Id.*

52. See Jeanne M. Glader, *A Harvest of Shame: The Imposition of Independent Contractor Status on Migrant Farmworkers and Its Ramifications for Migrant Children*, 42 HASTINGS L.J. 1455, 1460–61 (1991) (criticizing agricultural exemptions to labor laws).

53. *Id.*

54. *History of Changes to the Minimum Wage Law*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/minwage/coverage.htm> (last visited Jan. 24, 2015).

55. Glader, *supra* note 52, at 1461.

56. *Id.* at 1461–62.

57. Five hundred man-days is roughly equivalent to seven employees employed full time in a calendar quarter, “[h]owever, a farmer who hires temporary or part-time employees during part of the year, such as the harvesting season, may exceed the man-day test even though he may have only two or three full-time employees.” 29 C.F.R. § 780.305(a) (2011).

C. Agricultural Worker Protection Act

In 1983, Congress passed AWPA. The express purpose of AWPA was “to remove restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; to require farm labor contractors to register under this chapter; and to assure necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers.”⁵⁸ AWPA requires every non-exempt farm labor contractor, agricultural employer, and agricultural association to: “disclose [upon request] the terms and conditions of employment” in writing; “post information about worker protections at the worksite”; pay workers on time and provide workers with an itemized statement of their earnings and deductions; ensure that any housing the employer offers to its employees complies with substantive federal and state safety and health standards (usually Occupational Safety and Health Administration (“OSHA”)); ensure that any vehicles the employer provides to its employees for transportation “meet applicable federal and state safety standards and insurance requirements,” and that employees driving these vehicles have obtained driver’s licenses; comply with the terms of any work agreement; and keep payroll records for each employee for the last three years.⁵⁹ The strength of AWPA is that it allows farmworkers to bring a private cause of action for its violations.

Despite Congress’ intent to provide farmworkers with legal protection under AWPA, many farmworkers fall under AWPA’s statutory exemptions and thus, remain unprotected. For example, AWPA excludes farmers that work on family farms or for “small businesses.”⁶⁰ Moreover, AWPA excludes H-2A farmworkers.⁶¹ In addition to its broad statutory exemptions, AWPA is devoid of any language protecting farmworkers from pesticide misapplication or over-application. Accordingly, the few farmworkers who are protected under AWPA must find an alternative legal avenue to seek redress for their injuries that result from pesticide exposure.

The working arrangement provisions of AWPA provide that “[n]o farm labor contractor, agricultural employer, or agricultural association shall, without justification, violate the terms of any working arrangement made by that contractor, employer, or association with any migrant [or seasonal]

58. 29 U.S.C. § 1801 (2012).

59. *The Migrant and Seasonal Agricultural Protection Act*, U.S. DEP’T OF LABOR, <http://www.dol.gov/compliance/laws/comp-msawpa.htm> (last visited Jan. 24, 2015).

60. 29 U.S.C. § 1803 (a)(1)–(a)(2) (2012).

61. Christopher Ryon, Comment, *H-2A Workers Should Not Be Excluded from the Migrant and Seasonal Agricultural Protection Act*, 2 U. MD. L.J. RACE, RELIGION, GEND. & CLASS 137, 138 (2002), available at <http://digitalcommons.law.umaryland.edu/trgc/vol2/iss1/8>.

agricultural worker.”⁶² Recently, farmworker advocates have been attempting to expand the scope of the working arrangement concept under AWPA to encompass issues of pesticide usage. If such efforts were successful, farmworkers would be allowed to bring a private cause of action against employers who violate the under-enforced provisions of related law (OSHA and the Worker Protection Standard (“WPS”).⁶³ “Despite the fact that the working arrangement provisions comprise a substantial part of the protections provided to farmworkers under AWPA, neither the Act itself nor the regulations promulgated under authority of the Act define working arrangement.”⁶⁴ Accordingly, it remains unclear if the standards of OSHA and WPS are enforceable through AWPA.

D. National Labor Relations Act and Agriculture

The NLRA is another piece of federal legislation that was drafted with an exemption for agricultural workers.⁶⁵ Since its inception, the NLRA has excluded farmworkers from its protection of workers’ right to collective bargaining.⁶⁶

Although agricultural laborers are not protected there is no mention that agricultural laborers are forbidden from forming unions. But without the protection offered by the NLRA, farmers do not have to recognize the union nor will they face any consequences in failing to so recognize in contrast with employers in other industries.⁶⁷

62. 29 U.S.C. §§ 1822(c), 1832(c) (2012); Lockard, *supra* note 24, at 520.

63. See Lockard, *supra* note 24, at 519 (outlining the case for an expanded use of the working arrangement prong of AWPA to protect farmworker health and safety).

64. *Id.* at 523.

65. 29 U.S.C. § 152(3) (2012). The term employee includes:

[A]ny employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor, practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer. *Id.*

66. Jaclyn Reilly, *Agricultural Laborers: Their Inability to Unionize Under the National Labor Relations Act*, 1 (n.d.) (unpublished J.D. student paper, Pennsylvania State University) (on file with Pennsylvania State University, Dickinson School of Law), *available at* http://law.psu.edu/_file/aglaw/Publications_Library/Agricultural_Laborers.pdf (“Employees who engage in collective bargaining are able to band together to bargain with employers for better wages, a safer working environment, fringe benefits and other terms and conditions of employment. The NLRA protects this bargaining process and the parties involved.”).

67. *Id.*

Several scholars have pointed out that this exclusion keeps agricultural workers in low-wage, dangerous working conditions, and exacerbates the workplace safety risks they face.⁶⁸

E. Limitations of Current Pesticide Use Regulations

In 1974, the EPA published its WPS.⁶⁹ The WPS requires farmers that use pesticides or employ workers that use pesticides to take steps to reduce the risk of pesticide-related illnesses.⁷⁰ There is no private cause of action for a violation of the WPS.

One of the most important requirements involves keeping workers out of treated areas during applications and while the restricted entry interval (REI) remains in effect. Growers also must provide workers with . . . protective equipment and decontamination supplies when they enter treated fields within 30 days of expiration of the REI.⁷¹

Generally, the EPA has cooperative agreements with states, through which states are delegated the authority to implement and enforce provisions of the WPS while EPA's regional offices oversee their activities.⁷²

The WPS authorizes EPA and delegated state officials to conduct compliance inspections on farms. These inspections are either routine or for cause (i.e., in response to a complaint).⁷³ Noncompliance with WPS may result in both civil penalties by EPA and criminal liability under the Federal Insecticide Fungicide and Rodenticide Act ("FIFRA").⁷⁴

68. See Lockard, *supra* note 24, at 518 (arguing that farmworkers' exclusion from NRLA bolsters the case for allowing farmworkers the right to seek monetary damages under AWPAs in a private cause of action).

69. 40 C.F.R. § 170 (2012).

70. 40 C.F.R. § 170.1 (2012).

71. *Agrichemicals WPS—Information Exchange Between Commercial Handlers and Growers*, U.S. ENVTL. PROT. AGENCY (Aug. 2001), <http://www.epa.gov/oecaagct/factsheets/epa-305-f-01-011ag.html>.

72. OFFICE OF PESTICIDE PROGRAMS, U.S. ENVTL. PROT. AGENCY, 2015-2017 FIFRA COOP. AGREEMENT GUIDE 1, 6 (2014), *available at* <http://www2.epa.gov/sites/production/files/2014-10/documents/15-17guidance.pdf>.

73. Memorandum from Lisa C. Lund, Dir., U.S. Env'tl. Prot. Agency Office of Compliance, to Reg'l Pesticide Div. Dirs. and Reg'l Pesticide Branch Chiefs (Feb. 21, 2012) (on file with agency), *available at* <http://www2.epa.gov/sites/production/files/2013-09/documents/wpsinspectionsguide.pdf>.

74. 40 C.F.R. § 170.9(b) (2012).

Under [] FIFRA section 12(a)(2)(G) it is unlawful for any person “to use any registered pesticide in a manner inconsistent with its labeling.” . . . A person who has a duty under this part, as referenced on the pesticide product label, and who fails to perform that duty, violates FIFRA section 12(a)(2)(G) and is subject to a civil penalty under section 14. A person who knowingly violates section 12(a)(2)(G) is subject to section 14 criminal sanctions.⁷⁵

Interestingly, while OSHA “assure[s] safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance,” it does not protect farmworkers from pesticide misapplication and over-application.⁷⁶

Since its inception in 1970, OSHA has only promulgated one regulation that applies to the agricultural industry, the Field Sanitation Standard (“FSS”). The FSS requires growers “to provide potable drinking water, toilet facilities, and hand washing facilities to all employees engaged in hand-labor operations in fields and allow employees reasonable opportunities throughout the workday to use these facilities.”⁷⁷ Notably, there is no private right of action under the Occupational Safety and Health Act, which created OSHA, for employees to enforce its rules or standards.⁷⁸

Instead of OSHA, which is well versed in the practice of workplace safety, it is EPA that regulates pesticide use on farms. Initially, EPA and OSHA disputed which agency was responsible for overseeing workplace protection standards for agricultural laborers. “[T]wo advocacy groups and a pesticide-affected worker filed an action to compel the Secretary of Labor to issue permanent farmworker pesticide safety regulations under OSHA.”⁷⁹ The D.C. Circuit held that Congress had conferred authority to regulate pesticides at agricultural workplaces to EPA under FIFRA.⁸⁰ Thus, since the early 1970s, “OSHA has been prevented from governing farmworkers’ pesticide safety.”⁸¹

In 2000, the GAO found three main areas of inconsistent enforcement of the WPS.⁸² First, only three of EPA’s ten regions set a target number for

75. 40 C.F.R. § 170.9 (2012).

76. *OSHA Law and Regulations*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/law-regs.html> (last visited Jan. 25, 2015).

77. Lockard, *supra* note 24, at 512.

78. *Id.*

79. Flocks, *supra* note 7, at 265.

80. *Id.*

81. *Id.*

82. Lockard, *supra* note 24, at 516.

inspections.⁸³ Second, EPA did not clearly define what constituted a worker protection inspection.⁸⁴ Finally, EPA's supervision of state enforcement varied greatly.⁸⁵ Due to these insufficiencies, some farmworker advocates have argued for the creation of a private right of action under the WPS, FIFRA, or the extension of AWPA's private right of action to pesticide-related incidents.⁸⁶ Currently, "FIFRA does not expressly provide a private right of action through which farmworkers can hold employers liable for violations of EPA regulations."⁸⁷ So-called "citizen suits" permit individuals or advocacy groups to bring legal claims against agencies, which, if successful, require the agency to enforce provisions of environmental statutes and regulation, and, in some cases, to collect reasonable attorney's fees.⁸⁸

Under FIFRA and the WPS, the only recourse for an individual harmed by failure of enforcement or insufficient standards is to petition EPA to take action or to attempt traditional theories of tort recovery. FIFRA itself does not offer a victim under the WPS the statutory right to bring a private cause of action.

In February 2014, EPA announced proposed rulemaking changes to the WPS.⁸⁹ According to EPA, the proposed changes include: "increased frequency of mandatory trainings . . . to inform farmworkers of protections they are provided under law"; expanded mandatory posting of REI no-entry signs; a 16-year-old minimum age requirement for pesticide handlers; "no entry buffer zones around pesticide-treated fields"; measures to improve state compliance and enforcement abilities; standard OSHA respirators for all applicators; and mandatory availability of pesticide application information to farmworkers and their advocates.⁹⁰ It remains to be seen whether any of these proposed changes will be adopted.

F. Limitations of Tort Recovery

In *Bates v. Dow Agrosciences*, the Supreme Court did away with a decade and a half of jurisprudence that assumed all pesticide-related tort

83. *Id.*

84. *Id.*

85. *Id.*

86. Tool, *supra* note 25, at 119–20.

87. Lockard, *supra* note 24, at 513.

88. Tool, *supra* note 25, at 119 (explaining that citizen suits are otherwise known as the right to a private cause of action).

89. *Proposed Agricultural Worker Protection Standard*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/oppfead1/safety/workers/proposed/index.html> (last updated May 15, 2014).

90. *Id.*

claims were barred under federal FIFRA preemption.⁹¹ In the lower courts prior to *Bates*, a plaintiff alleging “a pesticide product was negligently designed because it harmed a person even when applied according to the label, the court[s] would rule that such a cause of action was really a ‘failure to warn’ disguised as ‘design defect.’”⁹² In other words, the courts reasoned that because EPA had decreed that the product was a good product when used according to the label, the tort claim was preempted because, “the judgment about whether it was properly designed had already been made [according to federal regulations].”⁹³

In *Bates*, the Supreme Court dealt with the question of whether the state tort claims filed by a group of Texas peanut farmers were preempted under FIFRA.⁹⁴ The Court held that FIFRA did not preempt claims for defective design, defective manufacture, negligent testing, or breach of express warranty.⁹⁵ The Court reasoned the long history of tort litigation against manufactures of poisonous substances prior to the enactment of FIFRA and the lack of express wording in FIFRA to prevent state tort remedies emphasized the fact that such claims were not preempted.⁹⁶

Quoting Justice O’Connor’s opinion in *Medtronic, Inc. v. Lohr*, Justice Stevens, writing for the majority, held:

[A] state cause of action that seeks to enforce a federal requirement does not impose a requirement that is [preempted by federal law for being] different from, or in addition to, requirements under federal law. To be sure, the threat of a damages remedy will give manufacturers an additional cause to comply, but the requirements imposed on them under state and federal law do not differ. 360k does not preclude States from imposing different or additional *remedies*, but only different or additional *requirements*. Accordingly, although FIFRA does not provide a federal remedy to farmers and others who are injured as a result of a manufacturer’s violation of FIFRA’s labeling requirements, nothing in § 136v(b) precludes States from providing such a remedy.⁹⁷

91. *Bates v. Dow Agrosciences*, 544 U.S. 431, 440–41 (2005); H. BISHOP DANSBY, *BATES V. DOW AGROSCIENCES: U.S. SUPREME COURT RESTORES SANITY IN PRODUCTS LIABILITY LAW 10* (2005) (explaining the old method of interpreting tort claims under FIFRA concluding, “after *Bates*, this is not the law as to pesticides and is less likely to be the law for other dangerous products.”).

92. *DANSBY*, *supra* note 91.

93. *Id.*

94. *Bates*, 544 U.S. at 434.

95. *Id.* at 452.

96. *Id.* at 449.

97. *Id.* at 448 (internal citations omitted).

Thus, state tort claims are not prohibited under FIFRA and could be brought in the case of farmworker injury, provided all the other elements could also be met. Still, farmworkers like Carlitos' parents face other legal and practical obstacles in bringing tort claims for pesticide-related injuries. First, in many states, pesticide exposure is considered a workplace injury covered by worker's compensation.⁹⁸ Traditionally, an individual injured at work has a right to worker's compensation, but has no standing to bring a private cause of action if the employer fails to provide it.⁹⁹ Oftentimes farmworkers are employed as private contractors where the employer is not obligated to provide worker's compensation, leaving private contractor farmworkers even less protected.

Second, under traditional tort theory, a claimant has the burden of proving a causal connection between the tortfeasor's activities and the harm that he or she has suffered.¹⁰⁰ This burden is practically insurmountable in the pesticide context; it is difficult for farmworkers to prove by a preponderance of the evidence that a pesticide caused their illness. Proving a causal link between pesticide exposure and illness is both scientifically and practically difficult. Scientifically, the chronic harms caused by pesticide exposure can take years to manifest. According to the National Center for Environmental Health of the Centers for Disease Control and Prevention, studies conducted to date are inconclusive as to whether pesticides cause injuries to health.¹⁰¹ For this reason, the attorney representing Carlitos' parents chose not to pursue a tort claim against the chemical company, and instead charged the employer with a breach of duty.¹⁰² Realistically, farmworkers often do not speak English, live in remote areas without access to medical care (where even if they could make it to a medical facility, very few medical care providers are trained to recognize the symptoms associated with pesticide illness), and may be undocumented and reluctant to seek assistance out of fear of deportation. In order to facilitate farmworkers bringing tort claims, they need some assurance that they will not be deported when they bring tort claims for illnesses caused by pesticides.

98. FARMWORKER JUSTICE & MIGRANT CLINICIANS NETWORK, A GUIDE TO WORKERS' COMPENSATION FOR CLINICIANS SERVING AGRICULTURAL WORKERS 2 (n.d.), available at https://www.farmworkerjustice.org/sites/default/files/GUIDE_WorkersComp_FINAL_ONLINE.pdf.

99. Joseph H. King, Jr., *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405, 407 (1988).

100. Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117, 2120 (1997).

101. IMPROVEMENTS NEEDED, *supra* note 9, at 4.

102. ESTABROOK, *supra* note 2, at 40.

III. HARM TO SOCIETY OF AGRICULTURAL PESTICIDE MISUSE AND LIMITATIONS OF ENVIRONMENTAL LAW TO REGULATE PESTICIDE USAGE

In the United States, there are several statutes that are designed to protect the environment. These laws recognize the societal value in protecting the natural environment including water, air, and endangered species. However, many of these environmental statutes contain exemptions for agricultural activities. Moreover, environmental statutes and regulations that do regulate agricultural activities, including the application of pesticides, are rarely enforced. Thus, these laws offer farmworkers, who bear direct witness to the environmental impact of farming, virtually no protection from the misuse of pesticides.

A. Federal Insecticide, Fungicide, and Rodenticide Act

As mentioned in Section II, FIFRA is the primary statute regulating pesticide use in the United States. FIFRA charges EPA with the responsibility for regulating the use and sale of pesticides. FIFRA's statutory provisions, however, fall short of protecting the environment and farmworker health.

In order to legally sell pesticides on the market, pesticide manufacturers must submit an application to EPA for approval to sell that pesticide.¹⁰³ EPA takes the information submitted by the entity seeking to sell, distribute, or use the pesticide and evaluates its claims that the pesticide will be "used in accordance with widespread and commonly recognized practice [and] will not generally cause unreasonable adverse effects on the environment."¹⁰⁴ If EPA determines that the pesticide has unreasonable adverse effects on the environment, EPA rejects the pesticide for sale. FIFRA defines "unreasonable adverse effects on the environment" as:

[A]ny unreasonable risks to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide, or (2) a human dietary risk from residues that result from a use of a pesticide in or on any food inconsistent with the standard [under the Federal Food, Drug and Cosmetics Act (FFDCA)].¹⁰⁵

103. *Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)*, U.S. Envtl. Prot. Agency, <http://epa.gov/agriculture/lfra.html> (last updated June 27, 2012).

104. 7 U.S.C. § 136a(c)(5)(D) (2006).

105. MARY JANE ANGELO ET AL., *FOOD, AGRICULTURE, AND ENVIRONMENTAL LAW* 131 (2013).

Since its inception, EPA has interpreted this language to require a cost-benefit analysis, except for instances where the more rigorous FFDCA applies.¹⁰⁶ The FFDCA regulates the presence and permissible levels of pesticide residues in or on food products at time of purchase for consumption.¹⁰⁷ Under the FFDCA, “before a registration can be granted for a food use pesticide, a tolerance or tolerance exemption must be in place.”¹⁰⁸ Additionally, the FFDCA requires the use of a health-based standard for setting the tolerance; that standard is “reasonable certainty of no harm.”¹⁰⁹

The cost-benefit analysis utilized under FIFRA is a lower standard than the health-based standard of the FFDCA. This leaves farmworkers far less protected than consumers from exposure to pesticides. While EPA does require data to assess and evaluate human exposure to pesticides, including “acute human hazard, sub chronic human hazard, chronic human hazard, mutagenicity, metabolism, reentry hazard, spray drift evaluation, as well as . . . oncogenicity, teratogenicity, neurotoxicity, and reproductive effects in humans,”¹¹⁰ the information is subject to the cost-benefit analysis. Therefore, as long as the economic and social benefits outweigh the human and environmental risks, EPA will approve the pesticide.¹¹¹

Another problem with FIFRA is that it does not require farmers to report their annual pesticide use to EPA.¹¹² To date, only California’s state implementation plan contains a system for reporting full agricultural pesticide use to EPA.¹¹³ Accordingly, farmworker advocates have pointed out that even though EPA has estimated that approximately 5.1 billion pounds of pesticides are used annually in the United States, there is not enough reporting of their use for the agency to accurately evaluate the risks to human health and the environment.¹¹⁴

106. *Id.*

107. *Laws and Regulations, Pesticides*, U.S. ENVTL PROT. AGENCY, <http://www.epa.gov/pesticides/regulating/laws.htm> (last updated Oct. 17, 2014).

108. *Id.*

109. *Id.*

110. ANGELO ET AL., *supra* note 106.

111. *Id.*

112. This is subject to change if the amended rule making passes EPA’s approval. *See* ENV’T PROT. AGENCY, PROPOSED AGRICULTURAL WORKER STANDARD: EPA NEEDS YOUR INPUT, <http://www.epa.gov/oppfeed1/safety/workers/proposed/index.html> (last visited Oct. 20, 2014).

113. *Id.*

114. FARMWORKER JUSTICE, EXPOSED AND IGNORED: HOW PESTICIDES ARE ENDANGERING OUR NATION’S FARMWORKERS 4 (2013), *available at* <http://www.farmworkerjustice.org/sites/default/files/aExposed%20and%20Ignored%20by%20Farmworker%20Justice%20ingles%20compressed.pdf>.

B. Clean Water Act

The Clean Water Act (“CWA”) is the primary federal law in the United States governing the environmental impacts to water sources from agriculture.¹¹⁵ Because the CWA does not sufficiently provide direct federal authority for regulating most of the agricultural sources of water pollution, it does not provide the tools with which to regulate the application of pesticides and their potential to harm farmworkers.¹¹⁶

One of the most significant provisions of the CWA is the National Pollutant Discharge Elimination System (“NPDES”) permit system.¹¹⁷ The NPDES system requires entities to apply for a permit if their activities will add pollutants from a point source into navigable waters of the United States.¹¹⁸ Many agricultural discharges, including those containing pesticide residue, fall outside the purview of the CWA because the CWA explicitly excludes agricultural water discharges and return flows from irrigated agriculture.¹¹⁹ Therefore, the CWA leaves an enormous gate through which the current of pesticide-contaminated water flows largely unregulated.

C. Clean Air Act

The Clean Air Act (“CAA”) is a federal law that aims to protect and enhance the quality of the nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.¹²⁰ Since pesticides have an effect on air quality, the CAA can be applied to pesticides. However, because the CAA charges states with enforcement, each state is left to develop its own implementation plans, programs, and policies for CAA enforcement. Therefore, the regulation of pesticides through the CAA is cumbersome. Most states lack the resources to do an effective job, thus leaving farmworkers and the natural environment under- or unprotected by the CAA.

Congress granted states wide authority over air regulations believing they would be better equipped to develop local solutions.¹²¹ “Under the CAA, state, local, and tribal governments . . . monitor air quality, inspect

115. ANGELO ET AL., *supra* note 106, at 147.

116. *Id.* at 161.

117. *Id.*

118. *Id.*; 33 U.S.C. § 1342 (2012).

119. 33 U.S.C. § 1362(14) (2012).

120. 42 U.S.C. § 7401(b)(1) (2012); *see also Understanding the Clean Air Act*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/airquality/peg_caa/understand.html (last updated Oct. 28, 2014) (noting that since the CAA was passed, the nation’s GDP has tripled and its energy use has doubled).

121. *Understanding the Clean Air Act*, *supra* note 121.

facilities under their jurisdictions and enforce CAA regulations.”¹²² Pursuant to the CAA, states must develop State Implementation Plans (“SIPs”) that outline how each state will control air pollutants.¹²³ “A SIP is a collection of the regulations, programs and policies that a state will use to clean up polluted areas.”¹²⁴

States regulate many pollutants under their SIPs, including Volatile Organic Compounds (“VOCs”). VOCs are “usually made from petroleum and are a major constituent of gasoline. They are also used as solvents present in products from paints and adhesives to inks and some, but not all, consumer and commercial pesticide formulations. As these products dry, VOC solvents are emitted into the air.”¹²⁵ Moreover, “VOC-emitting pesticides are highly prone to drifting away from where they are applied onto farmworkers and rural communities. Most VOC-emitting pesticides are fumigants, the most dangerous and toxic pesticides used in agriculture.”¹²⁶ Again, California provides one example of a state that has adopted a protective SIP. The California Department of Pesticide Regulation (“DPR”) is “responsible for maintaining an emission inventory to track the VOC emissions from agricultural and commercial structural pesticide products. One of the key components in estimating emissions is determining the VOC content (emission potential) of pesticide products.”¹²⁷

Some farmworker advocates, like the CRPE, have incorporated DPR’s studies into their broader approach to protect farmworkers from pesticides. “In 2008, [the CRPE] pesticide campaign succeeded in forcing the [DPR] to adopt regulations to control smog-forming VOC emissions from pesticides, as they had promised to do as far back as 1994.”¹²⁸ However, even in a state with a rigorous SIP like California, the CAA does not and cannot provide farmworkers with adequate protections to keep them safe because of a lack of enforcement resources.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Clean Air Act and Volatile Organic Compounds*, CROP LIFE AM., <http://www.croplifeamerica.org/pesticide-issues/clean-air> (last visited Jan. 24, 2015).

126. *The Pesticide Campaign*, CTR. ON RACE, POVERTY & THE ENV’T, <http://www.crpe-aj.org/crpe/index.php/campaigns/clean-air/pesticides> (last visited Jan. 24, 2015).

127. *Volatile Organic Compound Emissions from Pesticides Regulatory Requirements for the Emissions Inventory*, CAL. DEP’T OF PESTICIDE REGULATION, http://cdpr.ca.gov/docs/emon/vocs/vocproj/voc_reg_issues.htm (last visited Jan. 14, 2015).

128. CTR. ON RACE, POVERTY & THE ENV’T, *supra* note 127.

IV. COOPERATIVE VISA PROGRAMS—GROUNDWORK FOR A SOLUTION

A. *The POWER Act*

In 2010, Senator Robert Menendez of New Jersey introduced S. 3207, the POWER Act to Congress.¹²⁹ The POWER Act sought to provide protection to ensure equal application of workplace laws, provide U visa eligibility for workers suffering serious labor violations, preserve labor law enforcement opportunities, and hold employers responsible for labor law violations, and in so doing protect all workers in the United States.¹³⁰ The bill died after it was referred to the judiciary committee.¹³¹ The following year, the POWER Act was reintroduced in the Senate and the House.¹³² It was not enacted by either.¹³³

Despite the failure of either house to enact the POWER Act, several of its key provisions were picked up in S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013. Specifically, Subtitle B—Protecting United States Workers, Section 3201 Protections for Victims of Serious Violations of Labor and Employment Law (Section 3201)—included protections introduced by the POWER Act. Section 3201 would amend the U visa program to encompass serious violations of “any Federal, State or local law, serious workplace abuse, exploitation, retaliation or violation of whistleblower protections;” as well as violations giving rise to a civil cause of action under 18 U.S.C. § 1595—Civil Remedy, or a violation resulting in the deprivation of due process or constitutional rights.¹³⁴ Section 3201 would also amend section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996—8 U.S.C. § 1367—by adding “bona fide workplace claim” to the list of

129. Protect Our Workers from Exploitation and Retaliation Act of 2010, S. 3207, 111th Cong; *Menendez Joined By Rev. Jesse Jackson, Labor and Civil Rights Groups to Announce Workers' Rights Legislation*, BOB MENENDEZ: U.S. SENATOR FOR N.J. (Apr. 14, 2010), <http://www.menendez.senate.gov/news-and-events/press/menendez-joined-by-rev-jesse-jackson-labor-and-civil-rights-groups-to-announce-workers-rights-legislation>.

130. *Menendez Joined By Rev. Jesse Jackson, Labor and Civil Rights Groups to Announce Workers' Rights Legislation*, *supra* note 129.

131. S. 3207, 111th Cong. (2010), available at <https://www.govtrack.us/congress/bills/111/s3207>.

132. H.R. 2169 (112th Cong.): *POWER Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/112/hr2169> (last visited Jan. 19, 2015).

133. Protect Our Workers from Exploitation and Retaliation Act of 2011, S. 1195, 112th Cong. (2011), available at <https://www.congress.gov/bill/112th-congress/senate-bill/1195>; Protect Our Workers from Exploitation and Retaliation Act of 2011, H.R. 2169 112th Cong. (2011), available at <https://www.govtrack.us/congress/bills/112/hr2169>.

134. Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong. § 3201(a) (2013), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113s744es/pdf/BILLS-113s744es.pdf>.

limitations on sources of information that may be used to make adverse immigration status determinations.¹³⁵

The rationale behind the POWER Act, Section 3201, and the cooperative visas currently in place is consistent through each. The express purpose of each of these programs is threefold. First, Congress recognized the need to catch all perpetrators of serious crimes (and serious employment violations under Section 3201). Second, that noncitizens would only cooperate with police if they received protection from deportation. Third, Congress acknowledged the importance of noncitizens' presence in the United States to testify against perpetrators of crimes (and civil violations in the case of Section 3201) and to assist in investigations.¹³⁶

While the Senate passed Section 3201 in S. 744, the bill has not become law because the House failed to approve a similar measure. Therefore, there are currently three visa categories that provide immigration relief to noncitizens to encourage cooperation with law enforcement. As previously mentioned, those cooperative visas are categories S, T, and U. In order to qualify for these visas, the noncitizen must be a victim or witness to a crime and cooperate with law enforcement to catch the perpetrator of the crime.

B. The S Visa

The S visa is an "informant" visa for undocumented immigrants who cooperate with law enforcement in prosecuting criminal actions, particularly cases involving terrorist activities.¹³⁷ The S visa is "designed to assist in the prevention of acts of international terrorism, international narcotics trafficking, serious violations of international humanitarian law, transnational organized crime, and other related criminal acts."¹³⁸

The process for granting an S visa to an individual who has assisted law enforcement as a witness or informant begins when the law enforcement agency submits an application for permanent residence on behalf of the witness or informant, after that individual completes the terms and conditions of his/her S classification.¹³⁹ Only federal or state law

135. S. 744, 113th Cong. § 3201(f) (2013).

136. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (showing the purposes of this division are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims).

137. *Green Card for an Informant (S Nonimmigrant)*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/green-card/other-ways-get-green-card/green-card-informant-s-nonimmigrant> (last updated Sept. 3, 2009) [hereinafter *S Nonimmigrant*].

138. 22 U.S.C. § 2708 (a)(2) (2012).

139. *S Nonimmigrant*, *supra* note 137.

enforcement agencies and U.S. Attorney's offices may submit a request for an S nonimmigrant visa on behalf of a witness or informant.¹⁴⁰

The S visa grants authorization to live and work in the United States for up to three years.¹⁴¹ If the information supplied by the S visa holder leads to a successful prosecution, he or she may be able to adjust to legal permanent resident status—what is commonly referred to as a “green card.”¹⁴² “Qualifying immediate family members . . . may also be eligible for a green card.”¹⁴³

The S visa does not provide relief to undocumented farmworkers because the underlying activity being reported must be criminal. The misapplication or over-application of pesticides, even when it causes health-related problems, is not a criminal offense. Therefore, the S visa does not protect undocumented farmworkers from deportation if they report that violation.

C. *The T Visa*

Congress created the T nonimmigrant status by passing the Victims of Trafficking and Violence Protection Act (“VTVPA”) in October 2000.¹⁴⁴ The purpose of the T visa is “to combat trafficking in persons, a contemporary manifestation of slavery[,] . . . to ensure just and effective punishment of traffickers, and to protect their victims.”¹⁴⁵

Once certified as an eligible victim of human trafficking, the federal benefits for T nonimmigrants include stabilization of immigration status, and financial and social support in rebuilding their lives equivalent to those of refugees.¹⁴⁶ The T visa grants four-year authorization to live and work in the United States.¹⁴⁷ After three years, there is a possibility for adjustment of status to permanent resident.¹⁴⁸ The T visa also extends to certain derivative family members.¹⁴⁹

140. KARMA ESTER, IMMIGRATION: S VISAS FOR CRIMINAL AND TERRORIST INFORMANTS 2 (2005), available at <http://www.fas.org/sgp/crs/terror/RS21043.pdf>.

141. *Id.*

142. *Id.*

143. *S Nonimmigrant Status*, *supra* note 137.

144. *T Nonimmigrant Status*, *supra* note 20.

145. 22 U.S.C. § 7101(a).

146. *Id.* § 7105(b)(1).

147. *Questions and Answers: Victims of Human Trafficking, T Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status/questions-and-answers-victims-human-trafficking-t-nonimmigrant-status (last updated Dec. 29, 2014).

148. 8 U.S.C. § 1253(l)(1)(A).

149. *Id.* § 1253(l)(1).

The T visa, however, does not provide relief to undocumented farmworkers following pesticide injuries. To qualify for a T visa, an individual must be a victim of a severe form of human trafficking; being injured by pesticides or a witness to their misapplication does not meet this requirement.

D. The U Visa

The U visa was created in October 2000, “to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes . . . while . . . [at the same time,] offering protection to victims of such crimes.”¹⁵⁰ In order to be eligible for a U visa, an individual must: have suffered substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity that occurred in the United States; have information concerning that criminal activity; and must have been, currently is, or is likely to be helpful in the investigation or prosecution of the crime.¹⁵¹ Qualifying criminal activities include one or more of the following: abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, female genital mutilation, felonious assault, hostage, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, torture, trafficking, witness tampering, unlawful criminal restraint and other related crimes.¹⁵² The individual must file a petition for U nonimmigrant status with United States Citizenship and Immigration Services and provide the appropriate certification from a certifying agency. The U nonimmigrant status certification must demonstrate that the petitioner “has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the criminal activity.”¹⁵³ For successful applicants, the U visa grants four-year permission to live and work in the United States. After three years, there is a possibility for permanent residency. The U visa also allows for certain derivative family members to remain in the United States with the U visa holder.¹⁵⁴

150. *Id.* § 1513, 114 Stat. at 1533.

151. *Id.* § 1513(b)(3).

152. *Id.*

153. *Questions and Answers, supra* note 147.

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

If the agricultural exemptions were tightened, pesticide misapplication and over-application could serve as serious violation of labor and employment law, FLSA, the WPS and maybe even other federal statutes, but the House has not passed a bill with language equivalent to Section 3201. Therefore, pesticide-related workplace injury or exposure does not currently satisfy any of the enumerated criminal grounds that form the basis for relief under the U visa. Thus, the U visa does not provide relief to undocumented farmworkers exposed to pesticides.

V. ENVISIONING A NEW COOPERATIVE VISA PROGRAM

Farmworkers are not sufficiently protected against pesticide misuse. There is a severe under-reporting of agricultural chemical misuse because the environmental laws that do regulate pesticide usage rely on the so-called “citizen suit” or complaint system. This is a disservice to farmworkers, rural communities, and the natural environment.

The restriction of agricultural exemptions to environmental statutes and creation of a new relief visa are justified by the health, social, and environmental benefits that it would ensure. Such revisions would increase farmworkers’ ability to report pesticide misuse and bring tort claims. Protecting noncitizen farmworkers from deportation would facilitate cooperation between them and enforcement agencies in order to hold pesticide abusers accountable.

As seen in the case of Carlitos’ parents, noncitizen farmworkers are reluctant to seek legal help because they are afraid of being deported, often depend on their employers for housing, frequently lack transportation, typically do not speak English, and lack an understanding of their legal rights. In Carlitos’ case, the deformity was so severe, requiring such expensive and constant medical attention, his parents likely concluded the potential benefit of covering his care outweighed the possibility of deportation. Carlitos’ parents are the exception, not the rule. In other instances where undocumented persons have been victimized, they tend to seek help from law enforcement when the government has offered some buffer from removal and the potential for temporary nonimmigrant status.

While the current relief visas deal with criminal activities, the underlying social policy goals of extending immigration benefits to victims of pesticide misuse and over-application are analogous to Congress’ intent for those visas. This is further evidenced by the Senate’s adoption of the dual-purpose rationale in Section 3201. The current relief visas exist because Congress and the public wanted to provide an incentive for noncitizens to report unlawful activities without fearing deportation. The social benefit rationale is the same for expanding immigration benefits to

undocumented farmworkers who facilitate the enforcement of environmental laws.

While Section 3201 has not become law, it would have addressed the immigration piece of this larger legal issue. In the absence of comprehensive immigration reform, Congress can and should enact legislation that will specifically protect farmworkers based on all the policy rationales outlined in this Note. One way it could do this is by passing a new cooperative relief visa.

This new visa, which this Note will call the Z visa, would extend to civil violations, specifically pesticide misuse. The Z visa, in tandem with stricter environmental statutes and narrower agricultural exemptions covered here, would provide incentive and security to the vulnerable population that is the most likely to witness conduct that violates FIFRA and other environmental statutes.

The Agricultural Chemical Exposure (“ACE”) Act proposed here would enable the Z visa. The ACE Act would amend 7 U.S.C. § 136–136y to allow a person who witnesses or is exposed to harmful effects of agricultural chemical use the right to bring a private cause of action against the manufacturer, the grower, and or the government agency responsible for permitting the use of such chemical.¹⁵⁵ The ACE Act would also amend 8 U.S.C. § 1101(a)(15) to include subsection Z. Section Z would read as follows:

- (i) ELIGIBILITY. Subject to section 1184(p) of this title, an alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that
 - (I) the alien has witnessed or been exposed to a covered violation;
 - (II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning activity described in subparagraph (II);
 - (III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting civil violations described in clause (II); and

155. S. 744, 113th Cong. § 3201(a), and the U visa provide the template for the statutory proposal I lay out here.

(IV) the action described in clause (II) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States.

(ii) VIOLATION. A covered violation referred to in this subparagraph is a serious violation involving 1 or more of the following or any similar activity in violation of any Federal, State, or local law

(I) pesticide exposure or misapplication under the Worker Protection Standard of 7 U.S.C. §§ 136–136y, codified at 40 C.F.R. Part 170;

(II) serious workplace abuse;

(III) exploitation, retaliation, or violation of whistleblower protections;

(IV) a violation giving rise to a civil cause of action under section 1595 of title 18, United States Code; or

(V) a violation resulting in the deprivation of due process or constitutional rights.

(iii) TEMPORARY STAY OF REMOVAL. Section 274A (8 U.S.C. 1324a), as amended by section 3101, is further amended (1) in subsection (e) by adding at the end the following:

(I) CONDUCT IN ENFORCEMENT ACTIONS. If the Secretary undertakes an enforcement action at a facility about which a bona fide workplace claim, including violation of the Worker Protection Standard, has been filed or is contemporaneously filed, or as a result of information provided to the Secretary in retaliation against employees for exercising their rights related to a bona fide workplace claim, the Secretary shall ensure that

(A) any aliens arrested or detained who are necessary for the investigation or prosecution of a bona fide workplace claim or criminal activity (as described in subparagraph (T) or (U) or (Z) of section 101(a)(15)) are not removed from the United States until after the Secretary

(i) notifies the appropriate law enforcement agency with jurisdiction over such violations or criminal activity; and

(ii) provides such agency with the opportunity to interview such aliens;

(B) no aliens entitled to a stay of removal or abeyance of removal proceedings under this section are removed; and

- (C) the Secretary shall stay the removal of an alien who
- (i) has filed a claim regarding a covered violation described in clause (II) of section 101(a)(15)(Z) and is the victim of the same violations under an existing investigation;
 - (ii) is a material witness in any pending or anticipated proceeding involving a bona fide workplace claim or civil rights claim; or
 - (iii) has filed for relief under such section if the alien is working with law enforcement as described in clause (i)(III) of such section.

(iv) **VICTIMS OF CRIMINAL ACTIVITY OR PESTICIDE MISUSE OR LABOR AND EMPLOYMENT VIOLATIONS.** The Secretary of Homeland Security may permit an alien to remain temporarily in the United States and authorize the alien to engage in employment in the United States if the Secretary determines that the alien

- (I) has filed for relief under section 101(a)(15)(Z); or
- (II)(A) has filed, or is a material witness to, a bona fide claim or proceeding resulting from a covered violation (as defined in section 101(a)(15)(Z)(II)); and
- (B) has been helpful, is being helpful, or is likely to be helpful, in the investigation, prosecution of, or pursuit of civil remedies related to the claim arising from a covered violation, to
 - (i) a Federal, State, or local law enforcement official;
 - (ii) a Federal, State, or local prosecutor;
 - (iii) a Federal, State, or local judge;
 - (iv) the Environmental Protection Agency;
 - (v) the Equal Employment Opportunity Commission;
 - (vi) the Department of Labor; or
 - (vii) a medical professional.

In summary, the Z visa, like other cooperative visas, would grant victims of pesticide abuse temporary status after cooperation with enforcement agencies and later they would be eligible for adjustment to legal permanent resident status. Similar to the U visa, which requires the certification of an enforcement agency, the Z visa would add EPA and medical professionals to the list of certifying agencies. The medical certification would verify that the harm suffered by the individual matched specified criteria relating to the acute and chronic health effects of pesticide

exposure. The Z visa would not require the same standard of causation used in tort recovery; rather a prima facie showing that links physical symptoms to pesticide exposure. Just like Section 3201, the Z visa would establish protections against abuse to ensure it would only be granted for meritorious claims.¹⁵⁶

CONCLUSION

As consumers of food, we should all care about where our food comes from, what substances were utilized in its production, and that the people who grew, processed, and prepared it before it reaches our mouths were guaranteed basic protections from harm. In theory, existing environmental laws are designed to protect farmworkers and the environment from the adverse effects of pesticides. However, these laws and the tort system, combined with draconian immigration policy, fail to ensure complete reporting of pesticide misuse.

Historically, agricultural laborers have received little-to-no legal protections regarding labor, wages, abuse, or working conditions. While chattel slavery ended about 149 years ago, the United States once again finds itself with a system of agricultural production that depends on labor performed by persons without citizenship status and the privileges that status affords.¹⁵⁷ Just as former slaves needed the guarantees of citizenship to ensure access to the legal system in order to ensure basic civil liberties, so do the undocumented farmworkers today. There is no legitimate reason why chemical companies that make these chemicals, and the growers who utilize them, should not be held legally responsible for the toxic chemical exposure experienced by undocumented farmworker employees or independent contractors.

Farmworkers should be incorporated into an enforcement system because they are in a unique position to witness and experience pesticide misuse. The structure of this new relief visa better protects farmworkers and the natural environment. The Z visa would provide security that coming forward would not jeopardize their place in the U.S. labor market. Just as the U and T visas facilitate participation in enforcement through cooperation with law enforcement, the Z visa would incentivize farmworker participation in environmental law enforcement.

156. S. 744, 113th Cong. § 3201(a) (2013).

157. The Thirteenth Amendment of the U.S. Constitution abolished the institution of slavery in 1865. U.S. CONST. amend XIII.