

LEGALIZING UNDOCUMENTED WORK

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INTRODUCTION

An estimated eight million undocumented workers live as a subclass of workers in the United States.¹ Their essential work is cast in a shadow of “illegality” because federal immigration law prohibits employers from hiring such workers.² As a result, undocumented workers are relegated to low-paying jobs in specific industries, such as agriculture, construction, or domestic work.³ Employers can easily take advantage of such workers by paying them less than the minimum wage or requiring them to work under dangerous conditions.⁴ While social movements focused on undocumented workers may target their ire against private employer exploitation, the immigration system itself is ultimately responsible for facilitating the systemic subordination of undocumented workers.

Given this phenomenon, this paper urges these social movements to reconsider the undocumented worker separate and apart from their immigration status. It proposes that all individuals, regardless of immigration status, should have the lawful ability to work.⁵ My argument is that the case for legalizing undocumented work offers a series of compelling claims centered on the problematic subordination of a distinct racial subclass of workers in the United States.

The outlawing of undocumented work at the federal level is of relatively recent vintage. In 1986, the Immigration Reform and Control Act (IRCA) created the federal prohibition to control migration by

¹ Jeffrey S. Passel & D’Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, PEW RSCH. CTR. 27 (Nov. 27, 2018), https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2019/03/Pew-Research-Center_2018-11-27_U-S-Unauthorized-Immigrants-Total-Dips_Updated-2019-06-25.pdf [<https://perma.cc/HQ6L-498V>].

² 8 U.S.C. § 1324a (2012). Undocumented workers are disproportionately “essential workers” as defined by the Department of Homeland Security. RAUL HINOJOSA-OJEDA, SHERMAN ROBINSON, JAIHUI ZHANG, MARCELO PLEITEZ, JULIE AGUILAR, VALENTIN SOLIS, EDWARD TELLES & ABEL VALENZUELA, *ESSENTIAL BUT DISPOSABLE: UNDOCUMENTED WORKERS AND THEIR MIXED-STATUS FAMILIES* 6 (2020).

³ See TRISH HERNANDEZ & SUSAN GABBARD, *FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY 2015-2016: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS* 5 (2018); Jeffrey S. Passel & D’Vera Cohn, *Industries of Unauthorized Immigrant Workers*, PEW RSCH. CTR. (Mar. 26, 2015) [hereinafter Passel & Cohn, *Industries*], <https://www.pewresearch.org/hispanic/2015/03/26/chapter-2-industries-of-unauthorized-immigrant-workers> [<https://perma.cc/772Y-5YUT>]; LINDA BURNHAM, LISA MOORE & EMILEE OHIA, *LIVING IN THE SHADOWS: LATINA DOMESTIC WORKERS IN THE TEXAS-MEXICO BORDER REGION* 4 (2018).

⁴ See *infra* text accompanying notes 68–71.

⁵ See Joseph H. Carens, *The Case for Amnesty*, in *IMMIGRANTS AND THE RIGHT TO STAY* 1, 39 (2010) (noting that “[f]or too long advocates of legalization have relied almost entirely on the pragmatic case, leaving moral arguments to those who oppose legalization in the name of fairness and respect for the law”).

stopping the magnet of jobs in the United States.⁶ IRCA, however, has been ineffective in stemming the tide of migration.⁷ Since its enactment, the undocumented population has increased⁸ and effective enforcement has been nearly impossible.⁹ Instead, the result of IRCA has been the creation of a separate caste of low-wage workers who are vulnerable to abuse and exploitation.

There is some official recognition of the resulting abuse and exploitation of undocumented workers, although the focus has been on private “bad apple” employers who victimize workers. The need for victimized workers opens the door to determining whether undocumented workers too have acted badly in some way. While campaigns against exploitative employers can be incredibly effective at highlighting the problems with undocumented work, they often obscure the more systemic problem created by governmental policy.

Further, the moral disapproval of undocumented workers helps to bolster the continued connection between migration and work. While the act of engaging in undocumented work violates no law in and of itself,¹⁰ this moral claim centers on the earlier act of border crossing or visa overstay, transforming this unlawful act into a continuing state of “illegality.” By violating the rule of law, the moral claim is that undocumented immigrants have forfeited their right to lawfully work.¹¹ Another version of this moral claim centers on fairness, claiming that undocumented immigrants have unfair access to the limited resource of jobs, disadvantaging impoverished native-born workers.¹² Using this

⁶ Immigration Reform and Control Act of 1985, S. REP. NO. 99-132, at 1-2 (1985); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

⁷ Muzaffar Chishti & Charles Kamasaki, *IRCA in Retrospect: Guideposts for Today's Immigration Reform*, 9 MIGRATION POL'Y INST. 1, 5 (2014), <https://www.migrationpolicy.org/research/irca-retrospect-immigration-reform> [<https://perma.cc/Q2RE-TT2D>].

⁸ *Id.* at 2; see also Jens Manuel Krogstad, Jeffrey S. Passel & D'Vera Cohn, *5 Facts About Illegal Immigration in the U.S.*, PEW RSCH. CTR. (June 12, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s> [<https://perma.cc/PB9U-BCN7>] (indicating an increase in the undocumented population from 3.5 million in 1990 to 12.2 million in 2007 and then reducing in recent years to 10.5 million in 2017).

⁹ Chishti & Kamasaki, *supra* note 7, at 2-5.

¹⁰ Immigration law makes those who have engaged in undocumented work ineligible for certain future benefits. See, e.g., 8 U.S.C. § 1255(c) (2009).

¹¹ Peter Skerry, *It Takes Two: Immigration and the Rule of Law*, BROOKINGS (May 9, 2013), <https://www.brookings.edu/articles/it-takes-two-immigration-and-the-rule-of-law> [<https://perma.cc/K7KS-RAJE>] (noting that “Republicans continue to insist that the undocumented must be treated as law-breakers, even as criminals, who must be penalized and not allowed to benefit from their transgressions”).

¹² See Victor Davis Hanson, *Is Illegal Immigration Moral?*, NAT'L REV. (Nov. 26, 2010, 5:00 AM), <https://www.nationalreview.com/2010/11/illegal-immigration-moral-victor-davis-hanson> [<https://perma.cc/J2K6-HLW5>].

justification of “illegality,” some states and localities have also jumped on the bandwagon seeking to further outlaw undocumented work.¹³

The countervailing case for legalizing undocumented work separate and apart from immigration status bases the injustice of the federal prohibition in the elimination of a caste-like system that violates America’s stated commitment to equality, freedom, and anti-racial subordination.¹⁴ In terms of equality, undocumented workers are entitled to equal treatment not only because of their membership within the American community of workers,¹⁵ but also as a matter of reciprocal obligation owed to such workers who participate in and contribute to the law and economy of the workplace.¹⁶ In terms of freedom, undocumented workers experience constraints on the ownership over their own labor, preventing the realization of their autonomy, security, and dignity through work.¹⁷ The subordination of undocumented workers more specifically implicates racial equity as well, with its disproportionate impact on a “brown-collar” workforce.¹⁸

¹³ See, e.g., Leticia M. Saucedo, *The Making of the “Wrongfully” Documented Worker*, 93 N.C. L. REV. 1505, 1529–31 (2015) [hereinafter Saucedo, *The Making*] (noting the increase of states creating penalties for undocumented workers for the use of false documents for employment); CATH. LEGAL IMMIGR. NETWORK, INC., FEDERAL E-VERIFY: WHY STATES SHOULD REFRAIN FROM REQUIRING ITS USE 3 (2019) (noting eight states that mandate E-Verify for all employers).

¹⁴ These anti-racial subordination principles are borne out of this country’s history with slavery and underlie efforts to address continued issues of racial injustice. See, e.g., Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 309 (2004); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10–11 (2003).

¹⁵ See, e.g., MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 60 (1983) (noting that “[p]articipants in economy and law” must have basic civil liberties); Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1141 (1994) [hereinafter Bosniak, *Membership*] (noting how alienage is not morally relevant for determining the social rights of individuals within the membership community).

¹⁶ See, e.g., GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 63 (1996) (describing a “mutuality of legal obligation” where those present within the United States and subject to its laws have the “concomitant right to the protection of the fundamental law of the land”); D. Carolina Núñez, *Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for the Undocumented Worker*, 2010 WIS. L. REV. 817, 870–71 (2010) (noting that reciprocal obligations between employer and employee should prevent employers from governing employees without restraint).

¹⁷ See, e.g., Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558, 1583 (2015) (noting that undocumented workers should have the ability to assert free labor rights); Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMMIGR. L.J. 243, 280–81 (2017) (arguing that an “immigrant right to work is implicit in the concept of ordered liberty”).

¹⁸ See Kevin R. Johnson, *It’s the Economy, Stupid: The Hijacking of the Debate Over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, etc.)*, 13 CHAP. L. REV. 583, 604 (2010). The term “brown-collar” refers to immigrant Latinos who are severely overrepresented in certain occupations. See Lisa Catanzarite, *Brown-Collar Jobs: Occupational Segregation and Earnings of Recent-Immigrant Latinos*, 43 SOCIO. PERSPS. 46 (2000).

Some would use the concept of “illegality” or fairness to justify the exclusion of undocumented workers from equality and freedom principles. A closer look at “illegality,” however, reveals the malleability of this concept, which is often the result of more complex circumstances related to poverty, family unity, and political instability rather than intentional law breaking. Further, the United States government has created expectations by historically creating a norm of acceptability of undocumented work,¹⁹ including collecting taxes from undocumented workers²⁰ and tolerating their hiring within certain industries.²¹ Undocumented work is indistinguishable from any other work in the United States in the ways that workers are engaged in an exercise in responsibility to family, employers, and the larger community.²² On balance, fairness dictates that undocumented workers, particularly as a racial or ethnic subclass of workers, are owed equality and freedom on the same terms as native-born workers.

There are several benefits to this countervailing case for legalizing undocumented work separate and apart from immigrations status. The timing for such countervailing moral claims based on freedom and equality, grounded in anti-racial subordination principles, is opportune. There continues to be growing resistance, through sanctuary-type policies, public protests, and lawsuits, which focus on shared principles of equal treatment and freedom from an indiscriminate deprivation of rights for immigrants.²³ The increasing anger towards the exclusion of immigrants on the basis of racial animus²⁴ has the potential to dovetail with recent mass protests seeking to compel society to address systemic racism.²⁵

¹⁹ See HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 110 (2014) [hereinafter MOTOMURA, *IMMIGRATION OUTSIDE*].

²⁰ CONG. BUDGET OFF., PUB. NO. 2500, *THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS* 6–7 (2007).

²¹ Forty-nine percent of migrant agricultural workers are working without lawful authorization. See HERNANDEZ & GABBARD, *supra* note 3, at 5. The immigration law has an exception for agricultural employers stating that ICE may not enter the premises of an agricultural operation without the consent of the owner or a properly executed warrant. 8 U.S.C. § 1357(e) (2006).

²² See Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 532 (1997) [hereinafter Karst, *Coming Crisis*].

²³ See *infra* text accompanying notes 203–26.

²⁴ See, e.g., Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1493 (2017) (comparing the current regime for immigrants to Jim Crow-era states and localities in the American South, which suppressed the articulation of membership claims).

²⁵ Jelani Cobb, *An American Spring of Reckoning*, NEW YORKER (June 14, 2020), <https://www.newyorker.com/magazine/2020/06/22/an-american-spring-of-reckoning> [https://perma.cc/VH26-K9GD].

While individuals of certain political ideologies will remain unpersuaded,²⁶ the purpose here is to target those who might recognize the humanity of undocumented workers but need further persuasion as to why they should be entitled to equivalent civil, social, and economic rights as workers.

Further, such arguments based on moral claims go beyond economic arguments, which often get mired in the costs and benefits of undocumented work. While there is ample evidence to refute the hyperbole about undocumented workers “stealing jobs” or “draining resources,” there is insufficient information about the fine-grained impact of undocumented workers on specific communities.²⁷ The recent coronavirus pandemic has distilled how undocumented workers are essential workers, yet revealed the continued refusal to acknowledge their contributions by excluding them from any federal relief.²⁸ Arguments focused solely on the benefits of undocumented workers to the economy, therefore, continually fall short in countering the moral disapproval of undocumented workers.

Finally, this proposal for legalizing undocumented work applies more broadly to all undocumented workers within our territorial boundaries. The favored solution for undocumented workers is the legalization of their immigration status by providing a pathway to citizenship. While such legalization proposals hold out promise for some undocumented workers, they inevitably result in leaving behind others who do not qualify for the benefits reserved for “deserving” immigrants.²⁹ By disentangling the concept of undocumented work from citizenship status, it avoids the inevitable limitations of such proposals.

²⁶ John T. Jost, Christopher M. Federico & Jaime L. Napier, *Political Ideology: Its Structure, Functions, and Elective Affinities*, 60 ANN. REV. PSYCH. 307, 326–27 (2009) (noting the power of ideology to explain discrepancies within the current social order to serve the status quo). The moral case likely will not persuade those with more extreme opposition to undocumented workers based on prejudices that emphasize cultural, phenotypical, and other real or imagined differences. See Elizabeth Fussell, *Warmth of the Welcome: Attitudes Toward Immigrants and Immigration Policy in the United States*, 40 ANN. REV. SOCIO. 479, 480 (2014).

²⁷ See Jennifer Gordon, *Tensions in Rhetoric and Reality at the Intersection of Work and Immigration*, 2 U.C. IRVINE L. REV. 125, 140–42 (2012).

²⁸ See *infra* text accompanying notes 229–31.

²⁹ See Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of “Illegality”*, 52 HARV. J. ON LEGIS. 355, 357 (2015); Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV. 257, 258 (2017); see also Michael D. Shear, *Biden Signals He’s Flexible on Immigration Overhaul*, N.Y. TIMES (Feb. 17, 2021), <https://www.nytimes.com/2021/02/17/us/politics/biden-immigration.html> [<https://perma.cc/AHD2-JZJZ>] (noting the administration’s support of a pragmatic strategy of first targeting legalization for popular subgroups such as Dreamers or agricultural workers).

This proposal for reconsidering the undocumented workers separate and apart from their immigration status builds upon the existing literature that details the harms created by the federal prohibition and the need to restore full employment rights for such workers.³⁰ In response, several scholars have proposed alternate non-federal frameworks for addressing the rights of undocumented workers such as state and local law,³¹ international human rights law,³² or transnational bilateral programs.³³ This paper seeks to return to the primary problem of the federal prohibition³⁴ by bringing together several theories about what is owed to those engaging in undocumented work within our borders.³⁵ It offers countervailing moral claims for the ambitious reform of legalizing undocumented work.

The legalization of undocumented work undoubtedly raises some practical questions. One is how it can actually be accomplished. Repealing the federal prohibition is an obvious first step. A second step would be to affirmatively legalize undocumented work. Both steps raise several challenges, including the question of how to register such workers without creating a database that can be used for immigration enforcement purposes. Another question concerns the practical import on the existing social movements for undocumented workers. The countervailing case can help with the development of framing that will encourage collective action by connecting to the current demands by undocumented workers for dignity and respect.

Having the lawful ability to work is not a panacea. It does not remove all the challenges that undocumented workers face as they are still subject to deportation based on immigration status. There will necessarily have to be accompanying reforms that strengthen anti-retaliation protections for undocumented workers and prohibit

³⁰ See generally Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, U. CHI. LEGAL F. 193, 195 (2007); David Bacon & Bill Ong Hing, *The Rise and Fall of Employer Sanctions*, 38 FORDHAM URB. L.J. 77, 77 (2010); Nuñez, *supra* note 16, at 823; Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1365 (2009).

³¹ See Jennifer J. Lee, *Redefining the Legality of Undocumented Work*, 106 CALIF. L. REV. 1617, 1619–21 (2018) [hereinafter Lee, J., *Redefining*]; Kati L. Griffith, *The Power of a Presumption: California as a Laboratory for Unauthorized Immigrant Workers' Rights*, 50 U.C. DAVIS L. REV. 1279, 1297–98 (2017).

³² See Beth Lyon, *Changing Tactics: Globalization and the U.S. Immigrant Worker Rights Movement*, 13 UCLA J. INT'L L. & FOREIGN AFFS. 161, 195 (2008); see also RUBEN J. GARCIA, MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION 132 (2012).

³³ Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 563 (2007).

³⁴ A few authors have directly argued for the need to eradicate the federal prohibition. See Bacon & Hing, *supra* note 30, at 105; Wishnie, *supra* note 30, at 217.

³⁵ See *supra* text accompanying notes 15–17.

immigration enforcement at worksites. Nor does obtaining the status of lawful employees—especially for those who are low-wage workers—automatically mean that they will have broad opportunity and economic security at work.³⁶

This paper, however, does not purport to solve all the social ills that face undocumented workers. It deliberately does not, for example, take on the larger question of citizenship status. The lens of citizenship is not necessary to respond to discrimination and injustice against undocumented workers.³⁷ Further, the discussion about whether or not undocumented workers are entitled to citizenship status is a different calculus that requires contending with competing views about what should count for purposes of citizenship, such as length of residence, affiliation with citizens, or the ability to economically contribute.³⁸ Such discussions have been at an impasse for decades and continue to be mired in politics.³⁹ Instead, this proposal limits itself to the legalization of undocumented work because it can still transform the social and economic conditions of undocumented workers. The lawful ability to work would open up access to different job markets and would allow workers to move more freely between jobs when they are dissatisfied with pay or working conditions. The status of being a legitimate employee provides workers with a greater ability to use their voice and assert workplace rights. Such official participation in the workplace too can lead to better social integration, not unlike the way that a right to a

³⁶ In particular, many employers have increasingly classified workers as independent contractors to forego the legal responsibility of providing benefits that are provided to employees. NATIONAL EMPLOYMENT LAW PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES 1 (2020). The legalization of undocumented work would not necessarily impact these workers who are not otherwise considered to be employees. Yet it might encourage employers who otherwise misclassify undocumented workers to evade the prohibition on undocumented work to hire them as employees.

³⁷ See Paulina Tambakaki, *Citizenship and Inclusion: Rethinking the Analytical Category of Noncitizenship*, 19 CITIZENSHIP STUD. 922, 928 (2015).

³⁸ Our current immigration system has examples of each of these values underlying a basis for providing a pathway to citizenship. See, e.g., 8 U.S.C. § 1259 (registry); 8 U.S.C. § 1229b (cancellation of removal); 8 U.S.C. § 1151(a)(1) (family-sponsored immigrants).

³⁹ See, e.g., Elaine Kamarck & Christine Stenglein, *Can Immigration Reform Happen? A Look Back*, BROOKINGS (Feb. 11, 2019), <https://www.brookings.edu/blog/fixgov/2019/02/11/can-immigration-reform-happen-a-look-back> [<https://perma.cc/2JDF-M9J2>] (detailing the gridlock over past attempts to enact immigration reform); Laura Barrón-López, Heather Caygle & Anita Kumar, *Biden's Immigration Bill Lands on the Hill Facing Bleak Odds*, POLITICO (Feb. 18, 2021), <https://www.politico.com/news/2021/02/18/bidens-immigration-bill-bleak-odds-469769> [<https://perma.cc/P4YM-LCMX>] (discussing how the U.S. Citizenship Act of 2021 faces bleak odds).

K–12 education for undocumented immigrants has contributed to how immigrant youth integrate into American society.⁴⁰

Finally, the choice of work is not meant to be exclusionary towards non-workers. Rather, work is a good starting place for reexamining the restoration of social and economic rights to immigrants that have otherwise been foreclosed because of “illegality.”⁴¹ The case for work is strong because it is an integral part of the identity of so many undocumented immigrants.⁴² Work also naturally creates connections to coworkers and the broader community, which are essential for building movements. If the penalty of “illegality” can be successfully disentangled from undocumented work, it opens up the possibility of reexamining the other ways in which undocumented immigrants face inequality or subordination within our territorial boundaries.

Part I introduces the federal law’s creation of the separate caste of undocumented workers and the ways in which recognition of private employer exploitation obfuscates the systemic role of the federal prohibition. It then reviews the moral disapproval that justifies tying migration to work based on the “illegality” of undocumented workers. Next, Part II offers the countervailing case for legalizing undocumented work based on principles of freedom and equality. Part III examines the benefits of the countervailing case, including how such claims are ripe for consideration, go beyond the economic debates about undocumented worker contributions, and support more transformative change for the entire subclass of undocumented workers. Finally, Part IV provides some practical thoughts about the challenges in constructing a system that legalizes undocumented work and the potential of such framing about equality, freedom, and racial injustice to increase collective action.

⁴⁰ Shannon Gleeson & Roberto G. Gonzales, *When Do Papers Matter? An Institutional Analysis of Undocumented Life in the United States*, 50 INT’L MIGRATION 1, 5 (2012).

⁴¹ The restoration of other rights, for example, could include voting or access to public benefit programs. The case for other rights, however, requires some distinct analysis from the case for legalizing work. There is the possibility of legalizing undocumented work solely through executive action. The executive action that created the program for Deferred Action for Childhood Arrivals (DACA), for example, provided work permits to DACA recipients. *The Dream Act, DACA, and Other Policies Designed to Protect Dreamers*, AM. IMMIGR. COUNCIL 1 (Aug. 27, 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_dream_act_daca_and_other_policies_designed_to_protect_dreamers.pdf [https://perma.cc/FW6A-N4YT]. Because DACA recipients have deferred action, which provides them temporary relief from deportation, they also qualify for work permits. *Id.* I do not, however, discuss this option because it ultimately continues to tie the right to work with immigration status. It would necessarily involve a discussion about who deserves to qualify for temporary immigration relief, ultimately narrowing the category of eligible undocumented workers.

⁴² Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 L. & SOC. INQUIRY 561, 589 (2010).

I. MIGRATION AND WORK

Federal immigration law ties migration to the legality of work. By outlawing undocumented work, it creates a subclass of undocumented workers, concentrated in low-wage positions in certain industries, without full labor and employment rights. While there is some recognition of employer exploitation of undocumented workers, the focus on penalizing “bad apple” employers obfuscates the underlying immigration system that makes such exploitation possible. Rather, the moral disapproval of “illegal” workers is what bolsters this interconnection in federal immigration law. It centers on the importance of obeying the rule of law and extends the “illegality” of undocumented immigrants to the workplace. Further, it argues that providing undocumented workers with access to the “limited resource” of jobs is unfair, given the difficulties confronting native-born low-income individuals.

A. *Plight of Undocumented Workers*

Federal law creates a subclass of undocumented workers in two respects. First, IRCA prohibits the employment of undocumented workers, resulting in the exclusion of undocumented workers from traditional labor markets. The prohibition further makes them vulnerable to abuse and exploitation and constrains their rights to remedy their own exploitation. Second, the immigration system has created a two-tier system for immigrant workers in the United States,⁴³ by only providing a pathway to permanent immigration status for “high-skilled” workers.⁴⁴ As a result, the federal laws create a separate caste of “low-skilled” undocumented workers with circumscribed rights and opportunities within the United States.

IRCA requires employers to check the documents of employees through the I-9 process or be subject to penalties. Undocumented workers, therefore, are not free to work in any industry. Rather, undocumented workers are heavily segregated into specific industries that are dangerous and low paid.

⁴³ Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 849 (2007).

⁴⁴ See 8 U.S.C. § 1153(b).

Construction and agriculture, for example, are among the top industries with the most annual fatal injuries.⁴⁵ Within these industries, undocumented workers are more highly concentrated as a percentage of the overall workforce in the following occupations: crop production (22%), private household employment (22%), landscaping (21%), apparel manufacturing (19%), building maintenance (19%), and dry cleaning and laundry (18%).⁴⁶ Occupations within these industries are associated with low wages. For example, the average wages for crop production, private households, and landscaping are as follows: \$670, \$526, and \$728 per week.⁴⁷ If these earnings were year-round, they would amount to an annual salary at or slightly above poverty level for a family of four in the United States.⁴⁸

IRCA's prohibition on hiring has also caused employers to use job arrangements that distance themselves from the direct hiring of undocumented workers.⁴⁹ Employers accomplish this indirect hiring by engaging undocumented workers through subcontractors, temporary work agencies, or as independent contractors. As employers increasingly distance themselves from undocumented workers, they can claim that they have no legal obligations towards such workers because they are not the official employer.⁵⁰ Further, such hiring tends

⁴⁵ *Commonly Used Statistics*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, <https://www.osha.gov/oshstats/commonstats.html> [<https://perma.cc/UR8T-G8DK>]; *Agricultural Safety*, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, CTR. FOR DISEASE CONTROL & PREVENTION (Oct. 9, 2019), <https://www.cdc.gov/niosh/topics/aginjury/default.html> [<https://perma.cc/S6LJ-7N87>].

⁴⁶ Jeffrey S. Passel & D'Vera Cohn, *Size of U.S. Unauthorized Immigrant Workforce Stable After the Great Recession*, PEW RSCH. CTR. (Nov. 3, 2016), <https://www.pewresearch.org/hispanic/2016/11/03/size-of-u-s-unauthorized-immigrant-workforce-stable-after-the-great-recession> [<https://perma.cc/PZE9-C4WB>].

⁴⁷ *Quarterly Census of Employment and Wages (2d Quarter 2019)*, U.S. BUREAU OF LAB. STATS., https://data.bls.gov/cew/apps/data_views/data_views.htm#tab=Tables (search by industry and select "get table") [<https://perma.cc/6HAG-GP48>].

⁴⁸ Office of the Assistant Sec'y for Plan. & Evaluation, *2019 Poverty Guidelines*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://aspe.hhs.gov/2019-poverty-guidelines> [<https://perma.cc/LZL4-T8DX>] (indicating the 2019 poverty guideline was \$25,750, while year-round wages for crop production, private households, and landscaping are as follows: \$34,840, \$27,352, and \$37,856).

⁴⁹ Douglas S. Massey & Kerstin Gentsch, *Undocumented Migration to the United States and the Wages of Mexican Immigrants*, 48 INT'L MIGRATION REV. 482, 496–97 (2014); Heeren, *supra* note 17, at 246.

⁵⁰ Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law*, in *THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET* 34 (Annette Bernhardt, Heather Boushey, Laura Dresser & Chris Tilly eds., 2008).

to be extremely informal or short-term so that workers have difficulty claiming their legal rights against such employers.⁵¹

Studies also confirm that undocumented workers experience wage suppression compared to their counterparts with legal status.⁵² A study of undocumented workers in Chicago found the median wage to be just slightly over the minimum wage.⁵³ Within farm work, studies have shown that undocumented workers earned less pay per hour and were less likely to have health insurance compared to documented or native-born counterparts.⁵⁴ With respect to Mexican immigrants, one study reported that undocumented workers earned on average 20% less than legal immigrants.⁵⁵ This same study found a significant deflation in undocumented workers' wages corresponding to the enactment in the federal prohibition in 1986, as a result of the increased costs and risks of undocumented hiring.⁵⁶ Another study revealed how undocumented status is a "self-regulating barrier to upward mobility within the workforce," either in terms of increased wages or promotion to managerial positions.⁵⁷

Further, courts have limited the legal rights of undocumented workers because of IRCA. In *Hoffman Plastic*, the Supreme Court held that an undocumented worker did not have the right to receive damages after his employer had violated his rights.⁵⁸ It is undisputed that the employer had illegally fired the worker after finding out that he was involved in union organizing efforts, an activity protected by the National Labor Relations Act (NLRA).⁵⁹ The Court, however, claimed that an award of damages for work never performed (otherwise known

⁵¹ One study of day laborers, for example, most of whom are undocumented immigrants, described the informality of the work arrangements, which included the hiring by contractors of workers on an "as-needed basis" at busy intersections, in front of home improvement stores, or in public parks. ABEL VALENZUELA JR., NIK THEODORE, EDWIN MELÉNDEZ & ANA LUZ GONZALEZ, *ON THE CORNER: DAY LABOR IN THE UNITED STATES* 1 (2006).

⁵² See Anita Alves Pena, *Legalization and Immigrants in U.S. Agriculture*, 10 B.E. J. ECON. ANALYSIS & POL'Y Iss. 1, 2010, art. no. 7 (2010) (reviewing studies documenting a wage gap between documented and undocumented immigrants).

⁵³ CHIRAG MEHTA, NIK THEODORE, ILIANA MORA & JENNIFER WADE, *CHICAGO'S UNDOCUMENTED IMMIGRANTS: AN ANALYSIS OF WAGES, WORKING CONDITIONS, AND ECONOMIC CONTRIBUTIONS* 12 (2002).

⁵⁴ Alison Reid & Marc B. Schenker, *Hired Farmworkers in the US: Demographics, Work Organisation, and Services*, 59 AM. J. INDUS. MED. 644, 652 (2016).

⁵⁵ Massey & Gentsch, *supra* note 49, at 491. A different data set found the differential to be 14%, which did not include data from 1970–1990 when "real wages" were higher and which was based on state-level estimates. *Id.* at 495.

⁵⁶ *Id.* at 496–97.

⁵⁷ Gleeson & Gonzales, *supra* note 40, at 7.

⁵⁸ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002).

⁵⁹ *Id.* at 140.

as “back pay”) under the NLRA was prohibited. In this instance, the Court reasoned that back pay, which was for work that could have been done had the worker not been illegally fired, would otherwise legitimate an illegal employment relationship prohibited by IRCA.⁶⁰ A number of courts have followed *Hoffman Plastic* by preventing undocumented workers from getting damages for back pay.⁶¹

Despite the limitations of *Hoffman Plastic*, undocumented workers still have a panoply of rights under federal, state, and local law.⁶² The practical reality, however, is that undocumented workers are not truly free to exercise their rights. They fear that filing complaints might subject them to scrutiny or cause them to lose their job.⁶³ There is a sense of wanting to conform, which may mean not asking for pay raises, breaks, or taking any other action that “rock[s] the boat.”⁶⁴ Undocumented workers, for example, may shoulder the responsibility for taking on precautions to not get injured during work because they either believe that they are not entitled to redress for such injuries or do not want to face increased scrutiny for requesting a benefit like workers’ compensation.⁶⁵ Some employers will use immigration status as an explicit tool against workers by threatening to call local police or U.S. Immigration and Customs Enforcement (ICE) to arrest workers.⁶⁶ In the past, workplaces where workers were organizing or agitating about workplace conditions have been targets for immigration enforcement.⁶⁷

As a result, employers can more readily exploit undocumented workers. One large-scale survey of low-wage workers found that nearly half of the female undocumented workers surveyed had experienced a

⁶⁰ *Id.* at 151.

⁶¹ See, e.g., *Mendoza v. Detail Sols., LLC*, 911 F. Supp. 2d 433, 443 (N.D. Tex. 2012); *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510, 520–21 (Mich. Ct. App. 2003); *Ulloa v. Al’s All Tree Serv., Inc.*, 768 N.Y.S.2d 556, 558 (N.Y. Dist. Ct. 2003).

⁶² See *infra* text accompanying notes 83–84. Courts have reaffirmed such rights to address their exploitation based on unpaid wages, discrimination, and health and safety violations. Jennifer J. Lee, *Outsiders Looking In: Advancing the Immigrant Worker Movement Through Strategic Mainstreaming*, 2014 UTAH L. REV. 1063, 1072–73 (2014) [hereinafter Lee, J., *Outsiders*].

⁶³ Gleeson, *supra* note 42, at 586.

⁶⁴ *Id.*

⁶⁵ Maria Eugenia Fernández-Esquer, Maria Carolina Agoff & Isabel M. Leal, *Living Sin Papeles: Undocumented Latino Workers Negotiating Life in “Illegality”*, 39 HISP. J. BEHAV. SCIS. 3, 13–14 (2017); Gleeson & Gonzales, *supra* note 40, at 9.

⁶⁶ See generally REBECCA SMITH & EUNICE HYUNHYE CHO, WORKERS’ RIGHTS ON ICE: HOW IMMIGRATION REFORM CAN STOP RETALIATION AND ADVANCE LABOR RIGHTS (2013); Andrew Khouri, *More Workers Say Their Bosses Are Threatening to Have Them Deported*, L.A. TIMES (Jan. 2, 2018, 7:00 AM), <https://www.latimes.com/business/la-fi-immigration-retaliation-20180102-story.html> [https://perma.cc/4MUL-ZERG].

⁶⁷ Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1122 (2009).

minimum wage violation in the previous work week, compared to the 16.1% of female native-born workers.⁶⁸ A study of domestic workers found that undocumented workers were more likely to be threatened, pressured to work more hours, or pushed or physically hurt.⁶⁹ Other studies of industries with a high concentration of undocumented workers have found similar evidence of exploitation. One study of women who work in the meatpacking industry found that they had suffered from wage theft and inadequate safety equipment and had been denied access to bathroom breaks or time off for family emergencies.⁷⁰ Female farmworkers have reported a high level of sexual harassment and abuse on the job.⁷¹

Moreover, the immigration laws create this subclass of undocumented workers because they provide no mechanism for such workers to obtain lawful status in the United States. “High-skilled” workers with “extraordinary ability” or “advanced degrees” can readily obtain lawful status in the United States through employment.⁷² In contrast, the only opportunity for “less-credentialed” workers is through the temporary worker (“guest worker”) programs, which are limited to several hundreds of thousands of workers.⁷³ These programs provide temporary visas for seasonal work that do not convert into permanent immigration status.⁷⁴ As there are effectively no options for

⁶⁸ ANNETTE BERNHARDT, RUTH MILKMAN, NIK THEODORE, DOUGLAS HECKATHORN, MIRABAI AUER, JAMES DEFILIPPIS, ANA LUZ GONZÁLEZ, VICTOR NARRO, JASON PERELSHTEYN, DIANA POLSON & MICHAEL SPILLER, *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES* 43 (2009).

⁶⁹ BURNHAM, MOORE & OHIA, *supra* note 3, at 4.

⁷⁰ S. POVERTY L. CTR., *INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE U.S. FOOD INDUSTRY* 23 (2010).

⁷¹ HUMAN RIGHTS WATCH, *CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT* 3 (2012).

⁷² 8 U.S.C. § 1153(b)(1)–(2).

⁷³ *2019 Yearbook of Immigration Statistics: Table 32. Nonimmigrant Temporary Worker Admissions (I-94 Only) by Region and Country of Citizenship: Fiscal Year 2019*, DEP’T OF HOMELAND SEC., <https://www.dhs.gov/immigration-statistics/yearbook/2019/table32> [<https://perma.cc/T854-JWV4>].

⁷⁴ The H-2A program is limited to agricultural jobs while the H-2B program is capped at 66,000 workers. See 8 U.S.C. § 1101(a)(15)(H)(ii)(a)–(b); *Cap Count for H-2B Nonimmigrants*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-h-2b-nonimmigrants> [<https://perma.cc/U7NZ-Y749>] (last updated June 3, 2021); Cox & Posner, *supra* note 43, at 849.

“less-credentialed” workers,⁷⁵ they end up as participants in the “de facto” undocumented worker program.⁷⁶

The “de facto” undocumented worker program is primarily brown-collar.⁷⁷ While there are no precise figures on the national origin of undocumented workers, 94% of undocumented immigrants are from non-European countries, with nearly three-quarters from Latin America.⁷⁸ As undocumented workers are concentrated in certain industries, it has added to the racial or ethnic segregation of workers into certain jobs. Latinx workers are known to dominate farm work and housekeeping.⁷⁹ Racialized conceptions about workers also play a role in this segregation. Employers, for example, may express a preference for Latinx workers for low-wage work because of a belief that they “will work on a repetitious basis,” “seem to be good with their hands,” and “are willing to come and do whatever job you tell them without question.”⁸⁰ This perceived docility naturally is the result of workers with precarious immigration status who do not want to make waves.⁸¹ Native-born workers too begin to absorb this mentality and refuse certain jobs (“Mexican work”) because they are associated with specific ethnic groups.⁸² The result, therefore, is the further segregation of brown-collar undocumented workers into specific low-wage jobs vulnerable to abuse and exploitation.

B. *Recognition of Employer Exploitation*

The federal government has to a limited extent recognized employer exploitation of undocumented workers. It does so by allowing

⁷⁵ There is one employment-based immigration category, the EB-3, which theoretically includes a pathway for “low-skilled” workers. 8 U.S.C. § 1153(b)(3). It is almost impossible to obtain immigration status through this provision because of the extensive requirements, which include showing that qualified workers are not available in the United States. 8 U.S.C. § 1182(a)(5)(A)(i).

⁷⁶ Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 POPULATION & DEV. REV. 1, 22 (2012).

⁷⁷ *Profile of the Unauthorized Population: United States*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US> [<https://perma.cc/M49E-V9UD>].

⁷⁸ *Id.* (the remaining 6% are from Europe, Canada, and Oceania).

⁷⁹ Susan Eckstein & Giovanni Peri, *Immigrant Niches and Immigrant Networks in the U.S. Labor Market*, 4 RUSSELL SAGE FOUND. J. SOC. SCIS. 1, 7, 12–13 (2018).

⁸⁰ ROGER WALDINGER & MICHAEL I. LICHTER, HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR 162 (2003).

⁸¹ Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO STATE L.J. 961, 1011 (2006).

⁸² WALDINGER & LICHTER, *supra* note 80, at 182–83.

undocumented workers to come forward and seek to hold “bad apple” employers accountable who have otherwise victimized undocumented workers. While providing redress to exploited workers is significant in and of itself, it can manage to obfuscate the systemic role that the immigration system plays in creating the plight of undocumented workers.

Despite *Hoffman Plastic*, the courts have recognized that undocumented workers have the right to bring claims under various federal statutes, including the Fair Labor Standards Act and Title VII.⁸³ Undocumented workers have had access to the courts to address worker exploitation based on unpaid wages, discrimination, or health and safety violations.⁸⁴

Such cases, however, often lead to a comparative culpability analysis that tries to determine who the guilty party is in the employment situation.⁸⁵ The problem, of course, is that the analysis can focus on the wrongdoing by undocumented workers as well. *Hoffman Plastic* is an example where the worker’s use of false documents influenced the consideration of whether he could recover damages.⁸⁶ In other cases involving workers’ compensation or torts, the use of false documents by undocumented workers has sometimes impacted their ability to recover damages.⁸⁷

Federal agencies too have publicly acknowledged that federal laws protect undocumented workers in cases of employer exploitation.⁸⁸ In particular, undocumented workers who are victims of human trafficking can obtain both economic redress and visas to remain in the United States.⁸⁹ In order to obtain a visa, the worker must attempt to convince a law enforcement agency to support an application for immigration relief.⁹⁰ The worker not only needs to demonstrate their victimization, but also must convince the agency of the employer’s criminal behavior.⁹¹ This process is realistically only available to scenarios where employers have exercised some form of explicit

⁸³ See, e.g., *Patel v. Quality Inn S.*, 846 F.2d 700, 706 (11th Cir. 1988); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1069 (9th Cir. 2004).

⁸⁴ Lee, J., *Outsiders*, *supra* note 62, at 1072–73.

⁸⁵ Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1749 (2010).

⁸⁶ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149–50 (2002).

⁸⁷ Christine N. Cimini, *Undocumented Workers and Concepts of Fault: Are Courts Engaged in Legitimate Decisionmaking?*, 65 VAND. L. REV. 389, 412–14 (2012).

⁸⁸ Lee, J., *Redefining*, *supra* note 31, at 1627–28.

⁸⁹ 18 U.S.C. § 1595; 8 U.S.C. § 1101(a)(15)(T).

⁹⁰ Lee, J., *Outsiders*, *supra* note 62, at 1078–80.

⁹¹ *Id.* at 1079.

coercion, leaving behind those workers who have “acquiesced” to more generalized exploitation.⁹²

Stories about private employer exploitation do provide stark examples of how undocumented workers are unequal and not free in the same way as native-born workers.⁹³ At times, immigrant workers have rallied around such exploitation and engaged in organizing and direct action to confront such employers.⁹⁴ Exposing exploitative employers can translate into real remedies for undocumented workers.⁹⁵ It might also spur the passage of local or state level protective legislation that will help increase the social rights of such workers.⁹⁶

The focus on the wrongdoing by employers, however, squarely places the blame of the exploitation of undocumented workers on the private sector. By providing a way to address exploitation, it makes available a stop-gap measure that for now can serve to placate undocumented workers.⁹⁷ But such measures fundamentally fall short in addressing what is the true problem: how the immigration system itself is responsible for creating the plight of undocumented workers.

C. Moral Disapproval of “Illegal Workers”

Despite the plight of undocumented workers, the moral disapproval of “illegal workers” maintains this connection between migration and work. The prohibition of undocumented work is premised on a law and order concept that these immigrants have shown disrespect for the rule of law. These immigrants, who have either entered unlawfully or stayed beyond the expiration of their visa, have violated the immigration laws.⁹⁸ The public discourse extends the concept of “illegality” to undocumented work. The term “illegal

⁹² Kim, *supra* note 17, at 1573.

⁹³ See, e.g., Bacon & Hing, *supra* note 30, at 77–83 (recounting stories of undocumented worker exploitation).

⁹⁴ Lee, J., *Outsiders*, *supra* note 62, at 1087–88.

⁹⁵ See, e.g., Greg Asbed & Sean Sellers, *The Fair Food Program: Comprehensive, Verifiable and Sustainable Change for Farmworkers*, 16 U. PA. J.L. & SOC. CHANGE 39, 43–45 (2013) (outlining the success of immigrant worker organizing and the Fair Food Program).

⁹⁶ NAT’L IMMIGR. L. CTR., INCLUSIVE POLICIES ADVANCE DRAMATICALLY IN THE STATES: IMMIGRANTS’ ACCESS TO DRIVER’S LICENSES, HIGHER EDUCATION, WORKERS’ RIGHTS, AND COMMUNITY POLICING 1, 10–13 (2013), <https://www.nilc.org/wp-content/uploads/2016/02/inclusive-policies-advance-in-states-2013-10-28.pdf> [<https://perma.cc/6VTJ-R75M>] (discussing local and state campaigns to protect immigrant workers).

⁹⁷ See FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 29 (1977) (discussing how the government offers concessions to remedy some immediate grievances as an effort to placate disruptive groups).

⁹⁸ 8 U.S.C. § 1325 (unlawful entry); 8 U.S.C. § 1202(g) (visa overstay).

workers” is commonly used,⁹⁹ even though IRCA was purposeful in not prohibiting immigrant workers themselves from engaging in undocumented work.¹⁰⁰ Undocumented workers are morally suspect because they “steal” jobs and “drain” the United States of resources.¹⁰¹ Such moral claims, therefore, bolster the continued adherence to the principles of outlawing undocumented work, even with the well-known inefficacy of the federal prohibition.

The main moral claim centers on the undocumented worker’s “illegality.” The border crossing or visa overstay is no longer a single unlawful incident but rather “a facet” of an “illegal alien[‘s]’ very being” that has repercussions in other parts of their lives.¹⁰² By violating the rule of law, undocumented workers have forfeited their right to lawfully work within the United States. It follows that they should not benefit from any of the resources provided by the United States because they are breaking the law.¹⁰³ Violating the law has significance beyond the actual law itself. By letting people get away with violating the law, it also undermines the overall sanctity of the legal system and encourages future law breaking.¹⁰⁴

A different version of this moral claim focuses on the unfairness in allowing such “illegal” individuals to access the “limited” resource of jobs. Opponents characterize undocumented workers as unfair

⁹⁹ See, e.g., Miriam Jordan & Julie Jargon, *U.S. Begins New Crackdown on Hiring Illegal Workers*, WALL ST. J. (Sept. 12, 2013, 6:34 PM), <https://www.wsj.com/articles/SB10001424127887324755104579071331936331534> [<https://perma.cc/2MTT-NFTM>]; *Worksite Enforcement*, U.S. IMMIGR. & CUSTOMS ENF’T, U.S. DEP’T OF HOMELAND SEC. (May 18, 2021), <https://www.ice.gov/worksite> [<https://perma.cc/V57C-6V4V>] (referencing “illegal workers”); Daren Bakst, *Congress Should Reject Amnesty for Illegal Agricultural Workers*, HERITAGE FOUND. (Dec. 10, 2019), <https://www.heritage.org/immigration/report/congress-should-reject-amnesty-illegal-agricultural-workers> [<https://perma.cc/AW4R-5CQ6>].

¹⁰⁰ *Arizona v. United States*, 567 U.S. 387, 405 (2012) (stating that “IRCA’s framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives”). In conducting a forensic analysis of the legislative history to IRCA, Kati Griffith reveals that labor rights concerns were central in enacting the law. Kati L. Griffith, *When Federal Immigration Exclusion Meets Subfederal Workplace Inclusion: A Forensic Approach to Legislative History*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 881, 909–14 (2014).

¹⁰¹ See, e.g., *Immigration*, GALLUP, <https://news.gallup.com/poll/1660/immigration.aspx> [<https://perma.cc/5FY7-T88L>] (June 2019 survey finding 42% of respondents believing that immigrants make taxes worse and 31% believing that immigrants make the economy worse).

¹⁰² Susan Bibler Coutin, *Contesting Criminality: Illegal Immigration and the Spatialization of Legality*, 9 THEORETICAL CRIMINOLOGY 5, 7 (2005).

¹⁰³ See Hanson, *supra* note 12.

¹⁰⁴ *Id.*

competition who “steal” jobs that belong to native-born workers.¹⁰⁵ This claim is premised on a fixed resource of jobs, where “[i]f [the immigrant] didn’t have that job, somebody else, somebody born here, would have it.”¹⁰⁶ It follows that the effect of undocumented work has had particularly deleterious consequences for “impoverished U.S. citizens” at the bottom of the economic ladder.¹⁰⁷ Such native-born workers continue to be stereotyped by employers as being somehow averse to hard work, in comparison to their undocumented counterparts.¹⁰⁸ Native-born workers, who have experienced barriers to employment based on criminal history, also claim that undocumented workers are able to avoid such screening processes because they evade the regular employment channels.¹⁰⁹

Together, these moral claims support the continuation of the federal prohibition despite its inefficacy for controlling migration. The federal prohibition has had no effect on stemming the tide of undocumented immigrants since its enactment.¹¹⁰ Rather, Douglas Massey and Karen Pren chart the cause of the increase of the undocumented population from Latin America to the termination of the Bracero guest worker program with Mexico (1960s and 1970s) and the civil wars in Central America (1970s and 1980s).¹¹¹ They also argue that the increased militarization of the border reduced the numbers of

¹⁰⁵ Masha Gessen, *What Happens When a Group of Strangers Spends a Day Debating Immigration?*, NEW YORKER (Jul 23, 2019), <https://www.newyorker.com/news/dispatch/what-happens-when-a-group-of-strangers-spends-a-day-debating-immigration> [https://perma.cc/X4QP-ZQJ9]; see also Remarks by President Trump on the Illegal Immigration Crisis and Border Security, WHITE HOUSE (Nov. 1, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security> [https://perma.cc/A2J6-Y26S] (noting how “[i]llegal immigration hurts American workers”); cf. Plaintiffs’ Motion for Preliminary Injunction at 13–15, *Texas v. United States*, No. 18 Civ. 00068 (S.D. Tex. May 2, 2018) (arguing that its citizens will be displaced in jobs by DACA recipients was sufficient to establish standing by the plaintiff-states).

¹⁰⁶ Adam Davidson, *Debunking the Myth of the Job-Stealing Immigrant*, N.Y. TIMES MAG. (Mar. 24, 2015), <https://www.nytimes.com/2015/03/29/magazine/debunking-the-myth-of-the-job-stealing-immigrant.html> [https://perma.cc/6Q93-7UY7]. The evidence about the displacement of native-born workers by undocumented immigrants is complicated. See *infra* text accompanying notes 233–37.

¹⁰⁷ Hanson, *supra* note 12; Jerome Danner, *Yes, Illegal Immigration Is a National Emergency, but not for the Reasons Trump Is Giving*, FOX NEWS (Mar. 16, 2019), <https://www.foxnews.com/opinion/yes-illegal-immigration-is-a-national-emergency-but-not-for-the-reasons-trump-is-giving> [https://perma.cc/9S7V-RL6V].

¹⁰⁸ See, e.g., WALDINGER & LICHTER, *supra* note 80, at 157, 172 (noting how employers can describe White and Black workers to be lacking in work ethic). There is a longstanding conception of the hard-working immigrant who does the jobs that native-born workers are unwilling to do.

¹⁰⁹ Gessen, *supra* note 105.

¹¹⁰ Massey & Pren, *supra* note 76, at 24.

¹¹¹ *Id.* at 22–23.

undocumented immigrants who migrated back to their home country.¹¹² By increasing the costs of going back and forth, the undocumented population “hunker[ed]” down in the United States, swelling during the 1990s and 2000s.¹¹³

The well-known under-enforcement of IRCA has created a system by which employers can readily violate the law.¹¹⁴ The federal government has catered to employers by providing broad exceptions to liability.¹¹⁵ Over the years, its attitude towards enforcement against businesses has stressed cooperation with employers.¹¹⁶ Employers are readily willing to violate the law, particularly in certain sectors where such violations are the norm.¹¹⁷ They can also evade the federal prohibition by outsourcing the hiring of undocumented workers to contractors or temp staffing agencies in order to insulate themselves from liability.¹¹⁸ Undocumented workers too do not believe that engaging in undocumented work, even with false documents, is somehow problematic.¹¹⁹

Yet there have been no attempts to repeal the employer sanctions since the 1990s.¹²⁰ Rather, recent congressional activity on

¹¹² *Id.*

¹¹³ *Id.* at 17–18.

¹¹⁴ Saucedo, *The Making*, *supra* note 13, at 1516–17. Over the years, the federal government’s targeting of undocumented workers has ebbed and flowed. Most recently, the Trump administration has refocused efforts on conducting workplace raids. The actual numbers of employers penalized remains miniscule. Renae Merle, *As Workplace Raids Multiply, Trump Administration Charges Few Companies*, WASH. POST (Aug. 9, 2019, 5:45 PM), <https://www.washingtonpost.com/business/2019/08/09/workplace-raids-multiply-trump-administration-charges-few-companies> [https://perma.cc/LP2N-HPNG].

¹¹⁵ Wishnie, *supra* note 30, at 210–11; Saucedo, *The Making*, *supra* note 13, at 1513–14.

¹¹⁶ Lee, *supra* note 67, at 1128; *see also* Wishnie, *supra* note 30, at 210 (noting that “politicians of both parties regularly intervene when . . . worksite enforcement disrupts important local industries”).

¹¹⁷ Chishti & Kamasaki, *supra* note 7, at 4 (noting that some employers because of their industry or business model have become reliant on hiring unauthorized immigrants); *see also* Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 L. & SOC’Y REV. 1041, 1053 (1990) (studying how most employers who continued to hire undocumented workers “expressed very little fear of getting caught”); Bert I. Huang, *Shallow Signals*, 126 HARV. L. REV. 2227, 2231 (2013) (noting how individuals and corporations are known to violate the law based on the “signal of noncompliant behavior by peers [which] is often taken as a cheap source of information (to put it charitably, a sort of vetting) about the degree of a law’s enforcement”).

¹¹⁸ Heeren, *supra* note 17, at 245.

¹¹⁹ Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 653–54 (2015); Gleeson & Gonzales, *supra* note 40, at 12.

¹²⁰ The few attempts to repeal the employer sanctions took place in the 1990s. Employer Sanctions Repeal Act of 1990, H.R. 5185, 101st Cong. (1990); Employer Sanctions Repeal Act of 1991, H.R. 3366, 102nd Cong. (1991); Employer Sanctions Repeal Act of 1991, S. 1734, 102nd

undocumented work has focused on further requiring employment verification of workers through electronic databases. Several current proposals, for example, seek to make it mandatory for all employers to use the E-Verify database.¹²¹ Some states and localities too have actively been seeking to further outlaw undocumented work by mandating E-Verify or criminalizing undocumented work.¹²² Beyond inaccuracies within the E-Verify database itself, these experiments have so far not been successful for similar reasons of under-enforcement or lack of compliance by employers.¹²³ One comprehensive study of E-Verify also raised concerns about how mandatory E-Verify will result in driving undocumented workers further underground into the informal economy.¹²⁴

II. RECONCEPTUALIZING THE UNDOCUMENTED WORKER

By considering the undocumented workers as separate and apart from their immigration status, the focus becomes what is owed to them as members of the American community of workers. As workers first and foremost, it becomes apparent that the separate caste of undocumented workers violates American principles of equality and

Cong. (1991). These repeals were based on concerns about racial or national origin discrimination against workers who had lawful authorization to work. See U.S. GOV'T ACCOUNTABILITY OFF., GGD-90-62, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION (Mar. 29, 1990).

¹²¹ See, e.g., Accountability Through Electronic Verification Act, H.R. 1399, 116th Cong. (2019); E-Verify Act of 2019, S. 301, 116th Cong. (2019); Legal Workforce Act, H.R. 250, 116th Cong. (2019).

¹²² CATH. LEGAL IMMIGR. NETWORK, *supra* note 13, at 3 (noting eight states that mandate E-Verify for all employers).

¹²³ See, e.g., David J. Bier, *The Facts About E-Verify: Use Rates, Errors, and Effects on Illegal Employment*, CATO INST. (Jan. 31, 2019, 7:39 PM), <https://www.cato.org/blog/facts-about-e-verify-use-rates-errors-effects-illegal-employment> [<https://perma.cc/Y7QV-WRHQ>] (noting error rates); Joe Henke, *Arizona's E-Verify Law Widely Ignored, Rarely Enforced*, ARIZ. DAILY STAR (Oct 18, 2015), https://tucson.com/business/local/arizonas-e-verify-law-widely-ignored-rarely-enforced/article_5e9f950e-6565-5c21-9531-69b8c8d05dfb.html [<https://perma.cc/QW5Z-7NVE>] (noting lack of enforcement and compliance to the mandatory E-Verify law in Arizona).

¹²⁴ Sarah Bohn & Magnus Lofstrom, *Employment Effects of State Legislation Against the Hiring of Unauthorized Immigrant Workers* 22–23 (Inst. of Labor Economics (IZA), Discussion Paper No. 6598, 2012).

freedom.¹²⁵ These principles, however imperfect in practice,¹²⁶ derive from the history of racial subordination in the United States and the ideal of “nourish[ing] a vision of American society that emphasizes tolerance and the value of belonging.”¹²⁷ The equality principle forbids the treatment of an individual as a member of an inferior or dependent caste.¹²⁸ The principle of the freedom to work without coercion derives from the prohibition against slavery or indentured servitude.¹²⁹ These values are really “a set of overlapping legal norms that aim to promote human flourishing.”¹³⁰

While “illegality” stands to challenge whether these principles should apply to undocumented workers, a closer analysis reveals that it fails to convincingly ascribe a moral failing to undocumented workers that justifies their differential treatment. Even considering the plight of native-born workers, reciprocal obligations require extending the shared values of equality and freedom to undocumented workers as a matter of justice.

A. Equality

Equality addresses the separate caste of undocumented workers by requiring their equal membership in the community of workers

¹²⁵ See generally Owen Fiss, *The Immigrant as Pariah*, BOS. REV. (Oct. 1, 1998), <http://bostonreview.net/forum/owen-fiss-immigrant-pariah> [<https://perma.cc/8KCA-C96L>] (arguing that social disabilities, such as restrictions on employment, benefits, and education for undocumented immigrants, are at odds with the Constitution because of the social stratification they tend to produce).

¹²⁶ Facial equality can provide justification for those who argue that existing inequalities are the natural result of individuals’ personal characteristics rather than any systemic inequality. Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1312–13 (2011). Freedom too supports laissez faire ideology that creates the notion that workplaces need not be regulated. Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1887 (2000).

¹²⁷ Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 337 (1986); see also William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 2 (1999) (noting that the outlook of *Brown* provided that the solution to racial subordination was to extend equal citizenship to those excluded because of skin color).

¹²⁸ KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 3 (1989) [hereinafter KARST, *BELONGING TO AMERICA*].

¹²⁹ James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941, 963 (1997).

¹³⁰ Richard Delgado, *Centennial Reflections on the California Law Review’s Scholarship on Race: The Structure of Civil Rights Thought*, 100 CALIF. L. REV. 431, 454 (2012). Equality and freedom often overlap because they both require respect for human dignity so that “anything that erodes one is apt to curtail the other.” *Id.*; see also Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1895 (2004) (arguing that human dignity underlies liberty and equality, yet all three concepts are crucial protections under the Constitution).

regardless of their “illegality.” The key to this claim is redefining the membership of undocumented workers separate and apart from immigration status. Such equal treatment among all workers conforms to the widely accepted view that finds the scope of obligations of justice to be defined by membership in a common community.¹³¹ The current federal prohibition, however, denies equal rights and opportunities to undocumented workers, placing it at odds with this view of membership.

For Michael Walzer, membership in the polity should be defined by those who live, work, and are governed by the laws within the territory.¹³² In particular, his discussion of membership relates to the situation of noncitizen guest workers, brought into a territory for a fixed time period on a contract with a specific employer.¹³³ As a matter of distributive justice, he finds that the state’s treatment of guest workers as outcasts without membership to be tantamount to tyranny.¹³⁴ While Walzer’s work ultimately addresses membership within the polity—implicating citizenship status and its accompanying political rights—it can be used here for highlighting the moral limitations of denying undocumented workers membership in the American community of workers.

Linda Bosniak recognizes how membership, rather than being legally defined by citizenship status, could be treated as a matter of social fact.¹³⁵ By defining membership in a different way, the citizenship status of a person is not morally relevant for purposes of “determining the civil, social, and economic rights of individuals who reside within the membership community.”¹³⁶ Opposing the imposition of “less-than-complete-membership” on classes of noncitizen residents, therefore, “honors the egalitarian and anti-caste commitments to which liberal constitutionalism purports to aspire.”¹³⁷

An analogous concept of membership can be found in the United States’ early history pertaining to noncitizens. James Madison’s view of “aliens” was that those who “expos[e] themselves to the burdens of the United States’ legal system, were entitled to insist on the observance of

¹³¹ Iris Marion Young, *Responsibility and Global Justice: A Social Connection Model*, 23 SOC. PHIL. & POL’Y 102, 103 (2006).

¹³² WALZER, *supra* note 15, at 60.

¹³³ *Id.* at 56–57.

¹³⁴ *Id.* at 62–63.

¹³⁵ Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389, 392 (2007).

¹³⁶ Bosniak, *Membership*, *supra* note 15, at 1141 (explaining Walzer’s view of how membership principles must be confined to the domain of determining admission to membership).

¹³⁷ Bosniak, *Being Here*, *supra* note 135, at 392.

the whole of that legal system.”¹³⁸ After the passage of the Fourteenth Amendment, the Supreme Court clarified this concept, explaining that due process and equal protection applied to noncitizens because they “are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”¹³⁹ This concept of membership is what Gerald Neuman would describe as a “mutuality of obligation”—a kind of reciprocal view of membership.¹⁴⁰

In considering this mutuality of obligation, undocumented workers should be able to claim membership in the American community of workers as individuals who live, work, and participate in the economy and law of the United States.¹⁴¹ Carolina Núñez describes this reciprocal obligation to derive from not only the state’s ability to impose obligations upon undocumented workers but also the give or take between employer and worker.¹⁴² The very act of working demonstrates significant contribution and ties with the community that should garner the “full distribution of membership rights” as workers.¹⁴³ Walzer too references this idea of reciprocity by highlighting how guest workers must be possessed of basic civil liberties because they are “[p]articipants in economy and law.”¹⁴⁴ The act of working, without any accompanying requirement related to duration of presence, should be sufficient to trigger membership. The state’s responsibility to provide equal opportunity and rights to all workers then follows from this mutuality of obligation.

Such equality principles of membership are also reflected in our laws and institutions. The Supreme Court’s decision in *Plyler v. Doe*, for example, expresses this anti-caste vision of social membership by

¹³⁸ NEUMAN, *supra* note 16, at 59 (quoting 4 DEBATES, RESOLUTIONS AND OTHER PROCEEDINGS, IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 560 (Jonathan Elliot ed., 2d ed. 1836)).

¹³⁹ *Id.* at 62 (quoting *Yick v. Hopkins*, 118 U.S. 356, 369 (1886)); *see also* *Fong v. United States*, 149 U.S. 698, 754 (1893) (Field, J., dissenting) (“The moment any human being from a country at peace with us comes within the jurisdiction of the United States, with their consent . . . he becomes subject to all their laws, is amenable to their punishment, and entitled to their protection.”).

¹⁴⁰ NEUMAN, *supra* note 16, at 60.

¹⁴¹ Núñez, *supra* note 16, at 870; *see also* Cunningham-Parmeter, *supra* note 30, at 1411–12 (describing how the workplace provides an important site of membership for undocumented workers).

¹⁴² Núñez, *supra* note 16, at 870–71.

¹⁴³ *Id.* at 870.

¹⁴⁴ WALZER, *supra* note 15, at 60. In contrast, Joseph Carens finds the state’s responsibility to provide “[b]asic human rights derive[s] simply from one’s status as a human being.” Carens, *supra* note 5, at 32.

finding that undocumented children cannot be excluded from a public school education.¹⁴⁵ While *Plyler* does not stand for the proposition of extending all rights to undocumented immigrants more generally, it does reference egalitarian principles for civil, social, and economic rights. It describes the situation of the “shadow population” as one that “raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.”¹⁴⁶

More recent court decisions have found that undocumented immigrants have equivalent rights to citizens to claim unpaid wages or seek a remedy for discrimination.¹⁴⁷ Federal agencies have publicly acknowledged that they protect workers regardless of immigration status.¹⁴⁸ While not explicitly addressing equality principles, they support the principle of equal treatment of undocumented workers separate and apart from their immigration status.

B. *Freedom*

The federal prohibition violates freedom principles. The outlawing of undocumented work limits the ability of workers to sell their labor, earn a living, and quit the workplace. Their condition is problematic because it violates principles of freedom from coercion in the workplace as well as liberty-oriented principles of self-expression, security, and dignity related to work. Notably, these constraints on freedom are being imposed on a distinct ethnic subclass of workers.

The Thirteenth Amendment enshrines the principle of freedom from coercion in the workplace.¹⁴⁹ It “render[s] impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another’s benefit.”¹⁵⁰ The freedom to work includes “the right to determine the terms and conditions of labor, the right to gain from their labor, and

¹⁴⁵ *Plyler v. Doe*, 457 U.S. 202, 226 (1982).

¹⁴⁶ *Id.* at 218–19.

¹⁴⁷ See, e.g., *Patel v. Quality Inn S.*, 846 F.2d 700, 706 (11th Cir. 1988); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1068–69 (9th Cir. 2004).

¹⁴⁸ Lee, J., *Redefining*, *supra* note 31, at 1627–28.

¹⁴⁹ See Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 SEATTLE U. L. REV. 859, 860–61 (2016) (arguing that the Thirteenth Amendment embodies a positive right to free labor, which includes the right to work for a living wage free of undue coercion and free from discrimination based on immutable characteristics).

¹⁵⁰ *Bailey v. Alabama*, 219 U.S. 219, 241 (1911).

the right to quit.”¹⁵¹ There are federal laws that already prohibit modern-day slavery, recognizing more subtle forms of psychological coercion used for pressuring workers to engage in forced labor.¹⁵² For undocumented workers, there are notable cases of workers who have been threatened with deportation as a form of coercion.¹⁵³

Kathleen Kim, however, suggests that anti-coercion principles should extend beyond such explicit scenarios to addressing the structural coercion created by the federal prohibition.¹⁵⁴ In essence, the coercion that undocumented workers experience is structural because it is created by the immigration system itself.¹⁵⁵ The outlawing of undocumented work creates a system of servitude by impermissibly enabling “harsh overlordship or unwholesome conditions of work.”¹⁵⁶ Undocumented workers are neither free to determine the terms and conditions of their labor nor are they in many instances truly free to quit.¹⁵⁷ They cannot move freely from job to job, meaning they will tolerate abuse and exploitation to avoid rocking the boat.¹⁵⁸

The freedom to work without coercion is also connected to “liberty-oriented ideas of independence, self-expression, personal satisfaction, security, and even dignity.”¹⁵⁹ At a basic level, it includes the right to freely sell “one’s labor power” in order to survive.¹⁶⁰ John

¹⁵¹ Maria L. Ontiveros, *A Strategic Plan for Using the Thirteenth Amendment to Protect Immigrant Workers*, 27 WIS. J.L. GENDER & SOC’Y 133, 139 (2012).

¹⁵² Lee, J., *Outsiders*, *supra* note 62, at 1080 n.92.

¹⁵³ See, e.g., Press Release, U.S. Attorney’s Office, N.D. Cal., Hayward Man Convicted of Forced Labor and Harboring Illegal Aliens (Mar. 18, 2019), <https://www.justice.gov/usao-ndca/pr/hayward-man-convicted-forced-labor-and-harboring-illegal-aliens> [<https://perma.cc/TGZ7-VGDF>]; see also Sheldon X. Zhang, Michael W. Spiller, Brian Karl Finch & Yang Qin, *Estimating Labor Trafficking Among Unauthorized Migrant Workers in San Diego*, 653 ANNALS AM. ACAD. POL’Y & SOC. SCI. 65, 83 (2014) (estimating 30% of undocumented migrant laborers in San Diego could meet the criteria for engaging in forced labor).

¹⁵⁴ Kim, *supra* note 17, at 1582.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1583 (quoting *Pollock v. Williams*, 322 U.S. 4, 18 (1944)). Both Kim and Ontiveros connect concepts of “free labor” to an affirmative state of labor autonomy. *Id.* at 1564; Ontiveros, *supra* note 151, at 156–57; see also Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438 (1989) (discussing how the Thirteenth Amendment delineates a free labor ideal); Pope, *supra* note 129, at 963–64 (“No matter how well the impersonal market mechanism might discipline employers, workers could not experience freedom unless they could exercise a degree of conscious control over their own work lives.”).

¹⁵⁷ Federal courts, for example, have recognized the coercive impact of employers inquiring into immigration status during the pendency of proceedings and readily granted protective orders. Lee, J., *Outsiders*, *supra* note 62, at 1075–76.

¹⁵⁸ Stanley Aronowitz, Shirley Lung & Ruthann Robson, *Work, Work, and More Work: Whose Economic Rights?*, 16 CUNY L. REV. 391, 400 (2013).

¹⁵⁹ Karst, *Coming Crisis*, *supra* note 22, at 538.

¹⁶⁰ Forbath, *supra* note 127, at 19–20.

Locke, for example, believed that each person has “‘property’ in his own ‘person.’”¹⁶¹ Interfering with this ability to work and reap the benefits, such as being coerced to labor for the benefit of others, is impermissible. Adam Smith explained that “[t]he patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property.”¹⁶²

Taken to an extreme, the idea of being free to contract one’s own labor has actually led to deregulation of the workplace and increased inequality for low-wage workers.¹⁶³ The freedom to work alone does not automatically translate into a person having meaningful, dignified, or well-paid work.¹⁶⁴ Yet these liberty principles are significant for addressing the more fundamental problem confronting undocumented workers. Undocumented workers are foreclosed from selling their labor power to most United States employers.¹⁶⁵ They lack access to any kind of social safety net so that working is a necessity to support families.¹⁶⁶ As a result, they are left no options except to take jobs that are low-paying, dangerous, temporary, or involve hiring through various subcontractors or temporary staffing agencies.¹⁶⁷

Further, the value of the liberty-oriented ideas about work is not just about its material ends. Work, as part of our humanity, is also about self-expression and dignity. Geoffrey Heeren explains that this connection to liberty and autonomy is “deeply rooted in this Nation’s history and tradition.”¹⁶⁸ The Supreme Court has stated that anything that interferes with this freedom to work, such as the ability to define one’s occupation, “seems to be intolerable in any country where

¹⁶¹ 2 JOHN LOCKE, TWO TREATISES ON CIVIL GOVERNMENT, ch. V, § 27 (George Routledge & Sons, 2d ed. 1887).

¹⁶² Heeren, *supra* note 17, at 280 (quoting 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, ch. 10, part 2 (London, Methuen, ed. 1904)).

¹⁶³ Forbath, *supra* note 127, at 21; Schultz, *supra* note 126, at 1887; Samuel R. Bagenstos, *Consent, Coercion, and Employment Law*, 55 HARV. C.R.-C.L. L. REV. 409, 450–51 (2020).

¹⁶⁴ See Schultz, *supra* note 126, at 1887 (noting how freedom of contract is associated with limited rights for working people).

¹⁶⁵ Employers cannot hire undocumented workers without violating federal law. See *supra* Section I.A.

¹⁶⁶ 8 U.S.C. § 1611.

¹⁶⁷ See *supra* Section I.A.; see, e.g., REBECCA DAILY, TRACIE JOHNSON & HOLLY SMITH, SHELLER CTR. FOR SOC. J., PENNSYLVANIA WORKERS IN JEOPARDY: THE HIDDEN PROBLEM OF TEMPORARY EMPLOYMENT 12–13 (2017) (describing how temporary staffing agencies specifically exploit immigrant workers).

¹⁶⁸ Heeren, *supra* note 17, at 279 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

freedom prevails.”¹⁶⁹ Work reflects the values of “respect, independence, and participation” and is a means of proving one’s self-worth in the eyes of others.¹⁷⁰ To some extent, all low-wage workers in the United States could claim that they have limited freedom for self-expression and dignity through work.¹⁷¹ For undocumented workers, however, the federal prohibition provides a more acute version of this problem, preventing them from taking advantage of their opportunity and ability to achieve things that they can and do value.¹⁷²

Finally, these constraints on freedom operate almost exclusively against workers of color. The two-tier immigration system that allows “high-skilled” workers lawful work authorization and “low-skilled” workers no such authorization, has resulted in an undocumented “brown-collar workforce.”¹⁷³ Maria Ontiveros notes the ways in which dehumanizing racialized rhetoric against undocumented workers is reminiscent of that used to describe slaves to justify their differential treatment.¹⁷⁴ Depriving this ethnic subclass of workers the ability to work freely is morally problematic because it amounts to a “rigid social hierarchy that traps people in a system that holds them down.”¹⁷⁵

C. Contending with “Illegality”

Some would argue, however, that the “illegality” of undocumented workers cancels out these principles of equality and freedom. It has the operative effect of either excluding a person from membership or condoning governmental action that constrains the freedom to work.¹⁷⁶ This exceptional treatment of undocumented workers is further rationalized to correct the unfair advantage undocumented workers supposedly have over native-born workers.¹⁷⁷ A closer look at “illegality,” however, reveals that it falls short of justifying a violation of fundamental principles of equality and freedom. Further, an examination of fairness must also consider what is owed to undocumented workers, including as a matter of racial justice.

¹⁶⁹ *Id.* at 255 (quoting *Yick v. Hopkins*, 118 U.S. 356, 370 (1886)).

¹⁷⁰ Karst, *Coming Crisis*, *supra* note 22, at 532.

¹⁷¹ See Bagenstos, *supra* note 163, at 412 (noting the growing imbalance of power between employers and workers and workers forced to take on precarious work).

¹⁷² AMARTYA SEN, RATIONALITY AND FREEDOM 585 (2002) (arguing that freedom should be seen in terms of persons’ capabilities to achieve things that they can and do value).

¹⁷³ See *supra* text accompanying notes 72–78.

¹⁷⁴ Ontiveros, *supra* note 151, at 141.

¹⁷⁵ See KARST, BELONGING TO AMERICA, *supra* note 128, at 32.

¹⁷⁶ See *supra* Sections II.A & II.B.

¹⁷⁷ See *supra* text accompanying notes 98–124.

For starters, the act of unlawful entry or visa overstay is unconnected to the act of engaging in undocumented work. The unequal treatment of undocumented workers solely derives as a kind of punishment for the immigrant's "illegality." These earlier acts, however, are somewhat morally ambiguous.¹⁷⁸ As acts that are not *mala in se*, they do not present an obvious risk to society or direct harm to victims.¹⁷⁹

Further, the "unlawful" act, which could have taken place last week, two years ago, or decades ago, is being extended to punish a person in other separate and distinct realms of their life.¹⁸⁰ In the criminal context, this phenomenon of punishing individuals in realms entirely unrelated to their prior arrest or conviction occurs as well. Yet there has been a wholesale questioning of the fairness of such practices. States, for example, are beginning to address felon disenfranchisement as an unfair attempt to exclude those who have committed crimes in the past from their membership in the polity of voters.¹⁸¹ Recent governmental efforts have also countered the ways in which private entities discriminate against individuals with past criminal convictions in unrelated realms such as employment and housing.¹⁸²

An undocumented worker's "illegality" is also not the result of a simple individual and binary choice of whether or not to obey the law. The easiest example to contest this assumption is that of children, who many feel should have no culpability for their "illegality."¹⁸³ If children had no choice about violating the law because it was made by their parents, what about immigrants in situations where their personal circumstances left them little or no choice but to come to the United States? Immigrants may be fleeing political persecution or violence, unable to make a living to support their family due to climate change,

¹⁷⁸ See Coutin, *supra* note 102, at 10 (describing arguments related to the societal ambiguity about the criminality of an act in question).

¹⁷⁹ Ryo, *supra* note 119, at 654.

¹⁸⁰ See Andrew Tae-Hyun Kim, *Deportation Deadline*, 95 WASH. U. L. REV. 531, 543 (2017) (noting that statutes of limitations reflect the concept that even highly culpable defendants deserve to be free of civil or criminal liability over time).

¹⁸¹ Michael Wines, *Kentucky Gives Voting Rights to Some 140,000 Former Felons*, N.Y. TIMES (Dec. 12, 2019), <https://www.nytimes.com/2019/12/12/us/kentucky-felons-voting-rights.html> [<https://perma.cc/8E2D-TBZE>] (leaving Iowa as the only state that strips all former felons of voting rights).

¹⁸² BETH AVERY, NAT'L EMP. L. PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS 1 (July 2019).

¹⁸³ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 226 (1982) (stating its reluctance to impute to Congress the intention to withhold access to basic education from children who "are present in this country through no fault of their own"); *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 486 (2018) (describing DACA recipients as "those noncitizens who unwittingly entered the United States as children").

or no longer be able to wait in the decade-long “line” to obtain a visa to reunite with their family in the United States.

The “economic” migrant is often maligned because the push factor of economic gain appears less sympathetic, thereby making such migrants legitimate targets for exclusion.¹⁸⁴ Imagine a situation, however, where a person is unable to earn enough money to feed their children, put a roof over their head, or send them to school. How morally wrong does it seem if that person chooses to migrate to another country to address their economic woes? These examples demonstrate that the label of “illegal” may be more malleable than it first appears.¹⁸⁵ Further, a more contextual and historical look shows the various factors that have produced the undocumented population over time, rather than focusing on individual acts of “illegality.”¹⁸⁶ There are limits, therefore, to morally justifying the condition of undocumented workers based on the sovereign’s national interest in holding individuals accountable for their “illegality.”

Consider too the United States’ corresponding obligation to uphold equality and freedom principles given its historic toleration of undocumented work.¹⁸⁷ Hiroshi Motomura describes the presence of undocumented workers as a result of “[a] national policy of acquiescence,” resulting in a “tacit arrangement that is mutually beneficial.”¹⁸⁸ It “assure[s] a supply of flexible, cheap labor, subject to discretionary, unpredictable, and inconsistent enforcement.”¹⁸⁹ While some might dispute the extent to which the government is complicit with private employers in the invitation for workers,¹⁹⁰ the reality is that low levels of enforcement over the years have certainly created a norm of toleration for undocumented work.¹⁹¹ It results in industries heavily

¹⁸⁴ E. Tendayi Achiume, *Reimagining International Law for Global Migration: Migration as Decolonization?*, 111 AM. J. INT’L L. UNBOUND 142, 143 (2017).

¹⁸⁵ See MOTOMURA, IMMIGRATION OUTSIDE, *supra* note 19, at 194–95 (providing examples of legalization programs for undocumented immigrants).

¹⁸⁶ Ahmad, *supra* note 29, at 289.

¹⁸⁷ MOTOMURA, IMMIGRATION OUTSIDE, *supra* note 19, at 109–10.

¹⁸⁸ *Id.* at 107.

¹⁸⁹ *Id.*

¹⁹⁰ Compare *id.* at 107–08 (arguing fairness and reliance by undocumented immigrants), with Carens, *supra* note 5, at 29–31 (arguing that one cannot hold the state responsible for enforcement failures or for the will of private employers).

¹⁹¹ Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U. L. REV. 655, 661 (2006) (explaining how low compliance rates create the impression that it is okay to break the law); see also Miriam Jordan, *Trump’s Crackdown on Illegal Immigration: 11 Employers Prosecuted in the Past Year*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/2019/05/31/us/illegal-immigration-employers-prosecutions.html> [https://perma.cc/N26P-4QHJ] (noting that the administration’s focus has been on arresting and deporting workers and not prosecuting employers).

employing undocumented workers. The food system, comprised of agriculture and food processing, and restaurants, provide a good example of the pervasiveness of undocumented work.¹⁹²

This acquiescence, however, is not only about failed enforcement. It includes an economic system that enriches the country with undocumented work including: the government through taxes, private employers through profits, and consumers through cheap goods and services.¹⁹³ The Internal Revenue Service (IRS), for example, collects taxes from undocumented workers without social security numbers through use of an Individual Taxpayer Identification Number (ITIN).¹⁹⁴

Fairness, therefore, dictates that undocumented workers have the full rights and opportunities owed to any other worker in the United States. In his conception of justice as fairness, John Rawls explains that “society is interpreted as a cooperative venture for mutual advantage.”¹⁹⁵ The obligation for equal treatment derives from the reciprocal obligations between the state and its members. Abridging the rights of undocumented workers, by restricting their liberty and freedom to work, is unfair to those workers who are exercising responsibility “not just to our loved ones but to our coworkers, and even to the larger community.”¹⁹⁶ It is morally suspect, therefore, for the state to benefit from the existence of undocumented work while condemning such workers to non-membership or constraining their freedom to work.

While native-born workers at the bottom of the economic ladder may also face unfairness, their circumstances do not justify denying equality and freedom to undocumented workers. Native-born workers admittedly confront inequality as part and parcel of the larger systemic problems confronting low-wage workers, such as employer discrimination, the outsourcing of work, or the failure to pay living wages.¹⁹⁷ These larger systemic problems, however, will not be solved

¹⁹² Passel & Cohn, *Industries*, *supra* note 3.

¹⁹³ See MOTOMURA, *IMMIGRATION OUTSIDE*, *supra* note 19, at 110 (noting the quandary created by unauthorized migrants who have come to the U.S. enriching the economic system with their labor).

¹⁹⁴ Lee, J., *Redefining*, *supra* note 31, at 1627.

¹⁹⁵ JOHN RAWLS, *A THEORY OF JUSTICE* 84 (1971).

¹⁹⁶ Karst, *Coming Crisis*, *supra* note 22, at 532. It is worth recognizing the ways in which this formulation can leave out non-workers or work within the home.

¹⁹⁷ See, e.g., Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 *ANNALS AM. ACAD. POL'Y & SOC. SCI.* 195, 200 (2009) (noting increased barriers for Black versus White offenders in obtaining callbacks); Zatz, *supra* note 50, at 37–42 (discussing the restructuring of the low-wage workplace); Carey Anne Nadeau & Amy K. Glasmeier, *Bare Facts About the Living*

by the continued differentiation of undocumented workers from the rest of the worker polity.¹⁹⁸

Rather, there needs to be further understanding and negotiation between community members that opens up the dialogue about undocumented work.¹⁹⁹ A focus on systemic problems can be helpful for opening up that dialogue. It helps to find commonalities between different groups of low-wage workers about their subordination within the workplace more generally.²⁰⁰ Major unions, for example, have undergone this precise transformation from expressing outward hostility towards undocumented workers to recognizing the commonalities of employer exploitation across low-wage work.²⁰¹

Finally, this differential treatment of undocumented workers, who are primarily people of color, underscores the need for fairness. Here, the act of exclusion from the principles of equality and freedom is of a distinct racial or ethnic subclass of workers.²⁰² The United States has developed anti-caste principles in response to this kind of racial subordination. To the extent that such exclusion begins to resemble such past racial subordination, it favors the rejection of any such differentiation as a matter of justice.

III. BENEFITS OF THE COUNTERVALING CASE

There are several benefits to considering undocumented workers separate and apart from their immigration status. First, it is an opportune time to be having this discussion. The current larger movement for immigrants is focused on the treatment of immigrants as a matter of equality, freedom, and racial justice. Seizing the moment,

Wage in America 2017-2018, LIVING WAGE CALCULATOR (Aug. 30, 2018), <https://livingwage.mit.edu/articles/31-bare-facts-about-the-living-wage-in-america-2017-2018> [<https://perma.cc/CS69-FUDE>].

¹⁹⁸ In fact, the differentiation, which allows for exploitation, increases the likelihood that employers will be attracted to hiring undocumented workers. *See, e.g.*, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 155 (2002) (Breyer, J., dissenting).

¹⁹⁹ MOTOMURA, *IMMIGRATION OUTSIDE*, *supra* note 19, at 167 (noting that honest fear and insecurity play a role that cannot simply be dismissed by academic studies by economists).

²⁰⁰ Employer adherence to longstanding racialized narratives about low-wage workers that place White immigrants at the top, Latinx immigrants in the middle, and African Americans at the bottom, could provide a connection between subordinated groups for fighting against racial injustice. Llezlie L. Green, *Outsourcing Discrimination*, 55 HARV. C.R.-C.L. REV. 915, 936 (2020).

²⁰¹ Linda Bosniak, *Citizenship and Work*, 27 N.C. J. INT'L L. & COM. REGUL. 497, 504 (2002).

²⁰² *See generally* JOHN TIRMAN, *DREAM CHASERS: IMMIGRATION AND THE AMERICAN BACKLASH 2-4* (2015) (arguing that the opposition to immigration is less about legality, economics, or politics but more about a cultural clash because of the “fear of diluting some distinctive American character”).

these moral claims can focus on the necessity of establishing universal rights that should attach to all workers in the United States regardless of immigration status. Second, this approach supersedes thinking about undocumented workers solely in economic terms, which has done little to contest the hegemony of the federal prohibition justified by the moral disapproval against “illegal” workers. Finally, this reconceptualization of the undocumented worker broadens the remedy, eschewing the more limited legalization proposals that focus on a smaller subset of “deserving” undocumented workers.

A. *Opportune Time for Claims of Equality and Freedom*

These claims of equality, freedom, and racial justice can build on the current fight for immigrant rights within the United States. The country lacks consensus about how to treat those who are present without lawful immigration status.²⁰³ There is growing resistance to the harsh treatment of immigrants by the federal system through the enactment of local sanctuary-type policies, engagement in public protest, and legal challenges.²⁰⁴ This expression of resistance is actively reinterpreting existing conceptions of justice for immigrants within the United States.²⁰⁵ With its focus on equality and freedom for a population that is vastly non-European, this fight also dovetails with other movements for racial justice such as Black Lives Matter.²⁰⁶

Local sanctuary-type policies can provide a robust expression of equality and freedom principles for undocumented immigrants. Across the country, they have mostly sought to address the ways in which undocumented immigrants have been excluded from equal treatment and participation in the community.²⁰⁷ In terms of equality, they have

²⁰³ Rose Cuison Villazor & Pratheepan Gulasekaram, *The New Sanctuary and Anti-Sanctuary Movements*, 52 U.C. DAVIS L. REV. 549, 550–52 (2018).

²⁰⁴ Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1227–28 (2018) [hereinafter Cuison Villazor & Gulasekaram, *Sanctuary Networks*]. At the same time, there are competing anti-sanctuary movements that are seeking to extinguish such local activism at the state level. Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 848–50 (2019) [hereinafter Gulasekaram, Su & Cuison Villazor, *Anti-Sanctuary*].

²⁰⁵ Cuison Villazor & Gulasekaram, *Sanctuary Networks*, *supra* note 204, at 1252.

²⁰⁶ *End the War on Black Migrants*, M4BL, <https://m4bl.org/policy-platforms/end-the-war-on-migrants> [<https://perma.cc/H76R-VGLP>]; *see also* Marisol Orihuela, *Crim-Imm Lawyering*, 34 GEO. IMM. L.J. 613, 654 (2020) (suggesting that further connections can be made between Black and Brown communities by exploring immigrant justice as criminal justice and racial justice).

²⁰⁷ *See* Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes & Annie Lai, *Understanding “Sanctuary Cities”*, 59 B.C. L. REV. 1703, 1709 (2018).

restored some social and civil rights to undocumented immigrants by providing access to local benefits, such as state or municipal identification, in-state tuition, or professional licenses. In terms of freedom, they have sought to protect undocumented immigrants by creating a safer environment in which immigrants could be at increased liberty to live and work within their communities. Some common policies include disentangling ICE enforcement from local law enforcement²⁰⁸ or protecting immigrant workers from immigration-related threats by employers.²⁰⁹ These sanctuary-type policies symbolically demarcate who is a full member of the community.²¹⁰ By doing so, they countenance anti-subordination principles that reject the separation of immigrants into a distinct caste from other community members.

A closer look at the purpose of these sanctuary-type policies reveal that they are often grounded in equality and freedom principles. Many of these policies express values of equal protection and equal treatment based on the ways in which immigrants are members of the local community.²¹¹ The New York City Identification Card Program, for example, states that its purpose is to “ensure that every New Yorker is provided with the opportunity and peace of mind that comes with possessing a government issued photo identification.”²¹² In terms of freedom principles, the Boston Trust Act seeks to “[p]rotec[t] the civil rights, civil liberties, and safety of residents” while “provid[ing] opportunity, access, and equality for immigrants.”²¹³ In Philadelphia, a city council resolution expresses these freedom principles in the context of undocumented workers by “[r]ecognizing every person’s fundamental right to earn a living, regardless of immigration status” while affirming a “commitment to protect and secure a safe and dignified workplace for all.”²¹⁴

Immigrant movements too within the United States have similarly grounded their message in these equality and freedom principles. The movement for undocumented youth focuses on how such youth are denied full equal membership in society although they are “Americans

²⁰⁸ See, e.g., PHILADELPHIA, PA., EXEC. ORDER NO. 8-09 § 2 (Nov. 10, 2009); ALBUQUERQUE, N.M., CODE RES. § 3-1-11 (Jan. 11, 2001); *Immigration Policy 2014*, S. TUCSON, AZ., POLICE DEP’T, (2014), <https://www.acluaz.org/sites/default/files/documents/STPD%20Immigration%20Policy%202014%20Appendix%20C%20STPD%20ACLU%20Settlement%20Agreement.pdf> [https://perma.cc/4LKH-JQ8T].

²⁰⁹ Lee, J., *Redefining*, *supra* note 31, at 1636.

²¹⁰ Peter J. Spiro, *Formalizing Local Citizenship*, 37 FORDHAM URB. L.J. 559, 563 (2010).

²¹¹ See, e.g., S.F., CAL., ADMIN. CODE § 12I.1.

²¹² NOTICE OF ADOPTION OF RULE, IDNYC CARD PROGRAM (Nov. 26, 2014).

²¹³ BOSTON, MA., BOSTON TRUST ACT AMENDMENTS (Dec. 19, 2019).

²¹⁴ RESOLUTION IN SUPPORT OF WORKERS, PHILA. CITY COUNCIL, 2016-17 Sess. (Pa. 2017).

in every way but on paper.”²¹⁵ Religious institutions have publicly sought to provide sanctuary or other protections to migrants who are facing deportation.²¹⁶ As a matter of faith, they argue for “respect[ing] the dignity of every resident of this country.”²¹⁷ Those rallying to abolish ICE focus on freedom from the “cruelty” of a mass deportation and detention system that is “indiscriminate” or “random.”²¹⁸ This protest meme has come to symbolize the ways in which ICE’s “authoritarian” tactics have infringed on basic freedoms by “harassing, pursuing, and terrorizing immigrants and activists all over this country with impunity. . . . forcing immigrants to live in fear, while making the rest of us less safe.”²¹⁹ Jewish groups have been gathering to protest outside of migrant detention facilities across the United States calling them “concentration camps” engaged in “state-sponsored dehumanization.”²²⁰

Lawsuits are winding their way through the courts, notably for challenging the treatment of immigrants as an issue of racial equality.²²¹ As of late, the public discourse about the connection between racial inequality and the treatment of immigrants has become more explicit. In 2018, advocacy organizations filed multiple lawsuits to contest the termination of Temporary Protected Status (TPS) for immigrants from multiple countries based on racial, ethnic, or national origin discrimination against TPS holders.²²² In 2019, state attorneys general came together again to sue on the new public charge rule, which seeks

²¹⁵ Michael Tan, *DACA Is Ending. But the Movement Is Not.*, ACLU (Sept. 5, 2017, 12:30 PM), <https://www.aclu.org/blog/immigrants-rights/road-citizenship/daca-ending-movement-not> [<https://perma.cc/7XCA-4AGK>].

²¹⁶ MYRNA OROZCO & NOEL ANDERSEN, *SANCTUARY NOT DEPORTATION, SANCTUARY IN THE AGE OF TRUMP: THE RISE OF THE MOVEMENT A YEAR INTO THE TRUMP ADMINISTRATION* 6 (2018).

²¹⁷ *Id.* at 11.

²¹⁸ Elaine Godfrey, *What ‘Abolish ICE’ Actually Means*, ATL. (July 11, 2018, 12:32 PM), <https://www.theatlantic.com/politics/archive/2018/07/what-abolish-ice-actually-means/564752> [<https://perma.cc/W5HV-38HZ>].

²¹⁹ Sean McElwee, *It’s Time to Abolish ICE*, NATION (Mar. 9, 2018), <https://www.thenation.com/article/archive/its-time-to-abolish-ice> [<https://perma.cc/M2EB-V46C>].

²²⁰ Carol Kuruvilla, *Jewish Activists Are Protesting ICE Detention Centers Across the Country*, HUFFPOST (July 4, 2019), https://www.huffpost.com/entry/never-again-action-ice-protests_n_5d1cc0abe4b0f312567d7267?gucounter=1 [<https://perma.cc/4G9N-9REB>].

²²¹ A number of courts have so far upheld plaintiffs’ equal protection claim based on discriminatory animus. *See, e.g.*, *Regents of the Univ. of Cal. v. DHS*, 908 F.3d 476, 520 (9th Cir. 2018) (DACA); *NAACP v. DHS*, 364 F. Supp. 3d 568, 578 (D. Md. 2019) (TPS); *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1105 (N.D. Cal. 2018) (TPS).

²²² *Challenges to TPS and DED Terminations and Other TPS-Related Litigation*, CATH. LEGAL IMMIGR. NETWORK, INC. (Jan. 5, 2021), <https://cliniclegal.org/resources/challenges-tps-terminations> [<https://perma.cc/5HU2-CNG2>].

to expand the kind of benefits to disqualify immigrants from lawful permanent residency. In announcing the filing of the lawsuit, Letitia James, the New York Attorney General, stated that the new rule “implements this Administration’s explicit animus against immigrants of color.”²²³ The Supreme Court recently rejected the equal protection claim in the lawsuits filed by multiple state attorneys general against the termination of the Deferred Action for Childhood Arrivals (DACA).²²⁴ While disagreeing with the majority, Justice Sotomayor wrote that the plaintiffs had stated a plausible claim because of “the disproportionate impact of the rescission decision on Latinos” and because “the words of the President’ help to ‘create the strong perception’ that the rescission decision was ‘contaminated by impermissible discriminatory animus.’”²²⁵

The focus on racial inequality also dovetails with the recent surge of anti-racist protests focusing on how institutions, like the police, are creating, replicating, or maintaining racial injustice.²²⁶ Here too the interposition of race on the inequality or subordination of undocumented workers plays an important role for these claims of equality and freedom. While the federal prohibition on undocumented work is not overtly based on race, its outright effect is of unequal treatment and subordination of workers of color. As racial justice conversations come to focus on structural racism, the plight of the undocumented worker provides a perfect example of the ways in which the immigration system has structurally created a separate caste of workers who are neither equal nor free.

While the primacy of the federal law seemingly justifies the harsh treatment of undocumented immigrants, it does not ultimately control this discourse. Rather, social movements more generally focused on immigrant rights are actively bringing about new meanings of justice for undocumented immigrants. The rise of sanctuary policies nationwide reflects the shared American values of equality and freedom as extended to undocumented immigrants. The interposition of ethnicity on the inequality or subordination of undocumented immigrants too plays an important role in this national conversation, connecting to shared values that oppose systemic racism.

²²³ Zack Budryk, *Three More States Sue Over ‘Public Charge’ Immigration Rule*, HILL (Aug. 20, 2019, 2:09 PM), <https://thehill.com/homenews/state-watch/458114-ny-attorney-general-sues-over-public-charge-rule> [<https://perma.cc/7MSU-GE2V>].

²²⁴ *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020).

²²⁵ *Id.* at 1917 (Sotomayor, J., concurring and dissenting) (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2440 (2018) (Sotomayor, J., dissenting)).

²²⁶ Cobb, *supra* note 25.

The landscape for making the case for legalizing undocumented work, therefore, has drastically changed from even a decade ago. The outright effect of the federal prohibition on undocumented work is the unequal treatment and subordination of workers of color. The case for legalizing undocumented work can dovetail with the growing social movements that focus on freedom, equality, and racial justice for undocumented immigrants.

B. *Superseding Economic Claims*

A focus on these principles of equality and freedom supersedes the economic benefit arguments that are used to justify the fair treatment of undocumented workers. Economic arguments can counter the “illegality” of undocumented workers by building sympathy for them as “hard workers.”²²⁷ Yet pragmatic economic arguments have so far proved insufficient in countering the far-reaching moral disapproval of undocumented work that underlies the federal prohibition. The economic studies vary widely and are often mired in debates about costs and benefits. Rather, social movement actors need to move beyond these economic claims to make the moral case for equality and freedom grounded in anti-racial subordination principles.²²⁸

The coronavirus pandemic has crystallized how little the economics of undocumented work matter when arguing for the fair treatment of undocumented workers. Many undocumented workers are “essential workers” to the economy.²²⁹ Yet the “principle” behind the federal prohibition is alive and well. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) denies a federal tax rebate to undocumented workers and their families.²³⁰ Even with the massive layoffs due to the pandemic, there is no attempt to extend unemployment benefits to these workers.²³¹ California and New York

²²⁷ Lee, J., *Outsiders*, *supra* note 62, at 1069–70.

²²⁸ See Carens, *supra* note 5, at 39 (noting that “[f]or too long advocates of legalization have relied almost entirely on the pragmatic case, leaving moral arguments to those who oppose legalization in the name of fairness and respect for the law”); see also Kit Johnson, *Theories of Immigration Law*, 46 ARIZ. STATE L.J. 1211, 1249 (2014) (noting that Americans may be more likely to support policies that are framed in terms of individual liberty).

²²⁹ Donald Kerwin, Mike Nicholson, Daniela Alulema & Robert Warren, *US Foreign-Born Essential Workers by Status and State, and the Global Pandemic*, CTR. MIGRATION STUD. 2 (May 2020), <https://cmsny.org/wp-content/uploads/2020/05/US-Essential-Workers-Printable.pdf> [<https://perma.cc/5YDV-A6S8>].

²³⁰ *Id.* at 1.

²³¹ Undocumented immigrants are ineligible for unemployment benefits as a “Federal public benefit.” 8 U.S.C. § 1611(a).

so far are the only states to establish any kind of relief program for undocumented workers.²³²

Further, there is controversy about the precise economic effects of undocumented workers in the United States, although such studies do generally manage to refute hyperbolic claims that undocumented workers are “stealing jobs” or “draining resources” from the United States.²³³ First, it is unclear whether undocumented workers are displacing native-born workers or simply working in industries that have worker shortages. Some studies show that immigrant workers and native-born workers are largely employed in different industries, sectors, or jobs.²³⁴ Other studies show that there is some overlap between immigrant workers and native-born workers within certain industries.²³⁵ In some studies focused on cities, immigrant workers did displace African American workers in specific occupations.²³⁶ Yet another nationwide analysis shows that cities with greater immigration from Latin America had lower unemployment and more jobs among African Americans.²³⁷

Studies examining the wages of native-born workers are also mixed. According to some, the immigrant workers put downward pressure on the wages of specific groups of native-born workers, such

²³² Press Release, Office of Governor Gavin Newsom, Governor Newsom Announces New Initiatives to Support California Workers Impacted by COVID-19 (Apr. 15, 2020), <https://www.gov.ca.gov/2020/04/15/governor-newsom-announces-new-initiatives-to-support-california-workers-impacted-by-covid-19> [<https://perma.cc/9MYG-Z997>]; Annie Correal & Luis Ferré-Sadurní, *\$2.1 Billion for Undocumented Workers Signals New York’s Progressive Shift*, N.Y. TIMES (Apr. 19, 2021), <https://www.nytimes.com/2021/04/08/nyregion/covid-relief-undocumented-workers-nyc.html> [<https://perma.cc/E2EN-E9A8>]. Other cities or coalitions of nonprofits have created relief funds by raising private funds for such programs. See, e.g., Mayor’s Off. of Immigrant Affs., *Emergency Relief for Immigrant Families*, CITY OF BALT., <https://mima.baltimorecity.gov/erif> [<https://perma.cc/W5CJ-TNFZ>]; Arizona Undocumented Workers Relief Fund, ARIZ. CMTY. FOUND., <https://www.azfoundation.org/Giving/Giving-Circles/Latina-Giving-Circle/Arizona-Undocumented-Workers-Relief-Fund> [<https://perma.cc/4F87-ALKZ>].

²³³ Many of the studies about economic effects also look at the impact of immigrant workers rather than more specifically of undocumented workers.

²³⁴ See GIOVANNI PERI, NAT’L BUREAU OF ECON. RSCH. IMMIGRANTS’ COMPLEMENTARITIES AND NATIVE WAGES: EVIDENCE FROM CALIFORNIA 20 (2007), <https://www.nber.org/papers/w12956.pdf> [<https://perma.cc/L3GR-QE2C>].

²³⁵ KENNETH MEGAN & THERESA CARDINAL BROWN, BIPARTISAN POL’Y CTR., CULPRIT OR SCAPEGOAT: IMMIGRATION’S EFFECT ON EMPLOYMENT AND WAGES 9 (2016).

²³⁶ Julie Murray, Jeanne Batalova & Michael Fix, *The Impact of Immigration on Native Workers: A Fresh Look at the Evidence*, 18 MIGRATION POL’Y INST. 1, 7 (2006).

²³⁷ Jack Strauss, *Allies, Not Enemies: How Latino Immigration Boosts African American Employment and Wages*, IMMIGR. POL’Y CTR., at 2–3 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/allies_not_enemies.pdf [<https://perma.cc/QC6X-353H>] (noting that the study statistically controlled for “simultaneity (cause and effect)”).

as high school dropouts.²³⁸ An overall review of 27 studies on wage effects, however, finds that while the results are mixed, the measured effects are “economically very small” and “not statistically significant.”²³⁹ This same review found that the largest concentration of estimated effects is clustered around zero. Some scholars explain that these studies arrive at mixed results because of the differential methodology, including the assumptions made about labor supply and markets.²⁴⁰

Finally, multiple one-sided studies have come up with opposite results about the economic impact of immigrant workers on the United States economy. In terms of costs, a recent study by Federation for American Immigration Reform (FAIR) estimated that undocumented immigrants cost \$116 billion each year, although it has been criticized as “[f]atally [f]lawed.”²⁴¹ In terms of benefits, a 2013 estimate found that undocumented immigrants paid an estimated \$11.74 billion in state and local taxes in 2010, which includes \$1.1 billion in personal income taxes.²⁴² More recent estimates find that the removal of undocumented workers would not only result in a double-digit reduction of the workforces in certain industries but also result in a significant loss in gross domestic product (GDP).²⁴³ Another study found that immigrant workers not only help make products and services cheaper but also provide affordable services like child and elder care that increase the capacity of female professionals to work.²⁴⁴ In a report that looks at both costs and benefits, the National Academies of Sciences, Engineering,

²³⁸ George Borjas, *Immigration and the American Worker: A Review of the Academic Literature*, CTR. FOR IMMIGR. STUD. 12–13 (2013), <https://cis.org/sites/default/files/borjas-economics.pdf> [<https://perma.cc/G4MS-UHDY>].

²³⁹ Giovanni Peri, *Do Immigrant Workers Depress the Wages of Native Workers?*, IZA WORLD OF LAB. 4 (2014), <https://wol.iza.org/uploads/articles/42/pdfs/do-immigrant-workers-depress-the-wages-of-native-workers.pdf?v=1> [<https://perma.cc/2EZ8-VA8M>].

²⁴⁰ Christian Dustmann, Uta Schönberg & Jan Stuhler, *The Impact of Immigration: Why Do Studies Reach Such Different Results?*, 30 J. ECON. PERSPS. 31, 32 (2016).

²⁴¹ Alex Nowrasteh, *FAIR’s “Fiscal Burden of Illegal Immigration” Study is Fatally Flawed*, CATO INST. (Sept. 29, 2017, 1:08 PM), <https://www.cato.org/blog/fairs-fiscal-burden-illegal-immigration-study-fatally-flawed> [<https://perma.cc/VM4S-NXM7>].

²⁴² Lisa Christensen Gee, Matthew Gardner, Misha E. Hill & Meg Wiehe, *Undocumented Immigrants’ State & Local Tax Contributions*, INST. ON TAX’N & ECON. POL’Y 3 (2017), <https://itep.sfo2.digitaloceanspaces.com/immigration2017.pdf> [<https://perma.cc/MBT7-VZ5D>].

²⁴³ Ryan Edwards & Francesc Ortega, *The Economic Impacts of Removing Unauthorized Immigrant Workers: An Industry- and State-Level Analysis*, CTR. FOR AM. PROGRESS 2–3 (2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/09/20120917/massdeport1.pdf> [<https://perma.cc/9JHV-KRF4>].

²⁴⁴ Harry J. Holzer, *Immigration Policy and Less-Skilled Workers in the United States*, MIGRATION POL’Y INST. 10–11 (2011), <https://www.urban.org/sites/default/files/publication/26861/1001488-Immigration-Policy-and-Less-Skilled-Workers-in-the-United-States.PDF> [<https://perma.cc/9X2D-7JCL>].

and Medicine estimated the net cost per immigrant to be \$1,600 per year for state and local governments for first-generation immigrants (including the cost of K–12 education), while finding that children and grandchildren of immigrants paid far more in taxes than they consumed in public services.²⁴⁵

Make no mistake, economic-benefit arguments about how undocumented workers can enhance the welfare of all Americans can be attractive.²⁴⁶ The refrain that “immigrants do the jobs that no American will do” helps to create recognition of how such undocumented workers are integral to our economy. Yet economic arguments do not appear to have a significant effect on attitudes about undocumented immigrants.²⁴⁷ Instead of focusing solely on these pragmatic considerations, moral claims for legalizing undocumented work directly assail the claim that such workers deserve their condition because of their “illegality.”

C. *Impacting All Undocumented Workers*

The focus on legalizing undocumented work provides for a broader approach that applies to all workers within the United States. By disentangling work from migration, it overcomes the inevitable limits of citizenship status proposals. The ready solution for undocumented work usually focuses on a program that would allow undocumented workers to convert to lawful status and eventually obtain citizenship (“legalization”). The beneficiaries of such programs, however, are limited to those “deserving” immigrants who can qualify to earn their legalization.

Over the past few decades, there have been several attempts to enact some kind of legalization program. In both 2007 and 2013, bipartisan legalization programs were negotiated.²⁴⁸ Both bills provided for the legalization of immigrant youth (DREAMers), agricultural workers, and other undocumented immigrants who met specific

²⁴⁵ NAT’L ACADS. OF SCIS., ENG’G & MED., *THE ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION* 12 (Francine D. Blau & Christopher Mackie eds., 2017).

²⁴⁶ See Cristina M. Rodriguez, Essay, *The Early Obama Administration: Immigration and the Civil Rights Agenda*, 6 STAN. J.C.R. & C.L. 125, 133 (2010).

²⁴⁷ Irene Bloemraad, Fabiana Silva & Kim Voss, *Rights, Economics, or Family?: Frame Resonance, Political Ideology, and the Immigrant Rights Movement*, 94 SOC. FORCES 1647, 1660–61 (2016).

²⁴⁸ See Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (as introduced in Senate, May 9, 2007); Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (as passed by Senate, June 27, 2013).

criteria.²⁴⁹ These programs excluded undocumented immigrants who, for example, had past criminal convictions, insufficient continuous presence, or an inability to meet financial obligations (including the payment of a monetary fine).²⁵⁰

Even those who could initially meet the requirements to obtain temporary lawful status could face further barriers to obtain permanent legal status. The 2013 bill, for example, provided temporary lawful status for certain undocumented immigrants, called registered provisional immigrant (RPI) status.²⁵¹ A worker in RPI status would have to maintain a more or less solid work trajectory for ten years to earn lawful permanent residency.²⁵² RPIs, who are low-wage workers, could also have difficulty meeting the minimum income requirements to show that they will not become a “public charge” to qualify for lawful permanent residency.²⁵³ Women, who on average earn less money, would be less likely to meet the requirements.²⁵⁴

Most recently, the Trump administration’s Reforming American Immigration for a Strong Economy (RAISE) Act favors legalization of young workers with high levels of education, disqualifying much of the undocumented worker population.²⁵⁵ The heavy politics against legalization, which opponents derisively label as “amnesty,” will ensure that any such program contains multiple barriers, particularly for those with less education. Even the Biden administration’s most recent proposal may ultimately leave behind many undocumented workers.²⁵⁶

Legalization ensures, therefore, that lawful status is earned as an entitlement for “deserving” immigrants. Muneer Ahmad details how earned citizenship underlies the concept of the moral transgression of undocumented immigrants.²⁵⁷ It does so by necessitating that immigrants earn their status while subjecting them to penal and disciplinary measures for their transgression. Angélica Cházaro similarly argues about the harms of focusing on individualized case-by-case earned legalization, which serves to mask the greater systemic harms related to the entire category of “illegality.”²⁵⁸ With that line

²⁴⁹ S. 1348 at §§ 601, 613, 624; S. 744 at §§ 2101, 2103, 2211.

²⁵⁰ S. 1348 at §§ 601, 613, 624; S. 744 at §§ 2101, 2103, 2211.

²⁵¹ S. 744 § 2101.

²⁵² *Id.*

²⁵³ See S. 744 §§ 2101, 2323.

²⁵⁴ See Mariela Olivares, *Unreformed: Towards Gender Equality in Immigration Law*, 18 CHAP. L. REV. 419, 434–35 (2015).

²⁵⁵ See Reforming American Immigration for a Strong Economy Act, H.R. 2278, 116th Cong. (2019).

²⁵⁶ Shear, *supra* note 29.

²⁵⁷ See Ahmad, *supra* note 29, at 288.

²⁵⁸ Cházaro, *supra* note 29, at 387–88.

drawing comes the moral judgment about those left behind, who were “undeserving” of legalization as they were ultimately unable to overcome their “illegality.”

By separating the legality of work from citizenship status, therefore, it provides for a more universal remedy than legalization programs for status citizenship.²⁵⁹ While the legalization of citizenship status is a life-changing opportunity for those who can qualify, the criticism lies with it as a necessarily incomplete solution for addressing the plight of undocumented workers. The moral claims about the systemic inequality and subordination of undocumented work support a broader vision that does not rely on undocumented workers “deserving” rights. Rather, this vision looks to legalizing undocumented work for all workers within our borders.

IV. PRACTICAL CONSIDERATIONS

In this last Section, I offer some preliminary ideas about the more practical aspects of legalizing undocumented work. There are a couple of ways to approach the legalization of undocumented work and the accompanying challenges that exist with designing such a system. At the same time, I acknowledge that there are limitations to legalizing undocumented work. For this reason, it is significant that there are additional protections in place that ensure that ICE does not engage in enforcement at the workplace. Finally, while the steps that social movements for undocumented workers need to take to legalize undocumented work are beyond the scope of this paper, it offers a few brief ideas about how the principles of freedom and equality, grounded in anti-racial subordination, can help shape injustice frames to propel collective action.²⁶⁰

²⁵⁹ One concern, however, is that such legalization of undocumented work will decrease the motivation for working towards such legalization solutions for status citizenship. Employers, for example, may no longer feel the need to support such programs. It is not so clear, however, that employers would simply reverse course after their longstanding support for legalization. *See, e.g., Immigration Reform*, U.S. CHAMBER OF COM., <https://www.uschamber.com/immigration-reform> [<https://perma.cc/N5PU-BLHT>].

²⁶⁰ *See* David A. Snow, E. Burke Rochford, Jr., Steven K. Worden & Robert D. Benford, *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOCIO. REV. 464, 466 (1986).

A. *Two Options for Legalizing Undocumented Work*

The legalization of undocumented work can take on two approaches: simply repealing the prohibition on undocumented work or affirmatively legalizing undocumented work. Both approaches raise challenges. Should workers be registered into some kind of database? What kind of protections exist to prevent such a database from being used for immigration enforcement purposes? Despite having the lawful ability to work, undocumented workers would still be vulnerable to employers who could use the possibility of deportation to keep workers subordinated. While the legalization of undocumented work is not a panacea, it is a significant step to removing some of the precariousness undocumented workers experience on a daily basis. In turn, the hope is that they will have increased power to negotiate, complain, and agitate for workplace reform.

By repealing the prohibition on undocumented work, employers could hire those without work authorization.²⁶¹ Employers, for example, would no longer engage in the I-9 process to verify documents of a worker.²⁶² It would obviate the need to use false documents for employment, reducing an undocumented worker's exposure to potential civil or criminal liability relating to document fraud. This repeal would return employers to the system that existed prior to the enactment of IRCA in 1986.²⁶³ Without the employer prohibition at the federal level, there would no longer be federalism concerns about states and localities regulating undocumented work.

States and localities that seek to restrict immigration would likely enact harsh measures that penalize employers and undocumented workers. Several states have already enacted E-Verify laws that penalize employers by revoking their licenses for having hired undocumented workers.²⁶⁴ Arizona went further by seeking to criminalize workers for engaging in undocumented work, although this provision was preempted by IRCA.²⁶⁵ Prior to IRCA, states and localities had laws on

²⁶¹ See 8 U.S.C. § 1324a. Independent of the moral case here, support for the repeal has long existed based on national origin discrimination; see *supra* note 120.

²⁶² See 8 U.S.C. § 1324a(b). Many categories of immigrants must apply to U.S. Citizenship and Immigration Services for a document evidencing such employment authorization. 8 C.F.R. § 274a.12(a).

²⁶³ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

²⁶⁴ CATH. LEGAL IMMIGR. NETWORK, *supra* note 13, at 3 (noting that 24 states mandate E-Verify for select or all employers).

²⁶⁵ See *Arizona v. United States*, 567 U.S. 387, 406 (2012).

the books to regulate the work of immigrants in various ways, often focusing their laws to keep immigrants out of particular industries.²⁶⁶

In contrast, states and localities that seek to welcome immigrants could choose to go further to enact measures that help to affirmatively legalize undocumented work. They could issue state or local-level work permits for residents. These permits could be tied to other benefits that exist for residents and help with the payment and collection of taxes. The closest example to such local programs is when states have attempted to create their own guest worker programs.²⁶⁷ These programs were not only preempted but also problematic because of the well-known abuses in the guest worker programs.²⁶⁸ Yet they provide a glimpse into how some states have sought to independently legalize immigrant workers at the local level.

While there may be some discomfort about how this free-for-all would result in fragmentation among states and localities, it is already occurring on the issue of immigrants.²⁶⁹ Sanctuary-type policies are a good example of this difference.²⁷⁰ Rather than view such dichotomy as a harm to national identity, policy divergences at the local level can be helpful.²⁷¹ Undocumented workers may vote with their feet, leaving behind jurisdictions that are less welcoming.²⁷² The differential treatment can create a natural experiment about the benefits and drawbacks of legalizing undocumented work. Are places suddenly faced with high unemployment or economic benefits? What is the impact of defining the community more exclusively or inclusively? What does the landscape look like for workers in differing jurisdictions in terms of workplace standards and rights?

²⁶⁶ Heeren, *supra* note 17, at 252 n.68.

²⁶⁷ See UTAH CODE ANN. §§ 63G-12-201 to -212 (LexisNexis 2021); H.R. 2603, 2012 Leg., Reg. Sess. (Kan. 2012); State Sponsored Visa Pilot Program Act of 2017, S. 1040, 115th Cong. (2017) (proposing a federal program to authorize states to create and run their own guest worker programs); see also Alex Nowrasteh, *Op-Ed: Immigration Reform: Let the States Lead the Way*, L.A. TIMES (June 16, 2015, 5:00 AM), <https://www.latimes.com/nation/la-oe-nowrasteh-let-states-issue-guest-worker-visas-20150613-story.html> [<https://perma.cc/7MBC-Z6VZ>].

²⁶⁸ Jennifer J. Lee, *U.S. Workers Need Not Apply: Challenging Low-Wage Guest Worker Programs*, 28 STAN. L. & POL'Y REV. 1, 14–17 (2017).

²⁶⁹ See Gulasekaram, Su & Cuison Villazor, *Anti-Sanctuary*, *supra* note 204, at 877 (noting that uniformity is a jurisprudential conceit in tension with the structure and practice of federal immigration enforcement law).

²⁷⁰ See *supra* text accompanying notes 207–10.

²⁷¹ See Cuison Villazor & Gulasekaram, *Sanctuary Networks*, *supra* note 204, at 1276.

²⁷² H.B. 56, an anti-immigrant law in Alabama, caused the departure of 40,000 to 80,000 immigrant workers and concomitant losses in tax revenue and consumer demand. Raymond A. Mohl, *The Politics of Expulsion: A Short History of Alabama's Anti-Immigrant Law, HB 56*, 35 J. AM. ETHNIC HIST. 42, 50 (2016).

Beyond repealing the prohibition on undocumented work, the federal government could take additional steps to legalize undocumented work. Such steps could potentially prevent states and localities from legislating to penalize undocumented work because of preemption.²⁷³ Federal immigration law, for example, could be amended to include an affirmative statement about the legality of undocumented work. Such language might state: “Any person or entity may recruit, hire, or employ an alien that is present in the United States, regardless of whether the alien is lawfully admitted for permanent residence or otherwise authorized to be lawfully present in the United States.” By creating an affirmative program at the federal level, it would uniformly legalize undocumented work and create facially equal rights for undocumented workers under labor and employment laws.²⁷⁴

There are still, however, practical challenges with these two options. The first is the creation of some type of workable registration system for undocumented workers to facilitate the payment of payroll taxes. Such a system would require protections to prevent such information from being used for immigration enforcement purposes. The second more fundamental challenge to these proposals is one of political feasibility.

The Federal Insurance Contributions Act (FICA) requires that employers pay a contribution to the Social Security and Medicare programs on behalf of an employee. Employers are also required by law to deduct the employee’s contribution to the Social Security and Medicare programs. Currently, undocumented workers who work under false social security numbers (SSNs) are paying into the system, which has resulted in an estimated \$13 billion annually paid in payroll taxes.²⁷⁵ With either approach, undocumented workers would need an SSN-type number so that employers could comply with FICA. The Social Security Administration (SSA), for example, could issue such

²⁷³ The issue of preemption will largely be determined by the purpose and language of the new law. Compare *Chamber of Com. v. Whiting*, 563 U.S. 582, 611 (2011) (holding that an Arizona law that imposes business license sanctions on violating employers is not preempted by the language of federal law), with *Arizona v. United States*, 567 U.S. 387, 406 (2012) (holding that an Arizona law that criminalizes undocumented workers is preempted by the purpose of federal law).

²⁷⁴ The courts too could take on this task on their own, although it is unlikely given the decision in *Hoffman Plastic*. With either of these proposals, the decision in *Hoffman Plastic*, which is premised on a conflict between IRCA and the NLRA, would become inapplicable. See *supra* text accompanying notes 58–61.

²⁷⁵ Stephen Goss, Alice Wade, J. Patrick Skirvin, Michael Morris, K. Mark Bye & Danielle Huston, *Effects of Unauthorized Immigration on the Actuarial Status of the Social Security Trust Funds*, SOC. SEC. ADMIN. ACTUARIAL NOTE, Apr. 2013, at 3, https://www.ssa.gov/oact/NOTES/pdf_notes/note151.pdf [<https://perma.cc/3LUV-DTHW>].

numbers to undocumented workers that could be used solely for purposes of FICA and filing taxes with the IRS.

Undocumented immigrants, however, are categorically ineligible for federal public benefits such as Social Security or Medicare.²⁷⁶ If the law continues to make undocumented workers ineligible, they are paying into a system from which they will never benefit. Native-born workers and lawful permanent residents can only qualify for these benefits if they have earned forty lifetime credits. What if undocumented immigrants who meet these requirements could similarly obtain this benefit? On the one hand, it might seem reasonable to open up the system to undocumented workers who have earned the forty lifetime credits. On the other hand, powerful political discourse about immigrants “draining taxpayer resources” will likely prevent them from obtaining this kind of federal benefit.²⁷⁷ An alternative idea would be to create a separate fund from these FICA payments that could be reimbursed annually to undocumented workers when they file their taxes.²⁷⁸

Further, there is some concern about how an SSN-type number can cause employers or the government to track undocumented workers. If such numbers are facially different, employers would be able to recognize who among their employees is an undocumented worker. This differentiation could facilitate the same kind of employer exploitation of undocumented workers that exists under the current system. There is also concern that the federal government will use such information to conduct immigration enforcement. In the past, the SSA has not shared information with ICE for immigration enforcement purposes. The SSA, for example, has a no-match letter program. It issues letters to employers when it finds that the SSN listed on the Form W-2 does not match the SSA’s records. The SSA, however, has steadfastly announced that the purpose of these letters is to “properly post its employee’s earnings to the correct record.”²⁷⁹ In fact, the SSA

²⁷⁶ 8 U.S.C. § 1611.

²⁷⁷ See, e.g., Proclamation No. 9945, 84 Fed. Reg. 53,991 (Oct. 4, 2019) (suspending the entry of immigrants who will financially burden the healthcare system).

²⁷⁸ Exempting undocumented workers altogether from FICA would be problematic for two reasons. First, employers would be able to hire undocumented workers more cheaply without having to pay payroll tax, which would put them on unequal footing with native-born workers and immigrants with lawful authorization to work. Second, it would flag that the worker is undocumented for employers.

²⁷⁹ *Employer Correction Request Notices (EDCOR)*, SOC. SEC. ADMIN., <https://www.ssa.gov/employer/notices.html> [<https://perma.cc/42XD-SQFC>].

has interpreted the sharing of such information with ICE as a violation of federal law.²⁸⁰

While at first glance, the creation of an SSN-type number system for undocumented workers may seem unworkable, the IRS's ITIN system provides a good example. In 1996, the IRS began to issue ITINs to help those without SSNs to "comply with the U.S. tax laws."²⁸¹ While ITINs are not exclusively issued to undocumented immigrants, millions of undocumented immigrants have obtained ITINs in order to file their taxes each year.²⁸² The IRS has been successful in catering to undocumented immigrants by advertising that the ITIN is available for any person regardless of immigration status.²⁸³ In fact, the Internal Revenue Code prohibits the sharing of taxpayer information with any other federal agency.²⁸⁴ A similar restriction would have to be enacted for the SSA to ensure the confidentiality of such records.²⁸⁵

In terms of political feasibility, it is hard to imagine building the necessary impetus for repealing the federal prohibition, much less creating a new system that allows workers to lawfully work in the United States. If the failed attempts to enact legalization are any kind of barometer for feasibility, these proposals will be politically challenging. At the same time, unlike issues of citizenship status, these proposals do not require contending with the harder questions of who "deserves" citizenship status. All workers would be automatically eligible to lawfully work in the United States.

B. *Limitations of Legalizing Undocumented Work*

Even assuming the successful creation of a system that can legalize undocumented work, such workers are still at risk of exploitation. Unscrupulous employers who suspect or discover the undocumented status of workers may seek to use the threat of immigration

²⁸⁰ See *Questions Employers Ask for the Employer Correction Request Notice*, SOC. SEC. ADMIN. 20, <https://www.ssa.gov/employer/notices/Questions%20Employers%20Ask%20Final.pdf> [<https://perma.cc/6G6K-G78R>].

²⁸¹ *Individual Taxpayer Identification Number*, INTERNAL REVENUE SERV. (Jan. 8, 2021), <https://www.irs.gov/individuals/individual-taxpayer-identification-number> [<https://perma.cc/AN8B-VLB3>].

²⁸² Francine J. Lipman, *The "ILLEGAL" Tax*, 11 CONN. PUB. INT. L.J. 93, 96–97 (2011).

²⁸³ *Immigration and Taxation*, INTERNAL REVENUE SERV., <https://www.irs.gov/pub/irs-utl/20-Immigration%20and%20Taxation.pdf> [<https://perma.cc/QL5V-YSBW>]; *Individual Taxpayer Identification Number*, *supra* note 281.

²⁸⁴ I.R.C. § 6103.

²⁸⁵ The SSA does currently share information on noncitizens, such as their date of birth and address pursuant to 8 U.S.C. § 1360(b).

enforcement to exploit such workers. Regardless of the lawful ability to work, undocumented workers are still at risk of arrest, detention, and deportation by ICE.

The anti-retaliation provisions of many federal laws ostensibly protect workers from such immigration-related retaliation if workers have voiced or filed workplace complaints.²⁸⁶ Yet such protections are piecemeal, as they are dispersed within various labor and employment laws. A comprehensive and federal anti-retaliation provision that is more specifically applicable towards immigration-enforcement retaliation could more readily protect undocumented workers. In California, for example, the law protects undocumented workers by issuing civil penalties for employers who call or threaten to call the police or ICE in response to workers asserting their rights under the state labor and employment laws.²⁸⁷ There are other states and localities that have defined the crime of extortion to include threatening immigration enforcement in order to stop a worker from obtaining a work-related benefit.²⁸⁸ In order to make such an anti-retaliation law truly effective at the federal level, it would require the Department of Labor (DOL) to engage in active community education with both employers and workers to notify them of the prohibition on retaliation. The funding that is used by ICE to conduct I-9 audits and workplace raids could be transferred to the DOL to fund enforcement of this program.

It is also crucial that the government act to restrain ICE from engaging in immigration enforcement at the workplace. Currently, a memorandum of understanding (MOU) exists between ICE and other federal agencies that enforce workers' rights, such as the DOL, Equal Employment Opportunity Commission (EEOC), and National Labor Relations Board (NLRB).²⁸⁹ This MOU states that ICE will generally refrain from engaging in enforcement at a worksite if there is an existing investigation of a labor dispute. Yet it fails to consider the many forms of immigration-enforcement retaliation that occur at the workplace prior to initiating a federal investigation. Ex ante monitoring could help

²⁸⁶ See, e.g., 29 U.S.C. § 215(a)(3); 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 158(a)(4).

²⁸⁷ CAL. LAB. CODE § 244(b) (Deering 2021); CAL. BUS. & PROF. CODE § 494.6 (Deering 2021).

²⁸⁸ Lee, J., *Redefining*, *supra* note 31, at 1636.

²⁸⁹ *Addendum to the Revised Memorandum of Understanding Between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites*, DEP'T OF LAB. (May 5, 2016), www.dol.gov/sites/dolgov/files/OASP/MOU-Addendum_4.19.18.pdf [<https://perma.cc/L7DC-4AKN>]; *Revised Memorandum of Understanding Between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites*, DEP'T OF LAB. (Dec. 7, 2011), https://www.dol.gov/sites/dolgov/files/OASP/DHS-DOL-MOU_4.19.18.pdf [<https://perma.cc/DZH4-JY9N>].

address this problem.²⁹⁰ The laws could require that ICE get permission from the DOL before engaging in any enforcement action at a workplace.²⁹¹ Even more significantly, the workplace should be off-limits as a site for immigration enforcement. At least one federal proposal has envisioned increasing the ability of undocumented workers to obtain visas based on serious workplace abuses, which would help address any retaliatory actions for their deportation.²⁹²

The failure to address immigration status, however, ultimately leaves intact the overall caste system created by the differentiations between those with and without lawful immigration status. There is no denying that legalizing undocumented work is an incomplete solution for undocumented immigrants. From the perspective of workers, however, the workplace remains an incredibly important part of the everyday lived experiences of many undocumented immigrants.²⁹³

Further, the ability of workers to freely quit their jobs and seek work elsewhere without limitations will hopefully change the dynamics of the workplace. Currently, undocumented workers may remain in jobs and put up with unjust or unsafe working conditions because of the fear of being “discovered” or the anxiety of having to find another job in a limited market for undocumented work.²⁹⁴ The legalization of undocumented work may make some undocumented workers feel more comfortable to negotiate or complain about on-the-job conditions. There may be psychological benefits too in gaining some stability and power in the workplace.²⁹⁵ While the imbalance of power between employers and low-wage workers will persist, there should be increased pressure on employers to improve the on-the-job conditions needed to attract and retain workers.

The focus on undocumented work too is not meant to imply that social rights should only be restored to “deserving” working immigrants. Outside of work, there are many issues that confront undocumented immigrants that violate principles of equality or freedom, such as equal access to benefits or freedom from civil detention. Rather than perceive the focus on undocumented work as exclusionary, it serves as a test case concerning the restoration of

²⁹⁰ See Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1125 (2011).

²⁹¹ *Id.*

²⁹² See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3201 (as passed by Senate, June 27, 2013).

²⁹³ See Lee, J., *Outsiders*, *supra* note 62, at 1101.

²⁹⁴ See Gleeson, *supra* note 42, at 584 (quoting worker who was reluctant to go through the gamut of verification again) (“They go over everything, now that it’s the law. They have to check your Social [Security number] and everything.”).

²⁹⁵ See Fernández-Esquer, Agoff & Leal, *supra* note 65, at 10.

additional social and political rights to undocumented immigrants. In doing so, it will help to lessen the “illegality” of such immigrants by helping to strengthen their worker identities and reduce intergroup bias.²⁹⁶ As undocumented workers engage in legal work within their communities, the more incongruous their “illegality” as a matter of citizenship status will be with their lived lives.

C. *Connecting to the Social Movement*

Undocumented workers feel wronged by the current immigration system. At times, they have organized to demand fairness, justice, and respect. Social movements, however, require oppressed individuals to view the problem no longer as misfortune, but as an injustice.²⁹⁷ Arguments for legalizing undocumented work can connect with the moral intuitions and principles expressed by these workers. By countering the moral disapproval of “illegal” workers with equality and freedom principles grounded in anti-racial subordination, such arguments can help develop injustice frames for the social movement. In turn, such frames provide the potential for mobilizing immigrants and allies based on their high degree of resonance with their current life situation or ideology.²⁹⁸

In reviewing the success of the civil rights movement, Aldon Morris discusses how “[p]eople must develop an oppositional consciousness that provides them with a critique of the status quo and reasons to believe that acting collectively will lead to change.”²⁹⁹ Collective action frames “negotiate a shared understanding of some problematic condition or situation they define as in need of change, make attributions regarding who or what is to blame, articulate an alternative set of arrangements, and urge others to act in concert to affect change.”³⁰⁰ Rebellion against authorities is partly dependent on the generation and adoption of an injustice frame, which defines the system as unjust while justifying noncompliance.³⁰¹ “Frame alignment,” which involves a broad consensus between individual interests, values,

²⁹⁶ Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 HARV. LATINO L. REV. 129, 177–78 (2012).

²⁹⁷ Snow, Rochford, Worden & Benford, *supra* note 260, at 466.

²⁹⁸ *See id.* at 476–77.

²⁹⁹ Aldon D. Morris, *A Retrospective on the Civil Rights Movement: Political and Intellectual Landmarks*, 25 ANN. REV. SOCIO. 517, 523 (1999).

³⁰⁰ Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOCIO. 611, 615 (2000).

³⁰¹ *Id.*

and beliefs and a social movement's activities, goals, and ideology, is a necessary condition for movement participation.³⁰²

Undocumented workers already have some elements of oppositional consciousness about their work that contests its "illegality." They have suggested that there is no "illegality" in seeking a job or supporting one's family.³⁰³ Emily Ryo has empirically studied the legal consciousness of undocumented immigrants and found a common refrain of "we only come to work; we don't come to harm anyone."³⁰⁴ Undocumented workers view their work as legal and honorable and a benefit to society.³⁰⁵ Shannon Gleeson too has studied undocumented workers who emphasized that their sense of belonging is shaped by having come to the United States to work.³⁰⁶ Workers explain that their work ethic sets them apart from other workers.³⁰⁷ Maria Eugenia Fernández-Esquer, Maria Carolina Agoff, and Isabel M. Leal also found that undocumented workers claim an identity that they are essential and irreplaceable: "If we're not here to do these jobs, who'll do it for them?"³⁰⁸ They justify undocumented work by stating that their families have to eat and would probably starve without such work.³⁰⁹ In order to support their families, there was nothing wrong with using false documents to get work.³¹⁰ As one undocumented worker summed up: "All the government cares about is whether you are working and paying taxes."³¹¹

At times, there have been instances of collective action against the immigration system and the ways in which it "illegalizes" undocumented work. Immigrant workers have engaged in work stoppages and consumer boycotts in actions known by various names, such as "Day Without Immigrants" or "May Day Resistance." The largest of these work stoppages occurred in 2006, with accompanying rallies of over a million people. As a result, some businesses were forced to close down for the day across the United States.³¹² While the focus was on defeating a bill pending in Congress that would criminalize

³⁰² Snow, Rochford, Worden & Benford, *supra* note 260, at 476.

³⁰³ Coutin, *supra* note 102, at 23.

³⁰⁴ Ryo, *supra* note 119, at 653.

³⁰⁵ *Id.* at 654.

³⁰⁶ Gleeson, *supra* note 42, at 590.

³⁰⁷ *Id.* at 589. Gleeson notes how these comparisons are often grounded in racialized conceptions of other workers. *Id.* at 590–91.

³⁰⁸ Fernández-Esquer, Agoff & Leal, *supra* note 65, at 11.

³⁰⁹ *Id.*

³¹⁰ Gleeson & Gonzales, *supra* note 40, at 12.

³¹¹ *Id.*

³¹² *Thousands March for Immigrant Rights*, CNN (May 1, 2006, 10:21 PM), <https://www.cnn.com/2006/US/05/01/immigrant.day/> [<https://perma.cc/QVV5-WP8N>].

undocumented immigrants, it more broadly sought to argue that immigrants deserve the right to continue to live and work in the United States. Immigrants carried various signs that alluded to their contributions as workers, such as, “We build your homes,” as well as more controversial signs that sought to differentiate themselves from less “desirable” immigrants, such as, “We are not terrorists.”³¹³ Another more recent series of “Day Without Latinos” and “May Day Resistance” actions occurred across the country in 2017.³¹⁴ These actions were similar in wanting to bring awareness to the contributions immigrant workers provide to the United States but also focused on denouncing the impact of the Trump administration’s get-tough immigration policy on vulnerable workers in some of America’s lowest-paying jobs.³¹⁵

Immigrant workers, along with allies, have also participated collectively in direct actions in response to ICE workplace audits that have led to mass firing of undocumented workers. Chipotle fired hundreds of workers after an I-9 audit. In protest, community allies were arrested for chaining themselves together other in a Chipotle restaurant.³¹⁶ Other immigrants and allies shut down an intersection in front of a Silicon Valley supermarket chain where hundreds were fired after an I-9 audit and walked off the job of a recycling facility when their employer and ICE threatened their jobs in a similar audit.³¹⁷ Workers from the famed Tom Cat Bakery, who were fired after an I-9 audit, protested their firings demanding dignity and respect.³¹⁸ A “Day Without Bread” protest involved community allies chaining themselves to one of the bakery’s morning delivery trucks in protest of the firings.³¹⁹ Henry Rivera, a Tom Cat Bakery worker who walked off the job in protest, explained, “We’re on strike today to send a message that we

³¹³ *Id.*

³¹⁴ Dan DiMaggio & Sonia Singh, *Tens of Thousands Strike on Day Without Immigrants*, LAB. NOTES (Feb. 23, 2017), <https://labornotes.org/2017/02/tens-thousands-strike-day-without-immigrants> [<https://perma.cc/2G4V-5Z3B>].

³¹⁵ *Id.*

³¹⁶ Sasha Aslanian, *Chipotle Exec Responds to Minn. Immigration Audit*, MINN. PUB. RADIO NEWS (Jan. 25, 2011, 9:40 PM), <https://www.mprnews.org/story/2011/01/25/chipotle-immigrant-workers> [<https://perma.cc/EUH9-TEJ7>].

³¹⁷ David Bacon, *Giving Up on Congress, Immigrant Workers Stage Waves of Protest*, IN THESE TIMES (Mar. 6, 2014), https://inthesetimes.com/working/entry/16382/wave_of_immigrant_worker_actions [<https://perma.cc/FSM6-4EYF>].

³¹⁸ Tejal Rao, *Immigration Inquiry Draws Protest at Tom Cat Bakery*, N.Y. TIMES (Apr. 21, 2017), <https://www.nytimes.com/2017/04/21/dining/immigration-protest-tom-cat-bakery-a-day-without-bread.html> [<https://perma.cc/GAS2-RQGV>].

³¹⁹ Hannah Wulkan, *Four Arrested, on Day Tom Cat Bakery Fires Approximately 30 Immigrant Workers*, LIC POST (Apr. 21, 2017), <https://licpost.com/four-arrested-on-day-tom-cat-bakery-fires-approximately-30-immigrant-workers> [<https://perma.cc/R6NY-ZFTR>].

help make America great and we cannot just be thrown away like day-old bread.”³²⁰

By focusing on the universal principles of equality and freedom that should attach to all workers in the United States regardless of immigration status, it offers additional injustice frames that can potentially support the mobilization of undocumented workers and allies. Frame alignment can transform the feelings of discontent into injustice by recruiting and mobilizing individuals for collective action. Community activists, for example, have found that the language of human rights or civil rights helps to mobilize “Latinos and immigrants” around various issues to “understand that their fights are interlaced.”³²¹ In particular, the framing of the immigration system’s treatment of undocumented workers as a matter of racial subordination can lend support to this mobilization. Studies have shown that anti-immigrant policies have promoted “ethnic group solidarity and political mobilisation” across the Latinx public.³²²

Still, there remain large questions ahead of how to further mobilize undocumented workers into social movements. One of the major barriers to collective action among immigrants is fear. As discussed above, undocumented workers avoid complaining about problems and even “internalize an ideal in which ‘good’ workers endure such conditions quietly.”³²³ For this reason, allies can be significant in supporting the mobilization of such undocumented workers. As one community organizer said after a Day Without Immigrants action: “It’s important to let workers know that organizations have their backs if they do suffer retaliation.”³²⁴ Employers too have acted in solidarity by shutting down businesses during Day Without Immigrant actions.³²⁵ Business owners, particularly with immigrant roots of their own, explained “the importance of making a statement and standing behind all of our staff.”³²⁶ Unions have included undocumented workers into

³²⁰ *Id.*

³²¹ Lisa M. Martinez, “Flowers from the Same Soil”: Latino Solidarity in the Wake of the 2006 Immigrant Mobilizations, 52 AM. BEHAV. SCIENTIST 557, 573 (2008).

³²² Sophia Jordán Wallace & Chris Zepeda-Millán, *Do Latinos Still Support Immigrant Rights Activism? Examining Latino Attitudes a Decade after the 2006 Protest Wave*, 46 J. ETHNIC & MIGRATION STUD. 770, 773 (2020).

³²³ Gleeson & Gonzales, *supra* note 40, at 14.

³²⁴ DiMaggio & Singh, *supra* note 314.

³²⁵ See, e.g., Bourree Lam, *A Strike to Show What America Is Like Without Immigrant Workers*, ATL. (Feb. 16, 2017), <https://www.theatlantic.com/business/archive/2017/02/day-without-immigrants/516969> [<https://perma.cc/T3FG-VMGV>].

³²⁶ *Nationwide “Day Without Immigrants” Protest Closes Many Restaurants*, CBS NEWS (Feb. 16, 2017, 8:07 PM), <https://www.cbsnews.com/news/day-without-immigrants-protest-closes-many-us-restaurants-nationwide> [<https://perma.cc/6E4Q-MC4V>].

their bargaining units announcing the “dignity of labor done by all workers regardless of their immigration status.”³²⁷ They have negotiated collective bargaining agreements with employers that explicitly seek an agreement not to cooperate with ICE enforcement tactics.³²⁸ A group called Sanctuary Restaurants has created networks across restaurants to protect workers from deportation.³²⁹ Consumers still remain a relatively untapped potential source of influence. The Fair Food Program and Milk with Dignity campaign offer innovative examples of how worker organizing allied with consumers can accomplish political pressure.³³⁰ The use of injustice frames can similarly mobilize additional allies who feel the necessity and propriety of standing up.³³¹

These injustice frames of freedom and equality, grounded in anti-racial subordination, therefore, might offer some ways to further build these social movements for undocumented workers. In general, principles of equality and freedom already resonate across immigrant movements. While the challenge ahead is significant, the fight for legalizing undocumented work can connect to the moral intuitions and principles shared by undocumented workers and allies to mobilize for change.³³²

³²⁷ UNITE HERE *Statement on Mississippi Raids*, UNITE HERE (Aug. 8, 2019), <https://unitehere.org/press-releases/unite-here-statement-on-mississippi-ice-raids> [<https://perma.cc/Y4DL-L2FC>]; see also *ILWU Members Train to Resist Immigration Raids*, 75 DISPATCHER 1, 1, 7 (2017), <https://www.ilwu.org/wp-content/uploads/2017/05/DispatcherAPR2017lores.pdf> [<https://perma.cc/ER5V-MQ59>]; Rebecca Savransky, *NY Teamsters Train to be ‘Sanctuary Union,’ Protect Members from Immigration Officials*, HILL (Feb. 12, 2018, 11:46 AM), <https://thehill.com/homenews/state-watch/373418-new-york-teamsters-learning-rights-how-to-challenge-immigration> [<https://perma.cc/D9DQ-VY4U>].

³²⁸ Virginia Parks, *Enclaves of Rights: Workplace Enforcement, Union Contracts, and the Uneven Regulatory Geography of Immigration Policy*, 104 ASS’N AM. GEOGRAPHERS 329, 333 (2014).

³²⁹ Gowri J. Krishna, *Growing the Resistance: A Call to Action for Transactional Lawyers in the Era of Trump*, 7 TENN. J. RACE, GENDER & SOC. JUST. 206, 213 (2018).

³³⁰ See, e.g., Greg Asbed & Sean Sellers, *The Fair Food Program: Comprehensive, Verifiable and Sustainable Change for Farmworkers*, 16 U. PA. J.L. & SOC. CHANGE 39, 43–44 (2013); ANNELESE ORLECK, “WE ARE ALL FAST-FOOD WORKERS NOW”: THE GLOBAL UPRISING AGAINST POVERTY WAGES 195–98 (2018).

³³¹ Snow, Rochford, Worden & Benford, *supra* note 260, at 470–71.

³³² See, e.g., *Economic Justice & Democracy*, PEOPLE’S REVOLUTION, <https://thepeoplesrevolution.org/plank/income-wealth-inequality-occupy-sec> [<https://perma.cc/T6FK-W7CJ>] (proposing work authorization for all undocumented immigrants as part of its platform).

CONCLUSION

Undocumented workers exist as a separate subclass of workers subject to exploitation in the United States. The reconceptualization of the undocumented worker separate and apart from their immigration status provides a new way of thinking about the problem of undocumented work. By tying the treatment of undocumented workers to more fundamental American principles of equality and freedom within the context of racial justice, it responds to the emotional opposition that undocumented work engenders.³³³ It resonates with the current social movements for immigrant rights engaged in resistance against the federal government concerning the treatment of undocumented immigrants. It holds promise in terms of linking with the current consciousness of undocumented workers and offering collective framing for building a more robust social movement about undocumented work.

These principles of equality, freedom, and racial injustice ultimately explain why undocumented work should be lawful within the United States. Yet the legalization of undocumented work is not meant to be an end in and of itself. There is still much practical work to make these concepts for undocumented workers into a reality. As low-wage workers, undocumented workers will still contend with many of the problems associated with the imbalance of power between such workers and their employers. Further, as undocumented immigrants, their freedom would be hindered as they continue to be at risk for deportation from the United States. The disentanglement of work from migration, however, is a first step for reconsidering the ways in which the “illegality” of immigrants deprives them of social, economic, and political rights in the United States. The legalization of undocumented work will practically provide such immigrants with increased power. By changing the dynamics of power, undocumented workers may then advocate for improvements to the workplace or expanded opportunities for pathways to citizenship.

³³³ There are increasing studies that find that the emotional response to immigration is an important component towards preference for particular policies. *See, e.g.*, Ted Brader, Nicholas A. Valentino & Elizabeth Suhay, *What Triggers Public Opposition to Immigration? Anxiety, Group Cues, and Immigration Threat*, 52 AM. J. POL. SCI. 959, 960 (2008); Fussell, *supra* note 26, at 486.