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SWEATY SUBURBS: CAN STATES AND WORKER CENTERS WASH THEM CLEAN?

KATE S. WOODALL*

SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS. By Jennifer Gordon. Cambridge, MA: Belknap Press of Harvard University Press 2005.

Abstract: In *Suburban Sweatshops*, Jennifer Gordon paints a bleak picture of the current state of undocumented workers' rights in suburban America's service industry. As immigration law is increasingly interpreted to limit the rights of undocumented workers, undocumented immigrants are having a harder time organizing to demand workplace rights. In the face of this increasing exploitation, however, Gordon finds hope in alternatives to the traditional union structure. She focuses on the efforts of the Workplace Project, a Long Island worker center, to advocate for immigrant workers through participation in the political process and geographic organization. This Book Review examines the legal framework in which suburban sweatshops thrive and explores the effectiveness of alternative organizing groups, such as the Workplace Project, in effecting change for undocumented workers. Through the political process and geographic organization, worker centers around the nation have met with limited success in combating the abuse of undocumented immigrant workers.

INTRODUCTION

Jorge Bonilla was hospitalized with pneumonia after sleeping all winter on tablecloths mounded on the floor of the Long Island restaurant where we worked, the heat capped at 50°. He had been evicted from the room where he had been living because his wage of 30¢ an hour was so low that he could not pay his rent, even working 80 hours a week.

As a live-in domestic worker, Yanira Juarez cared for two children and cleaned house in Suffolk County. Duped by her employer's claim that her wages were being paid "into a savings account," she worked for 6 months with no pay, and then was fired without seeing a penny.¹

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¹ JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 2 (2005). "This book has its roots in grim sweatshop stories like these. But it also has an unexpected tale to tell." *Id.* at 3.

In *Suburban Sweatshops: The Fight for Immigrant Rights*, Jennifer Gordon examines the pervasive problem of sweatshop working conditions in the service industries of America's suburbs.² Employers of restaurant workers, domestic workers, janitors, and day laborers routinely cheat employees out of their wages, require workers to work long hours, fail to pay employees overtime, and pay workers well below the minimum wage.³ Complicating matters, most of the workers in current suburban sweatshops throughout the United States are immigrants who face obstacles such as their undocumented or non-citizen status, language and cultural barriers, and an increasingly hostile government stance on immigration.⁴ Many undocumented immigrants are unaware of their rights and are afraid to learn about them for fear of being deported.⁵ Thus, they do not demand the legal protections to which they are entitled.⁶

The meager protections offered to undocumented workers by federal law create a fertile soil for exploitation.⁷ First, the Immigration Reform and Control Act of 1986 (IRCA) used employment restrictions as a way to enforce stricter immigration control.⁸ The IRCA

² See *id.* at 13–14 (discussing new kinds of emerging sweatshops).

³ *Id.* at 15, 21–22; see, e.g., Tisha R. Tallman, *Liberty, Justice, & Equality: An Examination of Past, Present, & Proposed Immigration Policy Reform Legislation*, 30 N.C. J. INT'L L. & COM. REG. 869, 871 (2005) (stating that “approximately two-thirds of undocumented workers earn less than two times the minimum wage”); Michael J. Wishnie, *The Border Crossed Us: Current Issues in Immigrant Labor*, 28 N.Y.U. REV. L. & SOC. CHANGE 389, 389 (2004) (asserting that “[i]t is well known that many immigrants in this country labor for long hours for illegally low pay in perilous working conditions”).

⁴ See GORDON, *supra* note 1, at 46, 51 (referring to the Supreme Court's interpretation of the National Labor Relations Act in *Hoffman Plastics v. NLRB* as a major setback for immigrant workers); REBECCA SMITH & AMY SUGIMORI, *LOW PAY, HIGH RISK: STATE MODELS FOR ADVANCING IMMIGRANT WORKERS' RIGHTS* 8 (2003), available at http://www.nelp.org/iwp/reform/state/low_pay_high_risk.cfm (arguing that immigrant workers are “under attack from many fronts,” including recent Supreme Court decisions interpreting federal law); Tallman, *supra* note 3, at 872–73 (remarking that “[c]urrent U.S. immigration policy is broken” because it punishes immigrant workers).

⁵ GORDON, *supra* note 1, at 6–7; see Wishnie, *supra* note 3, at 398 (“[E]mployers frequently seek to control their non-citizen workers by threatening them with deportation.”).

⁶ See GORDON, *supra* note 1, at 6–7 (stating that many undocumented workers submit to illegal working conditions out of fear of losing their jobs).

⁷ JANICE FINE, NEIGHBORHOOD FUNDERS GROUP, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* 8 (2005), available at http://www.nfg.org/publications/worker_centers_with_cover.pdf. In an effort to explain the exploitation faced by low-wage immigrant workers, Dr. Fine describes their condition as the result of “a ‘perfect storm.’ It is a storm resulting from labor laws that have ceased to protect workers, little effective labor market regulation of new economic structures and a national immigration policy that has created a permanent underclass of low-wage workers.” *Id.*

⁸ Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a(a)(1)–(2) (1988); Dennise A. Calderon-Barrera, Note, *Hoffman v. NLRB: Leaving Undocumented Workers Unprotected Under United States Labor Laws?*, 6 HARV. LATINO L. REV. 119, 120 (2003). Calderon-

aimed to decrease the number of undocumented aliens in the United States by making it illegal for employers to knowingly employ undocumented immigrants.⁹ This focus on reducing the number of undocumented immigrants in the American work force has created an atmosphere of fear of deportation that makes it difficult for undocumented immigrants to demand their rights.¹⁰ Second, the National Labor Relations Act (NLRA), which protects workers' rights to organize, does not adequately protect undocumented workers.¹¹ While undocumented workers are considered "employees" for the purposes of

Barrera explains that Congress tried to decrease the demand for undocumented workers by punishing employers who hired undocumented immigrants. Calderon-Barrera, *supra*, at 120. In decreasing the undocumented immigrant labor market, they hoped to simultaneously diminish the attractiveness of immigrating to the United States to work. *Id.*

⁹ 8 U.S.C. § 1324a(a)(1)–(2) (“(a)(1) In general—It is unlawful for a person or other entity— (A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment.”); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 355–56 (2001). President Ronald Reagan noted that:

[I]n the past 35 years our nation has been increasingly affected by illegal immigration. This legislation takes a major step toward meeting this challenge to our sovereignty. . . . The employer sanctions program is the keystone and major element. It will remove the incentive for illegal immigration by eliminating the job opportunities which draw illegal aliens here.

Statement by President Ronald Reagan Upon Signing S. 1200, 22 WEEKLY COMP. PRES. DOC. 1534 (Nov. 10, 1986).

¹⁰ See GORDON, *supra* note 1, at 113 (explaining that workers who wished to be involved with the Workplace project had to first conquer their fear of being deported if they demanded their rights from an employer); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 500 (2004) (explaining that the IRCA “deputized” employers in the efforts to control immigration by requiring them to inquire regarding their employees immigration status).

¹¹ National Labor Relations Act, 29 U.S.C. § 157 (2005); see, e.g., GORDON, *supra* note 1, at 51 (“[A]lthough the NLRA still technically covers undocumented workers, the usual remedies of reinstatement and back pay do not apply when employers retaliate against undocumented immigrants for their union support.”). The NLRA provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157.

the NLRA, the U.S. Supreme Court has severely restricted their ability to receive remedies for their employers' labor violations.¹²

Finally, the new emphasis in the American economy on service industry occupations calls into question the relevancy of the NLRA in the bulk of current workplaces.¹³ Typical unions base their strategies around a group of employees collectively bargaining with one large employer, such as a large manufacturer.¹⁴ This traditional method of protecting workers' rights fails when applied to the smaller employers and diffused workplaces of the suburban service industry.¹⁵

Against this bleak legal landscape, Gordon paints a surprisingly hopeful portrait of the efforts of the Workplace Project, a Long Island organization that she founded, as an example of how to address the problem of immigrants' rights in the workplace.¹⁶ The Workplace Project is now comprised of and run by members from Central and South America who live and work on Long Island.¹⁷ The Workplace Project is a community-based organization that implements creative strategies to help employees, organized in small groups, improve their working conditions.¹⁸ The organization is dedicated to informing

¹² 29 U.S.C. § 152(3); *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 140 (2002) (holding that undocumented workers are entitled to the unionizing protections under the NLRA, yet their remedies for adverse employment actions are limited).

¹³ See, e.g., GORDON, *supra* note 1, at 53 (arguing that service work is a major aspect of the U.S. economy, yet is resistant to unionizing). Due to the shift in the U.S. economy, from manufacturing to service, unions need to reach out to the service industry in order to survive. *Id.* Gordon notes that, "[n]onmanufacturing—mostly service—work accounts for 67.8 percent of all work in the United States but only 38.8 percent of union membership. Only 5.7 percent of service workers and a mere 4.4 percent of retail workers belong to a union." *Id.* The service industry is difficult to organize because of the lack of a clear employer with which to bargain, and the reality of the dominance of small employers in the service industry. *Id.* at 54.

¹⁴ Katherine V. W. Stone, *Employee Representation in the Boundaryless Workplace*, 77 CHL-KENT L. REV. 773, 797–98 (2002). Stone contends that the rights created by the NLRA no longer apply to current workplace conditions, since employees do not stay with one employer for their entire career, but rather move from job to job. *Id.* Under the NLRA, unions exist only to represent employees when bargaining with a single employer. *Id.* Since employees today do not often have such long-term relationships with one employer, the function of the union under the NLRA is somewhat outdated. *Id.*

¹⁵ See *id.* (stating that traditional notions of organizing do not match current employment practices); Julie Yates Rivchin, Note, *Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies*, 28 N.Y.U. REV. L. & SOC. CHANGE 397, 411–13 (2004) (noting the disparity between the realities of service industry workers and the traditional union strategies of collective bargaining).

¹⁶ See GORDON, *supra* note 1, at 68–69 (listing accomplishments that surpassed the worker's expectations). "The Workplace Project refuses to accept that the newest and worst off immigrants are unorganizable." *Id.* at 3.

¹⁷ *Id.* at 70, 82.

¹⁸ *Id.* at 81–82. The Workplace Project educates, provides legal services, and organizes Long Island immigrant workers, mostly Latinos, across many industries. *Id.* at 82. It took

immigrant workers about their rights as workers in the United States, and employs flexible, experimental methods to address the needs of their working immigrant community through self-organizing, legal services and leadership training.¹⁹

One of the ways in which the Workplace Project was able to better the lives of its members was by changing state law.²⁰ Through their educational and organizing efforts, the Workplace Project realized the need to address the problem of employers cheating employees out of their wages, paying employees less than the minimum wage, and other violations of the Fair Labor Standards Act (FLSA).²¹ The FLSA sets minimum wage requirements, provides for mandatory premium payments for overtime work, and prohibits various forms of child labor.²² In the mid-1990s, however, the federal Department of Labor (DOL) had a policy of cooperating with immigration officials who could deport workers.²³ This made it risky for immigrant workers to even report their employers to the federal DOL.²⁴ Since most undocumented immigrants were unable to gain the protections afforded them by federal law, they were left with only state laws and, in New York, the New York

inspiration from the worker center model, which is characterized by having a membership of employees and a focus on organization. *Id.* at 81. Worker centers differ from a union, where membership is based around employment with one employer in that worker centers accept all workers in a given community and examine workers' roles as citizens and workers. Stone, *supra* note 14, at 809.

¹⁹ GORDON, *supra* note 1, at 68, 82. Some of these strategies include organizing day laborers; workers who are employed for the day to perform landscaping jobs and domestic workers. *Id.* at 69.

In its first five years, the Workplace Project and its immigrant leaders raised wages on Long Island day labor streetcorners by over 30 percent . . . created a domestic worker bill of rights and a model contract for domestic employers, and forced payment agencies to promise to adhere to them — a promise they sometimes kept. They founded a very small but successful worker-owned landscaping cooperative, and were planning for what would become a much larger housecleaning cooperative.

Id.

²⁰ GORDON, *supra* note 1, at 241–42.

²¹ Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 206, 207, 212 (2005) (setting federal minimum wage and maximum hours for covered employees and employers); see GORDON, *supra* note 1, at 240–41 (providing anecdotal examples of wage violations and the Department of Labor's slow response). Gordon explains that “the usual” problems that the Workplace Project saw were “scores of day laborers unpaid for a few days’ work, the dozens of domestic workers earning less than half the minimum wage, the array of injuries in landscaping and factories from speed-ups and lack of training.” *Id.* at 123.

²² 29 U.S.C. §§ 206, 207. Undocumented workers are not excluded from the definition of “employees” under the FLSA. 29 U.S.C. § 203(c)(1).

²³ Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, & the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 419 (1995).

²⁴ *Id.*

State Department of Labor (NYDOL) to protect them from sub-minimum wages.²⁵ The Workplace Project found, however, that the NYDOL was inadequate in responding to the needs of immigrant workers.²⁶ Therefore, the members of the Workplace Project decided to focus on enabling better enforcement of state laws through legislation.²⁷

Despite the fact that many of its members were not citizens, the Workplace Project effectively drafted and lobbied for a bill in the New York state legislature, the Unpaid Wages Prohibition Act (UWPA).²⁸ The UWPA deterred employers from taking advantage of low-wage workers through increased penalties for employers engaged in unlawful practices and more stringent enforcement measures to facilitate a more effective response to immigrant workers.²⁹ The toughest law of its kind in the nation, it provides for up to \$20,000 in fines for employers who withhold wages from their employees and finds repeat offenders guilty of a felony, not just a misdemeanor offense.³⁰

Part I of this Book Review surveys the complex legal and societal landscape in which suburban sweatshops flourish. Part II explores the organizing efforts of the Workplace Project to improve working conditions for suburban sweatshop workers through the political process. Specifically, Part II will look at the Workplace Project's role in drafting and lobbying for the Unpaid Wages Prohibition Act, a New York law that strengthened enforcement measures for unpaid wages. Part III analyzes the effectiveness of solving the suburban sweatshop crisis on the state level by looking at the UWPA's impact on New York working conditions. Finally, this Book Review concludes there is hope for suburban sweatshop workers since worker centers, which offer an alterna-

²⁵ GORDON, *supra* note 1, at 241 (describing New York state law regarding failure to pay wages as "weak — the maximum penalty for an employer who repeatedly or willfully failed to pay legal wages was a mere twenty-five percent on top of the total the employer owed; the crime of repeated nonpayment of wages was only a misdemeanor.").

²⁶ *Id.* at 243.

²⁷ *Id.* at 241–42.

²⁸ *Id.* at 245, 260.

²⁹ Unpaid Wages Prohibition Act, N.Y. LAB. LAW § 198-a (1)–(3) (Consol. 1998); GORDON, *supra* note 1, at 107. The law increased civil fines for employers who do not pay their employees. *Id.* Under the former law, employers could be fined up to twenty-five percent of what they owed their employees, while the UWPA allowed the DOL to fine employers up to two-hundred percent of the withheld wages. *Id.* Additionally, the former law held that repeat offenders were guilty of a misdemeanor offense with a maximum penalty of \$10,000. *Id.* The UWPA made repeat offenders guilty of a felony with a maximum \$20,000 penalty. *Id.*

³⁰ N.Y. LAB. LAW § 198-a (1); FINE, *supra* note 7, at 5.

tive to formal unions and collective bargaining, yield effective results on the state level.

I. OBSTACLES TO ORGANIZATION

The United States' laws present a number of barriers to immigrant workers striving to organize in today's suburban sweatshops.³¹ The federal government's policy, as articulated by the Congress and by the U.S. Supreme Court, effectively blocks undocumented immigrants from organizing to demand rights.³² Additionally, the structures of the industries in which many suburban immigrant workers are employed make using typical unionizing strategies difficult or impossible.³³

A. Legislation

Undocumented workers are not adequately protected by United States labor law.³⁴ The National Labor Relations Act protects workers' rights to engage in collective bargaining with their employers.³⁵ The policy behind the NLRA was to deter unfair labor practices.³⁶ Collective bargaining units, or unions, represent employees and negotiate with employers to gain better working conditions.³⁷ Undocumented immigrants' rights to collectively bargain are protected, since they are included as "employees" under the NLRA.³⁸ Nonetheless, undocumented

³¹ See, e.g., FINE, *supra* note 7, at 8 (stating both labor laws and immigration policy fail to protect low-wage immigrant workers); GORDON, *supra* note 1, at 51–57 (noting the inadequacies in the legal system and the difficulties of organizing in the service industry); Rivchin, *supra* note 15, at 400 (describing a historic union inability to organize immigrants).

³² See, e.g., GORDON, *supra* note 1, at 65 (referring to *Hoffman Plastics* and the NLRA's detrimental impact on undocumented immigrants' right to organize).

³³ Howard Wial, *The Emerging Organizational Structure of Unionism in Low-Wage Services*, 45 RUTGERS L. REV. 671, 672 (1993); Rivchin, *supra* note 15, at 411–12.

³⁴ GORDON, *supra* note 1, at 318 n.66.

³⁵ National Labor Relations Act, 29 U.S.C. § 157 (2005) (protecting the rights of employees to organize, including bargaining collectively with their employer, without retaliation by the employer).

³⁶ See, e.g., Michael Weiner, Comment, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52 UCLA L. REV. 1579, 1619 (2005) ("President Franklin Roosevelt noted: 'By preventing practices which tend to destroy the independence of labor, [the Act] seeks, for every worker within its scope, that freedom of choice and action which is justly his.'").

³⁷ See, e.g., Stone, *supra* note 14, at 797–98 (discussing that once a union is certified by the National Labor Relations Board, they become obligated to fairly represent all employees in bargaining with the employer to form an agreement that will govern the terms and conditions of employment).

³⁸ 29 U.S.C. § 152(3). Under the NLRA, undocumented immigrants have been deemed "employees" for statutory purposes. *Id.*; see Wishnie, *supra* note 10, at 501 (indicat-

immigrants are inadequately protected under the law since the NLRA's definition of "employee" does not cover those employees in many of the key industries in which immigrant workers labor.³⁹ These forms of employment include agricultural workers, persons employed in domestic service in a home, and independent contractors, including day laborers and janitors.⁴⁰

Compounding the problem of the lack of protection under labor law is the hostile posture of United States immigration law towards undocumented workers.⁴¹ The Immigration Reform and Control Act of 1986 departed from previous immigration legislation and emphasized restricting employment of undocumented workers.⁴² Before the IRCA, American immigration policy, as established in the Immigration and Nationality Act of 1952, focused on the movement of immigrants across the border, the admission, entry, harboring and transportation of illegal immigrants, and was silent on issues of employment.⁴³ The drafters of the IRCA believed that immigrants were entering this country illegally because the immigrants thought it would be easy to obtain em-

ing that the reasoning behind this definition of "employees" is well articulated by then-Judge Anthony Kennedy's statement, "[i]f the NLRA were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices.")

³⁹ 29 U.S.C. § 152(3); see Rivchin, *supra* note 15, at 411 (remarking that the exclusion of these occupations is of concern to worker centers).

⁴⁰ 29 U.S.C. § 152(3). Some legal scholars contend these exemptions are due to "racial biases" in the law. Rivchin, *supra* note 15, at 400-01. According to Rivchin, "[t]he NLRA excluded from its protections workers in occupations dominated at the time by African-Americans in a political compromise orchestrated to appease Southern politicians and maintain the racial dynamics of Southern socio-economic structures." *Id.*

⁴¹ GORDON, *supra* note 1, at 46, 51; SMITH & SUGAMORI, *supra* note 4, at 8; Tallman, *supra* note 3, at 872-73.

⁴² Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a(a). The other main objective was "grant[ing] amnesty to special agricultural workers who could prove they had been performing agricultural work in the United States for at least ninety days between May 1985 and May 1986 without proper documentation." Ryan D. Frei, Comment, *Reforming U.S. Immigration Policy in an Era of Latin American Immigration: The Logic Inherent in Accommodating the Inevitable*, 39 U. RICH. L. REV. 1355, 1373 (2005). Since the IRCA, there have been two legislative acts that focused on immigration and addressed undocumented immigrants. *Id.* at 1373-74. First, the Immigration Act of 1990 made it easier to deport criminal aliens and increased the size of the border patrol. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified in scattered sections of 8 U.S.C.). Second, the Illegal Immigration Reform and Immigration Responsibility Act of 1996 emphasized efforts to strengthen border patrol. Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 U.S.C.).

⁴³ Immigration and Nationality Act of 1952 (INA), 8 U.S.C. §§ 1181-1182, 1225 (1952); Calderon-Barrera, *supra* note 8, at 120.

ployment.⁴⁴ Therefore, if employers ceased to hire undocumented workers, undocumented immigrants would not come to the United States, since there would be no demand for them in the labor market.⁴⁵ The intent of Congress was not to decrease the rights of undocumented workers in the labor force, but rather to destroy the incentive for undocumented immigrants to come to the United States.⁴⁶ Congress understood that if they took the protections of the NLRA away from undocumented workers, they would be creating a class of workers who would be more attractive to employers since they would be unable to collectively bargain for their rights.⁴⁷ This would depress the labor market for workers who did have the protections of the NLRA.⁴⁸ Instead, Congress continued to afford undocumented immigrants protection from unscrupulous employers while furthering the employment policy of keeping undocumented workers out of the tight labor market.⁴⁹ Unfortunately, the resulting effect of the law has been to punish the employee more than the employer, realizing the fears of the law's critics.⁵⁰

⁴⁴ H.R. REP. NO. 99-682, pt. 1, at 46 (1986) ("Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.").

⁴⁵ See *id.* at 47 ("Since most undocumented aliens enter this country to find jobs, the [House Judiciary] Committee believes it is essential to require employers to share responsibility to address this serious problem.").

⁴⁶ See *id.* at 58 ("The employer sanctions provisions are not intended to limit in any way the scope of the term 'employee' in Section 2(3) of the National Labor Relations Act (NLRA) . . . application of the NLRA 'helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.'").

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Nessel, *supra* note 9, at 361-62 (arguing that undocumented immigrants bear the brunt of the IRCA's enforcement measures); Tallman, *supra* note 3, at 886 (stating that employer sanctions harm employees). For example, in Operation Vanguard, an attempt by the Immigration and Naturalization Service (INS) to enforce the IRCA, the INS cooperated with employers during reviews of their workplaces. Nessel, *supra* note 9, at 359-60. If the employers agreed to fire the undocumented employees the INS found in their workforce, no further action would be taken against the employer to punish them for violating the IRCA by employing undocumented workers. *Id.* This has the effect of further pushing undocumented immigrants into the underground economy where they are exploited. *Id.* at 60. Additionally, the INS had a policy of not conducting raids at employment sites where there are ongoing labor disputes. Wishnie, *supra* note 3, at 390. Nonetheless, "fifty-five percent of the workplaces raided by the INS in the sample were the subject of at least one formal complaint to or investigation by a labor agency." *Id.* at 392.

The IRCA's focus on labor issues wedds employment and immigration laws in complex ways.⁵¹ The immigration agenda of the IRCA strives to protect American workers from competition with undocumented workers by making it illegal for them to work in the United States.⁵² The status of undocumented immigrants as illegal workers raises questions about the extent to which the NLRA covers undocumented workers.⁵³ The judiciary is only now beginning to address these questions.⁵⁴

B. *Judicial Decisions*

There have been only two U.S. Supreme Court cases that have addressed the status of undocumented immigrants under American labor laws: *Sure-Tan, Inc. v. N.L.R.B.* and *Hoffman Plastic Compounds, Inc., v. N.L.R.B.*⁵⁵ Both cases involved the remedies available to undocumented workers for violations of the National Labor Relations Act.⁵⁶ The court held that there was no question that undocumented workers are protected as "employees" under the NLRA.⁵⁷ Nonetheless, these two cases reveal limitations when undocumented employees try to enforce these rights and obtain remedies for employer violations.⁵⁸

In *Sure-Tan*, the Supreme Court held that undocumented workers were not eligible for back pay under the NLRA, which is one of the primary remedies available for workers.⁵⁹ This case involved an em-

⁵¹ See Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration & Labor Laws*, 36 U. MICH. J. L. REFORM 737, 765 (2003) (arguing that although labor and immigration law are separate bodies of law, in reality, their effects are intertwined).

⁵² H.R. REP. NO. 99-682, pt. i, at 58.

⁵³ *Developments in the Law—Jobs and Borders: IV. Legal Protections for Illegal Workers*, 118 HARV. L. REV. 2224, 2224-25 (2005) (noting, "[i]llegal workers, many of whom cross a border to find a job, constitute a significant part of American Society, as well as one of our largest classes of lawbreakers. . . . Because of their status as lawbreakers, however, illegal workers are difficult for the law to protect.") [hereinafter *Developments in the Law*].

⁵⁴ *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 149 (2002) (holding that undocumented workers have only limited remedies under the NLRA and cannot receive back pay); *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 892, 903 (1984) (holding that undocumented immigrants were "employees" as defined under the NLRB, yet were not eligible for back pay).

⁵⁵ *Hoffman*, 535 U.S. at 149; *Sure-Tan*, 467 U.S. at 892, 903; Wishnie, *supra* note 10, at 498-99.

⁵⁶ *Hoffman*, 535 U.S. at 149; *Sure-Tan*, 467 U.S. at 892, 903.

⁵⁷ *Hoffman*, 535 U.S. at 144; *Sure-Tan*, 467 U.S. at 892; see 29 U.S.C. § 152(3) (stating that the term "employee" shall include "any" employee).

⁵⁸ See Weiner, *supra* note 36, at 1595 (remarking on the court's reluctance to grant undocumented workers remedies for their employers' violations of the NLRA).

⁵⁹ *Sure-Tan*, 467 U.S. at 903; see SMITH & SUGIMORI, *supra* note 4, at 45 (defining back pay as payment of wages the worker would have earned if he or she had not been illegally

ployer at Sure-Tan, a leather tanning operation, who knowingly hired several illegal immigrants.⁶⁰ When the workers attempted to unionize and were certified as a union by the NLRB, their employer reported them to the INS.⁶¹ The employees were deported as a result of the employer's communications with immigration officials.⁶² The Court reasoned that since the employee who brought the suit returned to Mexico after losing his job at Sure-Tan, a back pay award for six months after the employee was fired was speculative and not limited to the actual consequences of the employer's actions.⁶³ Additionally, the Court held that employees are unavailable for work and therefore are not entitled to back pay, if they are not lawfully working in the United States.⁶⁴ Until the court decided *Hoffman*, it was unclear if this holding was to be interpreted broadly, or if it was a fact-specific ruling.⁶⁵

The Supreme Court's ruling in *Hoffman* provided guidance in answering this question, when a divided court ruled 5-4 that undocumented workers were not eligible for back pay under the combined statutory scheme of the NLRA and IRCA.⁶⁶ The Court held that undocumented immigrant employees who had used fraudulent documents to obtain employment were not entitled to back pay under the terms of the IRCA if their employers violated the NLRA.⁶⁷ The Court's analysis rested on an interpretation of how the policy goals of the IRCA should interact with those of the NLRA.⁶⁸ The majority reasoned that the employee's use of fraudulent documents violated the

terminated). The Court found that the employer's actions constituted an unfair labor practice in violation of the NLRA. *Sure-Tan*, 467 U.S. at 903. Since the workers were deported, however, the Court found they were not available for work in the United States, and therefore were not entitled to back pay. *Id.*

⁶⁰ *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 887 (1984).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 900 (stating that "a backpay remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practice.")

⁶⁴ *Id.* at 903.

⁶⁵ Calderon-Barrera, *supra* note 8, at 125. Calderon-Barrera notes that the Court's decision leaves open the question of whether an undocumented worker who remains in the United States after being fired in violation of the NLRA is considered available for work, and subsequently, eligible for back pay. *Id.*

⁶⁶ *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 140 (2002). In this case workers who were involved in organizing a union were fired by their employer. *Id.* After firing one employee, Jose Castro, the employer learned at the NLRB proceedings that Castro was not authorized to work in the United States and had used false documents to obtain the job at Hoffman Plastic Compounds. *Id.* at 141.

⁶⁷ *Id.* at 149.

⁶⁸ *Id.* at 151-52; Calderon-Barrera, *supra* note 8, at 133.

express provisions of the IRCA.⁶⁹ If the employee were to mitigate damages by finding new employment, as required under the NLRA, he or she would violate the IRCA by working in the U.S. through the use of forged documents, or would work for an employer who hired him or her illegally.⁷⁰ Since it is impossible for an undocumented immigrant to obtain employment without acting against the IRCA, the court held that awarding back pay to undocumented workers for their employers' NLRA violations runs counter to the IRCA.⁷¹

The dissent by Justice Breyer, however, argued persuasively that the two policies must be viewed as interdependent.⁷² Breyer highlighted that in enforcing the NLRA's policy of worker's rights and awarding back pay to undocumented workers, the Court would further immigration policy by removing the incentive for employers to hire undocumented workers.⁷³

The Court's decision in *Hoffman* has been widely criticized.⁷⁴ Most critics are concerned that the *Hoffman* decision set a dangerous precedent of downsizing undocumented immigrants' rights.⁷⁵ There is some

⁶⁹ 8 U.S.C. § 1324c(a)(1)–(4) (1986) (making it a crime to used a forged, counterfeit, altered, falsely made document or a document lawfully issued to a person other than the possessor to get a job in the U.S.); *Hoffman*, 535 U.S. at 148.

⁷⁰ *Hoffman*, 535 U.S. at 150–51.

⁷¹ *Id.* at 151.

⁷² See *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 153 (2002) (Breyer, J., dissenting) (arguing that “the National Labor Relations Board’s limited backpay order will *not* interfere with the implementation of immigration policy. Rather, it reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent”).

⁷³ *Id.* at 155 (Breyer, J., dissenting). Justice Breyer notes that denying the National Labor Relations Board the authority to award backpay to illegal aliens could have the effect of lowering the cost to the employer of labor law violations. *Id.* This, in turn, would increase the employer's incentive to hire undocumented immigrant workers and therefore increase the flow of undocumented workers into the United States. *Id.* He also noted the danger of losing the deterrent power of the NLRA if the Board was unable to issue back pay to undocumented workers. *Id.* at 153–54.

⁷⁴ See, e.g., *Developments in the Law*, *supra* note 53, at 2228–29 (noting that legal scholars argue that the Court did not properly balance the need to enforce immigration law and the need to protect immigrant workers, leaving open the possibility of further erosion of workers' protections.); Wishnie, *supra* note 3, at 394 (“The *Hoffman Plastic* decision was wrongly decided. It will no doubt cause further exploitation of already-vulnerable immigrant workers, as well as an erosion of the terms and conditions of employment for those who compete with them in the labor market.”).

⁷⁵ See OFFICE OF GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD, MEMORANDUM GC 02-06 C.1. (2002) (confirming critics' fears and reading *Hoffman* broadly). On the administrative level, the NLRB's *Office of General Counsel Memorandum 02-06*, takes a broad view of the *Hoffman* decision and says that regardless of the circumstances of their hire, undocumented immigrants are not eligible for back pay under the NLRA. *Id.* In federal courts, Florida and Kansas have used *Hoffman* to limit the protections available to undocumented workers. See *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 188 (4th Cir. 1998) (holding undocumented immigrants are not covered by Title VII of the Civil Rights

room for optimism, however, since some federal district courts have declined to extend *Hoffman* to cases involving employer violations of the FLSA.⁷⁶ Additionally, growing numbers of the immigrant population are finding employment outside of traditionally unionized fields, which lends hope to the prospect that there may be ways to circumvent the *Hoffman* ruling.⁷⁷ Through tactics employed by organizations such as the Workplace Project, worker centers may be able to prevent the further erosion of rights for undocumented immigrant workers in today's suburban sweatshops.⁷⁸

C. Structural Challenges

In addition to the harsh policies of the federal government regarding undocumented immigrant workers, these vulnerable workers must also deal with a breakdown in the effectiveness of typical unionizing strategies.⁷⁹ The worker protections of the NLRA are predicated on a model of collective bargaining that is not a realistic tool for many immigrant workers in the service industry.⁸⁰ Gordon argues that most undocumented immigrant workers labor in the service industry, which

Act); *Veliz v. Rental Serv. Corp. USA, Inc.*, 313 F. Supp. 2d 1317, 1336 (M.D. Fla. 2003) (finding that giving hurt workers lost wages under tort law would implicate the court in crime); *Hernandez-Cortez v. Hernandez*, No. 01-1241, 2003 U.S. Dist. LEXIS 19780, at *17 (D. Kan. Nov. 4, 2003) (holding that plaintiffs without work authorization cannot recover for future earnings in the United States). In New York state, federal courts are split on the issue of availability of back pay for undocumented workers under tort law. *See Sanango v. 200 E. 16th St. Hous. Corp.*, 788 N.Y.S.2d 314, 321 (App. Div. 2004) (holding the IRCA preempts undocumented workers from recovering compensation for lost wages in tort actions). *But see Cano v. Mallory Mgmt.*, 760 N.Y.S.2d 816, 817-18 (Sup. Ct. Richmond Co. 2003) (holding undocumented immigrants are not precluded from seeking compensation for lost wages in tort actions).

⁷⁶ *See Flores v. Amigon*, 233 F. Supp. 2d 462, 464-65 (E.D.N.Y. 2002) (holding discovery of plaintiff's immigration status was not relevant to her claim for back pay for unpaid wages under the FLSA, since the risk to the plaintiff was higher than the probative value); *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002) (holding discovery of plaintiff's immigration status was not relevant for claims to recover lost wages under the FLSA); SMITH & SUGIMORI, *supra* note 4, at 45-46 (noting the FLSA defines back pay as the payment of wages the employee earned, yet was not paid).

⁷⁷ GORDON, *supra* note 1, at 82.

⁷⁸ *See id.* (noting various tactics that the Workplace Project employed to help immigrant workers).

⁷⁹ Rivchin, *supra* note 15, at 411-12; Stone, *supra* note 14, at 798. Professor Stone notes that there has been a decline in union representation, which will exacerbate the problems of "income inequality and employment discrimination." *Id.* at 788.

⁸⁰ Stone, *supra* note 14, at 786; Wial, *supra* note 33, at 678-79 ("Low-wage service jobs are characterized by high labor turnover, many temporary and part-time workers, and the absence of firm-specific internal labor markets. The absence of long-term attachments between low-wage service workers and particular employers makes the organization of these workers on an employer-specific basis . . . difficult to begin and difficult to sustain.").

in many suburbs has become an underground economy.⁸¹ The underground economy is marked by the mobile capital of small businesses, subcontractors, and factories, which can easily change names to evade the law, or are not covered under the laws.⁸² This business structure results in workplaces that are smaller, dispersed over broad geographic areas, marked by high labor turnover and temporary and part time workers, which makes collective bargaining with one employer difficult.⁸³ Additionally, the high number of recent immigrants in low-wage service jobs make it crucial that organizers be sensitive to the varied needs of their workers.⁸⁴

Organized labor's next move needs to be the formulation of groups that can organize employees from various employers and across localities or even regions.⁸⁵ Labor organizers' newest challenge exists in organizing service-industry workers in a way that allows them to work outside of the legal framework of anti-immigrant policies such as those established in *Hoffman*.⁸⁶ The Workplace Project is one of the few groups successful in overcoming these obstacles.⁸⁷ One of their major achievements was the drafting and passage of the Unpaid Wages Prohibition Act, which helped suburban sweatshop workers

⁸¹ Gordon, *supra* note 23, at 412–13 (1995) (explaining that employers do not register with the proper authorities, do not comply with labor or tax laws, and often fail to participate in mandatory programs such as workers' compensation and disability benefits).

⁸² GORDON, *supra* note 1, at 24, 48 ("It's hard to organize someone who for all formal appearances doesn't exist."); Rivchin, *supra* note 15, at 411–12; Wial, *supra* note 33, at 678 ("Service workers are employed at smaller and more geographically decentralized work-sites than workers in manufacturing industries.")

⁸³ Wial, *supra* note 33, at 678–79.

⁸⁴ GORDON, *supra* note 1, at 70 (some workers cannot speak English, fear deportation, see organizing as risky, and are from widely varying backgrounds); Wial, *supra* note 33, at 677–78.

⁸⁵ GORDON, *supra* note 1, at 55; Wial, *supra* note 33, at 692; see Stone, *supra* note 14, at 802 (arguing that in the new "boundaryless workplace," the focus of organizing employees needs to be on factors other than a common employer).

⁸⁶ Wial, *supra* note 33, at 671; see Rivchin, *supra* note 15, at 416 (explaining that groups of workers excluded by the NLRA have been successful in organizing outside of the NLRA structure).

⁸⁷ See GORDON, *supra* note 1, at 61–66 (discussing various other successful low-wage immigrant advocacy organizations). Along with the Workplace Project, the Service Employees International Union's (SEIU) Justice for Janitor's campaign, was able to effectively work around the NLRA's restrictions on secondary boycotts and gain support for undocumented workers. *Id.* at 61–62. Bans on secondary boycotts make it difficult to exert pressure on companies whose subcontractors do not comply with labor laws. *Id.* Since picketing these secondary employers is illegal, the SEIU has gained support from religious leaders, students, community organizations, and public officials to make worker's rights an issue in the community. *Id.* at 62.

receive the pay they earned.⁸⁸ The Workplace Project's flexible and creative strategies were vital in changing a hostile legal climate for the benefit of undocumented workers.⁸⁹

II. IMMIGRANTS CIRCUMVENT *HOFFMAN*

After surveying the legislation, court decisions, and structural challenges undocumented workers face, it is clear that creative solutions are required to address the problem of undocumented workers' rights.⁹⁰ Professor Katherine V.W. Stone exhorts labor organizations to "expand their focus upward into the political domain and outward into the community," which is exactly how the Workplace Project became successful.⁹¹ In 1995, the members of the Workplace Project, frustrated by the lack of enforcement of the New York state minimum wage laws, triumphed over employers who withheld workers' wages by changing state law.⁹² The passage of the UWPA is an instructive example of how a group of mainly immigrant workers—including undocumented workers—effectuated change outside of the traditional union framework on the state level.⁹³ The Workplace Project was able to improve working conditions for low-wage workers through active participation in the political process.⁹⁴

A. *Organizing for Political Change*

In 1995, members and staff of the Workplace Project were upset by the New York Department of Labor's (NYDOL) slow processing of low-wage workers' claims for unpaid wages.⁹⁵ They saw how the low penalties for cheating employees out of their wages provided no deterrent to dishonest employers.⁹⁶ They also realized a need for reform on the

⁸⁸ See *id.* at 3 (the Workplace Project's victories are the result of a "resourceful combination of collective action and legal advocacy").

⁸⁹ *Id.*

⁹⁰ See *id.* at 69 (describing the many and varied experimental attempts made by the Workplace Project, other worker centers, and Unions in an effort to combat the problem of exploitation of undocumented workers).

⁹¹ Stone, *supra* note 14, at 802.

⁹² Jennifer Gordon, *The Campaign for the Unpaid Wages Prohibition Act: Latino Immigrants Change New York Wage Law*, 4 Working Papers (Carnegie Endowment for Int'l Peace, Washington D.C.), Sept. 1999, at 7, 9, available at http://www.carnegieendowment.org/files/imp_wp4gordon.pdf (the Unpaid Wages Prohibition Act changed state law by providing stricter enforcement measures and trying to combat the ineffectiveness of the NYDOL).

⁹³ GORDON, *supra* note 1, at 238; Stone, *supra* note 14, at 815.

⁹⁴ Gordon, *supra* note 92, at 7.

⁹⁵ *Id.*

⁹⁶ *Id.* at 4.

agency level, since the NYDOL's efforts were stymied by both under funding and prejudice against undocumented immigrants.⁹⁷ Armed with firsthand knowledge, field research, and a passion for change, the immigrants—including those without permission to work in the United States—committed to drafting and lobbying for a bill that would address some of the problems with minimum wage law enforcement.⁹⁸

One reason for the Workplace Project's success is their status as a worker center, and not a NLRB certified union.⁹⁹ Worker centers are "organizing laboratories," since one of their characteristics is a unique ability to brainstorm and implement new options for organizing.¹⁰⁰ Worker centers flexibly address the needs of their members, and engage in organizing efforts, such as the campaign for the UWPA, which fall outside of the collective bargaining model.¹⁰¹ Worker centers are valuable in providing an alternative to unions, since they can address issues of workplace rights on a larger scale than collectively bargaining with just one employer.¹⁰² This emphasis on broader change in labor law allows them to attract workers who are hard to organize, and workers for whom traditional unions do not meet their needs.¹⁰³ Even in a post-*Hoffman* climate, there is hope for organizing undocumented workers into effective groups that can advocate for stronger worker protections.¹⁰⁴

⁹⁷ *Id.* at 3, 5–6. Gordon argues that one major problem with wage law enforcement is the under funding of the state and federal agencies meant to uphold the law. *Id.* at 3. This means that there are not enough inspectors to adequately monitor legitimate, registered businesses. *Id.* On Long Island, the Workplace Project gathered statistics that out of the seventy two claims they filed with the NYDOL only three resulted in even partial payment to the employee. *Id.* at 5. Furthermore, NYDOL workers show their bias against advocating for undocumented workers with statements such as: "I don't even take claims for housekeepers for overtime . . . it's a waste of time," and "I don't like to take claims for domestic workers and restaurant workers." *Id.*

⁹⁸ *See id.* at 7 (discussing how the UWPA was initiated); GORDON, *supra* note 1, at 244–45 ("Given that so many immigrant workers were paid less than the minimum, giving the law teeth would be an important victory.").

⁹⁹ *See Rivchin, supra* note 15, at 415 (noting the advantage of worker centers over unions). Rivchin notes that although the NLRA confers rights to groups of organized workers, it also places restrictions on organizing activities, such as prohibiting secondary boycotts. *Id.* at 410–13. Secondary boycotts are key in organizing heavily subcontracted industries and regulating picket activities. *Id.*

¹⁰⁰ FINE, *supra* note 7, at 9.

¹⁰¹ *See id.* (discussing innovative strategies that worker centers developed and used).

¹⁰² Rivchin, *supra* note 15, at 401.

¹⁰³ FINE, *supra* note 7, at 9.

¹⁰⁴ *See* GORDON, *supra* note 1, at 245–46 (noting that the members of the Workplace Project first felt that their status as non-citizens would render them ineffectual in the political process, but soon learned that they could muster a strong political voice if they presented their bill in the correct light).

B. *Mobilizing Undocumented Workers*

Having undocumented immigrants lobby for the bill was a strategic feat for the members of the Workplace Project.¹⁰⁵ In May 1996, the Workplace Project had 420 members, approximately two percent were citizens, sixty-eight percent were noncitizen legal immigrants, and thirty percent were undocumented immigrants.¹⁰⁶ Despite the risks, the Workplace Project decided to combine the forces of documented and undocumented workers.¹⁰⁷ The Workplace Project members were able to do this because there was some protection in participating as a member of a large group.¹⁰⁸

In campaigning for the UWPA, Workplace Project members met with legislators and persuaded them that unpaid wages was a problem of epidemic proportions on Long Island, which harmed not only undocumented workers but also the public.¹⁰⁹ In the anti-immigrant political climate of 1995 Long Island, the drafters of the UWPA made strategic alliances with businesses, community organizations, the media, and key politicians in order to pass their bill through the Republican Senate and the Democratic controlled Assembly.¹¹⁰ The workers framed their legislation to win Republican legislators' votes by emphasizing key features.¹¹¹ The campaigning members of the Workplace Project told Republican legislators that the UWPA focused on pre-

¹⁰⁵ See *id.* at 246 (describing the reluctance of many undocumented members of the Workplace Project to campaign for the UWPA); Gordon, *supra* note 92, at 22 (attributing the campaign's success, in part, to the participation of undocumented workers who spoke directly with legislators).

¹⁰⁶ GORDON, *supra* note 1, at 245.

¹⁰⁷ *Id.* at 245–46. Undocumented members of the Workplace Project were fearful that engaging in a political campaign would expose their immigration status and make them easy targets for discriminatory firing or even deportation. *Id.* Additionally, Workplace Project member Juan Calderon highlights another reason workers were hesitant to campaign, “[i]f you’re not a citizen, how can you make demands? If I can’t vote, I’m no one. I’m invisible. How can I protest?” *Id.*

¹⁰⁸ See *id.* (stating “the sense that there will be some protection in doing this as a group, under the umbrella of the Workplace Project.”).

¹⁰⁹ *Id.* at 256; Gordon, *supra* note 92, at 26–27. Members of the Workplace Project campaign rehearsed what to emphasize to different legislators to showcase the most persuasive elements of the bill, and brainstormed answers to questions the legislators might ask. *Id.* at 26. The meetings took place in Spanish, and the legislators wore headphones that instantaneously translated the lobbyists' words into English. *Id.* at 26–27.

¹¹⁰ See GORDON, *supra* note 1, at 248, 256–68 (noting that Suffolk County, Long Island was in a heated “English-only” debate and describing the Workplace Project’s strategy: the process of lobbying, gathering public support for the bill, and the eventual passage of the bill in the New York legislature); Gordon, *supra* note 92, at 9–22 (detailing the political actions of the Workplace Project, and propounding four theories for why the legislators passed the bill into law).

¹¹¹ GORDON, *supra* note 1, at 251; Gordon, *supra* note 92, at 8.

venting unfair competition by punishing employers who violate minimum wage laws, paying people the money they were owed as a way to keep them off of public benefits, increasing state revenue by increasing fines, and funding the additional responsibilities the bill gives to the NYDOL through the fines it implements.¹¹² Throughout the lobbying process, the members of the Workplace Project prepared how they would answer the legislator's questions about immigration status, since even many documented workers were not citizens, and therefore were not part of the constituent group to which the legislators answered.¹¹³ Immigration status, however, never arose in the meetings with legislators.¹¹⁴

One interesting limitation that the campaign illuminates is that it may not have been possible for a group of exclusively undocumented immigrants to pass this legislation on their own.¹¹⁵ This suggests that it is crucial for undocumented workers to organize in a way that combines their forces with other low-wage workers in order to gain more protections under the law.¹¹⁶ This possible limitation, however, has not stopped immigrant groups from organizing to gain more worker protections for all immigrants.¹¹⁷

C. *Successful Post-Hoffman Political Activism*

Other examples of successful political campaigns organized by worker centers demonstrate how the principles motivating the Workplace Project have been applied in a post-*Hoffman* political climate.¹¹⁸ For example, Rhode Island's United Workers Committee of Progreso Latino combined forces with religious, labor, and immigrant groups in Rhode Island to pass the Temporary Employment Protection Act.¹¹⁹

¹¹² Gordon, *supra* note 92, at 8.

¹¹³ *Id.* at 26.

¹¹⁴ *Id.*

¹¹⁵ *See id.* at 13 (explaining that if immigration status had become an issue in the campaign, it may have been harder to gain support from legislators concerned with being seen pro-illegal alien).

¹¹⁶ *See id.* (having a mixture of documented and undocumented immigrants may take the focus off of immigration status, and therefore help issues from becoming about helping "illegal aliens").

¹¹⁷ *See* Wishnie, *supra* note 10, at 508 (remarking that many of the biggest issues of low-wage immigrant workers are not exclusive to undocumented workers); *supra* text accompanying note 87 (citing the SEIU as another example of creatively organizing around the NLRA.); *infra* notes 119, 121, 122 (discussing examples of successful organizing campaigns).

¹¹⁸ *See infra* notes 119, 121, 122 (providing descriptions of immigrant groups who made positive changes in the law for undocumented immigrant workers).

¹¹⁹ R.I. GEN. LAWS § 28-6.10 (2005); MAURICE Emsellem & Catherine Ruckelshaus, NAT'L EMPLOYMENT LAW PROJECT, ORGANIZING FOR WORKPLACE EQUITY: MODEL STATE

The new law requires temporary agencies to give employees written notice of job descriptions, work schedules, and pay rates, so these employees are not abused by the temporary agency's clients.¹²⁰ Additionally, worker centers have successfully used the political process to lead local minimum and living wage campaigns across the nation.¹²¹ Not all worker centers have focused their efforts on gaining rights for the undocumented population, but the success of these other worker centers combined with the success of the Workplace Project suggests that political advocacy through worker centers may be a powerful tool for advancing the rights of undocumented workers.¹²²

The success of worker centers in becoming effective political participants lends optimism to the discussion of the downsizing of undocumented workers' rights.¹²³ Despite the Workplace Project members' status as disenfranchised and undocumented they were able to make positive changes for low-wage undocumented workers.¹²⁴ The success of passing the law is an important one, yet the next section will examine the UWPA's impact on the daily lives of undocumented workers after it became New York state law.¹²⁵

III. STATES "STEP INTO THE BREACH"¹²⁶

With the federal government taking a decidedly anti-immigrant stance, those who advocate for undocumented workers' rights argue that change must be effected on a state level.¹²⁷ Not all workers are cov-

LEGISLATION FOR "NONSTANDARD" WORKERS 22 (2000), available at <http://www.nelp.org/docUploads/pub17%2Epdf>.

¹²⁰ R.I. GEN. LAWS § 28-6.10; Emsellem & Ruckelshaus, *supra* note 119, at 22; United Workers Committee, History and Evolution of the U.W.C., <http://www.rictu.org/historia.html> (last visited Mar. 10, 2006).

¹²¹ See Fine, *supra* note 7, at 16 (highlighting organizations such as the Baltimoreans United in Leadership Development (BUILD), which helped pass the first living wage law in the nation).

¹²² See *id.* at 9 (indicating that worker centers have "unprecedented success" in organizing low-wage immigrant workers, including large numbers of undocumented workers and provide a "central vehicle" for these employees to gain services, education, participate in civil society, and affect economic and political change).

¹²³ *Id.* at 25 (characterizing worker centers as "hopeful," and "helping to set the political agenda"); Gordon, *supra* note 92, at 37-38 (concluding that the campaign for the UWPA "contradicts our instinct that an effort to pass legislation led by noncitizen immigrants . . . would be a recipe for disaster").

¹²⁴ See *infra* note 132 (describing the UWPA's provisions regarding enforcement of minimum wage laws in New York state).

¹²⁵ See *infra* Part III.A.

¹²⁶ Smith & Sugimori, *supra* note 4, at 12.

¹²⁷ See *id.* (suggesting that state level authorities have a deeper understanding of what immigrant workers mean to their economy, a better awareness of the abuses immigrants

ered on the federal level, and states tend to provide more protections to undocumented workers.¹²⁸ Additionally, local government may be in a better position to see the problems that the lack of protections for undocumented workers have on the entire community.¹²⁹ This section will evaluate the Unpaid Wages Prohibition Act (UWPA) and determine the effectiveness of organizing on the state level.

A. *Thinking Locally—The Burdens and Benefits of State Changes*

On the state level, advocates can help all workers, including undocumented workers, by pressuring state agencies to adopt pro-worker policies for enforcing current laws.¹³⁰ For example, after the legislature passed the UWPA, unpaid low-wage workers, including undocumented workers, found benefits to the new law.¹³¹ The legislation the Workplace Project drafted focused on increasing penalties to deter employers from violating minimum wage law, and fixing the slow turn around for NYDOL managed employee claims.¹³² The bill also shifted the burden of proof to the employer to show payment of wages when the employer did not keep adequate records, required workers to be informed of the process of their claim periodically, and allowed labor unions to file wage claims on behalf of their members.¹³³

suffer, and feel a sense of duty to protect all local residents); NAT'L EMPLOYMENT LAW PROJECT, A SURVEY OF STATE WAGE ENFORCEMENT LAWS: MODELS FOR SUCCESSFUL REFORM 1 (1997), *available at* <http://www.nelp.org/publications.cfm?section=\iwp> (arguing that the inadequacies in federal law in covering certain industries and job classifications and the inability of the DOL to enforce labor and immigration law requires strict state penalties).

¹²⁸ Gordon, *supra* note 92, at 39 n.8 (noting that employees that do not put goods into the stream of interstate commerce and have less than five hundred thousand dollars in gross revenues a year are not covered by the FLSA).

¹²⁹ SMITH & SUGIMORI, *supra* note 4, at 12.

¹³⁰ *Id.* at 47–48 (noting that such policies are needed to make states reaffirm their commitment to enforcing all laws, without taking into account workers' immigration status). After *Hoffman*, California and Washington have adopted policies that protect undocumented workers' rights to back pay and workers compensation, respectively. *Id.*

¹³¹ Gordon, *supra* note 92, at 31.

¹³² Unpaid Wages Prohibition Act, § 198-a (1) (1998) (increasing penalties for employers who fail to pay their workers). Specifically, the final version of the Act included provisions increasing the civil penalty for repeatedly or willfully not paying wages from twenty-five to two hundred percent of the amount owed, turning nonpayment into a felony offense, requiring the NYDOL to go back the full six years permitted by law in their investigations of employer conduct, and not allowing settlements of less than one hundred percent without the employee's permission. Gordon, *supra* note 92, at 7.

¹³³ §§ 196-a, 199-a; Gordon *supra* note 92, at 7–8.

Although difficult to quantify, the UWPA furthered the Workplace Project's goal of deterring employers from violating existing minimum wage laws.¹³⁴ After passage, the Workplace Project alone worked with forty-four percent more workers than the previous year, and recovered a record amount of unpaid wages.¹³⁵ Gordon notes that employers were spurred to settle by simply receiving a letter informing them that they could face a fine of up to two-hundred percent of what they owed.¹³⁶ Other advocacy groups used the UWPA as a tool to gain unpaid wages for workers of all types in New York.¹³⁷ Additionally, a low-wage worker successfully brought a claim for unpaid wages under the burden shifting provision of the law when his employer failed to keep adequate payment records.¹³⁸

By some measures, however, the UWPA was not successful.¹³⁹ Although there were a number of positive changes resulting from the new law, these changes have not led to a substantial increase in the amount of wages the NYDOL recovers for low-wage workers.¹⁴⁰ Gordon attributes the problems with the Act's use at the NYDOL to a number of factors, including a lack of funds generated by the Act, no provisions to force the NYDOL to change their tactics, and the Workplace Project's decreased organizing and advocacy work for the law's implementation.¹⁴¹ Despite the problems of the UWPA, it is vital to enforce the state minimum wage laws, and judging by the number of other states who have passed similar legislation, it was persuasive in effecting change nationally.¹⁴²

¹³⁴ Gordon *supra* note 92, at 30.

¹³⁵ *Id.* at 30–31.

¹³⁶ *Id.* at 30.

¹³⁷ *Id.* at 31 (explaining the Local 802 of the American Federation of Musicians' use of the Act to recover unpaid wages).

¹³⁸ *Angello v. Nat'l Fin. Corp.*, 769 N.Y.S.2d 66, 69–70 (App. Div. 2003). In *Angello*, the plaintiffs alleged that their employer, the National Finance Corporation, failed to pay them their earned wages and certain wage supplements. *Id.* at 67. The employer failed to keep adequate records of the wages paid to the plaintiffs. *Id.* The court held that, in wage claims cases, where the employer did not submit proof contradicting the claims made by employees, the burden of proof shifts to the employer to show payment of wages. *Id.* at 69–70.

¹³⁹ Gordon, *supra* note 92, at 31.

¹⁴⁰ *Id.* The NYDOL hired a full-time Spanish-speaking investigator for their Hempstead, New York office, developed Spanish versions of forms, and began to process cases more quickly through the use of a new, more efficient docketing system. *Id.* Nonetheless, once the DOL was "out of the spotlight" their efforts to punish employees to the full extent of the law decreased markedly. *Id.*

¹⁴¹ *Id.* at 32. Ironically, these measures were some of the very measures that helped the bill pass the legislature. *Id.*

¹⁴² See generally STATE LAWS CREATING CRIMINAL PENALTIES FOR FAILURE TO PAY WAGES (2004) available at <http://www.nelp.org/docUploads/criminal%20penalties%20for%20un->

One way to affect more sweeping changes may be to focus energy on addressing the problem at a national level.¹⁴³ There are some fledgling national efforts for immigration and employment law reform, but most of the campaigns of worker centers focus on changing conditions within their states.¹⁴⁴ These national efforts to unite worker centers and create political change on a federal level are promising yet underfunded organizations.¹⁴⁵ Many advocates still think the efforts of groups with little political power and a lack of funding are better focused on the state level.¹⁴⁶ Working to affect change at the state level can have a big impact on all workers, since state laws apply to more workers than federal laws.¹⁴⁷ Additionally, there may be more opportunity to affect change on the state level for groups like the Workplace Project, who lack the political power and membership base to advocate for change on a national level.¹⁴⁸ Once one state makes a change, and other states see that it works, they may be more willing to follow suit.¹⁴⁹ Finally, there is the idea that the states are laboratories for justice, and if a number of states adopt policies that enforce current laws or expand rights for undocumented workers, the federal government may be more willing to follow their

paid%20wages%2Epdf (outlining criminal penalties under state laws for failure to pay wages) [hereinafter STATE CRIMINAL PENALTIES].

¹⁴³ FINE, *supra* note 7, at 11.

¹⁴⁴ *Id.* at 16 (citing the Immigrant Workers Freedom Ride as a national rally for immigrant rights that resulted in the Fair Immigration Reform Movement as one example of a national movement gaining momentum).

¹⁴⁵ *See id.* at 11 (discussing the isolation and difficulty in building coalitions to affect political change on state and national levels as a weakness of worker centers).

¹⁴⁶ SMITH & SUGIMORI, *supra* note 4, at 47.

¹⁴⁷ *See id.* at 12 (stating that state laws provide stronger protections for undocumented workers than federal law).

¹⁴⁸ FINE, *supra* note 7, at 11 (noting that the small and isolated status of worker centers does not foster networking between centers which would help aggregate power and apply more persuasive pressure to opponents of low-wage workers' rights).

¹⁴⁹ *See generally* STATE CRIMINAL PENALTIES, *supra* note 142 (listing the various state laws regarding failure to pay wages). After the Workplace Project passed the UWPA, other states increased their enforcement measures for employees who did not pay their workers. FINE, *supra* note 7, at 11. After the BUILD campaign for a living wage, seventy other localities passed living wage ordinances. Living Wage Facts at a Glance, Economic Policy Institute, http://www.epi.org/content.cfm/issueguides_livingwage_livingwagefacts (last visited Mar. 10, 2006).

lead.¹⁵⁰ Overall, state legislation is an important and rewarding avenue for protecting undocumented workers' rights.¹⁵¹

C. *Looking Beyond Long Island*

While the Workplace Project provides a successful example of advocating for legislative change on behalf of undocumented low-wage workers in New York, it was the result of a unique set of circumstances that may prove difficult to replicate.¹⁵² First, the bill was self-funding and thus, did not require increased state funding.¹⁵³ The second factor was unique to the political climate of New York in 1995.¹⁵⁴ Republicans in the Senate recognized a need to send bills to Governor Pataki, a fellow Republican, which would make him look sympathetic to the working class.¹⁵⁵ Additionally, the large numbers of Latino immigrants were more of a political force on Long Island than they may be in many communities.¹⁵⁶ While some of these factors are easier than others to duplicate, the confluence of all of them greatly aided the passage of the UWPA, and give reason to question the chances for other immigrant worker groups to succeed.¹⁵⁷

¹⁵⁰ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")

¹⁵¹ *Id.*; see FINE, *supra* note 7, at 16 (while there are a few national efforts to organize workers, worker centers have found state level action to be a more rewarding avenue for advocacy).

¹⁵² See Gordon, *supra* note 92, at 11 (listing the factors Gordon attributes to the success of the campaign for the UWPA). Gordon explains that "power in the legislative system is seen to come from two sources: either votes or money. And conventionally, immigrant workers are thought to wield neither." *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* Gordon suggests four factors which may have prevented the traditionally anti-immigrant and anti-worker Republican party in New York from viewing the UWPA as a threat. *Id.* First, the Republicans were looking to gain support from the growing Latino population in upcoming elections. *Id.* Second, the powerful political allies in the business world that the campaign attracted shifted the focus away from the "immigrant question." *Id.* Third, the Workplace Project's message and effective use of the media made it difficult for legislators to oppose the UWPA without looking like they supported "bad employers." *Id.* Finally, Gordon suggests that the moral strength of the arguments and personal stories of the immigrant lobbyists persuaded the legislature. *Id.*

¹⁵⁶ See *id.* (noting the possibility that Republicans supported the UWPA because of the growing political influence of Latinos on Long Island).

¹⁵⁷ Gordon, *supra* note 92, at 37. Gordon explains that the legislation's message of "hard work and the right to be paid for it" was beneficial, since it emphasized the immigrant workers' role as exploited workers. *Id.* This message is not easy to duplicate in cam-

Despite this possibly unique set of circumstances, the UWPA demonstrates that efforts to pass legislation by noncitizens are not always doomed for failure.¹⁵⁸ A number of other immigrant organizations have achieved state and local political change.¹⁵⁹ Omaha Together One Community, for example, successfully campaigned for the adoption of a “Workers Bill of Rights” for mostly Mexican exploited workers in the meatpacking industry, which guaranteed the right to organize.¹⁶⁰ The Service Employees International Union (SEIU) has met with success in organizing home health aides in southern California, despite the fact that these workers were spread out among thousands of private homes.¹⁶¹ The SEIU advanced workers’ rights by not only organizing workers, but by also effecting a change in the law.¹⁶² The law created public authorities as the employer of record, with whom the union could bargain.¹⁶³ These successes suggest that organizing for state and local change is a viable option for immigrant groups who are working in a post-*Hoffman* political landscape and are looking to increase undocumented worker protections.¹⁶⁴ The applicability of strategies similar to that of the Workplace Project lends hope to the picture of the future of undocumented immigrants in the United States.¹⁶⁵

paigms to preserve benefits, and increase protections specifically for immigrants, which tend to cast immigrants in the light of “takers.” *Id.*

¹⁵⁸ *Id.* at 38.

¹⁵⁹ See FINE, *supra* note 7, at 13, 16 (discussing the work of Omaha Together One Community in the meatpacking industry); GORDON, *supra* note 1, at 63 (describing the SEIU’s decade-long efforts to organize home health aides in California, which resulted in the government creating an entity with which the union could collectively bargain); *supra* note 119 (detailing the work of Rhode Island’s United Workers Committee of Progreso Latino).

¹⁶⁰ FINE, *supra* note 7, at 13, 16.

¹⁶¹ Linda Delp & Katie Quan, *Homecare Worker Organizing in California: An Analysis of a Successful Strategy*, 27 LAB. STUD. J. 1, 4 (2002); GORDON, *supra* note 1, at 63.

¹⁶² Delp & Quan, *supra* note 161, at 8; GORDON, *supra* note 1, at 63.

¹⁶³ S.B. 35, 1993 Leg., Reg. Sess. (Cal. 1993); S.B. 1078, 1993 Leg., Reg. Sess. (Cal. 1993); S.B. 485, 1992 Leg., Reg. Sess. (Cal. 1992); Delp & Quan, *supra* note 161, at 9; GORDON, *supra* note 1, at 63.

¹⁶⁴ AMY SUGIMORI ET AL., ASSESSING THE IMPACT OF THE SUPREME COURT’S DECISION IN *HOFFMAN PLASTIC COMPOUNDS V. NLRB* ON IMMIGRANT WORKERS AND RECENT DEVELOPMENTS 6 (2002), available at http://www.nilc.org/immsemplmmt/Hoffman_NLRB/Hoffman_NELP_NILC_FINAL.PDF (arguing that it is likely that state courts will continue to limit the *Hoffman* ruling by not applying it to undocumented workers’ remedies under state employment and labor law). Since states may make their own policy decisions about the remedies available to undocumented immigrants, advocates may be more successful in petitioning for change on the state level. *Id.* at 7.

¹⁶⁵ Gordon, *supra* note 92, at 38 (remarking that “the conditions that allowed the campaign for the Unpaid Wages Prohibition Act to flourish and succeed are far from unique. Through community-based organizing institutions, immigrant leaders have the opportu-

CONCLUSION

The failure of unions to formulate successful strategies for organizing low-wage immigrant workers combined with the Supreme Court's decision in *Hoffman*, which severely limited undocumented workers' right to remedies, seems like an insurmountable obstacle for suburban sweatshop workers.¹⁶⁶ The Workplace Project's successful campaign to improve the lives of suburban sweatshop workers through state legislation, however, provides a glimmer of hope in an altogether bleak legal and social landscape.¹⁶⁷ While the Workplace Project is conscious of their limitations, they understand that they have found successful strategies in the model of the worker center and in political activism on the state level.¹⁶⁸ Despite the fact that suburban sweatshop workers face an uphill battle to improve their working conditions, the opportunity for undocumented immigrants to organize and engage in the political process is empowering for laborers in suburban sweatshops.¹⁶⁹ If tactics of geographic organization and state level political activism are pursued, this may provide a way for undocumented immigrants to organize outside of the typical union framework and around the Supreme Court's decision in *Hoffman*.¹⁷⁰

nity to identify and attack the problems that their communities face . . . [and] can win victories that would surprise the staunchest cynic.”).

¹⁶⁶ See *supra* Part I.A.–B. (explaining the legislative and judicial factors which limit suburban sweatshop workers' rights).

¹⁶⁷ See Gordon, *supra* note 88, at 38 (concluding that the UWPA's passage sends a message of strength and optimism to other worker centers).

¹⁶⁸ See GORDON, *supra* note 1, at 108 (noting that the Workplace Project has not been effective in permanently raising the wages of low-wage workers). As member and organizer Carlos Canales said, “I feel like right now we are on the tip of an iceberg. The Workplace Project is a tiny ant, with a tiny ant's needle, trying to break that iceberg down.” *Id.* at 302. Yet, Gordon notes, “[w]ith such small victories, the omnipresent and overwhelming sense of powerlessness . . . may begin—just begin—to dissolve.” *Id.*

¹⁶⁹ *Id.* at 302. In the words of Workplace Project member Zoila Rodriguez, “[p]erhaps they will fire me for raising my voice or demanding something, but they won't have fired me with my mouth closed. I will have stood up for myself.” *Id.* at 80.

¹⁷⁰ See Rivchin, *supra* note 15, at 430.

Hoffman Plastic may be seen as a setback to organizing immigrant workers and to the labor movement as a whole; yet, it can also be viewed as a call to action to galvanize organizing efforts. While viewing *Hoffman*'s restrictions on remedies for labor violations as a potential obstacle to organizing, we should also consider that organizing under labor law has always faced multiple constraints. . . . The examples of workers who have organized outside of the NLRB model pose alternatives to traditional union organizing and in turn may suggest the limitations of *Hoffman*'s impact.

Id.