

Means to an End: An Assessment of the Status-blind Approach to Protecting Undocumented
Worker Rights

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Abstract

This article applies the tenets of bureaucratic incorporation theory to an investigation of bureaucratic decision making in labor standards enforcement agencies (LSEAs), as they relate to undocumented workers. Drawing on 25 semistructured interviews with high-level officials in San Jose and Houston, I find that bureaucrats in both cities routinely evade the issue of immigration status during the claims-making process, and directly challenge employers' attempts to use the undocumented status of their workers to deflect liability. Respondents offer three institutionalized narratives for this approach: (1) to deter employer demand for undocumented labor, (2) the conviction that the protection of undocumented workers is essential to the agency's ability to regulate industry standards for all workers, and (3) to clearly demarcate the agency's jurisdictional boundaries to preserve institutional autonomy and scarce resources. Within this context, enforcing the rights of undocumented workers becomes simply an institutional means to an end.

Keywords

labor, immigration, bureaucracy

Introduction

There are competing theories of how political processes shape the rights afforded to marginalized groups, such as the 11 million undocumented immigrants currently living in the United States. The deadlock of the current legislative context, which has left comprehensive immigration reform hinging on partisan politics, suggests that the power of constituents to sway their representatives is paramount. Another scene from the ongoing congressional drama of immigration reform has been the droves of activists performing sit-ins, marches, and other demonstrations to demand their rights as students, workers, and family members. Beyond the importance of political elites and the power of social movements, a third—perhaps more mundane—component in the process of advancing undocumented immigrant rights are the scores of bureaucrats who run the agencies that these individuals encounter on a daily basis.

From the perspective of political control theory, newcomers must first have sufficient political power to elect sympathetic legislators who can in turn pressure bureaucracies to do their bidding (McCubbins et al. 1987; Meier and O'Toole 2006; Waterman, Rouse, and Wright 1998). On this count, undocumented immigrants are a disenfranchised population, as the federal government has launched a multipronged campaign to enhance immigration enforcement and limit undocumented immigrant rights. However, traditional political control theories do not account for the reality that, despite their noncitizen status and repeated congressional deadlock on immigration reform, undocumented immigrants across the country are being served by bureaucracies whose mission provides a logical argument for their incorporation. For example, undocumented immigrants in the United States enjoy access to a K-12 education (Olivas 2005), protections for undocumented victims of domestic violence (Salcido and Adelman 2004), and emergency hospital care for undocumented patients (Smith 2010).

As such, recent research in the area of bureaucratic incorporation amends this earlier work in political control theory, highlighting instances where bureaucrats have deflected restrictive immigration policies by drawing on their organizational missions to evaluate an immigrant's deservingness (Lewis and Ramakrishnan 2007). Bureaucrats in service agencies, Jones-Correa (2008) argues, are particularly disposed by their professional ethos to exercise individual discretion when they work with undocumented immigrants, and they are able to work around otherwise restrictive policies (see also Marrow 2009, 2011).

Labor standards enforcement agencies (LSEAs) present an important, but thus far underexamined, case study for understanding the bureaucratic incorporation of immigrants. While the workplace has become a central site of immigration enforcement, LSEAs across the varied federal and state jurisdictions have made undocumented workers a top outreach priority. LSEAs comprise a complicated web of workplace enforcement that spans several issue areas (e.g., wage and hour, discrimination, health and safety, collective bargaining), across federal, state, and even local jurisdictions. As a result, workers enjoy a varied constellation of protections depending on where they are located. Furthermore, the allies undocumented workers can rely on, and the foes they have to face, can differ drastically from place to place. The predicted result would be uneven willingness to protect the rights of undocumented workers.

To this end, in this paper, I seek to understand what motivates LSEA bureaucrats in two divergent political contexts to promote the rights of undocumented immigrants, and what institutional processes shape their interactions with these claimants. One might assume that a context with policies that are more friendly to undocumented workers would yield bureaucratic staff who are more willing to enforce the workplace protections of undocumented workers, while a more hostile context would foment more reticence among bureaucrats. However, if bureaucrats

in two divergent political and advocacy environments are in fact operating with similar motivations, this suggests the continued importance of institutional factors for driving immigrant incorporation.

In this paper, I find that LSEA bureaucrats in two distinct traditional immigrant destinations— San Jose and Houston—exhibit similar behaviors and cite parallel motivations for protecting the rights of undocumented workers. The primary mechanism for this bureaucratic incorporation, the extant literature has argued, is bureaucrats who deem clients morally worthy of service, regardless of their legal status. In contrast, rather than sympathy for downtrodden workers, bureaucrats I interview in both cities cite mundane institutional rationales as motivations for their behavior. In both places, they argue that to differentially enforce the rights of documented and undocumented workers would run counter to their fundamental mandate: to identify employers that violate labor and employment laws and levy the appropriate penalties. This orientation—doing the agency’s business day-to-day—leads LSEA bureaucrats to focus on a claimant’s eligibility as a covered employee and to avoid queries that would uncover the worker’s immigration status. To do so, these bureaucrats draw on their professional mission, not to judge the moral desert of undocumented claimants but instead, to advance their agency’s ability to preserve their organization’s *raison d’ être*.

Within this context, LSEA bureaucrats discuss enforcing the rights of undocumented workers as simply a means to an end, not a value-driven discretionary act. This “don’t ask, don’t tell” approach is facilitated by the institutional distinction between determining whether a claimant’s rights have been violated and determining whether a remedy is warranted. In the pages that follow, I discuss three types of rationales LSEA bureaucrats offer for their status-blind approach: (1) aligning the goals of labor standards enforcement with a desire to deter the demand

for undocumented labor, (2) articulating a need to protect all workers to maintain their ability to fulfill their statutory mandate, and (3) demarcating clear jurisdictional boundaries to preserve agency autonomy and scarce resources.

I conclude that incorporation strategies that rely on a bureaucratic environment of passive ignorance may indeed facilitate incorporation for the select workers who file a claim. However, the status-blind approach of LSEA bureaucrats is not a panacea for the exploitation of undocumented workers who must rely on a workers' rights bureaucracy that remains chronically underfunded, who have inferior opportunities for restitution, and who are subject to a global economy that perpetuates marginalization of immigrant workers.

Theoretical Foundations

Research on Bureaucratic Responses to Undocumented Communities

Political sociologists have typically followed two threads of investigation as they have sought to understand how political processes affect the rights of undocumented immigrants. The first focuses on how certain political elites have pushed for expanded immigrant rights. These efforts have hinged on high-level political compromises and the ability of interest groups to sway decision makers (e.g., Tichenor 2002, 2009). The second line of inquiry examines the growth and mobilization of grassroots organizations whose mission is to pressure the federal government to halt deportations and push for a path for legalization. The immigrant rights' marches of 2006 in the United States brought thousands of undocumented immigrants out in protest, revealing alternative pathways to political incorporation for noncitizens (e.g., Pallares and Flores-González 2009; Voss and Bloemraad 2011).

Research on bureaucratic incorporation considers the question of immigrants' rights from a third institutional perspective. This literature reveals that, apart from the processes of policymaking and the tactics of social movements, the ways in which bureaucrats implement laws also affect the lives of undocumented immigrants. One way to understand bureaucratic behavior is to examine how political elites use administrative procedures to extend their own interests by pressuring bureaucratic agents across "various venues of influence" (McCubbins et al. 1987; Waterman et al. 1998), sometimes even radically reshaping an agency's priorities, resources, and leadership (Teles 2009). From this perspective, the treatment of minority groups such as undocumented immigrants, is ultimately dependent on their political influence (Lewis and Ramakrishnan 2007; Meier and O'Toole 2006)

Yet, bureaucrats are not always the puppets of the political forces that fund their agencies and stack their boards and commissions. Bureaucrats can also be driven by interests that are quite distinct from those of the political actors who control them. Bureaucrats can, and do, engage in autonomous behavior. Although many early studies determined that bureaucratic discretion could prevent minorities from accessing key rights (Lipsky 1980), later work showed that bureaucrats could also be responsible for important innovations that sometimes serve not only agency goals but also the public good (Brehm and Gates 1999; O'Leary 2005).

As such, recent studies point to the important role that bureaucratic incorporation plays as a non-electoral route to the integration of undocumented immigrants in a wide range of institutional arenas, such as libraries (Jones-Correa 2005), schools (Gonzales 2011), health care agencies (Marrow 2012), court systems (Marrow 2009), and even law enforcement agencies (Lewis and Ramakrishnan 2011). A primary factor shaping discretionary bureaucratic behavior is an agency's mission, which is determined by statutes and subsequent court rulings that define the

“rules of the game” (Marrow 2009). Bureaucrats in service agencies, who tend to work closely in empathic ways with their clients, are more likely to have a positive attitude toward immigrants than bureaucrats functioning in a regulatory capacity, who have minimal relationships with those who are being regulated (Jones-Correa 2005).

Yet, we lack a deeper understanding of how the “institutional and ideational context created by policy paradigms in local communities” shapes bureaucratic behavior (Bernstein 2011: 26). As such, LSEAs are an ideal institutional setting to examine the bureaucratic incorporation of immigrants, given the complex regulatory terrain of undocumented worker rights. Undocumented workers comprise 5.2 percent of the civilian labor force and have become structurally embedded in several low-wage industries rife with workplace violations (Cornelius et al. 2004; Passel and Cohn 2011). Their lack of legal status, however, makes undocumented workers particularly vulnerable targets for employer abuse, and less likely to come forward to file a claim. A contradictory set of federal and state statutes works at cross-purposes to create a confusing context for undocumented workers in this realm of “immigration law” (Griffith 2011, 2012).

The Legal and Bureaucratic Context for Undocumented Workers

Although the 1986 Immigration Reform and Control Act is mostly known for initiating a sweeping amnesty, another of its important legacies is the establishment of employer sanctions, which instituted penalties for employers who hire undocumented workers. The landmark 2002 Supreme Court ruling in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* (NLRB) rested its findings on *International Register of Certificated Auditors (IRCA)* when it

denied an undocumented worker the key remedies of job reinstatement and back pay after he was fired for union organizing, a clear violation of the National Labor Relations Act. Chief Justice William Rehnquist, writing for the majority, argued that even though the facts in *Hoffman* affirmed the employer's culpability, to grant undocumented immigrants full rights "not only trivializes the immigration laws, [but] also condones and encourages future violations." In his dissent, Justice Stephen Breyer countered that the decision would grant egregious employers "immunity in borderline cases" and ultimately encourages employers to "hire with a wink and a nod those potentially unlawful aliens."

Since *Hoffman*, several other high-profile cases have reflected the unsettled nature of the law regarding undocumented workers' rights. For example, in 2008, *Agri Processors, Inc. v. NLRB* reasserted an undocumented worker's eligibility to participate in union elections. Yet, three years later, the NLRB concluded in *Mezonos Maven Bakery, Inc.* that undocumented workers were ineligible for back pay remedies even in cases where the offending employer knew about their illegal status when they hired them (NLRB 2011). Critics have argued that this current environment of "rights without remedies" has created a culture of fear among undocumented workers, furthered their exploitation, and stifled collective bargaining efforts (Fisk and Wishnie 2005; Motomura 2010; Wishnie 2007).

After *Hoffman*, state and federal LSEAs have worked hard to convey their ongoing willingness to uphold the rights of all workers regardless of immigration status, and to combat what advocates feared would be a chilling effect on worker rights. Although *Hoffman* prompted many agencies to review their policies for applying back pay and reinstatement remedies, the new ruling did not preclude LSEAs from processing claims and assessing employer culpability. The chairman of the Equal Employment Opportunity Commission (EEOC), for example, issued

a public statement reaffirming that “protecting immigrant workers from illegal discrimination has been, and will continue to be, a priority for the EEOC.” He also directed all EEOC field offices to retain all other forms of relief in “accordance with existing standards, without regard to an individual’s immigration status” (Equal Employment Opportunity Commission 2002a).

The U.S. Department of Labor (DOL) also proactively clarified its incorporative stance toward undocumented workers following Hoffman. In a public fact sheet, the DOL Wage and Hour Division declared that the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) were not affected by Hoffman and that the agency “will continue to enforce the FLSA and MSPA without regard to whether an employee is documented or undocumented” (U.S. Department of Labor 2007). In addition, the DOL vowed to continue managing its memorandum of understanding (MOU) with Immigration Customs Enforcement (ICE), meant to minimize ICE interference in DOL investigations (see Chen 2012; Lee 2011). In 2004, the DOL also entered a joint bilateral declaration with the Mexican government to facilitate outreach to Mexican workers.

State LSEAs, even those in politically divergent contexts, have also clarified their labor policies in response to the Hoffman ruling. For example, the California Department of Industrial Relations (DIR), which enforces some of the most generous labor protections in the country, amended the state’s labor code to reiterate its commitment to protecting undocumented workers. Even in Texas, where support for undocumented workers has been politically fraught, the labor code does not explicitly exclude undocumented workers from either wage and hour, or discrimination protections.

How, then, are LSEAs implementing this incorporative stance? What explains the tendency of LSEA bureaucrats to eschew any role in immigration enforcement and ignore the

immigration status of the workers they encounter? Recalling the most expansive guest-worker program in U.S. history, Calavita (1992) provides a nuanced account of how the Immigration and Naturalization Service (INS) and DOL negotiated their respective agendas during the post-war Bracero Program. Building on this previous work, Wells (2004) highlights how the conflicting norms and practices of INS and DOL also ultimately allowed DOL bureaucrats to deflect a mandate under IRCA to examine workers' documentation status during the course of their labor standards investigations. Wells points to how "multiple levels, diverse administration branches, and decentralized agencies" have facilitated the "immigrant-inclusive" implementation of otherwise "immigrant-exclusive" federal policies (Wells 2004:1310).

While Wells does not elaborate on the factors driving LSEA behavior, her findings reveal how "DOL's mandates and operating procedures led its agents to assist minimally in employer sanctions enforcement from the start (Wells 2004:1333)." Although Wells' argument affirms the bureaucratic incorporation thesis that a bureaucrat's professional ethos can shape his or her behavior, it also shows how the structural arrangements between the INS and the DOL created openings for advancing the rights of undocumented workers. The varied political dynamics and cultures of local implementation, according to Wells, also matter. In the current era, DOL investigators are no longer required to inspect immigration documents, yet there has been an increased devolution of immigration enforcement at the workplace (Lee 2009, 2011). These efforts have confounded claims-making by undocumented workers (Bernhardt et al. 2009), and created a further challenging environment for LSEAs, whose insufficient budgets have already led to severe backlogs and inefficiencies (Government Accountability Office 2009). Consequently, protecting the rights of undocumented workers is a challenging endeavor, particularly in contexts where immigrant rights remain highly contested.

To this end, this paper examines the factors that lead bureaucrats in LSEAs in two politically divergent immigrant destinations—San Jose, California, and Houston, Texas—to invest with similar vigor in the incorporation of undocumented workers. Rather than cast the behavior of LSEA bureaucrats toward undocumented immigrants as heroic, I suggest that the motivations that prompt bureaucratic actions are often highly institutionalized. This finding parallels the classic argument advanced by Graham Allison’s (1969) study of the Cuban missile crisis. Rather than adopt a value-driven view of bureaucratic behavior, Allison’s research demonstrated how “for large classes of issues . . . the stance of a particular player can be predicted with high reliability from information concerning his seat” (Allison 1969:711). In sum, Allison argues that the factors that motivate bureaucrats are often quite predictable, not necessarily extraordinary or intentional, and may not always be rooted in direct concerns for clients themselves. Similarly, I find that LSEAs proactively employ a status-blind approach not because they have a particular affinity toward undocumented workers, but rather because this population is the linchpin of the agency’s ability to achieve its enforcement goals.

Study Methodology

This research investigates the foundations of LSEA bureaucratic behavior toward undocumented workers in two cities that differ significantly in both their worker rights policies and their environment for immigrant rights: San Jose, California, and Houston, Texas. Both cities are traditional immigrant destinations (Singer 2003), with similar hourglass economies that employ both high-skilled immigrants and a vast army of undocumented low-wage labor. Yet, the political power of organized labor in San Jose far exceeds that of Houston: 13.4 percent of workers in San Jose are union-represented, compared with 4.9 percent of workers in the Houston

area (Hirsch and Macpherson 2012). The infrastructure supporting worker rights also contrasts sharply: many fewer statutory protections and resources for claims-making are available in Houston.

Moreover, the political leaders in San Jose have been far more resistant to expand federal immigration enforcement via local agencies. For example, in San Jose, the city council has overwhelmingly denounced restrictive legislation in states like Arizona (Rodriguez 2010), and Santa Clara County has actively rejected increased calls for local enforcement (Rusk 2010). Meanwhile, despite relatively supportive mayoral leadership, immigration has become a flashpoint on the Houston city council as public support has mounted to overturn the city's "sanctuary city" policies and eliminate the long-standing Mayor's Office of Immigrant and Refugee Affairs (City of Houston 2005).

Political control theory would suggest that given the differing political landscapes of these two cities, LSEA bureaucrats in Houston might be more resistant to enforcing the rights of undocumented workers, or might offer distinct rationales for doing so. Indeed, previous scholarship in San Jose and Houston reveals vastly different approaches for enforcing immigrant rights. San Jose has a well-developed legal advocacy community that relies on worker-friendly state laws and a strong union movement to promote undocumented immigrant rights (Rhee and Sadler 2007). Conversely, a weak labor movement, absent state apparatus, and active anti-immigrant movement has required a more coordinated response by federal LSEAs in conjunction with labor and immigrant advocates, and the Mexican consulate (Karson 2004). However, the research presented here uncovers nonetheless surprisingly similar institutional justifications for LSEA outreach efforts in the two cities.

For this research, I conducted semistructured interviews with 25 high-level officials in each of these jurisdictions (See Table 1). I interviewed the director of each of these agencies and, where possible, at least one investigator or outreach person (12 individuals in San Jose, and 13 in Houston). I asked bureaucrats to speak about their agency’s mission and the procedures they used to execute it. I also asked respondents to speak specifically about how they had handled cases involving undocumented claimants and to identify the considerations that had shaped their approach. With the exception of one follow-up interview, I conducted all interviews in person at the agency.

Table 1. Federal and State Labor Standards Enforcement Agencies Serving Houston and San Jose.

Workplace issue	Houston, Texas	San Jose, California
Wages and hours	Federal Department of Labor, Wage and Hour Division Texas Workforce Commission, Payday Law	Federal Department of Labor, Wage and Hour Division California Department of Labor Standards Enforcement
Discrimination	Equal Employment Opportunity Commission Texas Workforce Commission, Civil Rights Division	Equal Employment Opportunity Commission (San Francisco District and San Jose Field Office) Department of Fair Employment and Housing*
Health and safety	Occupational Safety and Health Administration (Houston South Area Office)	California Occupational Safety and Health Administration
Collective bargaining	National Labor Relations Board (Region 16)	National Labor Relations Board (Region 20)
Workers’ compensation	Texas Department of Insurance, Division of Workers’ Compensation	California Department of Industrial Relations, Division of Workers’ Compensation

*Note: I was unable to formally interview anyone within the California Department of Fair Employment and Housing, however, I did speak with representatives during outreach events.

I conducted primary interviews in 2006. I then completed targeted follow-up interviews at the DOL and EEOC in 2009 and 2012 to capture information about key personnel and resource changes instituted by the Obama administration. All but two interviews were recorded and then professionally transcribed for analysis.

Findings: Incorporative Behaviors

Through the course of this research, I interrogated the behaviors and rationales that federal and state LSEA bureaucrats in two divergent political contexts deploy toward undocumented workers. I find that despite operating in a place with weaker workplace protections, more stringent local immigration enforcement policies, and a political landscape where organized labor and immigrant advocates have decidedly less power, LSEA bureaucrats in Houston espouse a surprisingly similar perspective on enforcing the rights of undocumented workers, as do their counterparts in San Jose.

In the following sections, I identify two primary strategies that LSEA bureaucrats in both San Jose and Houston use to implement the rights of undocumented workers: (1) maintaining a status-blind approach to processing claims and (2) aggressively pursuing employers that use a claimants' immigration status to deflect culpability. After discussing these tactics, I then examine the parallel institutional rationales that bureaucrats summon to advance the protection of undocumented workers' rights.

Maintaining a Status-Blind Approach to Processing Claims

LSEAs face significant challenges in reaching out to undocumented workers. A representative of the California Division of Labor Standards Enforcement in San Jose described the difficulty he faces.

They're scared to death to come in here . . . they're afraid of being reported. It takes a lot for them to come in here and file something. So, we try to treat them with respect, we treat them fairly, we explain to them what we're doing and why we're doing it.

In response, bureaucrats across the various state and federal jurisdictions have adopted a status-blind approach to processing worker claims. For example, the California Division of Workers' Compensation holds monthly workshops to help Spanish-speaking injured workers initiate and advance a claim; during these meetings, an information and assistance officer regularly explains to workers that their immigration status will in no way affect their case.

Similarly, a representative at Houston's NLRB's Region 16 likened his agency's post-*Hoffman* protocol to the military's "don't ask, don't tell" policy. The agency initially approaches

the whole charge on a neutral basis . . . We give full due process to each party and have to allow responses to allegations, and [we] pursue independent witnesses . . . If the law was violated . . . we review the evidence and will try to either reinstate the individual or make the remedy whole.

An official at the Texas Workforce Commission (TWC) also stated emphatically that immigration status is a non-issue for his agency

"If an illegal laborer comes to [us] and files a complaint," he said, "[we don't] ask 'show us your green card, show me your driver's license, show me your Social Security number' . . . That leaves the door wide open for employers to be unscrupulous."

The tactic of avoiding or delaying the collection of information regarding a claimant's immigration status protects the worker, but more important, it shields the agent who otherwise may be required to take this information into account when assessing which remedies to make available to a claimant. The NLRB Region 16 official from Houston explained the tricky position *Hoffman* puts him in. In cases where credible information regarding worker's

immigration status is revealed, the law compels investigators to take it into account. However, if employers do not bring this information into a case, the official emphasized, “we don’t ask.”

Aggressively Pursuing Employers

In areas where clear remedies do exist, such as payment for wage theft and workers’ compensation, the bureaucrats I spoke with reported that they do not hesitate to push back strongly against an employer’s attempt to raise the undocumented status of workers as a defense for unlawful behavior. A lead investigator with the California Division of Labor Standards Enforcement explained a common scenario: “Employers will come forward after working this person for six months and say, ‘They don’t have a Social Security number. I don’t have to pay them.’” His response to these employers is incredulity. “Wait a minute, [you] broke federal law. I mean, which way do you want it?” The director of the California Division of Workers’ Compensation described her similar, typical response: “I’ve had letters come to me from employers who were basically trying to turn the [claimant] in, saying that they’re illegal, but I don’t care. They hired them; they had them working there when they got injured.” An Occupational Safety and Health Administration (OSHA) official in Houston was also unmoved by employer’s claims of ignorance, “It is difficult to believe,” he exclaimed, “that anyone doing business in this country does not know the [immigration] laws.”

For LSEA bureaucrats in both cities, provocation from employers played no role in their willingness to pursue an investigation into a worker’s claim, and at times, they even proactively intervened when a claimant was detained by ICE. The outreach director for the EEOC in Houston, for example, explained how he was able to invoke a U-visa petition in the case of a

worker who had been rounded up in a workplace raid. On advice of his attorney, the offending employer called ICE, and the workers were detained and incarcerated within hours. Operating in the nascent months following the EEOC's formal rules on U-visa certification, and drawing on training he had received by the Department of Justice, this bureaucrat quickly invoked his agency's authority with the help of the EEOC regional attorney. While he hoped that press from this case would combat racism and xenophobia toward immigrants, he also reiterated the importance this witness would play for the EEOC, which would now be in a better position to pursue this highprofile egregious sexual harassment case.

Findings: Institutional Rationales

Unlike other arenas in which rights for undocumented workers are more restricted, such as higher education and social service benefits, labor standards enforcement has developed a rather permissive set of statutory openings for incorporating undocumented claimants. One interpretation of this is to assume that the ambiguity of enforcement requirements predicts inclusive behavior. Yet, I argue that it is too simplistic to assume that bureaucrats at LSEAs would deploy resources and political currency toward undocumented workers only because the law allows for it.

In fact, a central tenet of bureaucratic incorporation theory is the recognition that scholars must interrogate the policy implementation processes to understand the dynamics of immigrant incorporation. As law and society scholars have argued, rights on the books do not always equal rights in action. Agencies are rarely required by legislation, judicial rulings, or regulatory guidelines to adopt specific implementation strategies. There are substantial opportunities for

agency leaders to direct scarce resources away from undocumented immigrants and toward other, less politically contested target populations such as youth, the elderly, or the disabled. Furthermore, neither federal nor state labor laws prohibit bureaucrats from inquiring about a worker's undocumented status at the initial stages of a claim. In fact, doing so would surely create a significant deterrent effect that could help reduce the massive backlog that these agencies face.

Given these limitations, why did my respondents feel so strongly that undocumented workers should have access to labor protections? This study suggests that they do so not because they necessarily believe these workers to be deserving of assistance, but because their ability to do so is tied directly to the legitimacy and efficacy of their agency. Despite the fact that many of the bureaucrats I spoke with expressed sympathy with the plight of undocumented workers, they also offered powerful institutional rationales for their approach. In these final sections, I review three that were articulated repeatedly: to reduce demand for undocumented labor, to ensure the agency's ability to enforce the rights of all—undocumented and documented—workers, and to protect the jurisdictional autonomy and limited resources of the agency.

Deter the Demand for Undocumented Labor

When asked why they chose not to query claimants about their immigration status, many of the LSEA bureaucrats I interviewed began by explaining that their agency's mission in no way contravened the principles of immigration enforcement. In fact, they argued that their agency's ability to protect undocumented workers was in line with a broader effort to reduce the flow of undocumented labor. For example, an official with California Division of Workers'

Compensation described several outreach campaigns that have targeted workers in the construction and agricultural industries, which, she acknowledged, were rife with undocumented workers. She explained, “If we [California] did exclude illegal immigrants from workers’ comp, it would create a perverse incentive for employers to hire illegals because they would be cheaper and they [the employer] wouldn’t have to pay workers’ comp premiums.” She characterized states where restrictive policies bar injured undocumented workers from accessing benefits as grossly misdirected, explaining that, as with any insurance pool, it is imperative to have all stakeholders participating and paying into the system. Employers who evade California’s requirement to provide coverage for all their employees are rewarded with cheaper labor costs, which creates perverse incentives within the workers’ compensation system, gives unscrupulous employers an unfair market advantage, and ultimately further the demand for undocumented labor.

A high-level official with the EEOC in Houston similarly offered an argument that echoes Justice Breyer’s dissent in Hoffman: if his agency were not allowed to enforce the rights of all workers, employers would be emboldened to hire undocumented workers solely “with the intent of exploiting them.” He argued that immigration restrictions created the conditions of vulnerability that undocumented workers face, and not holding employers accountable for violating the law only reinforces the demand for undocumented labor. Similarly, the “no-match” letters being issued by the Social Security Administration and the Department of Homeland Security (DHS) were a top concern for the California Division of Labor Standards Enforcement. These letters inform employers whenever the social security information of one of their workers has been flagged as discrepant. Employers are not required to terminate a worker who receives a letter, and must follow strict protocols for when and how to inform the worker in question.

However, in practice, employers frequently use “no-match letters” to intimidate workers. The result is not only a terrified claimant but also an indignant employer who feels free to continue hiring undocumented workers whom they could exploit.

Protect Each Worker by Protecting All

Respondents also argued that in addition to providing disincentives that could dissuade employers from flouting immigration laws, their status-blind approach was a tactic for preserving their agency’s ability to protect the rights of native-born and documented workers. When I asked a high-level official at the Houston EEOC why he was concentrating his efforts on people who did not have authorization to work, he reiterated his agency’s across-the-board directive: “We’re trying to uncover blatant discrimination in the workplace.” He deflected the issue of an employee’s immigration status as the sole responsibility of employers to screen, and discussed the rampant exploitation of immigrants as a statutory concern for his agency. Referencing the EEOC’s mandate under Title VII of the Civil Rights Act, which protects against race, color, and national origin discrimination (EEOC 2002b), he explained “[W]e’re only interested in looking at employment policies and practices of companies that may be exploiting immigrants, not because they happen to be immigrants, but because they happen to be of different ethnicities.” As such, undocumented claimants were seen as indistinguishable from the broader labor force covered by the statute.

An analogous rationale was offered to justify unconventional outreach tactics. For example, the director of Cal/OSHA described recent collaborations with the Mexican Consulate as an effort to reach out simultaneously to “underserved workers” and those in the “underground

economy.” In his view, access to undocumented workers was central to fulfilling his agency’s regulatory mission: cracking down on egregious employers under the 1970 Occupational Health and Safety Act. He went on:

We’ve done sweeps where we target [immigrant-dense industries], primarily agriculture and construction . . . We find violations are pretty rampant . . . So, to the extent we configure [our operations] holistically, we do it because . . . we can target the bad actors as much as we can.

As such, reaching out to workers who may be undocumented is simply a necessary means for regulating high-violation industries *writ large*.

Similarly, a high-level official with the California Division of Worker’s Compensation tied the litany of health and safety risks in restaurants to the concentration of undocumented workers in kitchens:

Restaurants have a lot of cuts, burns, back injuries, etc. And the thing about the restaurant industry is that it also has a tremendous number of undocumented workers. So it’s one area that we know we need to target in order to reach illegal workers, and where we know they are concentrated.

An official with the Texas Department of Insurance Workers’ Compensation Division likewise described how the rights of undocumented workers simply relate to his agency’s broader regulatory goals.

“Our primary goal is to make the work place safer,” he stated, “and whether it’s an immigrant, a resident, a native, whatever—whatever it takes to make the work place

safer. We want to reduce fatalities. We want to reduce injuries . . . That's our main goal.”

For each of these officials, the ability to protect the rights of undocumented workers was necessarily tied to their agency's ability to protect the rights of all workers under their jurisdiction.

It is important to note that in order to adopt this status-blind approach, labor standards enforcement agents have to draw a fine distinction between worker rights and remedies. From this perspective, the only necessary criterion for bringing a claim is whether the worker is a covered employee. For example, under the FLSA, this includes a non-exempt employee working for an establishment that grosses \$500,000 in yearly revenue or that is engaged in interstate commerce. Under Title VII of the Civil Rights Act, coverage is restricted to claims against employers with 15 workers or more. If a claim meets these standards and a worker can provide the necessary evidence and documentation, then the claim may move forward. Ultimately, meeting these requirements does not ensure a ruling in a claimant's favor, or that an employer will ultimately meet their penalty payment obligations. However, from the perspective of the investigative process, LSEA bureaucrats view documented and undocumented workers in similar fashion.

Patrol Jurisdictional Boundaries and Protect Limited Resources

Beyond meeting their enforcement goals, LSEAs must also tightly patrol their jurisdictional boundaries to preserve their agency's autonomy and scarce resources. This is not to say that the bureaucrats I spoke with did not care about the well-being of the workers with whom they

interacted. To be sure, many bureaucrats expressed considerable sympathy for undocumented victims of workplace violations. However, bureaucratic staff in a wide range of settings understandably will work to preserve their job and do whatever possible to make their tasks easier. Institutional motivations for bureaucratic discretion do not always privilege the well-being of undocumented immigrants, as is the case with ICE agents who are resisting the implementation of President Obama's Deferred Action for Childhood Arrivals (DACA) initiative. However, in the case of LSEAs, institutional incentives happen to help protect undocumented workers.

When resources are scarce—a stark reality for LSEAs for the past several decades (Bobo 2008)—carrying out the functions of another agency whose goals directly contravene your own, is illogical. Respondents repeatedly pointed out that they wanted nothing to do with immigration enforcement functions, citing dwindling resources and their inability to sufficiently investigate and proactively enforce abuses. This reaction is similar to how social workers and other professionals defend their turf—by defining the boundaries of their field and partitioning the division of labor within it (Abbott 1995).

For example, an official with Cal/OSHA, reflected on how continued attempts to use labor standards enforcement as a stepping-stone for immigration enforcement would inevitably prove disastrous for his agency. He recounted an incident in 2005 in which agents from the DHS posed as OSHA agents and rounded up a group of undocumented workers who had shown up for what they thought was mandatory safety training. These operations, he explained, challenge OSHA's legitimacy, do irreparable damage to undocumented workers' willingness to come forward, and complicate the agency's ability to hold the employers who unlawfully hire them accountable.

Even conservative respondents marked these boundaries. For example, a high-level DOL administrator in Houston, who did not want to be recorded, explained rather unsympathetically the situation facing workers who might find themselves caught up in an ICE raid. However, he stressed that the MOU between DOL and ICE limited how much immigration enforcement agents could encroach on his agency's efforts to regulate labor standards, a boundary he worked hard to maintain. His own rationale for this separation, he emphasized, was not the protection of undocumented workers, but the preservation of his agency's autonomy. He wanted to operate unhindered by the objectives of another agency whose resources far outweighed his own.

Bureaucrats situated in California and Texas LSEAs similarly also justified this jurisdictional boundary by the principles of the U.S. system of federalism, which starkly demarcate state and federal governance. For example, an investigator with the California Division of Labor Standards Enforcement was quick to distinguish his agency's labor standards enforcement responsibilities from those of federal immigration enforcement:

Like I said before, our policy is: if you work, you get paid . . . Federal law provides that an employer is supposed to check the Social Security number, get the I-9 signed and the authorization to work in the United States within three days of employment. We don't enforce federal laws, whether they did that [used false papers] or didn't, we don't care . . . We do not have jurisdiction; we will not enforce federal law . . . We do not share any information with the INS, and I don't believe [an investigator] would have to ask [about legal status].

He and other state agents repeatedly reminded me that they represented the interests of their state, not those of the federal government.

In sum, many LSEA bureaucrats rejected the notion that their resources should be used to pursue the goals of ICE, whose objectives clearly contradicted their own.

Conclusion

Despite a setting defined by contradictory laws and policies, LSEAs remain committed to protecting the rights of undocumented workers. I have described how, in response to judicial interpretations that have limited the remedies available to undocumented workers, LSEAs have crafted outreach campaigns and bureaucratic procedures that elide the issue of immigration status. In both San Jose and Houston, two politically divergent places, I uncovered a pattern of “don’t ask, don’t tell” that has allowed bureaucrats at LSEAs to maximize the protections they can offer to undocumented workers. These findings reaffirm the importance of institutional logics, which have been the subject of key research in organizational sociology (e.g., DiMaggio and Powell 1994; Thornton and Ocasio 1999),

The mere existence of undocumented workers’ legal rights cannot explain how and why LSEA bureaucrats have responded this way. Research in the area of bureaucratic incorporation offers one explanation—namely, that the professional mission of LSEAs encourages bureaucrats to regard undocumented immigrants as workers who deserve their sympathy. These bureaucrats may indeed be predisposed in this direction, since they may have selected this profession because of their desire to serve deserving populations (Marrow 2012). However, the evidence presented in this study offers an alternative explanation.

My findings reveal three common, and not mutually exclusive, justifications for the bureaucratic incorporation of undocumented workers into LSEAs: (1) efforts to reduce the

exploitability of undocumented workers and thus reduce their demand by employers, (2) the conviction that the protection of undocumented workers is essential to the agency's ability to regulate industry standards and enforce the rights of all workers, and (3) attempts to preserve the agency's autonomy, legitimacy, and scarce resources. The bureaucratic distinction between rights and remedies helped to facilitate this status-blind approach.

The identification of the status-blind approach in two politically divergent cities repudiates theories that would privilege the political culture of an enforcement environment as a singular force driving bureaucratic discretion. While my findings affirm the importance of institutional factors such as an agency's statutory mandate and professional mission, I also find that the mundane factors underlying organizational also matter. These findings from San Jose and Houston may speak to the bureaucratic experiences in a variety of other large traditional immigrant destinations. More research is needed, however, in new destinations such as the South where the immigrant labor force is rapidly changing, as well as in jurisdictions such as Arizona where ant immigrant state legislation has directed state resources toward worksite enforcement of immigration law.

These findings also suggest applications for our understanding of how other institutional arenas may be responding to undocumented workers and other disenfranchised groups. Institutional incentives may drive bureaucratic behavior, not only in contexts where goods and services are limited (such as undocumented students in higher education), but also in contexts where jurisdictional boundaries and statutory imperatives conflict (such as perhaps community policing). The case of LSEAs has demonstrated how bureaucrats use a statusblind approach to reconcile competing directives, while also advancing their own agency's legitimacy within their jurisdiction. In this instance, the end effect is an open-door policy for undocumented workers.

Yet, recalling work on the bureaucratic implementation of civil rights legislation of the 1960s (see, for example, Bonastia 2010), we know that the structure of an organization can also be the source of its limited efficacy and the ultimate failure of policy implementation.

Finally, this research suggests that the status-blind approach adopted by LSEAs should not be viewed as a panacea for addressing the exploitation of undocumented workers.

Undocumented workers frequently fall outside of agency jurisdictions, or are misclassified as independent contractors (National Employment Law Project [NELP] 2009). At-will employment policies pose further challenges (Garcia 2012). We know that only a small fraction of workers who experience a violation actually come forward to file a claim, and when they do, the measure of aid they are eligible for often pales in comparison with the real losses they have experienced (Bernhardt et al. 2009). Employers have also come to view paltry labor standards enforcement penalties as merely the cost of doing business (Bernhardt et al. 2008.) Finally, the long-term viability of the bureaucratic incorporation of undocumented workers will ultimately be limited in the absence of comprehensive immigration reform.

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Notes

1. The U.S. Immigration and Customs Enforcement (ICE) has met its annual goal of deporting 400,000 unauthorized immigrants in large part by deputizing state and local law enforcement through programs such as 287(g) and Secure Communities. These programs follow a long line of federal policies meant to restrict immigrant rights over the last two decades, such as the 1996 Personal Responsibility and Work Opportunity Reconciliation Act, the Illegal Immigration Reform and Immigrant Responsibility Act, and the Anti-terrorism and Effective Death Penalty Act.
2. See *Plyler v. Doe*, 457 U.S. 202, 215 (1982).
3. See 1999 Battered Immigrant Women Protection Act.
4. See 1986 Emergency Medical Treatment and Active Labor Act.
5. The focus of this article is squarely on the institutional responses to advancing immigrant worker rights. Elsewhere, scholars have written extensively on the ways in which undocumented workers contest their poor labor market conditions through unions and worker centers (see, for example, Gordon 2007; Milkman, Bloom, and Narro 2010.)
6. Bureaucracies may also adopt hybrid missions that offer contradictory directives, such as when police are not only uniquely authorized to “employ the state’s coercive power” to enforce rules, but also expected to protect all individuals who fall under their jurisdiction (Marrow 2009:768; see also Maynard-Moody and Musheno 2003).
7. *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board (NLRB)*, 535 U.S. 137 (2002).

8. Later challenges would also highlight the “criminal element” that was purportedly inherent in undocumented workers, which, according to some, constituted blatant abuse of the American legal system. See, for example, arguments in 2003 *Sanchez et al. v. Eagle Alloy* (2003 658 N.W.2d 510), *Jane Doe v. Kansas Department of Human Resources* (2004 Kan. LEXIS 262), *Ulloa v. Al’s All Tree Service* (2003 68 N.Y.S.2d 556), *Sanango v. 200 East 16th* (2004 788 N.Y.S.2d 314), and *Rosa v. Partners in Progress, Inc.* (2005 868 A.2d 994).

9. *Agri Processor Co., Inc. v. NLRB*, 514 F.3d 1 (2008).

10. *Mezonos Maven Bakery, Inc.*, 357 NLRB No. 47. Subsequent to *Mezonos*, the General Counsel office at the NLRB issued an “Operations Management Memorandum” upholding the premise that an “employee’s work authorization status is irrelevant to the underlying question of the employer’s liability under the Act,” but also requiring that an employer must present sufficient evidence during compliance hearings to demonstrate a valid basis for raising the issue of a worker’s immigration status (NLRB 2012).

11. See *Brownell* (2010) for an excellent summary of the provenance of *Sure-Tan* and *Hoffman* and an institutionalist approach to understanding the court’s decisions.

12. Immigrant worker advocates such as the National Employment Law Project (NELP) have worked to enforce these agreements, noting that employer retaliation against undocumented claimants remains rampant. The challenge on the ground is that these retaliatory actions do not always percolate to the top of the overwhelmed agency’s priorities. Furthermore, the memorandums of understanding (MOUs) remain political fraught, and complicated by infrequent and inefficient opportunities for the DOL to alert ICE of those investigations that would be

significantly disrupted by a raid (Personal communication with the National Employment Law Project, February 22, 2012, and May 2, 2012).

13. To address the disproportionate health and safety risks facing Hispanic workers, the DOL has sponsored a “Hispanic Health and Safety Summit” (Occupational Safety and Health Administration [OSHA] 2004, 2010), and every year the DOL co-sponsors “Labor Rights Week/Semana de Derechos Laborales” in conjunction with the Mexican Consulate and several other LSEAs and community groups. These efforts were reinvigorated during the leadership of Secretary of Labor Hilda Solis (2009–2013)

14. California Labor Code 1171.5 reads, “All California workers—whether or not they are legally authorized to work in the United States—are protected by state laws regulating wages and working conditions . . . The California Department of Industrial Relations—which enforces the state’s labor and workplace safety and health laws—will not question workers about their immigrant status” (California Department of Industrial Relations [CA-DIR] 2009).

15. The form required for filing a wage claim under the Texas Payday Law clearly states that providing a social security number is optional, and the intake form used by the Texas Workplace Commission Civil Rights Division does not request it at all (Texas Workforce Commission [TWC] 2012). Undocumented workers who are covered by employer policies also remain eligible for benefits in Texas (Beardall 2010).

16. In 2003, the Immigration and Naturalization Service (INS) was dismantled and three new agencies were created under the provisions of the Homeland Security Act: U.S. Citizenship and Immigration Services (USCIS), Customs and Border Protection (CBP), and ICE.

17. Due to legal advocacy through the North American Agreement on Labor Cooperation, and sympathetic support from the President's cabinet, DOL bureaucrats were eventually instructed to cease such inspections in complaint-driven cases (Wells 2004:1333).

18. While I cannot exclude other unarticulated intentions that these respondents may have for their actions, in this paper, I base my conclusions on the ways in which LSEA bureaucrats discuss their behavior toward undocumented claimants. Ultimately, my focus here is on the similar ways in which LSEA bureaucrats in these two divergent contexts justify and carry out the rights of undocumented workers, which I argue highlights the importance of institutional factors driving bureaucratic incorporation.

19. Golden (2000), similarly engages Miles's law in her examination of bureaucratic behavior during the Reagan era when, grounded in their loyalty to the agency and its principals, civil servants in the Department of Justice Division of Civil Rights contested the wishes of political appointees. See also Miles (1978).

20. Estimates place the undocumented population in Santa Clara County at 10.2 percent of the population (Hill and Johnson 2011:17), while an estimated 8 percent of Houston–Sugar Land–Baytown metropolitan area residents are estimated undocumented (Jankowski 2006:1).

21. While non-union worker centers exist in both cities, I refer here to union representation as a well accepted marker of inequality and the political power afforded to workers (Western and Rosenfeld 2011).

22. For example, whereas the California Department of Labor Standards Enforcement has 21 field offices throughout the state, with one located directly in downtown San Jose, all offices of the TWC are concentrated nearly three hours away in the state capital of Austin, leaving Houston

workers to rely on a mail-in claims process. In terms of wage and hour standards, the state of California provides a higher minimum hourly wage for workers (\$7.50 on January 1, 2007). California also provides additional discrimination and health/safety protections for workers. Conversely, Texas protections merely mimic federal standards (including a minimum hourly wage of \$5.85 as of July 24, 2007). Since March 11, 2013, workers in the City of San Jose are subject to a \$10 minimum hourly wage, though this ordinance falls outside the scope of this article.

23. Copies of the semistructured interview questionnaire are available upon request.

24. The immigrant rights marches of 2006 were a prominent theme in the political background of both cities, though the historical significance of the mobilizations was not immediately apparent during the early course of this research. While an obvious theme for discussion with civil society advocates, LSEA staff I spoke to made little direct reference to the protests.

25. Interview, California Division of Labor Standards Enforcement, San Jose, November 20, 2006.

26. Interview, California Division of Workers' Compensation, San Jose, August 18, 2009.

27. Fox (2012) identifies similar tactics among social workers in the Northeast and Midwest during the earlier part of the century.

28. Interview, TWC, Austin, October 20, 2006.

29. See Chen (2012) for an extensive discussion of how different federal agencies have instituted regulatory responses post Hoffman.

30. Advocates have documented employer intimidation in labor standards enforcement proceedings, and it is not uncommon for employers to raise the issue of a claimant's immigration status in their defense, as evidenced by the many state and federal court cases that have debated the issue post *Hoffman*. (See Garcia 2011 for a discussion of the judicial impact of *Hoffman*.)

31. Interview, California Division of Workers Compensation, Oakland, December 11, 2006.

32. Interview, OSHA, Houston, October 17, 2006.

33. Several state and federal LSEAs now certify "U-visas," which provide legal status to undocumented immigrants who have been the victim of a crime, and who agree to aid in the labor standards enforcement investigation (NELP 2011a). See Equal Employment Opportunity Commission (EEOC) memorandum issued July 3, 2008 concerning "EEOC Procedures for U Nonimmigrant Classification Certification" (see http://iwp.legalmomentum.org/immigration/u-visa/government-memoranda-andfactsheets/U%20VISA_EEOC%20Certification%20Memo_7.3.08.pdf).

34. Interview, EEOC, Houston, June 30, 2009.

35. See, for example, the DOL's YouthRules! initiative, and the EEOC's Leadership for the Employment of Americans with Disabilities campaign.

36. The vast welfare state literature provides examples of strategies that agencies have adopted to reduce caseload. For example, historically social service agencies have implemented seemingly innocuous requirements for applying for benefits, such as multiple office visits, which may nevertheless deter resource-poor populations from meeting minimum eligibility requirements to receive benefits (For a discussion of such diversion tactics, see, for example, Goldberg 2007; National Center for Law and Economic Justice 1998; Reese 2005).

37. Interview, EEOC, Houston, June 23, 2006.

38. Interview, California Division of Labor Standards Enforcement, November 20, 2006.

39. Interview, EEOC, Houston, June 23, 2006.

40. Interview, EEOC, Houston, June 23, 2006.

41. Interview, Cal/OSHA, Oakland, November 21, 2006.

42. Interview, California Division of Workers' Compensation, Oakland, December 11, 2006.

43. Interview, Texas Division of Insurance, Department of Workers' Compensation, Austin, October 19, 2006.

44. To be sure, I am not suggesting that immigration status does not affect the outcome of a claim, or that industries where undocumented workers are located do not face particular structural challenges. According to a report by the NELP, "Many workers—even after overcoming the fear of asserting their right to be paid, filing a wage claim or suit, gathering evidence, and receiving a winning judgment—are never able to collect their unpaid wage judgments . . . Employers file bankruptcy. They hide their assets. They shut down operations and reorganize as a 'new' entity. Some simply cannot be found. In 2009, the California Division of Labor Standards Enforcement assessed nearly \$22.4 million in wages due but was only able to collect for workers about \$13 million, or just 58 percent of those wages. The remaining wages were left unpaid" (NELP 2011b:111).

45. In 2012, the ICE officer's union sued the Department of Homeland Security (DHS), citing that by enforcing Deferred Action for Childhood Arrivals (DACA), DHS is breaking the law by

choosing not to enforce the deportation of these low-priority undocumented immigrants (see Christopher L. Crane et al., v. Janet Napolitano, in her official capacity as secretary of Homeland Security, et al., Civil Action No. 3:12-cv-03247-O, http://www.gpo.gov/fdsys/pkg/USCOURTS-txnd-3_12-cv-03247/pdf/USCOURTS-txnd-3_12-cv-03247-1.pdf)

46. Interview, Cal/OSHA, Oakland, November 21, 2006.

47. ICE will call in the DOL to interview workers during immigration raids if they suspect workplace violations, as was the case in the high-profile 2006 raid of the shipping supply firm IFCO Systems (Houston Chronicle 2006).

48. Interview, DOL, Houston, October 17, 2006. According to a report by the Migration Policy Institute, “the US government spends more on its immigration enforcement agencies than on all its other principal criminal federal law enforcement agencies combined” (Meissner 2013).

49. My findings, however, do not speak to the varied ways that the courts have interpreted the rights afforded to undocumented workers. See for example, Chen’s (2013) discussion of how state courts vary in the remedies afforded to injured undocumented workers within the workers’ compensation system.

50. Similar critiques have been articulated regarding the limits of color-blind approaches to addressing institutional inequality (Haney-López 2000; Bonilla-Silva 2006; Carbado and Harris 2008;).

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