State Policies and Undocumented Workers’ Rights

“I believe that they used the immigration threat for people like me who spoke out. It gives employers power over their workers” (Harris, 2013). Felipe Villareal stood up to his employer’s unfair labor practices, but was soon met with immigration-related retaliation (Harris, 2013). His story is like so many others in which undocumented immigrants are exceptionally vulnerable in the face of workplace abuses. There are estimated to be 11 million undocumented immigrants in the United States (Bolter et. al, 2021). Large numbers of these undocumented immigrants are employed in construction, food services, and agricultural jobs (MPI, 2019 and Bolter et. al, 2021). Thus, many undocumented immigrants work in lower paying and physically taxing jobs that also leave them open to threats such as wage theft and unsafe working conditions.

To resist these challenges, the Biden administration announced in January that undocumented workers who are victims or witnesses to labor abuses could “access a streamlined and expedited deferred action request process” (DHS, 2023). In other words, undocumented workers involved in labor investigations will be able to more easily gain protection from deportation. This is a significant move because it allows undocumented workers to push back against abuses without as much concern about deportation. However, as we have seen, immigration is a highly contested issue, and federal policies often change rapidly when new presidential administrations emerge. Similarly, Congress has struggled to pass significant immigration reform. While federal immigration reform provides a theoretical method for improving undocumented workers’ labor rights, the federal government has proven itself to be highly volatile and unreliable when it comes to immigration reform. However, state policies and community organizing provide important opportunities to improve undocumented workers’ rights, even in the absence of federal consistency or cooperation.

At the federal level, immigration policy is determined by both the executive and legislative branches. While Congress has the opportunity to pass legislation that alters the
United States’ immigration policy, the executive branch is responsible for the enforcement of that immigration policy, thereby giving it significant control over the system that immigrants must navigate. Such attempts to dictate policy without the cooperation of Congress often spark legal cases. One such example is the Trump administration’s travel ban. The ban began with an executive order issued by President Trump (Wolf, 2018). Over the course of the controversy, the ban was struck down repeatedly in federal courts, revised by the Trump administration several times, and then ultimately approved by the Supreme Court (Wolf, 2018). These court cases involved temporary partial blockages and upholdings of the ban, creating a chaotic and unstable legal environment (Wolf, 2018).

Another example of the vulnerability of executive branch determined policy is the Deferred Action for Childhood Arrivals (DACA) program. The history of the DACA program is particularly illustrative because the idea of assisting undocumented immigrants who arrived as children actually began in Congress. In 2001, Senators Dick Durbin (D-IL) and Orrin Hatch (R-UT) introduced the DREAM Act, which was intended to help these young arrivals obtain permanent legal residency in the United States (Henry, 2023). Despite its introduction over 20 years ago, and repeated attempts to pass the legislation, the act has still not passed (Henry, 2023). This inaction is even more remarkable given that 74% of US adults support permanent legal status for childhood arrivals (Krogstad, 2020). Recognizing the importance of the issue, but also coping with Congress’s unwillingness to pass the act, President Obama issued an executive order in 2012 to create the DACA program (Henry University, 2023). The program allowed undocumented immigrants meeting a certain set of requirements, among them entrance into the United States before turning 16, to avoid deportation for a two year period and obtain work authorization (US Citizenship and Immigration Services, 2022).

However, the program was quickly terminated by the Trump administration in 2017 (Mospan, 2023). This action faced legal challenges, which eventually prevented the termination of the program (Mospan, 2023). However, the program itself has also faced legal challenges,
with the program currently being unable to accept initial requests (requests from immigrants who have not previously used the program) because of a federal court case in which a judge decided that the program was unlawful (USCIS, 2022). The DACA program’s abrupt termination due to a presidential administration change, along with the ongoing legal battles surrounding the program, exemplify the vulnerabilities of immigration reform that comes from the federal executive branch. While such efforts can introduce new programs and provide for improvements, they are easily alterable after an administration change and often become submerged in legal battles.

The history of DACA also exemplifies the problems with relying on Congressional action to improve undocumented workers’ rights by passing immigration reform. Just as the DREAM Act has gone unpassed for over 20 years, NBC News reports that “Congress’s failure to pass any meaningful immigration reform stretched to more than two decades in the last session” (Gamboa, 2023). Given this very extended period of inaction, it seems unlikely that productive immigration reform will come from Congress at any time in the near future.

While the value of federal immigration reform cannot be understated, in light of its unlikelihood, we must consider state-level influences on the experiences of undocumented workers. In his paper entitled “Immigration and Employment Federalism: State Courts and Workers’ Compensation for Unauthorized Workers,” Tobia Kuehne writes about the Hoffman v. NLRB Supreme Court case. In Hoffman v. NLRB, a worker had been fired for participating in unionization activities. This type of retaliatory firing is forbidden by the National Labor Relations Act (NLRA), so the worker should have been entitled to backpay for the time he did not work because he had been fired (Kuehne, 2022). However, because the worker was undocumented, and thus working illegally, the Supreme Court denied him this backpay (Kuehne, 2022). Despite this ruling, state courts have often decided that workers deserve compensation even if they are undocumented(Kuehne, 2022). In light of these decisions, Kuehne argues that state courts often view undocumented workers as contributors to the labor
market and thus deserving of protection regardless of their status (Kuehne, 2022). In this way, state court rulings can alter the experiences of undocumented workers, even without support from federal courts.

In some of the cases Kuehne discusses, state policies specifically allow unauthorized workers to receive compensation in spite of their status (Kuehne, 2022). Kuehne’s discussion of the tensions between the state and federal court systems raises questions about the ways that differing state policies impact undocumented workers’ rights. To gain insights into these questions, I examine two case studies, Arizona and California. These states have significantly different policies related to immigration and undocumented workers. Specifically, I will focus on the Legal Arizona Workers Act (LAWA) and a variety of California legislation intended to protect undocumented workers’ rights.

Arizona and California are both states with significant numbers of undocumented immigrants. Pew Research Center estimates from 2016 found that undocumented workers made up 5.7% of Arizona’s labor force and 8.6% of California’s labor force (Pew Research Center, 2019). Additionally, Arizona and California are at essentially opposite ends of the spectrum in terms of their willingness to protect undocumented workers. They thus provide ideal samples to study varying types of state-level legislation. Upon examination, it becomes apparent that Arizona’s legislation is incredibly damaging for undocumented workers, while California’s legislation provides the legal framework necessary for government agencies to protect undocumented workers.

In 2007, Arizona passed the Legal Arizona Workers Act, one of numerous pieces of anti-immigrant legislation passed in the state in the 2000s. The LAWA requires businesses to use federal E-verify to check workers’ status. It also allowed for the suspension or revocation of business licenses of businesses that knowingly hired undocumented workers (Campbell, 2011). This was one of several significant anti-immigrant laws passed in Arizona. The passage of these laws began in 2004 and reached an extremely intense moment with the passage of SB 1070,
known for allowing law enforcement officials to request that people “show me your papers” (Campbell, 2011 and Becerra, 2016). Thus, the LAWA, along with Arizona’s generally anti-immigrant environment, provides an opportunity to examine the ways that restrictive state policies impact the experiences of undocumented workers.

A qualitative analysis of the impacts of the LAWA, which gathered data through focus groups with immigrants, found that the law did seem to accomplish its “intended purpose” of making it more difficult for undocumented immigrants to get jobs (Ayon et. al, 2011). Similarly, a more quantitative analysis of the impacts of the law found a statistically significant decrease in the population that was “Hispanic noncitizen” (Bohn et. al, 2014). Another study assessing the impact of Arizona’s anti-immigrant laws found associations between fear of deportation and finding and keeping a job (Becerra, 2016). These findings suggest the development of a difficult labor market for undocumented workers.

While these effects of the law are somewhat unsurprising, the development of such a desperate labor market would logically have important implications. In such a desperate labor market, we would expect that workers would be more willing to take exploitative jobs or to remain in exploitative workplaces because they do not have other options. The qualitative analysis mentioned above confirms this expectation, with one participant reporting that “the employers are taking advantage to the point that they sometimes don’t pay us for the hours that we’ve worked” and another saying that employers “know that we need this job and that if we leave we won’t be able to find another job” (Ayon et. al, 2011).

In these ways, we see that the LAWA and other state level policies in Arizona had a real and undoubtedly negative impact on undocumented workers’ experiences in the workplace. The restrictive policies caused the development of a labor market with fewer options for undocumented workers, severely limiting undocumented workers’ abilities to escape abusive workplaces and forcing them to either tolerate these conditions or leave the state altogether. It is also important to note that such consequences were not the stated intent of the law. The law was
theoretically meant to punish employers, not employees. This goal is the reason that businesses can have their licenses revoked for violating the law. However, in 2013, five years after the law had been instituted, only 3 businesses had been sent to court (Billeaud, 2013). Instead, employees were bearing the bulk of the legal consequences (Billeaud, 2013). This problem is also described in the qualitative analysis, with participants reporting that it seems employees are facing consequences while employers are not (Ayon et. al, 2011). Thus, we see that the policy’s focus on employers does not correspond with reality. The reality has been few legal challenges for businesses, but arrests and a difficult and vulnerable labor market for employees.

In “The Power of Presumption: California as a Laboratory for Unauthorized Workers’ Rights,” Kati Griffith argues that state governments have significant legal power to protect undocumented workers from employers’ immigration status investigations while enforcing their own workplace protection laws. More specifically, Griffith argues that such powers are not superseded by current federal immigration laws (Griffith, 2017). In this way, Griffith provides a legal argument to justify state level legislation intended to improve undocumented workers’ rights.

As Griffith suggests, California has taken significant steps in an effort to protect the workplace rights of undocumented immigrants. California’s AB 263 and SB 666, both from 2013, prohibit immigration status related retaliation by employers, with penalties including fines and revocation of a business’s license (Costa, 2018). In other words, employers are prohibited from bringing in immigration enforcement authorities in order to retaliate when workers advocate for their rights. Going even further in 2015 and 2016 with AB 622 and SB 1001, California prevented employers from checking employee authorization status unless in a situation where it is required by federal law (Costa, 2018). SB 54 from 2017 is an attempt to limit ICE’s access to places where undocumented immigrants would take legal action against abusive employers (Costa, 2018). These laws are significant alterations to the legal situations faced by undocumented immigrants who are dealing with abusive employers.
In his article, “Stealing Wages from Immigrants,” Jed DeVaro suggests that AB 263 and SB 666 are unlikely to have a huge immediate impact on the behavior of undocumented workers because they cannot actually prevent undocumented workers from being deported (DeVaro, 2014). This issue is admittedly a significant limitation for state level legislation. However, it does not make legislation like that passed in California meaningless. While this legislation does not directly protect undocumented immigrants, it emboldens the California Labor Commissioner to punish businesses that engage in these retaliatory practices. For example, a 2018 article in The World describes two cases in which employers were found guilty of immigration-related retaliation and notes that the nonprofit Bet Tzedek, which helps workers file claims, has seen workers filing claims regarding immigration-related retaliation (Fernandes, 2018). A report by the Economic Policy Institute includes mentions of letters sent to employers involved in such cases reminding them of the consequences for immigration-related retaliation. In this discussion, the report mentions a conversation with a lawyer who described these letters as a “valuable deterrent” (Costa, 2018). In this sense, legislation like California’s provides the legal framework necessary for the Labor Commissioner to make it costly for businesses to engage in immigration-related retaliation. Over time, with adequate enforcement, such an environment will ideally make immigration-related retaliation an unappealing option for employers, thereby giving undocumented employees the ability to advocate for their rights with less fear.

Probably for this reason, other places have begun to look to California as a model. A 2016 article in the Toronto Star encouraged Ontario to look to California as an example (Mojtehedzadeh, 2016). In this article, the Los Angeles inspector of public workers is described as saying, “fines are all about leverage” (Mojtehedzadeh, 2016). This sentiment corresponds with the value of the new laws described above because the new laws provide leverage for the government to make businesses stop using immigration-related retaliatory measures. An article in the Columbia Journal of Gender and Law argues that New York should adopt policies similar to California’s with regards to immigration-related retaliation (Taykhman, 2016). Thus, it
appears that outsiders have recognized the value of California’s policies. While DeVaro’s concern that the laws cannot provide direct protection from immigration enforcers, the legal framework created by these laws at the very least provides an opportunity, if paired with adequate enforcement, to make immigration-related retaliation an unattractive option for abusive employers.

In their action on the issue of undocumented workers’ rights, California and Arizona demonstrate two diverging exercises of state level power. It is clear that, while the Arizona law was supposedly intended to punish employers, it has in fact had significant consequences for undocumented employees. These consequences have come in the form of arrests, but perhaps more importantly in the creation of an increasingly desperate labor market in which undocumented employees have no choice but to remain in abusive jobs. In contrast, California’s exercise of state power has created a legal environment in which immigration-related retaliation has the potential to become an unappealing option for employers.

In comparing these diverging paths, it becomes apparent that there are two ways undocumented workers can respond to abusive employers. One option is that they can simply find a new job. In some labor markets, undocumented workers make up large portions of the workforce and employers may not investigate immigration status when new employees are hired. In such a labor market, finding a new, and less abusive, employer could be a legitimate response for an undocumented worker facing exploitation and abuse at the hands of their employer. In California, such a response remains a legitimate consideration. However, Arizona law has significantly decreased the feasibility of this response. The LAWA, along with Arizona’s generally harsh treatment of undocumented immigrants, has created an environment in which this form of resistance and escape is not an option.

The second way that undocumented workers can respond to abusive employers is by calling out their employer’s abusive practices. However, undocumented workers are at extremely high risk in taking such actions because their employers can easily retaliate by
questioning their immigration status and/or calling in immigration enforcement officials. In Arizona, this risk remains a problem. In fact, given the anti-immigrant environment in the state and the atmosphere of fear that undocumented immigrants face, it is likely a very significant issue. However, California’s laws help to alleviate this concern by punishing employers who take immigration-related retaliatory actions.

In these ways, it is very clear that legislation like that in Arizona, though theoretically intended to focus on employers, is extremely damaging to undocumented workers’ ability to respond to labor abuses because it removes their ability to escape abusive employers through the labor market and fails to protect them from retaliatory action if they challenge abusive employers. In contrast, legislation in California protects undocumented workers’ abilities to resist or escape abusive employers via both of these routes.

These contrasting case studies demonstrate that state legislatures can take action that impacts the undocumented workers’ options for responding to abusive employers. It is crucial that state legislatures avoid adopting legislation like Arizona’s, which will create a more desperate labor market for undocumented workers. In addition, state governments can and should adopt and enforce legislation, like California’s, that protects undocumented workers from retaliation. In doing so, state governments can exercise their power to protect undocumented workers, and thereby protect all workers in their labor markets, in a way that is resilient to inconsistency at the federal level. Protecting undocumented workers is an incredibly worthwhile cause, both from moral and economic standpoints. In efforts to do so, it is easy to feel powerless in light of federal volatility and inaction. However, it is valuable to remember that we should focus on what we can control, which means pursuing more achievable state level policy changes while hoping for a more favorable federal situation sometime in the future.
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