

IMMIGRATION POLICY FOR WORKPLACE VIOLENCE AND UNDOCUMENTED WOMEN: STATE-BASED SOLUTIONS FOR WISCONSIN

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INTRODUCTION

Wisconsin needs to amend its current sexual harassment laws to ensure that employers do not submit undocumented women to sexual violence,¹ and use their undocumented immigration status in the United States to deter women from reporting abuse. Undocumented women face more challenges when it comes to reporting sexual harassment or abuse occurring in the workplace. This is attributed to judicial interpretation of Title VII, President Obama’s

1. The terms “sexual harassment,” “sexual abuse,” and “sexual violence” are used interchangeably in this article because of the difficulty in separating those terms from the data and experiences of undocumented women, who have been sexually harassed, sexually assaulted, and raped in the workplace by employers. When the article is speaking about the criminal charges of sexual assault or rape it will refer to those terms.

immigration enforcement policy, and Congress' failure to act to resolve the immigration issues. Two recent Supreme Court decisions² make it more challenging for victims with Title VII claims to succeed in court. Meanwhile, the Obama Administration has increased its enforcement power, resulting in mass deportations,³ and Congress, specifically the House of Representatives, has halted any opportunities of immigration relief in the near future.⁴ Undocumented women must now rely on the states to protect them from workplace abuse. But in order for the states to do so, women must first report the abuse. However, reporting the abuse presents many challenges when there are no safeguards in place to protect undocumented women from employer retaliation.

On October 11, 2013, the undocumented community won a small victory when the state of California signed three bills into law that ensure protections to undocumented individuals.⁵ California recognized that states are in a better position to protect these vulnerable undocumented women from unscrupulous employers or employees who take advantage of undocumented women's legal status, subject them to sexual abuse, and keep them from going to the authorities. Governor Jerry Brown signed into law AB 263, SB 666, and AB 524, "designed to strengthen workers' rights and punish unscrupulous employers who retaliate against workers for exercising their rights."⁶ These

2. See *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2535, 186 L. Ed. 2d 503, 524-25, 2013 U.S. LEXIS 4704 (2013) (increasing the plaintiff's burden under Title VII claims by holding that a "plaintiff making a retaliation claim under §2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer"); *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443, 186 L. Ed. 2d 565, 2013 U.S. LEXIS 4703 (2013) (rejected to adopt the EEOC guidelines "which ties supervisors status to the ability to exercise significant direction over another's daily work").

3. *Removal Statistics*, U.S. DEP'T OF HOMELAND SEC., <http://www.ice.gov/removal-statistics/> ("In FY 2012, ICE removed 409,849 individuals.") (last visited Jan. 20, 2014); see also Gilda Holguin et al., *Petition For Rule Making Submitted To The Department of Homeland Security*, NOT1MORE, <http://www.notonemoredeportation.com/resources/rulemaking/> (last visited March 4, 2014) (Submitting a petition requesting ICE stop the mass deportations); David Nakamura, *Immigration Advocates Ask Obama to Suspend Some Deportations*, WASH. POST BLOG (May 13, 2013, 1:41 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/05/13/immigration-advocates-ask-obama-to-suspend-some-deportations/> (Immigration advocates request that President Obama stop the mass deportations).

4. See David Nakamura & Ed O'Keefe, *Immigration Reform Effective Dead Until Obama Leaves Office, Both Sides Say*, WASH. POST (June 26, 2014), http://www.washingtonpost.com/politics/immigration-reform-deal-now-unlikely-until-after-obama-leaves-office-both-sides-say/2014/06/26/945d1210-fc96-11e3-b1f4-8e77c632c07b_story.html.

5. *Governor Brown Signs Historic Laws Protecting Immigrant Workers from Abusive Employers*, CA LABOR FEDERATION (Oct. 11, 2013) <http://www.nelp.org/page/-/Press%20Releases/2013/PR-California-Immigrant-Worker-Anti-Retaliation-Bill-Signed.pdf?nocdn=1>.

6. See *Governor Brown Signs Historic Laws Protecting Immigrant Workers from Abusive Employers*, CA LABOR FEDERATION (Oct. 11, 2013), http://www.calaborfed.org/index.php/site/page/gov._brown_signs_historic_laws_protecting_immigrant_workers_from_abusive_em.

laws will hold employers accountable, finally allowing undocumented female workers in California to come forward and speak out about the sexual abuse occurring at work, without fearing their undocumented status in the United States will be used against them.⁷

However, this is not true for undocumented workers in other states. As mentioned above, Wisconsin is one state where undocumented women must still remain in the shadows. Wisconsin's current sexual harassment laws⁸ do not offer protections to undocumented women, permitting employers to abuse undocumented women without facing any consequences. For example, if an undocumented woman in Wisconsin were to report her employer for sexual harassment, the employer could retaliate by reporting her immigration status. The ensuing investigation can result in deportation of the undocumented woman,⁹ forcing victims of workplace abuse back to their home country without the opportunity to vindicate their rights. Wisconsin legislators must stop employers, and their employees, from overpowering undocumented women and putting them in a situation where they are forced to choose between being deported or submitting to abuse.

The changing demographics in Wisconsin require the state to change their laws to protect undocumented women from sexual harassment. In recent years, Wisconsin has experienced a change in its demographics when it comes to the Latino population.¹⁰ Along this line, there has also been an increase in its immigrant population.¹¹ For this reason, Wisconsin's laws must begin addressing issues affecting members of the immigrant community, specifically undocumented women facing sexual violence at work. The critical circumstances faced by undocumented workers deserve legal action.

This article begins by addressing barriers undocumented women face in reporting sexual harassment in the workplace. Part I provides a broad overview of workplace sexual harassment in the United States, followed by a comparison with the experiences of undocumented women facing sexual harassment at

7. See *infra* Part II for an analysis of these three bills that became law on January 1, 2014.

8. An analysis of Wisconsin's sexual harassment statute will be discussed in *infra* Part II.

9. Rebecca Smith and Eunice Hyunhye Cho, *Workers' Rights on ICE*, NELP (Feb. 2013) <http://www.nelp.org/page/-/Justice/2013/Workers-Rights-on-ICE-Retaliation-Report.pdf?nocdn=1>

10. In 2000, Wisconsin's population was 3.6% Latino and 87.3% White only. *Profile of Demographic Characteristics: 2000*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_DP1&prodType=table (last visited Jan. 20, 2014). Ten years later, the Latino population increased to 5.9% and the White only population decreased to 83.3 percent. *Profile of General Population and Housing Characteristics: 2010*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DP_DPDP1 (last visited Jan. 20, 2014).

11. See *New Americans in Wisconsin*, IMMIGR. POL'Y CTR: AM. IMMIGR. COUNCIL, (Published on Jan. 10, 2013), <http://www.immigrationpolicy.org/just-facts/new-americans-wisconsin> ("The foreign-born share of Wisconsin's population rose from 2.5% in 1990, to 3.6% in 2000, to 4.7% in 2011, according to the U.S. Census Bureau.")

work. Finally, Part I of this article addresses the barriers undocumented women face when they pursue criminal prosecutions of workplace sexual assault perpetrators.

The second part of the article argues that the state is in a better position than the federal government to address the issue of sexual abuse of undocumented women in the workplace. This article proposes that the state of Wisconsin implement laws that are similar to California's new bills AB 263, AB 524, and SB 666. Such laws would impose liability on Wisconsin employers who threaten deportation to prevent undocumented women from reporting sexual abuse. Part III concludes by predicting that, when Wisconsin provides laws that will protect undocumented women against unscrupulous employers, they will come forward and report the sexual abuse they have long endured.

I. BACKGROUND

In the United States, addressing workplace sexual harassment has its obstacles. First, preventing sexual harassment can be difficult because of the lack of reporting by victims.¹² This problem is magnified when victims of employment sexual harassment are undocumented workers.

In an effort to resolve several issues employees were facing in the workforce, Congress passed Title VII of the Civil Rights Act of 1964. Title VII makes it unlawful for employers to discriminate against employees, because of their sex, among other categories.¹³ The category of sex was added by Congress in the last minute before adjourning,¹⁴ the statute prohibiting sex discrimination reads as follows: “[i]t should be unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.”¹⁵

Although the statutory language found in Title VII does not expressly refer to sexual harassment, there are other guidelines that have evolved to include sexual harassment in the definition of sex discrimination. The Equal Employment Opportunity Commission (“EEOC”) guidelines, supported by Supreme Court precedent, have stated that sexual harassment is a form of sex discrimination, and has defined it as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual

12. See *Know Your Rights: Workplace Sexual Harassment*, AM. ASS'N OF UNIV. WOMEN, <http://www.aauw.org/what-we-do/legal-resources/know-your-rights-at-work/workplace-sexual-harassment/#about> (“Workplace Report”) (last visited Jan. 15, 2014) (A telephone poll study of 782 U.S. workers showed that 62% who had been subjected to sexual harassment at work took no action).

13. 42 U.S.C. § 2000e (2014).

14. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63 (1986) (citing 110 Cong.Rec. 2577–2584 (1964)).

15. 42 U.S.C. § 2000e-2(a)(1) (2014).

harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.¹⁶

Title VII protections apply both to lawful citizens and noncitizens and are enforced by the EEOC. The EEOC has the authority to investigate and enforce the federal laws that make it illegal for employers¹⁷ to discriminate against an employee in certain situations, including sexual harassment.¹⁸

Under Title VII, a victim of sexual harassment in the workplace can file against an employer or employee claims for: *quid pro quo*,¹⁹ retaliation,²⁰ or hostile work environment.²¹ The EEOC's enforcement power extends to situations where an employer retaliates towards an employee who "[c]omplained about discrimination, filed a charge of discrimination, or participated in an employment investigation or lawsuit."²² When a person files a complaint to the EEOC, the commission investigates the claim and issues a letter describing the EEOC's findings.²³ If the EEOC finds reasonable cause for sexual harassment, it will first try to settle the case, but if that shows unsuccessful results, then it will determine if a lawsuit is warranted.²⁴ However, if the EEOC finds no reasonable cause for a sexual harassment claim, the charge will be dismissed.²⁵ The aggrieved person then has the option to pursue a private lawsuit against the defendant within 90 days.²⁶

16. 29 C.F.R. § 1604.11 (1999). *See, e.g., Vinson*, 477 U.S. at 64 (noting that "without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates[s]' on the basis of sex").

17. Under Title VII, employer is defined as "a person engaged in industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person False" 42 U.S.C. § 2000e(b) (2014).

18. *See* 42 U.S.C. § 2000e-5(a) (2014); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (noting that "as long as 1980, the EEOC, charged with enforcement of Title VII" cases).

19. *See Bryson v. Chicago State Univ.*, 96 F.3d 912, 915-16 (7th Cir. 1996) (provides an analytical framework in examining a *quid pro quo* harassment claim).

20. *See Che v. Mass. Bay Transp. Auth.*, 342 F.3d 31, 38 (1st. Cir. 2003) (prescribing the three elements needed for a plaintiff to make a *prima facie* case of retaliation).

21. *See Vinson*, 477 U.S. at 65-67 (defining what constitutes a hostile work environment); *EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 432 (7th Cir. 2012) (noting factors that are used to determine when harassment in the workplace has risen to the level of creating a hostile work environment violating the statute).

22. *Overview*, U.S. EEOC, <http://eeoc.gov/eeoc/> (last visited Jan. 15, 2014).

23. 29 C.F.R. § 1601.21(a) (1999).

24. *See* 42 U.S.C. § 2000e-5(b) (2014).

25. *See id.* While the EEOC's responsibility is to enforce federal law, there are states that also have their own sexual harassment laws. The sexual harassment law of Wisconsin

The reporting process is much less clear for undocumented workers who experience workplace sexual harassment. Undocumented harassment victims are often forced to remain in the shadows, fearful that speaking out will result in arrest and deportation. The circumstances between undocumented women and women lawfully in the United States are very different, and deserve independent analysis to better understand the unique difficulties faced by undocumented women, and why there is a lack of reporting by the victims. First, Section A briefly looks at the circumstances faced by women working lawfully in the United States when they are confronted by workplace sexual harassment and abuse. Next, Section B looks at the unique dilemmas undocumented women face when they are sexually harassed at work. Finally, Section C concludes that the distinctive circumstances faced by undocumented women when experiencing sexual harassment necessitate the amendment of Wisconsin's current sexual harassment laws to include protections for undocumented women. Wisconsin needs legislation that will fill the gaps left by EEOC enforcement, specially protecting and encouraging undocumented women to report workplace sexual abuse.

A. Women Facing Sexual Harassment in the United States

Sexual harassment at work, independent of a women's legal status, is a pressing problem in the United States. A 2011 ABC news article reports that "one in four U.S. women reports sexual harassment in the workplace."²⁷ That same year the EEOC received an estimated of 11,364 complaints of sexual harassment.²⁸ Of the total lawsuits that EEOC filed in 2011, about 83% were made on behalf of women.²⁹ These figures are just an estimate, and do not reflect the total number of sexual harassment victims, because many women that decide, for whatever reason, not to report the abuse.³⁰

A distressing element of workplace sexual harassment is the number of supervisors who are the perpetrators of the sexual harassment. Women whose harassers are also their supervisors may fear retaliation, deterring victims from reporting the harassment. This may deter victims from reporting the workplace harassment. In a telephone poll, 43% of the women who reported to have been sexually harassed in the workplace indicated that a supervisor engaged in the

will be analyzed in *infra* part II. For the purpose this article this is all the information that will be provided regarding the EEOC and its authority to enforce, specifically, sexual harassment complaints since the focus is on Wisconsin's sexual harassment law.

26. See 42 U.S.C. § 2000e-5(f)(1) (2014).

27. Gary Langer, *One in Four U.S. Women Reports Workplace Harassment*, ABC NEWS (Nov. 16, 2011), <http://abcnews.go.com/blogs/politics/2011/11/one-in-four-u-s-women-reports-workplace-harassment/>.

28. *Sexual Harassment Changes EEOC & FEPAs Combined: FY 1997-FY 2011*, U.S. EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm (last visited Jan. 16, 2014).

29. See *id.*

30. See Workplace Report, *supra* note 13.

harassment, while 54% indicated it was another co-worker.³¹ Women facing workplace sexual harassment are in an especially difficult position when the perpetrator is the supervisor, because the reality is that a supervisor holds a great amount of power, including the ability to fire anyone at a given time. Also, in the workplace, most of the time worker reports any issues they might be having directly to the supervisor who is charged with the responsibility of solving the issue. When the person you are required to report issues is the one doing the abuse, it could make the women more hesitant to report the harassment. In most cases the first choice of a victim of workplace sexual harassment is not to report the harassment.³²

There are numerous reasons why women may decide not to report sexual harassment. For one, many women fear that others will not believe that they were victims of sexual harassment.³³ An unfortunate example of this reality is when Professor Anita Hill accused U.S. Supreme Court Justice Clarence Thomas of sexual harassment when they worked together.³⁴ Thomas was Professor Hill's supervisor during her time at the Department of Education's Office for Civil Rights, as well as when she worked the Equal Employment Opportunity Commission.³⁵ The accusations came to light days before Justice Thomas' nomination to the Supreme Court.³⁶ The public put in its two cents regarding this incident and indicated that they did not believe Professor Hill's accusations.³⁷ This controversy brought much-needed attention to the issue of sexual harassment in the workforce.³⁸ It also demonstrates the difficult position a woman confronts when her harasser is also her supervisor.

The Hill versus Thomas controversy provides a good example of victims' well-founded belief that others will doubt their accusations and the difficulty of winning the "he said, she said" battle. Other factors, beyond winning the "he said, she said" battle, can play in women's decision to not report the abuse. Reporting requires exposure of some of the most intimate details of a woman's

31. *Id.*

32. See *Workplace Sexual Harassment Poll Finds Large Share of Workers Suffer, Don't Report*, HUFFINGTON POST (Updated Aug. 28, 2013 8:08 AM), http://www.huffingtonpost.com/2013/08/27/workplace-sexual-harassment-poll_n_3823671.html (A poll conducted by HuffPost/YouGov reported 70 % of the respondents who were victims of sexual harassment did not report it.).

33. Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 122 (1995).

34. See Jill Smolowe, *Sex, Lies and Politics: He Said, She Said*, TIME MAGAZINE (Oct. 21, 1991), <http://content.time.com/time/magazine/article/0,9171,974096,00.html> (providing a detail recount of the controversy events between Professor Hill and Supreme Court Justice Thomas).

35. See Smolowe, *supra* note 35.

36. *Id.*

37. See, e.g., *The Conversation: Anita Hill and Clarence Thomas, Nearly 20 Years Later*, ABC NEWS (Oct. 20, 2010), <http://abcnews.go.com/WN/clarence-thomas-anita-hill-decades/story?id=11928941> (citing a 2001 New York Times/CBS News poll that found "58 percent of Americans believed Thomas, while 24 percent believed Hill").

38. *Id.*

life; this might prevent many victims from reporting. To report an assault, women have to recount graphic details of the abuse to third parties, exposing intimate details of their body and personal life to others and reliving the experience. Many women are just not willing to go through that emotionally traumatic experience.

Other common factor is a victims' fear of "retaliation, including ostracization by their coworkers, loss of opportunities for advancement, transfer to less desirable positions, and even loss of employment."³⁹ Similarly, victims are deterred from reporting abuse when co-workers label reporting victims as troublemakers, instigators, and hypersensitive.⁴⁰ In other cases, victims simply do not want to cause problems to their harasser.⁴¹

A troubling result is that the victims are left to react to the situation by ignoring the behavior.⁴² Other responses by victims of sexual harassment are "[s]ocial coping (e.g., discussing the behavior with friends), *confrontation/negotiation* (e.g., asking the harasser to stop), and *advocacy seeking* (e.g., filing a formal report)."⁴³ However, none of these responses carry legal consequences for the harasser, so many instances of workplace sexual harassment are effectively swept under the rug.

Workplace sexual harassment is a pressing issue in the United States. There are a high number of complaints filed with the EEOC, but many incidents still go unreported. Even with EEOC and Title VII protections, women face many risks in reporting sexual harassment. Women who report are often forced to reveal very intimate and graphic details of the abuse. Some women elect not to report because they fear a lack of belief in those they tell, loss of employment or other retaliation, or being blamed for their own abuse. Undocumented women face the same obstacles, but they also experience an even greater hurdle: the fear of deportation for working unlawfully in the United States

B. Undocumented Women Facing Sexual Harassment in the United States

Undocumented women are among the most vulnerable workers in our society today.⁴⁴ These women face many of the same concerns and fears as

39. See Camille L. Hebert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L. J. 711, 741 (2007); and Fitzgerald, *supra* note 34, at 122 (referring to similar reasons why women do not report the sexual harassment).

40. See Hebert, *supra* note 40, at 740-41.

41. Fitzgerald, *supra* note 34, at 122.

42. See Hebert, *supra* note 40, at 735 (citing to a 1994 survey conducted by the Merit Systems Protection Board indicating that 45% of female victims who experience sexual harassment at work decided to ignore it).

43. Anne M. O'Leary-Kelly et al., *Sexual Harassment at Work: A Decade (Plus) of Progress*, 3 JOURNAL OF MGMT. 503, 511 (June 2009). See also Hebert, *supra* note 40 (providing a similar analysis regarding other victim reactions when confronted with a sexual harassment incident).

44. *Immigrant Women, Backbone of U.S. Food Industry, Targets for Wage Theft, Sexual Harassment and Other Abuses, New SPLC Report Finds*, S. POVERTY LAW CTR. (Nov. 16, 2010) (hereinafter "2010 SPLC Report"), <http://www.splcenter.org/get->

other women reporting workplace sexual harassment. However, because of their immigration status, the experience of undocumented women varies significantly from that of women who do not have to fear deportation. It is difficult to establish the breakdown of demographics regarding the national origin or age of undocumented women experiencing workplace sexual harassment because of the limited information available about a population present illegally in the United States. Much of the information and studies regarding workplace harassment and undocumented women comes from nonprofit organizations that advocate for protections for these women. The information consists of surveys and interviews that involved Latina women.⁴⁵ Although much of the information in this section refers to undocumented women who are Latinas, it is important to remember that workplace sexual harassment occurs across different undocumented immigrant groups.⁴⁶

The focus of this article is not to look at a specific culture or labor sector, but to go beyond national origins and employers to analyze a commonality among these immigrant women: their undocumented status. Undocumented women's apprehension of speaking out and reporting the sexual abuse has its roots in the fear of retaliation, deportation, and separation from family, independently of where they are employed.

Fear of retaliation is the reoccurring theme in the experience of undocumented women. In some respects, the fear of retaliation experienced by undocumented women differs significantly from that of women who are legally in the United States. For example, one of the most common retaliatory measures faced by undocumented women is the possibility of deportation if they file an EEOC complaint. Employers commonly threaten to report undocumented women to immigration authorities if the women report the abuse.⁴⁷ Such threats paralyze victims from taking action. A survey of 150 women working in fields and factories across the United States reported that "the threat of deportation and the possible destruction of their families keeps them from reporting workplace abuses – even when it means enduring sexual

informed/news/immigrant-women-backbone-of-us-food-industry-targets-for-wage-theft-sexual-harassment.

45. *Existe Ayuda Fact Sheet*, OFF. FOR VICTIMS OF CRIME, http://www.ovc.gov/pubs/existeayuda/tools/pdf/factsheet_eng.pdf (last visited Jan. 15, 2014) (A study conducted in 2009 indicated that 77% of the Latinas surveyed said that sexual harassment was a major problem in the workplace).

46. See *Sexually Harassed Florida Farmworkers Get Justice*, S. POVERTY LAW CTR., (Jan. 24, 2007), <http://www.splcenter.org/get-informed/news/sexually-harassed-florida-farmworkers-get-justice> (Five women from Haiti brought a sexual harassment case against Florida's largest fruit and vegetable wholesale).

47. See, e.g., *EEOC v. Restaurant Co.*, 490 F. Supp. 2d 1039 (D. Minn. 2006). See also Olivia LaVecchia, *The Perfect Victim: Exploitation and the threat of deportation* (May 29, 2013), <http://www.citypages.com/2013-05-29/news/the-perfect-victim-exploitation-and-threat-of-deportation/full/>, William R. Tamayo, *Retaliation in Harassment Cases and the Threat of Deportation* (June 2013), http://www.americanbar.org/content/dam/aba/events/labor_law/am/2013/06tamayo.authcheckdam.pdf.

harassment and other indignities.”⁴⁸ Undocumented women are forced to compromise their dignity in exchange for the ability to remain in the United States and provide for their families.

The women’s fear of deportation is well-founded. Undocumented women hear, through the media or their community, about vast deportations occurring in the United States. In 2013 alone, U.S. Immigration and Customs Enforcement (“ICE”) removed 368,644 individuals,⁴⁹ and prior to that, in 2010 almost 390,000 undocumented workers were deported—twice as many as in 2000.⁵⁰ This awareness of the high number of deportations instills a present and reasonable fear of deportation in undocumented women. This makes an employer’s threats of deportation seem very real. The fears are so strong that undocumented women convince themselves that remaining in the shadows and submitting to the sexual abuse is the best decision. Allowing an employer to have such power over undocumented women is barbaric.

Another difficulty undocumented women face when reporting workplace sexual abuse is the fact that employers often side with the supervisors or coworkers perpetrating the abuse over the undocumented women reporting the abuse. The end result sometimes means that undocumented women are fired from their job for reporting the abuse and being undocumented, while the perpetrators are able to continue their employment as if nothing happened. For example, in *EEOC. v. Rest. Co.*,⁵¹ Ms. Torres, while working at Perkins Riverside restaurant as a cook, reported to the regional manager that her supervisor Mr. Centeno sexually harassed her at work.⁵² Ms. Torres told the regional manager that when Ms. Torres rejected Mr. Centeno’s sexual advances, Mr. Centeno, among other things, began to make threats that he would report her to immigration authorities.⁵³ During the investigation, Ms. Torres notified the regional manager that the reason she did not come forward regarding the abuse earlier was because she feared she would be deported due to her undocumented status.⁵⁴ Several days after Ms. Torres complained about the sexual harassment, Ms. Torres was notified that “she would be placed on

48. See *supra* note 45. “At least 60 percent of the agricultural workforce consists of unauthorized immigrants, who fear being deported if they complain.”

49. *FY 2013 ICE Immigration Removals*, ICE, <http://www.ice.gov/removal-statistics/> (Last visited Jan. 16, 2014).

50. Jeffrey S. Passel and Seth Motel, *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood*, PEW RESEARCH (Dec. 1, 2011), <http://www.pewhispanic.org/2011/12/01/unauthorized-immigrants-length-of-residency-patterns-of-parenthood/>. But see Adam Goodman, *How the Deportation Numbers Mislead*, Opinion, ALJAZEERA AMERICA (Jan. 24, 2014), <http://america.aljazeera.com/opinions/2014/1/what-the-deportationnumbersdonattell.html> (arguing that deportation numbers are low, but the consequences of getting deported are harsher than before).

51. *EEOC v. Rest. Co.*, 490 F. Supp. 2d 1039 (D. Minn. 2006).

52. *Id.* at 1043.

53. *Id.* at 1044.

54. *Id.*

leave of absence until she returned with the proper documentation.”⁵⁵ Management was well aware that Ms. Torres would not be able to provide proper documentation, leaving her with no option other than to not return to work. Mr. Centeno received a written warning.⁵⁶ There are many women who find themselves in a similar situation as Ms. Torres, facing similar repercussions after complaining about workplace sexual harassment.⁵⁷

The fear of deportation goes beyond the fact that immigration officers will return them to their home country. Undocumented women’s fear of deportation is intensified by the reality that they will leave behind their family. In the United States, a 2010 study indicated that there are nine million people that are considered a “mixed-status” family, which includes at least one unauthorized adult and at least one U.S. born child.⁵⁸ Within these mixed families, there are 400,000 unauthorized immigrant children who have a U.S. born sibling.⁵⁹ When undocumented women are deported, they often leave behind children who may stay in the United States legally.⁶⁰ Deportation leaves undocumented women with uncertainty as to when they will see their family again, and who will take care of the family left behind in the United States. Thus, without workplace sexual harassment protections in place, undocumented women must first consider the very high risks involved before reporting the abuse, including separation from family.⁶¹ This end result contradicts the United States policy supporting keeping families together.⁶² No woman should be forced to decide between suffering abuse and remaining in the country, or reporting the abuse and separation from her loved ones.

The language barrier is another reason why undocumented women are the perfect targets for sexual abuse. In *Caesars Entertainment, Retaliation, Inc.*, the majority of women who faced sexual harassment by employers were Spanish

55. *Id.* at 1046.

56. *Id.* at 1045.

57. *See, e.g.*, EEOC’s Second Amendment Comp. at ¶¶ 12-16, EEOC v. Caesars Entertainment, Retaliation Inc., et. al. No. CV-S-05-0427-LRH-PAL, 2006 WL 4988143 (D.Nev.) (Trial Pleading) (“*Caesars Entertainment*”) (Females were terminated from employment when they complained about the sexual harassment at work.); EEOC v. ABM Indus. Inc., 261 F.R.D. 503, 505 (E.D. Cal. 2009) (Plaintiff, as well as other similarly situated, were discharged for complaining about sexual harassment).

58. Passel & Motel, *supra* note 51.

59. *Id.*

60. *Id.*

61. *See* Seth Freed Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just Two Years*, COLORLINES (Dec. 17, 2012, 9:45 AM), http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html (“Between July 1, 2010, and Sept. 31, 2012, nearly 23 percent of all deportations—or, 204,810 deportations—were issued for parents with citizen children, according to federal data unearthed through a Freedom of Information Act request.” In 2011 it was estimated that there were approximately 5,000 children in foster care because their parents were deported).

62. *President Obama’s Executive Order Stresses Family Ties, Fails to Mention LGBT Families*, IMMIGRATION EQUALITY, (Nov. 21, 2014), <http://www.immigrationequality.org/president-obamas-executive-order-stresses-family-ties-fails-mention-lgbt-families/>.

speakers.⁶³ After *Caesars Entertainment* case was settled, Attorney Anna Park⁶⁴ expressed her concerns by stating, “In a case like this where many of the workers were monolingual Spanish speakers, victims of sexual harassment often feel further isolated, marginalized and unable to vindicate their rights False”⁶⁵ A lack of English language skills impedes undocumented women from understanding that laws exist to protect them from sexual abuse.⁶⁶ The problem sometimes is not that employers do not provide information to the employees regarding their rights, but that the information provided is in English. Employers who prey upon undocumented women are aware that they will not understand their rights because the women do not speak the English. The EEOC recognized this vulnerability and during settlement agreement requires – when the victims were monolingual – that employers provide sexual harassment policies in English and Spanish.⁶⁷

Undocumented women face unique circumstances when confronted with the decision of whether to report workplace sexual harassment. Their unlawful immigration status places them in a vulnerable situation—if they speak out employers often threaten them with deportation or employment termination, and finding another job without lawful status can be difficult. They also face the devastating consequences of deportation if they speak up, such as separation from their families. The recent surge in mass deportations makes this a well-founded fear. Finally, women face linguistic problems. A vast majority of the time employers might have EEOC regulations posted at the place of work, but they are provided in English, preventing many undocumented women from understanding their rights. All of these conditions combine to create the unique circumstances undocumented women face as they decide whether to report workplace sexual harassment. Even when undocumented women

63. *Caesars Place To Pay \$850,000 For Sexual Harassment and Litigation*, EEOC (Aug. 20, 2007), <http://www.eeoc.gov/eeoc/newsroom/release/8-20-07.cfm>.

64. Attorney Park served as the Regional Attorney for the EEOC’s Los Angeles District during *Caesars Entertainment*.

65. See *supra* note 64.

66. *Injustice On Our Plates*, S. POVERTY LAW CTR. 42 (2010), available at http://www.splcenter.org/sites/default/files/downloads/publication/Injustice_on_Our_Plates.pdf.

67. See, e.g., Verdict and Settlement Summary EEOC. and Does v. National Food Corporation, 13 N.W.P.I.Lit.Rpts. 215 (No. 2:12-CV-00550-TOR), 2013 WL 4788318 (E.D. Wash.) (Employer agreed to provide policies in Spanish to its employees throughout Eastern Washington and South Dakota); Verdict and Settlement Summary, EEOC v. Ann Arbor Nights, Inc. and Yannet Ruiz, JAS MI Ref. No. 262283WL (No. 5:10-CV-12197-JCO-MKM), 2010 WL 7281826 (E.D. Mich.) (Employer agreed to “adopt and distribute anti-sexual harassment policies in both English and Spanish and conduct training in both languages”). There have also been other settlements where the EEOC mandates that sexual harassment policies be provided in languages other than English and Spanish. See, e.g., *EEOC Reaches Voluntary Settlement for Sexual Harassment with Koreatown Restaurant*, EEOC (July 1, 2010), <http://www.eeoc.gov/eeoc/newsroom/release/7-1-10b.cfm> (A settlement reached in a sexual harassment case against Latinas and Korean women workers provided that employer will be required to “post notices about the agreement in English, Korean and Spanish at the restaurant”).

overcome their concerns and elect to report workplace sexual harassment, they face even more barriers within the criminal justice system.

C. The Under Reporting and Failure to Prosecute Sexual Assaults of Undocumented Women in the Workplace

Undocumented women face significant barriers to justice – for example, the breakdown in trust of the police because of their connection with immigration officers and unwilling prosecutors who don't press charges against the perpetrators because of lack of evidence – when they decide to bring criminal charges against the perpetrators of sexual assault or rape. These barriers are both systemic, when unwilling prosecutors fail to file a criminal complaint, and personal, when undocumented women struggle to trust the law enforcement officers who investigate the crime. This makes it even more difficult for undocumented women to vindicate their rights within the criminal justice system.

Many workplace sexual harassment perpetrators commit forcible abuse prohibited by criminal law. The Department of Justice conducted a study from 1993 to 1999 that noted, “While working or on duty, U.S. employees experienced 36,500 rapes and sexual assaults.”⁶⁸ Although the study included U.S. employees, it gives an overview of the seriousness and frequency of workplace harassment, since a lot of the information for undocumented women is difficult track. While it is difficult to determine exact numbers when it comes to undocumented women and sexual assault or rape, interviews conducted by the Southern Poverty Law Center (“SPLC”) stated that “a majority of the women interviewed . . . [stated] they endured some sort of sexual harassment that, at times, rose to the level of sexual assault while working in the fields, packinghouses or processing plants.”⁶⁹ The difficulty in addressing workplace harassment in the workforce is the limited information available. Studies that focus on workplace harassment by U.S. employees can serve as a guide to understand the frequency of such occurrences. Although limited information is available, there have been several big cases that have exposed the existence of workplace sexual harassment of undocumented women.

The cases that manage to make it through the criminal justice system paint a harrowing portrait of criminal sexual abuse perpetrated on undocumented women in the workplace. Women are experiencing graphic acts of sexual abuse that go beyond verbal harassment. In *Caesars Entertainment*, women were subjected to “harassment consisting of . . . forced vaginal sex, attempted sodomy, forced oral sex, unwelcomed touching”⁷⁰ In another case, the EEOC stated, “one of defendants’ supervisors raped a female employee at the

68. Detis T. Duhart, *National Crime Victimization Survey: Violence in the Workplace, 1993-99*, BUREAU OF JUSTICE STATISTICS (2001), <http://www.bjs.gov/content/pub/pdf/vw99.pdf>.

69. *Supra* note 67, at 44.

70. *Caesars Entertainment*, *supra* note 58, at 5. *See also supra* note 64 (EEOC asserted that male supervisors would demand and/or force female workers to perform sex with them under threat of being fired).

worksite.”⁷¹ These women are not complaining about inappropriate water cooler jokes: they are being coerced into engaging in sexual acts against their will and below any human’s right to dignity.⁷² It is an imperative concern when women label their workplace as the “field of panties,”⁷³ or the “green motel”⁷⁴ to portray the reality of what horrific acts employers submit undocumented women to in the workplace. These women are having their most intimate part of their life, their body, invaded by their supervisors or co-workers without the ability to speak out against the abuses to vindicate their rights and get their dignity back. To do so, undocumented women must face extensive barriers within the criminal justice system.

The first hurdle that an undocumented woman must overcome in order to see her perpetrator behind bars is trusting the police. However, undocumented women struggle to turn to local law enforcement for protection. Undocumented women fear speaking to their local police regarding their sexual assault or rape because – although local officers are not immigration officers – law enforcement officers are charged with the responsibility to assist in the enforcement of immigration laws.⁷⁵ “There are no legal protections to stop law enforcement officials from turning crime victims — even victims of rape — over to the U.S. Immigration and Customs Enforcement (ICE).”⁷⁶

Local community advocates for immigrant rights know that a victim of a crime who is undocumented has the possibility of being deported if she seeks out help from law enforcement. For example, SPLC “is aware of several cases in which female crime victims have been deported and several cases in which victims of trafficking were prosecuted by both state and federal law enforcement entities instead of being protected when they stepped up to complain.”⁷⁷ Thus, if undocumented women want justice after their dignity has been violated they must first consider the risk of being deported. Although they are the victims of a crime and “[p]olice are supposed to vigorously investigate

71. Complaint at 4, *EEOC v. ABM Industries Inc. and ABM Janitorial Servs., Inc.*, (No. 1:07-cv-01428-LJO-SMS), 2007 WL 4436849 (E.D.Cal.).

72. See generally *Cultivating Fear*, HUMAN RIGHTS WATCH at 7 (May 16, 2012), available at <http://www.hrw.org/node/107023/section/7> (Provides women testimonials who have endured the sexual violence in the workplace); *Injustice On Our Plates*, *supra* note 67 (Provides testimonials of women who have been sexually assaulted or rape by supervisors in the workplace.).

73. Maria Ontiveros, “*Lessons from the Fields: Female Farmworkers and the Law*,” 55 ME. L. REV. 157, 169 (2003).

74. Rebecca Clarren, “*The Green Motel*,” MS. MAG. (Summer 2005), <http://www.ms magazine.com/summer2005/greenmotel.asp>.

75. Robert Reich, former U.S. Secretary of Labor, describes this relationship as “fundamental schizophrenia” because of the responsibility of law enforcement to “[enforce] immigration laws and protect[t] the civil and human rights of people in this country.” Hannah Mintz, *Why Have There Been So Few Sexual Assault Prosecutions In the Agriculture Industry?*, PBS (June 25, 2013), <http://www.pbs.org/wgbh/pages/frontline/social-issues/rape-in-the-fields/why-have-there-been-so-few-sexual-assault-prosecutions-in-the-agriculture-industry/>.

76. *Injustice On Our Plates*, *supra* note 67, at 50.

77. *Injustice On Our Plates*, *supra* note 77.

crimes against all victims, regardless of immigration status . . . ,”⁷⁸ law enforcement’s intertwined partnership with federal immigration officers puts victims in a difficult situation. The partnership between law enforcement and immigration officers may also benefit an undocumented perpetrator of sexual violence because he will sometimes just get deported to his home country, without having to face a criminal sentence.⁷⁹ These factors coalesce to create an environment where undocumented women must overcome their fear of law enforcement officers in order to seek justice for their assaults.

If undocumented women have the courage to report their perpetrators, the next impediment to overcome is requesting local prosecutors to bring criminal charges against the perpetrators. “When sexual harassment crosses the line into sexual violence, it becomes a matter for not only the civil courts but the criminal justice system.”⁸⁰ The EEOC’s enforcement power extends only to the investigation and the civil remedy of a lawsuit.⁸¹ The discretion to bring criminal charges against the actual perpetrators who committed sexual assault or rape against the undocumented women lies solely in the discretion of the prosecutors.⁸² Unfortunately, in many occasions, perpetrators have been able to walk away free of criminal charges.⁸³

Victims of rape and sexual assault run the risk of not being able to see their perpetrators held accountable for their actions by the criminal justice system. For one, “[s]exual assault prosecutions present some of the most vexing, difficult, and intractable proof problems known to law.”⁸⁴ The prosecutor is charged with the responsibility to prove beyond a reasonable doubt each of the elements depending on what type of charge is brought against the perpetrator.⁸⁵ There is an even greater challenge of prosecuting sexual assault or rape when a woman is undocumented. Kern County District Attorney Lisa Green states that there are “difficulties of getting juries to connect with Spanish speakers and understand why survivors of workplace sexual harassment would go back to work in the same place.”⁸⁶

78. *Cultivating Fear*, *supra* note 73, at 3.

79. *Cultivating Fear*, *supra* note 73, at 12.

80. *Injustice On Our Plates*, *supra* note 61 at 50.

81. *See supra* note 23.

82. *See* Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/Attorney Relationships*, 48 S. TEX. L. REV. 695, 703 (2007) (“The role of the prosecutor is ‘quasi-judicial’ because of the inherent power or discretion to initiate investigations, to point the power of a grand jury at an individual, to seek charges from a grand jury, to decide after charging whether to drop some or all charges, to offer the option of a plea to a lesser offense, and to recommend a range of or a specific punishment”).

83. *See* Mintz, *supra* note 76 (Attorney Lisel Holdenried, who represents agricultural workers, stated that California Rural Legal Assistance “has represented dozens of female farmworkers who claim they were sexually assaulted. But only one recent case has resulted in a criminal conviction”).

84. 7 Wis. Prac., Wis. Evidence § 420.1 (3d ed.)

85. *See generally* 65 AM. JUR. 2D Rape § 39 (providing a detailed description of the elements and burden of proof required, depending on the specific crime of rape or sexual assault the prosecutor charges).

86. *Cultivating Fear*, *supra* note 73, at 12.

Undocumented women do not report their abuse to authorities and get justice because they fear deportation. The partnerships that local police and immigration services have create a reporting barrier. Then, even if they do report the abuse, undocumented women may later face a prosecutor unwilling to pursue the case for the lack of evidence. The reality is that undocumented women who have been sexually assaulted or raped at work may never see their perpetrators pay for the crimes they committed. The perpetrator gets to walk free, while the victim has to live with the traumatic experience. In order to convince undocumented women to step forward and report the abuse, the states must step in.

II. WISCONSIN NEEDS TO AMEND ITS SEXUAL HARASSMENT LAWS TO INCLUDE PROTECTIONS SIMILAR TO THE CALIFORNIA LAWS PROTECTING UNDOCUMENTED WOMEN FACING SEXUAL HARASSMENT IN THE WORKPLACE

The treatment of undocumented workers is an imperative concern in each state because of the influence their presence has on the state. In the forthcoming years, there will be large changes in the labor force as the immigrant population increases each year. The states, and specifically Wisconsin, must be ready for those changes. In 2011, there were an approximately 11.1 million unauthorized immigrants living in the United States.⁸⁷ It is difficult to state with certainty how many undocumented workers are in the state of Wisconsin. According to the U.S. Census, Wisconsin was home to approximately 100,000 to 200,000 unauthorized immigrants in 2008.⁸⁸ Some of the labor sectors where there is a high presence of undocumented immigrants in Wisconsin⁸⁹ include agriculture⁹⁰ and meat processors.⁹¹ Although those are the areas where

87. *A Nation of Immigrants*, PEW RES. CTR. 2 (Jan. 29, 2013), available at http://www.pewhispanic.org/files/2013/01/statistical_portrait_final_jan_29.pdf. (It should be noted that this type of analysis present challenges in to determining the exact make up the immigrant community because of the difficulty in gathering data from unauthorized immigrants in the U.S. Therefore, the data presented in this article is only an estimate, and many immigration advocates believe it could be significantly greater.

88. *A Portrait of Unauthorized Immigrants in the United States*, PEW RES. CTR. V (April 14, 2009), available at <http://pewhispanic.org/files/reports/107.pdf> (citing the 2008 U.S. Census). A 2010 study indicated that there was an estimated 65,000 unauthorized workers living in the state of Wisconsin. *Unauthorized Immigrant Population: National and State Trends, 2010*, PEW RES. CTR. 24 (Feb. 1, 2011), available at <http://pewhispanic.org/files/reports/133.pdf#page=25>.

89. There is limited information regarding the breakdown of where unauthorized immigrants are employed in Wisconsin. This article will use the national data of labor sectors that are similar to Wisconsin to be able to provide information of where it is most likely there is an influence of undocumented workers. The specific data available referring to Wisconsin will be noted in the article.

90. According to a 2009 University of Wisconsin-Madison Study, "Immigrants make up nearly 60 percent of the work force at the state's largest dairy farms, those with more than 300 cows, while just 20 percent of workers at smaller dairies are immigrants." Jacob Kushner, *Wisconsin Dairy Farms Are Growing – Along With Their Immigrant Work Forces*, WISCONSIN WATCH (Posted May 26, 2010), <http://www.wisconsinwatch.org/2010/05/26/wisconsin-dairy-farms-are-growing-along-with->

information is available, it is necessary to note that undocumented women run the risk of sexual abuse in any type of employment.⁹²

Wisconsin should not minimize or ignore the issue that employers overpower undocumented women by subjecting them to sexual abuse. The fact that it is not broadcast daily in the media does not mean that it does not exist. Wisconsin cannot turn a blind eye on this issue. These women live in the shadows and, as discussed in *supra* Part I, there are many reasons why they choose to remain hidden. A case involving Palermo's, a business in Milwaukee, Wisconsin, shows that this abuse is very real. Immigrant workers, many of them Spanish-speakers, decided to stand up for their rights and organized against Palermo's Pizza. In response, "Palermo's delivered letters to 89 immigrant workers, asking them to provide documentation verifying that they had the right to work in the United States."⁹³ Palermo's Pizza provides an example on how unscrupulous employers try to intimidate employees. Again, we see the reoccurring cycle where employers use the legal status of immigrant workers to retaliate against them for standing up for their rights. The reason why there are so few reports being made against employers is not because the abuse is not occurring, but because Wisconsin's laws do not offer any protections to undocumented women so they may speak out.

A. Wisconsin is in a Better Position than the Federal Government to Protect Undocumented Women from Employers Preying on the "Perfect Victim"

Gaps exist between the enforcement of federal immigration laws and the protection of undocumented victims of a crime. Prior to November 21, 2014,

their-hispanic-work-forces/. The National Agricultural Workers Survey conducted between 2000 and 2002 reports that 22% of the farmworkers in the U.S. are female. DEP'T OF LABOR, A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF U.S. FARM WORKERS, FINDINGS FROM A NATIONAL AGRICULTURAL WORKERS SURVEY at 9 (March 2005), available at http://www.doleta.gov/agworker/report9/naws_rpt9.pdf.

91. In Wisconsin there are approximately 19 meat processors. *Wisconsin Meat Processors*, <http://meat-processing.regionaldirectory.us/wisconsin.htm> (last visited Jan. 16, 2014). According to a May 2012 report, employment in a slaughter and meatpacking ranged from 2,000 to 10,940. BUREAU OF LABOR STATISTICS, *Occupational Employment Statistics*, DEP'T OF LABOR (last modified Mar. 29, 2013), <http://www.bls.gov/oes/current/oes513023.htm>. In the U.S., a quarter of the workers who butcher and process meat, poultry and fish are undocumented. 2010 SPLC Report, *supra* note 45.

92. See *ACLU Wins Settlement for Immigrant Women in Sexual Harassment Case*, AM. CIV. LIBERTIES UNION (Aug. 29, 2007), <https://www.aclu.org/womens-rights/aclu-wins-settlement-immigrant-women-sexual-harassment-case> (The article discusses *Espinal v. Ramco General Stores*, where employer sexually harassed three immigrant women employed as cashiers and general assistants.).

93. Steven Greenhouse, *Fight Over Immigrant Firings*, N.Y. TIMES (July 27, 2012), http://www.nytimes.com/2012/07/28/business/striking-palermos-pizza-workers-say-immigrants-were-fired-to-stop-a-union.html?pagewanted=1&_r=1.

the federal government had a policy called “Secure Communities.”⁹⁴ On November 21, 2014, President Obama issued an executive order, *Immigration Accountability Executive Action*, among other provisions, that replaced the program Secure Communities with Priority Enforcement Program (PEP).⁹⁵ However, there is skepticism as to whether PEP actually differs from Secure Communities in practice.

Secure Communities requires law enforcement to share fingerprints with ICE so that they may be checked against immigration databases.⁹⁶ Under the Secure Communities program, “[a] state do[es] not have a say on whether it wants its local law enforcement officials to “identify potentially deportable individuals whom they encounter [.]”⁹⁷ because the information sharing is carried out automatically when officers fingerprint an undocumented immigrant. According to the program, immigration officers can only use their discretion to detain an individual after the undocumented immigrant has violated a local, state, or federal law.⁹⁸ Despite this, recent statistics indicate that ICE is deporting a great number of individuals with no criminal record.⁹⁹

Similar to Secure Communities, PEP will continue the sharing of data between state local law enforcement and ICE.¹⁰⁰ According to the Executive Order, the information will only be utilized to remove those convicted of criminal offences.¹⁰¹ The reality is that, even though policies state that they only target criminals, sadly, that is not always the case.¹⁰² PEP echoes the enforcement priorities of Secure Communities, so it is still unclear what substantive differences exist between the programs. The bottom line is that state participation in these policies has created yet another barrier to cooperation between the immigrant community and local law enforcement.

94. “All 72 counties in Wisconsin are now participating in the program.” Georgia Pabst, “*Secure Communities*” Comes to Wisconsin, JOURNAL SENTINEL BLOG (Jan. 13, 2011), <http://www.jsonline.com/blogs/news/113490639.html>.

95. *Fact Sheet: Immigration Accountability Executive Action*, THE WHITE HOUSE (Nov. 20, 2014), <http://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action>.

96. *Secure Communities*, ICE (Jan. 16, 2014), http://www.ice.gov/secure_communities/. See Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1126 (2013) (detailing the Secure Communities policy of information sharing between agencies).

97. Kalhan, *supra* note 97, at 1133.

98. *Id.*

99. According to ICE’s report on its 2013 enforcement operations, 216,810 of the total number of people removed last year (58.8%) had previously been convicted of some crime. This means that 41.2% of people removed last year had no criminal history.” *ICE: 41% of Noncitizens Removed in FY Had No Criminal History; 20% Fell Into Most Serious Crime Category*, CRIMMIGRATION BLOG (Jan. 30, 2014, 4:00 AM), <http://crimmigration.com/2014/01/21/ice-41-of-noncitizens-removed-in-fy-13-had-no-criminal-history-20-fell-into-most-serious-crime-category.aspx>.

100. THE WHITE HOUSE, *supra* note 96.

101. *Id.*

102. See *supra* note 96.

Wisconsin has faced similar ICE enforcement when detaining undocumented immigrants. From January 2011 to April 2012, there were 466 undocumented immigrants deported from Wisconsin under this policy.¹⁰³ Although Secure Communities immigration officers can only act if an undocumented person has a criminal record, data has shown that immigration officers have detained individuals with no criminal record.¹⁰⁴ Although the people detained may have committed a crime, that does not necessarily mean it was a dangerous offense.¹⁰⁵ These high numbers may reflect the pressures of a Congressional mandate requiring ICE to “detain an unprecedented 34,000 people in immigration detention centers each day.”¹⁰⁶ So when the state supports programs where local law enforcement must work with immigration officers, it creates a barrier between victims of sexual abuse and local law enforcement. The undocumented community’s experience is that being fingerprinted by local law enforcement result in immigration officers deporting them.¹⁰⁷ When this situation happens it does not matter who is actually deporting the undocumented person; in the eyes of the person being deported, a local police officer arrested him, and the next thing he knows, he is being sent back to his home country. Thus, for the undocumented community, police officers are viewed as directly working with ICE, even if there are local police departments that are not. These incidents leave the undocumented community wary of the police.

ICE worksite enforcement¹⁰⁸ increases the possibility that victims of sexual abuse will be deported during routine enforcement of immigration laws at the victim’s workplace. During worksite enforcement, also known as “ICE Raids,” ICE will go into businesses suspected of employing undocumented workers and detain individuals who cannot prove their legal status in the United States. ICE is able to conduct worksite enforcement under the Immigration &

103. Edgar Mendez, *Special Report: Despite rules, 34% of Milwaukee County Deportees Lack Criminal Record*, NEIGHBORHOOD NEWS SERV. MILWAUKEE (July 9, 2012), <http://www.milwaukeeenns.org/2012/07/09/despite-rules-34-of-milwaukee-county-deportees-lack-criminal-record/>.

104. *See id.* (“Government data show that 34 percent of individuals deported from Milwaukee County had no criminal record”).

105. Of the 477,523 individuals detained in 2012 and fall in the category of committing a crime: “23.8% (47,438 people) had been convicted of an immigration crime (e.g., unauthorized entry or unauthorized reentry). A similar number—23.1% or 46,038 people—were convicted of a ‘criminal traffic offense.’” *Record Number of Immigration Detainees in FY ‘12: 477,523*, CRIMMIGRATION (Jan. 28, 2014), <http://crimmigration.com/2014/01/28/record-number-of-immigration-detainees-in-fy-12-477523.aspx>.

106. Goodman, *supra* note 51.

107. *See* DEPARTMENT OF HOMELAND SECURITY, HOMELAND SECURITY ADVISORY COUNCIL, TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS 11, 24 (Sep. 2011), *available at* <http://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities-findings-and-recommendations-report.pdf>.

108. In 2012, “ICE served 3,127 Notices of Inspection and 637 Final Orders.” *Fact Sheet Worksite Enforcement*, ICE (Apr. 1, 2013), <http://www.ice.gov/news/library/factsheets/worksite.htm>.

Nationality Act (“INA”) § 247A,¹⁰⁹ and determines what type of businesses to investigate “based on leads or tips obtained from a variety of sources.”¹¹⁰ Employers also use ICE worksite enforcement as a way to retaliate against undocumented workers who stand up for their rights. The worksite enforcement allows an employer to contact ICE and report the employee’s undocumented status.¹¹¹ During the ICE raids, immigration officers request undocumented immigrants provide proof of their legal status; failure to do so will result in removal proceedings.¹¹²

Wisconsin is not excluded from these famous ICE raids. Over the years, Wisconsin businesses have experienced ICE raids at farms and factories.¹¹³ The

109. “It is unlawful for a person or other entity – to hire, or recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment, or . . . to hire for employment in the United States an individual without complying with the requirements of [INA 247A(b)] or if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 3 of the Migrant and Seasonal Agricultural Worker Protection Act, to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirement of [INA 247A(b)].” Immigration and Nationality Act §§ 274A(a)(1)(A)-(B), 8 U.S.C. 1324a (2006).

110. See *supra* note 109.

111. *No Free Pass To Harass*, ACLU 11 (last visited Mar. 3, 2014), available at https://www.aclu.org/sites/default/files/pdfs/womensrights/no_free_pass_20071119.pdf.

112. See generally Raquel Aldana, *Of Katz and “Aliens”: Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1093 (2008) (providing a detailed analysis of ICE raids in businesses).

113. See generally Julia Preston, *Sweep Coincides With Delay on Deportation Policy Changes*, N. Y. TIMES (May 29, 2014), http://www.nytimes.com/2014/05/30/us/politics/immigrant-raid-coincides-with-deportation-policy-delay.html?_r=2; Deandra Corinthios, *Immigration Raid Nets 31 Arrests In Northeast Wisconsin*, NBC26 (Mar. 18, 2014), <http://www.jrn.com/nbc26/news/Immigration-Raid-Nets-31-Arrests-in-Northeast-Wisconsin-250804511.html> (ICE arrested 31 people in a series of raids throughout Northeast Wisconsin). *Three Years Since Agriprocessors Immigration Raid*, WQOW (May 12, 2011), <http://www.wqow.com/story/14631082/three-years-since-agriprocessors-immigration-raid?clienttype=printable> (ICE raided a Postville meat packing plant where 400 individuals were arrested); Georgia Pabst, *Raid Brings Home Fight Over Illegal Immigration*, MILWAUKEE J. SENTINEL (May 1, 2007), <http://www.jsonline.com/news/wisconsin/29261514.html> (ICE raided Star, a company that packages food and other products). It is necessary to note that there have been other ICE raids in WI, although not conducted at the workplace. See Jon DeMaster, *Immigrant Rights Group Question ICE Raid Netting 30 Supposed Latino Gang Members*, WTAQ (Aug. 5, 2011, 4:29 PM), <http://wtaq.com/news/articles/2011/aug/05/immigrant-rights-group-question-ice-raid-netting-30-supposed-latino-gang-members/> (ICE arrested 30 undocumented immigrants alleged to be part of street gang); Lindsay Veremis, *24 Arrested in Northeast Wis. ICE Raids*, FOX 11 (Published Aug. 27, 2010, 2:21 PM), <http://www.fox11online.com/news/24-arrested-in-northeast-wisconsin-ice-raids> (ICE raid that arrested 370 individuals). The issue with these ICE raids, whether at home or workplace, is that it gives too much discretion to immigration officers without having the appropriate policies in place to determine if those individuals qualify for some type of relief. ICE alleges that it only arrests individuals with criminal records who pose a public safety concern. However, the evidence indicates that ICE is interpreting their mandate too broadly. A five-year arrest report indicated, “nearly three-quarters of the 96,000 people [ICE] apprehended had no criminal convictions.” Nina Bernstein, *Target of Immigration Raids Shifted*, N.Y.

problem arising during ICE raids is that undocumented women who have experienced gruesome sexual abuse by their employer or co-workers run the risk of being deported before they ever have the opportunity to speak out about the abuse. There are some limitations to ICE worksite enforcement when it is discovered that the employer provided ICE with the information to retaliate against an undocumented worker. For example, there will be ICE oversight or limited ICE enforcement in some circumstances.¹¹⁴ Additionally, ICE can exercise prosecutorial discretion during worksite enforcement in cases that involve victims and witnesses of crimes. An ICE memorandum indicates, “[a]bsent special circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime.”¹¹⁵ However, there is skepticism as to whether this policy really protects victims of crimes or witnesses during ICE raids. For one, the memorandum does not set out “[a] policy of screening immigrants to determine if they would qualify for an exercise of prosecutorial discretion.”¹¹⁶ Additionally, an undocumented victim will only qualify for prosecutorial discretion, if she affirmatively provides information that she is a victim of a crime to ICE agents.¹¹⁷ Thus, if undocumented women do not speak out about the sexual abuse they experienced by their employer or co-workers, they will be deported, while the perpetrator gets to walk away free of charges.

The failed attempts at passing immigration reform in 2014 and President Obama’s unsuccessful attempts via executive action is an indication that states are in a better position to address the needs of immigrant communities within state boundaries. After almost two years of efforts by immigration advocates and the Senate toward immigration reform, last summer’s gridlock in the House of Representatives on the provisions of what should be included in any

TIMES (Feb. 3, 2009), http://www.nytimes.com/2009/02/04/us/04raids.html?pagewanted=all&_r=0. In addition, taken together the news stories discussed above demonstrate that most of the individuals arrested by ICE have no criminal history.

114. See *supra* note 112 (citing the ICE manual, which indicates “no action should be taken on [employers report of a worker’s undocumented status] without the review of District Counsel and approval of the Assistant District Director for Investigations or an Assistant Chief Patrol.”); DEP’T OF LABOR & IMMIGR. & CUSTOMS ENFORCEMENT, “*Revised Memorandum of Understanding Between Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites*,” (Dec. 7, 2011), <http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf> (Memorandum of Understanding by the Department of Labor (“DOL”) indicates that, “ICE agrees to refrain from engaging in civil worksite enforcement activities at a worksite that is the subject of an existing DOL investigation of a labor dispute during the pending of the DOL investigation and any related proceeding”).

115. DEP’T OF LABOR & IMMIGR. & CUSTOMS ENFORCEMENT, “*Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs Memorandum*,” (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

116. *Id.*

117. *Cultivating Fear*, *supra* note 73, at 54.

immigration reform killed the initiative.¹¹⁸ After those unsuccessful attempts, the immigrant community lost hope that Congress would address immigration. In an effort to address some of the concerns of the immigrant community, President Obama issued an executive order, *Immigration Accountability Executive Action*, intended to provide lawful status to five million undocumented immigrants, among other provisions.¹¹⁹ However, after several states¹²⁰ filed a lawsuit to prevent the Executive Order from going into effect, a Texas District Court issued an injunction preventing several of the provisions from taking effect, including the lawful status provisions.¹²¹ Federal gridlock on immigration issues requires Wisconsin to take action itself to strengthen the rights of undocumented women facing workplace abuse.

Others would argue that the federal government already implemented a U Visa program¹²² that addresses the issue of undocumented women who have endured workplace abuse.¹²³ The problem is that U Visas do not deter or punish employers from making threats of deportation to undocumented women. Rather, the visas provide a path for undocumented women to obtain legal status. To protect undocumented women from workplace sexual harassment and abuse and hold employers accountable, Wisconsin needs to amend its sexual harassment laws to include more extensive protections.

The conflicting federal administrative interest in enforcing immigration laws and Congress' lack of interest in passing immigration reform leaves a gap when it comes to protecting undocumented immigrant victims of workplace sexual violence. That gap can be filled with state legislation protecting undocumented women when they speak out about workplace sexual abuse.

118. See David Nakamura & Ed O'Keefe, *Immigration Reform Effectively Dead Until Obama Leaves Office, Both Sides Say*, WASH. POST (June 26, 2014), http://www.washingtonpost.com/politics/immigration-reform-deal-now-unlikely-until-after-obama-leaves-office-both-sides-say/2014/06/26/945d1210-fc96-11e3-b1f4-8e77c632c07b_story.html.

119. See *Fact Sheet: Immigration Accountability Executive Action*, *supra* note 96 (Provides a detailed analysis critical elements of President Obama's Executive Order).

120. Wisconsin was one of the states that joined in the lawsuit against Obama's Executive Order. See Jessie Opoien, *Wisconsin Joins Lawsuit Against Obama Administration Over Immigration Order*, THE CAPITAL TIMES (Dec. 4, 2014), http://host.madison.com/news/local/writers/jessie-opoien/wisconsin-joins-lawsuit-against-obama-administration-over-immigration-order/article_1236746a-725a-55fb-ac95-739620bf5a2f.html.

121. *State of Texas v. United State of America* (Mar. 19, 2015, 8:22 PM), <http://crimmigration.com/wp-content/uploads/2015/02/Memorandum-Opinion-Texas-v-United-States.pdf>. The injunction does not affect Obama's provision to replace Secure Communities.

122. "In the U visa program, Congress authorized the issuance of visas for victims willing to cooperate with law enforcement authorities to investigate and/or prosecute a given set of crimes." Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 303, 311 (2010).

123. See *id.* at 311.

B. California's New AB 263, SB 666, and AB 524 Laws Protect Workers from Employer Retaliation when Exercising Their Rights

California welcomed 2014 with new legislation to protect the vulnerable community of undocumented immigrants who have long resided in “The Golden State.”¹²⁴ During California’s 2013 legislative session, the legislature was busy passing bills meant to prevent employers from continuing to abuse California’s immigrant community. Unlike Congress’ unfulfilled promises to protect immigrant rights,¹²⁵ California enacted AB263, SB 666, and AB 524¹²⁶ to strengthen immigrant rights in their state. California’s new laws restore dignity to a community that has a long-lived in the shadows for fear of deportation. There was overwhelming support by the California Senate and Assembly in passing these laws.¹²⁷ Although it is too soon to see how these laws will affect the immigrant community, California sent a strong message to employers who take advantage of undocumented immigrants in their state: If an employer takes advantage of a worker’s immigration status, that employer will be held liable. AB 263, SB 666, and AB 524 are laws that offer enough protections for immigrant workers to speak out against unscrupulous employers who take advantage of workers undocumented status.¹²⁸ The laws are a step forward in protecting victims of sexual abuse in the workplace. It will be important for the state of Wisconsin to examine each of these laws in designing safeguards against employer abuse for undocumented women. .

124. In 2015, once more California welcomed the year with more legislation to strengthen the rights of its undocumented community. However, this article will only focus on the laws passed in 2014. The California laws in 2014 offer a great starting point for Wisconsin. In the future, Wisconsin might be in a position to pass similar laws to provide undocumented immigrants relief in civil suits.

125. Senator Robert Menendez, on June 14, 2011 re-introduced a bill called Protect Our Workers from Exploitation and Retaliation Act (“POWER ACT”) to the Senate to strengthen immigrant rights in the U.S. See *The Power Act*, NATIONAL GUESTWORKER ALLIANCE, <http://thepoweract.com/wp-content/uploads/2010/08/POWER-Act-fact-sheet-revised.pdf> (last visited Jan. 16, 2014) (A fact-sheet with the major provisions of POWER ACT). The Judiciary Committee is presently reviewing the bill. Although there was a strong political campaign to pass some form of immigration reform in 2013, reform did not materialize. See, e.g., Julia Preston, *Immigration Advocates Undeterred as House Departs Without Action*, N. Y. TIMES (Dec. 12, 2013), http://www.nytimes.com/2013/12/13/us/politics/immigration-advocates-undeterred-as-house-departs-without-action.html?_r=0; <http://www.cbsnews.com/news/can-immigration-reform-pass-in-2014/>.

126. Went into effect on January 1, 2014.

127. Gigi Graciette, *New California Laws In 2014 Try To Help Employees, Immigrants* (Mar. 19, 2015 8:27 PM) <http://www.myfoxla.com/story/24341492/new-california-laws-in-2014-try-to-help-employees-immigrants>.

128. Note that this article is not intended to provide a full analysis of these laws, but rather, discuss those that will benefit the state of Wisconsin in addressing the issue of employer retaliation against undocumented women.

Among other protections, AB 263 is designed to prohibit specific immigration-related practices by employers¹²⁹ against immigrants that exercise their protected rights.¹³⁰ AB 253 also strengthens enforcement and penalties for violating the law.¹³¹ Under AB 263, immigrant workers can file a complaint against an employer who has violated their rights, without fear of retaliation. AB 263 states in part that,

It shall be unlawful for an employer or any other person or entity to engage in, or to direct another person or entity to engage in, unfair immigration-related practices against any person for the purpose of, or with the intent of, retaliating against any person for exercising any right protected under this code or by any local ordinance applicable to employees.¹³²

This law protects immigrants who, among other actions, in good faith: 1) file a complaint against an employer for violating the immigrant's rights; 2) seek out information of whether the employer's is following AB 263 or law ordinances; or 3) provide advice to other immigrant's regarding code AB 263, or other protections.¹³³

Additionally, AB 263 prevents employers from continuing to use deportation threats as a tactic to prevent immigrants from reporting rights violations. Thus, an employer cannot retaliate against a worker by requesting more proof of legal status than is required by Title VIII¹³⁴ of the United States Code,¹³⁵ or using E-verify¹³⁶ inappropriately.¹³⁷ Nor can employers use police or immigration officers as a way to punish immigrant workers for exercising

129. The term "employers" will be used throughout this section, but Cal. Lab. Code § 1019 has been amended to include employees.

130. See Cal. Lab. Code § 1019b (West 2014).

131. See Cal. Lab. Code § 1019d (West 2014).

132. Cal Lab Code § 1019(a) (West 2014).

133. Cal Lab Code §§ 1019(a)(1)-(3) (West 2014).

134. Under 8 U.S.C. § 1324b (2010), it provides a detailed explanation of the documents that employers must be provided to establish an individual's ability to lawfully work in the United States.

135. Employers are required to file an Employment Eligibility Verification ("I-9") form to U.S. Citizenship and Immigration Services or ICE, along with photocopy of documents that establish the employee's identity. *I-9, Employment Eligibility Verification*, U.S. CITIZENSHIP & IMMIGR. SERV. (last updated May 8, 2013), See also U.S. Citizenship & Immigration Serv., *Handbook for Employers: Guidance for Completing Form I-9*, DEP'T OF HOMELAND SEC., available at <http://www.uscis.gov/sites/default/files/files/form/m-274.pdf> (revised Apr. 30, 2013) (Provides detailed information regarding the required documents or the I-9 Form).

136. "E-Verify is an Internet-based system that compares information from an employee's Form I-9, Employment Eligibility Verification, to data from U.S. Department of Homeland Security and Social Security Administration records to confirm employment eligibility." U.S. Citizenship & Immigration Serv., *What is E-Verify*, DEP'T OF HOMELAND SEC, <http://www.uscis.gov/e-verify/what-e-verify> (last updated Sep. 29, 2013).

137. Cal. Lab. Code §§ 1019b(1)(A)-(B) (West 2014).

their rights. AB 263 precludes employers from “threatening to file or the filing of a false police report”¹³⁸ or, “threatening to contact or contacting immigration authorities.”¹³⁹ An employer who violates AB 263 will face consequences, including suspension of all his licenses.¹⁴⁰ Under AB 263, an employer is presumed to have used an unfair immigration-related practice if it occurs within 90 days after an employee exercises their rights.¹⁴¹

There was overwhelming support for AB 263 in the California Assembly and Senate, with votes of 54 to 19 and 27 to 11 for the bill, respectively.¹⁴² The opposition raised concerns regarding AB 263 and the implications it will have on California’s employers, specifically, a court’s discretion to suspend the business’ licenses for violating AB 263 for a certain amount of time.¹⁴³ The opposition fears that such harsh penalties can put a business out of operation. Those opposing AB 263 are alarmed that a supervisor of a large business could violate AB 263, but the owner would be penalized.¹⁴⁴ Another concern was that AB 263 would paralyze employers from reporting undocumented workers to ICE.¹⁴⁵

Despite these concerns, the public good that AB 263 will bring to the undocumented community living in California does outweigh both these opposing arguments. First, the court’s ability to suspend a business’ licenses for violating AB 263 is discretionary, and a court only makes that determination after providing a business an opportunity to present its case.¹⁴⁶ For that same reason, the second opposing argument to AB 263 fails. The employer will have the opportunity to present to the court that the actions were not committed to retaliate against the employee, but rather for a legal purpose. Therefore, a judge will only determine if a business suspension of licenses is warranted after hearing all the evidence from both sides. AB 263 has the safeguards necessary to ensure that business have a fair opportunity to explain the situation to the court before facing severe consequences.

SB 666 is, in many ways, a compliment to AB 263, specifically when it comes to protecting workers rights from unscrupulous employers. Under SB 666, an employer is not involved in unfair immigration-related practices if it requires “[p]rospective or current employee to submit, within three business

138. Cal. Lab. Code § 1019b(1)(C) (West 2014).

139. Cal. Lab. Code § 1019b(1)(D) (West 2014).

140. See Cal. Lab. Code § 1019d (West 2014) (for a detailed of all the fines under Cal. Lab. Code § 1019).

141. Cal. Lab. Code § 1019(c) (West 2014).

142. *Open States: AB 263*, SUNLIGHT FOUNDATION, <http://openstates.org/ca/bills/20132014/AB263/#actions> (last visited Jan. 16, 2014).

143. See *supra* note 116.

144. *Employment: Retaliation: Hearing on AB 263 Before the Assembly Comm. on Judiciary*, 6 (Apr. 23, 2013), <http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml> (statement of California Employment Law Council, representing management lawyers and employment matters).

145. *Id.* (statement of a group called Save our State).

146. See *supra* note 117.

days of the first day of work for pay, an I-9 form.”¹⁴⁷ Similar to AB 263, SB 666 provides that an employer who violates subdivision (b) of Section 244 of California Labor Code¹⁴⁸ can have his business licenses suspended or revoked.¹⁴⁹ Additionally, both laws authorize fines up to \$10,000 per employee for each violation of the section at a business.¹⁵⁰ It can be argued that there is no need for California to enact new legislation, since the federal Immigration Reform and Control Act (“IRCA”) was put in place to provide the same protections.¹⁵¹ However, the proponents of SB 666 were concerned that IRCA only protected workers that were U.S. citizens or lawful permanent residents.¹⁵² SB 666 specifically addresses retaliation based upon immigration status.¹⁵³ With SB 666 now in full effect, California employers have no room for ambiguity, and their prior tactics to quell the voices of the immigrant community are explicitly prohibited.

There are key distinctions between SB 666 and AB 263. One of the differences is that AB 263 empowers workers against unscrupulous attorneys. Specifically, AB 263 provides enforcement against attorneys hired to defend employers in worker’s litigation and violate the law with their tactics.¹⁵⁴ For example, California can now pursue attorneys who threaten deportation to discourage undocumented workers from litigation. SB 666 adds a provision to California’s Business and Professional Code that provides sanctions against attorneys who use a worker or witness’ legal status as a litigation tactic. Under this provision,

It is cause for suspension, disbarment, or other discipline for any member of the State Bar to report suspected immigration status or threaten to report suspected immigration status of a witness or party to a civil or administrative action or his or her family member to a

147. CA Bus. & Prof. § 494.6(c) (West 2013).

148. SB 666 added to the California Labor Code the following provision: “Reporting or threatening to report an employee’s, former employee’s, or prospective employee’s suspected citizenship or immigration status, or the suspected citizenship or immigration status of a family member of the employee . . . to a federal, state, or local agency because the employee . . . exercises a right under the provisions of this code, the Government Code, or the Civil Code constitutes an adverse action for purposes of establishing a violation of an employee’s . . . rights.” Cal. Lab. Code § 244(b) (West 2013).

149. Cal. Bus. & Prof. Code § 494.6(a) (West 2013).

150. Cal. Lab. Code § 98.6(b)(3) (West 2013).

151. See 8 U.S.C. § 1324b(a)(5) (2010) (“It is also an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section”).

152. See 8 U.S.C. §§ 1324b(a)(3)(A)-(B) (2010).

153. See *supra* note 129.

154. Roger Hernandez, *AB-263 Employment: Retaliation: Immigration-Related Practices*, CALIFORNIA LEGISLATIVE INFORMATION (Oct. 11, 2013), available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB263.

federal, state, or local agency because the witness or party exercises or has exercised a right related to his or her employment, broadly interpreted.¹⁵⁵

The proponents of SB 666 were concerned with attorneys who threaten individuals with their undocumented status to keep them “[f]rom testifying or showing up to depositions in support of workers trying to enforce their rights.”¹⁵⁶ This section of SB 666 argued the proponents, “[w]ould reaffirm California’s interest in protecting employees and their ability to seek redress under California law.”¹⁵⁷ Together, SB 263 and SB 666 provide two distinct, but necessary, protections for undocumented women against individuals of power.

Finally, AB 524 provides that a person threatening to report an individual’s immigration status may constitute criminal extortion.¹⁵⁸ California did not invent the provisions of AB 524; the states of Colorado¹⁵⁹ and Virginia¹⁶⁰ have implemented similar amendments to their criminal extortion laws. Proponents of AB 524 argued that such protections were vital to decrease the number of unreported crimes committed against undocumented immigrants who fear deportation if they speak out.¹⁶¹ AB 524 will provide justice to undocumented immigrants who are victims of a crime and are being intimidated to keep silent through threats of deportation. It will also deter individuals from silencing undocumented workers by using their undocumented status as an intimidation tactic. “AB 524 helps level the playing field and prevents unscrupulous employers from using immigration status as a means of escaping responsibility for workplace abuses and wage theft violations.”¹⁶²

155. Cal. Bus. & Prof. Code § 6103.7 (West 2013).

156. *Employment: Retaliation: Hearing on SB 666 Before the Senate Committee on Labor and Industrial Relations*, 2013-14 Legislative Sess. 6 (Apr. 24, 2013), <http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml> (Statement of Proponents of SB 666).

157. *Employment: Retaliation: Hearing on SB 666 Before the Senate Judiciary Committee*, 2013-14 Legislative Sess. 8 (Apr. 30, 2013), <http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml> (Statement of Proponents of SB 666).

158. See Cal. Penal Code § 519(5) (West 2013).

159. See Colo. Rev. Stat. § 18-3-207(1.5) (2006) (“A person commits criminal extortion if the person, with the intent to induce another person against that other person’s will to give the person money or another item of value, threatens to report to law enforcement officials the immigration status of the threatened person or another person.”).

160. See Va. Code Ann. § 18.2-59(iii) (2010) (“Any person who . . . threatens to report him as being illegally present in the United States” is guilty of extortion).

161. See *Hearing on AB 524 Before the Assembly Committee On Public Safety*, 2013-14 Legislative Sess. 2 (Apr. 2, 2013), <http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml> (citing National Employment Law Project, Workers’ Rights on ICE: How Immigration Reform can Stop Retaliation and Advance Labor Rights Report (Feb. 2013)).

162. *Id.* at 3 (Statement of California State Council of Laborers).

Opponents raised a major concern regarding AB 524's narrowing of the statutory definition of extortion. By including more specific acts in the statutory definition of extortion, AB 524 could exclude other extortion cases that might have been brought under § 519 of the California Penal Code.¹⁶³ This potentially prevents prosecutors from charging extortion since it is not on the list provided in AB 524. This would also give a defense attorney the ability to argue that a “[l]ack of a specific reference to a particular set of facts demonstrates the Legislature’s affirmative exclusion of threats that are likely already covered today from the reach of § 519.”¹⁶⁴ Additionally, AB 524 was met with some resistance because of the possibility of increasing the inmate population in the already overcrowded California prison system.¹⁶⁵ However, the supporters of AB 524 argued that the amendment to the extortion statute is not intended to be a new law, but rather, to serve as a clarifying definition to extortion.¹⁶⁶ In order to decrease the high number of unreported crimes experienced by the undocumented community, there needed to be a safeguard put in place. AB 524 provides that protection and also serves as notice to individuals that it is explicitly against the law to deter a person from reporting a crime by using their immigration status.

Together, and in their own unique ways, AB263, SB 666, and AB 524 have strengthened immigrant rights in California. These new laws are a step forward in resolving distressing issues of employer abuse of a community that for many years could not fight back. California has provided great guidance to other states that might be looking for solutions to solve abuse against the undocumented immigrant community.

C. Wisconsin Needs to Consider California’s AB 263, SB 666, and AB 524 Laws as a Guide to Safeguard the Rights of Undocumented Women Facing Sexual Abuse in the Workplace

Wisconsin’s current sexual harassment laws do not offer undocumented women any protection against employer retaliation.¹⁶⁷ Wisconsin cannot rely on the federal government to resolve this immigration issue. In creating its own legislation, Wisconsin should look to California’s laws, which provide a framework that will ensure undocumented women in Wisconsin are protected against unscrupulous employers, thus increasing the reporting of sexual harassment incidents by these women in the workforce. Employer intimidation of undocumented women will continue to go unreported until Wisconsin steps

163. *Id.*

164. *Immigration: Extortion: Hearing on AB 524 Before the Senate Committee On Public Safety*, 2013-14 Legislative Sess. 7 (June 25, 2013), <http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml> (Statement of California District Attorneys Association).

165. *Id.* at 3-5 (For a detailed report of the overcrowding concerns).

166. An Nguyen Ruda et al., *California Labor & Employment Law Update : Key Changes in 2014 and What’s Slated for 2015*, LEXOLOGY (Dec. 30 2014) <http://www.lexology.com/library/detail.aspx?g=376f56a3-d296-4960-a314-f7b9e1b2acd5>.

167. *Id.*

up and decides to put this abuse to an end. Women will continue to live in the shadows because, in their minds, the fear of discovery by immigration officers and deportation is greater than the sexual abuse endured in the workplace. Wisconsin needs to act now; especially as its immigrant community continues to increase.

Wisconsin should consider California's laws to shield undocumented workers from employer abuse. The fear of deportation places undocumented women in an even more vulnerable situation than women who are legally in the United States.¹⁶⁸ Employers recognize that such vulnerability exists among the undocumented community and that is why they specifically prey on those women who will silently endure their abuse. Undocumented women have become the perfect target for unscrupulous employers. Undocumented women will continue to remain in the shadows until they know that speaking out will not result in deportation. It is fundamental that Wisconsin acts now, especially with the immigrant population increasing every year.¹⁶⁹ If Wisconsin wants to create laws that will protect those women, it must create a statute that expressly prohibits employer retaliation by threatening deportation after workers exercise their rights similar to that of California's AB 263 and SB 666.

Wisconsin, unlike some states, has its own state claim for employment discrimination in the workplace. In many ways Wisconsin's discrimination law reflects that of Title VII. Under Wisconsin Fair Employment Act ("WFEA"), sexual harassment¹⁷⁰ is a form of employment discrimination. WFEA recognizes two forms of sexual harassment: *quid pro quo*¹⁷¹ and hostile work environment.¹⁷² Unlike Title VII,¹⁷³ WFEA provides that an employer is presumed liable for sexual harassment committed by the employer or its employees, if he is put on notice and fails to take action to resolve the situation.¹⁷⁴ Finally, WFEA provides a safeguard against employer retaliation. It is unlawful for an employer "to discharge or otherwise discriminate against

168. See *supra* Part I.

169. See *supra* notes 5-6 and accompanying text.

170. Sexual harassment under WFEA is defined as "unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature." Wis. Stat. § 111.32(13) (2011). The statute further defines "unwelcome verbal or physical conduct of a sexual nature" as the deliberate: 1) repeated making of unsolicited gestures or comments of a sexual nature; 2) repeated display of offensive sexually graphic materials which is not necessary for business purposes; or 3) verbal or physical conduct of a sexual nature, whether or not repeated, that is sufficiently severe to interfere substantially with an employee's work performance or to create an intimidating, hostile or offensive work environment."

171. See Wis. Stat. § 111.36(1)(b) (2013) (Defining what constitutes *quid pro quo* claim).

172. See Wis. Stat. § 111.36(1)(br) (2013) (Defining what constitutes hostile work environment claim).

173. Title VII does not expressly have an employer liability presumption. However, the U.S. Supreme Court precedent establishes that employers under agency principles can be held liable for sexual harassment committed by their employees. See *Burlington Indus., v. Ellerth*, 524 U.S. 742, 743, 765 (1988).

174. See Wis. Stat. § 111.36(3) (2013).

any individual because he or she has opposed any discriminatory practice . . . or because he or she has made a complaint, testified or assisted in any proceeding¹⁷⁵ Thus, an individual who either makes a complaint of sexual harassment under WFEA, or opposes sexual harassment conduct or policy by other individuals is protected under the WFEA retaliation law.

Although WFEA generally protects victims of sexual harassment and abuse in the workplace, it does little to specifically address those undocumented women exposed to sexual abuse in the workplace. Undocumented women face different barriers when it comes to reporting sexual harassment.¹⁷⁶ WFEA's general provisions cannot resolve the difficulties that undocumented women would face if they report the abuse. Therefore, it is vital that Wisconsin pass legislation that will strengthen the rights of undocumented workers. Such legislation will break open the chains that have long restrained undocumented women living in Wisconsin from speaking out about the abuse endured in their workplace.

In order for employers to abide by the laws, there need to be consequences for violating the law. Wisconsin can strengthen WFEA by including laws or provisions similar to AB 263 and AB 524, extending protections to undocumented women. In particular, WFEA could implement AB 263's provisions explicitly tackling the immigration-related tactics that employers have relied on for many years to silence the undocumented community.¹⁷⁷ In addition; it is necessary that WFEA include employer accountability by including fines and the suspension of business licenses.¹⁷⁸ Finally, Wisconsin's criminal code relating to extortion should expressly provide that threatening a person to expose their undocumented status is criminal extortion.¹⁷⁹ By making these changes, Wisconsin's employers will be deterred from threatening undocumented women with deportation if they speak out about the workplace abuse.

Similar to California, Wisconsin will be confronted with opposition toward legislation that will strengthen the rights of undocumented women. This article already addressed the major counterarguments. Some may feel Wisconsin is overstepping its boundaries by addressing immigration, since it is traditionally a federal issue.¹⁸⁰ However, as mentioned above, the federal

175. Wis. Stat. § 111.322(3) (2011).

176. See *supra* Part II.

177. See *supra* note 129.

178. See *supra* note 144.

179. Wisconsin extortion law prohibits someone from “[e]ither verbally or by any written or printed communication, maliciously threatens to accuse or accuses another of any crime or offense, or threatens or commits any injury to the person . . . with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against the person’s will or omit to do any lawful act, is guilty of a Class H felony.” Wis. Stat. Ann. § 943.30 (1) (West 2013).

180. See Peter H. Schuck, *Taking Immigration Federalism Seriously*, 28 IMMIGR. & NAT'LITY L. REV. 273 (2007) (“Probably no principle in immigration law is more firmly established, or of greater antiquity, than the plenary power of the federal government to regulate immigration.”). This article does not provide a preemption analysis, because the

government has failed to address the issue of immigration in recent years.¹⁸¹ The Congressional gridlock over immigration has prevented any substantive change. This has encouraged many states to begin addressing immigration issues themselves, not by enforcement (which seems to be the only solution the House Republicans believe will resolve immigration issues)¹⁸² but by providing relief to their immigrant community.¹⁸³ Wisconsin will not be alone in implementing laws that address issues undocumented immigrants face in the workplace.

CONCLUSION

By amending Wisconsin laws to strengthen immigrant rights, the legislature will allow undocumented women living in Wisconsin to speak out about sexual abuse by employers. Employers force undocumented women to remain silent about the sexual harassment and abuse they experience in the workplace via threats of termination and deportation and by taking advantage of linguistic limitations. Wisconsin is in a better position than the federal government to address the sexual abuse that these victims endure in the workplace because it takes less political will power to make changes at the state level. Relying on the federal government has not solved the issue. If Wisconsin continues to push the issue aside, victims will continue to be forced to remain silent when employers abuse them. Currently Wisconsin's sexual harassment laws do not take into account the special circumstances that an undocumented woman faces if she exercises her rights. Yet every year Wisconsin continues to see an increase in its immigrant community. It is Wisconsin's responsibility to enact legislation that ensures that its workers' rights are protected regardless of their legal status. By doing so, women will come out and report the abuse.

propose legislation is not intended to address the immigration issues, but rather workers' rights in general in the state of Wisconsin.

181. In 2013, the number of state immigration-related laws total 437. "This is a 64 percent increase from the 267 laws and resolutions enacted in 2012." *2013 Immigration Report*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 20, 2014), <http://www.ncsl.org/research/immigration/2013-immigration-report.aspx> [hereinafter 2013 Immigration Report].

182. Cindy Saine, *US Passes Border Security Bill*, VOA NEWS (Aug. 1, 2014 12:14 PM), <http://www.voanews.com/content/us-house-of-representatives-to-vote-on-revised-border-security-bill/1969722.html>.

183. "Eight states—California, Colorado, Connecticut, Illinois, Maryland, Nevada, Oregon and Vermont—joined New Mexico, Utah and Washington in extending driver's license eligibility to unauthorized residents." Colorado, Minnesota, New Jersey, and Oregon joined other in expanding in state tuition to undocumented students, totaling 15 states. 2013 Immigration Report, *supra* note 182.