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## Organizing in the Shadows: Limits on Union Organization of Undocumented Day Laborers

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## NOTE

### Organizing in the Shadows: Limits on Union Organization of Undocumented Day Laborers

Paige Coomer\*

#### ABSTRACT

*This Note illustrates how the current US labor scheme acts as an impediment to union organization of undocumented day laborers. While the market for these contingent workers grows, so too does the need for worker protection from abuses. However, unions face legal and structural barriers that prevent them from effectively organizing day laborers. Ultimately, these legal and structural barriers show that the US labor scheme as a whole is incapable of effectively responding to the needs of day laborers, and by extension, to the needs of a globalized, migrant workforce. My Note argues that by failing to adapt to changes brought on by globalization, our labor law cannot be harnessed to protect vulnerable day laborers. As they stand, our labor laws secure the place of day laborers in the shadows of our working society.*

#### INTRODUCTION

“They thought we Latinos were disposable workers.”<sup>1</sup>

Josue was recruited from a street corner in New Orleans by an employer offering promising work for wages.<sup>2</sup> He was one of several *jornaleros*—day laborers, or temporary workers—hired to clean up portions of a Texas town that was destroyed by Hurricane Ike in 2008.<sup>3</sup> Josue accepted the employer’s offer, relying on the promise of good work, payment, and decent working conditions.<sup>4</sup> However, when Josue arrived for his first day of work, he was placed in an isolated labor camp, forced to perform dangerous work in toxic conditions with no protective equipment, and had no one to turn to for help.<sup>5</sup> Josue and his fellow day laborers not only risked their health by performing dangerous construction work, but also faced discrimination and wage

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1 *Josue’s Story, Day Laborers*, UNITED WORKERS’ CONGRESS, <http://www.unitedworkerscongress.org/day-laborers.html> (last visited Nov. 14, 2015).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

theft from their employers.<sup>6</sup> When Josue protested against his employer for stealing wages, his employer called Immigration and Customs Enforcement (“ICE”).<sup>7</sup> Josue, an undocumented worker, spent 78 days in jail for demanding \$250 in unpaid wages.<sup>8</sup>

Day laborers stand on sidewalks, street corners, and parking lots, waiting to be picked up by employers who offer temporary work.<sup>9</sup> Often invisible to mainstream America, day laborers build our houses, farm our land, and cook our meals—moving our day-to-day lives ever-forward through their work in the low-wage labor market. Of these “men on the corner,”<sup>10</sup> three-quarters are undocumented.<sup>11</sup> And, as the above narrative demonstrates, many undocumented day laborers face rampant abuse from employers.<sup>12</sup>

Josue’s situation is not uncommon. In any given day, approximately 117,600 undocumented day laborers search for work.<sup>13</sup> Employers in industries such as construction and agriculture often take advantage of the undocumented labor market because such labor is cheap and flexible.<sup>14</sup> Further, undocumented workers themselves often seek day labor jobs because of their informal, “no questions asked” nature.<sup>15</sup> The jobs are quick and temporary, and employers often do not require the verification documents and English language skills required by more formal employment opportunities.<sup>16</sup> However, such informality puts day laborers in a tenuous position: employers can withhold wages and place workers in unsafe

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6 *Id.*

7 *Id.*

8 *Id.*

9 Abel Valenzuela Jr., Nik Theodore, Edwin Meléndez & Ana Luz Gonzalez, *On the Corner: Day Labor in the United States*, UCLA CTR. URBAN POV., at i, <http://www.coshnetwork.org/sites/default/files/Day%20Labor%20study%202006.pdf> (2006).

10 Throughout this paper, I will refer to day laborers using the pronoun “he” because the majority of undocumented day laborers are male, with women comprising roughly two percent of the day labor population. *Id.* at 18. For an article discussing the unique problems women day laborers face, see Elizabeth J. Kennedy, *The Invisible Corner: Expanding Workplace Rights for Female Day Laborers*, 31 BERKLEY J. EMP. & LAB. L. 126 (2010).

11 Valenzuela et al., *supra* note 9, at iii.

12 Though day laborers come in many forms and work across various industries, this paper focuses on undocumented day laborers who migrate to the United States from the global south, namely Latin American countries. Typically, these laborers work in the construction or agricultural industries. See Rebecca Smith, *An Honest Day’s Work: Day Labor Advocacy in the United States*, 38 CLEARINGHOUSE REV. 355, 358 (2004).

13 Valenzuela et al., *supra* note 9, at i.

14 A report written by the Government Accountability Office found that contingent workers (day laborers) are paid less and have less job security than standard workers. This is because day laborers only receive work—and thus, only receive wages—when work is available. Because employers can hire day laborers at-will when work arises, they are in a more flexible position than the laborer. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-168R, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS, 30–31, 45–46, <http://www.gao.gov/assets/670/669766.pdf> (2015).

15 Amy Pritchard, Note, “We Are Your Neighbors”: *How Communities Can Best Address a Growing Day Labor Workforce*, SEATTLE. J. SOC. JUSTICE 371, 375 (2008).

16 *Id.* at 375.

conditions.<sup>17</sup> If undocumented workers complain, the employers simply threaten them with ICE and therefore avoid consequences for breaking the law.<sup>18</sup>

As the tide of undocumented workers continues to flow into the United States, day labor is often the first place vulnerable immigrants turn to for work opportunities.<sup>19</sup> But while the market for contingent workers grows, so too does the need for worker protection from abuses like those experienced by Josue. In light of this increase of day laborers and need for protection, it is essential to view day laborers within the broader labor landscape in the United States. When doing so, an interesting paradox crystalizes: the low-wage workforce continues to increase in size, but the bodies initially created to protect powerless workers—labor unions—are faltering.<sup>20</sup> Traditionally, low-wage, unskilled labor in the United States was concentrated in the industrial sector.<sup>21</sup> When these laborers faced workplace abuses, they unionized. Through collective action, industrial unions negotiated fair collective bargaining agreements to set wage and hour floors and promote fair workplace practices.<sup>22</sup> After WWII, roughly forty percent of the working population was unionized.<sup>23</sup> But as industrial workplaces have moved overseas to take advantage of cheap labor markets, union membership in the United States has steadily declined.<sup>24</sup> Labor’s industrial stronghold, affected and changed by “a new epoch of global production and finance,” no longer exists to the extent it once did.<sup>25</sup> Today in the United States, only twelve percent of the workforce is unionized.<sup>26</sup>

Ultimately, both the growth of the undocumented, contingent workforce and the steady disappearance of labor unions as a viable source of collective action illustrate changes in domestic labor brought on by globalization. While unions once organized the industrial laborer of the past, the face of the worker has, in many ways,

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17 See *Fact Sheet for Workers*, NATIONAL EMPLOYMENT LAW PROJECT 1–2 (2002), <http://www.aialadownloads.org/advo/NELP-FactSheetForWorkers.pdf>.

18 See Luna M. Yasui, *Written Statement of the National Employment Law Project on the Subject of Employment and Labor Protections for Day Laborers*, See *Fact Sheet for Workers* (2002), <http://www.nelp.org/content/uploads/2015/03/Employment-and-Labor-Protections-for-Day-Laborers.pdf>.

19 Valenzuela et al, *supra* note 3, at 2 (writing that “[f]or 60 percent of day laborers, this work was the first occupation they had held in the United States.”)

20 See Jake Blumgart, *Bonds of Steel*, THE AMERICAN PROSPECT (NOV. 5, 2010), <http://prospect.org/article/bonds-steel> (noting the fragmented nature of U.S. labor unions and that present-day unions have not “figured out how to defend their members”).

21 See *id.* (writing that organized labor has shifted from industrial unions to service and public sector unions because jobs in these areas are not so easily outsourced).

22 The establishment of the Wagner Act, or National Labor Relations Act, gave workers the right to “organize and bargain collectively through representatives of their own choosing.” FRANK W. McCULLOCH & TIM BORENSTEIN, THE NATIONAL LABOR RELATIONS BOARD 1510 (1974). In doing so, workers could create greater economic stability for themselves, as collective bargaining would “promote both a higher level of real wages and a better distribution of the national income.” JAMES B. ATELSON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 42 (1983).

23 Louise Uchitelle, *Globalization, Union Style*, THE AMERICAN PROSPECT, NOV. 5, 2010, <http://prospect.org/article/globalization-union-style>.

24 NPR, *50 Years of Shrinking Union Membership*, *In One Map* (Feb. 23, 2015), <http://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map>.

25 Blumgart, *supra* note 20.

26 Uchitelle, *supra* note 23.

evolved.<sup>27</sup> Undocumented workers—and more specifically, day laborers—provide a vivid illustration of this change.<sup>28</sup> With roughly 11.1 million undocumented immigrants in the United States,<sup>29</sup> undocumented workers occupy a key position in the US economy.<sup>30</sup> The work that day laborers like Josue perform is vital, but the undocumented workers that perform day labor are some of the most vulnerable members of our society.<sup>31</sup> This “vulnerability” comes not only from their status as undocumented workers, but from the fact that our labor laws and institutions—labor unions, specifically—that are meant to protect workers are incapable of reaching day laborers.

If we assume that the purpose of unions in the United States is to protect workers’ rights and set a baseline for fair workplace practices through collective bargaining, then unions are a logical place to turn when trying to determine how day laborers might be protected from abuse. A large population of workers desperately need the benefits of collective organization,<sup>32</sup> but as they stand, unions face significant barriers to organizing these laborers. As a result, day laborers are excluded from national labor protections.

The purpose of this Note is to explore the barriers that prevent unions from reaching day laborers. In doing so, this Note first places the plight of day laborers in a global context by exploring why such barriers exist. Ultimately, these barriers arise as labor laws and labor institutions fail to adapt to a new globalized workforce. Next, this Note discusses in detail both the legal and structural barriers that prevent unions from organizing day laborers. Legal barriers involve both definitional restrictions that prevent day laborers from falling within the National Labor Relations Act’s grasp and the tension between upholding workers’ rights while, at the same time, enforcing strict immigration policies. Structural barriers involve the nature of a globalized, day labor workforce, and how traditional union organization does not comport to the characteristics of such workers.

Further, this Note explores alternative labor solutions that try to give day laborers the same workplace protections that unions have traditionally sought to achieve. Specifically, these alternatives are the transnational labor citizenship

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27 The changing face of the American low-wage worker is largely a result of changes in our domestic economy. Today, service sector jobs are more prominent than they once were, while the number of industrial jobs has decreased as manufacturing work moves overseas. See Josh Eidelson, *Alt-Labor*, THE AMERICAN PROSPECT (Jan. 29, 2013), <http://prospect.org/article/alt-labor>.

28 See *id.*; see also Alfred C. Aman, Jr. & Graham Rehrig, *The Domestic Face of Globalization: Law’s Role in the Integration of Immigrants in the United States*, 2 OMNES J. MULTICULTURAL SOC’Y 43, 44 (2011) <http://www.repository.law.indiana.edu/facpub/1281> (noting the role that immigrants play in the U.S. as the “domestic face of globalization”).

29 Jeffrey S. Passel and D’Vera Cohn, *Unauthorized Immigrant Population Stable for Half a Decade*, PEW RESEARCH CTR. (July 2015), <http://www.pewresearch.org/fact-tank/2015/07/22/unauthorized-immigrant-population-stable-for-half-a-decade>.

30 María Pabón López, *The Place of the Undocumented Worker in the United States Legal System After Hoffman Plastic Compounds: An Assessment and Comparison With Argentina’s Legal System*, 15 IND. INT’L & COMP. L. REV. 301, 301 (2005).

31 See Valenzuela et al., *supra* note 9, at 20.

32 See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 14.

model<sup>33</sup> and the worker center model.<sup>34</sup> Both of these models respond to the legal and structural obstacles presented by the barrier analysis. As such, my analysis of both the barriers and the proposed solutions demonstrates what happens to organizations—here, unions—when they fail to adapt to globalizing forces: the result of failure to adapt is exclusion, and day laborers suffer from such exclusion.

## I. DAY LABOR IN THE CONTEXT OF GLOBALIZATION

Before exploring the barriers that prevent the organization of day laborers, we must first discuss the forces that led to the rise of an undocumented contingent workforce. Ultimately, globalization changed both the face of the domestic worker and the domestic workforce.<sup>35</sup> By failing to adapt to these changes, domestic labor laws and unions are unable to protect day laborers.

Returning to Josue’s story, what led workers like Josue to come to the United States, and how can his tenuous position as an undocumented day laborer be explained? Essentially, day laborers are part of a broader pool of migrant workers who fled poverty and economic stagnation in search of opportunity in the United States.<sup>36</sup> But more than that, migrant workers reflect the “internationalization of production.”<sup>37</sup> In her work *The Mobility of Labor and Capital*, Saskia Sassen explains that the expansion of export-oriented manufacturing in foreign countries led to the mobilization of migrant workers.<sup>38</sup>

When our economy internationalized, “transitional space” was formed, in which workers flowed, following trade patterns in reverse by following investment back to its source.<sup>39</sup> This pattern, and the close economic integration between the United States and countries like Mexico,<sup>40</sup> accounts for the number of immigrants in the United States from Latin American countries. Further, it should be noted that

33 Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 504 (2006).

34 See, e.g., Smith, *supra* note 12, at 355–56; Justin McDevitt, Note, *Compromise is Complicity: Why There is No Middle Road in the Struggle to Protect Day Laborers in the United States*, 26 A.B.A. J. LAB. & EMP. L. 101, 118–19 (2011); Eidelson, *supra* note 27.

35 Eidelson, *supra* note 27.

36 Immigration comes in diverse forms. See Aman & Rehrig, *supra* note 28, at 48 (writing that “immigration is not a monolithic or single phenomenon, but one that is extremely diverse even within a single country’s experience.”). For this Note, the focus is on immigrants from Latin American countries—particularly Mexico—because Latinos make up the largest percentage of day laborers. See Valenzuela et al., *supra* note 9, at iii (finding that most day laborers are Latino, with fifty-nine percent from Mexico).

37 SASKIA SASSEN, *THE MOBILITY OF LABOR AND CAPITAL* 9 (1988).

38 *Id.* at 3.

39 *Id.* at 15.

40 Douglas S. Massey, *Seeing Mexican Immigration Clearly*, MEXICANS IN AMERICA, CATO UNBOUND (Aug. 20, 2006), <http://www.cato-unbound.org/2006/08/20/douglas-s-massey/seeing-mexican-immigration-clearly> (writing that “[r]ates of migration between Mexico and the United States are entirely normal for two countries so closely integrated economically.”); see also Douglas S. Massey, *Five Myths About Immigration: Common Misconceptions Underlying U.S. Border-Enforcement Policy*, IMMIGR. POL’Y IN FOCUS 1, 4, <https://www.americanimmigrationcouncil.org/sites/default/files/research/IPC%20five%20myths.pdf> (Aug. 2005).

when migrant workers come to the United States, they are not necessarily fleeing poverty, but are more likely seeking economic freedom and mobility.<sup>41</sup> Workers have complex reasons for migrating to the United States, but many do not intend to stay.<sup>42</sup> Rather, an increasing number of migrant workers hope to find work in the United States so they can finance economic goals back home.<sup>43</sup> These complex factors perhaps explain why workers like Josue come to the United States in the first place.

The analysis above helps explain why migrant workers are here, but the next step in our analysis is determining why workers like Josue are in such vulnerable positions: Why is day labor needed, and why is it rife with abuses? Ultimately, the demand for day labor is the result of economic pressure for greater labor market flexibility in the United States.<sup>44</sup> Today, low-skilled work is characterized by short-term contracts, temporary placements, and employers' ongoing demand for cheap labor.<sup>45</sup> This reality is especially present in the construction industry, where many day laborers are concentrated.<sup>46</sup> Additionally, because industrialized jobs have largely moved overseas, where labor is cheaper, day laborers need contingent work just as much as employers need day laborers.<sup>47</sup> The low-skilled, factory jobs of the past are no longer present in the United States as they once were. This ever-growing need for cheap labor, combined with the supply of a migrant-labor workforce in the United States, allows the day labor sector to prosper.

However, it is the contingent and informal nature of day labor, combined with the fact that many day laborers are undocumented, that allows such work to be rife with abuses.<sup>48</sup> Historically, when workers felt oppressed by their employers, they organized.<sup>49</sup> Such collective organization was protected under the National Labor Relations Act (NLRA)<sup>50</sup> as a necessary way to prevent industrial strife.<sup>51</sup> However, the NLRA, and unions by extension, were developed during a time when both workers and the work they performed were intrinsically different than day laborers and the work they perform today. But because of the globalizing forces mentioned above, that reality has shifted.<sup>52</sup> Industries have largely moved overseas, and the service sector jobs that day laborers frequent are both common and essential for the maintenance of our economy.<sup>53</sup> The exploited worker is no longer the industrial laborer of the past; rather, it is the undocumented worker, and by extension, the day laborer.

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41 Massey, *Seeing Mexican Immigration Clearly*, *supra* note 40.

42 *Id.*

43 *Id.*

44 Valenzuela et al., *supra* note 9, at 1.

45 *Id.* at 6.

46 *Id.* at 1.

47 *See id.*

48 *Id.* at 2.

49 *See* MCCULLOCH & BORENSTEIN, *supra* note 22, at 15.

50 *See generally* 29 U.S.C. §§ 151–69 (2012) (granting employees the right to collectively organize).

51 ATLESON, *supra* note 22, at 42.

52 *See* Eidelson, *supra* note 27, at 2–3; *see also* Zohal Hessami & Thushyanthan Baskaran, *The Demise of Labor Unions in the Era of Globalization* 2–3 (Univ. of Konstanz Dept. of Econ., Working Paper No. 2, 2013), [http://www.wiwi.uni-konstanz.de/workingpaperseries/WP\\_02-Hessami-Baskaran\\_2013.pdf](http://www.wiwi.uni-konstanz.de/workingpaperseries/WP_02-Hessami-Baskaran_2013.pdf).

53 *See* Eidelson, *supra* note 27.

If labor law was created to protect workers, and if day laborers are a population of workers that need protection, then it is clear that the current labor scheme fails to effectuate its protective purpose because that scheme has not adapted to changes in the US workforce brought on by globalization. In analyzing this failure, this Note next discusses some of the most prominent legal and structural barriers to organizing day laborers. Further, by looking at scholars and organizations that have actively sought to protect day laborers, this Note highlights how the effective organization of the contingent workforce requires activists to go outside of the traditional US labor scheme. Woven through this analysis is recognition of the stark reality before us: that when our protective laws and institutions do not adapt to the changes that globalization brings, then vulnerable sects of our population are excluded from receiving protection. With that in mind, our labor laws, and unions as an institution, must shift to incorporate a global perspective if groups like day laborers are to receive workplace protections.

## II. BARRIERS: LEGAL AND STRUCTURAL LIMITS ON UNIONS THAT PREVENT DAY LABOR ORGANIZING

Domestic labor laws, which were created in light of a different economic reality than we have today, do not adequately protect the new, globalized workforce that day laborers represent. This is because there are certain legal and structural barriers that prevent our laws and institutions from providing undocumented migrant workers with labor protections. Legal barriers include the exclusionary way that our labor law characterizes day laborers and the tension between effectuating immigration controls while promoting workers' rights—a tension that has been answered by favoring tough immigration policies. Structural barriers refer to traditional exclusionary perceptions of immigrants held by labor unions, and how the nature of day labor work does not readily lend itself to the union model. These barriers show that the traditional union model—and the US labor scheme as a whole—is incapable of effectively responding to the needs of day laborers, and by extension, to the needs of a globalized, migrant workforce.

### A. *Legal Limitations to Organizing Day Laborers Under the NLRA*

The National Labor Relations Act of 1935 (NLRA) governs the relationship between employers and unions.<sup>54</sup> The NLRA was created to facilitate collective bargaining between employers and employees.<sup>55</sup> In the Preamble to the NLRA, Congress noted that the “inequality of bargaining power” between managers and laborers “affects the flow of commerce,” thereby impeding the success of the national

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54 See 29 U.S.C. § 151 (2012); see also NLRB, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT 1 (1997).

55 Atelson, *supra* note 22, at 42.

economy altogether.<sup>56</sup> It was thought that protecting the rights of workers to organize and bargain with employers was a way to eliminate economic warfare.<sup>57</sup>

There are limits to organizing day laborers under the NLRA, and these limits demonstrate how the NLRA fails to accommodate for a globalized workforce.<sup>58</sup> First, NLRA protection only extends to those who are considered “employees” under the Act.<sup>59</sup> Because day laborers are often excluded from the definition of “employee,” such workers cannot organize under the NLRA.<sup>60</sup> Second, the rise of undocumented workers in the United States has led to a tightening of immigration policy.<sup>61</sup> Such policy tends to conflict with workers’ rights, because undocumented workers are not legally allowed to maintain employment in the States.<sup>62</sup> Ultimately, stricter immigration policy has blocked unions from reaching groups like undocumented day laborers. Thus, under current US labor law, day laborers are widely excluded from union representation. Due to these legal barriers, US labor law, created for an industrial workplace that no longer exists, does not adequately protect the undocumented worker and does not reflect changes in the American workforce spurred by globalization.

#### i. Employee/Independent Contractor Distinction

Though the NLRA protects the rights of employees, under Section 2(3), the Act excludes certain workers from its protections. Specifically, it excludes domestic workers, agricultural laborers, and independent contractors.<sup>63</sup> Historically, undocumented workers have occupied these areas.<sup>64</sup> Though the NLRA’s protections generally apply to undocumented workers,<sup>65</sup> such protections do not extend to the undocumented worker who is classified under one of the three exceptions listed above.<sup>66</sup>

Day laborers are often classified as independent contractors.<sup>67</sup> Whether one is an independent contractor is determined by the common law “right to direct and control” test, which looks at various factors regarding the extent of control the employer has over the employee to determine whether the employee is an

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56 29 U.S.C. § 151 (1935); *see also* Atelson, *supra* note 22, at 42.

57 *Id.*

58 *See generally* 29 U.S.C. § 152.

59 29 U.S.C. § 152(3).

60 McDevitt, *supra* note 34, at 102.

61 *Id.* at 120.

62 The Immigration Reform and Control Act of 1986 makes it unlawful for employers to hire undocumented workers. *See* Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737, 741 (2003).

63 *Id.* at 102.

64 McDevitt, *supra* note 34, at 102.

65 *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

66 29 U.S.C. § 152(3).

67 Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL’Y J. 125, 142 (2009).

independent contractor.<sup>68</sup> When enough of these factors are met, courts will classify the worker as an independent contractor, and thus not afford the worker NLRA protections.<sup>69</sup>

Because the nature of day labor is often temporary and informal, many employers of day laborers classify them as independent contractors.<sup>70</sup> For instance, day laborers are often hired by private homeowners to perform discrete, short-term construction work. Employers will argue that these workers are independent contractors based on the informality and short length of the project.<sup>71</sup> In his work *The Rise of the Contingent Workforce: The Key Challenges and Opportunities*, Richard Belous lists factors that distinguish contingent workers, including day laborers and independent contractors, from “core” employees.<sup>72</sup> Specifically, contingent workers are distinguishable because of their (1) weak affiliations with the employer; (2) lack of an implicit long-term contract; (3) insignificant stakes in the company; and (4) lack of relationship with corporate family.<sup>73</sup> This independent contractor classification is favorable to the employer—and to an extent, the laborer—because it is not required that the immigration status of independent contractors be ascertained.<sup>74</sup>

Additionally, the classification is beneficial to employers of day laborers because it means they do not have to engage in official, NLRA-controlled collective bargaining.<sup>75</sup> Thus, an employer can exercise more control over his workers without the fear of violating the NLRA’s workplace and union protections.<sup>76</sup> But ultimately, classifying a day laborer as an independent contractor is harmful to the worker precisely because it puts the day laborer outside the scope of the NLRA. Excluded laborers are denied the legally protected right to organize, and while these laborers can certainly still organize in an informal fashion, they cannot join or form a legally recognized union, nor can they create a legally-binding collective bargaining agreement with their employer.<sup>77</sup> The NLRA does not contain a private right of action, so without an official union that can allege employer violations to the National

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68 *See, e.g.,* Roadway Package Sys., Inc., 326 N.L.R.B. 842 (1998); NLRB v. United Insurance Co. of Am., 390 U.S. 254 (1968). Factors considered in determining whether one is an independent contractor include: 1) the extent of control by which an employer may exert over the worker; 2) whether or not the worker is “engaged in a distinct occupation or business”; 3) the type of occupation, and whether such work is usually done under the direction of an employer or without supervision; 4) the skill required in the occupation; 5) whether the worker supplies his own tools; 6) the length of time for which the person is employed; 7) the method of payment; whether the work is part of the employer’s regular business; 8) whether or not the parties believe they are creating a master servant relationship; 9) and whether the principal is or is not in business. Rest. (Second) of Agency § 220(2) (1958).

69 *Id.*; *see also* Roadways, 326 N.L.R.B. at 849.

70 McDevitt, *supra* note 34, at 102.

71 *Id.*

72 Richard S. Belous, *The Rise of the Contingent Workforce: The Key Challenges and Opportunities*, 52 WASH. & LEE L. REV. 863, 865 (1995).

73 *Id.*

74 McDevitt, *supra* note 34, at 102 (Note, however, that federal regulations like the Immigration Reform and Control Act make it illegal for employers to hire workers who the employer is certain are undocumented).

75 *See* 29 U.S.C. § 153(3).

76 *See* Griffith, *supra* note 67, at 139.

77 *See id.*

Labor Relations Board, day laborers who are deemed independent contractors are entirely left out of the sphere of the NLRA's protections.<sup>78</sup>

Just as it is problematic for day laborers, the independent contractor classification is also problematic for unions who wish to organize these workers. In fact, many labor advocates believe such workers are often misclassified as independent contractors, when in reality they are "employees" under the NLRA.<sup>79</sup> In its written statement on "Employment and Labor Protections" for day laborers, the National Employment Law Project wrote that labor legislation like the NLRA should be read to "broadly protect day laborers and other contingent workers."<sup>80</sup> Further, scholars have noted the difficulty of applying the traditional "right to direct and control" test to day laborers.<sup>81</sup> Because the test is "unwieldy" and relies on a variety of distinct factors, day laborers who might be classified as independent contractors by courts in one region might not be considered independent contractors for performing the same work in another location.<sup>82</sup> The result is that unions could organize some day laborers under the NLRA, but not others.<sup>83</sup> The Department of Labor has highlighted the dangers of misclassifying workers as independent contractors: beyond being exempt from the NLRA, day laborers who are classified as independent contractors are denied access to minimum wage, overtime compensation, medical leave, employment benefits, and workplace safety.<sup>84</sup>

Essentially, the classification of day laborers as "independent contractors" under the NLRA—and the NLRA's broader exemptions of domestic laborers and agricultural workers, who often happen to be undocumented immigrants—does not reflect workplace changes catalyzed by globalizing forces. Day labor is an ever-growing sector of our service economy.<sup>85</sup> As such, when these workers are considered independent contractors, a significant majority of undocumented workers then fall outside the scope of the NLRA.<sup>86</sup> Thus, the independent contractor exception creates a "gap" in workplace protections. The NLRA's exceptions to the "employee" definition certainly might have worked in our past manufacturing, industrial economy, but it does not conform to today's service economy, where work is often temporary and informal in the sectors most widely populated by day laborers. Because unions are formed under the NLRA, and the NLRA's exceptions to coverage often block day laborers from union organization, the NLRA acts as a legal barrier to union organization of day laborers.

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78 *Id.* at 142–43.

79 See Dep't of Labor, *Misclassification of Employees as Independent Contractors* (Nov. 15, 2015), <http://www.dol.gov/whd/workers/misclassification/#stateDetails>.

80 NAT'L EMP'T LAW PROJECT, *Written Statement of the National Employment Law Project on the Subject of Employment and Labor Protections for Day Laborers* 3 (2002).

81 *E.g.*, Griffith, *supra* note 67, at 142–43.

82 *Id.*

83 *Id.*

84 Dep't of Labor, *supra* note 79.

85 NAT'L EMP'T L. PROJECT, *supra* note 80, at 2.

86 *See id.* at 3.

## ii. Policy Conflicts Between Labor Law and Immigration Law

Even if a day laborer is considered an “employee” so as to fall under the auspices of the NLRA, other legal limits of organizing day laborers under the NLRA exist in the contention between workers’ rights and enforcement of immigration policies. Legal scholar María Pabón López noted that the undocumented workers’ current place in the US legal system is one of “hostile inconsistency.”<sup>87</sup> The “inconsistency” comes from the tension between the NLRA, which operates with the goal of protecting workers’ rights, and immigration policy like IRCA, which tightens and controls the undocumented workers’ role in US workplaces.<sup>88</sup> The “hostility” appears in court precedent that considers the place of the undocumented immigrant in the world of workers’ rights.<sup>89</sup> By analyzing the policy goals of the NLRA and immigration legislation like the Immigration Reform and Control Act (IRCA), and by looking at Supreme Court decisions that limit undocumented workers’ rights, this section illustrates how hostile immigration policy acts as a barrier to organizing day laborers under the NLRA and the US legal system as a whole. As was the case with the independent contractor distinction, the failure of the legal system to extend protections to undocumented day laborers again represents the failure of our legal bodies to adapt a sufficiently global perspective when regarding the rights of such workers.

The tension between labor and immigration policy is most vividly depicted in the Supreme Court’s decision in *Hoffman Plastics Compounds v. NLRB*.<sup>90</sup> In *Hoffman*, the Supreme Court grappled with whether undocumented workers, who are considered “employees” under the NLRA,<sup>91</sup> are entitled to the same remedies for unfair labor practice as “legal” workers.<sup>92</sup> The Court found that while some remedies are still available to undocumented workers, such workers are not entitled to either back pay or reinstatement when subjected to unfair labor practices.<sup>93</sup> In *Hoffman*, this meant that an undocumented worker who was fired due to his union participation was not entitled to receive pay for three years of work he lost due to his employer’s retaliation for union participation, nor was he allowed to return to his lost job.<sup>94</sup>

In making its decision, the Supreme Court discussed the tension between immigration policy and workers’ rights. As noted, undocumented workers are broadly considered “employees” under the NLRA (as long as they do not fall under one of the three exceptions mentioned above), meaning they receive the Act’s labor

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87 Pabón López, *supra* note 30, at 303.

88 *Id.*

89 *See generally* *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

90 *Id.*

91 *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984).

92 *See generally* *Hoffman Plastic Compounds*, 535 U.S. 137, 142 (noting that “[t]he Courts of Appeals have divided on the question whether the Board may award backpay to undocumented workers.”).

93 *Id.* at 146.

94 *Id.* at 146–47.

protections.<sup>95</sup> However, under IRCA, undocumented workers are not legally entitled to work, and it is illegal for employers to knowingly hire undocumented immigrants.<sup>96</sup> Thus, the Supreme Court analyzed two opposing policies: the need for powerful remedies to restore a worker back to the position he was in before unlawful retaliation, or the need to keep undocumented workers out of the workplace.<sup>97</sup> The Court found that between the two legislative schemes, the policy behind IRCA—to prohibit undocumented immigrants from working—was violated by effectuating the remedies envisioned under the NLRA.<sup>98</sup>

In finding that immigration law supersedes the policies behind the NLRA in the undocumented worker context, the Supreme Court in *Hoffman* effectively “modified the . . . remedial scheme” of the Act.<sup>99</sup> Thus, in a post-*Hoffman* world, two of the Act’s most powerful remedies are no longer available to undocumented workers. The question becomes: How does this affect unions’ abilities to organize the undocumented workers that now represent a significant portion of our globalized workforce?

First, scholars have noted that the decision in *Hoffman* essentially makes it economical for employers to violate the NLRA when undocumented workers are involved.<sup>100</sup> Specifically, because undocumented workers are not entitled to the NLRA’s most powerful remedies, employers who hire undocumented workers might find the costs of violating the NLRA less than the costs of workers’ union protections.<sup>101</sup> This greatly diminishes the power of union organization in undocumented worker-heavy workplaces.

Additionally, scholars like Christopher David Ruiz Cameron have speculated that *Hoffman* essentially created a new Bracero Program.<sup>102</sup> The Bracero Program, which gave Mexican nationals temporary citizenship status based on their affiliation with an agricultural labor force, ultimately resulted in the creation of an “underclass of low-wage Latino immigrants.”<sup>103</sup> In theory, the Bracero Program was intended to provide some workplace protections to workers; in actuality, the laborers were kept outside the scope of our national labor law protections. The decision in *Hoffman* similarly pushes undocumented workers to the periphery of the US labor scheme. If the Act’s most powerful remedies are no longer available to undocumented workers, it seems less likely that these workers will have an incentive to unionize. Thus, undocumented workers are more likely to remain in the shadows after the decision in *Hoffman*.

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95 *Sure-Tan, Inc.* 467 U.S. at 891 (“The Board has consistently held that undocumented aliens are “employees” within the meaning of § 2(3) of the Act.”).

96 Pabón López, *supra* note 30, at 30203.

97 *See Hoffman Plastic Compounds*, 535 U.S. at 141–45, 160.

98 *Id.* at 146–47.

99 Pabón López, *supra* note 30, at 315.

100 *E.g.*, Garcia, *supra* note 62, at 742.

101 *Id.*

102 Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 24 (2003).

103 *Id.* at 4.

Overall, *Hoffman* illustrates the Court's failure to adopt a sufficiently global perspective.<sup>104</sup> In other words, even though the purpose of the Act is to protect workers, the Court placed a significant portion of our labor market outside of the Act's protections based solely on their legal status, without recognizing the prevalence of undocumented workers, their significance to the US economy, and their vulnerability to abuse. Undocumented laborers are an economic reality of our times, and this is demonstrated by the fact that undocumented workers, as a class, are considered employees under the NLRA. By not granting undocumented workers the right to back pay and reinstatement, the Supreme Court placed the interests of such workers at the periphery of labor law. And ultimately, because the Supreme Court established a broad rule that the policy goals of strict immigration regulation are favored over policy that secures workers' rights, undocumented workers are blocked from achieving the workplace protections that labor unions and the NLRA provide. By significantly decreasing the cost of unfair labor practices to employers and by making undocumented workers outsiders to US labor protections, the decision in *Hoffman* creates another barrier to organizing undocumented day laborers.

### *B. Structural Limitations*

Beyond the legal barriers found in the language of the Act and the tension between labor and immigration policy, certain structural barriers also prohibit the organization of undocumented day laborers under the traditional US labor scheme. Structural barriers refer to the inner-workings of union organization that block unions from reaching day laborers. To explore structural barriers, this section first looks toward the anti-immigration stance traditionally upheld by unions as representing a potential barrier to organization of day laborers. But ultimately, while the traditional protectionist stance taken by unions is significant, the most prominent structural barrier involves the question of whether legally recognized unions organized under the traditional union model can even reach day laborers to organize them. Again, these barriers demonstrate how our labor institutions fail to adapt to a current, globalized reality.

First, the anti-immigration stance historically adopted by most labor unions creates a sort of "moral" barrier (meaning, many union organizers would prohibit such organization as going against the union cause) to organizing undocumented day laborers. Traditionally, union organizers opposed immigration and the free flow of labor across borders.<sup>105</sup> This protectionist stance was a result of labor organizers viewing immigrants as a threat to native US workers because immigrants created a cheap labor pool for employers to draw from.<sup>106</sup> The idea was that more immigrants

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104 See Garcia, *supra* note 62, at 744 (writing that the Supreme Court's decision in *Hoffman* "illustrates the failure of labor laws originally enacted in the 1930s to respond to a changed global economic landscape").

105 See Gordon, *supra* note 33, at 531–32.

106 See *id.* at 517, 550.

meant less jobs for US-born workers, and in turn, less union membership.<sup>107</sup> Because immigration trends ultimately led to changes in the scale, skill-level, and geographical distribution of the national workforce, labor unions have consistently bound themselves to the goal of tightening immigration laws.<sup>108</sup> In fact, until the 1980s, unions repeatedly supported legislative initiatives that curbed immigration and created stricter immigration enforcement policies.<sup>109</sup> Unions maintained an anti-immigrant, or at least an anti-undocumented immigrant, stance through the 1990s.<sup>110</sup> The advent of immigration, which lessened the power of unions for the reasons noted above, was viewed as antithetical to the labor movement's call for solidarity among US workers.<sup>111</sup>

Notably, unions have become less restrictive with regard to immigration in recent years. In 2000, the American Federation of Labor (AFL-CIO) called for "blanket amnesty for undocumented immigrants."<sup>112</sup> This policy shift, along with the recognition that undocumented immigrants are especially vulnerable to workplace abuses, led to organization campaigns like Change to Win—a coalition of unions representing workers in migrant-heavy agricultural and service sectors.<sup>113</sup> Today, the AFL-CIO and its affiliates recognize the need for immigration reform to protect US workers, noting that the most effective way to afford undocumented workers protections is through giving "all workers—immigrant and native-born— . . . [access] to the protection of labor, health and safety and other laws."<sup>114</sup> But despite this shift in perception, unions still face a glaring barrier that they, ironically, promoted in the past: strict regulation of undocumented workers in the workplace. Thus, while the widespread anti-immigrant stance among unions is virtually a thing of the past, unions who wish to incorporate undocumented workers into their protective schemes are still blocked from doing so because of unions' past legislative lobbying efforts that ultimately led to tighter immigration laws.<sup>115</sup> Again, the legal barriers mentioned earlier come into play, and unions cannot effectively sidestep the fact that

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107 This perception was not totally invalid. Scholars at the Industrial and Labor Relations School at Cornell University have documented the relationship between immigration and union membership. When immigration is high, union membership flounders. In turn, in periods where immigration was low, union membership flourished. See the chart below for more information. Vernon M. Briggs, Jr., *American Unionism and U.S. Immigration Policy*, CTR. FOR IMMIGR. STUD. 1–2 (2001).

108 *Id.* at 1.

109 *Id.*

110 Esther Yu Hsi Lee, *Labor Unions Move to Protect Immigrants, Regardless of Legal Status*, THINK PROGRESS (Mar. 26, 2015), <http://thinkprogress.org/immigration/2015/03/26/3638255/unions-increasingly-bargaining-protect-undocumented-immigrants/>.

111 Gordon, *supra* note 33, at 524.

112 Lee, *supra* note 110.

113 See *About Us*, CHANGE TO WIN, <http://www.changetowin.org/about> (last accessed Nov. 15, 2016) (showing Change to Win is affiliated with the Service Employees International Union (SEIU), United Farm Workers of America (UFW), United Food and Commercial Workers International Union (UFCW), and the International Brotherhood of Teamsters (IBT)).

114 AFL-CIO & CHANGE TO WIN, *The Labor Movement's Principles for Comprehensive Immigration Reform* 1 (Aug. 2009), <http://www.aflcio.org/content/download/60511/854621/version/1/file/UnityFrameworkAug2009.pdf>.

115 See Briggs, *supra* note 107, at 1.

immigration law does create a place for the undocumented worker in the US workforce.

Additionally, unions face practical barriers to organizing undocumented day laborers. The nature of day labor, as noted earlier, is transitory and temporary.<sup>116</sup> Undocumented day laborers stay on the job for short periods of time, and work—especially in the construction and agricultural industries—is often seasonal, so day laborers do not have a steady source of income, nor a steady employer.<sup>117</sup> The informal nature of day labor does not fit easily within the union model. The power of a union is in its ability to set the stage for workers to sit down with employers and negotiate a collective bargaining agreement.<sup>118</sup> This negotiation process—a union’s primary tool for securing workplace rights and protections—is difficult, if not impossible, to perform considering the informal nature of day labor work. How can unions sit down with employers to negotiate agreements on wages, benefits, and safety when the employers change daily, and the laborers are out of work shortly after receiving it?

Moreover, many undocumented workers might oppose joining the union in the first place based on fears of employer retaliation.<sup>119</sup> In many instances, employers have deterred undocumented day laborers from contesting violations of labor law by threatening to turn them over to immigration authorities.<sup>120</sup> Thus, undocumented workers who are victims of workplace exploitation face a catch-22: if they remain silent, they face continued exploitation; but if they speak up, they face deportation.<sup>121</sup> Threats of deportation, coupled with widespread lack of understanding among undocumented workers about their legal rights, often curtail efforts to organize undocumented workers.<sup>122</sup>

The above structural barriers, combined with the legal barriers mentioned earlier, work to exclude a significant population of vulnerable workers from labor protections. As noted, these “barriers” can be seen as a result of a legal and structural scheme that failed to adapt to a changing workforce. The most vulnerable and unprotected laborers are no longer the industrial workers of the past: they are the undocumented workers, like day laborers, performing service sector jobs. The failure of legislation and unions to adapt to this change leaves a gap in labor policy, and it is within this gap that day laborers are situated.

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116 See Valenzuela et al., *supra* note 9, at 6.

117 See *id.* at 4.

118 *Id.*

119 Robert I. Correales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 BERKELEY LA RAZA L. J. 103, 110–11 (2003).

120 Valenzuela et al., *supra* note 9, at 22; see also *Velasquez-Tabir v. Immigration and Naturalization Service*, 127 F.3d 456 (5th Cir. 1997) (denying relief to undocumented workers who were arrested and deported pursuant to employer’s complaint to legacy INS shortly after certification of a labor union had taken place); *Impressive Textiles, Inc.*, 317 N.L.R.B. 8 (1995) (preventing employer from beginning to ask for documentation from workers after a successful union election, implying to workers that they would be reported to INS as a result of choosing the union to represent them); *Accent Maint. Corp.*, 303 N.L.R.B. 294 (1991) (preventing employer from discharging undocumented workers who joined the union, threatening to report undocumented worker to legacy INS if he did not withdraw from labor union, and promising to reinstate employees if they withdrew union support).

121 Correales, *supra* note 119, at 111.

122 *Id.*

### III. POTENTIAL SOLUTIONS: HOW ALT-LABOR TRIES TO FILL THE GAPS

Legal and structural barriers prevent unions, in their traditional form, from organizing day laborers. Thus, groups who advocate for day laborers have had to go outside the traditional US labor scheme to find creative ways to protect the rights of undocumented contingent workers. Importantly, these solutions highlight the “gaps” identified above: that both the legal scheme and structural scheme of unionization, as they stand, exclude undocumented day laborers from accessing key labor rights. These solutions demonstrate how groups and policy-makers have learned to adapt to the globalized undocumented workforce in order to afford workers basic labor rights in creative ways that circumvent traditional labor law. For legal solutions, Jennifer Gordon has proposed transnational labor citizenship, explored in Part A below. Additionally, structural solutions have been found in the worker center model, as discussed in Part B. In analyzing these solutions, it becomes clear that the path to organization is not through our current labor laws. Rather, we must look outside our traditional legal structures and find ways to adapt to the new, globalized worker encapsulated by the day laborer.

#### A. *Filling the Legal Gaps Through Transnational Labor Citizenship*

Transnational labor citizenship, a concept developed by Jennifer Gordon, attempts to knock down the legal barriers for day laborers in one sweeping reform: by giving migrant workers legal status.<sup>123</sup> In doing so, it becomes less likely that workers will be blocked from receiving workplace protections due to a technicality, such as characterization of day laborers as independent contractors, or due to the tension between enforcing both labor and immigration laws. Transnational labor citizenship is a way of organizing workers as they cross borders, and a method of re-conceptualizing the relationships between nations, institutions, and private actors so as to accommodate the needs of migrant workers.<sup>124</sup> Transnational labor citizenship gives migrant workers legal status through their participation in transnational labor organizations.<sup>125</sup> Through labor citizenship, migrant workers act in solidarity “to achieve recognition of and compensation for their economic contributions to society.”<sup>126</sup> The goal of Gordon’s proposal is to facilitate the free movement of labor while simultaneously setting baseline protections for workers.<sup>127</sup>

In order to work, Gordon’s model requires nations, migrants, and transnational labor organizations to each play unique roles. First, nations—Gordon uses the United States and Mexico as an example—must negotiate a bi-national framework for facilitating transnational labor citizenship.<sup>128</sup> These negotiations would involve input

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123 See generally Gordon, *supra* note 33 (creating the concept of transnational labor citizenship).

124 *Id.* at 504.

125 *Id.*

126 *Id.* at 512.

127 *Id.* at 504–05.

128 *Id.* at 565–66.

from nongovernmental organizations and labor unions with experience working with migrant laborers.<sup>129</sup> According to Gordon, the resulting framework would address recruitment of workers, compliance with the program, and sustainable methods of sending and receiving workers between countries.<sup>130</sup> Second, migrant workers must participate in transnational labor organizations to obtain citizenship.<sup>131</sup> Their participation requires compliance with certain standards. For instance, migrant workers would be required to take a “solidarity oath” with the labor organization, where they would promise not to accept work below set labor standards and agree to report employers who violate labor codes established by the organization.<sup>132</sup> Last—and most essential to Gordon’s proposal—networks of transnational unions must develop to organize workers and establish baseline workplace standards.<sup>133</sup> These grassroots groups would not only set rules for the workplace, but would also facilitate the sending and receiving of migrant workers by orienting them to their new workplaces and educating them on their rights.<sup>134</sup> The purpose of these organizations is to organize workers despite divisions among nationality, race, and immigration status. Through workers’ participation in these transnational union networks, they maintain labor citizenship status, and can legally work in the United States.<sup>135</sup>

Initially, it is clear that Gordon’s proposal knocks down some of the barriers to organizing day laborers mentioned earlier. Most noticeably, her proposal finds a way out of the legal obstacles by giving migrant workers legal status. This status perhaps allows workers to avoid the NLRA exclusions for independent contractors mentioned above, but more notably, giving workers legal status helps eradicate the tension between immigration policy and labor policy that provides a significant barrier to organizing under the NLRA. First, as mentioned above, day laborers do not fall under the NLRA if they are considered independent contractors. But under Gordon’s proposal, the entire notion that temporary, informal labor does not require the same protections as more stable work flies out the window. Gordon emphasizes that her proposal applies to all workers and all employers who are members of the network of transnational labor organizations.<sup>136</sup> Thus, for those involved in the network, the distinction between “independent contractors” and full-fledged “employees” would not matter—every worker would be entitled to the same workplace protections.

Additionally, and perhaps most significantly, Gordon’s proposal seems to work around the tension between immigration laws, like IRCA, and labor law by giving undocumented workers legal status. Thus, if the tension between IRCA and the NLRA is that undocumented workers are not legally entitled to work—and thus, not legally entitled to certain workplace protections—because of their undocumented

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129 Gordon, *supra* note 33, at 566.

130 *Id.* at 567.

131 *Id.*

132 *See id.*

133 *Id.* at 568.

134 *Id.*

135 *See id.* at 568–70.

136 *See* Gordon, *supra* note 33, at 568. Under the transnational labor citizenship, employers must comply to set floor of labor standards and migrants have obligations as well.

status, then transnational labor citizenship solves that problem by giving workers legal status. Under Gordon's model, it is because of workers' migrant status and participation in labor organizations—not in spite of their undocumented status—that workers are afforded protections. However, it is unclear whether her proposal is an effective work-around laws like IRCA, or if her policy cannot be implemented without changing strict immigration laws. But overall, her policy would essentially eviscerate the idea that migrant workers are not entitled protection because of their undocumented status, simply because her proposal gives workers legal status.

Of course, there are limits to organizing undocumented day laborers under Gordon's proposal. For instance, transnational labor citizenship proposes widespread reform for workers who have not yet migrated to the United States, but it is difficult to see how her proposal could help those day laborers already in the United States who are facing continuous abuse from their employers. A retroactive application of her proposal to workers already in the United States is difficult for some of the structural reasons mentioned earlier: day laborers are often transient, living in the shadows of our communities. Further, Gordon's proposal requires cooperation from major bodies, all with different interests. First, nations must make massive policy overhauls and agree to give legal status to workers who normally would not be afforded any sort of legal recognition at all.<sup>137</sup> Second, traditionally hard-bordered labor unions would have to reconfigure themselves to accept large swaths of workers who might normally be seen as a threat to the domestic workforce. And last, migrant workers would have to buy into the idea. Normative to union effectiveness is the idea of solidarity—that unions are only successful if every worker buys into the cause. But in light of past failed guest worker programs—like the Bracero Program, which effectively created an underclass of migrant citizens—migrant workers might be wary of such a proposal.

However, even with these limits in mind, the purpose of this section is not to analyze the effectiveness of Gordon's proposal, but rather to note how her proposal emphasizes the barriers to organizing day laborers that exist in our traditional legal scheme. Gordon's proposal introduces creative ways of navigating exclusionary immigration and labor laws in the United States. Gordon creates a method of establishing legal status for migrant workers, and in doing so Gordon does not violate, but goes around laws like the NLRA and IRCA.<sup>138</sup> By making baseline workplace rights the norm for workers who are members of the transnational union network, Gordon's proposal ensures that each migrant worker receives protections despite the nature of the work performed and despite the lack of documentation that the worker holds.<sup>139</sup> Additionally, by recognizing the importance of undocumented workers in the US workforce, and by recognizing the globalized nature of this work, Gordon's model provides a sweeping solution to organizing day laborers.

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137 *See id.* at 570.

138 *See generally* Gordon, *supra* note 33.

139 *Id.*

### B. Filling the Structural Gaps Through Worker Centers

With the decline of union participation and the limits of organizing under the NLRA, a strong “alt-labor” movement has developed in the United States, and its prominence is rising.<sup>140</sup> This movement is significant for our analysis because alt-labor arose as an alternative to the traditional US labor scheme that failed to provide adequate protections to undocumented workers.<sup>141</sup> Within this movement, worker centers—small organizations working outside the NLRA to organize day laborers—are considered the “new face” of labor organizing.<sup>142</sup> These centers are day labor hiring sites run by non-profits and community organizations.<sup>143</sup> Lawyers and community advocates work with day laborers and their employers to negotiate contracts and ensure workplace protections.<sup>144</sup> The purpose of these centers is to provide a “safe place” for employers and day laborers to negotiate baseline work standards.<sup>145</sup> As of 2013, there were 214 known worker centers in the United States.<sup>146</sup>

Notably, worker centers are located directly in the communities where day laborers work to facilitate the bargaining process.<sup>147</sup> Not only do these centers protect laborers’ workplace rights, but they also attempt to integrate day laborers into the broader community.<sup>148</sup> CASA de Maryland, located just outside of D.C., has been especially successful on this front.<sup>149</sup> The worker center’s organizing model extends beyond merely facilitating negotiations with employers to providing workers with English language classes and lessons on industry-specific skills.<sup>150</sup> By providing educational, social, and cultural services, in addition to advocating for workplace rights, worker centers shed a light on laborers who most often work in the shadows of our communities.

In many ways, worker centers have been quite successful in providing protections for day laborers. By acting in a similar manner to union “hiring halls,” employers who want to hire day laborers will go to worker centers, where advocates bargain for fair wages and safety standards.<sup>151</sup> By setting workplace baselines, worker centers ensure that day laborers receive some basic protections.<sup>152</sup> Further, many worker centers provide legal services to laborers. In 2006, CASA de Maryland

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140 Eidelson, *supra* note 27.

141 *See id.*

142 *Id.*

143 *See id.*; *see also* Smith, *supra* note 27, at 361.

144 *See* Smith, *supra* note 12, at 361.

145 *Id.*

146 Eidelson, *supra* note 27.

147 *See* Gordon, *supra* note 33, at 582–83.

148 David Rosenfeld, *Worker Centers: Emerging Labor Organizations Until They Confront the National Labor Relations Act*, 27 *Berkley J. Empl. & Labor L.* 470, 472 (2006).

149 Lydia DePillis, *It’s Easy to Make Day Laborers’ Lives Better. Why Isn’t it Happening in Washington D.C.?*, *WASH. POST* (Oct. 7, 2014) (calling Casa de Maryland the “best example of a worker center”).

150 *Services*, CASA DE MARYLAND, <http://wearecasa.org/what-we-do/services/> (last visited Aug. 18, 2016).

151 DePillis, *supra* note 149.

152 *Id.*

recovered over \$200,000 in back wages for day laborers.<sup>153</sup> In light of the successes of groups such as CASA de Maryland, the National Day Laborer Organizing Network (“NDLON”) was established in 2001 as an umbrella group for worker centers and day laborer allies.<sup>154</sup> Today, NDLON-member organizations undertake local and regional campaigns and promote legislative changes on behalf of day laborers.<sup>155</sup>

Despite the widespread success of worker centers and NDLON, these organizations face significant challenges. While the NLRA certainly provides obstacles to organizing day laborers, it also provides legitimacy. Once a union recognizes a group of workers, those workers are party to a collective bargaining agreement that employers and workers alike are required to negotiate periodically.<sup>156</sup> Alt-labor groups are potentially limited by this lack of collective bargaining rights.<sup>157</sup> Additionally, while unions are financially supported by their members, worker centers are supported by outside donors. They thus lack the same financial stability that comes with being in a union. And last, these centers face widespread backlash from communities and politicians. Communities often think that day labor, and worker centers by extension, brings crime into cities.<sup>158</sup> Additionally, politicians and anti-labor groups have criticized worker centers as end-runs around the NLRA.<sup>159</sup> Groups like Worker Center Watch view worker centers as a tactic by “Big Labor” to circumvent legal restrictions placed on unions.<sup>160</sup>

Despite these limitations, worker centers have been able to do what unions did with a traditional workforce, but have thus far been unable to do with day laborers. In other words, worker centers have protected workers by sitting down with employers and laborers and negotiating workplace terms. In this way, the worker center model, as a development outside the traditional union sphere, knocks down some of the structural barriers mentioned earlier. As noted, unions face structural barriers to organizing day laborers because of past anti-immigration perspectives, but more significantly, because of the temporary, informal nature of day labor work,

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153 *Wage Theft: How Maryland Fails to Protect the Rights of Low-Wage Workers*, CASA DE MARYLAND 8 (Jan. 2007), <http://cdm.nonprofitsoapbox.com/storage/documents/wagetheft.pdf>.

154 *Our History*, NAT'L DAY LABORER ORG. NETWORK, <http://www.ndlon.org/en/about-us/our-history> (last visited Aug. 18, 2016).

155 *See id.*

156 *See Employer/Union Rights and Obligations*, NLRB, <https://www.nlr.gov/rights-we-protect/employerunion-rights-and-obligations> (last accessed Aug. 18, 2016).

157 *See* Eidelson, *supra* note 27. However, it should also be noted that falling outside the NLRA is precisely one reason why worker centers have been so successful. *See also* Rosenfeld, *supra* note 148, at 509 (noting that “no worker center wants to be labeled a labor organization under the NLRA, considering all the restrictions and obligations that would apply.”).

158 Arturo Gonzalez, *Day Labor in the Golden State*, 3 CAL. ECON. POL. 1, 12 (2007).

159 *See* Diana Furchtgott-Roth, *What You Should Know About Job Killing “Worker Centers,”* REAL CLEAR POLITICS (2013), [http://www.realclearmarkets.com/articles/2013/07/30/what\\_you\\_should\\_know\\_about\\_job\\_killing\\_worker\\_centers\\_100510.html](http://www.realclearmarkets.com/articles/2013/07/30/what_you_should_know_about_job_killing_worker_centers_100510.html).

160 These restrictions refer to financial reporting requirements under the Labor-Management Reporting and Disclosure Act (LMRDA) and picketing limitations under the NLRA (for instance, unions cannot picket “secondary”—those not directly responsible for alleged unfairness—employers, while non-union organizations can). *See id.*

and because undocumented workers might not join a union in the first place because doing so opens the door to employer retaliation and potential deportation.

Worker centers have found ways around each of these barriers. First, because these centers were created with the needs of the most vulnerable workers in mind—undocumented day laborers—past animus is not an obstacle to organizing. Additionally, because worker centers are typically located in the center of day labor-heavy communities, they are not out of reach for transient, temporary workers. Often, these centers are located at informal sites, like strip malls.<sup>161</sup> Thus, worker centers, which are small and localized, are visible to day laborers. Finally, worker centers promote solidarity among undocumented workers, giving them security despite their undocumented status. By providing not only workplace advocacy and direct legal services, but also other social services like language classes and job skills training,<sup>162</sup> worker centers create a supportive community for undocumented workers to find protection and assistance.

Analyzing the worker center model illustrates how, in order to effectively organize day laborers, advocates have had to go outside of the traditional union model and labor law scheme, as did Gordon's proposal for transnational labor citizenship. Worker centers work around barriers by providing an alternative to labor unions. This alternative takes the form of small groups of advocates who situate themselves among day laborers in order to provide them with representation. Ultimately, worker centers—despite their limits—found a way to knock down some of the most significant structural barriers that keep unions from reaching day laborers. The success of the worker center movement emphasizes the failures of our current labor system. Our current system, as it stands, cannot reach day laborers, because its rules and regulations do not comport to a globalized workforce and a changed workplace. The worker center movement, and the alt-labor movement as a whole, recognizes these limitations. By providing on-the-ground services to day laborers, alt-labor not only protects some of our nation's most vulnerable workers, but also demonstrates the need for mainstream labor to adapt to changes spurred by globalization in order to effectively protect day laborers, and undocumented workers as a whole.

## CONCLUSION

Under our existing labor scheme, the organization of day laborers by unions and under the NLRA is impossible because of the legal and structural barriers that stand in the way. First, legal barriers like definitional restrictions under the NLRA and the enforcement of strict immigration policy over workers' rights prevent day laborers from receiving the labor protections the NLRA was created to provide. Further, structural barriers like the traditional hard-bordered union model and the nature of day labor itself make it unlikely that unions would be able to reach day laborers to organize them. Thankfully, proposals like transnational labor citizenship

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161 See Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, ECON. POL. INST. (Dec. 13, 2005), <http://www.epi.org/publication/bp159/> (noting the informal nature of worker centers).

162 See CASA DE MARYLAND, *supra* note 150.

and worker centers exist to overcome the most significant of these barriers. But by analyzing these potential solutions, the gaps in our current labor policy are further illuminated, and it becomes clear that in order to organize day laborers, one must go outside the traditional US labor scheme. Perhaps the best and only solution is to revamp this labor scheme entirely.

In order for our current labor scheme to protect day laborers, our governing laws and institutions must adapt to changes brought on by globalization. The current, global reality of our time involves a growing rise in the number of undocumented workers, coupled with the continued depletion of union membership. Despite these significant changes, the laws on the books for labor protections have not changed, even though these laws were created in the 1930s for an entirely different type of worker.<sup>163</sup> However, the face of the domestic worker has evolved, and undocumented workers—including day laborers—now make up a significant portion of our workforce.<sup>164</sup> Based on the analysis engaged in above, which attempts to identify the most significant barriers to organizing undocumented day laborers, it is clear that outmoded labor laws like the NLRA are not readily adaptable to this new, globalized workforce.

Now that we know that barriers exist, and that groups have recognized these barriers and tried to work around them, the question becomes: What does the existence of these barriers say about our legal structures? Most notably, these barriers demonstrate that the result of not adapting to change is exclusion. Our laws and institutions do not effectively reach a workforce that did not exist at the time those laws and institutions were created. By failing to adapt to changes brought on by globalization, our labor law cannot be harnessed to protect vulnerable day laborers. Thus, those day laborers are excluded from the protections that labor laws provide. Moving forward, lawyers and policymakers will have to determine how legislation can be reformed to conform to the realities of a global workforce. For instance, scholars like Kati Griffith have argued that the first step toward securing workplace protections for undocumented workers is through immigration reform.<sup>165</sup> By incorporating undocumented workers into our legal system, as opposed to seeing them as illegal “outsiders,” perhaps such workers will become entitled to essential labor protections. If such policy changes can be made, unions could incorporate undocumented day laborers into their reaches and hold true to the battle cry that encapsulates the union experience: “solidarity forever.”<sup>166</sup>

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163 Garcia, *supra* note 62, at 744.

164 See Valenzuela et al., *supra* note 9, at i.

165 Kati Griffith, *Immigration Advocacy as Labor Advocacy*, 33 BERKLEY J. EMP. & LAB. 73, 77–78 (2012).

166 RALPH CHAPLIN, SOLIDARITY FOREVER (The Little Red Songbook 1915).