Conclusion

In the months and years since I conducted the interviews for this book, dozens of jurisdictions have passed much-needed expanded protections for low-wage workers. Cities and states have increased minimum wages, with some even going a step further and strengthening enforcement mechanisms for violating employers. The federal government has expanded overtime protections to previously unqualified middle-income employees. The Equal Employment Opportunity Commission effectively declared sexual orientation discrimination illegal in all states under Title VII of the Civil Rights Act. And just this month, the classification of independent contractors for high-profile companies such as Uber is being reevaluated. These are all welcome developments, but this book is meant to make us pause for a moment during this necessary push to expand the rights of low-wage workers. As we continue to demand stronger laws and expanded legal processes to hold employers accountable, we should not neglect to consider how workers fall into and out of the enforcement mechanisms already in place.

LAW ON THE BOOKS, LAW IN PRACTICE

This book has examined the ways in which the practical applications of labor laws contrast starkly with their original intent. In short, while many workplace protections exist, actually enforcing them poses many problems in our predominantly claims-driven system. For example, the protection against employer retaliation is a staple in many statutes. In practice, however, restrictions against employer retaliation mean little when employers can dismiss their at-will employees for any (or no) cause and when actually proving that a dismissal was due to retaliation is
extremely difficult. Similarly, workers attempting to recover lost wages find that some claims are easier to advance (such as nonpayment of wages), while others (such as break violations) can be harder to prove without evidence of a clear and consistent pattern. To give yet another example, there are provisions in the workers’ compensation realm for emotional distress and other psychological injuries. But to actually win such a “psych suit” requires that workers undergo extensive interrogations about the source of their distress, draining ordeals that are often rewarded with minimal financial payoffs.

This research has also highlighted cracks in the law for some ineligible workers, specifically nonemployees, who are often misclassified as independent contractors. Individuals who are hired by subcontractors to provide specific services, such as day laborers or other temp workers, may also lack certain protections. Often paid in cash by employers who fail to withhold the appropriate deductions and taxes, these workers can find themselves ineligible for key benefits such as workers’ compensation and disability. Another way for a worker to fall through the legal cracks is to be excluded from an agency’s jurisdiction; for instance, farm laborers and some small-business employees are not entitled to overtime. Until recently, this was the case for all domestic workers as well.

Even eligible employees may struggle to identify the right person to approach within their multilayered management hierarchy. For example, a janitor may have little face-to-face interaction with the lead supervisor who dispatches her to various sites throughout the city to clean throughout the night; or consider the recycling plant worker who applies for the position through a temp agency but reports directly to the processing site alongside other permanent employees. In both cases, identifying the first point of contact for filing a claim can be convoluted, as human resources departments are centralized offsite and workers may be assigned to multiple units and supervisors.

When workers do come forward to file claims, they make key decisions about which rights to pursue and which to let go. In this study, for example, there were workers who filed basic wage claims but refused to pursue action against ongoing unsafe workplace conditions and persistent sexual harassment. These workers understandably prioritized their immediate material well-being over broader, more difficult claims less likely to result in restitution. They also had insufficient time for, or interest in, engaging three agencies at three different government levels (that is, the local minimum-wage authority, the state-run workers’ compensation system, and the federal EEOC). The path of least resistance is likely to be chosen. Workers’ precarity and disjunctured bureaucracies allow “higher order” workplace violations not tied directly to employment and earnings to persist. In such scenarios, who could blame the aggrieved worker for feeling overwhelmed by the path before her and neglecting to pursue each time-consuming claim?
THEORIZING FROM THE BOTTOM UP

This book has attempted to complement existing studies that elucidate the process of rights enforcement from the perspective of elite actors such as bureaucrats and attorneys. These studies have crucially theorized the exercise of discretion, the logic of the courts, and the challenges of educating and empowering workers about their rights. However, by focusing on the perspectives of the workers themselves, a different set of concerns emerges. Specifically I have provided here a window into how workers navigate power at the workplace, how and when they learn about their rights and the resources to help them in mobilizing them, and the process of weighing when and how extensively to fight for justice. As such, the perspectives of workers themselves are crucial because they help illuminate the opportunities and pitfalls of labor law.

Admittedly this “bottom-up” approach is methodologically limited by its very nature, because by relying on nonexperts to recount their experience of the law, we are bound to encounter misunderstandings about the intent and application of the law. Yet these misunderstandings tell us much about the problems of the claims process. Many of the interviewees simply were unsure of the bureaucratic details of their cases. Some, for example, could not recall the exact name of the agency where their claim was filed, or even the specific type of claim they lodged. Workers sometimes also misunderstood the reasons for their claim's demise. Take, for example, the many workers who remained convinced that their attorneys had misguided them, or, even worse, intentionally deceived them for their own gain. Workers also often recounted their conviction that their settlements had been rigged and that they deserved more than they ultimately were awarded.

These misunderstandings can be interpreted as a failure of legal advocates to fully explain the labor standards bureaucracy to their clients. But from the perspective of the workers, who have little experience in these opaque processes, the misunderstandings seem inevitable. As they hand their claim over to experts, who do their best to shepherd that claim through the formal bureaucracy, it is not always apparent why and how decisions are made. Therefore, rather than arising from the particular actions of bureaucrats and advocates, the animosity many workers expressed to me was a direct reflection of their social position and marginality before the law. That is, given workers’ precarious lives, lives in which the state and the law are rarely on their side, it is only rational for them to assume that the cards are not stacked in their favor.

WHAT DO WORKERS VALUE?

The perspectives of the workers in this book suggest the need for a broader understanding of how marginalized individuals conceptualize justice, as well as the
impact this conceptualization has on their relationship to legal rights and their ultimate desire to mobilize them. According to Luc Boltanski and Laurent Thévenot (1999), a principle of equivalence is necessary for actors to initiate a claim in the realm of justice. The authors describe this notion as the process of making connections between different sets of people and objects, connecting stories, and finding a common good as a method of “unveil[ing] an injustice and ask[ing] for an atonement” (363). The process of seeking redress in this way requires proof and justification. These determinations are bound by the specific institutional space workers occupy. For example, in the labor market arena, individuals may evaluate their worth according to their (labor) price on the market, which gives an indication of their productivity and efficiency for capital. Ultimately, though, the authors argue that there may be other bases on which to engage a dispute, including a feeling of social obligation or other “affective relations.” As confirmed by the experiences of many of the workers described here, this is a stark departure from the Rawlsian view of individuals as always “reasonable and rational” in their pursuits of justice (Rawls 2009; Turner 2014).

Workers’ understanding of their rights, and their ultimate propensity to mobilize them, are tied not only to the overarching policies of the state and the principles embedded in the formal law, but also to the social institutions in which they are embedded (Albiston 2005a). Key to this process are workers’ relationships with their employers, who may withhold and control access to certain information, who may or may not inspire loyalty, and who frame how their rights should be interpreted. Social networks (friends, family, and other contacts) can also shape how workers understand and mobilize their rights. While legal knowledge may indeed propel workers to pursue workplace change (Trautner, Hatton, and Smith 2013), other considerations may come into play during the course of a claim.

Workers decide whether to pursue or persist through a claim based not only on what they stand to gain but also on what they are likely to lose. As time goes on, many of those individuals choosing to fight for their claim must eventually reassess the logic of continuing to do so. Aside from the financial costs of retaining an attorney (if pro bono counsel is unavailable), workers must also consider the hours of work lost while attending meetings and hearings. In addition to wages, workers might also value scheduling priorities, peaceful relationships with employers and coworkers, and workplace perks that might vanish if they were to file a dispute. They might also consider time spent away from their families and the emotional toll that a legal dispute would cause. For undocumented workers, the threat of deportation and the challenge of finding a job without work authorization loom large.

During the claims-making process, workers must make determinations about how far to take a claim and how hard to fight based on the time and opportunity costs. Furthermore, they are forced to mute their own voices and trust an array
of experts, who translate their painful subjective experiences into objective assessments of harm. While we tend to think of legal mobilization as an inherently empowering process, I found that many workers focused on what was missing or lost throughout the ordeal. A lack of access to key brokers and experts, issues with language and communication during appointments and proceedings, and the time, monetary, and emotional costs of endless wrangling all weighed heavily on them. The financial impacts of job loss were obviously of great concern during the claims process, but so too were the ripple effects on workers’ families and broader social networks. Each of these factors contributed to how workers assessed their claims experience as either empowering or demobilizing. For some, the lesson to be learned was to always speak up and defend your rights; for many others it was to learn to remain quiet, as there is much to be lost.

The worker experience with the claims process is far from monolithic. Workers engage in legal mobilization selectively, sometimes opting to hold employers accountable for some forms of injustices but not others. Undocumented immigration status creates a contradictory dynamic, as workers are fearful of losing their jobs or being deported but also emboldened by their extreme precarity, which can give them the sense that they have little to lose. For some workers, self-preservation means defending their rights; for others it sometimes requires disengaging from the legal bureaucracy as a strategy for economic and emotional survival.

Despite all the challenges chronicled in these chapters, my intent has not been to paint these claimants as martyrs. In fact, as these interviews revealed, many of the workers I spoke with see themselves as agentic actors who are aware of what they have forgone or negotiated away, and what they have gained or preserved instead. Like the experts and defendants that they are up against, they are making strategic decisions about whether to move forward or stop fighting, even when they have imperfect information about their claim and its chances of success. And even for those workers who are left without a remedy and disillusioned with the legal system, they often devise a clear plan for how to deal with future harms by pursuing nonlegal strategies.

GATEKEEPING AND BROKERING RIGHTS

For the masses of workers protected under labor and employment law, there is no guarantee that they will see their day in court. Since William L. F. Felstiner, Richard L. Abel, and Austin Sarat (1980) proposed the model of “naming, blaming, and claiming,” there has been an explosion of work evaluating how individuals navigate the dispute pyramid. This work has made clear the various steps of this elite space. To use these authors’ terms, workers must first identify that they have in fact been grieved. Next they must come forth and file a claim (formally or not). If the employer (or opposing party) refuses to cooperate, a dispute will ensue. A portion
of those workers filing claims will seek legal counsel to help fight their case, and an even smaller portion will actually proceed to court. Grievances can commence, end, and recommence, the worker all the while navigating among complicated management hierarchies, coworkers, agency staff, and attorneys.

While it is tempting to describe labor and employment law as a thoroughly broken system, a more nuanced portrayal would focus on those who benefit throughout the process, intentionally or not. The same actors standing at the gates of the dispute pyramid—employers, agencies, attorneys, insurers, and even coworkers and consumers—have distinct interests that shape how they engage in the labor standards enforcement system. Unpacking these incentives and disincentives is central to shattering the myth of an objective labor standards enforcement process.

Consider the state, which plays a dualistic role in the process of enforcing workers’ rights. On the one hand, labor standards enforcement agencies are neutral sieves through which claims flow. Indeed, if you observe an administrative law hearing for a wage and hour claim or workers’ compensation claim, or a mediation or superior court trial for a discrimination case, the commissioners and judges make clear that their job is to adjudicate the evidence for the benefit of both parties. For example, the California Labor Commissioner’s stated mission “is to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.” This protective role is at least the proclaimed ideal.

On the other hand, the state is a collection of enforcement bureaucracies with limited statutory tools and staff resources to hear and adjudicate workers’ claims. Adjacent to the formal bureaucracy are also several ancillary actors, such as insurers and medical experts, who solicit or provide objective evidence. For example, in the field of workers’ compensation, insurers rely on qualified medical examiners to assess the source and extent of a worker’s injury. Their opinion is to be assessed separately from that of the worker’s treating doctor, whose explicit goal is to help return a worker to health. The compensable part of a worker’s disability is limited to the identifiable injury. Bureaucrats then use actuarial scales and occupational differentials with the goal of homing in on the value of a worker’s labor productivity. During this process, a claimant’s voice and holistic experiences can be lost amid the technocratic expertise.

Finally, attorneys can make or break a case. They can help workers determine whether their claim is worth pursuing and the chances of winning. They also help claimants gather the evidence necessary to bolster their claim, including records, eyewitness accounts, and other crucial documentation. Many of the workers I interviewed never made it past this first stage in the dispute pyramid once they realized that they were unable to secure legal counsel (either because none was available to
take their case or because they could not afford to retain one). After an initial consultation with attorneys, others quickly realized that they were facing an uphill battle and that they ultimately had neither the means nor the emotional strength to head down that road. In addition to helping workers make this assessment, attorneys—even very good and well-intentioned ones—operate with limited resources that require them to restrict their caseload to only certain chosen claims. Time-intensive cases, those lacking a substantial monetary award, and those with a slim chance of prevailing are passed over. These structural constraints are often interpreted by claimants as a further offense perpetrated by a system that has shut them out.

THE NEED FOR ACCESSIBLE LEGAL COUNSEL

If bureaucrats and technocrats stand guard at the gates of the system of workers’ rights enforcement, it falls largely to pro bono attorneys to shepherd the thousands of prevailing workers through. Attorneys and their staffs are the primary asset claimants have, especially if English is not their first language and if they are not “repeat players,” those advantaged actors who over the course of filing many claims have gained a legalistic knowledge of the system and know how to best deploy it (Songer, Kuersten, and Kaheney 2000; Galanter 1974). Attorneys provide legal advice, mundane technical assistance, and routine but helpful referrals to other resources in the community where workers can get help for meeting their basic needs. These attorneys are saviors for workers, who desperately need someone to stand by their side, but they are also often the bearers of bad news, informing their clients when the law has no legal or practical tool to offer them in their quest for justice. Attorneys can be found in both nonprofit advocacy centers (Gordon 2007; Fine 2006; Cummings and Rhode 2010) and in the private bar, where plaintiff-side employment law offers much less lucrative options to new graduates. (Recently, some law schools have attempted to stem the steady “drift” away from notoriously unprofitable public interest law [Addington and Waters 2012]).

Nonprofit attorneys rely on foundation grants, private donations, and the various mechanisms of supporting pro bono counsel, such as IOLTA funding and in-kind services provided by lawyers in the private bar. Given these limited sources of support, many legal aid clinics (in part due to funding restrictions) serve only applicants who meet low-income eligibility criteria. While this is a completely reasonable way to allocate scarce resources, it means that many middle-income workers are left ineligible for services. These restrictions notwithstanding, the clinic staff I saw worked generously and creatively to try and serve as many clients as possible. As a result, even several unemployed professionals—as opposed to low-wage workers—were included in our sample. Still, their claims tended to be of a qualitatively different nature than those of other low-wage workers, focusing especially on unjust termination and allegations of discrimination.
This research was conducted in arguably the most fertile region for pro bono labor and employment legal aid in the country, thanks in large part to the Legal Aid Society–Employment Law Center and its partner organizations. In areas lacking a robust pro-worker philanthropic community and/or a dense employment law community, however, such legal resources are rare. As a result, attorneys working there have a harder time advocating aggressively for their clients (Albiston and Nielsen 2014). Indeed, less than an hour or two from the San Francisco Bay Area, where the concentration of immigrant workers becomes quite dense in the agricultural regions of the Salinas Valley and the Central Valley, options for legal aid of any kind are scarce. In these remoter regions, federal funds through the Legal Services Corporation (LSC) are often the only game in town. Worse, to gain access to these federal funds, clinics are prohibited from serving undocumented clients. While enough privately funded advocates are operating in large parts of California, the restrictions imposed by federal funds amount to writing a blank check to abusive employers in other parts of the country where these alternatives are not available.

Teaching clinics are another valuable legal resource, but to balance the pedagogical needs of a law school practicum with the practical needs of a low-income clientele can be challenging. For these clinics, a necessarily small caseload can disqualify cases that are too mundane or those that the clinic has insufficient resources to pursue. Moreover, workers often recounted their frustration over being passed from student to student and not allowed to see “the real lawyer.” To be clear, the vast majority were grateful for the assistance they received. Of the 89 workers who granted me a follow-up interview, 60 affirmatively responded that they would return to the clinic if they had another workplace problem in the future. The average respondent also rated their experience in increasing their knowledge of workers’ rights as a 3.8 on a scale of 1 to 5. However, of those who did not return to the clinic for future assistance in pursuing their claim, the vast majority were urged (or chose) to seek a private attorney.

By design, for-profit attorneys, crucial legal advocacy players especially for those cases that proceed to superior court, rely on the damages assessed to culpable employers to fund legal counsel. As a result, attorneys logically screen cases that offer little chance of recouping substantial fees and/or where limited evidence makes success a long shot. This creates a hierarchy of claims within the field whereby basic wage and hour claims are less attractive than high-impact (and clearly litigable) discrimination claims. Similarly, cases involving devastating injuries resulting from isolated, major incidents are far easier to make than those involving chronic injuries developed over a lifetime of precarious employment or psychological claims related to emotional distress. And when it comes to claimant parties, the more the merrier, as single-worker incidents are far less likely to garner interest from prospective attorneys. This leaves isolated workers at a further disadvantage.
The private bar, while a large source of support for legal aid centers, is not a silver bullet. These firms are often reluctant to work on cases that threaten corporate client interests, and as a result take on few cases in the areas of employment and labor, environmental justice, or consumer law (Selbin and Cummings 2015, 738). This has led some advocates to call for a reenvisioning of legal education and legal practice to focus on non-lawyers (Rhode 2013). There is in fact evidence from the United Kingdom that “nonlawyers generally outperformed lawyers in terms of concrete results and client satisfaction” (Moorhead, Paterson, and Sherr 2003; Rhode 2013, 249). And indeed, in administrative law contexts such as the California Labor Commissioner, non-lawyer advocates have been efficiently and competently accompanying clients to their hearings, often with stunning success. Nonetheless, many of the workers I interviewed valued professional legal representation highly, as employers undoubtedly do as well.

Employment and labor law suffers further from the disparity between the right to legal counsel in criminal versus civil law. While the Supreme Court has since 1963 upheld the right to counsel for individuals convicted of a crime, no such protection exists in the civil arena, which also includes a wide range of other areas of “poverty law” (Cummings and Selbin 2015) such as housing, health, and family law. Yet, as one advocate of “Civil Gideon” (an effort to provide access to counsel in civil, not just criminal, cases) poignantly explains, the two arenas (civil and criminal law) are inevitably intertwined: “Those who lose their employment or are denied unemployment benefits may be forced to rely on public benefits, and those who lose public benefits that had been providing access to preventative health care or ongoing treatment for chronic illnesses may require substantially more expensive emergency medical care that all taxpayers ultimately bear” (Pollock 2013, 6). Furthermore, civil litigants who cannot effectively protect their housing or employment interests in court may wind up in the criminal justice system as a result.

All of this goes to show that while an array of legal aid options exist for aggrieved workers, the apparatus has structural flaws that can foil a worker’s legal mobilization.

THE INADEQUACY OF CLAIMS-DRIVEN ENFORCEMENT

The findings from this research have thrown the challenges of the current, mostly claims-driven system of labor standards enforcement into stark relief. There are, however, several models within the current system that place the burden of enforcement on the authorities rather than the victims. For example, the California Labor Commissioner’s Bureau of Field Enforcement (BOFE) strategically targets noncompliant employers through agency-directed initiatives, as well as fielding complaints from workers and their advocates. In fiscal year 2013–14, BOFE conducted 3,792 inspections and issued 2,664 citations, focusing on low-wage
industries such as agriculture (125), auto repair (253), car wash (201), construction (422), garment (135), restaurant (545), and retail (99). Nearly half of the citations issued were for workers’ compensation violations (1,224). Less than 20 percent were for overtime (199), minimum wage (178), or rest and meal period (115) infractions. The rest focused largely on licensing and child labor violations. Overall, $41,204,039 in penalties were assessed, but, as is typical, only $11,403,380 was collected (Su 2015). These enforcement efforts, while welcome, pale in comparison to the number of cases brought before the California Department of Industrial Relations. In fiscal year 2012–13, the Division of Labor Standards Enforcement alone reported 35,093 wage and hour cases opened.1

Lack of agency coordination becomes especially problematic in a claims-driven enforcement regime, as the task is left primarily to workers and their advocates to sift through and triage claims across various agencies. Here again, California’s efforts offer some positive models for joint enforcement. In 2013–14, for example, a joint Labor Enforcement Task Force between the Division of Labor Standards Enforcement, the Employment Development Department (which handles unemployment and state disability insurance), and the California Occupational Safety and Health Administration found that 40 percent of the 216 businesses inspected were out of compliance with all three agencies (California Commission on Health and Safety and Workers’ Compensation 2014). Similarly, efforts targeted at low-wage, Spanish-speaking workers and carried out through federal partnerships with the Mexican Consulate also provide examples of cross-filing models (Bada and Gleeson 2015).

Ultimately, the problem with relying on a claims-driven system to hold employers accountable is not simply one of scale and efficiency but also one of authority. By relying on workers to bring a claim forward, legal scholar Kati L. Griffith (2012) argues, enforcement systems in effect deputize workers as private attorneys general who lack the proper expertise to fulfill their intended role (631). Rather than “police-patrol oversight,” which would rely on widespread government inspections, this “fire-alarm oversight” approach relies on (often precarious) workers to pull the workplace “fire alarm” when necessary (see also McCubbins and Schwartz 1984). This is not to say that Congress did not anticipate this challenge in passing legislation to protect employees who do pull the alarm. In fact, the Fair Labor Standards Act and Title VII of the Civil Rights Act intended to preempt sub-federal laws that would otherwise discourage employees from coming forward. Both statutes provide incentives for these claims by allowing claimants to initiate private suits and requiring employers to pay attorneys’ fees and costs when workers win, as well as providing anti-retaliation remedies (Griffith 2011a, 432–36).4 (Yet, as my findings reveal, these incentives and remedies are dependent on a worker not only prevailing but also continuing to make her way through the claims process.) In the event of a victory, this legislation also requires that agencies make offending
employers actually comply with a positive judgment, a difficult prospect when companies file bankruptcy, shut down, or simply disappear.

While it is unlikely that the imbalances in the claims-driven enforcement system will be eradicated, current state and local efforts to tie an employer’s business operations to their workplace violation track record are encouraging. For example, emerging wage theft provisions in cities and counties across the country have used the revocation of business licenses as a tool with which to compel companies to comply with final judgments (National Employment Law Project 2011, 2012).

In this regulatory landscape, the challenge for undocumented workers is further complicated given their uncertainty about deportation. California law has addressed this fear explicitly in recent changes to the Labor Code, which revokes the business licenses of employers who use a worker’s immigration status to threaten him or her. The new changes also allow a civil action to be brought against the offending employer (National Employment Law Project 2013). Similar protections are certainly needed across the country and should be expanded. In any case, the deeper structural issue remains the precarity of both low-wage workers and especially low-wage undocumented workers, who face the possibility of losing their jobs and have few or no other sources of support to meet their families’ basic needs. Furthermore, even those who retain their jobs have limited time and resources to devote to advancing their claims, and the competing demands of everyday life are often likely to win out. As such, labor standards enforcement cannot rely solely on the efforts of precarious workers to hold employers accountable.

IMMIGRATION REFORM: NECESSARY AND INSUFFICIENT

The hurdles claimants face in navigating the labor standards enforcement bureaucracy are substantial regardless of legal status, but undocumented workers face specific and undeniable challenges. As of the writing of this book, the current political context in the United States has worsened for undocumented immigrants, given the hardened anti-immigrant rhetoric in the presidential election and the split June 24, 2016, Supreme Court decision in United States v. Texas, which effectively halted President Obama’s attempt to provide deportation relief and work authorization to parents of US citizens and legal permanent resident children under the Deferred Action for Parental Accountability (DAPA) program. The injunction has also blocked relief for an expanded group of youth who are otherwise ineligible for the 2012 Deferred Action for Childhood Arrivals program.

For these still-undocumented workers, their legal status operates as a “precarity multiplier” (Gleeson 2014a). They are subject to deportation unless they qualify for one of the various narrow forms of relief reserved for individuals who assist with law enforcement, such as the U visa (Saucedo 2010; National Employment Law Project 2014). These “liminal legal statuses,” however, hardly allow workers to
immediately secure a higher-paying job in the formal economy that would transform their material reality (Abrego and Lakhani 2015). The yearly cap of 10,000 U visas has been reached every year since its creation in 2000. As of December 2014, only 116,471 undocumented immigrants and their family members had benefited from the U visa program (US Citizenship and Immigration Services 2014), compared to the estimated eight million undocumented workers currently in the US labor force.

For undocumented immigrants, a dialectical relationship may emerge between their legal precarity and their economic precarity. That is, if the labor standards enforcement process opens a path toward justice for undocumented workers, their legal status erects symbolic barriers. As my previous work has found (Gleeson 2010), these barriers can keep workers from filing a claim at all. And even for those who have crossed that legal threshold by initiating a claim, the consequences of workplace abuse (and an imperfect system in place to regulate it) can reify notions of subordinate inclusion (Agamben 1998; Chauvin and Garcés-Mascareñas 2014). Unlike the full legal inclusion that citizens apparently enjoy under the law, undocumented workers are relegated to a secondary category. However, unlike the “bare life” that Giorgio Agamben argues renders individuals subject to total political control and subordination, Sébastien Chauvin and Blanca Garcés-Mascareñas (2014) argue that in certain regimes (such as the labor market), undocumented workers should be understood as subcitizens rather than noncitizens altogether. That is, though they are often afforded some formal rights (if not full remedies), they also carry the “stigma of ‘illegality’” all through their attempts to realize these rights (253).

As demonstrated by the stories of workers such as Gloria, whose sexual assault at the hands of a manager destroyed her capacity to continue as an economic actor, the sidelining effects of labor exploitation not only harm workers and their families in a practical manner, but also challenge their sense of belonging. In a society so squarely intent on using economic rationales for justifying rights (Bosniak 2002; Baker-Cristales 2009; Gleeson 2015b), workers stripped of their labor capacity are left with few alternative rationales for asserting their worth. That is, in a context where the “hard work” of undocumented workers is hailed as their primary contribution to society (Gleeson 2010), losing access to work through either injury or dismissal can further marginalize them. This is true regardless of whether the law determines their claim to be valid and actionable.

The challenges of navigating the workers’ rights bureaucracy also heightens workers’ sense of peripheral belonging and shapes every decision they make along the way. In the not-uncommon case of the worker Yael, he could not, given the aggressive tactics of Immigration and Customs Enforcement (ICE), write off as empty his employer’s threats to summon the police. With current discussions under way to dismantle sanctuary cities, and with tenuous Memoranda of Understanding in
place to prevent immigration enforcement from interfering with labor standards enforcement efforts, the threat of deportation is a practical reality, even in progressive places like the San Francisco Bay Area.

More important to the everyday lives of the workers I interviewed for this book were the practical realities of managing poverty and the constant search for work; the legal ability to file a workplace claim often ranked far lower. This is not to say that work authorization would have no impact on earnings for undocumented workers, as clearly outlined by a recent Center for American Progress report, which estimates an 8.5 percent increase in earnings as a result of temporary work permits that would be made available by the currently sidelined, embattled Deferred Action for Parental Accountability program (Oakford 2014). However, this 8.5 percent increase should be understood within a context in which the median household income for unauthorized immigrants is more than 25 percent lower than that of US-born residents, in which the children of unauthorized immigrants are twice as likely to live in poverty, and in which more than half of unauthorized immigrants in the pre–Affordable Care Act era had no health insurance (Passel and Cohn 2009).

Further adding to the precarity of the undocumented is the ongoing decline in union power. Union membership has fallen to 11.1 percent overall, and only 6.6 percent for the private sector (Hirsch and Macpherson 2015). Mexican immigrants, many of whom are noncitizens and unauthorized, have the lowest levels of unionization (Milkman and Braslow 2011), and those who are unionized are represented by unions that are undeniably weaker than those reigning in years past (Rosenfeld 2014). As evidenced by the experiences of the sixty-two unionized workers in my sample, even union membership does not necessarily protect against workplace violations. While these unionized workers consistently reported fewer experiences of wage and hour violations, they reported shockingly similar levels of workplace injuries, verbal abuse, and sexual harassment as their nonunion peers.

Doubtless, there are key advantages to union membership, but not necessarily for the undocumented. One of the most robust benefits of a union contract is providing a more stable alternative to at-will employment by giving workers a structure within which to contest unfair dismissal. Undocumented union members certainly have access to these contract mechanisms, but under the 2002 Hoffman Plastics Supreme Court decision, they do not generally have a right to reinstatement. For the vast majority of nonunion, at-will undocumented workers, this right does not exist, either. As such, both at-will employment policies and employer sanctions fuel precarity for undocumented workers, significantly so for subcontracted and seasonal workers. Unauthorized status also prolongs the period over which workers endure violations such as sexual harassment and unsafe working conditions and shapes the factors that claimants weigh in negotiating settlements.
Therefore, in a context where wages and benefits are low, and job stability nearly nonexistent, the necessity of immigration reform is inextricably linked to the necessity of revitalizing labor-capital relations and the systems structuring poverty and inequality more generally. The waning welfare state, which currently largely excludes undocumented immigrants (as well as DACA recipients under federal provisions of the Affordable Care Act), relegates the vast majority of undocumented workers to the market to meet their basic needs. While these workers are eligible to receive basic remedies under wage and hour, discrimination, and workers’ compensation law, unemployment benefits are not an option, nor are most public benefits intended to keep individuals and their families out of poverty in the event of job loss or a reduction in hours. These realities should all be understood as the factors driving workers’ decisions not only whether to file a claim but how to pursue it.

Having in this book outlined the history of labor standards enforcement and painted a detailed portrait of the claims process as it stands now, we should conclude by briefly considering what the future holds for those undocumented workers who occupy a vital yet precarious position in our economy. The day after the next major immigration reform is handed down, there will be a new cohort of undocumented immigrants arriving in the United States who are ineligible for relief. That is, any legalization effort must also consider the ongoing flow of workers who will inevitably arrive. It is also unclear how those who do benefit from deportation relief, and a positive path to citizenship, will be able to translate their new status into educational investments and occupational mobility, especially later in life. While preliminary findings from the now three-year-old Deferred Action for Childhood Arrivals program are optimistic, they are likely limited of course to this relatively young and educated sample (Gonzales and Terriquez 2013; Gonzales, Terriquez, and Ruszczyk 2014; Patler and Cabrera 2015; Wong et al. 2013). Previous evidence from the 1986 Immigration Reform and Control Act, the last major legalization program, suggest lasting negative effects of undocumented status that should temper our optimism about the emancipatory potential of future reforms (Powers, Kraly, and Seltzer 2004). In any case, worker and immigrant advocacy organizations will play a pivotal role in any attempt to make these immigrant rights real (de Graauw 2016).

**ON PRECARITY, AGENCY, AND THE PURSUIT OF JUSTICE**

Over the last decade there have been a litany of reforms within the realm of individual workers’ rights. These include new bases for discrimination protections, expanded coverage for previously unprotected sectors, additional mechanisms to hold employers accountable, and innovations to protect undocumented workers. These also include a scaling back of benefits for workers’ compensation beneficia-
ries, an expansion—and subsequent contraction—of unemployment benefits, and a mixed bag of decisions regarding the rights of workers to collectively bargain. In sum, the formal legal protections for workers’ rights have expanded in important ways, even as they have also constricted in an era of increased “flexibilization” that has made workers more precarious (Fraser 2003). Irrespective of these advances and setbacks, coalitions of attorneys and other professionals have continued to advocate for workers’ rights and attempted to hold the line for the most vulnerable employees. Groups such as the National Employment Law Project, Interfaith Worker Justice, Worksafe, the California Employment Lawyers Association, and the Coalition of Low-Wage and Immigrant Worker Advocates have worked tirelessly and effectively to this end.

While I have focused here on the experiences of individual workers navigating bureaucratic claims processes, these findings also have a bearing on how marginalized workers are being incorporated into collective mobilizations through unions and other worker centers. We know from the seminal work of Frances Fox Piven and Richard Cloward (1977) that bureaucratic forms of organizing can prove stifling, even when nominally in the service of positive reform. Social movement scholars such as Kim Voss and Rachel Sherman have identified key ingredients for combating bureaucratic conservatism in organized labor (Voss and Sherman 2000) and incorporating immigrants into collective mobilizing (Sherman and Voss 2000). Jennifer Chun’s work highlights the importance of understanding how workers themselves conceive of their precarious employment relationships (Chun 2009) in going beyond the reliance on exclusionary models of leadership by elite professionals (such as attorneys and other technocratic experts) (Chun 2016). Similar bottom-up strategies have proven effective in a wide range of other democratic projects that foster local governance and decision making (see for example Fung 2009).

Beyond improvements in the individual workers’ rights regime, coalitions have advanced alternative strategies beyond and outside the law to address the gaping hole between what the law says and what it does—or even to redefine what the law should do. Key examples from recent years include movements working to increase the minimum wage despite the ambivalence of federal and state legislators. The Fight for $15, which calls for a $15 minimum wage in the fast food industry, has perhaps become the most iconic of these movements for its attempt to organize a notoriously unorganizable sector. Other alternative labor strategies that rely on collective mobilization of precarious workers, such as the (now waning) OUR Walmart campaign, which nonetheless undoubtedly had some effect on the company’s decision to announce a wage hike (Hopkins 2015), were energizing as well. The demands to expand key occupational safety and health provisions to farmworkers in California, as well as the victories of the Domestic Workers Bills of Rights in Massachusetts, California, and Hawaii, are other examples of invigorating critical movements (Appelbaum 2010).
Workers themselves have also developed alternative strategies of resistance that parallel the efforts made in the legal arena. For example, when a restaurant in Silicon Valley refused to pay its many outstanding judgments with the Labor Commissioner, a coalition of advocates (including the same attorneys who processed the wage claims through the formal bureaucracy) staged an ongoing protest that eventually shut the notorious employer down (Myllenbeck 2015; State of California Department of Industrial Relations 2014a). Similarly, there have been countless consumer boycotts against offending employers who have pending cases before various agencies. Most notably, the recent boycotts of Driscoll’s (a berry grower that has underpaid its pickers in the United States and Mexico) (Luban 2015) and Amazon (following a 2015 New York Times exposé) (Kantor and Streitfeld 2015), have gained traction.

In other cases, mass protest has emerged as a way to advance perceived rights that the law does not recognize. For example, when a snacks factory in upstate New York recently chose to shut down and fire its workforce, workers and their advocates mobilized to protest a legal but (in their eyes) unfair action (Sayegh 2015). These attempts to pursue justice and restitution even when there was no identifiable violation reflect advocates’ frustration with the current system of labor standards enforcement. They also reflect the frustrations of workers seeking, often unsuccessfully, to effect lasting change in an era of global capital. Driscoll’s continues unfazed, and at last check Amazon is in no danger of going under.

What, finally, does this all mean for how we define and pursue social justice? Alfonso Gonzales (2013) offers a useful framework for understanding the failure of dominant (and heroic) efforts to defend immigrants’ rights. The author argues that part of the explanation for these shortcomings lies in the myopic view of the neoliberal roots of migration and the entrenched nature of state violence; the democratic ideal, in other words, does not necessarily apply to all residents of the United States. An extension of this analysis must also recognize the weak legal and bureaucratic structures that regulate employer behavior—structures that are unable to alone address economic precarity for both undocumented immigrants and the other low-wage workers they labor beside. One answer is to break out of nation-bound models of inclusion, as advocated by Seyla Benhabib (2004), Linda Bosniak (2006), and Nancy Fraser (2009). But a move toward cosmopolitan rights does not alone guarantee equality. Transnational advocates, all of whom have their own interests, are also not in and of themselves a panacea. Together, an expanded rights regime, an empowered network of global workers and their advocates, and a persistent check on state and economic power will be required.