IMMIGRANT WORKERS AND THE FUTURE OF AMERICAN LABOR

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Immigrant workers are at the vital center of recent efforts to rebuild the U.S. labor movement. Low-wage workers from Mexico and Central America, including many who lack legal status, were the protagonists of many of the nation's most dynamic union organizing campaigns starting in the 1980s and 1990s. In that same period, low-wage immigrants were on the front lines of "worker center" organizing and advocacy efforts as well. The 21st century has also witnessed the emergence of a vibrant immigrant rights movement, which is both a civil rights movement and a labor movement. All three types of immigrant organizing and advocacy have infused the beleaguered U.S. labor movement with new energy, new tactics, and new ideas.

Most immigrants come to this country with the goal of economic advancement, yet newcomers who arrive with few resources often find themselves confined to the bottom of the labor market, where wages are low, working conditions poor, benefits rare, and opportunities for promotion extremely limited. Moreover, in many of the jobs in which immigrants are concentrated, wage theft and violations of other longstanding labor standards are endemic. Few workers are more "organizable" today than low-wage immigrants, and campaigns that highlight the abuses to which they are subjected have proven capable of enlisting the sympathies of the wider public – despite the fact that the workers involved often lack legal status. Nevertheless, multiple obstacles stand in the way of large-scale immigrant unionization, obstacles that deserve close attention in any future

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efforts to reform U.S. labor law generally, or the National Labor Relations Act (NLRA) in particular.

Among the nation's 155 million workers, about 24 million (16 percent) are foreign-born.[2] This group includes many professionals, entrepreneurs, and other high earners. At the other end of the spectrum, about a third of the foreign-born labor force, or 8 million workers, are unauthorized immigrants, most of them Latino. They are typically employed in low-wage jobs in agriculture, construction, food and garment manufacturing, hotel and restaurant jobs, and a variety of other low-wage service industries.[3] Many legal immigrants (some of whom lacked that status when they first entered the country) labor alongside their unauthorized counterparts at or near the bottom of the labor market. Others have secured more stable work with better pay and conditions, and that in turn often motivates those stuck in the worst jobs to hope that they can do the same. Indeed it is precisely such aspirations that fuel the new immigrant labor movement.

Over recent decades, the size of the immigrant workforce – and its unauthorized component in particular – has grown steadily, until the current economic downturn. Given the uncertain timing of any recovery as well as the political impasse that currently exists in regard to comprehensive immigration reform, no one can predict the future size of the nation's foreign-born workforce with any precision. But it is difficult to imagine any scenario in which low-wage immigrants, including those who presently lack legal status, cease to be a significant element in the U.S. labor market. Even among advocates of immigration restriction, few are proposing a wholesale expulsion of the estimated 11

[2] These are 2009 figures, and include both employed and unemployed workers. See http://www.bls.gov/news.release/pdf/forbrn.pdf

[3] Jeffrey S. Passell and D'Vera Cohn, "A Portrait of Unauthorized Immigrants in the United States," Pew Hispanic Center Report, April 2009, available at http://pewresearch.org/pubs/1190/portrait-unauthorized-immigrants-states In addition to the 8 million unauthorized immigrants in the labor force, another 3 million are present in the U.S. but not in the labor force (including children).

million persons who currently lack legal status. And although the previous influx of unauthorized immigrants has come to a halt since 2007 as a result of the economic crisis, the outflow has been exceedingly modest, and indeed the influx of *legal* immigrants has actually increased slightly since the recession began.[4] Moreover, the low-wage jobs in which immigrants are concentrated are deeply entrenched in the U.S. economy; indeed, many of them are jobs for which continuing growth is in the forecast.[5] In short, the low-wage immigrant workforce is here to stay.

The Dynamics of Immigrant Labor Organizing

Immigrants arrive in the United States with a strong desire to improve their economic position; indeed, that is why most left their home countries in the first place. Scholarly controversy continues over the extent to which the "selection hypothesis" applies to today's Latino immigrants (that is, whether migrants have higher skill levels than non-migrants).[6] But in another, less technical sense, they are positively selected: once having arrived in this country, most immigrants dedicate themselves – individually and collectively – to the quest for economic advancement. Those who find themselves trapped at the bottom of the labor market harbor strong ambitions to move up into mainstream jobs where they can earn a living wage and where working conditions conform to basic legal standards. This aspiration, and the obstacles blocking its fulfillment, has thrust

[4] Jeffrey S. Passell and D'Vera Cohn, "U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade," Pew Hispanic Center Report, September 2010, available at http://pewhispanic.org/reports/report.php?ReportID=126

[5] In a 2009 report, among the 30 occupations for which the U.S. Bureau of Labor Statistics projected the largest employment growth over the decade beginning in 2008, eleven were typical low-wage jobs, listed as requiring only "short-term on-the-job training," including many in which immigrants are overrepresented, such as home health aides, food preparation and serving workers, construction laborers, truck drivers, landscaping and groundskeeping workers, child care workers, and the like. See Table 6 of U.S. Bureau of Labor Statistics, "Employment Projections, 2008-2018 Summary," (December 2009), available at http://www.bls.gov/news.release/ecopro.nr0.htm

[6] For access to the debate over the selection hypothesis, and a finding that among non-college-educated Mexicans, immigrants on average have more schooling than non-migrants, see Daniel Chiquiar and Gordon H. Hanson, "International Migration, Self-Selection, and the Distribution of Wages: Evidence from Mexico and the U.S.," *Journal of Political Economy*, 113:2 (2005): 239-81.

immigrants onto the front lines of labor movement efforts to challenge contemporary business strategies that are driving down pay, conditions, and living standards. And insofar as such challenges target employer practices that concern U.S.-born workers as well, immigrant workers' demands for economic justice often captivate the hearts and minds of the wider public, despite the countervailing reservoir of anti-immigrant sentiments.

Today's immigrant labor movement is comprised of three distinct strands. The first involves traditional trade unionism. Although U.S. unions have a mixed record in relation to foreign-born workers, often having supported restrictive immigration policies in the past, that has changed dramatically in recent years. Starting in the 1980s, several leading unions began to actively organize Latino immigrants employed in such low-wage sectors as janitorial, retail, hospitality, residential construction and manufacturing. Ten years ago, the AFL-CIO reversed its longstanding support for immigration restriction and embraced a new policy favoring immigrant rights and a path to legalization for the undocumented. Although the phenomenon of immigrant union organizing remains markedly uneven across industries and occupations, and some unions do far more of it than others, today virtually all U.S. labor unions offer at least nominal support for immigrant workers' rights.[7]

When union organizers first began recruiting immigrant workers in significant numbers during the 1980s, they met with widespread skepticism among labor movement officials and outside observers alike, most of whom presumed that these newcomers – especially those without legal status – would not be receptive to organizing opportunities. Many immigrants were sojourners who intended to return to their home countries after

[7]For the history of organized labor's immigration policies see Janice Fine and Daniel Tichenor, "A Movement Wrestling: American Labor's Enduring Struggle with Immigration, 1866-2007," *Studies in American Political* Development 23:1 (2009): 1-30.

working in *el Norte* for a few years, the argument went – so why should they invest time and effort in a quest for unionization? Besides, the skeptics noted, immigrants routinely compared their wages and working conditions in the United States to what they had experienced back home, and thus were not likely to be especially concerned about raising U.S. labor standards. Furthermore, many presumed that the unauthorized immigrants who made up a growing part of the foreign-born workforce were too fearful of apprehension and deportation to assume the considerable risks involved in actively seeking unionization.

However, this once-conventional wisdom has been falsified repeatedly over the past few decades.[8] The real and imagined barriers to recruiting foreign-born workers into unions are in practice counteracted by other factors that often make it easier to organize Latino immigrant workers than their U.S.-born counterparts. One such factor is the strength of immigrant social networks, which help newcomers establish a foothold in the host society – not least by helping them find jobs. As a result, these social networks are embedded in many workplaces, where they can become a resource for union organizing. In addition, Latino immigrants often understand their fate not so much as determined by their individual attributes or achievements, but rather as bound up with the fate of other members of their community. That worldview can facilitate collective action like union organizing, when the opportunity presents itself. And some Latino immigrant union recruits have a background of political and/or union activism in their home countries, still another resource facilitating their engagement with U.S. trade unions.

Another factor that often makes these workers highly receptive to unionization efforts is the ordeal of immigration itself and the stigmatization and hostility they

[8]See Hector Delgado, *New Immigrants, Old Unions: Organizing Undocumented Immigrants in Los Angeles* (Philadelphia: Temple University Press, 1993); Immanuel Ness, ed., *Immigrants, Unions, and the New U.S. Labor Market* (Philadelphia: Temple University Press, 2005); Ruth Milkman, ed., *Organizing Immigrants: The Challenge for Unions in Contemporary California* (Ithaca: Cornell University Press, 2000); Ruth Milkman, *L.A. Story: Immigrant Workers and the Future of the U.S. Labor Movement* (New York: Russell Sage Foundation, 2006).

experience – whether or not they have legal status – within the host society. The shared stigma and the related experience of racialization reinforce their collective worldview as well as the social networks that link immigrant workers together. Finally, in regard to the issue of fear: while participation in union drives in the contemporary United States does involve a high risk of job loss and other forms of employer retaliation, these hazards are minor relative to those involved in, for example, crossing the U.S. border without authorization. Perhaps this is why fear does not seem to have stopped many immigrants from participating in union organizing drives, when they have had the opportunity to do so.

For all these reasons, those unions that have sought to recruit immigrant workers into their ranks have been welcomed enthusiastically on the ground. In fact, such efforts have been among the most successful labor organizing drives in recent memory. The iconic example is the Service Employees International Union's "Justice for Janitors" campaign, but there are many others as well. Public sympathy is often in short supply for union struggles in high-wage workers in declining industries like auto or steel, or on behalf of public workers, who are often perceived as unfairly advantaged over other U.S.-born workers. In striking contrast, efforts to unionize poorly paid immigrants who suffer egregious abuse at the hand of employers can win broad pubic support.

One feature of the janitors' campaign and many of the other immigrant organizing success stories is that they have secured union recognition outside of the traditional NLRA representation election process. Indeed, these campaigns were on the leading edge of a broader trend toward establishing alternatives to that traditional process, which unions

have increasingly abandoned as flawed and ill-suited to currently prevailing employment arrangements.[9]

The second strand of the immigrant labor movement involves organizational forms that depart more radically from the NLRA regime, namely the burgeoning community-based "worker centers." These groups target workers in precarious, non-standard employment arrangements in which conventional union organizations are notoriously difficult to establish – such as day labor or domestic service – or in decentralized industries that unions have virtually abandoned as "unorganizable," like garment-making or restaurants. In 2005, there were 137 worker centers in the United States.[10] Many of their leaders and supporters are ambivalent about or even overtly hostile to traditional unions, which they view not only as ill-suited to the challenges of organizing non-standard workers, but also as overly bureaucratic, inflexible, and conservative.[11] Yet worker centers are quite similar to unions in their appeal to immigrant workers striving to improve their economic situation.

Worker centers routinely provide information to low-wage immigrant workers about their rights under U.S. labor and immigration law, a type of assistance that is highly prized by recipients. The centers also offer direct services to workers, especially by filing legal claims seeking to remedy wage and hour law violations. They centers almost never become involved in NLRA legal issues, but many do attempt to use "employment law as

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[9] See Benjamin I. Sachs, "Labor Law Renewal," *Harvard Law & Policy Review* 1 (2007), p. 378.

[10] Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream* (Ithaca: Cornell University Press, 2006). See also Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights* (Cambridge: Harvard University Press, 2005) and Ruth Milkman, Joshua Bloom and Victor Narro, eds., *Working for Justice: The L.A. Model of Organizing and Advocacy* (Ithaca: Cornell University Press, 2010).

[11] See Janice Fine, "A Marriage Made in Heaven? Mismatches and Misunderstandings between Worker Centers and Unions." *British Journal of Industrial Relations* 45:2 (2007): 335-360.

labor law," to use Benjamin Sachs' phrase, in the course of their organizing.[12] Some centers offer social and educational services as well. However, the demand for such assistance is so vast relative to the modest staff and funding available that most worker centers that start out with a service provision mission tend to limit this aspect of their work early in their development. Not only are they fearful that service provision could rapidly deplete their limited resources, but they often see it as incompatible with the goal of long-term institutional change – treating the symptoms rather than the root causes of low-wage workers' predicament. Instead, most worker centers devote their limited resources to advocacy campaigns designed to extract concessions from employers and governments. They organize at the grassroots level to target specific workplace injustices, expose employer abuses to the public through media outreach as well as by direct appeals to consumers, and engage in policy and legislative advocacy to improve enforcement of employment law. Some centers have secured passage of new legislation that provides concrete benefits for low-wage immigrant workers (although ensuring adequate enforcement has often proved difficult).

Considering the sparse resources at their disposal, the centers have accomplished a great deal in recent years. But this mode of organizing has its limitations. As Steve Jenkins has observed, "unlike union campaigns where workers can potentially demand higher wages, vacation days, and health insurance," worker centers rarely extend their efforts beyond seeking remedies for blatantly illegal employer practices.[13] On the other hand, the centers enjoy some freedom of maneuver that unions lack, since they are – thus far at least

[12] Sachs, "Labor Law Renewal," p. 389f.

[13] Steve Jenkins, "Organizing, Advocacy, and Member Power: A Critical Reflection," *Working USA* 6:2 (2002): 56-89.

– not subject to the ban on secondary boycotts and other such tactics under the NLRA.[14] Still, even the most successful worker center campaigns typically yield only modest improvements in pay and conditions for small groups of workers. They have achieved far more on the moral and discursive level, gaining extensive publicity for labor law violations and other problems affecting immigrants as well as other low-wage workers.

The third strand of immigrant labor activism is the immigrant rights movement itself. A range of efforts to win a path for legalization for the unauthorized gradually grew into a national movement in the two decades that followed passage of the 1986 Immigration Reform and Control Act (IRCA). That movement burst into public view in the spring of 2006, when millions marched in the nation's streets to protest H.R. 4437, the draconian proposal passed by the U.S. House of Representatives in late 2005 that proposed to criminalize unauthorized immigrants for merely being present in the country. The immigrant rights movement uses the rhetoric of human rights and civil rights, and enjoys support from a broad coalition that includes churches and ethnic organizations, but its underlying thrust is to improve the economic opportunities available to immigrants, especially the unauthorized. In that sense, the movement constitutes a form of labor activism – and indeed it has won energetic support from unions and worker centers alike.[15]

Tensions and differences sometimes divide these three strands of immigrant labor activism (unions, worker centers, and the immigrant rights movement). Yet their basic goals are strikingly similar, their activities are often synergistic, and at some points their efforts directly intersect. All three embrace the key goal of securing access for immigrants

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[14] But see David Rosenfeld, "Worker Centers: Emerging Labor Organizations – Until They Confront the National Labor Relations Act," *Berkeley Journal of Labor and Employment Law 27* (2006): 469-82.

[15] For a similar claim about the "sans papiers" protests in France, see Natasha Iskander, "Informal work and Protest: Undocumented Immigrant Activism in France, 1996-2000," *British Journal of Industrial Relations* 45:2 (2007): 309-34. For analysis of the 2006 marches see Irene Bloemraad. Kim Voss and Taeku Lee, eds., *Rallying for Immigrant Rights* (Berkeley: University of California Press, forthcoming).

to jobs that pay a living wage and that offer working conditions that conform to legal requirements. All three have come to understand that these goals cannot be reached without securing a path to legalization for the millions of unauthorized immigrants who are denied basic civil rights. And all three recognize the importance of increasing immigrant workers' access to collective representation. Nevertheless, only the traditional union strand engages at all with the NLRA, and even its engagement is on a steady downward trend.

Immigrant Unionism in the 21st Century: Achievements and Challenges

As one might expect, immigrants are less unionized overall than U.S.-born workers today, but thanks in part to the efforts described above, the gap has narrowed significantly over recent years. At this writing, about 10 percent of the nation's foreign-born workers, and 13 percent of the U.S.-born, are union members. The disparity largely reflects the fact that so few immigrants are employed in the highly unionized public sector. Indeed, private-sector unionization rates for immigrants and the U.S.-born are nearly identical (about 7 percent). And for some key subgroups - naturalized citizens as well as immigrants who arrived in the United States before 1990, private-sector unionization rates are actually higher – at 10 percent and 9 percent respectively – than the average for U.S.-born workers (7 percent).[16]

The vast majority of immigrant workers – and indeed the majority of native-born workers as well – remain outside of union ranks, but not for lack of interest in organizing. Recent surveys indicate that a majority of the nation's nonunion workers would vote to

[16] These data are for the eighteen months from January 2009 to June 2010, inclusive. See Ruth Milkman and Laura Braslow, "The State of the Unions: A Profile of 2009-2010 Union Membership in New York City, New York State, and the USA," available at http://workered.org/Portals/0/NYuniondensity2009-10.pdf

become union members if they had the opportunity to do so. Although the available data are fragmentary, surveys as well as qualitative evidence suggest that immigrants tend to be even more receptive to union organizing efforts, and to have more pro-union attitudes, than U.S.-born workers. In a 2001-02 survey of nonunion workers in California, for example, 66 percent of immigrant non-citizen respondents indicated they would vote for a union if a representation election were held in their workplace, compared to 54 percent of naturalized citizens and only 42 percent of native-born respondents, a statistically significant difference. And Latinos generally (regardless of nativity) express more positive views of unions than other ethnic groups, second only to African Americans in the extent of their pro-unionism. [17]

For immigrants and natives alike, the vast "representation gap" between the number of workers who express the desire to be union members and the number who actually are unionized suggests the scale of the challenge facing organized labor today, especially in the private sector, where union density has fallen into the single digits. Recent immigrant organizing successes, as noted above, are one of the few bright spots in this otherwise bleak landscape. But even with a low-wage immigrant workforce that is ripe for organization and capable of enlisting public sympathy, union drives must overcome formidable obstacles in order to succeed. Intense opposition from employers is ubiquitous in the private sector, and until recently, labor faced a hostile political environment as well. All that must change if the potential of immigrant unionism is ever to be fully realized.

In addition, immigrant union organizing confronts some specific obstacles, beyond those affecting the workforce as a whole. For example, among the many tactics that

[17] For the California survey, see Margaret Weir, "Income Polarization and California's Social Contract," *The State of California Labor 2002* (vol. 2) p. 121. For examples of other surveys and a summary of some qualitative evidence of immigrant receptivity to union organizing, see Milkman, *L.A. Story*, pp. 128-129.

employers use to oppose unionization drives is the threat of turning unauthorized workers over to immigration authorities. Kate Bronfenbrenner's study of over 1000 union representation election campaigns in the 1999-2003 period found that employers made such threats in 7 percent of all campaigns, in 41 percent of those with a workforce majority of recent immigrants, and in 50 percent of those with a majority of unauthorized immigrants.[18] As Peter Brownell has shown, such threats have often been carried out, with direct employer complaints to immigration authorities regularly producing arrests of unauthorized workers in the course of union organizing drives[19]

Another critical obstacle is that many low-wage immigrant workers are excluded outright from coverage under the NLRA. Domestic workers and agricultural workers, two of the Act's original excluded categories, are now more likely to be immigrants than African Americans (the target population when these occupations were originally excluded as a political concession to Southern Democrats).[20] In addition, many immigrant workers are employed as day laborers, temps, and in other types of "contingent work," or in jobs like taxicab or truck driving, which are among the larger group of jobs often classified (or misclassified, as many observers argue) as "independent contractors." All these categories are excluded from NLRA coverage.[21]

However, as Table 1 reveals, in the private sector, roughly the same overall proportion (about a third) of U.S.-born and foreign-born workers are excluded from NLRA

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[18] Kate Bronfenbrenner, "No Holds Barred: The Intensification of Employer Opposition to Organizing," Economic Policy Institute Briefing Paper No. 235 (May 2009), p. 12. Available at http://epi.3cdn.net/edc3b3dc172dd1094f_0ym6ii96d.pdf

[19] Brownell argues, using data from the 1990s, that to avoid complaints from employers about disruptive immigration raids in other circumstances, enforcement came to rely on leads from employers, many of them retaliatory. See chapter 5 of Peter Brownell, "Sanctions for Whom? The Immigration Reform and Control Act's 'Employer Sanctions' Provisions and the Wages of Mexican Immigrants," Ph.D. Dissertation, Department of Sociology, UC Berkeley, 2009.

[20] See Ira Katznelson, *When Affirmative Action Was White* (New York: W.W. Norton, 2005).

[21] On the exclusion of "independent contractors," see Craig Becker, "Labor Law Outside the Employment Relationship," *Texas Law Review* 74 (1996), pp. 1527-61.

coverage. For both groups, the largest excluded category by far is managers and supervisors, although it accounts for a larger proportion of the U.S.-born (16 percent) than of immigrants (13 percent). The other large excluded categories are self-employment – which, since these are self-reported data, probably includes some "independent contractors" as well – and various forms of contingent work. Taken together, the self-employed and contingent categories exclude about 10 percent of U.S.-born workers and 13 percent of immigrants.

In order to assess the extent of this problem for low-wage immigrant workers in particular, the bottom three lines of Table 1 omit managers and supervisors from the calculation, along with public sector workers (many of whom have collective bargaining rights, and few of whom are foreign-born) and those covered by the Railway Labor Act (RLA). In this context there is a sharp disparity in the proportion of foreign and U.S.-born workers excluded from NLRA coverage – 21 percent and 17 percent, respectively. There are no data available for unauthorized workers, but the first column of the table shows data for non-citizen immigrants (a group that includes unauthorized immigrants as well as legal residents who have not become naturalized citizens). Again omitting managers and supervisors, public sector, and RLA-covered workers from consideration, almost one-fourth (23 percent) of non-citizens are excluded from NLRA coverage, and the proportion is surely higher still for the unauthorized. As many commentators have suggested, updating the NLRA to offer avenues to union representation for these excluded workers must be part of any future labor law reform.[22] This would especially benefit low-wage immigrants, but

[22] See Sachs, "Labor Law Renewal," and Dorothy Sue Cobble, "Making Postindustrial Unionism Possible," in Sheldon Friedman, Richard W. Hurd, Rudoph A. Oswald and Ronald L. Seeber, eds, *Restoring the Promise of American Labor Law* (Ithaca: Cornell University Press, 1994), pp. 285-302. Table 1 of the present paper was inspired by the table Cobble includes on p. 290 of this article.

also would create new possibilities for collective representation for a large proportion of U.S.-born workers.

In discussions of immigrant workers and labor law reform, much attention has focused on the 2002 U.S. Supreme Court 5-4 ruling in *Hoffman Plastic Compounds v. NLRB,* 535 U.S. 137, which stipulated that if unauthorized immigrants are fired for organizing activities, they are not entitled to back pay or reinstatement – the legal remedies available to other workers under the NLRA. The decision's impact was modest on the practical level: since back pay and reinstatement awards are relatively rare events, few workers were affected directly.[23] However, *Hoffman*'s unprecedented signal that the traditional firewall between immigration law and labor law was no longer sacrosanct had enormous symbolic significance, raising fears among labor and immigrant advocates that protection for the unauthorized under other labor and employment laws might also be in jeopardy.[24]

That has not occurred, however. Indeed, apart from the narrow exception created by the *Hoffman* decision itself, the firewall between immigration law and labor law remains essentially intact, as far as the letter of the law is concerned.[25] Although unauthorized immigrants in the contemporary United States are denied many basic civil rights, in principle they still are protected by nearly all laws covering wages, hours, and union representation. But on the ground, the boundary lines are far less clear. The effectiveness

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[23] A total of 135,000 workers received back pay awards over fiscal years 2004-2008. See James J. Brudney, "Private Injuries, Public Policies: Adjusting the NLRB's Approach to Backpay Remedies," August 9, 2010. Ohio State Public Law Working Paper No. 131. Available at http://ssrn.com/abstract=1655758

[24] See for example, Rebecca Smith et al, "Undocumented Workers: Preserving Rights and Remedies after Hoffman Plastics Compounds v. NLRB," available at http://nelp.3cdn.net/b378145245dde2e58d_0qm6i6i6g.pdf

[25] See Catherine L. Fisk and Michael J. Wishnie, "The Story of *Hoffman Plastic Compounds, Inc. v. NLRB:* Labor Rights Withiout Remedies for Undocumented Immigrants," in *Immigration Stories*, eds. David A. Martin and Peter H. Schuck (Thomson/West, 2005), pp. 351-90. Arguably the scope of *Hoffman* will turn out to be narrower than many feared. In a 2006 case, *Mezonos Maven Bakery, Inc and Puerto Rican Legal Defense and Education Fund,* 29-CA-25476, an Administrative Law Judge ruled that because the employer had violated IRCA by knowingly hiring unauthorized immigrants, the employer *was* liable for back pay. See Monica Guizar, "Employer That Knowingly Violated I-9 Requirement Ordered to Pay 'Back Pay,'" *Immigrant Rights Update* 21(6), July 2007, available at http://www.nilc.org/immsemplymnt/emprights/emprights104.htm

and enforcement of employment and labor laws have been deeply eroded over the past few decades, even as enforcement of increasingly punitive immigration laws has been steadily intensified. The result is a growing scissors crisis for low-wage immigrant workers.

Not only has the NLRA become increasingly irrelevant to these workers, as noted above, but they also have experienced disproportionately high rates of violation of long-established labor standards. Payment below the legal minimum wage, failure to pay legally mandated overtime premiums, "off the clock" work, outright wage theft, and retaliation against those who complain or attempt to organize their co-workers have become standard business practices in many low-wage industries and occupations. Immigrant workers, and especially the unauthorized, are particularly vulnerable to these abuses, although many U.S.-born low-wage workers experience them too.[26] Unions and (especially) worker centers have increasingly focused on these violations, to the point that the Fair Labor Standards Act is emerging as an alternative to the NLRA as a legal framework for immigrant organizing.[27] As a result, the challenges of updating and improving enforcement of employment law and labor law are now inextricably intertwined.

To date, however, it has been politically impossible to achieve even the modest labor law reform embodied in the proposed Employee Free Choice Act. Yet, in light of the many transformations of the U.S. workplace that have taken place in recent decades, a far more extensive overhaul of the existing laws is needed. Any such overhaul must also be attentive to immigration law. Presently, like labor law reform, comprehensive immigration reform is in political limbo. But immigration law has changed significantly in recent decades, starting

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[26] See Kim Bobo, *Wage Theft in America* (New York: The New Press, 2009); Annette Bernhardt, Ruth Milkman, Nik Theodore, Douglas Heckathorn, Mirabei Auer, James DeFilippis, Ana Luz Gonzalez, Victor Narro, Jason Perelshteyn, Diana Polson and Michael Spiller, "Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities," 2009, available at www.unprotectedworkers.org

[27] Sachs, "Labor Law Renewal."

with the passage of IRCA in 1986. IRCA regularized the status of many unauthorized workers, but at the same time it ushered in enhanced border enforcement that had the unintended consequence of *increasing* the influx of unauthorized immigrants. In response to the latter development, popular support for punitive immigration measures mushroomed. In California, home to the nation's largest unauthorized immigrant population, voters passed Proposition 187 in 1994. Had it not been struck down as unconstitutional, this measure would have deprived unauthorized immigrants and their children of many basic government services, including public education. Two years later, the Illegal Immigration Reform and Immigrant Responsibility Act made unauthorized immigrants ineligible for Social Security benefits and, also in 1996, the national welfare reform placed restrictions on *legal* immigrants as well. [28]

A key turning point came with the September 11, 2001 attacks, when the prospect of comprehensive immigration reform (momentum for which had been building in the late 1990s) went into the deep freeze. Six months later, on March 27, 2002, the *Hoffman* decision was issued, and that same year the Social Security Administration greatly expanded its use of "no-match" letters.[29] Then in 2003, immigration enforcement was assigned to the newly created Department of Homeland Security's Immigration and Customs Enforcement (ICE) agency, which further enhanced border enforcement efforts.

Although the Bush administration strongly supported immigration reform, as it became apparent that this goal was politically impossible, and perhaps also in response to the huge immigrant rights marches in the spring of 2006, the administration shifted to a new approach: starting in 2006, ICE orchestrated a series of high-profile workplace raids.

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[28] Douglas S. Massey, Jorge Durand and Nolan J. Malone, *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration* (New York: Russell Sage Foundation, 2002), chapters 5 and 6.

[29] See p. 6 of "Social Security 'No-Match' Letters: A Primer," Migration Policy Institute,

Immigration raids and deportations were by no means a new phenomenon, but the scale of those ICE launched in this period was historically unprecedented in the post-World War II era. Whereas previously the main focus of enforcement had been at the border, now attention shifted to the nation's interior. The number of workers directly affected was relatively small compared to the overall size of the unauthorized population, but the wave of raids that began in 2006 created a climate of fear in immigrant communities across the nation. As a result, the scissors crisis grew worse, for unauthorized immigrants who experienced violations of labor and employment law now were even less likely than before to pursue the limited legal remedies available.[30] The economic downturn only reinforced their apprehension.

The NLRA's historical promise of "encouraging the practice and procedure of collective bargaining" and "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection" is in dire need of renewal. From the perspective of low-wage immigrant workers, any meaningful legal reform effort must encompass the realms of employment and immigration law as well as labor law. In the meantime, immigrants will continue to seek other means through which to organize, driven both by what Sachs calls the "hydraulic demand for collective action" and by what is still the American dream.[31]

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[30] See the report jointly issued by the AFL-CIO, American Rights at Work, and the National Employment Law Project, *Iced Out: How Immigration Enforcement Has Interfered with Workers' Rights* (2009)

[31] Sachs, "Labor Law Renewal," p. 393.