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Redefining the Legality of Undocumented Work

Jennifer J. Lee*

ABSTRACT

Undocumented workers face a new harsh reality under the Trump administration. Federal law's prohibition of undocumented work has facilitated exploitation because workers fear being brought to the attention of immigration authorities. The current administration's aggressive stance towards worksite enforcement will only exacerbate abuses against undocumented workers, such as wage theft, dangerous working conditions, or human trafficking.

Given the current climate, this Essay explores how states and localities can resist the federal prohibition by legalizing undocumented work. We live in times of resistance, with "sanctuary cities" that refuse to cooperate with federal immigration enforcement. Seizing on this moment, state and local resistance can offer more immediate accountability for addressing the plight of undocumented workers while disrupting the ways in which the federal immigration framework defines the illegality of undocumented work. To start, this Essay reviews how the incongruence between the lived experiences of

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undocumented workers and the federal immigration framework creates an underclass of workers. Next, it develops a typology of state and local resistance measures that recognize, protect, or promote undocumented work and considers whether these measures can succeed given concerns about federalism and governmental retaliation.

This Essay concludes by discussing why state and local resistance is worthwhile. Beyond the palpable benefits of addressing exploitation, state and local resistance can help undocumented workers overcome exclusion by increasing their sense of belonging. Community members also benefit from the strengthening of workers' rights and the contributions to the local economy. At the same time, such resistance changes social norms and provides a powerful critique of the federal prohibition on undocumented work. Ultimately, this Essay is the first to examine how state and local resistance focused on undocumented work can lend itself to building social movements that promote immigrant inclusion by redefining the legality of undocumented work.

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INTRODUCTION

Angela worked at a plant where she prepared the ready-made foods available in the freezer aisles of grocery stores. She worked twelve-hour days standing in the plant's freezer room. For this work she received about \$4.25 per hour, which violated both the minimum wage and overtime requirements. Several of her coworkers who had been injured on the job had either been fired or told to pay for their own medical care. When health and safety inspectors came, managers told some workers to hide until they left. As an undocumented worker, Angela feared rocking the boat by speaking up.¹

1. Email Interview with Nadia Hewka, Supervising Attorney, Community Legal Services (Jul. 31, 2017). The name of the worker has been changed to protect her identity.

By prohibiting the work of undocumented workers like Angela,² the federal government facilitates workplace abuses because workers fear being brought to the attention of immigration authorities.³ Employers are able to exploit undocumented workers by paying them less than the legal requirements or employing them in unsafe conditions. Before the 2016 presidential election, the margin of fear for some undocumented workers appeared to be diminishing, with the federal government even promoting undocumented workers' rights in an effort to curb exploitation.⁴ The Trump administration's pro-enforcement stance, however, creates a climate that will likely exacerbate mistreatment in the workplace by making the threat of deportation visceral.⁵ Federal authorities, now directed to take enforcement action against all undocumented immigrants, are targeting workers for arrest and reinstating workplace raids.⁶

Given these disastrous effects, this Essay explores the ways in which states and localities can resist the federal prohibition on undocumented work by legalizing undocumented work. Current federal immigration law prohibits undocumented work by making the hiring of undocumented workers unlawful.⁷ We live in times of resistance, when so many states, localities, groups, and individuals are expressing opposition to the Trump agenda.⁸ The "sanctuary city"

2. 8 U.S.C. § 1324a (2018).

3. Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 996 (2006).

4. See, e.g., Jayesh Rathod, *Danger and Dignity: Immigrant Day Laborers and Occupational Risk*, 46 SETON HALL L. REV. 813, 859–60 (2016); Pete Kasperowicz, *Obama Administration Promoting Workplace Rights for All, 'Regardless of Immigration Status,'* BLAZE (Aug. 26, 2014, 11:08 AM), <http://www.theblaze.com/stories/2014/08/26/obama-administration-promoting-workplace-rights-for-all-regardless-of-immigration-status/> [https://perma.cc/6NWQ-LSRY].

5. See Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. TIMES (Dec. 23, 2017), <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html> [https://perma.cc/YJ55-7TPF].

6. Memorandum from Matthew T. Albence, Exec. Assoc. Dir., U.S. Immigration and Customs Enforcement, to All Enforcement and Removal Operations (ERO) Employees (Feb. 21, 2017); John Burnett & Marisa Peñaloza, *How Kitchen Raids in Buffalo Sent Shock Waves Through Immigrant Rights Community*, NAT'L PUB. RADIO (Jan. 8, 2017, 8:35 AM), <http://www.npr.org/2017/01/08/508548698/how-kitchen-raids-in-buffalo-sent-shock-waves-through-immigrant-rights-community> [https://perma.cc/BCE8-NBBS]; Michael Matza, *After ICE Raid at Chesco Mushroom Farm, Anxiety High Among Immigrant Workers*, PHILA. INQUIRER, (May 7, 2017), <http://www.philly.com/philly/news/ice-raid-mushroom-fear-deport-chester-county.html> [https://perma.cc/UH7L-UDHY]; Andrew Selsky, *Activist: Immigration Officers Detain 10 Workers in Oregon*, ASSOCIATED PRESS (Mar. 1, 2017), <https://apnews.com/88fd12ab02124e17968a8068bc85a3dd/Activist-Immigration-officers-detain-10-workers-in-Oregon> [https://perma.cc/NWS6-YBTQ].

7. 8 U.S.C. § 1324a.

8. See, e.g., Sarah Ruiz-Grossman, *ACLU Launches Massive Local Resistance to Trump's Agenda*, HUFFINGTON POST (Mar. 13, 2017), http://www.huffingtonpost.com.mx/entry/aclu-people-power-launch-resist-trump_us_58c714bde4b0598c66990ad3 [https://perma.cc/LB66-VB7G] (describing the ACLU's training of local communities to engage them in activism against the Trump agenda); INDIVISIBLE, A PRACTICAL GUIDE FOR RESISTING THE TRUMP AGENDA (2017), <https://www.indivisible.org/guide/> [https://perma.cc/66R9-5W4P] (detailing how local action actually

movement is iconic of this resistance, whereby localities have declared their refusal to cooperate with federal immigration enforcement.⁹ Other states and localities have sought to accommodate undocumented immigrants by providing for driver's licenses, municipal identification cards (IDs), or access to in-state tuition regardless of immigration status.¹⁰ Many local communities, such as Philadelphia, Chicago, and San Francisco, stand ready to define themselves as inclusive of undocumented immigrants in direct resistance to the ways in which the federal immigration policy defines illegality.¹¹

Given the current constraints of the federal immigration policy, state and local resistance becomes the most viable option for addressing the exploitation of undocumented workers who engage in undocumented work. Social movements around immigration have previously turned to state and local resistance to address the incompatibility between the lived experiences of undocumented immigrants and federal immigration policy.¹² Undocumented work suffers from this same incongruence. Approximately eight million undocumented workers are in the workforce despite the federal prohibition.¹³ It is estimated that a majority of these workers pay federal income and payroll taxes each year.¹⁴ Undocumented workers theoretically have the right to allege many

works to resist the Trump agenda); Dean Kuipers & Capital & Main, *How California is Resisting Trump's Immigration Policies*, NEWSWEEK (May 2, 2017), <http://www.newsweek.com/california-resisting-trump-immigration-policies-593379> [<https://perma.cc/8945-MK95>] (discussing how local communities have engaged in resistance to current federal immigration policy).

9. See, e.g., S.F., CAL., ADMIN. CODE ch. 12I § 12I.1 (2018) (prohibiting law enforcement from honoring federal detainer requests); Phila. Exec. Order No. 5-16 § 1, City of Philadelphia, Office of the Mayor (Jan. 4, 2016) (requiring that Philadelphia jails not honor ICE detainer and release date requests); CHICAGO, ILL., MUN. CODE § 2-173-042 (2018) (prohibiting local law enforcement from enforcing federal immigration law).

10. NAT'L IMMIGRATION LAW CTR., INCLUSIVE POLICIES INCREASE DRAMATICALLY IN THE STATES: IMMIGRANTS' ACCESS TO DRIVER'S LICENSES, HIGHER EDUCATION, WORKERS' RIGHTS, AND COMMUNITY POLICING 1 (Oct. 2013).

11. See, e.g., Phila. City Council Res. 110536, PHILA. CITY COUNCIL LEG. INFO. CTR. (June 23, 2011) (stating that all residents, regardless of immigration status, have the right to remain in their neighborhoods with their communities and families); CHICAGO, ILL., MUN. CODE § 2-173-005 (finding that the cooperation of all persons, including those without documentation, is essential to achieving "the City's goals of protecting life and property, preventing crime and resolving problems"); S.F. ADMIN. CODE ch. 12H § 12H.1 (1989) (declaring San Francisco as a "City and County of Refuge"); see also Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of Illegality*, 52 HARV. J. ON LEGIS. 355, 357–58 (2015) (arguing the need for advocates to confront the construction of "illegality" created by the federal immigration framework).

12. See Caitlin Barry, *The Right to Remain in Safety: The Impact of Community Leadership on Philadelphia's ICE Holds Policy*, 13 U. ST. THOMAS L.J. 459, 463 (2017) (describing the social movement in Philadelphia to address the devastating impacts of federal immigration policy on local communities).

13. Jens Manuel Krogstad et al., *5 Facts About Illegal Immigration in the U.S.*, PEW RES. CTR. (Apr. 27, 2017) <http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/> [<https://perma.cc/8SST-GBL7>].

14. CONG. BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 6–7 (2007), <https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/87xx/doc8711/12-6-immigration.pdf>

violations of federal and state workplace laws.¹⁵ Despite an undocumented worker's semblance to any other American worker, the federal prohibition ensures that undocumented workers cannot exercise their full panoply of rights.¹⁶ As a result, undocumented workers have become an underclass that suffers disproportionately from exploitation such as wage theft,¹⁷ dangerous working conditions,¹⁸ or human trafficking.¹⁹

My objective, therefore, is to demonstrate how state and local resistance can offer more immediate and necessary improvements to the lives of undocumented workers while disrupting the ways in which the federal immigration framework defines the illegality of undocumented work. Through enacting laws that specifically help protect or support the health, safety, and well-being of undocumented workers, states can help legalize undocumented work. This concept of resistance, which I will call undocumented work resistance, builds upon the existing scholarship that addresses the injustice experienced by undocumented workers trapped between illegal and legal spaces²⁰ and the ways in which state and local resistance can more generally promote the inclusion of immigrants.²¹ By combining these two concepts, this

[<https://perma.cc/B52B-S7YJ>] [hereinafter CONG. BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS].

15. Jennifer J. Lee, *Outsiders Looking In: Advancing the Immigrant Worker Movement Through Strategic Mainstreaming*, 5 UTAH L. REV. 1063, 1072 (2014).

16. David Bacon & Bill Ong Hing, *The Rise and Fall of Employer Sanctions*, 38 FORDHAM URB. L.J. 77, 88–89 (2010); Kathleen Kim, *Beyond Coercion*, 62 U.C.L.A. L. REV. 1558, 1582–83 (2015); see also Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561, 592 (2010) [hereinafter Gleeson, *Labor Rights for All*]; Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 500 (2004).

17. Pia M. Orrenius & Madeline Zavodny, *Do Immigrants Work in Riskier Jobs?*, 46-3 DEMOGRAPHY 535, 548 (2009); CHIRAG MEHTA ET AL., CHICAGO'S UNDOCUMENTED IMMIGRANTS: AN ANALYSIS OF WAGES, WORKING CONDITIONS, AND ECONOMIC CONTRIBUTIONS 27 (2002).

18. ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 43 (2009).

19. Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1612 (2010).

20. See, e.g., Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1402 (2009) (describing how undocumented workers enjoy some degree of civil and social rights although lacking formal citizenship) [hereinafter Cunningham-Parmeter, *Redefining Rights*]; D. Carolina Núñez, *Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for the Undocumented Worker*, 2010 WIS. L. REV. 817, 849 (2010) (discussing how undocumented workers experience fractured membership because the workplace lies on the border of inclusion and exclusion); Kati Griffith, *Undocumented Workers: Crossing the Borders of Immigration and Workplace Law*, 21 CORNELL J.L. & PUB. POL'Y 611, 614 (2012) (stating that undocumented workers "have a legally-constructed dual personality as they are simultaneously regulated by immigration law and workplace law").

21. See, e.g., Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869 (2015) (discussing the work of integrationists at the state level working to enact laws that promote the inclusion of undocumented immigrants); Stella Elias Burch, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703 (2013) (noting the recent state laws passed that are meant to protect undocumented immigrants); HIROSHI MOTOMURA, IMMIGRATION OUTSIDE OF THE LAW 145–71 (2014) (discussing the different state and local measures that reflect efforts to include

Essay is the first to comprehensively analyze the different forms of undocumented work resistance and the ways in which such resistance can lead to positive social and political change.²² Although a focus on work can risk excluding undocumented immigrants who do not work and fueling the “hardworking” immigrant narrative over others, this Essay illustrates how such topically focused resistance offers the best chance of addressing the injustice experienced by undocumented workers and lends itself to building social movements that promote immigrant inclusion by redefining the legality of undocumented immigrants.

So how is undocumented work resistance defined? Here, I focus on the formal acts by state and local governments²³ to withstand the impact of the federal prohibition on undocumented work.²⁴ These acts might include enacting laws that protect the health and safety of undocumented workers, creating programs that support worker cooperatives to circumvent the federal prohibition, or requiring employers to refrain from cooperating with federal immigration enforcement.²⁵ The legalization of undocumented work happens each time governmental entities actively recognize, protect, or promote the existence of undocumented workers.

In fact, there are a large range of resistance measures available, falling into three general categories of recognition, protection, and noncooperation. These resistance measures, however, are constrained by federalism. Resistance measures may risk being unconstitutional if they encroach on the federal government’s exclusive authority to regulate immigration. Many of these resistance measures, therefore, focus on the public health, safety, and the well-

unauthorized migrants in communities); Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247 (2012) (discussing local and state laws meant to encourage undocumented immigrants to cooperate with law enforcement); Rose Cuison Villazor, “*Sanctuary Cities*” and *Local Citizenship*, 37 FORDHAM URB. L.J. 573 (2010) (noting different state and local laws that recognize undocumented immigrants as community members).

22. Kati Griffith has written about the ways in which state law can benefit undocumented workers. Her case study, however, is limited to California’s Agricultural Labor Relations Act (CALRA) as an example of state policy experimentation related to undocumented workers’ rights. She concludes that CALRA is constitutional despite its potential conflict with federal immigration law. Kati 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) [hereinafter, Griffith, *California as a Laboratory*].

23. As opposed to worker organizing, direct action, and private agreements, which are also important forms of resistance related to undocumented work. I do not mean to suggest that these options are mutually exclusive, as worker organizing, for example, would likely be the precondition to any movement for resistance.

24. In focusing on states and localities attempting to protect and promote undocumented work as against the federal government, this Essay does not specifically examine the challenges of *localities* resisting *state* policies hostile to undocumented work, such as requiring employers to use E-Verify. E-Verify is a federal database that allows employers to determine the eligibility of their employees to work in the US. While the challenges may differ from the federal context, the formal acts by local governments suggested by this Essay could similarly be used to resist state policies hostile to undocumented work.

25. See *infra* Part II.

being of workers. Such measures can take advantage of the way in which undocumented work inhabits legal spaces that are separate and apart from immigration, avoiding federalism concerns.²⁶ Other resistance measures may more directly or deliberately collide with federal immigration policy by raising federalism concerns. Certain jurisdictions may still want to consider these measures in order to forcefully register dissent from federal immigration policy. Further, states and localities may also have to contend with retaliation by federal or state governments.²⁷ The ultimate strategic choice of which resistance measures to take will inevitably be a localized decision balancing the particular legal, political, and practical pitfalls that may exist.

Yet the hard work involved in undocumented work resistance is ultimately worthwhile because it provides palpable benefits and can lead to disruption of the federal immigration system that makes eight million undocumented workers like Angela vulnerable to physical danger, economic insecurity, and deportation. Undocumented work resistance serves to address the exploitation of undocumented workers by expanding their legal rights, facilitating their inclusion into the workforce, and increasing their solidarity with other workers. In turn, the broader community can benefit from these resistance measures through stronger workers' rights and increased economic prosperity. This shared understanding and benefit across workers, employers, and community members illustrate the ways in which organizing around undocumented work can help build the broad-based coalitions necessary to support resistance to federal immigration policy more generally.

The benefits of undocumented work resistance can also lead to disruption of the federal immigration framework by reconceiving the legality of undocumented work. Such measures change social norms and erode support for the federal prohibition on undocumented work and anti-immigrant sentiment overall. These measures also create useful data for replication across jurisdictions while providing a powerful critique of the federal prohibition. As a result, this disruption can contribute to the fundamental restructuring of the way in which federal immigration law should address undocumented work.

This Essay starts with an overview of the incongruence between the lived experiences of undocumented workers and the federal immigration framework. Next, it develops a typology of state and local resistance measures to legalize undocumented work and uses this typology to analyze how these measures fare given concerns about federalism and retaliation. This Essay concludes by grappling with some of the challenges of undocumented work resistance while examining how it can play a significant role in creating positive social and political change.

26. See *infra* Part II.A.

27. See *infra* Part II.B.

I.

THE INCONGRUENCE OF UNDOCUMENTED WORK

The lived experiences of undocumented workers are incongruent with the federal immigration framework, which prohibits employers from hiring workers without authorization to work in the US.²⁸ This federal prohibition of undocumented work creates a situation that is rife for worker abuse and exploitation while circumscribing the rights of undocumented workers. Yet the federal prohibition does not exclusively define undocumented work. Workers, for example, may exercise their rights under federal or state workplace laws or pay income and payroll taxes on their earnings to the Internal Revenue Service (IRS). This Section seeks to explain how undocumented workers ultimately find themselves as an underclass of workers trapped between these illegal and legal spaces created by the incongruity of the legal system's treatment of undocumented workers.

Undocumented work was not regulated at the federal level until the passage of the Immigration Reform and Control Act of 1986 (IRCA).²⁹ IRCA penalizes employers who hire workers without lawful authorization to work in the US or fail to subject workers to the I-9 process.³⁰ The I-9 process requires employers to check the documents of individuals hired, including a combination of driver's licenses, Social Security cards, or US immigration documents.³¹ As individuals without lawful immigration status cannot get the requisite documents, they are ineligible for employment. IRCA provides for both civil and criminal penalties against employers for violations.³² Under the federal immigration system, workers can also be penalized for using false documents.³³

The federal prohibition creates a dire situation for undocumented workers. Not only are undocumented workers excluded from the traditional job market

28. 8 U.S.C. § 1324a (2018).

29. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of the U.S.C.). Prior to IRCA, states had tried to regulate immigrant work. Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMM. L.J. 243, 244 (2017).

30. 8 U.S.C. § 1324a(a)(1)(A)–(B).

31. 8 U.S.C. § 1324a(b)(1)(B)–(D).

32. 8 U.S.C. § 1324a.

33. 8 U.S.C. § 1324c(a) (2018). Angela Morrison argues that the federal government has focused on prosecuting workers over employers. Angela Morrison, *Executive Estoppel, Equitable Enforcement, and Exploited Immigrant Workers*, 11 HARV. L. & POL'Y REV. 295, 300 (2017). States too have jumped on the IRCA bandwagon by requiring the use of E-Verify for employment verification, increasing sanctions for violating employers, or criminalizing undocumented workers who use false documents. See, e.g., Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1690 n.89 (2011) (listing several states that have passed laws requiring employers to verify an employee's immigration status) [hereinafter Cunningham-Parmeter, *Forced Federalism*]; *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011) (holding that an Arizona law that imposes sanctions on violating employers and requires E-Verify is not preempted by federal law); Leticia M. Saucedo, *The Making of the "Wrongfully" Documented Worker*, 93 N.C. L. REV. 1505, 1529–34 (2015) (identifying states that modified the crime of identity theft to include the use of false identifying information to obtain employment).

but the looming threat of immigration enforcement also facilitates employer coercion and discrimination. Using this fear of deportation, employers are able to exploit undocumented workers by paying them less than the legal requirements or employing them in unsafe conditions.³⁴ In general, immigrant workers are more likely to experience workplace fatalities or workplace injuries than native-born workers, with estimates of approximately three hundred more fatalities and sixty-one thousand more injuries annually than their native-born counterparts.³⁵ Within this cohort of immigrants, undocumented workers are more likely to experience unsafe working conditions than immigrants with legal status.³⁶ In terms of minimum wage violations, one large-scale survey of low-wage workers found that nearly half of female undocumented workers surveyed had experienced a minimum wage violation in the previous work week, compared to the 18 percent of female native-born workers.³⁷ Undocumented workers are hindered from exercising their rights despite exploitative conditions because they may fear retaliation by their employer.³⁸ Employers will use immigration status as a tool to undermine workers' claims by calling local police or US Immigration and Customs Enforcement (ICE) to arrest workers.³⁹

Further, the courts have invoked the federal prohibition as a way to strip undocumented workers of legal remedies.⁴⁰ The US Supreme Court's *Hoffman Plastic Compounds, Inc. v. NLRB* decision held that an undocumented worker who used false documents to obtain his job was not entitled to a back pay remedy even though his employer had fired him in retaliation for participating in union organizing efforts protected by the National Labor Relations Act (NLRA).⁴¹ The back pay remedy represented some of the earnings the undocumented worker would have earned but for the unlawful hiring.⁴² The Court, however, claimed that such back pay was prohibited because it would otherwise legitimize an illegal employment relationship prohibited by IRCA.⁴³ A number of courts have subsequently held that undocumented workers cannot recover future US wages for an injury if the responsible party did not have knowledge of the worker's undocumented status.⁴⁴ In *Veliz v. Rental Service Corp.*, for example, an

34. Bacon & Hing, *supra* note 16, at 88–89; Kathleen Kim, *supra* note 16, at 1570–71.

35. Orrenius & Zavodny, *supra* note 17, at 548.

36. MEHTA ET AL., *supra* note 17, at 27.

37. ANNETTE BERNHARDT ET AL., *supra* note 18, at 43.

38. Gleeson, *Labor Rights for All*, *supra* note 16, at 569.

39. EUNICE HYUNHYE CHO & REBECCA SMITH, WORKERS' RIGHTS ON ICE: HOW IMMIGRATION REFORM CAN STOP RETALIATION AND ADVANCE LABOR RIGHTS 1 (Feb. 2013).

40. Christine N. Cimini, *Undocumented Workers and Concepts of Fault: Are Courts Engaged in Legitimate Decisionmaking?*, 65 VAND. L. REV. 389, 437–38 (2012) (explaining that the undocumented worker's crime or fraud might bar legal relief in workers' compensation, torts, wage and hour, Title VII, and state antidiscrimination contexts).

41. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148–50 (2002).

42. *Id.* at 141–42.

43. *Id.* at 148–49.

44. See, e.g., *Veliz v. Rental Serv. Corp. USA, Inc.*, 313 F. Supp. 2d 1317, 1336–37 (M.D. Fla. 2003) (holding that an award of lost wages was precluded because plaintiff, an undocumented worker,

undocumented worker had been killed when a forklift tipped over while he was working on a roofing job that he obtained using false documents.⁴⁵ The court foreclosed his estate from recovering future earnings because such recovery would be based on a violation of the federal immigration laws.⁴⁶ This regime created by IRCA, therefore, forms the illegal space in which undocumented workers find themselves.

At the same time, the federal prohibition is not strictly enforced, resulting in millions of undocumented workers working throughout the US, with both employers and workers complicit in defying the federal prohibition on a daily basis. Undocumented work proceeds mostly unchecked because ICE has severely under enforced IRCA. Overall, the number of undocumented workers removed due to enforcement of IRCA has been miniscule compared to the overall number that are engaging in undocumented work.⁴⁷ While many undocumented work arrangements are largely hidden from public view, workers may be more open about engaging in undocumented work through immigrant organizing by unions or worker centers.⁴⁸ Certain employers may also more openly acknowledge their reliance on undocumented work,⁴⁹ although their preference might be premised on discriminatory cultural assumptions.⁵⁰

Moreover, the federal prohibition does not exclusively define undocumented work.⁵¹ Interestingly, IRCA does nothing beyond prohibiting the employer from hiring undocumented workers.⁵² IRCA does not prohibit the act

obtained his employment with fraudulent documents); *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1001–02 (N.H. 2005) (holding that an employer should be held liable for an undocumented worker’s lost wages if the employer “knew or should have known of” the worker’s status). *See also* *Hernandez-Cortez v. Hernandez*, No. Civ. A 01-1241-JTM, 2003 WL 22519678, at *7 (D. Kan. Nov. 4, 2003) (holding that plaintiff’s status as an undocumented immigrant precluded his recovery of lost US future income based on a personal injury claim).

45. *Veliz*, 313 F. Supp. 2d at 1321, 1335.

46. *Id.* at 1337.

47. Saucedo, *supra* note 33, at 1516.

48. Shannon Gleeson, *Activism and Advocacy*, in 3 HIDDEN LIVES AND HUMAN RIGHTS IN THE UNITED STATES: UNDERSTANDING THE CONTROVERSIES OF UNDOCUMENTED IMMIGRATION, 221–22 (Lois Ann Lorentzen ed., 2014).

49. *See, e.g.*, Rebecca Beitsch, *In Targeting Undocumented Workers, Some Legislators Want Employers to Do More*, PEW CHARITABLE TRUSTS: STATELINE (Feb. 14, 2017) <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/02/14/in-targeting-undocumented-workers-some-legislators-want-employers-to-do-more> [<https://perma.cc/95MY-GAFA>] (discussing the reliance of certain businesses on undocumented labor); Jay Root, *In Texas, Lawmakers Don’t Mess with Employers of Undocumented Workers*, TEX. TRIB. (Dec. 14, 2016, 12:00 AM), <https://www.texastribune.org/2016/12/14/lawmakers-go-easy-employers-undocumented-workers/> [<https://perma.cc/92QH-DKX8>] (discussing the negative impact that wiping out the undocumented labor force would have on Texas businesses).

50. Saucedo, *supra* note 3, at 970.

51. Heeren, *supra* note 29, at 267–68.

52. Since IRCA’s enactment, employers have lobbied to relax employer sanctions by creating safe harbor provisions for employers who have a reasonable belief that an employee’s documents appeared genuine during the I-9 process. Saucedo, *supra* note 33, at 1514. The result was that Congress

of undocumented work in and of itself. Congress was quite deliberate in not penalizing workers.⁵³ It was a considered judgment to not criminalize workers “who already face the possibility of employer exploitation because of their removable status”⁵⁴ Many immigrants who are eventually able to obtain lawful status in the US are not penalized when they have previously worked without authorization.⁵⁵ IRCA also generally does not prohibit undocumented work that is performed as an independent contractor or business owner rather than as an employee.⁵⁶ This loophole, however, is often exploited by employers to misclassify undocumented workers as independent contractors so that they can evade the legal responsibility of providing overtime or workers’ compensation coverage.⁵⁷

Further, the federal government affirmatively recognizes undocumented work in certain contexts. The Internal Revenue Service (IRS) treats earnings from undocumented work as any other taxable income with the use of an Individual Taxpayer Identification Number (ITIN).⁵⁸ There is an “unspoken” wall between the IRS and the US Department of Homeland Security (DHS), as the IRS is generally prohibited from sharing individual taxpayer information with federal government agencies.⁵⁹ The IRS estimates that six million undocumented immigrants file their taxes each year while other studies have shown anywhere from a 50 to 75 percent compliance rate for filing taxes or paying income, Social Security, and Medicare taxes through payroll deductions.⁶⁰ Yet undocumented workers do not qualify for Social Security or Medicare benefits.⁶¹

Other federal agencies that regulate work are explicitly inclusive of undocumented work. The US Department of Labor (DOL), DHS, National Labor

“carefully crafted section 1324a [of IRCA] to limit the burden and the risk placed on employers.” Collins Foods Int’l v. INS, 948 F.2d 549, 554 (9th Cir. 1991).

53. Arizona v. United States, 567 U.S. 387, 405 (2012).

54. *Id.*

55. 8 U.S.C. § 1255(c) (2018).

56. 8 C.F.R. § 274a.1(f) (2018). The number of undocumented immigrants who are self-employed in the informal economy has increased in recent decades. Steven J. Gold, *Undocumented Immigrants and Self-Employment in the Informal Economy*, in 3 HIDDEN LIVES AND HUMAN RIGHTS IN THE UNITED STATES: UNDERSTANDING THE CONTROVERSIES OF UNDOCUMENTED IMMIGRATION 167 (Lois Ann Lorentzen ed., 2014).

57. FRANÇOISE CARRÉ, (IN)DEPENDENT CONTRACTOR MISCLASSIFICATION 4 (June 8, 2015), <http://www.epi.org/publication/independent-contractor-misclassification/> [<https://perma.cc/QYS6-JRS5>]. While employers cannot knowingly use independent contracting as a subterfuge for employing undocumented workers, 8 U.S.C. § 1324a(a)(4) (2018), they can otherwise use the services of independent contractors and avoid IRCA liability.

58. Alexia Fernández Campbell, *The Truth About Undocumented Immigrants and Taxes*, ATLANTIC (Sept. 12, 2016), <https://www.theatlantic.com/business/archive/2016/09/undocumented-immigrants-and-taxes/499604/> [<https://perma.cc/Z9SB-R8J7>].

59. 26 I.R.C. § 6103 (2018).

60. CONG. BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS, *supra* note 14, at 6–7.

61. 8 U.S.C. § 1611 (2018).

Relations Board (NLRB), and the Equal Opportunity Employment Commission (EEOC) share a Memorandum of Understanding that limits ICE's worksite enforcement activities involving the detention and removal of immigrant workers when there is a pending labor dispute.⁶² After *Hoffman Plastic*, the DOL and EEOC have clarified that their regulatory enforcement powers cover undocumented work.⁶³ Both agencies reaffirm that employers of undocumented workers still violate federal law when they engage in discrimination or fail to pay workers for work performed under the Fair Labor Standards Act (FLSA).⁶⁴ At the margins, those engaged in severely exploitative undocumented work may be able to obtain immigration status on that basis, either through U or T visas with US Citizenship and Immigration Services (USCIS).⁶⁵

Numerous court decisions have also explicitly recognized the inclusion of undocumented work under federal and state workforce laws.⁶⁶ Workers engaged in undocumented work have the right to be paid for the work already performed, to be free from discrimination, and to be protected by health and safety laws at the federal and state level.⁶⁷ As they integrate into communities, some undocumented workers may then choose to advocate for their rights, particularly with the support of unions, worker centers, or community-based organizations.⁶⁸

While these legal spaces provide some opportunities, they are simply insufficient for countering the illegal spaces created by the disastrous effects of the federal prohibition. For undocumented workers living within the US, the federal prohibition essentially creates a distinct underclass of workers. For this reason, undocumented work resistance is necessary as a response to the increasing incongruence between undocumented immigrants' work experiences

62. Addendum to the Revised Memorandum of Understanding between the U.S. Dep'ts of Homeland Sec. and Labor Concerning Enforcement Activities at Worksites (May 6, 2016), <https://www.dol.gov/general/immigration/2016-addendum> [<https://perma.cc/KPK6-UTXY>].

63. Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Reaffirms Commitment to Protecting Undocumented Workers from Discrimination (June 28, 2002), <https://www.eeoc.gov/eeoc/newsroom/release/6-28-02.cfm> [<https://perma.cc/PK9M-Y78Q>]; Fact Sheet No. 48, U.S. Dep't of Labor, Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman Plastics* Decision on Laws Enforced by the Wage and Hour Division (July 2008), <https://www.dol.gov/whd/regs/compliance/whdfs48.htm> [<https://perma.cc/Z5E8-J2MH>].

64. Press Release, U.S. Equal Emp't Opportunity Comm'n, *supra* note 63; Fact Sheet No. 48, *supra* note 63.

65. 8 U.S.C. § 1101(a)(15)(U) (2018); 8 U.S.C. § 1101(a)(15)(T) (2018).

66. Some scholars suggest that a right to work may exist independently from rights related to migration. The Thirteenth Amendment, for example, can be read as not only the right to be free from coerced labor but also the freedom and autonomy to work. U.S. CONST. amend. XIII; Stanley Aronowitz, Shirley Lung & Ruthann Robson, *Work, Work, and More Work: Whose Economic Rights?* 16 CUNY L. REV. 391, 395 (2013); Kim, *supra* note 16, at 1583; Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923, 927 (2007). Geoffrey Heeren argues for a return to the substantive due process right to work fashioned by the Supreme Court during the pre-*Lochner* era. See Heeren, *supra* note 29, at 197.

67. Lee, *Outsiders Looking In*, *supra* note 15, at 1073 n.50–52.

68. *Id.* at 1086 (noting the use of unions, worker centers, and community-based organizations by undocumented workers in asserting their rights).

and the federal immigration framework. The next Section of this piece explores how states and localities can take advantage of these legal spaces to engage in undocumented work resistance.

II. UNDOCUMENTED WORK RESISTANCE

There is a range of undocumented work resistance measures available. I offer a three-part typology that illustrates the different ways in which state and local resistance measures can commonly serve to legalize undocumented work. First, recognition measures recognize undocumented work by providing tax credits, professional licensing, or funding to programs that support the formation of businesses. Second, protection measures protect undocumented workers by regulating the health and safety of undocumented work. Third, noncooperation measures involve states and localities promoting undocumented work by refusing to assist in the enforcement of the federal prohibition or issuing local work permits. Through this recognition, protection, or promotion through noncooperation, these resistance measures help to legalize undocumented work.

Further, these measures range from those that take advantage of the legal spaces of undocumented work to others that more directly collide with the federal immigration framework. Congress, of course, may preempt any law that expressly or impliedly obstructs, contradicts, or conflicts with federal law.⁶⁹ In the immigration context, states historically had more leeway to enact laws until the nineteenth century, when the doctrine of federal exclusivity in immigration began to take hold.⁷⁰ Yet the Supreme Court has developed an immigration preemption jurisprudence that provides room for state and local resistance measures.

Using the typology to analyze such federalism concerns, this Section finds that the vast majority of undocumented work resistance measures appear to be constitutional. These resistance measures take advantage of the legal spaces that undocumented work occupies by focusing on concerns that the federal prohibition does not reach, such as the health, safety, and well-being of undocumented workers. The few measures that raise federalism concerns may either be tailored to respond to such concerns or nonetheless be used as part of a strategy to resist the federal prohibition of undocumented work.

States and localities, however, may face pushback. In particular, federal and state governments may seek to retaliate against states and localities that take on undocumented work resistance. While federal retaliation against states and localities is constrained by the Constitution, state retaliation against localities presents a larger threat. This Section briefly analyzes these challenges.

69. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152–53 (1982).

70. *Cunningham-Parmeter, Forced Federalism*, *supra* note 33, at 1683–84.

A. Resistance Typology

1. Recognition

States and localities can engage in undocumented work resistance measures that recognize the legal aspects of undocumented work. The federal law prohibits the employment of undocumented workers but does not regulate other aspects of the lived experiences of undocumented workers. It does not, for example, address whether workers can get tax credits, professional licenses, governmental IDs, or state and local public benefits.⁷¹ Nor does it prohibit undocumented work if it is conducted within a cooperative or as a business owner.⁷² Undocumented work resistance, therefore, can take advantage of these legal spaces where the federal prohibition does not reach in order to recognize undocumented work.

Peter Markowitz and Stella Elias Burch have argued that the current immigration federalism jurisprudence has made it constitutionally permissible for inclusive state and local laws to “regulate the lives of immigrants in areas ‘which the States have traditionally occupied.’”⁷³ While the contours of the preemption analysis are far from clear, state and local measures are generally permissible when they do not directly concern the regulation of who may be admitted to the country and the circumstances under which individuals are allowed to remain.⁷⁴ There are two types of preemption issues that may arise: conflict preemption and field preemption. Conflict preemption is where either compliance with both federal and state law is a physical impossibility or state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.⁷⁵ By contrast, field preemption focuses on whether the federal government has fully occupied the field it has chosen to regulate.⁷⁶

State and local measures that do not regulate immigration but rather seek to positively impact the everyday lives of immigrants tend to be permissible under both preemption doctrines. Many of the proposed resistance measures to recognize undocumented work pass constitutional muster because they seek to protect the public health, safety, and well-being of residents, which fall under the traditional “historic police powers of the States.”⁷⁷ Among those protections, the

71. See *infra* notes 72–73 below. The immigration laws restrict states and localities from providing public benefits to undocumented workers without an affirmative enactment of law.

72. Scott L. Cummings, *Developing Cooperatives as a Job Creation Strategy for Low-Income Workers*, 25 N.Y.U. REV. L. & SOC. CHANGE, 181, 197 (1999); Heeren, *supra* note 29, at 246.

73. Markowitz, *supra* note 21, at 900; Elias Burch, *supra* note 21, at 741; see also MOTOMURA, IMMIGRATION OUTSIDE OF THE LAW, *supra* note 21, at 152–54 (describing the diffuse harm, if any, of inclusionary policies compared to those created by exclusionary policies).

74. See, e.g., Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT’L L. 201, 202–03 (1994) (noting “as state lawmaking moves away from the ‘immigration’ end of the spectrum and toward ‘alienage,’ it touches more on areas that states routinely regulate”).

75. *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (citations omitted).

76. *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152–53 (1982).

77. *Dowling v. Slotnick*, 712 A.2d 396, 404 (Conn. 1998) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

Supreme Court has upheld state laws that regulate labor standards to protect workers.⁷⁸

Relatedly, state and local measures that serve a legitimate purpose other than regulating immigration are not likely to create a conflict with federal objectives. Thus, such measures would not create a conflict preemption problem. There are a growing number of state and local measures concerning undocumented immigrants, such as those providing in-state tuition benefits, driver's licenses, or public health benefits.⁷⁹ Such measures do not pose a conflict preemption problem precisely because they address legitimate state and local interests rather than seek to create an obstacle to the federal scheme to control migration.⁸⁰

While an argument can be made that any measure that improves the lives of undocumented immigrants is contrary to federal objectives, the Supreme Court has held that obstacle preemption requires more than “some purely speculative and indirect impact on immigration.”⁸¹ State and local governments, therefore, can engage in resistance measures that recognize undocumented work in order to improve public safety, public health, and economic outcomes for local residents, such as providing tax credits, extending state benefits, and providing professional licenses. In tailoring these resistance measures, however, states and localities must be mindful of developing the record to include how such measures are motivated by legitimate state and local interests.⁸²

States, for example, could provide undocumented workers with tax credits if they have paid taxes on undocumented work. Twenty-five states currently have a version of the earned income tax credit (EITC) modeled after the federal tax credit, for which undocumented workers are ineligible.⁸³ States could amend their tax laws to provide the EITC, or other tax credits based on work, to undocumented workers.

Further, states could extend benefits to all local residents regardless of immigration status.⁸⁴ The tax contributions made by undocumented workers to the local economy, in part, can help justify such policies. A few states have already expanded medical coverage for children regardless of immigration

78. *Metro. Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985).

79. NATIONAL IMMIGRATION LAW CENTER, *supra* note 10.

80. Markowitz, *supra* note 21, at 899; Hing, *supra* note 21, at 296.

81. Markowitz, *supra* note 21, at 899 (quoting *De Canas v. Bica*, 424 U.S. 351, 355–56 (1976)).

82. Hing, *supra* note 21, at 296–97; *see, e.g.*, Griffith, *California as a Laboratory*, *supra* note 22, at 1303 (illustrating the depth of California's police power interest in regulating agricultural labor relations).

83. 26 U.S.C. § 32(c)(1)(D) (2018); *State and Local Governments with Earned Income Tax Credit*, INTERNAL REVENUE SERV. (Dec. 7, 2016), <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/states-and-local-governments-with-earned-income-tax-credit> [<https://perma.cc/6BTA-QKZ8>].

84. It would be problematic if such benefits were otherwise limited to working families, presenting the classic divide between workers who have “earned” such benefits and those who are otherwise deemed “unworthy.”

status.⁸⁵ States could also expand eligibility for state funding for temporary cash assistance or food assistance programs. Several states have extended such benefits beyond the more limited federal “qualified alien” definition.⁸⁶ The state of Washington, for example, extends food assistance to all immigrants who are Persons Residing Under Color of Law (PRUCOL), which includes immigrants who do not have lawful status but are otherwise applicants for immigration relief.⁸⁷ At the local level, such services might include free legal services, vocational training, or English for Speakers of Other Languages (ESOL) instruction, provided in partnership with community-based organizations.⁸⁸

Undocumented workers could qualify for professional licenses. Several states have already grappled with the issue of whether to extend their licensing laws beyond eligible “qualified aliens.”⁸⁹ In New York, Florida, and Nebraska, Deferred Action for Childhood Arrivals (DACA) recipients have successfully advocated for the expansion of the eligibility requirements for professional licenses, although these new laws still require federal work authorization.⁹⁰ California, however, has made all professional licenses available regardless of immigration status by permitting the use of an ITIN, as opposed to a Social Security number, as proof of identification.⁹¹ States and localities could also issue certificates for certain kinds of job-related training. These certificates, for example, could be akin to the ones federal agencies issue for the completion of safety training for working with pesticides or in construction.⁹² Such

85. For example, the Children’s Health Insurance Program (CHIP). *See also* CAL. WELF. & INST. CODE § 14007.8 (West 2018) (“[A]n individual who is under 19 years of age and who does not have satisfactory immigration status . . . shall be eligible for the full scope of Medi-Cal benefits . . .”).

86. 8 U.S.C. § 1641(b) (2018) (defining “qualified alien” as those with immigration status, such as lawful permanent residents or refugees).

87. WASH. REV. CODE ANN. § 74.08A.120 (West 2018).

88. *See* John Byrne, *Emanuel Announces Immigrant Legal Fund*, CHI. TRIB. (Dec. 2, 2016), <http://www.chicagotribune.com/news/local/politics/ct-rahm-emanuel-immigrant-legal-fund-met-1203-20161202-story.html> [<https://perma.cc/32EU-DCLW>]; *Our Programs, Access to Justice*, NYC MAYOR’S OFF. ON IMMIGRANT AFF., <http://www1.nyc.gov/site/immigrants/index.page> [<https://perma.cc/G3LD-K5XY>] (facilitating access to justice for New Yorkers through a free immigration legal support program); *New York Immigrant Family Unity Project*, THE BRONX DEFS., <https://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project/> [<https://perma.cc/8W35-2XLS>] (“Funded by the New York City Council, the New York Immigrant Family Unit Program (NYIFUP) provides free, high-quality legal representation to every low-income immigrant facing deportation in the City of New York . . .”).

89. Michael A. Olivas, *Within You Without You: Undocumented Lawyers, DACA, and Occupational Licensing*, 52 VAL. L. REV. 65, 108–53 (2017).

90. N.Y. COMP. CODES R. & REGS. tit. 8, § 59.4 (West 2018); FLA. STAT. ANN. § 454.021 (West 2018); NEB. REV. STAT. ANN. § 4-111 (West 2018); *see also* Olivas, *supra* note 89 (detailing the occupational licensing requirements in each state).

91. S.B. 1159, 2013–14 Leg., Reg. Sess. (Cal. 2014).

92. *See, e.g.*, 40 C.F.R. § 170.230 (2018) (providing a training certificate for safety-trained pesticide handlers); OCCUPATIONAL SAFETY AND HEALTH ADMIN., OUTREACH TRAINING PROGRAM 1 (Apr. 1, 2017) (providing course completion cards for workers trained to recognize, abate, and prevent job related hazards).

certifications could serve to bolster the job qualifications of undocumented workers.

State or local public benefits, which include professional licenses, raise the special issue of express preemption by the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).⁹³ PRWORA prohibits providing state or local benefits to undocumented immigrants.⁹⁴ Yet it explicitly permits extensions of state or local benefits, if the right is affirmatively created by a state enactment of law after August 22, 1996.⁹⁵ Express preemption can be avoided as long as the state government creates the measure for benefits by an affirmative enactment of law.

Another proposal involves states and localities providing IDs to help recognize undocumented workers. About a dozen jurisdictions provide driver's licenses to residents regardless of immigration status.⁹⁶ Several localities also offer municipal IDs to all local residents, which help undocumented residents access city agencies, hospitals, and banks.⁹⁷ Such IDs can also serve the purpose of legitimizing undocumented work. Day laborer centers, for example, have used worker identification cards to both help undocumented workers address police harassment while seeking work and facilitate the hiring of undocumented workers.⁹⁸ A local ID program could also identify a worker's qualifications for jobs, such as job safety training certificates or professional licensing.

Finally, states and localities could provide funding to incubators or programs that help undocumented workers form their own businesses or cooperatives. The federal prohibition on undocumented work does not apply to business owners or members of a cooperative because they are not engaged in the "hir[ing]" or "employment" of "unauthorized aliens" as defined by IRCA.⁹⁹ New York City's Department of Small Business Services, for example, provided funding to ten partner organizations to launch the Worker Cooperative Business

93. Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 103-193, 110 Stat. 2105 (1996) (codified in scattered sections of U.S.C.).

94. 8 U.S.C. § 1621(a) (2018). Some services offered by states and localities, such as legal services, vocational training, or ESOL classes, do not meet the definition of "public benefit." 8 U.S.C. § 1621(c) (2018).

95. 8 U.S.C. § 1621(d) (2018).

96. SHELLER CENTER FOR SOCIAL JUSTICE, DRIVER'S LICENSES FOR ALL: THE KEY TO SAFETY AND SECURITY IN PENNSYLVANIA 14-16 (2015).

97. SILVA MATHEMA, PROVIDING IDENTIFICATION TO UNAUTHORIZED IMMIGRANTS: THE STATE AND LOCAL LANDSCAPE OF IDENTIFICATION FOR UNAUTHORIZED IMMIGRANTS 20-22 (2015).

98. See, e.g., *Frequently Asked Questions*, PASADENA CMTY. JOB CTR. (Apr. 5, 2009, 1:33 PM), <http://pasadenajobcenter.com/about-us/frequently-asked-questions/> [https://perma.cc/E5XS-XWQW] (noting that all Day Laborers, who are members of the Pasadena Community Job Center, "are registered and own a Pasadena Community Job Center ID card"). Governments often respond to day laborers by targeting day laborers for police surveillance and arrests. Elizabeth J. Kennedy, *The Invisible Corner: Expanding Workplace Rights for Female Day Laborers*, 31 BERKELEY J. EMP. & LAB. L. 126, 147 (2010).

99. 8 U.S.C. § 1324a(a)(1) (2018).

Development Initiative.¹⁰⁰ This program helped to fuel the rise of worker cooperatives that included those created by female immigrant entrepreneurs, many of whom are undocumented.¹⁰¹ Localities could also help fund immigrant incubators to help undocumented workers overcome traditional exclusion from the labor market by learning to create their own businesses.¹⁰²

While resistance measures that provide funding to such nonprofit incubators could be viewed as an obstacle to federal immigration law because they seek to circumvent the federal prohibition on employment, one response to such concerns is to design state and local measures to extend beyond undocumented workers to all community members who could benefit from such assistance. The Supreme Court recently confirmed that finding conflict preemption does not justify a “freewheeling judicial inquiry into whether a state statute is in tension with federal objectives” but rather requires that a “high threshold must be met if a state law is to be pre-empted.”¹⁰³ A more generalized program for community members, therefore, is unlikely to meet the high threshold necessary to conflict with federal immigration enforcement objectives.

Recognition measures, such as providing benefits, issuing IDs or licenses, or facilitating business ownership can avoid federalism concerns while helping to support undocumented workers. By recognizing the legal aspects of undocumented work, these measures offer one way to push back on the illegality of undocumented work.

2. Protection

The federal prohibition on undocumented work helps to create exploitative workplaces. Yet, as discussed below, the courts and governmental agencies have recognized the right of undocumented workers to be paid, to be free from discrimination, and to work in safe workplaces. These legal spaces provide an opportunity for states and localities to engage in a variety of resistance measures that increase protection for undocumented workers in the workplace.

The Supreme Court has recognized that “[s]tates possess broad authority under their police powers to regulate the employment relationship to protect

100. NYC DEP’T OF SMALL BUS. SERVS. & MAYOR’S OFFICE OF CONTRACT SERVS., WORKING TOGETHER: A REPORT ON THE FIRST YEAR OF THE WORKER COOPERATIVE BUSINESS DEVELOPMENT INITIATIVE 5 (2015).

101. Frank G. Runyeon, *Immigrants Fuel the Rise of Worker Cooperatives*, N.Y. NONPROFIT MEDIA (Nov. 7, 2016), <http://nynmedia.com/news/immigrants-fuel-the-rise-of-worker-cooperatives> [<https://perma.cc/NW44-8438>].

102. See, e.g., PHILADELPHIA IMMIGRANT INNOVATION HUB, <http://www.phillyihub.org/> [<https://perma.cc/VUK9-2RXZ>] (last visited Sept. 9, 2018) (providing entrepreneurial immigrants with the tools needed to create and develop their businesses); CMTY. ENTER. DEV. SERVS., www.cedsfinance.org/ [<https://perma.cc/AK89-X9M6>] (last visited Sept. 9, 2018) (assisting refugees, immigrants, and low-income individuals in Denver who want to create or grow businesses).

103. *Chamber of Commerce v. Whiting*, 563 U.S. 582, 607 (2011) (citations omitted); see also Griffith, *California as a Laboratory*, *supra* note 22, at 1295 (stating that “speculative obstacles between federal and state law are not sufficient to merit preemption”).

workers within the State.”¹⁰⁴ IRCA regulates undocumented work by prohibiting the hiring of workers without authorization and expressly preempts state or local law from imposing additional civil or criminal sanctions against employers for hiring undocumented workers.¹⁰⁵ Apart from this express preemption provision, IRCA does not generally occupy the field of regulating the workplace.¹⁰⁶ State and local resistance measures that focus on protecting undocumented workers should therefore not pose a field preemption problem.¹⁰⁷

As a matter of conflict preemption, one can argue that the underlying purpose of IRCA supports state and local measures to counter the exploitation of undocumented workers. Most recently, in striking down a state law that criminalized undocumented work, the Supreme Court in *Arizona v. United States* found 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.”¹⁰⁸

The Court has previously, however, characterized IRCA in a different way. In *Hoffman Plastic*, the Court premised its holding on the concept that IRCA’s central purpose was to combat “the employment of illegal aliens.”¹⁰⁹ At first it appears difficult to resolve these different views by the Supreme Court. Yet the argument for reconciling these differences is to show how the protection of undocumented workers would actually serve IRCA’s purpose to disincentivize employers from hiring such workers.¹¹⁰ Further, it is significant that the *Hoffman Plastic* Court found that the undocumented worker in question was still protected by the NLRA.¹¹¹ In other words, it did not find that the primacy of IRCA’s prohibition foreclosed all workplace rights (just the back pay remedy sought by an undocumented immigrant who had committed “serious misconduct” by using false documents).¹¹² Since the *Hoffman Plastic* decision, many courts have found

104. *De Canas v. Bica*, 424 U.S. 351, 356 (1976); see also Griffith, *California as a Laboratory*, *supra* note 22, at 1296 (stating that even with the passage of IRCA, “the Court still cites *De Canas* to make the general proclamation that employment regulations emanate from the states’ historic police powers even if they relate to immigration”).

105. 8 U.S.C. § 1324a(h)(2) (2018).

106. Griffith, *California as a Laboratory*, *supra* note 22, at 1295–96.

107. See, e.g., *Design Kitchen and Baths v. Lagos*, 882 A.2d 817, 826–27 (Md. 2005) (reviewing state court decisions that found IRCA did not expressly or impliedly preempt their state workers’ compensation laws); see also *Safeharbor Emp’r Servs. I, Inc. v. Velazquez*, 860 So. 2d 984, 986 (Fla. Dist. Ct. App. 2003) (holding that Florida’s inclusion of undocumented immigrants in workers’ compensation benefits was not preempted by federal law); *Medellin*, 17 Mass. Workers’ Comp. Rep. 592, 603 (Dep’t Ind. Acc. Dec. 23, 2003) (finding that federal immigration law does not preempt Massachusetts’ decision to afford workers’ compensation to undocumented workers).

108. *Arizona v. United States*, 567 U.S. 387, 405 (2012).

109. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

110. *Id.* at 914; 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, 909–10 (2014) [hereinafter Griffith, *Federal Immigration Exclusion*].

111. *Hoffman Plastic*, 535 U.S. at 144–45.

112. *Id.* at 146.

the protection of undocumented immigrants as consistent with the purpose of IRCA.¹¹³ *Hoffman Plastic*, therefore, should not serve as a bar on the enactment of state or local laws that protect undocumented workers.

Moreover, in conducting a forensic analysis of the legislative history to IRCA, Kati Griffith reveals that labor concerns were central in enacting the law.¹¹⁴ This sentiment is echoed in the much cited 1986 House Report, which states: “[T]he committee does not intend that any provision of this Act would limit the powers of State or Federal labor standard agencies . . . to remedy unfair practices committed against undocumented employees for exercising their rights.”¹¹⁵ Griffith argues, however, that this report is not an isolated piece of legislative history, but rather “carries more persuasive weight . . . in the context of a long line of reports that echo this sentiment.”¹¹⁶

The legal space of protection, therefore, provides an opportunity for resistance measures that increase or facilitate the exercise of rights available to undocumented workers. Many undocumented workers fear exercising their rights because they fear that their employers might retaliate by calling ICE. Some states and localities have addressed this fear of retaliation by creating protective measures. California, for example, enacted a law that protects undocumented workers by issuing civil penalties for employers who call the police or ICE in response to workers asserting their rights under the state labor laws.¹¹⁷ A number of states and localities, such as Colorado, Maryland, Virginia, California, and Seattle, Washington, have defined their criminal wage theft or extortion laws to include situations when employers use immigration-related threats to withhold wages or coerce services from undocumented workers.¹¹⁸ Further, some state or local agencies have sought to promote the rights of undocumented workers by issuing public statements about the enforcement of labor laws regardless of

113. Griffith, *Federal Immigration Exclusion*, *supra* note 110, at 890.

114. *Id.* at 909–10.

115. H.R. REP. NO. 99-682, pt. 2, at 8–9 (1986).

116. Griffith, *Federal Immigration Exclusion*, *supra* note 110, at 915.

117. CAL. LABOR CODE § 244 (West 2017); CAL. BUS. & PROF. CODE § 494.6 (West 2018).

118. SEATTLE, WASH., MUN. CODE § 12A.08.060(B)(6) (2018), https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT12ACRSCO_SUBTITLE_I_CRSCO_CH12A.08OFAGPR_12A.08.060TH [<https://perma.cc/4W45-BZYT>]; COLO. REV. STAT. ANN. § 18-3-207(1.5) (West 2018); VA. CODE ANN. § 18.2-59 (West 2018); MD. CODE ANN. CRIM. LAW § 3-701(b)(3) (West 2018); CAL. PENAL CODE § 519(5) (West 2018).

immigration status.¹¹⁹ These agencies may also be willing to take anonymous or confidential complaints from undocumented workers.¹²⁰

While all these measures undoubtedly seek to address the fears related to ICE retaliation, none of them specifically address undocumented workers' economic incentives to remain silent.¹²¹ When undocumented workers are discharged in retaliation, they may have difficulty finding new jobs given their exclusion from the formal labor market.¹²² Further, because of *Hoffman Plastic*, undocumented workers cannot legally obtain the remedy of reinstatement or back pay for an unlawful firing.¹²³

States and localities, however, may create statutory penalties for retaliatory discharge.¹²⁴ In this way, statutory penalties can be analogized to punitive rather than back pay damages, which are permissible regardless of immigration status.¹²⁵ As a practical matter, the availability of such statutory penalties might help an undocumented worker otherwise temporarily without work because of unlawful retaliation.

The expansion of undocumented workers' rights can also occur as part of a movement to more generally increase low-wage workers' rights. States and localities, for example, have focused on measures to improve the rights of workers in industries that rely heavily on undocumented workers, such as day labor or domestic work.¹²⁶ A whole host of campaigns for new and improved

119. See, e.g., CAL. CIV. CODE § 3339 (West 2018) (declaring that all rights and remedies available under state law are available to everyone regardless of immigration status); OFFICE OF MASSACHUSETTS ATT'Y GEN. MAURA HEALEY, *Massachusetts Wage & Hour Laws* (noting that retaliation against any employee is unlawful regardless of the employee's immigration status), <http://www.mass.gov/ago/docs/workplace/wage/wagehourposter.pdf> [<https://perma.cc/S8VB-35DD>]; STATE OF N.J. DEP'T OF LABOR AND WORKFORCE DEV., *Wage and Hour Compliance FAQs* (Apr. 6, 2017) (noting that New Jersey will not investigate the immigration status of any worker and that labor laws apply to all workers regardless of immigration status), https://lwd.state.nj.us/labor/wagehour/content/wage_and_hour_compliance_faqs.html#q48 [<https://perma.cc/CC9M-YQR9>].

120. D.C. CODE § 32-1306(a-1) (2016), <https://beta.code.dccouncil.us/dc/council/code/sections/32-1306.html> [<https://perma.cc/Q5KP-ZPJA>]; VT. STAT. ANN. tit. 21 § 342a(h) (West 2018); SEATTLE, WASH., MUN. CODE § 14.20.050(B) (2017), https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.20WATICORE [<https://perma.cc/SLV6-QLN3>].

121. Rathod, *supra* note 4, at 862; Gleeson, *Labor Rights for All*, *supra* note 16, at 583.

122. UNDOCUMENTED IMMIGRANTS IN THE UNITED STATES: AN ENCYCLOPEDIA OF THEIR EXPERIENCE 395 (Anna Ochoa O'Leary, ed. 2014) (discussing how the restrictions put upon undocumented workers result in them relying on the informal economy to make a living).

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

124. See, e.g., 29 U.S.C. § 1854 (2018) (authorizing statutory penalties for labor violations against agricultural workers).

125. See, e.g., *Almanza v. Baird Tree Serv. Co.*, No. 3:10-CV-311, 2012 WL 4026933, at *6-7 (E.D. Tenn. Sept. 12, 2012) (concluding that *Hoffman Plastic* did not bar all remedies, including punitive damages, for undocumented workers under the NLRA or other federal statutes); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056, 1061 (N.D. Cal. 2002) (declining to extend *Hoffman Plastic* to bar undocumented workers from seeking compensatory and punitive damages).

126. See, e.g., Domestic Bill of Workers Rights, S.B. 535, 27th Leg., 2013 Reg. Sess. (Haw. 2013) (codified at HAW. REV. STAT. §§ 378-2, 387-1 (West 2018)) (prohibiting employers from

wage theft laws at the state and local level have sought to improve enforcement of wage and hour violations against employers, something particularly relevant to undocumented workplaces.¹²⁷ For jurisdictions that are openly hostile to immigrants, resistance measures that focus more broadly on protecting all workers may be a more realistic starting place.¹²⁸ For these jurisdictions, protective measures for all workers can be more politically palatable because such measures address the exploitation of undocumented workers within the greater context of the government's failure to protect all workers.¹²⁹ Such measures might also bypass the need for legislative action by creating policies or programs at the state or local agency level.¹³⁰ An agency, for example, could use its discretionary enforcement powers to focus on industries that employ a majority of undocumented workers without need for legislative authorization.¹³¹

Even with increased protections on the books, undocumented workers will still be hesitant to come forward with complaints. Apart from fears of retaliation, workers fail to complain because of lack of knowledge, will, or ability to make claims.¹³² Therefore, rather than relying on a system driven by complaints, states and localities should consider measures that more proactively take on enforcement to make undocumented workers' rights real. State and local measures—such as the education of employers and workers or aggressive enforcement of workplace rights in workplaces heavily concentrated with undocumented workers—could be actually more significant to expanding undocumented workers' rights. In New York, for example, the Taskforce to Combat Worker Exploitation focuses on combating exploitation, with a particular interest in industries employing “off the books” workers.¹³³ Local

discriminating against domestic service workers “in compensation or terms, conditions, or privilege of employment”); Day Laborer Act, H.B. 672, 47th Leg., 2005 1st Sess. (N.M. 2005) (codified at N.M. STAT. ANN. § 50-15-1 *et seq.* (West 2018)) (authorizing a penalty of treble damages for the failure to pay day laborers for work performed).

127. NIK THEODORE, *THE MOVEMENT TO END WAGE THEFT: A REPORT TO THE DISCOUNT FOUNDATION* 15–17 (2011), http://www.faircontracting.org/PDFs/wage_theft/Wage_Theft_Report_2011_Oct.pdf [<https://perma.cc/S8VB-35DD>] (discussing local campaigns that led to the enactment of laws addressing wage theft of workers in Miami-Dade (Wage Theft Ordinance), New York (Wage Theft Prevention Act), and Chicago (Illinois Wage Payment and Collections Act)).

128. Many states and localities are actively engaging in efforts to further penalize undocumented workers, including by instituting mandatory E-Verify, increasing sanctions for employers, or criminalizing undocumented workers who use false documents. *See supra* note 33.

129. Lee, *Outsiders Looking in*, *supra* note 67, at 1086. New local laws concerning wage theft, misclassification, or temp workers address predominant issues for undocumented workers.

130. *Id.* at 1085.

131. THEODORE, *supra* note 127, at 23–24.

132. Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 *IND. L.J.* 1069, 1089 (2014).

133. GOVERNOR ANDREW M. CUOMO'S TASK FORCE TO COMBAT WORKER EXPLOITATION, 2016 REPORT 7 (2016), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EWTFReport_27.pdf [<https://perma.cc/2D29-P9K3>].

agencies, therefore, can engage in measures that partner with local chambers of commerce, community-based organizations, or foreign consulates to publicize workers' rights with an explicit message that the agency's mandate encompasses undocumented workers.¹³⁴

Finally, localities could provide land, property, or financial support to create hiring halls that welcome workers regardless of immigration status. For undocumented workers, intermediaries can play a significant role in empowering workers to navigate their legal rights. In the context of day laborers, a number of cities, such as Los Angeles and Portland, Oregon, fund day laborer centers that serve this purpose.¹³⁵ These sites are places where both workers and employers are encouraged to gather and negotiate hiring. Many of the nonprofits that help run these sites also provide workplace safety or "know your rights" training. El Centro Humanitario in Denver, for example, not only provides trainings for workers but also sets the terms for the hiring of day laborers with employers.¹³⁶ The transparency of these sites, coupled with trainings, aim to provide workers with more bargaining power in an industry where unsafe jobs and wage theft are rampant.¹³⁷ Such sites could, therefore, provide a model for hiring halls that apply beyond day laborers to other unskilled workers who have a difficult time navigating the labor market.

3. Noncooperation

This Section will discuss the numerous examples of undocumented work resistance measures that involve state and local noncooperation with the federal immigration framework. These noncooperation measures range from those that likely avoid federal preemption to others that more directly collide with the federal government's authority to regulate undocumented work. Examples of resistance measures include refusing to assist in the enforcement of the federal prohibition of undocumented work or issuing local work permits in defiance of the federal law.

Many actions taken on by "sanctuary cities" involve some form of noncooperation, like prohibiting inquiry into immigration status by government officials or restricting the ability of local officials to assist with federal

134. See S.F., CAL. ADMIN. CODE § 12R.25 (2017) (creating a partnership outreach program between the local enforcement agency and community-based organizations to promote workers' rights).

135. Jason McGahan, *Day Laborers Have Become an Easy Target for Anti-Immigrant Vigilantes*, LA WEEKLY (Jan. 10, 2017, 7:29 AM), <http://www.laweekly.com/news/day-laborers-have-become-an-easy-target-for-anti-immigrant-vigilantes-7803494> [https://perma.cc/JJ8E-BG3B]; Andrew Theen, *Day Labor in Portland: Five Years After Landing on Eastside, VOZ Longs for Permanent Home*, OR. LIVE (Oct. 25, 2013, 10:21 PM), http://www.oregonlive.com/portland/index.ssf/2013/10/day_labor_in_portland_five_yea.html [https://perma.cc/SC7R-G3M8].

136. CENTRO HUMANITARIO, EMPLOYMENT PROGRAM <http://www.centrohumanitario.org/programs/employment/> [https://perma.cc/9K7Y-BSK5] (last visited Sept. 8, 2018).

137. Rathod, *supra* note 4, at 853.

immigration enforcement. Bill Ong Hing argues that carefully drafted noncooperation measures can survive preemption challenges.¹³⁸ Express preemption concerns arise from 8 U.S.C. §§ 1373 or 1644. Both statutory provisions prohibit states and localities from restricting the voluntary sharing of information by state or local governmental officials with ICE.¹³⁹ To the extent that such noncooperation polices are carefully tailored, they can avoid any conflict with 8 U.S.C. §§ 1373 and 1644. Noncooperation measures that simply prohibit government officials from asking about immigration status, for example, pose no problem because a restriction on asking about such information in the first instance does not interfere with the voluntary sending of information to ICE.¹⁴⁰ While broader restrictions on information sharing with ICE or using state or local resources to assist in immigration enforcement may pose a conflict, several jurisdictions have such restrictions coupled with a savings clause that exempts any assistance that “is required by Federal . . . statute.”¹⁴¹ The viability of such savings clauses, however, are an open question.¹⁴² Based on the rationale that 8 U.S.C. §§ 1373 and 1644 interfere with local public safety decisions, states and localities may still simply choose to proceed with broader measures.¹⁴³ Further, broader measures can avoid implied preemption concerns. These measures do not occupy the field of immigration regulation because they regulate local police or governmental conduct.¹⁴⁴ Similarly, such measures arguably do not conflict with federal objectives because such measures have the legitimate local purpose of promoting public safety and conserving local law enforcement resources.¹⁴⁵

Generalized state or local noncooperation measures are helpful for legalizing undocumented work. Seattle, for example, has a broad policy which states that “no Seattle City officer or employee shall inquire into the immigration

138. Hing, *supra* note 21, at 296.

139. 8 U.S.C. §§ 1373, 1644 (2018).

140. *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 731–32 (Ct. App. 2009) (finding that section 1373 does not prohibit cities from regulating the information that police obtain from immigrants).

141. *See, e.g.*, S.F., CAL., ADMIN. CODE § 12H.2 (2017) (barring the use of city or county funds to assist federal immigration law enforcement or to gather or disseminate release status or personal information “unless such assistance is required by Federal or State statute, regulation, or court decision”);

[http://library.amlegal.com/nxt/gateway.dll/California/administrative/administrativecode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco_ca\\$sync=1](http://library.amlegal.com/nxt/gateway.dll/California/administrative/administrativecode?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$sync=1) [<https://perma.cc/F24B-UDQL>]; NEW ORLEANS POLICE DEPT OPERATIONS MANUAL ch. 41.6.1 (Feb. 28, 2016).

142. Memorandum from Michael E. Horowitz, Inspector General, U.S. Dep’t of Justice to Karol V. Mason, Asst. Att’y Gen. for the Office of Justice Programs 5–6 (May 31, 2016).

143. *Compare* Hing, *supra* note 21, at 280 (arguing that sections 1373 and 1644 have Tenth Amendment problems when they attempt to force local cooperation) *with* *City of New York v. United States*, 179 F.3d 29, 35–36 (2d Cir. 1999) (rejecting a facial challenge under the Tenth Amendment to the federal law prohibiting state and local government from restricting the voluntary exchange of information with federal immigration authorities).

144. *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 732 (Ct. App. 2009); Elias Burch, *supra* note 21, at 740–41.

145. Hing, *supra* note 21, at 290.

status of any person.”¹⁴⁶ Other policies, such as Chicago’s Welcoming City Ordinance, prohibit law enforcement from “arrest[ing], detain[ing] or continu[ing] to detain a person solely on the belief that the person is not present legally in the United States, or that the person has committed a civil immigration violation.”¹⁴⁷ San Francisco’s policy is even broader where it prohibits any officer or employee from using “City funds or resources to assist in the enforcement of Federal immigration law or to gather or disseminate information regarding release status of individuals or any other such personal information . . . unless such assistance is required by Federal or State statute, regulation or court decision.”¹⁴⁸ All of these policies cover undocumented workers in multiple situations, including while undocumented workers are seeking work, during work hours at their place of employment, and when they go to a local agency to file a work-related complaint.

In jurisdictions without a noncooperation policy, undocumented work could serve as the starting place for a discussion about noncooperation measures. The general prohibition on asking about immigration information, for example, could be tailored to prohibit governmental officials from requesting such information at hiring or work sites. In addition, noncooperation measures could prohibit local law enforcement’s participation in any kind of workplace raid. Undocumented work, therefore, could serve as the catalyst to encourage discussion about noncooperation measures.

Particularly in a climate of more aggressive workplace enforcement, state and local noncooperation resistance measures could extend to private employers as well. California currently has a proposal that would require employers to ask for a judicial warrant before permitting ICE onto their worksites.¹⁴⁹ This proposal would also prohibit employers from disclosing the private information of workers without a subpoena, while requiring notification of the state department of labor about an ICE workplace raid or I-9 audit.¹⁵⁰ Federal law already includes a similar carve out for agricultural employers, where federal immigration enforcement officials “may not enter [the premises of the farm or

146. SEATTLE, WASH., MUN. CODE § 4.18.015(A) (2017), https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT4PE_CH4.18ENFEIMLA [<https://perma.cc/K542-3EDC>].

147. CHI., ILL., MUN. CODE § 2-173-042 (2017), [http://library.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:chicago_il](http://library.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates$fn=default.htm$3.0$vid=amlegal:chicago_il) [<https://perma.cc/N7V3-WHAT>].

148. S.F., CAL., ADMIN. CODE § 12H.2 (2017), [http://library.amlegal.com/nxt/gateway.dll/California/administrative/administrativecode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco_ca\\$sync=1](http://library.amlegal.com/nxt/gateway.dll/California/administrative/administrativecode?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$sync=1) [<https://perma.cc/R9N3-NBZ2>].

149. Employment Regulation, A.B. 450, 2017–18 Reg. Sess. (Cal. 2017), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB450 [<https://perma.cc/KH6L-PBC3>].

150. *Id.*

the outdoor agricultural operation] without the consent of the owner . . . or a properly executed warrant.”¹⁵¹

Alternatively, states and localities could consider using financial incentives, such as tax credits, to reward employers who enact noncooperation policies. For example, UNITE HERE, a union that represents hospitality workers, has negotiated collective bargaining agreements (CBA) with employers to commit to noncooperation policies with ICE.¹⁵² The CBA between UNITE HERE and Los Angeles hotels requires employers to refuse the following: (1) admittance of any agents of DHS who do not possess a search and/or arrest warrant; (2) inspection of I-9 forms by DHS or DOL only after a minimum of three days written notice and only when a DHS warrant or subpoena specifically names employees or requires the production of I-9 forms; and (3) revealing any additional information to DHS, such as “the names, addresses or immigration status” of any employees in the absence of a valid subpoena or search warrant.¹⁵³ Businesses are already eligible to receive tax credits or exemptions for taking positive actions vis-à-vis the larger community through the adoption of energy efficient technology or creation of jobs within certain industries.¹⁵⁴ States and localities, therefore, could similarly incentivize employers to voluntarily establish such policies through tax credits or exemptions.

Noncooperation resistance measures that restrict cooperation between employers and ICE raise separate questions from those measures that focus on restricting cooperation between state and local officials and ICE. On the one hand, such noncooperation measures may appear to raise conflict preemption concerns because they more directly interfere with the objectives of the federal prohibition of undocumented work. On the other hand, such measures do nothing more than delineate the minimum legal standards for cooperating with federal immigration enforcement during a workplace raid or audit. These measures are analogous to the “sanctuary city” measures that refuse to honor ICE requests to detain suspected immigration law violators.¹⁵⁵ Further, these measures serve the legitimate state or local purpose of fostering good relationships between employer and workers.

Finally, states and localities could defy the federal prohibition by issuing work permits, which authorize employment within that jurisdiction, to undocumented residents. However, such a measure would raise constitutional concerns. The Supreme Court in *Arizona v. United States* held that Senate Bill 1070’s mandate that state law enforcement enforce federal immigration laws was

151. 8 U.S.C. § 1357(e) (2006).

152. Virginia Parks, *Enclaves of Rights: Workplace Enforcement, Union Contracts, and the Uneven Regulatory Geography of Immigration Policy*, 104(2) ASS’N OF AM. GEOGRAPHERS 329, 333 (2014).

153. *Id.*

154. See, e.g., ALA. CODE §§ 40-18-374 (West 2018) (providing tax incentives for qualifying projects); MINN. R. 4301.0100 *et seq.* (West 2018) (granting subsidies to projects that create jobs).

155. See *supra* note 9.

preempted because they assumed powers that rest exclusively with the federal government.¹⁵⁶ Similarly, state or local resistance measures that provide work permits to undocumented workers would likely be preempted because they supplant the federal government's authority to regulate work authorization as part of federal immigration law.

So why even consider a resistance measure that might fail? If state or local governments enacted laws to issue work permits despite clear federal preemption, it might similarly aid in efforts to legalize undocumented work. The current situation of undocumented work is not only untenable but such failed measures may also still serve the purpose of legalizing undocumented work. State and local measures that seek to restrict immigration provide an example of how failed laws have managed to serve a significant symbolic purpose while contributing to the public discourse about the need to control immigration.¹⁵⁷ Proposition 187 in California, for example, banned undocumented immigrants from obtaining any state services. Proponents, who believed that the federal system was not doing enough to control immigration, propelled this anti-immigrant measure as a form of state-level resistance. While the initiative was "dead as a legal matter," it still went on to help frame the national conversation about undocumented immigrants and public benefits.¹⁵⁸

Further, the idea of a state or local program issuing work permits for undocumented workers is not unpopular.¹⁵⁹ Utah, in fact, created a state program to issue guest worker visas based on the federal guest worker program.¹⁶⁰ Given the obvious usurpation of federal immigration authority, Utah sought unsuccessfully for years to obtain a waiver from the federal government.¹⁶¹ While guest worker programs in and of themselves are problematic in terms of workers' rights,¹⁶² these efforts nonetheless provide examples of how states are actively considering the concept of authorizing the right to work within their jurisdictions. Resistance measures, therefore, could focus on providing lawful work authorization to residents in a non-guest worker format. For instance, state

156. *Arizona v. United States*, 567 U.S. 387, 409–10 (2012).

157. Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339, 1361–62 (2013).

158. *Id.* at 1374.

159. See Alex Nowrasteh, Opinion, *Immigration Reform: Let the States Lead the Way*, L.A. TIMES (June 16, 2015), <http://www.latimes.com/nation/la-oe-nowrasteh-let-states-issue-guest-worker-visas-20150613-story.html> [<https://perma.cc/8PPS-88YY>] (providing examples of state-level guest-worker program proposals in Texas and California).

160. UTAH CODE ANN. § 63G-12-201 *et seq.* (West 2018); see also Kansas Business Workers and Community Partnership Act, H.B. 2603, 2012 Sess. (Kan. 2012); State Sponsored Visa Pilot Program Act of 2017, S.B. 1040, 115th Cong. (2017) (proposing a federal program to authorize states to create and run their own guest worker programs).

161. UTAH CODE ANN. § 63G-12-202 (West 2018); Michelle L. Price, *Utah Plans to Repeal Guest Worker Law After Federal Approval Never Came*, STANDARD EXAMINER (Feb. 5, 2016, 8:17 PM), <http://www.standard.net/Government/2016/02/05/Utah-plans-to-repeal-guest-worker-law-after-federal-approval-never-came> [<https://perma.cc/XTU2-DZCG>].

162. Jennifer J. Lee, *U.S. Workers Need Not Apply: Challenging Low-Wage Guest Worker Programs*, 28 STAN. L. & POL'Y 1, 14–15 (2017) [hereinafter Lee, *U.S. Workers Need Not Apply*].

and local governments could tailor resistance measures to require a waiver upfront from the federal government although it is unclear that such a waiver would adequately address preemption concerns. However, depending on the localized context, the fear of invalidation need not exclusively dictate the value of proceeding with such resistance measures.

B. Resistance Vulnerabilities

As states and localities take on undocumented work resistance, such measures may be vulnerable to push back. While many measures pose no federal preemption issues, a few may collide with the longstanding tension between the federal government's authority to regulate immigration and state and local measures impacting immigrants. In fact, regardless of the constitutional viability of such measures as discussed above, those opposing undocumented work resistance may still seek to legally challenge such measures on federalism grounds.

However, it is more likely that states and localities may also become targets for other kinds of direct retaliation by federal and state governments. Of the two, federal retaliation is easier to address since its contours are defined constitutionally. The Supreme Court's anti-commandeering doctrine states that Congress may not command state or local government to take affirmative acts on its behalf because of the Tenth Amendment.¹⁶³ Further, in *National Federation of Independent Business v. Sebelius*, the Court held that the federal government could not condition federal Medicaid funds on requiring the states to expand their Medicaid programs.¹⁶⁴ It not only held that states were required to have advance notice of the conditions on such funds but also that the withdrawal of funds could not effectively coerce jurisdictions into implementing a federal program.¹⁶⁵

Yet the federal government stands ready to retaliate against states and localities engaged in state and local resistance. The Trump Administration's Executive Order of January 25, 2017, for example, directs executive agencies to ensure that "sanctuary jurisdictions" that have noncooperation measures "do not receive Federal funds, except as mandated by law."¹⁶⁶ As a result, numerous jurisdictions are suing the federal government for violations of the Tenth Amendment and Spending Clause.¹⁶⁷ A federal court in California recently enjoined enforcement of the Executive Order of January 25, 2017, finding it

163. *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992).

164. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 585 (2012).

165. *Id.* at 577–78.

166. Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 30, 2017).

167. See *Complaint for Declaratory and Injunctive Relief, City of Chicago v. Sessions III*, No. 17-CV-05720 (N.D. Ill. filed Aug. 7, 2017); *Complaint for Declaratory Relief, City of Seattle v. Trump*, No. 17-CV-00497 (W.D. Wash. filed March 23, 2017); *Complaint for Declaratory and Injunctive Relief, City and County of San Francisco v. Trump*, No. 17-CV-00485-WHO (N.D. Cal. filed Jan. 31, 2017).

facially unconstitutional.¹⁶⁸ The Attorney General has since targeted “sanctuary” jurisdictions by requiring them to cooperate with immigration enforcement authorities as a condition of receiving federal criminal justice discretionary grant funding.¹⁶⁹ These compliance rules, however, appear to be legally problematic because they are not “germane” to the funding streams and go beyond the statutory authority of the federal criminal justice funding programs as established by Congress.¹⁷⁰ A federal judge in Illinois issued a nationwide preliminary injunction concerning the new compliance rules, and on October 13, 2017, denied the Department of Justice’s request for a stay until the Seventh Circuit Court of Appeals can hear the case.¹⁷¹ A federal judge in Philadelphia has similarly enjoined the Attorney General’s attempt to deny funding.¹⁷² These cases, therefore, illustrate that the ability of the Trump Administration to retaliate against states and localities is legally limited.¹⁷³

The more difficult question is how to respond to potential state retaliation against localities. Some localities are within states—such as California, New York, Illinois, and Washington—that would likely either support or be divided on how to respond to resistance measures, based on the political control of their state legislatures.¹⁷⁴ The concern, however, is with localities that may find themselves in states that are ready to retaliate against localities.¹⁷⁵ Texas, for example, recently enacted Senate Bill 4, which targets localities with “sanctuary policies” by banning the adoption of noncooperation policies.¹⁷⁶

Local governments are creatures of the state. As a matter of conventional legal theory, the state enjoys complete hegemony over its local governments.¹⁷⁷ While many cities have initial authority to regulate local matters through some

168. *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 530–36 (N.D. Cal. 2017).

169. Press Release, U.S. Dep’t of Justice, Att’y Gen. Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (Jul. 25, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial> [<https://perma.cc/6C75-QT4C>].

170. Annie Lai & Chris N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 58 SANTA CLARA L. REV. (forthcoming 2018).

171. Memorandum Opinion and Order, City of Chicago, No. 1:17-CV-05720 (N.D. Ill. Sep. 15, 2017); Memorandum and Order, City of Chicago, No. 1:17-CV-05720 (N.D. Ill. Oct. 13, 2017).

172. Memorandum Re: Pending Motion for Preliminary Injunction, City of Philadelphia, No. 2:17-CV-03894 (E.D. Pa. Nov. 15, 2017); Order, City of Philadelphia, No. 2:17-CV-03894 (E.D. Pa. Nov. 15, 2017).

173. Legislative attempts to retaliate against “sanctuary” jurisdictions have so far also failed. Lai & Lasch, *supra* note 170, at 112.

174. *State Partisan Comparison*, NAT’L CONFERENCE OF STATE LEGISLATURES (Apr. 11, 2018), <http://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx> [<https://perma.cc/UKT4-3PWN>].

175. See, e.g., S.B. 145, 2017–18 Sess. (N.C. 2017) (punishing localities that adopt “sanctuary” policies by making such localities ineligible for certain benefits and making them liable for crimes committed by undocumented immigrants); H.B. 14, 2017–18 Sess. (Pa. 2017) (withholding state funding from educational institutions with “sanctuary” policies).

176. S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (enacted).

177. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7 (1990).

form of home rule, which is the power to govern delegated by the state, cities often lose any head-to-head conflict between the state and city.¹⁷⁸ Yet cities are fighting back by challenging state attempts to preempt local measures. In Texas, for example, a growing list of localities—such as Austin, San Antonio, and El Paso—have filed lawsuits against the state challenging Senate Bill 4, and have so far successfully enjoined the law from taking effect.¹⁷⁹ Other localities too have challenged such retaliation by claiming impermissible infringement on their home-rule powers or raising constitutional violations.¹⁸⁰

Whether undocumented work resistance is worthwhile in more hostile states will largely rest on the political reality of such retaliation threats. It is easy for a few state legislators to propose retaliatory measures but politically much harder to get such measures enacted if they result in harming native-born citizens. Retaliatory measures, for example, that defund state university systems will ultimately harm the broader population that rely on these institutions.¹⁸¹ It is also possible that the threat, like in the federal context, will amount to a relatively minor part of the localities' budget.¹⁸² In other words, retaliatory threats may be more “bark than bite,” as they may be limited both legally and politically. Regardless, there may also be ways to tailor resistance measures around potential retaliation. Municipal ID programs, for example, retain minimal records on applicants.¹⁸³ Such measures would prevent any possible retaliatory attempts by the state to seize such records and identify applicants who have used foreign identity documents to obtain municipal IDs.

178. *Id.* at 10, 17.

179. Plaintiff's Complaint for Declaratory Judgment and Injunctive Relief, *El Paso Cty. v. Texas*, No. 17-CV-00459-OLG (W.D. Tex. filed May 22, 2017); *City of San Antonio v. Texas*, No. 17-CV-00489-OLG (W.D. Tex. filed June 1, 2017); *City of Austin's Complaint in Intervention, City of Austin v. Texas*, No. 17-CV-00489-OLG (W.D. Tex. filed June 2, 2017), ECF No. 6.

180. *See, e.g., City of Dayton v. State of Ohio*, No. 2015-1549, 87 N.E.3d 176, 186 (Ohio 2017) (finding that the state law seeking to preempt the city ordinances related to traffic cameras violates municipal home-rule authority); Amended Complaint, *Lewis v. Bentley*, No. 16-CV-00690-RDP (N.D. Ga. filed June 30, 2016), ECF No. 18, *appeal filed*, Notice of Transmittal (N.D. Ga. issued Mar. 3, 2017) (challenging state preemption of a municipal minimum wage ordinance as discriminatory on the basis of race).

181. *See supra* note 175 (noting a sample retaliatory state law proposal that pulls funding from state university systems).

182. Charlie Savage, *Sanctuary Cities Face Aid Cuts as Justice Dept. Tightens Screws*, N.Y. TIMES (Apr. 21, 2017), https://www.nytimes.com/2017/04/21/us/politics/sanctuary-city-justice-department.html?_r=0 [<https://perma.cc/7AXV-4G9H>] (revealing the following cuts to funding: \$4.3 million (New York City); \$2.3 million (Chicago's Cook County); \$1.7 million (Philadelphia); \$265,832 (New Orleans); \$11,537 (Las Vegas' Clark County); \$481,347 (Miami-Dade County); and \$937,932 (Milwaukee County)).

183. *See, e.g., An Ordinance in Relation to the Municipal Identification Card*, No. O2017-1950 (to be codified at CHI., ILL., MUN. CODE § 2-176-050) (requiring the Clerk to review but not collect documents provided by an applicant to prove identity); N.Y.C. ADMIN. CODE § 3-115(e) (having a policy that prevents the City from both indicating on the application the type of records used to establish residency and retaining copies of such identity documents).

III.

BENEFITS OF UNDOCUMENTED WORK RESISTANCE

Despite the challenges presented by undocumented work resistance, it is currently the most viable option for addressing the predicament created by federal law. In this Section, I explore how undocumented work resistance can provide benefits and disrupt the ways in which the federal immigration framework defines the illegality of undocumented work. While it grapples with some of the downsides of focusing on undocumented work, this Section also illustrates the potential power of topically focused resistance measures for organizing and building social movements necessary to engage in social and political change.

Undocumented work resistance immediately addresses the large human and social costs created by the illegality of undocumented work.¹⁸⁴ While undocumented workers work because they have to, they do so under conditions of exclusion, coercion, and unjust conditions in the workplace.¹⁸⁵ Recognition measures, such as governmental IDs, public benefits, or professional licensing, help undocumented workers overcome their exclusionary underclass status. Protection measures, ranging from those that seek to improve governmental enforcement against exploitative workplaces to those that facilitate the exercise of workplace rights, can counter the unjust conditions that undocumented workers face on a daily basis. Noncooperation measures similarly promote undocumented work resistance by disconnecting undocumented work from federal immigration enforcement to lessen the federal prohibition's coercive impact. By addressing the immediate needs of undocumented workers as a topic of state and local resistance, social movements can help organize community members around issues that undocumented workers already are confronting as part of their lived experiences on a daily basis.¹⁸⁶

Further, undocumented work resistance symbolically demarcates who is included in the community, which can help undocumented workers overcome exclusion by promoting a sense of belonging. Peter Spiro has noted that state and local resistance measures can be explained in terms of “who is inside and who is outside community boundaries.”¹⁸⁷ Localities that continue to resist, for example, in the wake of retaliation by the federal government for adopting “sanctuary” city status, reflect cities exercising their right to inclusively define members of their community. By symbolically defining who belongs in the community, state and local resistance measures can send a message that undocumented workers are entitled to the same civil, social, and economic rights

184. See Cristina Rodríguez, *Immigration and the Civil Rights Agenda*, 6 STAN. J. C.R. & C.L. 125, 133 (2010) (discussing the social costs of making undocumented work unlawful).

185. *Supra* notes 34–46.

186. See Barry, *supra* note 12, at 463 (2017) (describing the social movement in Philadelphia to address the devastating impacts of federal immigration policy on local communities).

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

as individuals who reside in the community.¹⁸⁸ For those who are used to being excluded, this sense of belonging contributes to their own self-worth and empowerment.¹⁸⁹ It signals the availability of rights offered to all community members, which might translate into increased claims concerning workers' rights. In particular, resistance measures that require affirmative participation on the part of undocumented workers, such as the filing of state or local taxes, creates obligations for substantive membership to formalize belonging.¹⁹⁰ Further, the active participation and leadership by undocumented workers in social movements related to state and local resistance provides the opportunity for political engagement that leads to empowerment and further integration into the polity.

The benefits of undocumented work resistance, however, are not limited to undocumented workers themselves. The mutual benefits between undocumented workers and other workers are strong in the workplace context, where the wages and working conditions of all workers are interconnected.¹⁹¹ The fact that undocumented workers, for example, can be more easily exploited not only makes the hiring of such workers more attractive to the detriment of work-authorized or native-born workers but also results in degrading workplace standards.¹⁹² Protection measures that promote the rights of undocumented workers can benefit all workers by improving overall working conditions.¹⁹³ Noncooperation measures, too, which limit government official cooperation with ICE, can benefit all workers by encouraging undocumented workers to report workplace violations.¹⁹⁴

188. See Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1141 (1994) (“[A]lienage is not a morally relevant status for purposes of determining the civil, social, and economic rights of individuals who reside within the membership community”); see also TAMARA C. DALEY ET AL., *IDNYC: A TOOL OF EMPOWERMENT* 42 (2016) (finding 77 percent of surveyed immigrants felt like New York City’s ID card had increased their sense of belonging to the City).

189. See Jolanda Jetten et al., *Having a Lot of a Good Thing: Multiple Group Memberships as a Source of Self-Esteem*, 10 PLOS ONE 1, 3 (2015) (citing growing evidence that identification with social groups affects psychological well-being in positive ways).

190. See Elaine R. Thomas, *Who Belongs?*, 5 EUR. J. SOC. THEORY 323, 335 (2002) (“[F]ull membership in the polity is earned by paying one’s dues to the state financially or contributing economically to the national community . . . through tax-paying, employment, or financial investment.”).

191. Keith Cunningham-Parmeter, *Redefining the Rights*, *supra* note 20, at 1406.

192. See SHANNON GLEESON, *PRECARIOUS CLAIMS: THE PROMISE AND FAILURE OF WORKPLACE PROTECTIONS IN THE UNITED STATES* 7 (2016) (discussing how undocumented status is a “precarity multiplier” that worsens workplace conditions, such as occupational segregation, pay differentials, and lack of safety).

193. Lee, *Outsiders Looking In*, *supra* note 15, at 1076–77.

194. By removing the fear that government officials are cooperating with ICE, undocumented workers might be more willing to file complaints. See *supra* Gleeson, note 16, at 586 (describing how undocumented workers fear bringing claims because of precarious immigration status).

These mutual benefits can also facilitate solidarity across disparate groups of workers by finding common interests, values, and histories.¹⁹⁵ By typically focusing on work itself, this type of resistance connects groups traditionally divided by ethnicity, race, or immigration status.¹⁹⁶ One-on-one private bargaining, which is currently the main mode of shaping wages and working conditions, is often lopsided in favor of the employer in most low-wage jobs.¹⁹⁷ At times, a sense of solidarity across race and immigration status has prevailed to bolster the ability of low-wage workers to privately bargain with employers.¹⁹⁸ The focus on work itself as an immigrant rights issue provides the opportunity for increased solidarity between immigrant workers and native-born workers by defining the community to explicitly include all workers. In turn, this solidarity can help build the social movement necessary to engage in state and local resistance surrounding undocumented work.

There are also community-wide benefits to undocumented work resistance beyond the workplace. Undocumented workers contribute a significant amount to local economies.¹⁹⁹ When several jurisdictions enacted anti-immigrant state and local measures, the estimated economic losses from the departure of undocumented workers were substantial.²⁰⁰ 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).²⁰¹ California, for example, would lose \$103 billion annually without its undocumented worker population.²⁰² At the

195. DONATELLA DELLA PORTA & MARIO DIANI, *SOCIAL MOVEMENTS: AN INTRODUCTION* 109 (1999).

196. Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 HARV. LATINO L. REV. 129, 176 (2012).

197. See, e.g., Cynthia L. Estlund, *How Wrong Are Employees About Their Rights?*, 77 N.Y.U. L. REV. 6, 32 (2002) (stating how bargaining in the labor market is skewed between employers and employees); Annette Bernhardt et al., *An Introduction to the "Gloves-off Economy,"* in *THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET* 1, 19 (Annette Bernhardt et al. eds., 2008) (describing how employers have a relatively free hand to contain or reduce wages in non-union settings).

198. Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1234–35 (2008); Fred Tsao, *Building Coalitions for Immigrant Power*, in *IMMIGRANT RIGHTS IN THE SHADOWS OF CITIZENSHIP* 329, 338–39 (Rachel Ida Buff ed., 2008); MOTOMURA, *IMMIGRATION OUTSIDE OF THE LAW*, *supra* note 21, at 158. Organized labor, too, has lent support to a number of immigrant worker initiatives. Lee, *Outsiders Looking In*, *supra* note 15, at 1086.

199. RYAN EDWARDS & FRANCESC ORTEGA, *THE ECONOMIC IMPACTS OF REMOVING UNAUTHORIZED IMMIGRANT WORKERS: AN INDUSTRY- AND STATE-LEVEL ANALYSIS* 2–3 (2016); see also Ted Hesson, *Why American Cities Are Fighting to Attract Immigrants*, ATLANTIC (Jul. 21, 2015), <https://www.theatlantic.com/business/archive/2015/07/us-cities-immigrants-economy/398987/> [<https://perma.cc/9VQA-LFSF>] (recounting how immigrants are contributing to local economies).

200. See Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES (Sept. 26, 2007), <https://www.nytimes.com/2007/09/26/nyregion/26riverside.html> [<https://perma.cc/2S2P-CX7F>] (estimating the costs incurred by local businesses because of the flight of undocumented workers in Riverside, New Jersey).

201. EDWARDS & ORTEGA, *supra* note 199, at 2.

202. *Id.* at 3.

state and local level, another estimate found that undocumented immigrants paid an estimated \$10.6 billion in state and local taxes in 2010, which includes \$1.2 billion in personal income taxes.²⁰³ Increasing the participation of undocumented workers in state or local tax programs would only help to increase state or local revenue. In addition, helping local residents establish worker cooperatives or businesses encourages economic self-sufficiency that supports local economies. Noncooperation measures also serve employers by limiting the ability of ICE to interfere with businesses that are essential to the local economy while conserving law enforcement resources for local communities.

Further, these community-wide impacts also point towards potential broad-based coalitions that extend beyond workers to employers and local residents. Specifically, employers, who still remain a nontraditional ally, may—while rejecting stronger worker protections—welcome recognition or noncooperation measures as a way to resist the federal prohibition of undocumented work.²⁰⁴ Local residents also represent a group with untapped potential that can play a role in supporting resistance efforts, whether it be because of economic benefits, a shared sense of community, or the desire to be ethical consumers.²⁰⁵ Specific resistance measures may naturally facilitate broader coalitions with underrepresented groups, such as proposals for municipal IDs, which also cater to Lesbian, Gay, Bisexual, and Transgender (LGBT) and homeless communities.²⁰⁶ This potential for coalition work is precisely what can be used to help advance undocumented work resistance.

The realization of these community-wide benefits, however, may require further understanding and negotiation between community members. In fact, some native-born workers may be outwardly hostile towards undocumented workers because they believe that undocumented workers take jobs.²⁰⁷ Hiroshi Motomura suggests that sorting out these issues at the local level makes sense since it provides the opportunity to balance the integration of undocumented

203. INST. ON TAXATION AND ECON. POLICY, UNDOCUMENTED IMMIGRANTS' STATE AND LOCAL TAX CONTRIBUTIONS 1 (2013).

204. Shannon Gleeson, *Shifting Agendas, Evolving Coalitions: Advocating for Immigrant Worker Rights in Houston*, 16 WORKING USA: J. OF LABOR & SOC'Y 207, 209–10 (2013) (explaining that strategic alliances, such as the one between organized labor and big business, are motivated not only by a common goal for social change, but also by the practical exchange of material resources and sometimes even symbolic legitimacy). One recent example includes the joint efforts of the US Chamber of Commerce and civil rights groups to challenge the Arizona law that punished employers who hired undocumented workers. *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 583 (2011).

205. 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) (describing the Fair Food Program to organize consumers); Aric Jenkins, *How the Restaurant Industry is Fighting President Trump on Immigration*, FORTUNE (Apr. 10, 2017), <http://fortune.com/2017/04/10/restaurant-industry-donald-trump-immigration/> [<https://perma.cc/UUJ6-QP4V>] (describing one restaurant's efforts to organize chefs and consumers).

206. MATHEMA, *supra* note 97, at 5.

207. MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 21, at 167.

immigrants with the interests of all members of the community.²⁰⁸ It might mean examining the ways in which criminalizing undocumented work might impact the broader community, in terms of workers' rights, integration, and economic prosperity.²⁰⁹ Finding the mutual benefits between undocumented workers and native-born residents will be essential to advancing state and local resistance.²¹⁰

While the topical focus on undocumented work can help advance state and local resistance, it can also raise several concerns. First, the focus on undocumented work can be exclusionary because not everyone is able to work. Those seeking to capitalize on the narrative of the hard-working immigrant may unwittingly distinguish such immigrants from their supposed "criminal alien" counterparts.²¹¹ This narrative also fuels the problematic concept that immigrants must earn their right to be present in the US.²¹² Second, undocumented immigrants too can become "essentialized" workers, who are divorced from their individual characteristics as human beings.²¹³ While these concerns are incredibly important, work itself serves as an issue around which to organize, precisely because it comprises an incredibly important part of the lived experiences of undocumented immigrants.²¹⁴ Further, work provides a connection point across workers, employers, and community members. However, these concerns highlight the need to proceed cautiously in framing the narrative for undocumented work resistance. Social movements can achieve this result by ensuring that they take the lead from community members, work across diverse groups to build coalitions, and promote the voices of undocumented workers.

Further, the benefits of undocumented work resistance can lead to disrupting the federal prohibition by reconceiving of the legality of undocumented work. The more undocumented workers assert their workplace rights, apply for professional licenses, or participate in worker cooperatives, the

208. *Id.*

209. Jennifer Gordon explains that the economic studies to date have not provided sufficient "fine-grained" information about the impact of immigration on specific communities. Jennifer Gordon, *Tensions in Rhetoric and Reality at the Intersection of Work and Immigration*, 2 U.C. IRVINE L. REV. 125, 140–42 (2012).

210. See, e.g., Rodríguez, *Immigration and the Civil Rights Agenda*, *supra* note 184, at 133 (noting the importance of recognizing the benefits that immigration has for Americans); Richard Delgado, *Rodrigo's Homily: Storytelling, Elite Self-Interest, and Legal Change*, 87 OR. L. REV. 1259, 1277–78 (2008) (noting that the benefits of immigration include new workers making contributions to Social Security); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1749 (2010) (explaining how the treatment of undocumented workers is connected to the working conditions and hiring of US workers).

211. See Cházaro, *supra* note 11, at 380–81 (describing the harms associated with categorizing some immigrants as "criminal aliens").

212. Cházaro, *supra* note 11, at 385.

213. Lee, *Outsiders Looking In*, *supra* note 15, at 1098; see also Lee, *U.S. Workers Need Not Apply*, *supra* note 162, at 46 (discussing the problematic conception of guest workers as solely a machine-body to temporarily "import" for work that avoids the "challenges" associated with the integration of immigrants on a more permanent basis).

214. Lee, *Outsiders Looking In*, *supra* note 15, at 1101.

more undocumented work will be socially recognized as legal work. These actions can help change the social norms surrounding undocumented work. While entrenched politics may appear to make social change impossible, it is possible for conservative, rural towns that struggle with an influx of undocumented workers to learn over time to accept them as members of their communities.²¹⁵ As the stories about the lived experiences of undocumented workers increasingly circulate, they can create a social recognition for work that remains largely invisible. As a result, local communities become more willing to accept the legality of undocumented work when they realize its benefits.²¹⁶ These mutual benefits lead to increased solidarity, which helps local residents accept undocumented workers as lawful members of their community.

By influencing these social norms, undocumented work resistance undermines the public authority of the federal immigration prohibition of undocumented work. Marijuana legalization provides an example of state resistance against the federal framework that has resulted in changing personal, moral, and social norms, despite a federal ban.²¹⁷ Not only has the legalization of medical marijuana relieved people of the obligation to obey the federal ban but it has also credibly signaled public approval of once taboo conduct.²¹⁸ As local laws, they are more likely to influence individuals because they reflect norms held by local communities, which are presumably more important than the norms held by distant strangers.²¹⁹ Likewise, the federal prohibition on undocumented work is already diminished because employers and workers regularly flout the federal law.²²⁰ By redefining undocumented work as lawful and independent of immigration status, state and local resistance help to further erode the impact and authority of the federal prohibition.

Undocumented work resistance measures could create a ripple effect across jurisdictions. The well-studied phenomenon of policy diffusion finds that, under the right conditions, policy innovation from outside the jurisdiction can result in spreading innovations from one government to another.²²¹ A mechanism of policy diffusion is when states act as “laboratories” for learning, particularly for

215. See, e.g., Patricia Cohen, *Immigrants Keep an Iowa Meatpacking Town Alive and Growing*, N.Y. TIMES (May 29, 2017), <https://www.nytimes.com/2017/05/29/business/economy/storm-lake-iowa-immigrant-workers.html> [<https://perma.cc/REY2-ZM47>] (describing how a diverse community in Iowa that initially experienced tensions from an influx of low-skilled, non-English-speaking workers came to recognize its shared future).

216. Marouf, *supra* note 196, at 177.

217. Mikos, *supra* note 218, at 1426.

218. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1474 (2009).

219. *Id.* at 1478. Since local governments are more accessible, they should lead to more responsive and representative policy-making as local government officials make decisions informed by the community's wants and needs. *Id.* at 1471.

220. Krogstad et al., *supra* note 13.

221. Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 841 (2008).

policies that are “identified as successes, both politically (as evidenced by lack of repeals) and on policy grounds (as evidenced by studies of effectiveness in general).”²²² While Kenneth Cunningham-Parmeter and Rick Su have argued that subfederal regulation of immigration has failed to turn states and localities into true “laboratories for reform,” they have mostly focused on the impact of restrictive state and local measures.²²³ Su, for example, argues that such measures have been more about testing political influence rather than effectuating policies because many have simply been “enjoined, struck down, or simply not prioritized.”²²⁴ Yet inclusive state and local measures tell a somewhat different story.²²⁵ They have largely managed to navigate around constitutional concerns and have been effectively implemented in their jurisdictions.²²⁶ As a result, there is preliminary data to analyze and determine the efficacy of these policies.²²⁷ While there is no denial that these measures also seek to influence the politics of immigration, these measures are also derived from the need to address the lived experiences of immigrants.²²⁸ By addressing real on-the-ground issues, such as the need for driver’s licenses or access to in-state tuition for higher education, these measures provide useful information for studying the efficacy of such policies.²²⁹

Undocumented work resistance similarly addresses the lived experiences of such workers and provides a menu of policy-making options that can be tested as policy innovations. For the most part, such measures have the potential to be politically successful because they should not face federalism roadblocks to implementation.²³⁰ As a result, once effectively implemented, they will provide

222. *Id.* at 842.

223. Cunningham-Parmeter, *Forced Federalism*, *supra* note 33, at 1726; Su, *The States of Immigration*, *supra* note 157, at 1398–99.

224. Su, *The States of Immigration*, *supra* note 157, at 1398, 1400.

225. Elias Burch, *supra* note 21, at 748 (explaining “the dynamism of the new immigration federalism, wherein state legislation intended to foster immigrant inclusion may stand alone, may overlap, or may serve as an inspiration for or a spur to action by other states or by the federal government”).

226. *See id.* at 747 (noting that legal challenges to tuition equity and “sanctuary” laws have so far been unsuccessful).

227. *See, e.g.*, Hans Lueders et al., *Providing Driver’s Licenses to Unauthorized Immigrants in California Improves Traffic Safety*, 114 PROC. NAT’L ACADEMY SCI. 4111, 4115 (April 18, 2017) (“Our findings show that providing unauthorized immigrants with access to driver’s licenses can create significant positive externalities for the communities in which they live.”); LATINO POLICY INST., *THE EFFECTS OF IN-STATE TUITION FOR NON-CITIZENS: A SYSTEMATIC REVIEW OF THE EVIDENCE 2* (2011) (noting the positive impacts of granting in-state tuition to noncitizens).

228. *See, e.g.*, Barry, *supra* note 12 (noting the push for noncooperation policies with ICE enforcement in Philadelphia because of the impact of Secure Communities); National Immigration Law Center, *supra* note 10, at 16 (noting that residents find restrictive policies unworkable, motivating residents to explore inclusive alternatives).

229. *Cf.* Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2128 (2013) (arguing that subfederal laws restricting migration generally do not respond to critical on-the-ground challenges so that other states and localities cannot glean much about the utility of such laws in addressing any policy challenges).

230. *See supra* Part II.B.

the opportunity to collect information about the efficacy of such measures.²³¹ Given the somewhat hidden nature of undocumented work, studies could obtain more concrete data about the following: the amount of income earned and taxes paid by undocumented workers; the kinds of occupations engaged in by undocumented workers; the impact of undocumented work on the local economy; and the impact of undocumented workers on prevailing wages and the health and safety practices of workplaces.

In addition, social movements can look to other jurisdictions to replicate successful measures while adapting them to the particular legal, political, or practical pitfalls that may exist at the local level. Politicians, too, can connect with like-minded politicians in other states about how to best tailor such resistance measures while national groups provide support in order to enable local communities to advance their agenda.²³² Therefore, the benefits that flow from the successful enactment of undocumented work resistance measures in one jurisdiction can influence their political receptivity in other jurisdictions.

This ripple effect across jurisdictions will only lead to further disruption of the federal immigration framework. It does so by providing a powerful criticism of the federal approach that can help inform changes in federal policy.²³³ Rick Su, in examining state experimentation concerning employer sanctions and the restriction of public benefits, argues that such experiments helped to inform the design of major reforms to the Immigration and Nationality Act by reframing the national conversation.²³⁴ Others, such as Pratheepan Gulasekaram and S. Karthick Ramakrishnan, when discussing restrictionist state and local measures, similarly explain how such measures focused pressure upwards to the federal level.²³⁵ They also note that as a political matter, federal lawmakers take heed of the immigration positions of state and local officials affiliated with their political party.²³⁶ Therefore, there is no reason to believe that undocumented work resistance would not similarly have an impact at the federal level.²³⁷

231. Heather K. Gerken & Jessica Bulman-Pozen, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1294–95 (2009) (explaining that real-life instantiation of the dissenters' view is quite useful in policy debates).

232. Cristina Rodríguez, *Negotiating Conflict through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2123 (2014) [hereinafter Rodríguez, *Negotiating Conflict through Federalism*]; see, e.g., *Sanctuary City Toolkit*, NAT'L IMMIGR. L. CTR. (Apr. 24, 2017), <https://www.nilc.org/issues/immigration-enforcement/sanctuary-city-toolkit/> [<https://perma.cc/G3EV-CG4H>] (providing a toolkit for advocacy groups seeking to enact local “sanctuary” policies).

233. Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 289 (2005).

234. See Su, *The States of Immigration*, *supra* note 157, at 1368, 1375–76, 1404; see also Elias Burch, *supra* note 21, at 751 (suggesting that states have pursued “immigrant-inclusive policies that may serve as models for future federal rulemaking”).

235. Gulasekaram & Ramakrishnan, *supra* note 229, at 2123.

236. *Id.* at 2115.

237. Elias Burch, *supra* note 21, at 751 (noting that almost all of the inclusionary suggestions for reform currently under consideration have been advocated and/or attempted at the state level).

Yet some might argue that the choice of state and local resistance translates into a problematic patchwork of rights for undocumented workers. For example, the flipside of resistance is that there are states and localities, such as Arizona and Georgia, that are actively engaging in efforts to further penalize undocumented workers.²³⁸ As a result, undocumented workers in more hostile jurisdictions will have fewer rights than their counterparts in welcoming jurisdictions.

This Essay, however, does not advocate for state and local regulation of undocumented work as an end in and of itself. Instead, this Essay presents a strategy given the current constraints of the federal system. Undocumented workers' rights may very well develop differently depending on location. In those instances, such differentiation between states and localities may lead to undocumented workers voting with their feet, leaving behind hostile jurisdictions that may suffer as a result of their departure.²³⁹ While some may raise concerns about the increased balkanization of the US,²⁴⁰ the reality is that this differentiation is already happening.²⁴¹ Rather than view such dichotomy as a harm to the national identity, policy divergences can potentially result in a more productive national discussion about the failure of the federal prohibition of undocumented work.²⁴²

Undocumented work resistance, therefore, can serve the long-term goal of fundamentally restructuring the way in which federal immigration law treats undocumented work. More modestly, it will provide opportunities for legalization of undocumented workers. The reality, however, is that any legalization program will likely focus on select groups to legalize their immigration status. For this reason, measures that concretely improve the lived experiences of undocumented workers are essential since such remedies can outlive more modest reform that leaves behind an underclass of undocumented workers.²⁴³ Further, the social movement that organizes around such measures can continue to advocate for broader social and political change. At its broadest, undocumented work resistance would look to fundamentally restructure the federal immigration framework to disentangle undocumented work from immigration policy.

238. Saucedo, *supra* note 33, at 1531.

239. See, e.g., *supra* note 200–203 (discussing the negative economic impact anti-immigrant policies have upon state and local jurisdictions).

240. Cunningham-Parmeter, *Forced Federalism*, *supra* note 33, at 1720.

241. See, e.g., Polly Mosendz, *Map: Every State Accepting and Refusing Syrian Refugees*, NEWSWEEK (Nov. 16, 2015, 6:19 PM), <http://www.newsweek.com/where-every-state-stands-accepting-or-refusing-syrian-refugees-395050> [<https://perma.cc/SQW2-BMZ2>] (mapping states that accept versus those that refuse Syrian refugees).

242. Rodríguez, *Negotiating Conflict through Federalism*, *supra* note 232, at 2129 (arguing that multiplicity of subfederal approaches can be productive and integrative).

243. Cházaro, *supra* note 11, at 413.

CONCLUSION

Given the current federal climate, undocumented work resistance is the best option to simultaneously address the human and social cost of undocumented work and disrupt the federal prohibition of undocumented work. It builds upon current state and local resistance, which rejects the ways in which the federal immigration framework defines legal and illegal spaces for undocumented immigrants. The topical focus of work provides the opportunity to locally organize around an issue central to the lives of the majority of undocumented immigrants. At the same time, work serves as a connection point between undocumented workers and other community members to build the social movement necessary to engage in undocumented work resistance. At its most disruptive, undocumented work resistance would put an end to the federal immigration's prohibition of undocumented work. Yet until that occurs, resistance reminds us about the importance of addressing the lived experiences of immigrants separate and apart from the federal immigration framework.