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Tensions in Rhetoric and Reality at the Intersection of Work and Immigration

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Tensions in Rhetoric and Reality at the Intersection of Work and Immigration

Jennifer Gordon*

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In 2005, I gave testimony before the House Judiciary Committee on the question of employer sanctions, at that time a rarely enforced element of immigration law that was shortly to become a centerpiece of the Bush and then Obama administrations' policies.¹ As I have repeatedly done during my twenty-

* Professor of Law, Fordham University School of Law. The author thanks Stephen Lee, Robin Lenhardt, Steven Pitts, and the participants in the University of California, Irvine School of Law symposium on "Persistent Puzzles in Immigration Law" for their very helpful comments on drafts of this Essay, and acknowledges with gratitude the research assistance of Noah Hertz-Bunzl and Sarah Jaramillo.

1. Employer sanctions were put in place by Congress in 1986. They empower the government to penalize employers who hire workers without proof of their authorization to work, using an escalating set of tools from fines to imprisonment. After the first few years following their passage, sanctions were only infrequently enforced. In 2004, the Immigration Control and Enforcement Bureau issued Notices of Intent to Fine under employer sanctions to a total of three employers, down from 417 in 1999. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-813, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 35 (2005). In the last years of the Bush administration, the government began to reinvigorate sanctions enforcement. Migration Policy Inst., DHS and Immigration: Taking Stock and Correcting Course 9–10 (Presentation, Feb. 11, 2009), *available at* https://secure.migrationpolicy.org/images/2009.2.11_Presentation-1.pdf. The Obama administration has since dramatically increased the number of immigration audits and prosecutions of employers. JEFFREY KAYE, IMMIGRATION POLICY CTR., DEEPER INTO THE SHADOWS: THE UNINTENDED CONSEQUENCES OF IMMIGRATION WORKSITE ENFORCEMENT 6 (2011), *available at* <http://www.immigrationpolicy.org/special-reports/deeper-shadows>; Julia Preston, *A Crackdown on Employing Illegal Workers*, N.Y. TIMES, May 30, 2011, at A1.

five years as an advocate for immigrants, I made the argument that sanctions against employers who hire undocumented workers should be repealed because they impede all workers' ability to defend their rights, immigrants and native-born alike. Like many fellow advocates, I asserted that the focus of government enforcement in the workplace with regard to undocumented immigrants should be on labor violations rather than immigration law.

I was not surprised when Republicans with records of opposing immigrants' rights responded with scorn. But I was taken aback when one of the Democrats on the Committee, Rep. Maxine Waters (D-CA), a progressive African American legislator from California's Thirty-Fifth District (which includes South Central Los Angeles and is largely Latino and African American), who is known for her support for immigrants' and workers' rights, offered heated remarks. "Let me tell you where you must examine your argument," Representative Waters said. "You must examine the argument that says someone who's here illegally in the first place has a right to go and challenge anybody about the conditions of the workplace. That argument won't fly in this public policy making that we have to do."² Although Representative Waters supports legalization for the undocumented, she maintained that "we cannot excuse the illegal immigration and somehow create a sophisticated argument that talks about how we must target the employer for better pay and more humane work policies as a response to the illegal immigration. That just doesn't wash."³

In the years since, I have given much thought to Representative Waters' words, to what I might have more productively said in response, and to the sources of our failure to connect. This Essay is the product of those reflections. While it is important to bridge the divides between people with firm anti- and pro-immigrant views, that is not my subject here. Instead, I explore the tensions within positions taken by progressive, pro-worker, and generally pro-immigrant advocates and policymakers on key questions relating to low-wage labor migration and workers rights, especially questions that have to do with race and economics.⁴ With the gaps and internal contradictions in the positions that I and others have taken as a starting point, I seek to clarify what is actually happening on the ground and to identify issues requiring further study, with the goal of removing a few of

2. *Lack of Worksite Enforcement and Employer Sanctions: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 109th Cong. 41–43, 68 (2005) [hereinafter *Lack of Worksite Enforcement and Employer Sanctions*] (testimony of Jennifer Gordon, Assoc. Prof. of Law, Fordham Law School) (detailing the harms to U.S. workers that have resulted from employer sanctions).

3. *Id.* at 67.

4. By focusing on the contradictions in arguments made by pro-immigrant advocates, I am by no means suggesting that the arguments made by anti-immigrant politicians and others are internally consistent or well-founded. To name just one hypocrisy among many, numerous legislators who decry the impact of immigration on "our workers" have otherwise shown no interest in the low-wage workforce, voting against bills to raise the minimum wage, provide job training, and increase workplace protection. For several examples, see *infra* note 61.

the intellectual obstacles to a common understanding among potential allies.

In particular, I focus on several arguments that other immigrants' rights advocates and I routinely make in response to the fear that newcomers will compete with citizens for jobs, drive down wages, and displace resident workers.⁵ To counteract the claim that ongoing immigration is harmful to resident workers, we often cite the large majority of economists whose studies have found immigrant workers have either no impact or a net positive impact on native wages and the employment of residents at a national level. In short, immigrants come to the United States to fill "jobs Americans won't do."⁶ To encourage support for the rights of undocumented immigrants in the workplace, we contend that reinforcing undocumented workers' rights should be of concern for *all* workers because everyone in the job market is harmed when a set of workers is unable to demand compliance with basic laws, much less to organize for better treatment than these minimum standards provide. In this context, advocates may imply—although we rarely directly state—that focusing on workplace rights offers an alternative to immigration enforcement and deportation as a way to remove undocumented immigrants from the labor market.

This Essay seeks out a more complicated truth behind the simplified

5. In this Essay I often use "resident" rather than the more common term "native." "Resident" encompasses both the native-born and those foreign-born workers who have set down roots in the destination country (as opposed to temporary migrant workers who intend to return home). This distinction is important because the foreign-born are more likely than native-born workers to suffer from the effects of an inflow of newcomers. See, e.g., Lisa Catanzarite, *Occupational Context and Wage Competition of New Immigrant Latinos with Minorities and Whites*, REV. BLACK POL. ECON., Summer–Fall 2003, at 77, 88 ("The findings demonstrate far higher brown-collar wage penalties for earlier-immigrant co-ethnics than for native workers."); Marco Manacorda et al., *The Impact of Immigration on the Structure of Male Wages: Theory and Evidence from Britain 17–18, 27–28* (IZA Discussion Paper No. 2352, 2006), available at <http://repec.iza.org/dp2352.pdf> ("Our conclusions suggest that the main impact of increased immigration in the UK is on the outcomes for immigrants who are already here."); HEIDI SHIERHOLZ, ECON. POLICY INST., IMMIGRATION AND WAGES: METHODOLOGICAL ADVANCEMENTS CONFIRM MODEST GAINS FOR NATIVE WORKERS 3 (2010), available at <http://www.epi.org/page/-/bp255/bp255.pdf> ("[I]he estimated effect of immigration from 1994 to 2007 was to raise the wages of U.S.-born workers, relative to foreign-born workers, by 0.4% (or \$3.68 per week), and to lower the wages of foreign-born workers, relative to U.S.-born workers, by 4.6% (or \$33.11 per week).")

In referring to the rhetoric or scholarship of others, however, I use the term that the author or speaker employs ("native," "American," or "U.S." workers).

6. The phrase is a common one, widely used in journalism and advocacy (whether as a pro-immigrant tagline or a rhetorical target for those who disagree). See, e.g., Elizabeth Dvoskin, *Why Americans Won't Do Dirty Jobs*, BUS. WK., Nov. 9, 2011, available at <http://www.businessweek.com/magazine/why-americans-wont-do-dirty-jobs-11092011.html> (The caption "Jobs Americans Won't Do" accompanies photographs of catfish gutters in Alabama that ran as a part of this article.); *Jobs That Americans Won't Do*, CHRISTIAN SCI. MONITOR (Sept. 1, 2009), <http://www.csmonitor.com/Commentary/the-monitors-view/2009/0901/p08s01-comv.html>; Kari Lydersen, *Working in the Shadows: Undercover Writer Sheds Light on Immigrant Labor*, IN THESE TIMES, Dec. 4, 2009, http://www.inthesetimes.com/working/entry/5268/working_in_the_shadows_gabriel_thompson_sheds_light_on_immigrant_labor (The lead sentence begins, "They call them the jobs Americans won't do," in this review of a pro-immigrant book.)

assertions on which each of these arguments rests. The most obvious conflict lies right on the surface, although I have not seen it explicitly discussed: if undocumented immigrants do not have a negative impact on resident workers' wages and employment rates, and if they are indeed taking "jobs Americans won't do," then they are not competing with resident workers for jobs. But if undocumented immigrants don't compete with residents, why (beyond empathy and solidarity) should resident workers care about the enforcement of undocumented workers' rights? In the end, I argue that this tension can be at least partly resolved by a more nuanced look at economists' claims, complemented by lessons from other disciplines about how labor markets operate. I also identify a number of questions for future exploration. The core lesson I draw for rhetoric from this examination of reality is that at the intersection of low-wage work and immigration lies a network with many nodes and tangles, and that we owe it to ourselves, to each other, and to the broader goal of building strong and stable alliances for immigrants' rights, to represent what is happening on the ground in ways that reflect its genuine complexity.

I. ADVOCATES' CORE ECONOMIC AND WORKERS RIGHTS ARGUMENTS

A. Economic

How much of an impact immigrants have on the U.S. labor market has long been a subject of dispute. But most economists now agree that aggregate immigration has a neutral or small positive effect on the U.S. economy overall.⁷ These findings about the United States are replicated in the majority of studies about the impact of immigrants on the labor market in European Union countries as well.⁸

7. For summaries of the literature, see GIOVANNI PERI, MIGRATION POLICY INST., THE IMPACT OF IMMIGRANTS IN RECESSION AND ECONOMIC EXPANSION 6 (2010), available at <http://www.migrationpolicy.org/pubs/Peri-June2010.pdf>; SHIERHOLZ, *supra* note 5, at 1, 3–4; RAKESH KOCHHAR, PEW HISPANIC CTR., GROWTH IN THE FOREIGN-BORN WORKFORCE AND EMPLOYMENT OF THE NATIVE BORN 27 (2006), available at <http://www.pewhispanic.org/files/reports/69.pdf>.

8. For a recent overview and summary of the literature on the European Union, see MADELEINE SUMPTION & WILL SOMERVILLE, EQUALITY AND HUMAN RIGHTS COMM'N, THE UK'S NEW EUROPEANS: PROGRESS AND CHALLENGES FIVE YEARS AFTER ACCESSION 37–39 (2010), available at http://www.equalityhumanrights.com/uploaded_files/new_europeans.pdf; WILL SOMERVILLE & MADELEINE SUMPTION, EQUALITY AND HUMAN RIGHTS COMM'N, IMMIGRATION AND THE LABOUR MARKET: THEORY, EVIDENCE AND POLICY 13–14 (2009). For one of the most recent E.U. studies, see Francesco D'Amuri & Giovanni Peri, *Immigration, Jobs and Employment Protection: Evidence from Europe* (Nat'l Bureau of Econ. Research, Working Paper No. 17139, 2011), available at http://www.nber.org/papers/w17139.pdf?new_window=1 (examining the impact of immigrant inflow from 1996 to 2007 on native jobs in fourteen Western European countries and finding no negative impact on native employment rates). On the United Kingdom in particular, see SOMERVILLE & SUMPTION, *supra*, at 14; Christian Dustmann et al., *The Effect of Immigration Along the Distribution of Wages* (Ctr. for Research and Analysis of Migration, Discussion Paper No. 03/08, 2008);

Advocates cite such economic studies to support the argument that immigrants do jobs that are of little interest to native workers. For example, in a fact sheet, the Immigration Policy Center of the American Immigration Council asserts that

[i]f immigrants really “took” jobs away from large numbers of native-born workers, especially during economic hard times, then one would expect to find high unemployment rates in those parts of the country with the largest numbers of immigrants—especially immigrants who have come to the United States recently (many of whom are unauthorized) and, presumably, are more willing to work for lower wages and under worse conditions than either long-term immigrants or native-born workers. Yet . . . there is little apparent relationship between recent immigration and unemployment rates at the regional, state, or county level.⁹

Or, as David Scott Fitzgerald of the Center for Comparative Immigration Studies puts it more succinctly, “Unemployed auto workers in Michigan are not migrating to California to pick fruit.”¹⁰ This assertion—that new immigrants are willing to take jobs that U.S. residents won’t do—is central to the arguments of many advocates for increased immigration levels.

Economists’ optimistic conclusions about the neutral or positive impact of immigration on overall native workers’ wages and employment opportunities strike most casual observers as counterintuitive. Most people think of the pool of jobs in the United States as fixed; more workers seeking those same jobs must therefore mean greater competition, lower wages, and higher unemployment for native workers who are not willing to work for the resulting reduced rates. Economists point to several realities that counter this common reaction. First, recent immigrants are not “perfect substitutes” for native workers. Without the language skills and cultural familiarity of native workers, immigrant workers tend to take jobs that require limited literacy and little contact with customers or other workers outside of their language group. Native workers are more desirable for jobs requiring reading, writing, interaction with customers, or job-related training in the United States, and for supervisory positions.¹¹ In that sense, new immigrant

Sara Lemos & Jonathan Portes, *The Impact of Migration from the New European Union Member States on Native Workers* (UK Dep’t for Work and Pensions, Working Paper No. 52, 2008), available at <http://research.dwp.gov.uk/asd/asd5/wp52.pdf> (reviewing data from 2004–2007); Nicola Gilpin et al., *The Impact of Free Movement of Workers from Central and Eastern Europe on the UK Labour Market* (UK Dep’t for Work and Pensions, Working Paper No. 29, 2006), available at <http://campaigns.dwp.gov.uk/asd/asd5/WP29.pdf> (reviewing data from 2004–2005).

9. *Immigration Reform and Job Growth*, IMMIGR. POL’Y CENTER (Jan. 20, 2011), <http://www.immigrationpolicy.org/just-facts/immigration-reform-and-job-growth>.

10. David Scott Fitzgerald et al., *The Immigration Economy*, COUNCIL ON FOREIGN REL. (Mar. 8, 2010), <http://www.cfr.org/economics/immigration-economy/p21605>.

11. Giovanni Peri & Chad Sparber, *Task Specialization, Immigration, and Wages*, 1 AM. ECON. J. APPLIED ECON. 135, 164–65 (2009) (finding “strong evidence” supporting the theory that “[w]hen

workers and native workers are often described as “complementary.”¹² It is not that new immigrants compete with *no one* for jobs. But the people they compete with are those most like them: other recent immigrants, not most native workers.¹³

Second, the number of available jobs is not static. Immigrants are also consumers, expanding the demand for goods and services, and thus the need for workers to produce them expands. They start businesses themselves, creating new jobs.¹⁴ And the availability of large numbers of immigrant workers may induce employers to choose more labor-intensive forms of production, further increasing the number of available jobs.¹⁵ Third, immigrants’ impact on the U.S. economy is cushioned by the fact that they tend to come in greater numbers when jobs are plentiful, while flows slow in times of recession.¹⁶

Finally, new immigrants fill the gaps left by changes in the demographics of the United States and the shifting structure of the U.S. economy. The U.S. population is aging, with workers in the sixteen to twenty-four age group predicted to shrink by over nine hundred thousand in the next seven years.¹⁷

immigration generates large increases in manual task supply, the relative compensation paid to communication skills rises, thereby rewarding natives who progressively move to language-intensive jobs. . . . As a consequence, immigration-induced wage losses among less-educated native workers are significantly smaller than the losses predicted by models in which less-educated native and foreign-born labor is perfectly substitutable. In particular, we estimate that immigration only reduced average real wages paid to less educated US-born workers by 0.3 percent between 1990 and 2000. Without task specialization that loss would have been 1.2 percent.”)

12. Roger Lowenstein, *The Immigration Equation*, N.Y. TIMES, July 9, 2006, at 36, 69.

13. See sources cited *supra* note 5.

14. ROBERT W. FAIRLIE, EWING MARION KAUFFMAN FOUND. 2010 KAUFFMAN INDEX OF ENTREPRENEURIAL ACTIVITY 4, 9 (2011), available at http://www.kauffman.org/uploadedFiles/KIEA_2011_report.pdf (“Immigrants were more than twice as likely to start businesses each month in 2010 than were the native-born.”).

15. HARRY J. HOLZER, MIGRATION POLICY INST., IMMIGRATION POLICY AND LESS-SKILLED WORKERS IN THE UNITED STATES: REFLECTIONS ON FUTURE DIRECTIONS FOR REFORM 6–7 (2011), available at <http://www.urban.org/UploadedPDF/1001488-Immigration-Policy.pdf>.

16. SHIERHOLZ, *supra* note 5, at 4, 19; *ICE Worksite Enforcement—Up to the Job?: Hearing Before the Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 101–12 (2011) (testimony of Daniel Griswold, Director, Cato Institute, Center for Trade Policy Studies) (This flow is distorted in the United States by intensified border enforcement and by severe penalties in immigration law for re-entry following unlawful presence, which have led many undocumented immigrants in the country to remain here during times of recession when they otherwise might consider returning home.); Douglas Massey, *The Wall That Keeps Illegal Workers In*, N.Y. TIMES, Jul. 4, 2006, at A23 (Although the recession at the end of the 2000s resulted in sharply reduced inflows of Mexican migrants, there was little if any increase in the numbers of departures by those already present.); JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR., MEXICAN IMMIGRANTS: HOW MANY COME? HOW MANY LEAVE? (2009), available at <http://pewhispanic.org/files/reports/112.pdf>.

17. Mitra Toossi, *Labor Force Projections to 2018: Older Workers Staying More Active*, U.S. DEPT OF LABOR, MONTHLY LAB. REV. 30, 32 (Nov. 2009), available at <http://www.bls.gov/opub/mlr/2009/11/art3full.pdf>.

Immigrants, by contrast, tend to be young.¹⁸ Meanwhile, although the native population is becoming better educated each year, an increasing number of jobs in this country are low-skilled.¹⁹ Because of the wage differential between new immigrants' home countries and the United States, and (in many cases) their perspective that their time in this country will be short, many new immigrants have a more positive view of jobs at the bottom of the wage and skill ladder.²⁰ In these ways, immigrants can be characterized as a match for this country's needs rather than a source of competition for scarce jobs—although, as I discuss below, this perspective can slide too easily into an unexamined statement that immigrants take “jobs Americans won't do.”

B. *Workers Rights*

Immigrant advocates argue that there should be a firewall between immigration enforcement and the workplace. The government should abandon immigration raids and repeal employer sanctions (together with the accompanying inspections or silent raids, the E-Verify system, and Social Security Administration no-match letters), because their enforcement drives undocumented workers further underground and undercuts all workers' ability to claim their rights. Instead, we argue, the government should put its enforcement resources into detecting and addressing violations of labor and employment law in workplaces with large immigrant workforces.²¹

Advocates explain that immigrants, including undocumented immigrants, are already covered by most workplace protective laws,²² such as the Fair Labor

18. *Statistical Portrait of the Foreign-Born Population in the United States, 2009*, PEW HISPANIC CTR. (Feb. 17, 2011), <http://pewhispanic.org/factsheets/factsheet.php?FactsheetID=69>, see Table 9a, available at <http://pewhispanic.org/files/factsheets/foreignborn2009/Table%209a.pdf>.

19. On the rising educational attainment of the native population, see U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT, EDUCATIONAL ATTAINMENT TIME SERIES TABLES, TABLE A-2, PERCENT OF PEOPLE 25 YEARS AND OVER WHO HAVE COMPLETED HIGH SCHOOL OR COLLEGE, BY RACE, HISPANIC ORIGIN AND SEX: SELECTED YEARS 1940 TO 2010 (Apr. 26, 2011), available at <http://www.census.gov/hhes/socdemo/education/data/cps/historical/index.html> (Approximately fifty years ago, in 1959, 43.7 % of adults twenty-five and older had completed high school and 8.1% had finished four years of college. Both numbers have risen steadily. In 2010, 87.1% of adults are high school graduates, and 29.9% have completed four years of college.). On the increase in low-wage work, see LOW-WAGE WORK IN THE WEALTHY WORLD (Jérôme Gautié & John Schmitt eds., The Russel Sage Foundation 2009) (low-wage work has increased substantially in the United States since the 1990s).

20. Jennifer Gordon & Robin Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1220–22 (2008).

21. See, e.g., NAT'L EMP'T LAW PROJECT, FROM ANTI-IMMIGRANT TO PRO-WORKER: WHAT STATES AND CITIES CAN DO ABOUT IMMIGRATION AND WORKERS' RIGHTS (2010), available at <http://www.nelp.org/page/-/Justice/2010/FromAntiImmigrant2010.pdf?nocdn=1>; REBECCA SMITH ET AL., ICED OUT: HOW IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS' RIGHTS 5–7, 32–35 (2009), available at http://www.nelp.org/page/-/Justice/ICED_OUT.pdf?nocdn=1.

22. Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 503 (2004).

Standards Act (FLSA—right to minimum wage and overtime),²³ the Occupational Safety and Health Act (OSHA—right to a safe and healthy workplace),²⁴ Title VII and other antidiscrimination provisions in most circuits,²⁵ and in most states, workers' compensation if injured on the job.²⁶ In one case where the Supreme Court limited undocumented workers' remedies for retaliation for union support under the National Labor Relations Act (NLRA), the Court still made clear that

23. *Patel v. Quality Inn S.*, 846 F.2d 700, 705 (11th Cir. 1988) (“[U]ndocumented aliens are ‘employees’ within the meaning of the FLSA.”); *Zeng Liu v. Donna Karan Int’l.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002) (rejecting a discovery request seeking plaintiff’s immigration status in a suit alleging FLSA violations as not relevant and prejudicial); *Singh v. Jutla & C.D. & R’s Oil*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002) (rejecting employer’s motion to dismiss that was premised on the employee’s undocumented status and confirming that the FLSA covers undocumented aliens).

24. REBECCA SMITH ET AL., NAT’L EMP’T LAW PROJECT, UNDOCUMENTED WORKERS: PRESERVING RIGHTS AND REMEDIES AFTER *HOFFMAN PLASTICS COMPOUNDS V. NLRB* 12 (2003), available at http://nelp.3cdn.net/b378145245dde2e58d_0qm6i6i6g.pdf (OSHA “contains no exclusion for undocumented workers,” and it is Department of Labor policy to enforce OSHA without regard to immigration status.). ICE staged a fake occupational safety and health meeting in 2005 to facilitate the deportation of undocumented workers, and the American Public Health Association has called for the codification of OSHA policy not to refer cases involving the undocumented to immigration authorities. *Occupational Health and Safety Protections for Immigrant Workers*, AM. PUB. HEALTH ASS’N, (Dec. 14, 2005), <http://www.apha.org/advocacy/policy/policysearch/default.htm?id=1318>.

25. *Rivera v. NIBCO*, 364 F.3d 1057 (9th Cir. 2004) (holding that undocumented workers are covered by Title VII); see *Iweala v. Operational Techs. Servs.*, 634 F. Supp. 2d 73, 80 (D.D.C. 2009) (noting that undocumented workers are covered by Title VII); *Escobar v. Spartan Sec. Serv.*, 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (supporting the proposition that undocumented immigrants are covered under Title VII). *But see Egbuna v. Time Life Libraries*, 153 F.3d 184, 187–88 (4th Cir. 1998) (suggesting that undocumented immigrants are not covered by Title VII when alleging discrimination during the hiring process).

26. Workers’ compensation for on-the-job injuries suffered by undocumented immigrants is limited in a few states and under dispute in others, although most states and the District of Columbia still guarantee coverage to the undocumented. See *Visoso v. Cargill Meat Solutions*, 778 N.W.2d 504, 511 (Neb. Ct. App. 2009) (upholding undocumented workers’ right to workers’ compensation for on-the-job injuries); *Asylum Co. v. Dist. of Columbia Dept. of Emp’t Servs.*, 10 A.3d 619, 626 (D.C. 2010) (upholding undocumented workers’ right to workers’ compensation for on-the-job injuries). *But see Sanchez v. Eagle Alloy*, 658 N.W.2d 510, 521 (Mich. Ct. App. 2003) (holding that an employee is not entitled to workers’ compensation wage-loss benefits for periods of time when the employee is unable to obtain or perform work because of commission of a crime, including the crime of presenting false documents to obtain employment). See generally THOMAS R. LEE & DENNIS V. LLOYD, AM. ASS’N OF STATE COMP. INS. FUNDS, WORKERS’ COMPENSATION AND THE UNDOCUMENTED WORKER (2007), available at http://www.aascif.org/public/workers_comp_undocumented_worker_full.doc (providing an overview of the state law in this regard).

Undocumented workers are ineligible for unemployment insurance, as their lack of legal status renders them unable to meet the requirement that recipients be “ready, willing and able” to accept another job. See, e.g., N.Y. LAB. LAW § 591(2) (Consol. 2006) (“No benefits shall be payable to any claimant . . . who is not ready, willing and able to work”); see also *Zapata v. Levine*, 375 N.Y.S.2d 424, 424 (N.Y. App. Div. 1975) (reasoning that immigrants without valid work permission are unable to meet the “available for employment” requirement because they are “legally barred from working”). Despite widespread coverage on the books, the undocumented are often unable to gain compensation for on-the-job injuries. Liz Chandler, *Illegal Immigrants Frequently Denied Compensation*, MCCLATCHY NEWSPAPERS (D.C.), Sept. 15, 2006, available at http://www.ufcw.org/ufcw_members_only/safety_and_health_facts/undocumented_workers.cfm.

undocumented immigrants qualify as employees within the Act's definition.²⁷ Advocates note, however, that undocumented workers are often unable to access the protections they have on paper because they fear deportation if they come forward. Thus, immigration controls in the workplace need to be replaced with effective strategies to encourage undocumented immigrants to identify violators of workplace protections and pursue complaints against them, coupled with resources directed toward targeted enforcement of labor laws in immigrant-heavy industries.²⁸

Most people in the United States are aware that undocumented workers are targets for abuse. The return of sweatshop-like conditions to U.S. cities, farms, and suburbs has been news since at least the early 1990s, when the latest surge in immigration gathered force. But many observers, like Representative Waters, find the argument that undocumented workers should have greater labor protections perplexing: if undocumented workers are "illegal," and it is against the law for employers to hire them, how could they have any rights in the workplace at all? Many also express a sense of inequity: isn't offering rights to undocumented immigrants an incitement for them to come, and a reward for breaking the law?

From the perspective of many immigrants' rights advocates, there are both principled and pragmatic responses to this challenge. From a principled position, many advocates believe that the primary reason to enforce workplace rights for undocumented immigrants is that they are human beings who are harmed by the abuses to which they are subjected.²⁹ They note that U.S. firms covertly (and

27. *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002) (holding that an employer who unknowingly hired an undocumented worker who presented false documents to obtain employment, and then violated the NLRA by firing that worker in retaliation for his union support, would not have to reinstate the worker or provide backpay, the standard remedies under the Act, despite the clear violation of the Act's prohibition on such firings). Reflecting the *Hoffman* Court's reiteration that undocumented workers are considered "employees" under the NLRA, courts have issued orders instructing employers to bargain with undocumented workers. *Agri Processor Co. and Local 432 United Food and Commercial Workers Union*, 347 NLRB No. 107 (2006) (holding that the respondent must bargain with the union even if the employees the union represents are undocumented workers), *upheld in Agri Processor Co. v. NLRB*, 514 F.3d 1, 9 (D.C. Cir. 2008). However, the NLRB very recently held that the remedy of backpay is not available to any undocumented worker after *Hoffman*, even those who did not use false documents to obtain employment. *Mezonos Maven Bakery*, 357 NLRB No. 47 (2011).

28. See SMITH ET AL., *supra* note 21, at 32–35 (providing recommendations on how to balance immigration law enforcement and labor law enforcement); NAT'L EMP'T LAW PROJECT, JUST PAY: IMPROVING WAGE AND HOUR ENFORCEMENT AT THE U.S. DEPARTMENT OF LABOR (2010), available at <http://www.nelp.org/page/-/Justice/2010/JustPayReport2010.pdf> (providing recommendations on how to improve labor law enforcement at the United States Department of Labor).

29. For example, many immigrants rights organizations and campaigns have adopted the slogan "No Human Being Is Illegal," a statement credited to Elie Wiesel, 1986 Nobel Prize winner. See, for example, the motto of the ACLU Immigrants' Rights Project, *Immigrants' Rights—Recent Court Cases, Issues, and Articles*, AM. CIV. LIBERTIES UNION, <http://www.aclu.org/immigrants-rights> (last visited Feb. 14, 2012), and *AFL-CIO Executive Council Statement on Immigration*, AFLCIO.org (Apr. 16, 2000), <http://www.aflcio.org/aboutus/thisistheafclio/ecouncil/ec0216200b.cfm> ("Millions of hard-

sometimes overtly) court undocumented immigrant labor and thus should be held to task for the workers' ensuing exploitation.³⁰ These are not, however, the main rhetorical arguments we offer to the public and to policymakers.

When engaging in the public conversation about immigration, most advocates emphasize a pragmatic response. In these terms, the rationale for this seemingly counterintuitive protection of undocumented workers is that if they are excluded from basic workplace laws, they will be cheaper as employees and much less likely to complain than native workers. These workers will be obliged to tolerate dangerous work, long hours, and subminimum pay if they have no recourse to the law.³¹ Unscrupulous employers will then seek out an undocumented workforce while maintaining working conditions at the basement level. This subverts the purposes of both our immigration and our labor laws. This rationale has proven persuasive to a number of judges, agency heads, and legislators.³²

working people who make enormous contributions to their communities and workplace are denied basic human rights because of their undocumented status.”).

30. See, for example, the statements of advocates in Julie Watson & Olga R. Rodriguez, *Many Mexicans Have Jobs Before Crossing*, ASSOCIATED PRESS, Apr. 14, 2006, available at <http://www.gmanetwork.com/news/story/4154/news/world/many-mexicans-have-jobs-before-crossing>.

31. See, e.g., AMY TRAUB, DRUM MAJOR INST. FOR PUB. POLICY, PRINCIPLES FOR AN IMMIGRATION POLICY TO STRENGTHEN & EXPAND THE AMERICAN MIDDLE CLASS 7 (2009), available at <http://drummajorinstitute.org/immigration> (“As long as a cheaper and more compliant pool of immigrant labor is available, employers are all too willing to take advantage of the situation to keep their labor costs down and are less willing to hire U.S.-born workers if they demand better wages and working conditions.”); see also *Lack of Worksite Enforcement and Employer Sanctions*, *supra* note 2, at 41–43 (testimony of author).

32. See, e.g., *Agri Processor*, 514 F.3d at 8–9 (supporting the placement of undocumented workers in the same bargaining units as legal workers). The NLRA extends to the undocumented to ensure that legal workers are not adversely affected by competition from undocumented workers. *Id.* at 5; *Saipan Hotel Corp. v. NLRB*, 114 F.3d 994, 997 (9th Cir. 1997) (holding that the NLRB covered both resident and nonresident workers on the Northern Mariana Islands, and noting that providing NLRA protections to nonresident workers ensures greater protections of legal workers' economic interests); *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1121 (7th Cir. 1992) (rejecting backpay for undocumented aliens discharged in violation of the NLRA, but noting that providing NLRA protections to undocumented workers ensures that legal workers are not adversely affected by competition from undocumented workers); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002) (holding that the Fair Labor Standards Act applies to undocumented workers). The *Singh* court noted that undocumented workers have a cause of action under the NLRA because of the reasoning set forth in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984), stating that “[i]f an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened.” *Singh*, 214 F. Supp. 2d at 1058; see also *Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 363 (2006) (holding “in the absence of proof that plaintiffs tendered false work authorization documents to obtain employment, that IRCA does not bar maintenance of a claim for lost wages by an undocumented alien”). “[L]imiting a lost wages claim by an injured undocumented alien would lessen an employer's incentive to comply with the Labor Law and supply all of its workers the safe workplace that the Legislature demands . . . [and] lessen the unscrupulous employer's potential liability to its alien workers and make it more financially attractive to hire undocumented aliens.” *Id.* at 359–60; *Dowling v. Slotnik*, 244 Conn. 781 (1998) (holding that the Workers' Compensation Act applies to undocumented

The baseline assumption underlying this argument is that undocumented workers and legally authorized/citizen workers are competing with each other for jobs. If employers must treat all undocumented immigrants like citizens under the law of the workplace, the reasoning goes, firms will have no reason to hire undocumented immigrants and will turn back to native and legally resident workers. The logical conclusion of this line of reasoning is that following increased enforcement of workplace laws, there will be fewer employment opportunities for undocumented immigrants, who may well return home when they are unable to find work. This is more often left as subtext than made explicit.

II. TENSIONS WITHIN AND BETWEEN THE TWO ARGUMENTS

Immigrants' rights advocates often make both the economic and the workers rights arguments together. For example, in a report calling for comprehensive immigration reform, Amy Traub of the Drum Major Institute, a progressive think tank, first states the economic arguments:

Anti-immigrant policies are often premised on a flawed conception of the economy as a closed, zero-sum system—if an immigrant has a job, he must have taken a job away from an American. In fact, the economy is dynamic, and the presence of hardworking immigrants contributes to the growth of the economy and the creation of new jobs that wouldn't exist if they weren't here.³³

Traub then almost immediately asserts the workers rights argument:

As long as a cheaper and more compliant pool of immigrant labor is available, employers are all too willing to take advantage of the situation to keep their labor costs down and are less willing to hire U.S.-born workers if they demand better wages and working conditions. So, low-skilled U.S.-born workers are left to either accept the same diminished wages and degraded working conditions as immigrants living under threat of deportation or be shut out of whole industries where employers hire predominantly undocumented immigrants.³⁴

The most obvious conflict between the economic arguments and the workers rights argument lies right on the surface. If immigrants do not have a negative impact on resident workers' overall wages or employment rates, and if they are indeed either creating new jobs or taking jobs that U.S. residents refuse to do, as the economic arguments suggest, then they are not competing with residents for jobs. But if immigrants do not compete with resident workers, they

laborers). The court studied the legislative history of the state act, citing a 1913 statement: “[The Workers’ Compensation Act] must not . . . exclude aliens from the benefits; because there would be precisely the same inducement under such a provision for an employer to take on the men who are not citizens of the country. . . . Connecticut cannot afford to discriminate against the employment of her own citizens.” *Id.* at 804.

33. TRAUB, *supra* note 31, at 7.

34. *Id.*

should not be affecting residents' wages and working conditions, as the workers rights argument suggests. Why, then, should those resident workers who are not otherwise inclined to favor immigrants care about the enforcement of immigrant workers' rights, or stand in solidarity with them in workplace organizing efforts?

In what follows, I will argue that this superficial contradiction is resolvable to a large degree through a closer examination of the assertion that immigrants take "jobs Americans won't do," and a disaggregated view of economists' findings on the job-competition question.

A. Looking Behind "Jobs Americans Won't Do"

The statement that there are "jobs Americans won't do" may be correct on the surface. The differing perspectives of native and migrant workers on wages and working conditions, and the cultural meaning that U.S. residents attach to particular jobs, do play roles in sorting out who does what.³⁵ The statement that immigrants do jobs that Americans reject is troubling, though, when—as is often the case—it is presented as a natural state of affairs, reflecting only the immutable tastes of workers. In fact, employers are the primary actors in labor markets. What made a number of occupations into "immigrant work" was not a natural evolutionary process but a concerted effort by employers to undercut unions and reduce wages and protections (and, in some cases, to recruit an immigrant workforce to take the resulting jobs that failed to attract resident workers). Employers are actively involved in generating the supply of labor they need to keep wages low. Employers who send recruiters to foreign countries, use guest-worker programs, or hire the undocumented through a foreman who builds a workforce by calling his relatives and friends, are making an active choice to circumvent the local labor supply. Once started, these flows may be self-sustaining, but employers' hands have crafted them.³⁶

Furthermore, employers have repeatedly demonstrated a preference for immigrants over native workers—and particularly over African Americans—based on their beliefs that immigrants are hardworking, subservient, easier to control,

35. See, e.g., Gordon & Lenhardt, *supra* note 20, at 1200–01. Farm labor is a perennial example of work that does not attract resident workers under the wages and conditions on offer. See, e.g., Kirk Johnson, *Hiring Locally for Farm Work Is No Cure-All*, N.Y. TIMES, Oct. 5, 2011, at A1.

36. Gordon & Lenhardt, *supra* note 20, at 1174–79; see STEVE STRIFFLER, CHICKEN: THE DANGEROUS TRANSFORMATION OF AMERICA'S FAVORITE FOOD 96 (2005). For the story of the deterioration of work and the switch from native to immigrant labor in the poultry processing industry, see LEON FINK, THE MAYA OF MORGANTON: WORK AND COMMUNITY IN THE NUEVO NEW SOUTH 12 (2003). For a chronicle of a parallel process in the entire meatpacking industry, see LANCE COMPA, HUMAN RIGHTS WATCH, BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS 11–14 (2004). For an overview of how the shift happened in the janitorial, garment, construction, and trucking industries, see RUTH MILKMAN, L.A. STORY: IMMIGRANT WORKERS AND THE FUTURE OF THE U.S. LABOR MOVEMENT 104–13 (2007).

and so on.³⁷ Indeed, to hire through temporary visa programs, agricultural employers must commit to paying a premium “adverse effect wage,” which ranges up to \$12.00 per hour depending on the state, rather than the \$7.25 per hour minimum wage that they can offer to resident workers.³⁸ And yet employers use these programs actively, seeking shelter from stepped-up government enforcement of employer sanctions against those who hire undocumented workers, and in pursuit of what they perceive as a controllable, reliable workforce.³⁹

Outside of the context of agricultural and domestic work, and even within them to some extent, resident workers may become interested anew in what are now seen as “immigrant jobs,” if wages rise. The classic example of this is meatpacking, which went from the hell pit of immigrant work, described by Upton Sinclair in *The Jungle*, to a highly unionized industry paying in the mid-teens per hour to a native workforce by the 1960s. After the industry consolidated and

37. ROGER WALDINGER & MICHAEL I. LICHTER, HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR 157–59, 176–79 (2003); Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 970 (2006). See generally JENNIFER GORDON, FREE MOVEMENT AND EQUAL RIGHTS FOR LOW-WAGE WORKERS? WHAT THE UNITED STATES CAN LEARN FROM THE NEW EU MIGRATION TO BRITAIN (2011), available at <http://www.law.berkeley.edu/ewi.htm> (offering interesting insights from the perspective of the U.K. in the wake of the 2004 and 2007 European Union enlargements); Robert MacKenzie & Chris Forde, *The Rhetoric of the ‘Good Worker’ Versus the Realities of Employers’ Use and the Experiences of Migrant Workers*, 23 WORK EMPLOY. & SOC’Y 142, 149–50 (2009), available at <http://wes.sagepub.com/cgi/content/abstract/23/1/142>. In the U.K. context, where E.U. free movement policy gives employers access to a wealth of legally authorized low-wage workers, some employers continue to seek out the newest group to employ. Immigration status is not the issue, and wages don’t seem to be either. What remains appealing to unscrupulous employers about new immigrants is their lack of English, the extra effort they are willing to make, their ignorance of the law and their rights, and the fact that they do not yet judge wages or the treatment they receive by the same standards as local workers.

38. *Adverse Effect Wage Rates—Year 2011*, U.S. DEP’T OF LAB. (Mar. 16, 2011), <http://www.foreignlaborcert.doleta.gov/adverse.cfm>.

39. Department of Homeland Security statistics show an increase from a low of 14,094 H-2A visas granted in 2003 to a high of 173,103 in 2008 (down to 149,763 in 2009). OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., 2009 YEARBOOK OF IMMIGRATION STATISTICS 63, 65 (2010), http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.

For anecdotal support for the assertion that this increase is at least partially due to increased enforcement, see Kathy Cobb, *Rolling the ICE Dice*, FED. GAZETTE, at 1, 7 (Nov. 1, 2007), available at http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=1167 (noting that ICE increased its arrests through workplace enforcement ninefold between 2003 and 2007, and commenting that DOL data appears to indicate that employers in some states have responded by turning to temporary work visas). “In Florida, [the] H-2A farm guest worker program is increasingly used to solve labor shortages on farms. In California, after a catastrophic pear season last year, farmers are earnest about getting a broad guest worker program into place. The increased demand may be due to stricter enforcement against illegal workers. In any event, H2A use is up 500% in Florida.” Peter Rousmaniere, *Shortages of Farm Labor Hit Florida, California. Are They Due to Immigration Enforcement?*, WORKING IMMIGRANTS BLOG (Jan. 16, 2007, 7:27 AM), <http://www.workingimmigrants.com/2007/01>.

systematically broke the back of the unions in the 1980s, and began recruiting immigrant labor, meatpacking once again became an immigrant industry, with abysmal working conditions and average wages of seven or eight dollars per hour.⁴⁰ It seems likely that resident workers would do those jobs once again, were they better paid.⁴¹ Yet raising wages for socially disparaged work is rarely presented as an alternative to importing workers who are willing to accept lower pay, longer hours, taxing demands, and uncompensated risk.

Since the category of “jobs Americans won’t do” is constantly in flux, rather than fixed, it is urgent to intervene in the labor market in ways that limit the spread of its boundaries. A reformulation of antidiscrimination law so that it addresses employers’ illegitimate use of race and nationality as a proxy for determining subservience (and the practice of making subservience a job qualification) is one important step.⁴² More generally, active and effective enforcement of basic workplace laws, passage of living wage ordinances, and sustained organizing efforts that cross lines of race, ethnicity, and immigration status are essential to avoid more occupations becoming degraded to the point that resident workers shun them.⁴³

B. Disaggregating Economists’ Findings

Economists’ assertions about the neutral or net positive effect of immigrants on native workers grow from studies of the impact of immigrant labor on resident workers and the U.S. economy *as a whole*. From a closer vantage point—one that distinguishes between highly skilled immigrants and those who do low-skilled

40. John Brueggemann & Cliff Brown, *The Decline of Industrial Unionism in the Meatpacking Industry: Event-Structure Analyses of Labor Unrest, 1946–1987*, 30 WORK & OCCUPATIONS 327 (2003). For accounts of similar shifts in other industries, see sources cited *supra* note 36.

41. Garbage collectors in New York City offer another illustration of the fact that dirty and dangerous jobs can be attractive to native workers. Sanitation trucks are staffed by unionized city employees who earn a starting annual salary of \$31,200 (not including overtime), which rises to an annual base salary of \$67,141 after five and a half years. Dep’t of Sanitation N.Y.C., *Job Opportunities*, N.Y.C.GOV (2011), <http://www.nyc.gov/html/dsny/html/jobs/jobs.shtml>. Recruitment of legally authorized workers has never been a problem. *Id.*

42. HOLZER, *supra* note 15, at 8 (“In some sectors—notably construction and manufacturing—wages might be high enough even today to entice young black men into the markets, even in the presence of immigrants, if they could be hired; but whether employers would hire young black men into these jobs if immigrants were not available remains questionable because of other factors such as discrimination and weak informal job networks”); Saucedo, *supra* note 37, at 1018–20.

43. This must be done in a way that takes such the reality of global competition into account. This means, among other things, a focus on industries that are locally rooted rather than footloose, for example, jobs that cannot be done overseas with cheaper labor. With some notable showcase exceptions, the battle for higher wages and better working conditions has essentially been lost in footloose industries such as garment and call centers. For one view of this question, see HOLZER, *supra* note 15, at 8 (“It seems unlikely that many native-born workers would find low-wage, low-status work in agriculture, restaurants, or landscaping very appealing, absent large wage increases which themselves might cause many of the jobs to disappear.”).

work, for example, or one that looks at subsectors of the U.S. economy—economists' conclusions are more complex and more contested.

Economists broadly agree that high-skilled immigrants bring significant benefits to the United States.⁴⁴ With regard to immigrants who do low-wage work, however, there is a greater range of viewpoints. As noted above, most economists who find any negative impact conclude that the group most likely to be hurt by competition with new immigrants is the prior cohort of immigrants. But others—most prominently George Borjas—have argued that the weight of immigration also falls significantly on native high school dropouts and those with minimal skills or work experience. Borjas and others in his camp report relatively small effects, with a one percent to four percent decrease in the wages of high school dropouts corresponding to a ten percent increase in immigration.⁴⁵ Small, but real—a decrease of four percent represents an annual loss of eight hundred dollars in pretax dollars for a worker earning twenty thousand dollars a year. The number of natives without a high school education in the United States is shrinking,⁴⁶ but

44. For summaries of the literature, see HOLZER, *supra* note 15, at 1, 3, and SOMERVILLE & SUMPTION, *supra* note 8, at 23, 29, 32.

45. On the lower end of the spectrum, the influential National Research Council issued a study in 1997 that found a small negative effect on the wages of the lowest skilled native workers, possibly one to two percent. NAT'L RESEARCH COUNCIL, *THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION* 6 (James P. Smith & Barry Edmonston eds., 1997). On the higher end of the spectrum, Borjas estimates approximately a four percent decrease in the wages of high school dropouts as a result of the 1990–2004 immigrant influx. George J. Borjas et al., *Imperfect Substitution Between Immigrants and Natives: A Reappraisal* 28 (Nat'l Bureau of Econ. Research, Working Paper No. 13887, 2008), available at <http://www.nber.org/papers/w13887.pdf> (offering the four percent figure and referring back to similar conclusions in Borjas's earlier work); see also DANIEL S. HAMERMESH & FRANK D. BEAN, *HELP OR HINDRANCE: THE ECONOMIC IMPLICATIONS OF IMMIGRATION FOR AFRICAN AMERICANS* 6 (1998); Kristen F. Butcher, *An Investigation of the Effect of Immigration on the Labor-Market Outcomes of African Americans*, in *HELP OR HINDRANCE: THE ECONOMIC IMPLICATIONS OF IMMIGRATION FOR AFRICAN AMERICANS*, 149, 151, 177 (Daniel S. Hamermesh & Frank D. Bean eds. 1998) (noting an impact on low-skilled African Americans); Lisa Catanzarite, *Occupational Context and Wage Competition of New Immigrant Latinos with Minorities and Whites*, 31 *REV. BLACK POL. ECON.* 77, 88 (2003) (noting that “blacks appear to suffer disproportionately from [immigrant] employment in brown-collar jobs,” but that “the findings do not support a sweeping conclusion that immigrant employment is generally harmful to native workers or to native minorities. Many brown-collar fields thrive precisely because of the availability of immigrant labor . . . [f]urther, the population growth associated with immigration creates a broad range of job opportunities for native-born workers.”). But see GERALD JAYNES, *A CONVERSATION ABOUT THE ECONOMIC EFFECTS OF IMMIGRATION ON AFRICAN AMERICANS* 3 (2009), available at <http://www.immigrationpolicy.org/sites/default/files/docs/Gerald%20Jaynes%20071409.pdf> (summarizing the findings of Franklin D. Wilson & Gerald Jaynes, *Migration and the Employment and Wages of Native and Immigrant Workers*, 27 *WORK & OCCUPATIONS* 135 (May 2000) (“A colleague and I launched a large-scale statistical analysis to measure immigration’s effects on wages and employment of natives nationwide. To our surprise, no matter how we approached the data, our results showed either no effects or very modest effects for the least-educated black men.”)).

46. U.S. CENSUS BUREAU, *supra* note 19.

African Americans are overrepresented within the remaining pool.⁴⁷ This raises the concern that they may be disproportionately affected by low-skilled immigration.

Recently, Heidi Shierholz of the Economic Policy Institute has argued that advances in methodology have resolved the conflict between the mainstream view and the Borjas perspective in favor of the conclusion that the wages of native workers (including workers with less than a high school degree, young workers, and African Americans, all groups that have been the focus of particular concern) are either unaffected by immigration or see modest benefits from it, while the wages of foreign-born workers are impacted negatively.⁴⁸ Shierholz's analysis has been widely cited in support of the proposition that immigrants help rather than harm native workers and the economy as a whole.⁴⁹

Yet the question remains a live one in many people's minds. If, in fact, immigrants have a net neutral or positive impact on the wages and job prospects of resident workers across the country, and if immigrants take "jobs Americans won't do," why do so many native workers perceive (not just believe from an abstract perspective) that immigration harms them economically, and thus have such a hard time accepting the economists' argument?

I would argue that the economists' view—which is largely based on national-level studies that group all regions, industries, immigrants, and native workers together—is not sufficiently fine-grained to describe the impact of immigration as it is experienced by communities, workplaces, and individual workers. Under a bird's eye approach, losses in one region are balanced by gains elsewhere, and harm to one group of workers is smoothed out by benefit to others. But from the perspective of whoever loses out in the shift, the harm is real and deeply felt. While the *net* economic effect of immigration may well be neutral or positive, a different picture emerges from a disaggregated perspective.

One question a disaggregated view raises is whether immigrants with varying immigration statuses, undocumented and temporary workers in particular, affect economic outcomes for resident workers differently. Shierholz sounds a note of

47. CHRIS CHAPMAN, JENNIFER LAIRD & ANGELINA KEWALRAMANI, U.S. DEP'T OF EDUC., TRENDS IN HIGH SCHOOL DROPOUT AND COMPLETION RATES IN THE UNITED STATES: 1972–2008: COMPENDIUM REPORT 8–9 (2010), *available at* <http://nces.ed.gov/pubs2011/2011012.pdf>; CTR. FOR LABOR MKT. STUDIES, N.E. UNIV. AND THE CHI. ALTERNATIVE SCH. NETWORK, LEFT BEHIND IN AMERICA: THE NATION'S DROPOUT CRISIS 5 (2009), *available at* http://iris.lib.neu.edu/cgi/viewcontent.cgi?article=1020&context=clms_pub.

48. SHIERHOLZ, *supra* note 5, at 1, 11. A similar argument was put forth, and similar conclusions drawn, in LINDA LEVINE, IMMIGRATION: THE EFFECTS ON LOW-SKILLED AND HIGH-SKILLED NATIVE-BORN WORKERS 10–11 (2010), *available at* <http://fpc.state.gov/documents/organization/142751.pdf>. *See also* Gianmarco Ottaviano & Giovanni Peri, *Immigration and National Wages: Clarifying the Theory and the Empirics* (Nat'l Bureau of Econ. Research, Working Paper No. 14188, 2008).

49. The debate is not over. *See generally* Borjas et al., *supra* note 45 (Contesting the conclusions of one of the studies on which Shierholz's thesis relies).

warning in this regard, pointing out that in the four states with the highest proportion of undocumented immigrants in the workforce (California, Florida, New York, and Texas), but nowhere else in the country, there appears to be a small negative effect of immigration on wages for male workers with less than a high school degree.⁵⁰ She hypothesizes that

[s]ince . . . unauthorized immigrants are more likely than other workers to be male and also more likely than other workers to be without a high school degree, a larger inflow of unauthorized immigrant workers, who are easily exploited by employers, may put downward pressure on the wages of similar native workers in these states, a pressure that is largely masked in estimates at the national level.⁵¹

The disaggregated view, as opposed to the bird's-eye view, raises another question: what impact does immigration have on particular locations and industries?⁵² Some localities are experiencing vast increases in their immigrant populations (and therefore in costs local taxpayers bear providing services, such as education and healthcare, to these populations), without deriving much benefit, or at least much perceived benefit, for the resident population.⁵³ But others appear to be benefitting greatly.⁵⁴ The need for better data is especially acute in the South, where over the past two decades new immigrants have begun to arrive in significant numbers in areas and industries where African Americans have been concentrated.⁵⁵ Many of those new arrivals are undocumented. This shift in

50. SHIERHOLZ, *supra* note 5, at 19.

51. *Id.* at 20.

52. *Id.* at 3.

53. On the issue of state and local costs, see generally CONG. BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS (2007), available at <http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf>. With regard to the perception that immigrants are harming state and local economies, the explosion of state and local legislative proposals to restrict immigration provides one powerful indicator. For an overview of all state legislation regarding immigrants in 2009, see Nat'l Conference of State Legislatures, *State Laws Related to Immigrants and Immigration, January 1–December 31, 2010*, NCSL (Jan. 5, 2011), <http://www.ncsl.org/default.aspx?tabid=21857>. For purposes of comparison, in 2005, 300 such bills were introduced at the state level; in 2010, the number was 1400. *Id.* at 1.

54. See, e.g., THOMAS DINAPOLI, NEW YORK STATE COMPTROLLER, THE ROLE OF IMMIGRANTS IN THE NEW YORK CITY ECONOMY (Office of the N.Y. State Comptroller, Report 17-2010, 2010), available at <http://www.osc.state.ny.us/osdc/rpt17-2010.pdf>.

55. AUDREY SINGER, BROOKINGS INST., THE RISE OF NEW IMMIGRANT GATEWAYS 5 (Feb. 2004), available at http://www.brookings.edu/~media/Files/rc/reports/2004/02demographics_singer/20040301_gateways.pdf. This change in demographics had barely begun in 1997 when the National Research Council published its influential report on the question of the economic impacts of immigration. At the time, the Council concluded:

None of the available evidence on spatial correlations suggests that in the aggregate the economic opportunities of black Americans are substantially reduced by immigration. . . . Some black workers have lost their jobs to immigrants, especially when they live in a place with a large concentration of immigrants. But the vast majority do not live in such places, and their economic opportunities are determined by other things.

NAT'L RESEARCH COUNCIL, *supra* note 45, at 223–24. Today, with new immigrants arriving in large numbers in both urban and rural southern communities, it would be harder to sustain the position

immigration patterns has produced a wealth of anecdotes about a change in hiring preferences in industries such as chicken processing, janitorial work, and fast food, with employers now contracting newcomers rather than African Americans.⁵⁶ In the absence of data, observers note the rising unemployment rate of African Americans and causally link the two. Given that an influx of newcomers seems likely to have more negative short-term impacts that even out in the long term,⁵⁷ it is not surprising that some of the greatest concerns arise in the “New South” context where large-scale immigration is a relatively new phenomenon.

Additional questions requiring further research relate to the effect of immigration on African American workers of different educational levels,⁵⁸ and on the question of where African Americans no longer employed in jobs like food processing and janitorial work are now working. Have they moved to a different region, stayed and found equal or better jobs, or become unemployed? Too little work has been done in these areas to offer a definitive answer, although a recent preliminary paper by economists at UC Berkeley and UC Riverside suggests that overall, Black workers have been able to “respecialize” in the face of competition with Hispanic workers, and thus have been largely shielded from the negative effects of that competition.⁵⁹

In the end, while immigration in the aggregate may bring economic benefits to the nation overall, we need to better understand the extent to which those gains come on the backs of those least able to bear the cost—resident workers, including poor white workers but particularly workers of color already disadvantaged by discrimination, whose opportunities are further limited because they must compete with new immigrants for low-skilled jobs. This will require more study of the local and industry/occupational impacts of undocumented and temporary migration on less educated—and particularly minority—resident workers, and of the employment outcomes for those workers who are displaced by immigrants.

In the meantime, a more specific description of the economic impact of immigration on less-educated African Americans and other resident workers without a high school degree could ameliorate the rhetorical tension I identify in opening this essay. Immigrants are largely beneficial to the economy and to resident workers overall, but to the extent they have a negative impact, it falls on prior immigrants and likely also on the least educated native workers. This effect is

that most African Americans are geographically shielded from immigration.

56. JAYNES, *supra* note 45, at 3.

57. PERI, *supra* note 7, at 7.

58. SHIERHOLZ, *supra* note 5, at 23; see HOLZER, *supra* note 15, at 12 (pointing out the lack of studies on different impacts of documented and undocumented workers on labor market outcomes of natives).

59. Arindrajit Dube et al., The Effect of Immigration on Ethnic Composition and Occupational Reallocation 18 (Nov. 11, 2009) (unpublished manuscript), available at <http://www.tcd.ie/Economics/Seminars/Sorensen.pdf>.

most evident when streams of newcomers first arrive in a region or industry and is amplified when those immigrants are undocumented. A focus on organizing and on protecting workplace rights for workers in immigrant-heavy industries will benefit all workers in the lowest-wage labor markets. This is not in conflict with the position that, based on an overview of the national economy, immigrants complement rather than compete with resident workers, explaining the fact that immigration appears to have either a neutral or a small net positive overall impact on resident workers' wages and employment rates.

C. A Caveat

There is some danger that by acknowledging that the lowest-wage, least-educated resident workers—who are disproportionately African American—are likely more negatively impacted by the arrival of new immigrants than resident workers overall, we will overstate the role of immigrants in determining African American employment opportunities, contributing to an exaggerated story of conflict between the two groups. Media attention to these tensions has penetrated the public's imagination far more deeply than quieter reporting of the fact that polling results often show African Americans expressing viewpoints more favorable to immigrants than white respondents do, even as they acknowledge economic concerns.⁶⁰ Fears of competition have also cynically been manipulated by employers, and by politicians who profess a concern for American workers in the context of arguing to curtail immigration, but then consistently oppose measures to raise minimum wage, enhance workplace protections, or support workers' rights to unionize.⁶¹

60. Carroll Doherty, *Attitudes Toward Immigration: In Black and White*, PEW RESEARCH CTR. (Apr. 26, 2006), <http://pewresearch.org/pubs/21/attitudes-toward-immigration-in-black-and-white> (reporting generally more positive views of immigrants, but greater concern about economic competition). For an overview of earlier studies (likewise reporting generally more positive views of immigrants, but concern about economic competition), see Paula McClain, et al., *Black and White Americans and Latino Immigrants: A Preliminary Look at Attitudes in Three Southern Cities* 4–6 (2009) (unpublished manuscript), available at <http://www.vanderbilt.edu/csdi/archived/working%20papers/McClain%20et%20al.pdf>; Ted Brader et al., *The Racial Divide on Immigration Opinion: Why Blacks Are Less Threatened by Immigrants* 1–2 (2010) (unpublished manuscript) (on file with the UC Irvine Law Review), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1642984 (“[S]urveys have found that blacks are more likely to favor easing immigration restrictions . . . increasing benefits to immigrants . . . , and to oppose English as the official language. . . . They also found that higher percentages of blacks than whites support the children of illegal immigrants attending public schools, and fewer blacks compared to whites believe that immigrants significantly increase crime rates.” This is despite the fact that “[m]ore blacks than whites say they or a family member have lost a job to an immigrant, and blacks are generally more likely to feel that immigrants take jobs away from American citizens.”).

61. Former Congressman Tom Tancredo (R-CO) offers a good example of such a politician. Tancredo is a vocal proponent of the position that immigrants harm U.S. workers through competition. “Every month our government lets in 75,000 permanent foreign workers via ‘green cards’ and 50,000 temporary workers through numerous guest worker programs. That’s 1.5 million new foreign workers each year. Then add all the illegal aliens flooding across our open borders. Every

The economic fate of less-educated African Americans requires urgent attention. Economist Steven Pitts has argued that Black workers face “a two dimensional job crisis: a crisis of unemployment and a crisis of low-wage work.”⁶² African Americans overall have by far the highest unemployment rate of any racial or ethnic group in the United States—in mid-2011, 16.1%, compared to 11.8% for Latinos and 8% for whites.⁶³ But while immigration may be one factor among many in this picture, it is dwarfed by other causes. African American employment rates have fallen precipitously due to the United States’ loss of unionized industrial employment, such as auto manufacturing, that once lifted hundreds of thousands of African American workers into the middle class; the increase in privatization of government jobs, once a unionized bulwark for African Americans denied opportunities in the private sector; and ongoing discrimination against African American workers by employers who prefer immigrants for low-wage jobs and whites for skilled work. The criminalization of young African American men and the epidemic high school dropout rates among African American students are two other key factors.⁶⁴ As Dr. Pitts notes, although Black unemployment receives far

one of those new arrivals is competing with American citizens for jobs—and contrary to the propaganda of the open borders lobby, they are not taking only “jobs Americans won’t do.” Tom Tancredo, *Ultimate Jobs Program: Immigration Timeout*, WORLDNETDAILY (Jan. 30, 2010), <http://www.wnd.com/index.php?fa=PAGE.view&pageId=123528>. Meanwhile, Tancredo has opposed increases in the minimum wage. *Tom Tancredo on Trade and Economics*, GLASSBOOTH.ORG, <http://glassbooth.org/explore/index/tom-tancredo/15/trade-and-economics/6> (last visited Oct. 5, 2011). Tancredo has a very low twenty percent rating from the AFL-CIO. *Tom Tancredo on Jobs*, ONTHEISSUES.ORG, http://www.ontheissues.org/house/Tom_Tancredo_Jobs.htm (last visited Oct. 5, 2011). Tancredo heavily criticized teacher unions in his recent Colorado gubernatorial campaign and has promised to “go after public employee unions.” Vincent Carroll, *The Audacity of Tom Tancredo*, DENVER POST (July 24, 2010), http://www.denverpost.com/opinion/ci_15588601.

Elton Gallegly (R-CA) is another example. Known as a strong proponent of anti-immigrant measures, he has expressed concern about African American job loss due to immigration. *Hearing on Making Immigration Work for American Minorities Before the Subcomm. on Immigration Policy and Enforcement*, 112th Cong. (2011) (statement of Elton Gallegly, Chairman), available at <http://www.house.gov/gallegly/media/media2011/030111immigration.htm>. Yet he opposes affirmative action, an increase in the federal minimum wage, or changes in the law to make unionization easier. *Representative Elton W. Gallegly—Issue Positions*, PROJECT VOTE SMART, http://www.votesmart.org/npat.php?can_id=26750#700 (last visited Oct. 5, 2011). His seven percent AFL-CIO rating is one of the lowest in the House. *Elton Gallegly on Jobs*, ONTHEISSUES.ORG, http://www.ontheissues.org/CA/Elton_Gallegly_Jobs.htm#03n-AFLCIO (last visited Oct. 5, 2011).

62. Steven Pitts, *The Race Question and Building Labor Power in the Context of the Immigrant Upsurge*, LAB. & WORKING-CLASS HIST. ASS’N NEWSL. (Labor and Working-Class History Assoc., Durham, N.C.), Fall 2007, at 7, 8, available at <http://www.lawcha.org/newsletters/fall07.pdf>.

63. *Employment Status of the Civilian Population by Race, Sex, and Age*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/news.release/empst.t02.htm#cps_empt_a02.f1 (last visited Sept. 29, 2011); *Employment Status of the Hispanic or Latino Population by Sex and Age*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/news.release/empst.t03.htm> (last visited Sept. 29, 2011).

64. JAYNES, *supra* note 45, at 4 (“The relative importance of less-educated young native workers’ job losses due to the competition of immigrants is swamped by a constellation of other factors . . . diminishing their economic status.”); David Bacon, *The Political Economy of International Migration*, NEW LAB. F., Fall 2007, at 57, 63; *Which Way Forward*, CTR. FOR NEW CMTY,

more attention, the poor quality of the low-wage jobs in which so many Black workers are employed is an equally—if not more—serious part of the problem.

Once we acknowledge that immigration may have a disproportionate (if small) impact on less educated resident workers' wages and unemployment levels, and once we highlight particular concern for African American workers who fall into that group because of persistent racism and disenfranchisement, we must also make clear that factors other than immigration are responsible for the vast majority of African American unemployment in the United States, and for the deterioration in the quality of low-wage work. Changes in immigration policy are likely to have a minimal impact without initiatives that address the root causes of the problem. The response to these conditions of work must emphasize the agency of employers in creating such conditions, rather than blaming immigrants. With regard to unemployment, additional investment in education (with a focus on schools in low-income areas), renewed commitment to workforce development (with an emphasis on linking training to institutions that help workers build labor market power rather than a sole focus on individual skill building),⁶⁵ and an increase in the minimum wage are likely to be far more effective responses than restrictionism. A broader assault on discrimination in the workplace and improved rehabilitation programs for ex-offenders are also important elements of policy responses.⁶⁶ Above all, an effective response requires support for solidarity and organization among low-wage workers to address the poor pay and treatment they all face on the job.⁶⁷

III. CONCLUSION

If we, as advocates, can be clearer and more nuanced in our discussion of the economics of job competition between immigrants and low-wage resident workers, we will move a long way toward avoiding the tensions I highlight at the beginning of this essay. From an overall view, immigration has a neutral or small positive effect on native workers' wages. But we should acknowledge that there is much we don't know about the potential for a greater detrimental impact on certain local areas and industries, especially in the short term, and on particular

<http://www.newcomm.org/content/view/2123/> (last visited Sept. 29, 2011); DeWayne Wickham, *Immigrants a Scapegoat for Blacks' Unemployment*, USA TODAY, Aug. 7, 2007, at A9, <http://www.usatoday.com/printedition/news/20070807/opcom07.art.htm>; Earl Ofari Hutchinson, *Rising Latino Numbers, Rising Black Fears*, BAY ST. BANNER (Boston), Dec. 6, 2007, at A1, <http://www.baystatebanner.com/opinion58-2007-12-06> ("The prime reasons for chronic black unemployment . . . are lingering racial discrimination and the lack of job skills, training and education. No matter, many blacks still blame their job plight on illegal immigrants."). On the high levels of incarceration among African American men and the role of criminal records as a barrier to black employment, see generally Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617 (2005).

65. Pitts, *supra* note 62, at 8.

66. JAYNES, *supra* note 45, at 4.

67. Pitts, *supra* note 62, at 8.

groups of residents, including the prior wave of immigrants, workers of color, and workers with less than a high school diploma, when immigrants' status is structured in ways that make them particularly vulnerable (especially the undocumented and workers on temporary visas). Such an approach is honest and also conveys the urgency of workers rights enforcement from the perspectives of both newcomers and residents in low-wage jobs.

At the same time, it is essential to address the flashpoint question of employers' role in creating the category "jobs Americans won't do," to acknowledge the breadth and depth of the sources of African American unemployment that are unrelated to immigration, and to recognize that at the core of the problem lies the deterioration of work for all low-wage workers in the United States. If we can do these things, we will come closer to advocating for immigrant workers' rights and immigration reform in ways that are consistent with reality on the ground, effective in fostering solidarity between immigrants and resident workers, and likely to engage productively with the immigration debate that Congress will (we hope) take up again in the near future.