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Did Hoffman Plastic Compounds, Inc. Produce Disposable Workers?

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Did *Hoffman Plastic Compounds, Inc.*, Produce Disposable Workers?

Robert I. Correales[†]

“If the NLRA were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices such as occurred in this case.”¹

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1. *N.L.R.B. v. Apollo Tire Co., Inc.*, 604 F.2d 1180, 1184 (9th Cir. 1979). This is the only statement made in a concurring opinion by then 9th Circuit Court of Appeals Judge Anthony Kennedy in a case involving violations of the National Labor Relations Act (NLRA) by an employer. The employer notified the Immigration and Naturalization Service of the status of its workers in retaliation for complaints about work conditions, and even threatened with death the wife of an undocumented employee who had threatened to go to the Labor Commission if the employer did not pay her husband overtime for work performed. The same, now Supreme Court Justice Anthony Kennedy sided with the majority in *Hoffman Plastic Compounds Inc. v. N.L.R.B.*, 122 S. Ct. 1275 (2002), to deny backpay to undocumented workers who have been discharged in violation of the NLRA.

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INTRODUCTION

On March 27, 2002, The United States Supreme Court ruled in *Hoffman Plastic Compounds v. N.L.R.B.*² that, although undocumented workers are “employees” within the meaning of the National Labor Relations Act (NLRA), they cannot be awarded backpay remedies, even if discharged in violation of the Act. The *Hoffman* decision represents a retrenchment from a trend in which virtually all jurisdictions that had considered the issue found in favor of the workers. The principal rationale in support of these remedies for undocumented workers had been that such awards are not only remedial but also serve important deterrent functions that protect the integrity of the collective bargaining process for all workers. Courts have articulated similar reasons in the areas of wages, hours, and workers’ compensation to support coverage of undocumented workers. If *Hoffman* undermines that basic rationale, the opinion could have a significant and broad ripple effect.

Hoffman will affect not only undocumented workers’ ability to organize into labor unions. Its effect will be felt well before that process begins, and will not be restricted to undocumented immigrants.³ The NLRA protects workers’ rights to organize and bargain collectively as well as to act for mutual aid or protection outside the labor union context.⁴ In California, Texas, Florida, New York and a

2. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 122 S. Ct. 1275, 1278 (2002).

3. The Government Accounting Office (GAO) has estimated the *Hoffman* decision will potentially affect about 5.5 million undocumented workers. Importantly, the GAO’s estimates include only individual undocumented workers. The GAO’s figures do not include legal residents or citizens who work alongside undocumented workers, and do not include the dependents of undocumented workers, many of whom are American citizens or legal residents. Also, the GAO’s estimates only address the impact on the decision on workers’ rights in the collective action context. They do not address the impact of the decision on cases that arise under other statutes. See Gen. Accounting Office, *Collective Bargaining Rights, Information on the Number of Workers With and Without Bargaining Rights*, GAO-02-835, 18 at <http://www.gao.gov/new.items.d02835.pdf>.

4. Section 7 of the Act provides: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other *mutual aid or protection*, (emphasis added) and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a)(3) of this title.” 29 U.S.C. § 157 (2003). For examples of protected concerted activity for mutual aid or protection outside the collective bargaining process, see *Signature Flight Support*, 333 N.L.R.B. 144 (2001) (three airplane cleaners discharged in violation of §8(a)(1) of the NLRA, for acting in concert to complain about substandard working conditions); *Timekeeping Sys., Inc.*, 323 N.L.R.B. 30 (1997) (employee terminated in violation of NLRA §8(a)(1) for inciting other employees to help him preserve a vacation policy which he believed better served their interests); *U.S. Serv. Indus., Inc.*, 314 N.L.R.B. 30 (1994), *enforced*, 80 F.3d 558 (D.C. Cir. 1996) (employee discharged in violation of §8(a)(1) of the NLRA for complaining about wages, hours and working conditions and for soliciting other employees to concertedly complain about such conditions).

growing number of states, legal residents work side-by-side with undocumented workers in occupations plagued by unsafe working conditions and low wages.⁵ *Hoffman* will sharply limit the ability of both groups to improve their work environment. Perhaps most significantly, the case may also assist the worst violators to calculate accurately the risk of knowingly hiring undocumented workers and violating the nation's labor and employment laws by exploiting those workers and discharging them unlawfully when they complain.

Hoffman could also have a significant impact in other critical areas. Despite what appears to be a narrow holding, a growing number of defendants have attempted to apply *Hoffman* to preclude remedies for undocumented immigrants in workers' compensation cases and in cases alleging violations of wage and hour laws or discrimination. The availability of remedies under those statutes appeared to have been settled long ago in most jurisdictions. However, a growing trend exists whereby defendants are using *Hoffman* as a prying device to discover the immigration status of people who have filed claims under those statutes, perhaps realizing that, even if denied, those discovery requests can be used to discourage the filing of claims. The age-old question of how to treat the workplace rights of undocumented immigrants, who are at once prohibited from entering the country and who are also wanted to fill jobs legal residents find unattractive, has now become extremely complicated.

This article will explore the meaning of the *Hoffman* decision and its potential impact. Part I will assess the historical, legal, social and economic contexts that provide the backdrop for the intersection of labor and immigration laws. Part II will analyze the paradoxes generated by legal fictions used to support both sides of the issue in cases that preceded *Hoffman*. Part III will analyze and criticize the *Hoffman* decision and evaluate its likely effect on labor law and other areas. It is hoped that the analysis in Part IV will help formulate strategies that can be used in light of *Hoffman* to ensure that remedies are obtained in appropriate cases. Part IV also will seek to demonstrate that allowing willful violators of the nations' immigration and labor laws to enjoy a windfall of their illicit conduct, though seemingly permitted by *Hoffman*, is inconsistent with U.S. labor and immigration law and basic notions of human rights. Part IV also will propose legislation to reconcile apparently inconsistent policies without resorting to additional and contradictory legal fictions.

5. A 1999 study by the General Accounting Office (GAO) revealed that employment of undocumented workers appears more significant in low-pay, high risk occupations, like: agriculture, where the Department of Labor estimated that 37 percent of the workforce in 1995 was undocumented; meatpacking, where the INS found that 23% of the workers at seven Nebraska and Iowa plants had questionable documents; construction, where an INS survey of 89 construction businesses in Las Vegas, NV revealed that approximately 39% of the workers appeared to be unauthorized; and garment manufacturing, where inspections of 74 Los Angeles area contractors revealed that 41% of the employees at those worksites appeared to be undocumented. See Gen. Accounting Office, *Illegal Aliens, Significant Obstacles to Reducing Unauthorized Alien Employment Exist*, GAO/GGD 99-33, 6-7 (April 1999). The GAO also found that INS focused more of its investigations in the seven states with the highest numbers of undocumented immigrant workers, California, Texas, Florida, New York, Illinois, New Jersey and Arizona. *Id.* at 29 n.27.

I. BACKGROUND

Unauthorized immigration to the United States has a long and complicated history. Undocumented immigrants have provided a steady supply of cheap labor to the United States for well over a century.⁶ Living in constant fear of detection and deportation, millions of undocumented workers have toiled without complaint about substandard wages or working conditions, principally taking jobs that legal residents find undesirable.⁷ History shows that business and government have worked to maintain a steady supply of disposable workers who are willing to work for cheap wages while enduring poor working conditions.⁸ Both state and federal actors have more recently worked to ensure the availability of undocumented workers during labor shortages, at times tacitly, and sometimes even directly.⁹ Today, despite the

6. See ERASMO GAMBOA, *MEXICAN LABOR AND WORLD WAR II: BRACEROS IN THE PACIFIC NORTHWEST*, (1990) (discussing history of Mexican Braceros and undocumented agricultural workers at the turn of the century); JUAN RAMON GARCIA, *OPERATION WETBACK, THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954* (1980) (discussing in great detail the repatriation of Mexican immigrants in 1954 by the U.S. government, and analyzing the reasons for Mexican migration to the U.S. in the early part of the twentieth century). See also Lora Jo Foo, *The Informal Economy—The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 *YALE L.J.* 2179 (1994); Kevin R. Johnson, *Fear of an "Alien Nation": Race, Immigration and Immigrants*, 7 *STAN. L. & POL'Y. REV.* 111, 117 (1996) (noting the substantial contributions immigrants make as workers, consumers, entrepreneurs, and taxpayers).

7. Professor Linda S. Bosniak has noted that "[w]hile [undocumented immigrants] formally are afforded the minimum rights of personhood under the law, they lie entirely outside the law's protections for many purposes, and they live subject to the fear of deportation at virtually all times." Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 *CONN. L. REV.* 555, 576-77 (1996) (citations omitted).

8. See GARCIA, *supra* note 7, at 70-76. This book includes a discussion of the "El Paso incident," an event that took place amidst broken negotiations between the U.S. and Mexico involving the Bracero program. When negotiations stalled, word was spread that Mexico was planning to close the borders. After thousands of immigrants decided to wade across the river, they were placed under technical arrest by El Paso immigration officials. They were then quickly paroled to the Texas Employment Commission. The Commission facilitated their hiring by farmers who needed the braceros to harvest their crops. Another manifestation of government complicity in the employment of undocumented workers is the "Texas Proviso," a law that was passed in 1952 to appease agricultural interests in the state of Texas who found it too onerous to secure workers through the "Bracero Program," a program designed to manage the flow of Mexican labor to the United States in the 1940s, 1950s and early 1960s. The "Texas Proviso," specifically exempted employment from the definition of "harboring, transporting and concealing" undocumented workers. See 8 U.S.C. § 1324(a)(3) (repealed by the Immigration Control Reform Act of 1986). The "Texas Proviso" stated in relevant part that any person who, "(3) willfully conceals, harbors or shields from detection . . . any alien . . . not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States . . . shall be guilty of a felony . . . provided however, that for purposes of this section, employment . . . shall not be deemed to constitute harboring." That exemption served to protect employers who relied on the labor of undocumented workers from sanctions imposed for violations of the Immigration and Nationality Act. Act of Mar. 20, 1952, Pub. L. No. 283, 66 Stat. 26 (1952) (repealed by the Immigration Control Reform Act of 1986). See, e.g., Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Immigration Law*, 1988 *WIS. L. REV.* 955 (1988).

9. See KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE INS 32-33* (1992) where the author discusses INS reluctance to detain undocumented workers during the harvest season in the 1940s and 1950s. As Calavita points out, INS reluctance to enforce immigration law was at times the result of two types of pressure from Congressional representatives. The first came in the form of reminders that rigid practices would be undesirable if they meant a reduction of the farm labor supply. The second came in the form of reductions in appropriations for the agency. Calavita points to a

threat of employer sanctions under the Immigration Control Reform Act of 1986 (IRCA), many businesses that rely on manual labor continue to hire these workers, claiming to be unable to function without them.¹⁰

Of course, this relationship is most often a two-way street.¹¹ Undocumented workers typically perform low paid, menial jobs.¹² But even low

statement by Senator Patrick McCarran, an immigration restrictionist, who said:

[O]n this side of the border there is a desire for these wetbacks . . . last year, when we had the appropriations bill up, the item that might have prevented from coming over . . . was stricken from the bill . . . [w]e might as well face this thing realistically. The agricultural people, the farmers along the . . . border in California, in Arizona, in Texas . . . want this help. They want this farm labor. They just cannot get along without it.

Id. at 36, 37. A modern example of this behavior is presented by the reaction of the U.S. Attorney General, two Georgia Senators and three Georgia Congressional Representatives who publicly criticized the INS after its raids of Georgia onion fields while the 1998 harvest was underway. It is estimated that at least 5,000 undocumented workers harvest the famous Vidalia onions in the state of Georgia. THE SAVANAH (Ga.) MORNING NEWS, reported that after a raid on the onion fields in Georgia by the Immigration and Naturalization Service caused farmers to lose valuable harvesting time, the late Senator Paul Coverdell, R-Ga. negotiated an agreement that called off the operation and persuaded the INS to raid the business offices and records of suspected labor law violators, rather than the workers in the fields. R.T. Stanley, a leading Vidalia onion grower stated that he tried the "100 percent legal" method of hiring workers through the H2-A guest worker program, but found the government program full of stacks of forms, expense and lost time. "It was so expensive and so much red tape that I had to back off," Stanley said. See Legalizing Immigrant Workers on Agenda. The Impact of Two Bills in the Works would Legalize or Rid Workers From the Workforce, Including Vidalia Onion Fields. SAVANAH (GA.) MORNING NEWS ON THE WEB, Feb. 26, 2001 at <http://www.savanahnow.com/stories/022601/LOCmigrantfarm.shtml>. See also Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263, 274 (1997) (commenting on the need for a disposable labor force in the United States).

10. Professor Kitty Calavita conducted a survey of employers who hired undocumented workers in Southern California. Many of the employers interviewed revealed that though they knew they were hiring undocumented workers and they appreciated the risk of sanctions, they nevertheless chose to take the risk because of their need for workers. Whether attributed to fear of being caught, desperation, or reverse prejudice, the work ethic of undocumented workers was characterized by the employers as superior to that of Americans. Many of the employers recognized that the jobs they were offering were not particularly desirable and would be difficult to fill were it not for undocumented workers. One such employer described the work at his plant and the difficulty of filling positions with a domestic work force thusly: "These girls come in at four o'clock in the morning, and it's cold out there in the room that they're working in. There is chicken meat all over the place, and it's not a real desirable work. . . . It's hard to find people that will do that. All the girls we have out here are either resident aliens or of Mexican heritage, and . . . ah . . . they're willing to do it. Consequently, if that's the type of people we have to get to do that type of work . . . we would have to hire them to get the work done." *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & SOC'Y REV. 1041, 1052-53 (1990). Another example involves farming in the Old South. See SAVANAH (GA.) MORNING NEWS ON THE WEB, *supra* note 10. The shortage of people to perform semi-skilled or unskilled jobs has led to the formation of the Essential Worker Immigration Coalition, (EWIC) an association composed of organizations such as the American Hotel and Motel Association, the American Meat Institute, Associated Builders and Contractors, The National Restaurant Association and the National Chamber of Commerce, which is dedicated to lobbying for programs to facilitate hiring people from abroad, termed "essential workers." EWIC describes the process of getting H-2B visas approved as "unnecessarily tedious, time-consuming, expensive, and many times unsuccessful." See <http://www.ewic.org/letters/11-99.htm>.

11. This phenomenon has been described as a "push and pull" mechanism. See Jo Anne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan Through Clinton, 1981-2001*, 16 GEO. IMMIGR. L.J. 601, 617 (2002).

12. Figures on the wages paid undocumented workers are hard to ascertain because of the difficulty of obtaining data. However, in a GAO report to the Chair of the Subcommittee on Commerce, Consumer and Monetary Affairs, on Efforts to Address the Prevalence and Conditions of Sweatshops, the GAO reported that labor officials in New York and Los Angeles believe that the large number and

wages, by U.S. standards, are preferable to the extreme poverty, unemployment, exploitative wages, and marginal living conditions that prevail in the sending countries.¹³ Risking serious injury or even death in their journey to the United States, millions have traded the ravages of poverty in their home countries for the opportunity to work, notwithstanding the stigma attached to their undocumented status.¹⁴ An estimate by Jeffrey Passel and Michael Fix of the Urban Institute based on figures from the 2000 census put the number of undocumented immigrants in the United States at 8.5 million.¹⁵

Contrary to the image of lonesome adventurers setting out to face an uncertain future in a foreign land, undocumented immigrants often arrive in the U.S. to join well-developed family and social networks that can include American citizens

severity of minimum wage and overtime violations in the garment industry may be related in part to the employment of undocumented workers. See Gen. Accounting Office, *Garment Industry – Efforts to Address the Prevalence and Conditions of Sweatshops*, GAO REPORTS, at 5 (Nov. 10, 1994). See also *Lang v. Landeros*, 918 P.2d 404 (Okla. Ct. App. 1996) (a case involving an undocumented worker, who was injured severely by boiling cooling oil. At the time of his injury Landeros was working 11.5 hours a day, six days a week, and earning \$950.00 a month).

13. The “push” factors include unemployment or low wages, substandard living conditions, and depressed economic prospects. In a recent newspaper article, Morris Thompson, citing figures from the World Bank has found that more than 60% of the world’s population live on less than \$2.00 a day per person. See Morris Thompson, *LAS VEGAS REV. J.*, May 26, 2001, at 30A. On the other hand, the “pull” factors include the promise of better wages, better working and living conditions and the possibility of a better future. See generally Calavita, *supra* note 10. See also Gerald P. Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 *UCLA L. REV.* 615, 620 (1981). Desperate for workers to perform menial jobs, the “pull” forces have become rather aggressive lately. An example of such “pull” factors at work is the recruitment of Mexican nationals by IBP, a meatpacking company. In an article in the *Wall Street Journal* on October 15, 1998, Laurie P. Cohen noted that IBP routinely travels into Mexico to recruit workers for its slaughterhouses in Nebraska, Kansas and Indiana. Advertising in Spanish on local radio stations, IBP promises to cover travel expenses to the U.S. and a starting salary of \$8.00 an hour. Though this practice would seem to be fraught with all kinds of legal trouble, IBP is able to recruit in Mexico through an INS program called “Basic Pilot,” which helps companies verify social security numbers and green cards new employees provide. However, the INS acknowledges that Basic Pilot can be circumvented by impostors who hold authentic documents and by undocumented individuals who use fraudulent documents that use real names and numbers (one individual interviewed by the author revealed that he had used his brothers’ resident-alien permit to obtain a job with ABP in Kansas). See Laurie P. Cohen, *WALL ST. J.*, Oct. 15, 1998, at A1.

14. The *Washington Post* reported the death of 14 undocumented immigrants who were left without water in the Arizona desert by coyotes (as smugglers are commonly known). The coyotes told them to walk to the highway while they returned with water. The migrants started walking to the highway, believing it was only a short distance. It was fifty miles away. See William Booth and Cheryl W. Thompson, *Border Patrol Continue Search for Missing Migrant; 14 Died in Ariz. Desert After Being Abandoned by Smugglers*, *THE WASH. POST*, May 25, 2001, at A03. In another story, the *Los Angeles Times* reported that 74 undocumented immigrants, many of them from Central America, were being held for ransom in a South Los Angeles home. See Hector Becerra, *Immigrants Held for Ransom in Home*, *L.A. TIMES*, May 31, 2001 §2 at 5; see also RUBEN MARTINEZ, *CROSSING OVER: A MEXICAN FAMILY ON THE MIGRANT TRAIL* (2001) (detailing the tragic experiences of a Mexican family with border enforcement. The family experienced the deaths of three sons on the migrant trail); Elvia R. Arriola, *Voices from the Barbed Wires of Despair: Women in the Maquiladoras, Latina Critical Legal Theory, and Gender at the U.S.-Mexico Border*, 49 *DEPAUL L. REV.* 729, 747-753 (2000) (detailing many of the dangers faced by undocumented immigrants as they make their way across the U.S.-Mexico border in search for work); Javier Valenzuela Malagon, *Towards a Conceptualization of Border Violence*, 7 *LA RAZA L.J.* 92-94 (1994) (discussing in graphic detail the violence to which many undocumented immigrants are subjected to in their journeys to the United States).

15. See *Testimony Prepared for the Subcommittee on Immigration and Claims, Hearing on “The U.S. Population and Immigration.” Before the House Comm. on the Judiciary*, (2002) (testimony of Jeffrey S. Passel & Michael Fix), at http://www.house.gov/judiciary/passel_080201.html.

and legal residents, as well as willing employers.¹⁶ Recognizing that legal decisions or policy choices that affect undocumented workers can directly affect American citizens who depend on those immigrants, some courts and commentators have urged that those interests be taken into account when legal decisions are made or laws are passed.¹⁷ Yet, even while high-ranking government officials praise their contributions to the U.S. economy,¹⁸ the nation's legal system has been inconsistent in its approach to this productive, yet vulnerable, and complex segment of the population. The apparent and not so apparent contradictions between labor law, employment law and immigration law, have converged to create an unpredictable system, whereby a basic right may be granted in one jurisdiction and denied in another.¹⁹ The unpredictability of the system is exacerbated by hints that undocumented workers' rights may be protected and by the absence of a clear federal statement on those workers' rights within the immigration context.²⁰ In many cases, that dynamic results in a continuous cycle where cruelty and hypocrisy are commonplace.

On its face, immigration law appears to prohibit employers from knowingly hiring undocumented workers.²¹ However, it is very difficult for employers to run afoul of that law. In addition, because of policies and practices that might best be described as benign neglect, immigration laws are rarely enforced in the workplace.²²

16. See CALAVITA, *supra* note 10, at 1052-1053.

17. See MICHAEL FIX, WENDY ZIMMERMAN & JEFFREY PASSEL, THE URBAN INSTITUTE, THE INTEGRATION OF IMMIGRANT FAMILIES IN THE UNITED STATES (2001) (a study revealing that one out of every ten families in the U.S. includes immigrant relatives, and that in the state of New York, 70 percent of families with children headed by undocumented immigrants contain citizen children, and noting that discriminatory practices against immigrants appear to have spillover effects on citizen children).

18. Bruce Babbitt, then governor of Arizona, when testifying before the Select Commission on Immigration and Refugee Policy, a group selected in 1979 by President Carter and Congress to undertake a comprehensive study of United States Immigration Policy stated: "[T]hese illegal migrant workers [are] generally law abiding, religious, family-oriented, productive people. . . . [They] pay taxes and contribute to social security which they will probably never receive. Generally, they are not heavy users of welfare or social services. Many of us in the Southwest would agree with president Carter's statement that 'through work they contribute much and require little from the host society.'" Testimony of Governor Bruce Babbitt of Arizona before the Select Commission on Immigration and Refugee Policy. (quoted in U.S. Immigration Policy and the National Interest: Staff Report of the Select Commission on Immigration and Refugee Policy to the Congress and President of the United States, at 58 (Apr. 30, 1981)). See also Rep. Richard A. Gephardt's Speech to the National Council of La Raza Conference in Miami, (July 22, 2002) (where Rep. Gephardt, while praising the contributions of immigrants to the United States also promised to work to bring about immigration reform to bring hard-working undocumented immigrants out of the shadow), at <http://democraticleader.house.gov/media/speeches/readSpeech.asp?ID=58>.

19. For example, workers' compensation benefits are provided in California, see *Foodmaker, Inc. v. Workers' Comp. Appeals Bd.*, 78 Cal. Rptr. 2d 767 (Cal. Ct. App. 1998), and Connecticut, see *Dowling v. Slotnik*, 712 A.2d 396 (Conn. 1998), and in most other states; but denied in Wyoming. See *Felix v. State ex rel. Wyoming Workers' Safety and Comp. Div.* 986 P.2d 161 (Wyo. 1999).

20. IRCA's legislative history indicates that Congress thought about the consequences of the existence of a vulnerable underclass if undocumented workers were left unprotected by labor statutes. See *infra*, note 134. However, Congress chose not to include protections in the statute.

21. See Immigration Reform Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. § 1324(a)(1994)).

22. Immigration enforcement takes place primarily at the border. Of 1,714,010 apprehensions by the INS in fiscal year 1999, 97% were made along the Southwest Border. See INS, 1999 Statistical Yearbook of the Immigration and Naturalization Service, at 4, at <http://www.ins.gov/graphics/aboutins/statistics/enf99text.pdf>. Similarly, in the year 2000, the INS dedicated most of its resources to border enforcement and the removal of criminal immigrants. Southwest border

The INS has been appropriately described as a Catch 22 operation.²³ On the one hand, it is charged with controlling unauthorized immigration; and, on the other, the agency is constantly reminded that its practices cannot harm an economy that relies on undocumented workers.²⁴ Ironically, the situation faced by undocumented workers who are victims of maltreatment and fear deportation has also been described as a Catch 22. Their choice, in many instances, is between remaining silent and being exploited or asserting their rights and becoming subject to deportation.²⁵

Before Congress passed the Immigration Control Reform Act of 1986, hiring undocumented workers was essentially legal, in spite of the workers' unauthorized immigration status. Similarly, even after IRCA employers who hire undocumented labor, even those who do so knowingly, have little to fear. The focus of the Immigration and Naturalization Service (INS) on border enforcement, the consequent lack of resources dedicated to workplace enforcement, and the good faith defense available under IRCA, make it extremely unlikely that employers who violate immigration law will be detected and prosecuted.²⁶ Therefore, millions of undocumented workers secure jobs few U.S. citizens or other legal residents want, and mostly remain silent in the face of unfair working conditions.

In numerous cases, undocumented workers are treated fairly and blend easily into the U.S. labor market. Unfortunately, many are not so lucky, falling victim to unscrupulous employers who use the workers' immigration status to gain or keep a competitive edge. Those employers reduce their cost of doing business and

apprehensions were 1,643,679, a record high, and removals of criminal immigrants totaled over 71,000 while workplace removals totaled only 1,966. *See* INS, Enforcement, Fiscal Year 2000, at 2-4, in INS, 2000 Statistical Yearbook of the Immigration and Naturalization Service (forthcoming), at http://www.ins.usdoj.gov/graphics/aboutins/statistics/ooyrbk_ENF_REV/ENF2000.pdf (last visited Sept. 12, 2002). For a more detailed study of the impediments placed on the INS to engage in workplace enforcement, see GENERAL ACCOUNTING OFFICE, ILLEGAL ALIENS: SIGNIFICANT OBSTACLES TO REDUCING UNAUTHORIZED ALIEN EMPLOYMENT EXIST, GAO/GGD-99-33 (April 1999). Significantly, the INS is required to give employers three days' notice before it can inspect the employers' premises. Control of Employment of Aliens: Subpart A Employer Requirements, 8 C.F.R. §274a.2 (2002).

23. *See* CALAVITA, *supra* note 10, at 39-41.

24. *Id.*

25. *See* Elizabeth M. Dunne, *The Embarrassing Secret of Immigration Policy: Understanding Why Congress Should Enact an Enforcement Statute for Undocumented Workers*, 49 EMORY L.J. 623, 627 n.10 (2000).

26. In *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & SOC'Y REV. 1041 (1990), Professor Calavita argues that the lack of employer compliance with IRCA is not only the result of lenient penalties, inadequate enforcement, and lax attitudes on the part of the enforcement agencies, but also the result of the way the statute was originally written. In that article, Professor Calavita interviewed a significant number of employers who hired undocumented workers. Because they are allowed to accept documents as long as the documents appear valid on their face, and the "good faith" defense is available under the statute, many of those employers saw the requirement that they fill out INS I-9 forms for each new hire not as a burden but as an effective barrier between violations and prosecution. *Id.* at 1055. This conclusion is supported by a recent General Accounting Office study, which found that of all the cases reviewed during a specified period nearly 83% resulted in no employer sanctions. *See* Gen. Accounting Office, *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist*, GAO/GGD-99-105, at 9 (July 1, 1999). The GAO study concluded that the "knowing" standard is very difficult to satisfy. *Id.* It also found that even knowing employers of unauthorized workers looking for "cheap labor" can hire them under the guise of having complied with the verification provisions. According to the GAO, even those employers have faced little likelihood that INS could (1) investigate them, (2) be able to prove that they knowingly hired unauthorized workers, (3) collect fines, or (4) criminally prosecute them. *Id.* at 32.

achieve a compliant workforce by using the workers' fear of detection and deportation against them. The employers' threats, coupled with workers' ignorance of employment or labor protections plus fear of the INS and unfamiliarity with the language, are often enough to deter at an early stage workers' efforts to organize and even to assert more basic rights. In fact, even workforces that include legal residents can be controlled when undocumented workers are discharged or reported to the INS for attempting to invoke their rights under labor law.²⁷ Thus, large numbers of these workers continue to labor in the shadow of U.S. society, risking deportation to depressed countries, as well as separation from their families or other social support systems, if they speak out about unfair wages, unsafe working conditions, or harassing supervisors. For many, such a fate can be far worse than enduring dangerous, coercive or oppressive work environments.

However, undocumented workers are not always passive victims. In many cases, especially in cases where they are aware of their importance to employers, unauthorized workers can be found at the forefront of initiatives to organize, or efforts to enforce other workplace rights.²⁸ Recently, these initiatives have been supported by major labor unions, which, in a complete departure from earlier policies have taken an interest in organizing undocumented workers.²⁹

Still, when unscrupulous employers are involved, organizing campaigns can involve much risk-taking. In those cases, undocumented immigrant workers who decide to protest worker maltreatment at the hands of callous violators must be willing to take chances in the face of overwhelming odds. These initiatives can hardly be described as a "labor movement."³⁰ Instead, they are random occurrences

27. See *N.L.R.B. v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 58 (2d Cir. 1997) (discussing how employers may be able to intimidate even workers who are legal residents by targeting undocumented workers).

28. In *Sure-Tan* five of seven eligible voters who worked to organize a union were undocumented immigrants. See *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 887 (1984). See also DELGADO, *NEW IMMIGRANTS, OLD UNIONS* (1993) (dispelling the myth of undocumented immigrants as compliant and docile workers whose fear of the INS would prevent them from organizing); Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089, 1091-92 (1999) (describing a number of successful union campaigns in Los Angeles California involving primarily Latinos, both documented and undocumented who benefited from their special "niche" within the labor force). A recent series of negotiations between service workers represented by various labor unions in Las Vegas, Nevada provides another example of this phenomenon. An interview with a union steward involved in a contract negotiation revealed that while many employers relied on economic scare tactics to avoid higher wages and benefits, they never threatened the workers with calling the INS. The shop steward believes that many undocumented workers are employed in the service industry in Las Vegas and that the employer involved was wise not to invoke potential immigration issues. Interview with [union shop steward, identity withheld] in Las Vegas, Nev. (Oct. 12, 2002).

29. The AFL/CIO's position was provided to the Senate Judiciary Committee on Immigration on September 13, 1995: "We believe that United States workers should have a first claim on jobs in the U.S.A. Wages and working conditions should not be undermined by workers from other lands." Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 619 n.73 (1996) (quoting Rudy Oswald, Director of Economic Research for the AFL/CIO). In a complete turnaround from this position, on February 16, 2000, at its Annual Convention in New Orleans, the AFL/CIO called for the repeal of employer sanction and announced its support for amnesty for undocumented workers in the United States. See <http://www.aflcio.org/pub/estatemnts/feb2000/immigr.htm>.

30. See, e.g., Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995) (where the author describes the difficulty of organizing collective action among the undocumented immigrant

that in many instances occur only after workplace abuse becomes severe enough to outweigh the fear of deportation.

Predictably, the more unscrupulous employers sometimes react to these initiatives or complaints by suddenly "becoming aware" that they have hired undocumented workers, and simply reporting the unhappy employees to the INS.³¹ Such reports have occurred even when the employers must concede that they knowingly hired undocumented immigrants.³² Though employers risk being fined by the INS for knowingly hiring undocumented workers, such fines are a small cost to pay in exchange for control of the workplace.³³ In addition to INS fines, before *Hoffman*, self-reporting employers also exposed themselves to cease and desist orders, orders to post notices of their violations, and perhaps most importantly, backpay orders if they discharged undocumented workers in violation of labor law.³⁴ Even so, given the interests involved, for many employers, paying INS fines, backpay awards and posting notices made economic sense.³⁵ By defeating unionization efforts through threats, intimidation, and the use of the INS, unscrupulous employers were not only able to secure a more compliant workforce, but also retain control over hiring, discharge decisions, seniority rules and work and schedule assignments.³⁶

Typical of that practice is a case involving Nortech Waste, a Roseville California waste management company. On October 1, 1997, Nortech fired 11 Hispanic employees who sought to improve workplace safety and to protect their right to overtime pay by helping to form a Union.³⁷ After the discharged employees filed a complaint with the N.L.R.B., the Board, while not wishing to minimize the importance of compliance with the Immigration Reform Control Act of 1986 (IRCA), concluded that the employer had used IRCA as "a smokescreen to retaliate for and to undermine the Union's election victory."³⁸

To satisfy its obligations under IRCA,³⁹ the employer had established a standardized process, which it placed in the hands of its human resources officer.⁴⁰ However, after the successful Union election, the employer's general manager supposedly heard rumors that the company employed undocumented workers.⁴¹

community of Long Island, N.Y., which is made difficult not only by the fear of immigration law among the workers, but also by systemic impediments that exist in labor and employment law).

31. See *Impact Indus. Inc.*, 285 N.L.R.B. 5, 35-36 (1987) (a case involving a hotly contested union campaign where the employer, which had a history of lax screening of workers, suddenly changed its policy and began to check the immigration status of Mexican employees who were involved in the union campaign. While calling for INS inspections of the workers who were involved in the union campaign, the employer did not notify the INS of workers in a sister plant where a union representation election petition had been withdrawn). See also *N.L.R.B. v. John Kolkka*, 170 F.3d 937, 939 (9th Cir. 1999) (a case involving an employer with an established policy of hiring workers with questionable documentation, who "suddenly realized" during a union campaign, that some of his employees may be undocumented).

32. See *infra* note 53.

33. *N.L.R.B. v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 53 (1997).

34. *Id.* See also *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 885 (1984).

35. *Impact Industries Inc.*, 285 N.L.R.B. at 31-32. See also text accompanying *infra* note 53.

36. See, e.g., Robert J. LaLonde & Bernard D. Meltzer, *Hard Time for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 963-965 (1991).

37. *Nortech Waste & Operating Engineers Local Union No. 3*, 336 N.L.R.B. No. 79, 2 (2001).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

Responding to an anonymous hand-written list including the names of 11 Hispanic employees, the general manager began a review of the employees' personnel records.⁴² Curiously, the list was lost and not entered into evidence.⁴³

Ruling in favor of the employees, the Board found no evidence that the general manager had ever criticized or found fault with the company's system to satisfy IRCA requirements. In fact, the Board ruled that the general manager's conduct did not reveal problems with the employer's IRCA verification procedures or led to a review or alteration of the procedures.⁴⁴ What was apparent to the Board was that the general manager had acted in a manner that did not appear to be a "good faith effort" to comply with the immigration law. Consequently, the Board concluded that the true reason for the employer's conduct was to undermine the union's victory. To avoid sanctions under the National Labor Relations Act, the employer offered reinstatement for all eleven employees. The employees all returned on October 14, 1997, although they did not further verify their status. The Board found that the employer had violated the National Labor Relations Act and ordered Nortech to pay make-whole remedies to all affected employees and to post a notice of its violations of the Act.⁴⁵

The conduct of the employer in *Nortech Waste* is not unique. Similar conduct was involved in *Montero v. INS* where the employer, STC Knitting (STC), responded to union activity with threats and coercion, including threats to inform the INS that certain employees were in the United States illegally.⁴⁶ After the Union was certified, STC's attorney, a former district director of the INS' New York office, sent a FAX to the INS indicating undocumented immigrants might be working for his client.⁴⁷

After receiving two anonymous complaints concerning the employment of undocumented workers at STC, the INS sought and received authorization to conduct a consent survey of STC's employment records pursuant to IRCA.⁴⁸ As a result of the survey, 10 employees were deported.⁴⁹ The INS assessed a fine of \$23,000 against STC for violating IRCA.⁵⁰ Importantly, the fine included an increase to reflect the aggravating circumstance of STC's alleged efforts to shield from the INS, undocumented workers who voted against the union.⁵¹ There are many more cases like *Nortech Waste* and *Montero*.⁵² *Hoffman* sharply reduces the

42. *Id.*

43. *Nortech Waste & Operating Engineers Local Union No. 3*, 336 N.L.R.B. No. 79, 4 n.4 (2001).

44. *Id.*

45. *Id.*

46. 124 F.3d 381, 382 (2d Cir. 1997).

47. *Id.* at 383.

48. *Id.*

49. *Id.*

50. *Id.* at 383 n.2.

51. *Id.* See also Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Immigration Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 346-47 (2001) (describing in more detail the violations of labor law that took place in *Montero v. INS*).

52. See, e.g., *Velasquez-Tabir v. INS*, 127 F.3d 456 (5th Cir. 1997) (arrest and deportation of undocumented workers pursuant to a complaint to the INS allegedly filed by the employer just a few days after certification of a labor union had taken place); *N.L.R.B. v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997) (employer knowingly hired undocumented workers and discharged them in violation of the NLRA after they engaged in union activities); *Impressive Textiles, Inc.*, 317 N.L.R.B. 8 (1995) (employer began asking for green cards after a successful union election, implying to

costs and risks associated with that illegal conduct.

II. THE LAW BEFORE *HOFFMAN*

A. *Sure Tan*

The situation presented in *Hoffman* had its genesis in *Sure-Tan, Inc. v. N.L.R.B.*⁵³ In that case, the Supreme Court left no doubt that the NLRA applies to undocumented workers.⁵⁴ Yet, it managed to leave unanswered the critical question of the extent to which the NLRA affords redress to those workers, by creating the illusion of a remedy that is vulnerable to unforgiving immigration law.⁵⁵ The uncertainty over the existence of a backpay remedy should never have occurred.

In *Sure-Tan*, five Mexican nationals, working in the U.S. without authorization, were discharged in retaliation for voting for a labor union during a Board supervised election held on December 10, 1976 (pre IRCA).⁵⁶ A mere two hours after the successful election, the company's president verbally attacked the employers for voting for the union and, and then inquired as to the immigration status of a number of them.⁵⁷ Several employees indicated that they were undocumented.⁵⁸

The employer filed with the Board objections to the election based on the undocumented status of six of the workers.⁵⁹ In a scenario that is often repeated, *Sure-Tan's* president later admitted in an affidavit that he had known about the employees' undocumented status for seven months prior to the election.⁶⁰ Nevertheless, after receiving notice that the objections to the election would be overturned, the company president sent a letter to the INS, asking that the agency

undocumented workers that they would be reported to the INS for selecting a labor union as their bargaining representative); *Accent Maint. Corp.*, 303 N.L.R.B. 294 (1991) (employer threatened to report to INS undocumented worker if he did not withdraw from labor union, discharged several undocumented workers who had joined, and promised to reinstate them if they withdrew from the union.); *Futuramik Indus. Inc.*, 279 N.L.R.B. 185 (1986) (employer's agent threatened to report certain employees to the INS if the employees chose union representation); *Del Rey Tortilleria, Inc.*, 272 N.L.R.B. 1106, 1112 (1984) (employer threatened with discharge several undocumented workers due to union activities stating that "no wetbacks were going to tell her what to do." Management officials also notified INS of the presence of undocumented workers in one of their plants and closed another on the day of INS raid to protect undocumented workers who were not union supporters); *Hasa Chem., Inc.*, 235 N.L.R.B. 903 (1978) (employer threatened to call INS to have all his undocumented workers taken away if he lost a hearing and threatened to close the plant if the union did come in); *Regal Recycling, Inc.*, 329 N.L.R.B. 38 (1999); *County Window Cleaning Co.*, 328 N.L.R.B. 190 (1999); *Local 512 v. N.L.R.B.*, 795 F.2d 705 (9th Cir. 1986); *Sure-Tan v. N.L.R.B.*, *infra* note 58, at 886-887.

53. 467 U.S. 883 (1984).

54. *Id.* at 891-892. See also Note, *Rights Without A Remedy-Illegal Aliens Under the National Labor Relations Act: Sure Tan, Inc. and Surak Leather Co. v. N.L.R.B.*, 27 B.C. L. REV. 407, 411 (1986) (arguing *Sure-Tan* left undocumented workers without a remedy. That position proved to be inconsistent with the N.L.R.B. and the majority of the courts until *Hoffman*, but was completely understandable given the ambiguity of the Court's reasoning).

55. See, e.g., Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345404-405 (2001).

56. *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 886 (1984).

57. *Id.* at 886-87.

58. *Id.*

59. *Id.*

60. *Id.*

investigate the immigration status of a number of the workers.⁶¹ On February 18, 1977, the INS visited the employer's worksite and discovered that five of the employees were not authorized to live in the United States and arrested them.⁶² The workers agreed to depart voluntarily for Mexico as a substitute for deportation, and did so the same day.⁶³

Pursuant to a complaint issued by the Board's Acting Regional Director, an Administrative Law Judge (ALJ) found that the employer had violated §§8(a)(1) and (3) of the National Labor Relations Act (NLRA) by requesting the INS to investigate the immigration status of the Mexican employees merely because they supported the union, knowing that the employees were unauthorized.⁶⁴ These findings were adopted by the Board, which also affirmed the ALJ's findings that "petitioners had violated §8(a)(1) of the Act by (1) threatening employees with less work if they supported the Union and promising more work if they did not; (2) interrogating the employees about their Union sentiments; (3) threatening the employees immediately after the election to notify the INS because they had supported the Union; and (4) threatening to go out of business because the Union won the election."⁶⁵

The Board adopted the ALJ's suggestion that the employer be ordered to cease and desist from the unfair labor practices.⁶⁶ However, the Board dismissed as too speculative the ALJ's recommendation of an offer of reinstatement to be held open for six months, and an award of a minimum 4-week period designed to provide some measure of relief to the illegally discharged workers and to deter future violations of the NLRA.⁶⁷ The Board modified the ALJ's order by substituting the "conventional remedy of reinstatement and backpay," leaving for later proceedings the determination of whether the employees had been available for work.⁶⁸

The Court of Appeals for the Seventh Circuit enforced the Board's order with several modifications. First, it conditioned reinstatement on the employees' demonstration that they were legally present and free to be employed in the United States when they presented themselves for reinstatement.⁶⁹ Moreover, to enable the employees to make arrangements for legal entry, the Court ordered that the offers of reinstatement be written in Spanish, be delivered so as to allow for verification of receipt and be left open for four years.⁷⁰ Second, recognizing that it was possible that the employees would not be able to collect backpay because of its ruling that they should be deemed unavailable for work during any period when they were not legally entitled to be present and employed in the United States, the court ordered six-months' backpay.⁷¹

Though the Supreme Court found the result counterintuitive, the court could not identify a conflict between the Immigration and Nationality Act and the NLRA.⁷² Observing that "[t]he central concern with the INA is with the terms and conditions

61. *Id.*

62. *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 886-887 (1984).

63. *Id.*

64. *Id.* at 887, 888.

65. *Id.* at 888 n.2.

66. *Id.*

67. *Id.* at 889.

68. *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 889 (1984).

69. *Id.* (citations omitted).

70. *Id.* at 889-890.

71. *Id.* at 890.

72. *Id.*

of admission to the country and the subsequent treatment of aliens,”⁷³ and that the “INA evinces “at best evidence of a peripheral concern with employment of illegal entrants,”⁷⁴ the court concluded that because Congress had not declared that hiring undocumented workers violated the INA, no conflict existed between the INA and protection of undocumented workers under the NLRA.⁷⁵

However, while “[approving] the Board’s original course of action in this case by which it ordered the conventional remedy of reinstatement and backpay,”⁷⁶ and conditioning reinstatement upon the worker’s legal reentry, the *Sur-Tan* Court failed to provide guidance with respect to how a backpay award should be administered. The Court said that “in computing backpay, the employees must be deemed “unavailable” for work (and the accrual of backpay therefore tolled) during any period during which they were not lawfully entitled to be present and employed in the United States.”⁷⁷

The apparent contradiction of, on the one hand, making a remedy available, while on the other, denying the remedy during any period when the workers were not lawfully entitled to be present and employed in the country (they were not lawfully entitled to be present because they were undocumented, but they could legally be hired to work) created much confusion. However, courts and the N.L.R.B. construed *Sure-Tan* to mean that undocumented workers were not entitled to backpay remedies only when they were not physically present in the United States. That meaning was hard to reconcile with a “plain language” reading of the opinion, but was deemed to best serve the interests of U.S. labor and immigration law. The apparent “plain language” meaning of *Sure-Tan* would later become the central argument for denying backpay remedies in the Seventh Circuit’s opinion in *Tortilleria La Mejor v. N.L.R.B.*, the only appeals court case to rule against workers, and in *Hoffman Plastic Compounds v. N.L.R.B.*

The *Sure-Tan* majority missed the opportunity to clarify the extent to which U.S. labor law protects undocumented workers. Though it mentioned the existence of a “proviso” in the Immigration and Nationality Act that exempted employment from the definition of “harboring” undocumented immigrants, the Court failed to articulate the legal, social and economic context of that provision, and to incorporate it into its analysis.

The “Texas proviso” as that provision came to be known, was a concession by Congress to agricultural interests in the state of Texas during deliberations on the so called “wetback bill” of 1952.⁷⁸ That law was passed in response to Mexico’s concern over undocumented immigration during the period when the Bracero program was in effect. The Bracero program consisted of a series of bilateral agreements between the U.S. and Mexico designed to manage the flow of temporary farm labor into the U.S. during the 1940s, 1950s and early 1960s. During negotiations to continue the version of the program that was to expire in 1952, Mexico demanded that the U.S. adopt means to reduce illegal immigration.⁷⁹ To help channel labor through the Bracero program, Mexico insisted on a penalty for

73. *Id.* at 892 (citing *DeCanas v. Bica*, 424 U.S. 351, 359 (1976)).

74. *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 892 (1984).

75. *Id.*

76. *Id.* at 902.

77. *Id.*

78. See CALAVITA, *supra*, note 10, at 66-70.

79. *Id.*

employing undocumented immigrants.⁸⁰ In response, the senate passed a bill introduced by Senator Kilgore of West Virginia (S. 1851) which made it illegal to “harbor, transport, and conceal” unauthorized immigrants.⁸¹ The bill was later amended to include a clause referred to as the “Texas proviso,” named after the Texas agricultural interests that fought for it.⁸² The proviso stipulated that, “for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.”⁸³

Unconvinced that the bill would eliminate the hiring of undocumented immigrants, Senator Hubert Humphrey challenged its sponsors to explain how it would work.⁸⁴ The response was that the bill was designed to protect employers who were unaware of their employees’ immigration status.⁸⁵ Thus, employers who knowingly hired undocumented workers, or those who continued to employ them after learning of their undocumented status, would be in violation of the legislation. However, a proposal by Senator Douglas to include in the bill penalties for knowing employment of undocumented workers was overwhelmingly rejected.⁸⁶ After House approval, the bill, which included an intact Texas proviso, was signed into law in March, 1952.⁸⁷ The Immigration and Nationality Act of 1952, including the Texas proviso did not only apply to undocumented Mexican immigrants but to all undocumented immigrants.⁸⁸

Thus, though not explicitly, the Texas proviso essentially legalized the labor of undocumented immigrants, at least with respect to employers. That was true, even as immigration law became more restrictive. The Texas proviso was in effect from 1952 until the passage of the Immigration Control Reform Act of 1986. Therefore, in the year *Sure-Tan* was decided, undocumented immigrants were “lawfully” available for work, simply by being physically present in the U.S., though they did not reside legally in the country.

Still, the use of the phrase “lawfully entitled to be present and employed in the United States” by the Supreme Court in *Sure-Tan* is not clear, even when the context of the Texas proviso is added. Though physical availability was sufficient to secure employment legally under the Texas proviso, physical availability was not enough to satisfy immigration law. As a consequence, as long as workers remained undocumented, they could not be “lawfully entitled to be present” in the United States, though they could, in fact, be legally hired.

The irony of this contradiction did not escape Wyoming Senator Alan K. Simpson, who, during deliberations on the Immigration Control Reform Act of 1986 said, “[S]o the law of the United States is the most bizarre of any law in any country. It simply means it is legal to hire an illegal, but it is illegal for the illegal to work. Now that is the law of the United States and that is how we got here. And is that not absurd?”⁸⁹

80. *Id.* at 66-67.

81. *Id.*

82. *Id.*

83. *Id.* at 69

84. *Id.* at 68.

85. *Id.*

86. *Id.* at 69.

87. *Id.*

88. *Id.* at 70, n. 172 (citing CONG. REC. 1952 pp. 795, 800).

89. See 132 CONG. REC. S16,879-01, 33,209 (daily ed. Oct. 15, 1986) (statement of Sen.

B. *Local 512 Warehouse and Office Workers' Union v. N.L.R.B. (Felbro)*

After the court's *Sure-Tan* decision, the N.L.R.B. and the courts struggled to identify the meaning of the phrase "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States" as used in *Sure-Tan*. The most widely accepted meaning was established in *Local 512, Warehouse and Office Workers' Union v. N.L.R.B., (Felbro)*.⁹⁰ *Felbro*, another pre-IRCA case, arose when several undocumented workers were laid off following a successful N.L.R.B. representation election because of their participation in the Union campaign. In *Felbro*, the Ninth Circuit reversed a Board decision to condition backpay to undocumented workers on the workers' ability to establish that they were authorized to work in the United States. According to the Ninth Circuit, the N.L.R.B.'s interpretation of that phrase in *Sure-Tan* foreclosed the possibility that an undocumented worker would ever be entitled to backpay.⁹¹ In reversing the Board, the court first interpreted *Sure-Tan* to at least imply the availability of a backpay remedy for discrimination under the NLRA, notwithstanding the workers' undocumented status.⁹² The court then drew a distinction between workers who have left the country, as had been the case in *Sure-Tan*, and those who remained and had not been the subject of any INS deportation proceedings, as was the case in *Felbro*. Focusing on *Sure-Tan*'s difficulty with speculative damages, the Ninth Circuit reasoned that when the employee has not left the country damages are "actual," not "speculative."⁹³ In the Ninth Circuit's opinion, the Supreme Court disapproved only of the speculative nature of the Seventh Circuit's award of a minimum six month's backpay for a worker who was no longer in the country.⁹⁴ It had not disapproved of a backpay remedy as a matter of principle.

Inexplicably, although it correctly identified the principle that it was not illegal for a person to accept employment after entering the country without authorization, the Ninth Circuit did not fully analyze the effect of the Texas proviso on immigration law before 1986. Had it correctly analyzed that issue, the court could have awarded backpay without creating an additional legal fiction.⁹⁵ In fact, there is no legal distinction between a person who enters the country without authorization and one who, for example, simply overstays a temporary visa.⁹⁶ In the eyes of the law, both persons are unauthorized to be in the country. However, under the Texas proviso, employers could not be prosecuted for hiring either of them, even the one who entered without authorization with the specific purpose of seeking

Simpson).

90. 795 F.2d 705 (9th Cir. 1986).

91. *Id.* at 716.

92. *Id.* at 717.

93. *Id.*

94. *Id.*

95. Legal fictions such as this permeate the field of immigration law. For thoughtful analysis on the use of legal fictions to rationalize immigration policy, see Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51 (1989).

96. For example a person who enters the U.S. with legitimate documentation, like a visa, and subsequently violates the term of the visa by overstaying its duration is also an "undocumented" immigrant. See 8 U.S.C. § 1251(a)(1)(C)(i) (1994) (person deportable for failing to keep the status under which he was admitted). However, that person would have entered the country without violating the law.

employment.

One explanation for the confusion over that language may be that it was carelessly drafted by its original author. On behalf of the court in the Seventh Circuit's opinion in *Sure-Tan v. N.L.R.B.*, Judge Cudahy had written, "in computing backpay discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States."⁹⁷ Later, in a strongly worded dissent in *Del Rey Tortilleria v. N.L.R.B.*,⁹⁸ Judge Cudahy reminded the majority that he had originally written that phrase. However, his explanation of what the phrase meant did not take into account its legal context. The *Del Rey* majority had taken the phrase to mean that undocumented workers can never qualify for backpay.⁹⁹ Cudahy disagreed, maintaining the *Sure-Tan* Court dealt strictly with the situation where undocumented aliens were out of the country and could not enter for the purpose of taking a job without breaking immigration law.¹⁰⁰ Those employees, said the judge, cannot be awarded backpay because they would have to break the law to obtain it.¹⁰¹ Conversely, in his opinion, employees who have not yet left the country qualified for the backpay award.¹⁰²

Cudahy correctly held the position that once an immigrant had entered the country employment was not an additional offense.¹⁰³ However, like the *Felbro* court, Cudahy also drew a distinction between a person who must enter the country illegally and thus violate immigration law to secure a job and one who is already in the country and need not violate immigration law to obtain employment; as if remaining in the country in violation of the immigration laws were not an offense. Again, the judge perpetuated a legal fiction to fashion a remedy, because, pre-IRCA, a worker while unauthorized, regardless of the date or manner of arrival, did not violate immigration law simply by seeking employment.

C. *Del Rey Tortilleria*

The most complete analysis of this problem before Congress passed IRCA was performed by the National Labor Relations Board in *Del Rey Tortilleria, Inc.*,¹⁰⁴ That case involved two undocumented workers who had been discharged in violation of the NLRA. In its defense, the employer contended that the workers' admissions they were undocumented proved conclusively they were not entitled to backpay, citing *Sure-Tan* for support.¹⁰⁵ In response, the Board built upon *Felbro's* holding that pre-IRCA the INA was only peripherally concerned with the employment of undocumented workers. The Board added that both workers had been eligible to continue working after their unlawful discharge because employment of undocumented workers was not prohibited by the INA at that time. According to the Board, undocumented workers were eligible for remedies if they were not subject to a final deportation order by the INS. Consistent with IRCA, the Board shifted the

97. *N.L.R.B. v. Sure-Tan*, 672 F.2d 592, 606 (7th Cir. 1982).

98. 976 F.2d 1115 (7th Cir. 1992).

99. *Id.* at 1118.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1124 (citing *Sure-Tan*, 467 U.S. 883, 893 (1984)).

104. 302 N.L.R.B. 216 (1991)

105. *Id.* at 219.

burden to the employer to establish the employee's lack of authorization. The Board, thus, ordered that backpay be paid to the discriminated employee until the day of unconditional reinstatement, which had been offered by the employer.¹⁰⁶

However, in *Del Rey Tortilleria v. N.L.R.B.*,¹⁰⁷ the Seventh Circuit denied enforcement of the backpay award issued by the Board, creating a circuit split. According to the court the "plain language" of *Sure-Tan* foreclosed the possibility of backpay remedies for undocumented workers even when discharged in violation of the NLRA.¹⁰⁸ Though noting that *Sure-Tan* had generally approved the Board's course of action in ordering backpay to undocumented workers who had been discharged in violation of the NLRA, the court also emphasized that *Sure-Tan* had left "until the compliance proceedings more specific calculations as to the amounts of backpay, if any, due these employees."¹⁰⁹

The *Del Rey* court was careful to note that the Supreme Court in *Sure-Tan* had expressed uncertainty about the workers' ability to "either enter the country lawfully to accept the reinstatement offers, or to establish at the compliance proceedings that they were lawfully available for employment during the backpay period."¹¹⁰ The court further noted that the "objective of deterring unauthorized immigration," required the employees to prove that they were lawfully available for employment during the backpay period.¹¹¹ If that were not the case, according to the court, "undocumented aliens would be rewarded by the N.L.R.B. for entering the country illegally."¹¹²

Curiously, the *Del Rey* court did not cite to any passage in the Supreme Court's opinion in *Sure-Tan* in support of the proposition that "lawfully available for employment" meant "legally available under immigration law." Instead, the court relied upon a dissenting opinion by Judge Beezer of the Ninth Circuit in *Local 512 v. N.L.R.B.*, in which he wrote:

The *unstated* (emphasis added by author) premise behind [*Sure-Tan*'s] holding appears to be that an undocumented alien has not been legally harmed by a lay-off or termination. An alien who had no right to be present in this country at all, and consequently had no right to employment, has not been harmed in a legal sense by the deprivation of employment to which he had no entitlement. It may promote the purpose of the NLRA to guarantee the collective bargaining rights of the NLRA to every employee, regardless of immigrant status. But the award provisions of the NLRA are remedial, not punitive, and thus should be awarded only to those individuals who have suffered harm.¹¹³

106. These workers were eligible for reinstatement having being "grandfathered" into IRCA, because they had been hired before November 6, 1986 and had been wrongfully discharged. *Id.* at 220 (citing 8 C.F.R. § 274a.2(b)(v), (iii)(E), (G) (1986)).

107. *Del Rey Tortilleria v. N.L.R.B.*, 976 F.2d 1115, 1117 (7th Cir. 1992).

108. *Id.* at 1119-1120.

109. *Id.* at 1119 (emphasis added by the court).

110. *Id.* (citing *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 904 (1984)).

111. *Id.*

112. *Del Rey Tortilleria v. N.L.R.B.*, 976 F.2d 1115, 1119 (7th Cir. 1992).

113. *Id.* (citing *Local 512, Warehouse and Office Workers' Union v. N.L.R.B.*, 795 F.2d 705, 725 (9th Cir. 1986) (Beezer, J., dissenting)).

Following Judge Beezer's lead, the court concluded that the *Del Rey* plaintiffs had not been harmed in a legal sense and were, therefore, not entitled to backpay.¹¹⁴ Interestingly, the court found additional support for this position in Justice Brennan's dissenting opinion in *Sure-Tan*, in which Brennan interpreted the majority's opinion thusly; "[o]nce employers, such as petitioners, realize that they may violate the NLRA with respect to their undocumented alien employees without fear of having to recompense those workers for lost backpay, their incentive to hire such illegal aliens will not decline, it will increase."¹¹⁵ According to the Seventh Circuit, the *Sure-Tan* majority's silence (which it interpreted to be a decision not to criticize Justice Brennan's broad interpretation of its holding) about Brennan's pessimistic dissent helped to establish that no backpay remedies are available when undocumented workers are discharged in violation of the NLRA.

Again, the Seventh Circuit failed to take into account that under the then-existing state of immigration law even *Sure-Tan*'s reasoning supported a backpay award. Nowhere in *Sure-Tan* did the court hold that "legally available" for work means "authorized by immigration law to be in the country." In fact, if anything, the court hinted to the contrary, citing the existence of a "proviso" in the INA that exempted employment from "harboring." Therefore, an unlawfully discharged undocumented employee did indeed suffer a legal harm—the loss of a job—where he could have remained employed unless detected and processed by the INS, because it was not against the law to employ him.

Another interesting and troubling point made by the Seventh Circuit, and a theme that has been repeated in other areas, was that unless the worker was required to be in the U.S. legally during the backpay period the N.L.R.B. would be "rewarding him for entering the country illegally" by awarding backpay.¹¹⁶ The characterization of legal remedies for harms suffered in the workplace as "rewards for violations of the immigration laws" has been used to rationalize the denial of remedies in other areas.¹¹⁷ That characterization ignores the culpability of the employer, which, in some cases may be significant, by making the undocumented status of the worker the controlling factor. That perspective conveniently ignores the critical causal connection between the injury inflicted and the remedy awarded. Undocumented workers who were awarded backpay because they were actually or constructively discharged, for participating in protected activity prior to *Hoffman* were not being paid for entering the country without authorization. They were, instead, being made whole for the injury inflicted by the unscrupulous employer—the discharge. The consequence of their unauthorized entry was, of course, deportation if detected and arrested.

D. *A.P.R.A. Fuel Oil Buyers, Inc.*

This issue was revisited post IRCA by the N.L.R.B. in *A.P.R.A. Fuel Oil Buyers, Inc.*¹¹⁸ That case involved an employer who had hired two workers after each had explicitly stated they were not authorized to obtain employment because of

114. *Id.*

115. *Id.* (citing *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 906 (1984) (Brennan, J., concurring in part and dissenting in part)).

116. *Id.*

117. See *Chicas v. Hott & Son Excavating, L.L.C.*, 2000 Va. Wrk. Comp. LEXIS 651, 4.

118. 320 N.L.R.B. 408 (1995).

their immigration status. Significantly, the employer assisted each of them to determine the types of documents they would need to be put in the books.¹¹⁹ However, the workers were quickly discharged once they became involved in union activity. According to the Board, the discharges would not have occurred absent the workers' union activities.¹²⁰ The discharge occurred in what the Board described as "flagrant and pervasive unfair labor practices,"¹²¹ which included threats of plant closure, the unlawful discharge of four employees and the threatened discharge of others, coercive interrogations, enhanced benefits for employees who voted against the union, and coerced affidavits revoking authorization cards.¹²²

The employer argued IRCA rendered the workers ineligible to be employed because of their immigration status, and that they should therefore not be treated as employees within the coverage of the NLRA.¹²³ Disagreeing with this position, the Board initially ordered reinstatement and backpay for all the wrongfully discharged employees, including the two undocumented workers. Later, the Board *sua sponte* decided that the order of backpay for the two undocumented workers required further consideration.¹²⁴

On reconsideration, the Board acknowledged its obligation to avoid conflicts with Congressional mandates in other areas.¹²⁵ Identifying no conflict between the two statutes, the Board found Congress enacted both the NLRA and IRCA to further virtually identical policy objectives with respect to the American workplace.¹²⁶ It also found that Congress has expressly indicated that the policies underlying these statutes reinforce each other;¹²⁷ concluding that this mutuality of purpose can best be achieved by vigorously enforcing the NLRA with respect to all employees provided that in doing so it did not require unlawful conduct by either employers or individuals.¹²⁸

The Board found support for its decision to award backpay in the Supreme Court's *Sure-Tan* decision. The Board noted correctly that the *Sure-Tan* Court had determined that undocumented workers are "employees" under Section 2(3) of the NLRA, and that extending to them the Act's protections furthers the purposes of the statute.¹²⁹ In addition, the Board relied on the public policies it identified in *Sure-Tan*, namely, 1) the need to protect wages and working conditions for legal residents and citizens, which can become seriously depressed by the presence of workers willing to labor for substandard wages and working conditions;¹³⁰ 2) the need to help prevent the formation of a permanent underclass, which, excluded from protection would not share in the collective goals of their legally resident co-workers, eroding

119. *Id.* at 409.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. See *N.L.R.B. v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997).

125. *A.P.R.A. Fuel Buyers Group, Inc.*, 320 N.L.R.B. 408, 410 (1995) (citing *Southern S.S. Co. v. N.L.R.B.*, 316 U.S. 31 (1942) for the proposition that the Board may not "apply the policies of its statute so single-mindedly as to ignore other equally important Congressional objectives.>").

126. *Id.* at 411.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

the unity of all employees and impeding effective collective bargaining;¹³¹ and, 3) the need to eliminate the distinct economic advantage to employers who hire from this group, if the group is left unprotected, and thus the incentive to hire undocumented workers instead of citizens or other legal residents.¹³²

The Board also relied heavily on IRCA's legislative history. To demonstrate the absence of a conflict between that statute and the NLRA, it quoted heavily from the House Committee Report on IRCA, which stated:

It is not the intention of the committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair labor practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. In particular, the employer sanctions provisions are not intended to limit in any way the scope of the term "employee" in section 2(3) of the National Labor Relations Act (NLRA), as amended, or of the rights and protections stated in Sections 7 and 8 of that Act. As the Supreme Court observed in *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883 (1984) application of the NLRA "helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment." 467 U.S. at 893.¹³³

In accordance with the language in the House Report, the Board reasoned that the most effective means of eliminating the economic incentives to hire undocumented workers was to provide them the same protections afforded to American employees.¹³⁴ The Board then took special note of the explicit disclaimer in the House Report of any limitation on the power of the Board to remedy employers' avoidance of workplace protections.¹³⁵ However, its analysis of the remedy for the wrongfully discharged undocumented individuals was not without limits.

To harmonize IRCA's prohibitions on the hiring of undocumented workers with the mandates of the NLRA, the Board conditioned reinstatement on the normal verification of eligibility requirements prescribed by IRCA.¹³⁶ The workers therefore were awarded reinstatement, provided they presented within a reasonable period of time, INS Form I-9 and the appropriate supporting documents. In support, the Board noted that conditional remedies have been used in other areas where reinstatement would require the removal of a legal disability.¹³⁷

131. A.P.R.A. Fuel Buyers Group, Inc., 320 N.L.R.B. 408, 411 (1995).

132. *Id.* at 412.

133. *Id.* at 414 (citing H.R. REP. NO. 99-692, pt. 1, at 58 (1986)).

134. *Id.* Of course, the same remedies available to American employees would also be available to non-citizen legal residents without limitations.

135. *Id.*

136. *Id.* at 415.

137. A.P.R.A. Fuel Buyers Group, Inc., 320 N.L.R.B. 408, 415 (1995) (citing *N.L.R.B. v. Future Ambulette, Inc.*, 903 F.2d 140, 145 (2d Cir. 1990) (reinstatement of driver whose license had been

Similarly, the backpay award was to cover payment from the date of their unlawful discharges until “the earliest of the following: their reinstatement by the [Company], subject to compliance with the [Company’s] normal obligations under the IRCA, or their failure after a reasonable time to produce the documents enabling the company to meet its obligations under IRCA.”¹³⁸ However, the Board did not identify what it meant by a “reasonable time” with respect to either reinstatement or backpay.

On appeal, the Second Circuit affirmed the Board’s decision to award reinstatement and backpay to the unlawfully discharged undocumented workers.¹³⁹ In light of IRCA’s prohibition against the hiring of undocumented workers, the Court ruled that when the Board has accounted for the goals of another statute, its decision will be affirmed only if the Board has “reconciled the two statutes in a reasonable way.”¹⁴⁰

To determine whether the Board had reconciled the two statutes in a reasonable manner, the court first reviewed pre-IRCA law. The court opined that despite IRCA, *Sure-Tan* set the background for the appeal, and that *Felbro* contained the correct interpretation of that case.¹⁴¹ Consistent with *Felbro*, the court emphasized that *Sure-Tan* dealt only with awards of backpay to undocumented employees who have left the country.¹⁴² The court reasoned that when undocumented workers remain in the United States after their illegal termination, backpay may appropriately be awarded.¹⁴³ In support of this conclusion, the court relied on the *Felbro* court’s observation that *Sure-Tan* was not dealing with the employment of undocumented immigrants but was primarily concerned with the INA’s prohibition against illegal entry into the United States.¹⁴⁴ According to the court, “[t]his prohibition against illegal entry was what rendered the employees in *Sure-Tan* unavailable for work during the backpay period.”¹⁴⁵ That being the case, the court concluded that because the claimants in *A.P.R.A. Fuel* had never left the country, there could be no enticement, by offer of employment or backpay, for them to reenter the country illegally.¹⁴⁶ Of course, this ignores the fact that remaining in the country without authorization is also an offense against the immigration laws, a fact that the Supreme Court in *Hoffman* would later use in support of its decision to deny backpay.

Secondly, the court looked at the interaction between IRCA and the NLRA. Importantly, the Second Circuit emphasized that this appeal raised the question whether an employer who *knowingly* hires undocumented workers can use the immigration laws as a shield to avoid liability for its retaliatory discharge of the same employees in violation of the NLRA.¹⁴⁷ According to the court, that question was answered in the negative by IRCA’s legislative history, which demonstrates that

suspended depended on the production of a valid drivers’ license within a reasonable time).

138. *Id.* at 416.

139. *N.L.R.B. v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997).

140. *Id.* at 54.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 55 (citing *Local 512, Warehouse and Office Workers’ Union v. N.L.R.B.*, 795 F.2d 705, 725 (9th Cir. 1986)).

145. *N.L.R.B. v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997).

146. *Id.*

147. *Id.* at 52.

“IRCA does not materially change the policy considerations underlying the previous decisions.”¹⁴⁸ The court further reasoned that IRCA’s employer-centered enforcement strategy was designed to make it more difficult to employ undocumented workers and to punish the employers who offer jobs to those workers.¹⁴⁹ The court also observed that, to accomplish that goal, IRCA adopted sanctions focused specifically on the employers of undocumented immigrants.¹⁵⁰ Noting that the “heart of the act is a provision making it unlawful for any person or entity to hire, recruit, or refer for employment any person known to be unauthorized to work in this country,” the court concluded that Congress’ “intent was to focus on employers, not employees, in deterring unlawful employment relationships.”¹⁵¹ The court then added that to reduce the appeal of illegal workers to unscrupulous employers, IRCA, as the judiciary committee report makes clear, did not limit the protections available to undocumented workers under Sections 7 and 8 of the NLRA,¹⁵² nor limit the powers of the Board to remedy violations of the NLRA.¹⁵³

According to the court, the Board’s remedies of conditional reinstatement and backpay for the illegally discharged undocumented workers promoted the shared policy goals of IRCA and the NLRA, and avoided conflicts with the specific provisions of IRCA.¹⁵⁴ The court reasoned that to reduce protections for undocumented workers would allow unscrupulous employers to play the provisions of the NLRA and IRCA against each other, “to defeat the fundamental objectives of each, while profiting from their own wrongdoing with relative impunity.”¹⁵⁵

Accordingly, the court ruled that the Board’s reinstatement remedy was properly tailored to the restrictions of IRCA. The requirement that the unlawfully discharged employees provide completed I-9 forms with the appropriate supporting documentation eliminated any risk the company would be required to violate IRCA in order to satisfy the Board’s remedy.¹⁵⁶ Also, by arranging compliance with IRCA to occur between the two private parties the Board avoided having to determine the employees’ immigration status. Similarly, the backpay was to be paid from the day of the unlawful discharge, but was to stop when either the workers were qualified for future employment, or the reasonable time allowed them to comply with IRCA expired.

In the court’s opinion, this remedy did not create an additional incentive to hire undocumented workers, and helped to ensure that employers who comply with IRCA did not suffer a competitive disadvantage for their obedience of the law. Consistent with that position, the court discussed approvingly the Board’s finding that the denial of backpay would frustrate the objectives of IRCA.

148. *Id.* at 55.

149. *Id.*

150. *Id.*

151. *N.L.R.B. v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 56 (2d Cir. 1997).

152. *Id.* (referring to provision of the NLRA codified at 29 U.S.C. §§ 157, 158, which guarantee the right to organize, bargain collectively through representatives, and to be free of unfair labor practices designed to prevent such activities).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 57.

III.

HOFFMAN PLASTIC COMPOUNDS INC. AND ITS CONSEQUENCES

In *Hoffman Plastic Compounds Inc. v. N.L.R.B.*¹⁵⁷ the Supreme Court reversed a trend that had begun with Local 512, and had continued through other courts and the N.L.R.B., making only a brief detour in the Seventh Circuit.¹⁵⁸ Besides denying the remedy of backpay, *Hoffman* rejected much of the rationale that had guided the lower courts' and administrative agencies' decisions and policies. Perhaps more importantly, much of the same rationale also supported the recognition of rights for undocumented workers in other areas.¹⁵⁹ *Hoffman*, therefore, also has the potential to undermine the remedies available for undocumented workers outside the traditional labor law area, and with that, it has the potential to affect the environment for all workers. *Hoffman* may have just closed the door to all but the most desperate, not only because of the chilling effect it will have on employees' efforts to unionize but because of the effect it will have on the minds of workers to even visualize the possibility of a remedy for maltreatment or for denial of more basic employment rights.

In May of 1988, Jose Castro, a native of Mexico, was hired by Hoffman Plastic Compounds, a company that custom-formulates chemical compounds for various industries, to operate various blending machines.¹⁶⁰ To fulfill the I-9 requirements Castro presented documents that appeared to verify his authorization to work in the United States.¹⁶¹ In December of 1988 the AFL/CIO began a union organizing campaign at Hoffman Plastic Compounds.¹⁶² In January 1989, Castro and other employees were laid off for engaging in protected collective activity.¹⁶³ In January 1992, the N.L.R.B. found for the employees in an unlawful firing charge.¹⁶⁴ The Board issued a cease and desist order.¹⁶⁵ It also ordered Hoffman to post a detailed notice to employees regarding the remedial order.¹⁶⁶ The Board also ordered Hoffman to offer reinstatement, and awarded backpay to the four employees.¹⁶⁷

In June of 1993, a compliance hearing was conducted before an Administrative Law Judge (ALJ) to determine the amount of backpay owed to each discriminatee.¹⁶⁸ On the final day of the hearing Castro testified that he was born in

157. 122 S. Ct. 1275 (2002).

158. See Part II, *supra* pp. 12-25.

159. See, e.g., *Dowling v. Slotnik*, 244 Conn. 781, 796 (1998) ("excluding such workers . . . would relieve employers from the obligation of obtaining workers' compensation coverage for such employees and thereby contravene the purpose of the Immigration Reform Act by creating a financial incentive for unscrupulous employers to hire undocumented workers").

160. *Hoffman Plastic Compounds Inc. v. N.L.R.B.*, 122 S. Ct. 1275, 1278 (2002).

161. *Id.*

162. *Id.*

163. *Id.* at 1279 n.1. (Section 8(a)(3) of the NLRA prohibits discrimination "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." (citing 49 Stat. 452, as added, 61 Stat. 140, 29 U.S.C. § 158(a)(3) (2002)).

164. *Id.*

165. *Id.*

166. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 122 S. Ct. 1275, 1279 (2002).

167. *Id.*

168. *Id.*

Mexico, and that he was never permitted to work legally in the United States.¹⁶⁹ It was then that the employer alleged to have learned of Castro's undocumented status for the first time.¹⁷⁰ Castro admitted that he had used a birth certificate belonging to a friend as proof of legal residence.¹⁷¹ He also admitted that he used those documents to obtain employment after his discharge by Hoffman. Based on that testimony the ALJ found that he was precluded from awarding Castro backpay and reinstatement, because that relief would be contrary to *Sure-Tan*, and in conflict with IRCA.¹⁷²

In September of 1998, seven years after Castro was fired, the Board reversed with respect to backpay. Reasoning that the "the most effective way to accommodate and further the immigration policies embodied in [IRCA] is to provide the protection and remedies of the [NLRA] to undocumented workers in the same manner as to other employees,"¹⁷³ the Board awarded Castro \$66,951 of backpay plus interest. Backpay was limited to the period after the unfair labor practice and before the employer learned of Castro's unauthorized status.¹⁷⁴ A dissenting board member would have affirmed the ALJ and denied Castro all backpay.

Seeking reversal of the Board's decision, Hoffman filed a petition for review in the D.C. Circuit. A panel of that court denied the petition.¹⁷⁵ An en banc court again denied the petition for review and enforced the Board's order.¹⁷⁶ The Supreme Court granted certiorari,¹⁷⁷ and reversed. Importantly, it took 13 years for this case to make its way through the administrative and judicial processes. In fact, even if the Supreme Court had not granted certiorari the case would have taken 11 years to conclude.

The Supreme Court based its decision to reverse the D.C. circuit on four basic grounds: 1) that the Board's discretion to select or fashion remedies for violations of the NLRA is not unlimited, and, as a consequence, the Court is not

169. *Id.*

170. There is some dispute as to whether the employer knew all along that Castro was undocumented. In response to a question on a form regarding his eligibility to work in the U.S. Castro answered "no." See Brief of Amicus Curiae National Employment Law Project, MALDEF, Asian American Legal Defense and Education Fund, Coalition for Humane Immigrant Rights of Los Angeles, et al. at 23, (on file with author) (citing Hoffman Plastic Compounds, Inc., 326 N.L.R.B. 1060, n.10 (1998)). Nothing was made of this information by any court. In the end, it would not have made a difference to the majority.

171. Hoffman Plastic Compounds, Inc. v. N.L.R.B., 122 S. Ct. 1275, 1279 (2002).

172. *Id.*

173. Hoffman Plastic Compounds, Inc., 326 N.L.R.B. 1060, 1061 (1998).

174. *Id.* Castro's award was consistent with the N.L.R.B.'s after-acquired evidence doctrine which states that even if the employer demonstrates the discharge would have still taken place (for example in cases where employee misconduct was not discovered until after the discharge) absent the unfair labor practice, the Board may still deem that discharge to be an unfair labor practice. The result of the application of the doctrine is that the Board cannot order reinstatement and will stop the period of backpay on the day the misconduct was discovered. See R. Shawn Wellons, *Plaintiff's Bane: The After Acquired Evidence Defense and Title VII Discrimination Suits*, 29 WAKE FOREST L. REV. 1325, 1336-37 (1994) (discussing the origins of the after-acquired evidence doctrine at the N.L.R.B.). See also *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360 (1995) (adopting after acquired evidence doctrine, while noting the "unclean hands" defense has been rejected by the Supreme Court).

175. 122 S. Ct. at 1279 (citing Hoffman Plastic Compounds, Inc., v. N.L.R.B., 208 F.3d 229 (D.C. Cir. 2000)).

176. *Id.* (citing Hoffman Plastic Compounds Inc. v. N.L.R.B. 237 F.3d 639 (2001)).

177. Hoffman Plastic Compounds Inc. v. N.L.R.B., 122 S. Ct. 1275, 1279 (2002) (citing Hoffman Plastic Compounds Inc. v. N.L.R.B., 533 U.S. 976 (2001)).

required to defer to the Board's interpretation of statutes where the Board has no particular expertise; 2) that since the Board's inception, the court has consistently set aside awards for reinstatement and backpay to employees found guilty of serious illegal conduct; 3) that awarding backpay remedies to undocumented workers fired for engaging in protected collective bargaining activity serves as a reward for their illegal act and acts as a magnet for continued unauthorized immigration, and, 4) that a cease and desist order coupled with an order that the employer post a notice of its violations of the NLRA and the possibility of contempt proceedings, suffice to promote the policies of the nation's labor laws.

With respect to the Board's discretion to select or fashion remedies for violations of the NLRA, the Court stressed that though generally broad,¹⁷⁸ that discretion is not unlimited.¹⁷⁹ In support, it recalled that it has consistently set aside awards of reinstatement and backpay to employees found guilty of serious illegal conduct in connection with their employment.¹⁸⁰ As examples, the Court cited *Fansteel*, which reversed an N.L.R.B. award of reinstatement and backpay for employees involved in an illegal "sit down" strike,¹⁸¹ and *Southern S.S. Co.*, which set aside an N.L.R.B. award of reinstatement and backpay to employees whose strike onboard a ship had amounted to a mutiny in violation of federal law.¹⁸²

Refusing to defer to the Board's position on the issue of the interaction between the NLRA and IRCA, the Court first cited its rejection of the Board's interpretation of a federal mutiny statute in *Southern S.S. Co.*,¹⁸³ and argued that it has never deferred to the Board, where its remedial preferences potentially "trench upon federal statutes and policies unrelated to the NLRA."¹⁸⁴ The Court then cited *Bildisco*, where it refused to defer to the Board's interpretation of the Bankruptcy Code,¹⁸⁵ *Connell Constr. Co. v. Plumbers*,¹⁸⁶ where the court refused the Board's claim that federal antitrust policy should defer to the NLRA, and *Carpenters v. N.L.R.B.*,¹⁸⁷ where the Court precluded the Board from selecting remedies pursuant to its own interpretation of the Interstate Commerce Act.¹⁸⁸ The court concluded by stating that *Sure-Tan*, decided before the passage of the Immigration Control Reform Act of 1986, followed this line of cases when it set aside an award closely analogous to the one in *Hoffman*.¹⁸⁹

Noting that prior to 1986 Congress had not yet made it a separate criminal offense for employers to hire undocumented immigrants or for those immigrants to accept employment even after entering the country without authorization, the Court

178. *Id.* at 1280 (citing *N.L.R.B. v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346-347 (1953)).

179. *Id.* (citing *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257-258 (1939); *Southern S.S. Co. v. N.L.R.B.*, 316 U.S. 31, 46-47 (1942); *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 532-534 (1984); *Sure-Tan, Inc., v. N.L.R.B.*, 467 U.S. 883, 902-904 (1984)).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Hoffman Plastic Compounds Inc. v. N.L.R.B.*, 122 S. Ct. 1275, 1280 (2002).

184. *Id.*

185. *Id.*

186. *Id.* (citing *Connell Const. Co., Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975)).

187. *Id.* (citing *Local 1976, United Broth. of Carpenters and Joiners of America, A.F.L. v. N.L.R.B.*, 357 U.S. 93 (1958)).

188. *Id.*

189. *Hoffman Plastic Compounds Inc. v. N.L.R.B.*, 122 S. Ct. 1275, 1280 (2002).

agreed with *Sure-Tan*'s conclusion that there was not "reason to conclude that application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA" at that time.¹⁹⁰ However, with respect to the remedies to be awarded, the Court took the view that *Sure-Tan* found the Board's authority limited by federal immigration policy.¹⁹¹ Accordingly, even in the context of *Sure-Tan* that meant the Board was prohibited from ordering reinstatement, which, as the court termed it, would effectively "reward" the worker for violating the immigration laws.¹⁹² Thus, "to avoid a potential conflict with the INA," the Board's reinstatement order had to be conditioned upon proof of the 'employee's legal reentry.'¹⁹³

Without much discussion, the Court seemed to be of the impression that *Sure-Tan* had denied backpay. It first cited with approval the statement "the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States,"¹⁹⁴ and then added, without elaboration, the statement, "in light of the practical workings of the immigration laws," such remedial limitations were appropriate even if they led to the "probable unavailability of the NLRA's more effective remedies."¹⁹⁵

Rejecting the Board's argument that *AFB Freight System, Inc. v. N.L.R.B.*¹⁹⁶ controlled the issue of backpay in *Hoffman*, the Court drew a distinction between the worker's conduct in that case, engaging in perjury during an administrative proceeding, conduct which did not cause the worker to forfeit his NLRA remedy,¹⁹⁷ and conduct that renders an underlying employment relationship illegal under explicit provisions of federal law (IRCA). As the Court saw it, (in *AFB Freight System, Inc. v. N.L.R.B.*) "we expressly did not address whether the Board could award backpay to an employee who engaged in "serious misconduct" unrelated to internal Board proceedings . . . such as threatening to kill a supervisor,¹⁹⁸ . . . or stealing from an employer."¹⁹⁹ Significantly, the Court also placed critical importance on the fact that *Hoffman* implicates federal statutes and policies administered by agencies other than the N.L.R.B. When that is the case, the Court cautioned, the Board must be "particularly careful in its choice of remedies."²⁰⁰

After describing the conflict that arose among the Circuits as a result of the *Sure-Tan* decision, the court declined to resolve the controversy of whether *Sure-Tan* restricted remedies only for undocumented workers who had left the country, or whether it limited remedies for all undocumented workers.²⁰¹ Instead, the court purported to analyze the case through a wider lens, "focused as it must be on a legal

190. *Id.* (citing *Sure-Tan, Inc., v. N.L.R.B.*, 467 U.S.883, 892-893 (1984)).

191. *Id.* at 1280, 1281.

192. *Id.* at 1281.

193. *Id.* (citing *Sure-Tan, Inc., v. N.L.R.B.*, 467 U.S.883, 903 (1984)).

194. *Id.*

195. *Hoffman Plastic Compounds Inc. v. N.L.R.B.*, 122 S. Ct. 1275, 1281 (2002) (citing *Sure-Tan, Inc., v. N.L.R.B.*, 467 U.S.883, 903-904 (1984)).

196. *ABF Freight Sys., Inc. v. N.L.R.B.*, 510 U.S. 317 (1994).

197. *Hoffman Plastic Compounds Inc. v. N.L.R.B.*, 122 S. Ct.1275, 1281-1282 (2002).

198. *Id.*

199. *Id.*

200. *Id.* (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172 (1962)).

201. *Id.* at 1282

landscape now significantly changed” (by the passage of IRCA).²⁰²

The Court then ruled the matter in *Hoffman* is controlled by the *Southern S.S. Co.* line of cases, which established that “where the Board’s chosen remedy trenches upon a federal statute or policy outside the Board’s competence to administer, the Board’s remedy may be required to yield.”²⁰³ In the Court’s view, that is exactly the situation that exists at present because of the passage in 1986 of IRCA,²⁰⁴ which consists of a “comprehensive scheme prohibiting the employment of illegal aliens in the United States.”²⁰⁵

After a discussion of IRCA’s employment verification requirements and penalties for violations of the statute, the Court stressed that it was undisputed that Castro had violated the statute by submitting false documents to obtain employment with Hoffman.²⁰⁶ Thereafter, Castro’s violation of the immigration laws became the central focus of the court’s analysis. Despite the employer’s NLRA violations, the Court found it impossible to overlook Castro’s immigration status and follow the Board’s recommendation to award him backpay “for years of work not performed, for wages that could not have lawfully have been earned, and for a job obtained in the first instance by criminal fraud.”²⁰⁷ Reasoning that a backpay award runs counter to policies underlying IRCA, which the Board has no authority to enforce or administer, the Court rejected the Board’s claim that a limited backpay award to Castro “reasonably accommodates” IRCA, because such an award is not “inconsistent” with IRCA.²⁰⁸ The Court also dismissed, without discussion, the idea advanced by the Board that because the backpay period was closed after Hoffman learned of Castro’s immigration status, Hoffman could have employed Castro during that period without violating IRCA.

In response to the Board’s argument that “while IRCA criminalized the misuse of documents, it did not make violators ineligible for backpay awards or other compensation flowing from employment secured by the misuse of those documents,”²⁰⁹ the court stated that “the mutiny statute in *Southern S.S. Co.*, and the INA in *Sure-Tan* were likewise understandably silent with respect to such things as backpay awards under the NLRA.”²¹⁰ In the court’s view, what really mattered was that Castro had violated immigration law.²¹¹ The Court found no Congressional mandate to permit backpay, even in the legislative history of the statute cited by the Justice Breyer. It dismissed Breyer’s suggestion of legislative intent as “a single Committee Report from one House of a politically divided Congress.”²¹² In the majority’s opinion, there is no Congressional mandate to award backpay “where but for an employer’s unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities.” The court concluded that “[f]ar

202. *Id.*

203. *Id.* (emphasis added)

204. *Hoffman Plastic Compounds Inc. v. N.L.R.B.*, 122 S. Ct. 1275, 1281 (2002) (citing § 101(a)(1), 100 Stat. 3360, 8 U.S.C. § 1324a).

205. *Id.* (citing § 101(a)(1), 100 Stat. 3360, 8 U.S.C. § 1324a).

206. *Id.*

207. *Id.* at 1283.

208. *Id.*

209. *Id.*

210. *Hoffman Plastic Compounds Inc. v. N.L.R.B.*, 122 S. Ct. 1275, 1283 (2002).

211. *Id.* at 1283, 1284.

212. *Id.* at 1284 n.4.

from “accommodating IRCA, the Board’s position, recognizing employer misconduct but discounting the misconduct of illegal alien employees, subverts it.”²¹³

The Court also ruled that “awarding back pay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations.”²¹⁴ In the Court’s view Castro only qualified for the award by remaining in the country. According to the Court, “the Board admits that had the INS detained Castro or had Castro obeyed the law and departed to Mexico, Castro would have lost his right to backpay.” Because Castro could only qualify for the award by remaining in the country illegally, the Court found the award to be an inducement to continue violating immigration law. The court also noted that Castro could not mitigate damages without triggering new IRCA violations.²¹⁵

In conclusion, the Court asserted that sanctions such as cease and desist orders and the requirement that Hoffman conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices in addition to contempt proceedings should the employer fail to comply with these orders, suffice to protect the NLRA. Having deemed such “traditional remedies” sufficient to effectuate national labor policy regardless of whether the “spur and catalyst of backpay accompanies them”²¹⁶ the Court concluded that “in light of the practical workings of the immigration laws,” any “perceived deficiency in the NLRA’s existing remedial arsenal “must be “addressed by congressional action,” not the courts.”²¹⁷

The Dissent

In a powerful dissent, joined by justices Stevens, Souter and Ginsburg, Justice Breyer focused sharply on the deterrent aspect of the N.L.R.B. backpay with respect to violations of immigration and labor law.²¹⁸ Noting that Castro was clearly dismissed for engaging in activity protected by the NLRA, Breyer stressed the Board has broad discretion to fashion a remedy for such violations, not only to compensate the victim of discrimination but also to deter employers from violating the Nation’s labor laws.²¹⁹ According to Breyer, without the deterrence of a backpay award, the Board can only impose future-oriented obligations on employers who violate the labor laws.²²⁰ Therefore, “in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity.”²²¹

213. *Id.* at 1283, 1284.

214. *Id.* at 1284.

215. *Id.* A typical response to this type of question in other contexts has been that the notion undocumented workers are “unavailable for work” is a legal fiction. “Of course, it is a legal fiction that an undocumented alien cannot get any jobs; between applicant willingness to conceal, and employer inability or unwillingness to detect undocumented status, hirings occur.” *Rivera v. United Masonry, Inc.*, 948 F.2d 774, 776 (D.C. Cir. 1991).

216. *Hoffman Plastic Compounds Inc. v. N.L.R.B.*, 122 S. Ct. 1275, 1285 (2002) (citing *Sure-Tan, Inc., v. N.L.R.B.*, 467 U.S.883, 904 (1984)).

217. *Id.* (citing *Sure-Tan, Inc., v. N.L.R.B.*, 467 U.S.883, 904 (1984)).

218. *Id.* at 1285, 1286.

219. *Id.* at 1286.

220. *Id.*

221. *Id.* (citing *A.P.R.A. Fuel*, 320 N.L.R.B. 408, 415 (1995) (without potential backpay order employer might simply discharge employees who show interest in a union “secure in the knowledge” that only penalties were requirements to ‘cease and desist and post a notice’). *See also* *Golden State Bottling*

Breyer also took the majority to task for relying on unexplained policies in the immigration laws. He first scolded the majority for its failure to articulate a “policy” “that might warrant taking from the Board this critically important remedial power,” a policy that Breyer could not identify in the statutory language.²²² He also questioned strongly the majority’s reliance upon the immigration laws’ purposes, explaining that the general purpose of the immigration laws is to eliminate the “magnet” of employment that “pulls illegal immigrants towards the United States.”²²³ Breyer then described an award of backpay as too “speculative a future possibility” to “realistically influence an individual’s decision to migrate illegally.”²²⁴

Breyer asserted that the majority’s decision to take away the backpay remedy from the Board may accomplish the exact opposite of what the immigration laws are designed to prevent.²²⁵ According to Breyer, the lack of backpay remedies essentially lowers the cost of employing undocumented immigrants, increasing the employer’s incentive to hire them.²²⁶ Stressing that the issue of whether backpay remedies are available in cases where the employer knowingly hires undocumented immigrants was not before the Court, Justice Breyer nevertheless warned that the ruling grants immunity to employers in borderline cases.²²⁷ According to Breyer, the Court’s ruling therefore essentially allows the employers to hire “with a wink and a nod,” workers with questionable immigration status, whose hiring would lower the costs of labor law violations.²²⁸

Addressing the Court’s skepticism of the Board’s ability to interpret immigration laws, Justice Breyer explained that, “the immigration law’s specific labor-related purposes also favor preservation, not elimination of the Board’s backpay powers.”²²⁹ He then cited IRCA’s legislative history to support the point that the immigration law foresees application of the labor laws to protect “workers who are illegal immigrants.”²³⁰

The majority’s reliance on precedent also drew sharp criticism. Justice Breyer noted that the court had indeed upheld an award for backpay for an unlawfully discharged employee who had committed a serious crime, namely

Co. v. N.L.R.B., 414 U.S. 168 (1973); EEOC v. Waffle House, Inc., 122 S. Ct. 754, 765 n. 11 (2002) (backpay award provides important incentive to report illegal employer conduct); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975) (“it is the reasonably certain prospect of a backpay award” that leads employers to “shun practices of dubious legality”).

222. *Hoffman Plastic Compounds Inc. v. N.L.R.B.*, 122 S. Ct. 1275, 1286 (2002).

223. *Id.* (citing H.R. REP. NO. 99-682, pt. 1, at 45 (1986)).

224. *Id.* (citing A.P.R.A. Fuel, 320 N.L.R.B. 408, 410-415 (1995)) (no significant influence from such a speculative factor); *Patel v. Quality Inn S.*, 846 F. 2d 700, 704 (11th Cir. 1988) (aliens enter the country in the “hope of getting a job,” not gaining “the protection of our labor laws”); *Peterson v. Neme*, 222 Va. 477, 482 (1981) (same); *Arteaga v. Literski*, 83 Wis. 2d 128, 132 (1978) (same); H.R. REP. NO. 99-682, pt. 1, at 45 (1986) (same)).

225. *Id.*

226. *Id.*

227. *Id.*

228. *Hoffman Plastic Compounds Inc. v. N.L.R.B.*, 122 S. Ct. 1275, 1286 (2002) (citing Gen. Accounting Office, *Garment Industry: Efforts to Address the Prevalence and Conditions of Sweatshops*, GAO/HES-95-29, at 8 (Nov. 1994) (noting a higher incidence of labor violations in areas of large populations of undocumented workers)).

229. *Id.* at 1287 (citing A.P.R.A. Fuel, 320 N.L.R.B. 408, 414 (1995)).

230. *Id.* (citing *Sure-Tan v. N.L.R.B.*, 467 U.S. 883, 891-893 (1984)); H.R. REP. NO. 99-682, at 58 (1986)).

perjury, leaving enforcement of the criminal law to “ordinary perjury-related civil and criminal penalties,”²³¹ implying that, in Castro’s case, immigration law is the proper means to deal with his immigration violations. Regarding the Court’s reliance on two cases in which it had set aside the Board’s remedy,²³² Breyer reminded the majority that the two cases involved *reinstatement* of workers who had committed unlawful acts against the employer, a sit-in strike in one and mutiny in the other.²³³ In both of those cases, despite the employer’s unfair labor practices, the employees’ misconduct provided the employer with “good cause” for the discharge.²³⁴ Breyer contrasted those facts with *Hoffman*, which did not include a discharge for “good cause.” In Breyer’s opinion, the discharge in *Hoffman* “did not sever any connection with an unfair labor practice. Indeed, the discharge was the unfair labor practice”²³⁵ The difference, as Breyer saw it, was between a lawful discharge (the former) and an unlawful discharge (*Hoffman*).

Breyer’s response to the majority’s refusal to “award backpay to an illegal alien [1] for years of work not performed, [2] for wages that could not lawfully have been earned, and [3] for a job obtained in the first instance by criminal fraud,” was equally sharp. Regarding the first point, Breyer reminded the majority that backpay is awarded to employees who may not find other work,²³⁶ and that the Board can tailor backpay awards to reflect the immigrant’s legal inability to mitigate damages.²³⁷ Breyer’s criticism of the next two features reflected his view that the court had focused almost exclusively on the employee’s violation of immigration law to the exclusion of the employer’s unfair labor practices. It also reflected the real context in which immigration law and labor law operate. In his opinion, “unlawfully earned wages” and “criminal fraud” only told a small portion of the relevant story.²³⁸ Looking at backpay awards from the perspective of deterrence, Breyer noted that the employer who violates labor law can be made to pay an “employee whom it believes could lawfully have worked in the United States (this would be consistent with IRCA’s “good faith” defense); for years of work that he would have performed, for a portion of the wages he would have earned, and for a job that the employee would have held—had the employer not dismissed the employee for union organizing.”²³⁹ According to Breyer, “[i]n ignoring these later features of the award, the Court undermines the public policies that underlie the Nation’s labor laws.”²⁴⁰

Breyer concluded by stressing that according to long-established principles of administrative law, the Board was owed deference by the Supreme Court. He argued that, unlike the majority, the Board had reached its decision to award backpay

231. *Id.* at 1287, 1288 (citing *ABF Freight Sys., Inc., v. N.L.R.B.*, 510 U.S. 317, 325 (1994))

232. *Id.* at 1288 (citing *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 250 (1939), and *Southern S.S. Co. v. N.L.R.B.*, 316 U.S. 31, 32-36, 48-49 (1942)).

233. *Id.*

234. *Hoffman Plastic Compounds Inc. v. N.L.R.B.*, 122 S. Ct. 1275, 1288 (2002).

235. *Id.*

236. *Id.* at 1289.

237. *Id.* (citing *Sure-Tan, Inc., v. N.L.R.B.*, 467 U.S. 883, 901-902 (1984)) (basing backpay on “representative employee”); *A.P.R.A. Fuel*, 320 N.L.R.B. 408, 416 (providing backpay for reasonable period); *Hoffman Plastic Compounds, Inc.*, 326 N.L.R.B. 1060, 1062 (cutting off backpay when employer learned of unlawful status)).

238. *Id.*

239. *Id.*

240. *Hoffman Plastic Compounds Inc. v. N.L.R.B.*, 122 S. Ct. 1275, 1289 (2002).

“after carefully considering both labor and immigration law,”²⁴¹ and that the Board had acted “with a discriminating awareness of its action” on the immigration laws.²⁴² Breyer noted that his later point was bolstered by the fact that the Attorney General, charged with the enforcement of immigration law, supported fully the Board’s decision.²⁴³ He finished by stating that the Board’s decision is, at the very least, reasonable, and consequently, lawful.²⁴⁴

A. *Does Hoffman Foreclose Backpay for Knowingly-Hired Undocumented Workers Who Are Unlawfully Discharged?*

One of the most significant issues in *Hoffman* is whether it precludes backpay when an employer unlawfully discharges workers whom he hired in complete disregard of the Nation’s immigration laws. In denying backpay, the *Hoffman* majority refused to resolve the conflict in *Sure-Tan*, citing what it called a changed legal landscape caused by the passage of IRCA in 1986. However, as has already been shown, little has changed as a result of the passage of that statute. Just as it was hard to run afoul of the Immigration and Nationality Act of 1952 because of the Texas proviso, it is also difficult to run afoul of IRCA as a result of its many loopholes and purposeful lack of enforcement. Consequently, even employers who knowingly hire undocumented workers understand that the risk of punishment for violations of the immigration laws is minimal.

Importantly, the *Hoffman* majority noted with some force that the employer in that case had only learned about the worker’s undocumented status after the proceedings before the ALJ had begun.²⁴⁵ That observation could be taken to suggest two things: first that employers who were not aware of their workers undocumented status should receive more sympathy for not knowingly violating immigration law; and, second, that a case involving knowing violators of immigration law would be decided differently. Similarly, in his dissent, Justice Breyer emphasized that the question of whether backpay is available when the employer knowingly hires undocumented workers was not before the Court. In what may have been an attempt to safeguard backpay remedies in cases involving unscrupulous employers bent on violating both immigration and labor law, Justice Breyer stressed that, “[w]ere the Board forbidden to assess backpay against a *knowing* employer—a circumstance not before us today. . . this perverse economic incentive, which runs directly contrary to the immigration statute’s basic objective would be obvious and serious.”²⁴⁶

241. *Id.* (citing *Hoffman Plastic Compounds, Inc.*, 326 N.L.R.B. 1060, 1062; *A.P.R.A. Fuel*, 320 N.L.R.B. at 412, 414).

242. *Id.*, at 1290 (citing, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 174 (1962)).

243. *Id.* (citing 8 U.S.C. § 1324a(e) (2000) (INS placed within the Department of Justice, under authority of the Attorney General who is charged with responsibility for immigration law enforcement); *United States v. Mead Corp.*, 533 U.S. 218, 258-259 n.6 (2001) (Scalia, J., dissenting) (Solicitor General’s statements represent agency’s position); *Jean v. Nelson*, 472 U.S. 846, 856 & n.3 (1985) (agency’s position with respect to its regulation during litigation “arrives with some authority”).

244. *Id.* (citing *Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984) (requiring courts to uphold reasonable agency decisions)).

245. *Id.* at 1279.

246. *Hoffman Plastic Compounds Inc. v. N.L.R.B.*, 122 S. Ct. 1275, 1287 (2002) (Breyer, J., dissenting).

However, despite Justice Breyer's warning, and its own observation that the employer had not known of the worker's undocumented status at the time the job offer was made, the *Hoffman* majority did not draw a distinction in cases involving known undocumented hires and those that are newly discovered after protected activity has commenced. Though the majority did not address directly Justice Breyer's assertion that the consequences of "knowing employment" of undocumented workers was not before the Court, it did, indirectly seem to foreclose the possibility of backpay even in those cases. Despite its focus on the employer's lack of complicity in the formation of an employer/employee relationship in violation of IRCA, the *Hoffman* majority did not limit its analysis to those situations. On the contrary, it hinted strongly that its analysis applied to all cases.

While ignoring the deterrent functions of backpay awards and the culpable conduct of violators of the NLRA, the Court painted all undocumented workers with a broad stroke, failing to distinguish between those who were victimized by employers who hired them knowing of their undocumented status, and those whose employers did not violate immigration law. Though the *Hoffman* majority did not resolve the ambiguity over the meaning of *Sure-Tan* because of a "changed legal landscape" brought about by the passage of IRCA, it nevertheless relied on the "plain language" of that case to support its holding that undocumented immigrants should not be paid money "not earned for work not performed that could not have been performed legally." That holding ignores the fact that in many cases unscrupulous employers use their workers' unauthorized status against them, and should be deterred from that conduct.

The majority also pointed out undocumented workers cannot legally mitigate damages by securing other employment while unauthorized. Again, that statement too, while ignoring economic and social reality, indicates that no distinction was drawn among the two classes of undocumented workers. The same can be said for Court's view that employers who violate labor law by unlawfully discharging undocumented workers are still subject to cease and desist orders and orders to post notices for violations of the nation's labor laws; and for its observation that the possibility of backpay remedies, even those as remote as the remedy in *Hoffman*, provide incentives for undocumented workers to remain in the country unlawfully. The Court's one-sided focus on workers' lack of authorized immigration status, and the need to discourage them from coming into the U.S., and its obvious lack of attention to the culpability of employers who violate immigration and labor laws, suggests strongly that even workers who are hired with full knowledge of their unauthorized immigration status and unlawfully discharged are not eligible for backpay.

In response to some of these features in *Hoffman*, the General Counsel of the National Labor Relations Board has advised all Regional Directors, Officers-in-charge, and Resident Officers to abstain from seeking backpay remedies even in cases involving the unlawful discharge of undocumented workers who were hired in complete disregard for the nation's immigration laws.²⁴⁷ That decision is premature. It is reminiscent of the Board's earlier decision to seek only conditional reinstatement and backpay in *Felbro*, which relied on ambiguous language in

247. Memorandum from the general counsel to the N.L.R.B., GC 02-06, Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens After *Hoffman Plastic Compounds, Inc.* C.1. (July 19, 2002), at <http://www.lawmemo.com/emp/N.L.R.B./gc02-06.htm>.

Sure-Tan and was later found to be inconsistent with U.S. labor policy.

Because of similar ambiguity in *Hoffman*, the issue should be decided in the courts. Already, one court in a case under the Fair Labor Standards act distinguished *Hoffman* not only on grounds that *Hoffman* only prohibits payment for work not performed, but also on grounds that the case before it involved an employer who had knowingly violated immigration law.²⁴⁸ Though the “knowing” hiring of undocumented workers would not have made a difference because the wages had already been earned, it is important to note that the court felt compelled to condemn the unscrupulous nature of the employer’s practices.

It is no secret that purposeful exploitation of undocumented workers continues to be a serious national problem. It is hard to imagine that the Supreme Court intended to enable employers, who conspire with smugglers to procure undocumented workers and who later exploit those workers, to reduce the risk of operating outside the law. However, by hinting strongly that whether the employees are hired outside the law should not make a difference, the Court may have unwittingly accomplished that result. The Court’s inattention to these problems is also surprising in light of the decision of the federal government to criminally prosecute smugglers under the Trafficking Victims Prevention Act.²⁴⁹

In a document detailing an inspection of the INS’ efforts to combat harboring and employing of undocumented immigrants in sweatshops, the Department of Justice reported that undocumented immigrants compose a large number of the sweatshop workforce in the U.S. The agency reported that those workers frequently labor for long hours for less than the minimum wage under working conditions sometimes approaching involuntary servitude. The agency also reported sweatshop conditions exist in garment manufacturing, restaurant and meat-processing industries. It also found that the undocumented status of this workforce inhibits most of these workers from challenging their poor working conditions and sub-minimum wages through an appeal to government labor agencies.²⁵⁰ The Justice Department’s findings are confirmed by the U.S. Department of Labor, which also found that violations of the nation’s labor and immigration laws are widespread in the garment industry.²⁵¹

The exploitation of undocumented immigrants by unscrupulous operators in the garment industry was also exposed in a July 26, 2001 investigative report by Newsday. The article chronicled the story of Xue Yan Huang, a machine operator

248. *Singh v. Charanjit Jutla*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002).

249. The Trafficking Victims Prevention Act provides for protection for victims of severe human trafficking. The Act provides information and translation services, and enables victims of severe forms of trafficking and witnesses to remain in the United States. See Testimony of Ralph F. Boyd, Jr., Assistant Attorney General for Civil Rights, Committee on International Relations, United States House of Representatives, Implementation of the Trafficking Victims Protection Act, at <http://www.usdoj.gov/crt/speeches/1129testimony.htm>.

250. See Inspections Div., Dep’t of Justice, Inspections Report of the Immigration and Naturalization Service’s Efforts to Combat Harboring and Employing Illegal Aliens in Sweatshops (May 1996), at <http://www.usdoj.gov/oig/i9608/i9608p1.htm>.

251. Press Release, U.S. Dep’t of Labor, New Jersey Garment-Sewing Shops Re-Inspected By U.S. Labor Department; More Than Half Still Violating Minimum Wage And Overtime Law, at <http://www.dol.gov/esa/media/press/whd/ny/206.htm> (Oct. 16, 2000); Press Release, U.S. Dep’t of Labor, Only One-Third Of Southern California Garment Shops In Compliance With Federal Labor Laws, at <http://www.dol.gov/esa/media/press/whd/sfwh112.htm> (Aug. 25, 2000); Press Release, U.S. Dep’t of Labor, Garment Shops Fined \$270,000 For Violating Federal Labor Laws, at <http://www.dol.gov/esa/media/press/whd/sfwh141.htm>.

who made less than \$3 an hour. Ms. Huang, who was 69 years old in 1996, severely fractured her arm on a fall that resulted from an unkempt floor. The employer refused to provide medical treatment to her, maintaining that she had never worked at that factory. On the night she was injured, the employer had changed the hours of Ms. Huang and several other Chinese immigrants to a 14-hour night shift to avoid Labor Department inspectors.²⁵²

Today, little incentive exists under the U.S. labor laws for an undocumented worker in Ms. Huang's situation to act in concert with other employees to protest inhumane working conditions, not to mention to attempt to organize collective action. *Hoffman*, and the N.L.R.B.'s decision not to pursue backpay remedies even against employers who knowingly violate the law in such a brazen manner have just handed those employers a formidable tool to continue oppressing their undocumented workforce and to continue undercutting their law-abiding competitors.

Cases of abuse of undocumented workers at the hands of unscrupulous employers who knowingly hire them while intending to violate labor and employment laws, and then use the INS against them are not rare. In an amicus brief filed on behalf of Castro, the National Employment Law Project, and a number of other prominent civil rights organizations, cited numerous examples of those kinds of abuses.²⁵³

The *Hoffman* majority's focus on punishing the employee's violation of the nation's immigration laws while virtually ignoring the employer's violation of labor law and immigration law is inconsistent with the intent of Congress in passing IRCA. IRCA was passed two years after the Supreme Court's *Sure-Tan* decision, eliminating the "Texas proviso." Its primary focus was to deter employers from "knowingly hiring" undocumented workers.

8 U.S.C. §1324a (IRCA) provides in part:

(a) (1) In general, it is unlawful for a person or other entity (A) to hire or to recruit or refer for a fee, for employment in the United States, an alien knowing the alien is an unauthorized alien . . . with respect to such employment, or (B)(i) an individual without complying with the requirements of subsection (b) of this section, (the verification provisions) or, (ii) if the person or entity is an agricultural employer or farm labor contractor (as defined in section 1802 of title 29), to hire or to recruit or refer for a fee, for

252. Thomas Maier, *Blood, Sweat, Tears*, *Newsday* at <http://www.newsday.com/news/ny-work-swcat726.story>. See also Swcatshop Watch, *El Monte Thai Workers: Slave Sweatshops* <http://www.swcatshopwatch.org/swatch/campaigns/elmonte.html> (detailing the story of a sweatshop in El Monte California where 72 Thai workers were held under lock in virtual slavery, many for up to 17 years, by an employer who controlled them by threatened harm to the workers, and their families in Thailand. Their captor (and employer) monitored their phone calls and their letters and sold them food and other necessities at up to 5 times the market price); *Bureerong v. Uvawas*, 959 F. Supp. 1231 (C.D. Cal. 1997) (involving claims under respondeat superior theory against manufacturers that did business with EL Monte sweatshop operators).

253. Brief of Amici Curiae National Employment Law Project, Mexican American Legal Defense and Educational Fund, Asian American Legal Defense and Education fund, Coalition for Humane Immigrant Rights of Los Angeles et al., at 12-21. (citing *Contreras v. Corinthian Vigor Ins. Brokerage Inc.*, 25 F. Supp. 2d 1053 (N.D. Cal. 1998); *Urrea v. New England Tea & Coffee Co.*, 2000 WL 1483215 (Mass. Super. 2000); *Fuentes v. INS*, 765 F.2d 886, 887 (9th Cir. 1985), *vacated* 844 F.2d 699, 700 (9th Cir. 1988), at <http://nelp.org/litigation/litig11.pdf>).

employment in the United States an individual without complying with the requirements of subsection (b) of this section.

(a) (2) [I]t is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1) to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

IRCA was designed to stem the flow of undocumented workers by two principal means: 1) legalization of people who had entered the country before January 1 1982,²⁵⁴ and, 2) employer sanctions designed to punish employers who knowingly hire undocumented workers, by means of civil fines and criminal penalties.²⁵⁵ Covered employers may be punished civilly²⁵⁶ for three types of offenses: first for knowingly hiring an unauthorized worker; second, for failing to comply with the verification requirements of the statute, and third; for continuing to employ an individual having learned that he is unauthorized to work in the United States. In addition, they may be punished criminally for a pattern or practice of violations.²⁵⁷

According to IRCA's legislative history, the legalization provisions were intended to eliminate an underclass of people whose fear of detection and deportation left them vulnerable to exploitation by unscrupulous employers, and to protect jobs for Americans and other legal residents.²⁵⁸ Employer sanctions, on the other hand, were designed to eliminate the lure of jobs thought to be a major cause of unauthorized immigration, by punishing employers who knowingly operate outside the law.²⁵⁹

254. Only those people who entered the country before Jan. 1, 1982 were eligible for legalization under IRCA if they could prove they had resided continuously in the United States in an unlawful status since that date and through the date the application was filed. 8 U.S.C. § 1255a(a)(2)(A)(1994). In addition those applicants had to establish "continuous physical presence" between the date the law was enacted and the date their legalization application was filed. § 1255a(a)(3)(A)-(B). The limits imposed by these effective dates helped ensure the undocumented population would continue to exist. See Catherine L. Merino, *Compromising Immigration Reform: The Creation of A Vulnerable Subclass*, 98 Yale L. J. 409, 411-412 (1988).

255. Cease and desist orders can be issued, and civil money penalties are assessed, for hiring, recruiting and referral violations. 8 U.S.C. § 1324a(e)(4) (1994). Fines can range from \$250 to \$2000 for each alien, no less than \$2000 for each such alien in the case of a person or entity previously subject to one order under this paragraph (*id.* at (ii)); and, no less than \$3000 and no more than \$10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph. § 1324a(e)(4)(A)(i)-(iii). Civil penalties for paperwork violations are, no less than \$100 and no more than \$1000 for each individual. § 1324a(e)(5). When the employer or other entity engages in a pattern or practice of knowingly hiring, recruiting or referring unauthorized aliens for employment is subject to a criminal penalty of up to \$3000 per violation and up to six months in jail. § 1324a(f)(1).

256. *Id.* § 1324a(e)(4) Cease and desist order with civil money penalty for hiring, recruiting and referral violations; (5) Order for civil money penalty for paperwork violations; § 1324a(f) Criminal penalties and injunctions for pattern or practice violations.

257. *Id.* § 1324a(f) Criminal penalties and injunctions for pattern or practice violations.

258. A House Judiciary Committee Report issued prior to the passage of IRCA expressed the concern that the willingness of many undocumented immigrants to accept low wages and substandard working conditions makes them attractive to some employers who are ready to exploit them as a source of labor, to the detriment of United States workers whose wages are depressed or whose jobs are lost. See H.R. REP. NO. 99-682(I) (1986), at 47, 52, 58, *reprinted in* 1986 U.S.C.C.A.N. 5651, 5656, 5652.

259. "Employment is the magnet that attracts undocumented workers here illegally[.]" *Id.* at 46.

The problem of the “knowing” employment of undocumented workers was addressed by the Second Circuit in *N.L.R.B. v. A.P.R.A. Fuel Oil Buyers Group Inc.* In that case, the court explained that in passing IRCA, Congress sought to deter the hiring of undocumented workers through an employer-centered mechanism.²⁶⁰ According to that court, “the heart of the act is a provision making it unlawful for any person or entity to hire, recruit, or refer for employment any person known to be unauthorized to work in this country.”²⁶¹ Furthermore, the court noted, that IRCA contains many more sanctions directed at employers than employees attests to Congress’ design to focus on employers not employees.²⁶²

Perhaps most importantly, the Second Circuit also noted that IRCA does not reduce the legal protections available to undocumented workers under labor law.²⁶³ According to the court, Congress’ principal aim when it passed IRCA, was to eliminate the appeal of undocumented workers to *unscrupulous employers* (emphasis added).²⁶⁴ Adding that “[IRCA] was not intended to limit in any way the scope of the term ‘employee,’ [or] the rights and protections stated in sections 7 and 8 of the Act.”²⁶⁵ The court reasoned that this means “provisions codified at 29 U.S.C. §§157,158, which guarantee the right to organize, bargain collectively through representatives, and to be free of unfair labor practices designed to prevent such activities.”²⁶⁶

At first glance it would appear that the second circuit’s opinion in *A.P.R.A. Fuel* does not account for the practical implications of immigration law enforcement. However, the court’s reasoning must be analyzed in the context of remedies for labor law violations, keeping in mind that immigration law enforcement is a separate issue. IRCA was designed to deter employment of undocumented workers by punishing both employers and undocumented employees, not just employers. It was not designed to be played against statutes guaranteeing labor protections.

Hoffman shifts IRCA’s focus one hundred eighty degrees in the labor/immigration context by failing to distinguish between knowing violators and those who accidentally hire undocumented workers. *Hoffman* enables unscrupulous employers who hire undocumented workers in violation of IRCA and who then discharge them in violation of the NLRA when they act in concert for mutual aid and protection, or attempt to form or join labor unions, to play both statutes against each other and enjoy the windfall. The possibility of similar windfalls has convinced some courts to treat cases involving knowing violators differently from cases involving employers who hired workers unaware of their immigration status.²⁶⁷

Those windfalls argue strongly for treating cases involving “knowing” violators of immigration law differently from those involving employers who are truly unaware of their employees’ immigration status. The economic advantage gained by the former as a result of their illegal activity was driven home forcefully

260. *N.L.R.B. v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 55, 56 (2nd Cir. 1997).

261. *Id.* at 56 (citing IRCA’s legislative history, H.R. REP. NO. 99-682 (I), at 46, 91 (1986), reprinted in 1986 U.S.C.C.A.N. 5650, 5695).

262. *Id.* at 56.

263. *Id.*

264. *Id.*

265. *Id.* (citations omitted)

266. *N.L.R.B. v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 56 (2nd Cir. 1997).

267. *See, e.g., Manis v. Arellano*, 13 Va. App. 292 (1991).

by an amicus brief arguing in favor of backpay in *Hoffman*.²⁶⁸ Another amicus brief, arguing against backpay, seemed to make the same point, though less directly, by observing that Hoffman was innocent of violating immigration law.²⁶⁹

In its amicus brief, the Employers and Employee Organizations in Support of Respondent [hereinafter EEOSR] relied heavily on economic analysis to argue in favor of backpay for workers who are unlawfully discharged by “knowing” employers. EEOSR argued that a contrary result would “create economic incentives for shoddy employers to violate the law, and subject law-abiding companies to the unfair competition that Congress, the courts, and the administrative agencies sought to avoid.”²⁷⁰ EEOSR argued that backpay awards help to avoid the creation of unfair competitive advantages for violators over law-abiding businesses, comparing that function to cases where government agencies operate to ensure that regulatory avoidance does not result in similar gains.²⁷¹ Citing the economic pressures that exist in low margin, labor-intensive businesses like the garment industry, which faces heavy domestic and foreign competition, and the meatpacking and agriculture industries, which also face great pressures to control costs, EEOSR argued that the adverse economic consequences from rogue employers who violate labor and immigration law by hiring low cost undocumented labor were real and direct.²⁷²

For purposes of this analysis it is important to consider that the good faith defense under IRCA, and the ease with which documents that appear to satisfy the requirements of the INS I-9 forms can be obtained, enable the employer/employee relationship to form without much of a risk to the employer. In fact, those cases may actually be the rule rather than the exception. It is also important to consider that in many cases even employers who knowingly hire undocumented workers, or who have a reasonable suspicion that they may have some of those workers in their employ, do not use the workers’ immigration status against them. Many of those employers (particularly those who depend on this workforce because of the undesirability of the work) willingly negotiate with labor unions over terms and conditions of employment. Therefore, the most significant effect of *Hoffman* may be that the most unscrupulous employers—those who conspire to bring the workers to the U.S. and who then treat them poorly—will enjoy the biggest windfall. The windfall will not only include the avoidance of backpay awards, it will also include savings in wages and benefits that will result from undeterred intimidation and coercion.

Of course, a “knowing” unscrupulous employer is not always one who manifests aggressively its knowledge of the workers’ immigration status and uses it to oppress them. Sometimes the unscrupulous employer will simply keep information of the workers’ undocumented status close to the vest and use it only when it absolutely needs to. Those situations too can result in unfair competitive

268. See Brief of Amici Curiae Employers and Employer Organizations in Support of Respondent No. 00-1595, 2001 WL 1631729, *6 (Dec. 10, 2001).

269. Concern about punishing employers who have hired undocumented workers without knowing of their immigration status, and providing a windfall to those who manage to conceal their status from their employer, was also expressed in an amicus brief filed on behalf of Hoffman. See Brief of Amici Curiae Equal Employment Advisory Council and LPA, Inc. in Support of Petitioner, No. 00-1595, 2001 WL 1480578 at *4, *19 (Nov. 9, 2001).

270. EEOSR, at 30.

271. *Id.* at 14–23.

272. *Id.* at 19, 20.

advantages to the somewhat wiser (and immune) violators, and argues for backpay in all cases. Even so, given the limitations imposed by *Hoffman*, that cannot happen at this time without Congressional action. However, when it can be established that the employer acted with full knowledge and impunity in violation of both sets of laws, the N.L.R.B. must continue to pursue backpay remedies for those workers.

B. *Cease and Desist Orders, and the Possibility of Contempt Citations When De-Coupled From Backpay Remedies are Not Effective Deterrents to Violations of the Nation's Labor Laws*

The *Hoffman* majority cited the Board's authority to issue cease and desist orders and the threat of possible contempt sanctions for violations of those orders as sufficient to protect the integrity of the nation's labor laws.²⁷³ That position ignores the practical context in which labor/management relations are carried out, and the relative weakness of labor law. The general inadequacy of the labor laws to remedy unfair labor practices has been well documented.²⁷⁴ Even outside the immigration/labor context, the inadequacy of the remedies and the delays attendant in obtaining them make it cost efficient for employers to violate the NLRA.²⁷⁵ *Hoffman* just made it even easier and cheaper to do so.

It is well known the NLRA remedial scheme poses little deterrence to employers committed to defeating organizing campaigns.²⁷⁶ First, there is the absence of punitive remedies²⁷⁷ or fines for even the most egregious employer conduct such as threats of discharge, unlawful discharges of union organizers, threats of plant closings, withdrawals of benefits, or other kinds of reprisals.²⁷⁸ In fact, even orders or reinstatement and backpay are non-punitive.²⁷⁹ They are instead designed to place the aggrieved individual in the same position he would have been had the illegal employer conduct not taken place.²⁸⁰

Second, there is the delay attendant to any efforts on the part of employees to seek redress for illegal conduct.²⁸¹ Outside of orders of backpay or reinstatement for illegally discharged employees, the N.L.R.B. is only able to provide relief to employees subjected to illegal employer conduct by means of cease and desist orders.²⁸² Those orders are not self-executing.²⁸³ To enforce its cease and desist orders, the N.L.R.B. must petition a court of appeals for an enforcement order.²⁸⁴ The additional steps can add significant time and cost to an already lengthy and

273. *Hoffman Plastic Compounds Inc. v. N.L.R.B.*, 122 S.Ct. 1275, 1278 (2002).

274. See, e.g., JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF AMERICAN LABOR RELATIONS POLICY, 1947-1994*, (1995); David L. Gregory, *Working for a Living*, 58 BROOK. L. REV. 1355 (1993); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769 (1983).

275. See James A. Gross, *Worker Rights as Human Rights: Wagner Act Values and Moral Choices*, 4 U. PA. J. LAB. & EMP. L. 479, 484-485 (2002).

276. See Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws"* 1990 WIS. L. REV. 1, 118-25 (1990).

277. See *Republic Steel Corp. v. N.L.R.B.*, 311 U.S. 7, 9-12 (1940).

278. *EEOSR*, *supra* note 272 at *8.

279. Rogers, *supra* note 278, at 120.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. Rogers, *supra* note 278, at 120.

expensive process. Delay is not only strongly associated with declining union success during elections,²⁸⁵ but also plays an important role in whether a worker is willing to file an individual complaint. *Hoffman* offers a good example of the kinds of delays that are commonplace in N.L.R.B. administrative processes and subsequent appeals. Eleven years passed from the time Castro's complaint was filed to the time the case was decided by the U.S. Supreme Court. Even without the Court's involvement, it would have taken Castro nine years to have his case decided.

To the extent that they work, cease and desist orders work best when coupled with the threat of backpay awards. They are most effective in the context of dynamic situations the law seeks to protect, like unionization campaigns where the preservation of the employer/employee relationship is paramount.²⁸⁶ Those desirable dynamic situations do not exist when undocumented workers are involved (at least not technically), especially once the INS is implicated in labor disputes. Even in cases where workers have been unlawfully reported to the INS for engaging in activity protected by the NLRA, the INS cannot be expected to ignore its responsibility under IRCA.²⁸⁷

Though the employees may have been victimized in violation of labor law, they nevertheless continue to be unauthorized workers. The INS is therefore obligated to process those workers, and will deport them if necessary. A cease and desist order (stating that the employer is to cease and desist from reporting undocumented workers to the INS for engaging in protected activity) at this time, will do little to deter violations of labor law. In effect, rather than provide deterrence, the possibility of such an order only after the fact, will give unscrupulous employers some peace of mind by enabling them to calculate the risk of their unlawful activities with precision. Therefore, cease and desist orders without backpay awards give the employer a free bite, and a formidable weapon in the battle over control of the workplace. Employers who are already operating outside the law will hardly be deterred by such orders.

The suggestion by the *Hoffman* majority that cease and desist orders and the

285. See Richard Block & Benjamin Wolkinson, *Delay in the Union Election Campaign Revisited: A Theoretical and Empirical Analysis*, in *ADVANCES IN INDUSTRIAL & LABOR RELATIONS* (David B. Lipsky & David Lewin eds., 1986).

286. Rodgers, *supra* note 278, at 5.

287. The INS is unlikely to respond to reports of undocumented workers in cases where it has reason to believe labor disputes are in progress. However, whether it responds or not is difficult to predict. INS Operating Instruction 287.3a entitled "Questioning Persons During Labor Disputes," (revised Dec. 4, 1996) states that when employers are given information about undocumented immigrants the agency must consider whether the information is being provided to interfere with or in retaliation of the workers' exercise of their rights under the labor statutes. If a determination is made that the information may have been provided to interfere with or retaliate against the employees' exercise of their rights, the agency cannot take action without further review by the District Counsel, the Assistant District Director for Investigations or an Assistant Chief Patrol. Though the agency attempts to avoid involvement in labor disputes, it is not prohibited from enforcing the immigration laws even when labor disputes or allegations of discrimination under other statutes exist. OI 287.3a, at <http://www.ins.usdoj.gov/lpBin/lpext.dll/inserts/slb/slb-1/slb-44385/slb-51990?f=templates&fn=document-frame.htm#slb-oi2873a> (visited 2/16/03). Thus, the agency has been known to both attempt to stay out of labor disputes in order to facilitate the enforcement of labor law, see *Illegal Hotel Workers Allowed to Stay in the U.S.* at <http://www.immigrationlinks.com/news/news243.htm> (where the INS allowed several undocumented workers who had been discharged in violation of labor law to remain and work in the U.S. for 2 years, and to enforce immigration law during a labor dispute). *Velasquez-Tabir v. INS*, 127 F.3d 456 (5th Cir. 1997) (where the INS arrested and deported several undocumented workers pursuant to an employer's report shortly after a successful union certification).

possibility of contempt sanctions suffice to protect the integrity of the nation's labor laws is but another example of the Court's inability or unwillingness to tie loose ends in the immigration/labor context. Its recognition of the existence of a remedy, though one as attenuated as cease and desist orders and contempt sanctions, must, by necessity go further than mere protection of the nation's labor laws. The notion that the integrity of the nation's labor laws can be protected while the rights of workers are ignored is a false premise. Even weak remedies such as cease and desist orders and contempt sanctions are granted for the benefit of workers. It is hard to imagine the court's justification for orders to cease and desist the unfair labor practice of reporting unauthorized workers to the INS in retaliation for engaging in activity protected by the NLRA. Given the practical implications of enforcing the nation's labor laws, those orders are meaningless. The same can be said for contempt sanctions.

C. *Did the N.L.R.B. "Trammel" Upon a Statute?*

The *Hoffman* majority rejected the N.L.R.B.'s interpretation of the policies behind IRCA. Among several cases, the majority cited *N.L.R.B. v. Bildisco & Bildisco*²⁸⁸ for the proposition that agency's interpretations of statutes must be set aside when they unnecessarily trammel upon statutes administered by other agencies.²⁸⁹ The Court's reference to that case only tells a part of the story. It also provides no guidance that can be used to determine whether an agency has "trammelled" upon a statute it does not administer. Though administrative law doctrine is beyond the scope of this article, it is useful to note the contradictions of the Court's treatment of the principles of deference to administrative agencies, and the steps Congress took to correct a potentially severe problem.

Contrary to the Court's interpretation, much like *Hoffman*, *Bildisco* is an example of an agency harmonizing two statutes designed to act in concert, rather than "trammeling" upon a statute upon which it has no jurisdiction. In *Bildisco* the Supreme Court addressed the apparent contradictions between the Bankruptcy Code and the NLRA. The issue in that case was whether collective bargaining agreements may be unilaterally rejected as executory contracts in a Chapter 11 reorganization. The Bankruptcy Code allows for the rejection of executory contracts under certain circumstances. Collective bargaining agreements are considered executory contracts. However, section 8(a) of the NLRA prohibits unilateral rejection of collective bargaining agreements.

Finding against the N.L.R.B., the Court ruled that the Bankruptcy Court can approve rejection of a collective bargaining agreement if three factors have been satisfied: 1) the agreement was a burden to the estate; 2) the debtor in possession demonstrated that the equities balanced in favor of rejection; and, 3) the debtor in possession made a reasonable effort to negotiate a voluntary modification of the collective bargaining agreement, and that such negotiations were not likely to succeed. In support of that position, the majority argued that because immediate infusions of capital may be necessary to keep the business operating, it would be counterproductive to force the debtor in possession to comply with the labor contract until a bankruptcy court finally authorized rejection of the agreement. Consequently,

288. 465 U.S. 513 (1984).

289. *Hoffman Plastic Compounds Inc. v. N.L.R.B.*, 122 S.Ct. 1275, 1280 (2002).

according to the Court, collective bargaining agreements may be unilaterally rejected by the debtor in possession before obtaining the approval of the bankruptcy court.

In dissent, Justice Brennan argued that petitions to reject collective bargaining agreements in bankruptcy required that the Court accommodate the policies of *both* federal statutes.²⁹⁰ In Brennan's opinion, that could not be accomplished by concentrating on the Bankruptcy Code alone.²⁹¹ Brennan also maintained that to examine both statutes would lead to the conclusion that Congress did not intend the filing of a bankruptcy petition to affect the applicability of § 8(d) of the NLRA.²⁹² Justice Brennan explained that section 8(d) of the NLRA provides that when a collective bargaining agreement is in effect, four additional requirements to the duty to bargain collectively are added. Brennan argued that no party to [the agreement] shall terminate or modify such contract unless he, (1) provided the other party to the contract with timely written notice of the proposed modification, (2) "offers to meet and confer with the other party," (3) provides timely notice to the Federal Mediation and Conciliation Service and any similar state agencies, and (4) 'continues in full force and effect . . . all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.'²⁹³ He therefore concluded that a unilateral modification of a collective bargaining agreement is a violation of § 8(d) of the NLRA.

Donald H. J. Hermann and David M. Neff, have analyzed *Bildisco* and the subsequent Congressional Response.²⁹⁴ Hermann and Neff first noted that Congress reacted to *Bildisco* by passing Section 1113 to the Bankruptcy amendments and Federal Judgeship Act of 1984.²⁹⁵ That law required the employer after filing its bankruptcy petition but before seeking court approval to reject the labor contract to: 1) make a proposal to the union, based on the most complete and reliable information supporting the modifications; 2) to treat creditor, the debtor, and all affected parties fairly and equitably in the proposal; 3) to offer the union any relevant information it needs to evaluate the proposal; and 4) to meet with the union at reasonable times and bargain in good faith in an effort to reach an agreeable modification of the collective bargaining agreement.²⁹⁶

Under this section, the bankruptcy court is precluded from allowing rejection unless the debtor produces an effective proposal and the union rejects it without "good cause." In addition, the equities must clearly balance in favor of rejection. Finally, the statute provides a way to seek interim changes in the collective bargaining agreement if they are "essential to the continuation of the business," or are needed to avoid "irreparable damage" to the estate. However, contrary to the Court's opinion, the debtor in possession cannot unilaterally reject the agreement under any circumstances without following the procedure outlined in the statute.

290. N.L.R.B. v. *Bildisco & Bildisco*, 465 U.S. 514, 541 (1984).

291. *Id.*

292. *Id.* at 541, 542.

293. *Id.* at 536.

294. Donald H.J. Hermann & David M. Neff, *Rush to Judgment: Congressional Response to Judicial Recognition of Rejection of Collective Bargaining Agreements Under the Bankruptcy Code*, 27 ARIZ. L. REV. 617 (1985).

295. *Id.* at 623.

296. *Id.* at 633-635.

A study of cases decided after the amendment, conducted by Hermann and Neff, concluded that bankruptcy courts applying §1113 balanced the policies of federal labor law and bankruptcy law.²⁹⁷ Bankruptcy law was not applied to the detriment of labor law after the statute was passed. Herman and Neff cited several cases in support of their conclusions. In one case the court ruled the employer's proposed savings by modifying the contract (by substantially reducing wages and insurance benefits) were so insubstantial that they could not be considered necessary to the bankruptcy reorganization, and also ruled that the employer's conduct—failure to confer in good faith with the union—violated the statute.²⁹⁸ Another case involved a proposed pay cut that was not tied to a general scheme to advance reorganization. In that case, the court ruled that “[m]erely demonstrating a resultant savings to the debtor to justify a modification does not appear to meet the statutory standard without the additional showing that but for the particular savings reorganization cannot be achieved.”²⁹⁹ The authors cited numerous other cases, some granting and some denying rejection of the collective bargaining agreement. All the cases demonstrated a careful balancing of the interests of the employer seeking reorganization and of interests of the labor union.

Rather than denying the N.L.R.B. a role in this process, the new statute cured the *Bildisco* problem by protecting employees' interest in the preservation of collective bargaining agreements while helping the employer to stay in business after declaring bankruptcy. The new statute enabled bankruptcy courts to deal with cases involving collective bargaining agreements, an area clearly outside of their expertise, by requiring the cooperation of the debtor in possession and the labor unions to ensure both interests were represented. By passing section 1113, Congress ensured that one interest was not ignored in favor of the other.³⁰⁰

Similarly, IRCA and the NLRA are intimately involved with labor issues. In cases that involve the hiring of undocumented workers who are then subjected to substandard working conditions or low wages while under the threat of deportation, one of those statutes cannot be enforced at the exclusion of the other. This task is best accomplished when the two different agencies cooperate, as is the case between the N.L.R.B. and the INS with respect to the enforcement of IRCA and the NLRA.

Though this relationship was not identified in Breyer's dissent, he did make the point that the agency charged with the interpretation of the Nations' immigration laws agreed with the N.L.R.B.'s harmonization of IRCA and the NLRA in *Hoffman*. Citing *Chevron v. Natural Resources Defense Council*, Breyer argued the agency's interpretation of IRCA deserved judicial deference.³⁰¹ In fact, both agencies have a history of cooperation in the immigration/labor context. Similarly, the Equal Employment Opportunity Commission (EEOC) and the N.L.R.B. have entered into an agreement to coordinate agency response in cases where the NLRA and the ADA are involved.³⁰² Whenever a charge filed with the N.L.R.B. alleges a violation of a

297. *Id.* at 643.

298. *Id.* at 644 (citing *In re American Provision*, 44 B.R. 907, 910 (Bankr. D. Minn. 1984)).

299. *Id.* at 644, 645 (citing *In re Fiber Glass Indus., Inc.*, 49 B.R. 202, 206 (Bankr. N.D.N.Y. 1985)).

300. See Christopher D. Cameron, *How "Necessary" Became the Mother of Rejection: An Empirical Look at the Fate of Collective Bargaining Agreements on the Tenth Anniversary of Bankruptcy Code Section 1113*, 34 SANTA CLARA L. REV. 841, 848 (1994).

301. *Hoffman Plastic Compounds Inc. v. N.L.R.B.*, 122 S.Ct. 1275, 1290 (2002).

302. Memorandum of Understanding Between the General Counsel of the N.L.R.B. and the

duty to bargain by either an employer or a labor union, and resolution of the charge would require that the Board interpret the ADA, the Board consults with the EEOC regarding the applicability of the ADA to that case.³⁰³ Agency cooperation with respect to interpretation of related statutes must be encouraged to take full advantage of agencies' relative expertise and to avoid conflicting results.

IV.

CONSEQUENCES OF *HOFFMAN* BEYOND LABOR LAW

It is possible that *Hoffman* may ultimately be limited to the denial of backpay remedies to undocumented workers for violations of the nation's labor laws. However, in the immediate future the case also portends confusion regarding the rights of undocumented workers in other areas. In the area of labor law *Hoffman* may mean that many cases will never reach the N.L.R.B. Though that represents a significant problem in states like California, Florida, Texas and New York, *Hoffman's* more significant impact may be felt in areas where it should not apply. Cases involving undocumented workers arising under statutes like the Fair Labor Standards Act and workers' compensation laws are far more numerous and personally significant than those arising under the NLRA. After *Hoffman*, statutory protections for undocumented immigrants may be in danger in some jurisdictions, not simply because the statutes may be interpreted differently, but because as courts determine whether *Hoffman* applies to other fields, that decision will provide a prying device to intimidate workers and thus eliminate dissent in the workplace. A current trend exists in the areas of wages, hours, workers' compensation and discrimination to use *Hoffman* in that manner.³⁰⁴

A. FLSA and Anti-discrimination Laws

In *Patel v. Quality Inn South*,³⁰⁵ the 11th Circuit ruled that even after IRCA, the Fair Labor Standards act continues to cover undocumented immigrants. Similarly, the Labor Department has taken the official position that *Hoffman* prohibits payment only for work not performed, and that the case does preclude the Department from seeking payment under the Fair Labor Standards Act for wages earned. Still, the more general, yet unclear policy implications of *Hoffman* have been relied upon by some defendant employers to support arguments that they do not have to pay due wages or overtime to undocumented workers. Perhaps most

EEOC (Nov. 16, 1996), available at <http://www.eeoc.gov/docs/eeoc-N.L.R.B.-ada.html>.

303. *Id.*

304. Nancy Cleeland, *Employers Test Ruling on Immigrants*, L.A. TIMES, Apr. 22, 2002, at 1 (discussing attempts by employers to test the limits of *Hoffman* in areas as varied as workers compensation, sexual harassment, wage and hour law, and out-of-court settlements of unionization efforts). The article also quotes a lawyer who represented a meat market accused of paying less than the minimum wage to undocumented workers. The lawyer is quoted as saying that he believed the worker fired from the market is not entitled to the difference between his wages and the minimum wage because "that's backpay." The lawyer also stated that his client probably knew of the undocumented status of the worker. The article also reports that many workers, confused about the meaning of the case, or simply as a result of a very rational fear, have simply dropped out of contract grievances and walked away from union organizing campaigns, available at <http://www.tepeyac.org/latimesemployers.htm>.

305. 846 F.2d 700 (11th Cir. 1988), *rev'g* *Patel v. Sumani Corp.*, 660 F. Supp. 1528 (N.D. Ala. 1987).

troubling, *Hoffman* has also been used as a prying device to uncover information about workers' immigration status in the discovery process, with some success. The uncertainty over what might result from such requests portends of a chilling effect that may keep workers from even complaining about unfair wages or working conditions.

Despite what appears to be a narrow holding—that undocumented workers cannot be paid for wages not earned—*Hoffman* has already created a stir in this area. In a growing number of cases involving wages and overtime under the FLSA, defendants have relied on *Hoffman* to inquire about the plaintiffs' immigration status during discovery.³⁰⁶ Those discovery requests cannot be predicated on the fear that the defendants may be prosecuted for violating IRCA, as some contend, because that statute is only violated when employers *knowingly* hire undocumented workers. Moreover, the requests are not consistent with the position held by the Department of Labor. In addition, the requests are clearly unsupported by the plain language in *Hoffman*, because complaints under the FLSA generally involve payment for work already performed. Still, despite all that, defendants continue to cite *Hoffman* as a prying device. That practice reflects defendants' understanding of the reality of undocumented workers' vulnerable daily existence, which is marked by constant fear of detection and deportation, and their willingness to use that information to their advantage.

In *Zeng Liu v. Donna Karan International Inc.*, a class action alleging violations of the FLSA, the employer moved to discover the plaintiffs' immigration status.³⁰⁷ Finding the plaintiffs' immigration status irrelevant for purposes of wages already earned, even after *Hoffman*, the court ruled that even if the parties were to enter into a confidentiality agreement restricting the disclosure of the workers' immigration status, there would still remain "the danger of intimidation, the danger of destroying the cause of action."³⁰⁸ Similarly, in *Singh v. Jutla & C.D. & R's Oil Inc.*,³⁰⁹ the plaintiff filed a claim for unpaid wages under the California Labor Code and the FLSA for work actually performed.³¹⁰ After the claim was filed the defendant threatened to report the plaintiff to the INS unless the claim was dropped.³¹¹ The defendant also attempted to force the plaintiff to sign a written waiver of his claims.³¹² On a motion to dismiss, the defendant argued *Hoffman* not only eliminates backpay under the NLRA but also has a more general impact on the remedies available to undocumented workers under the FLSA.³¹³ The court ruled *Hoffman* does not bar undocumented employees from recovering unpaid wages for work already performed.³¹⁴ Interestingly, the court also noted the defendants in the case had hired the plaintiff knowing of his undocumented status.³¹⁵

Though that finding was not critical to the decision, the court was moved to express its disapproval of the defendant's complicity in the violation of immigration

306. See, e.g., *Rivera v. NIBCO, Inc.*, 2001 WL 1688880 (E.D. Cal. Dec. 21, 2001).

307. 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002).

308. *Id.* at 192, 193.

309. 214 F.Supp.2d 1056 (N.D. Cal. 2002).

310. *Id.* at 1057.

311. *Id.*

312. *Id.*

313. *Id.* at 1060.

314. *Singh v. Jutla & C.D. & R's Oil Inc.*, 214 F.Supp.2d 1056, 1060 (N.D. Cal. 2002).

315. *Id.* at 1060-61.

law. Noting that Justice Breyer had argued that the case of a “knowing employer” was not before the Court in *Hoffman*, and that if backpay remedies in cases of knowing employers were disallowed, “this economic incentive, which runs directly contrary to the immigration statute’s basic objective, would be obvious and serious,” the court stressed that the employer in the case had knowingly violated immigration law by recruiting the undocumented worker.³¹⁶

In *Cortez v. Medina’s Landscaping, Inc.*,³¹⁷ a case arising out of the FLSA, the defendants made a request for discovery of the plaintiff’s immigration status after the discovery deadline had passed.³¹⁸ Despite *Hoffman’s* narrow holding, the defendants argued that the information about the plaintiffs’ immigration status was relevant because as a result of *Hoffman*, undocumented workers are not protected by the FLSA.³¹⁹ The court ruled that *Hoffman* did not hold that undocumented workers are barred from recovering wages for work actually performed, and denied the request.³²⁰

B. Other Civil Rights Statutes

In *Lopez v. Superflex, Ltd.*, a case involving a motion to dismiss a claim alleging violations of the Americans with Disabilities Act (ADA), an undocumented worker withdrew claims for backpay and reinstatement in light of the *Hoffman* decision, retaining claims for emotional distress and punitive damages.³²¹ Relying on *EEOC v. Wal-Mart*, involving an allegation of discrimination during a job interview, where the defendant had never been an employee yet was allowed to bring an action for punitive damages, the court found an award of backpay or reinstatement is not a prerequisite for punitive damages under the ADA.³²² Still, the defendant argued rather generally that the real issue was whether the plaintiff’s claim was viable in light of *Hoffman*, asserting that enough information existed in the record for the conclusion that the plaintiff was an undocumented worker.³²³ Finding the record did not yet reflect the plaintiff’s immigration status, the court refused to consider whether *Hoffman* applied to the claim.³²⁴

Importantly, the court rejected the defendant’s unsupported and generalized argument that after *Hoffman*, a plaintiff must prove he is legally employed, in order to be entitled to federal relief, and that, therefore, he must plead he is a documented immigrant.³²⁵ It also refused to rule on whether an undocumented worker has standing to sue under the ADA, stressing that because the immigration status of the plaintiff was not established, the issue was not before the court.³²⁶ However, in footnote 4 of the opinion, the court seemed to warn of the consequences of a judicial finding that the plaintiff was in the country without authorization—the plaintiff

316. *Id.*

317. 2002 WL 31175471, *1 (N.D. Ill. Sep. 30, 2002)

318. *Id.* at 1 n.1. (discussing the discovery request as untimely, the court noted that it nevertheless would not be inclined toward the defendant’s position).

319. *Id.*

320. *Id.* (citations omitted).

321. 2002 WL 1941484, *2 (S.D.N.Y. Aug. 21 2002).

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Lopez v. Superflex, Ltd.*, 2002 WL 1941484, *2 (S.D.N.Y. Aug. 21 2002).

would be subject to deportation.³²⁷

This issue became more complicated in a case involving claims under Title VII of the Civil Rights Act of 1964, the FLSA and the Illinois minimum wage law.³²⁸ In *De la Rosa v. North Harvest Furniture*,³²⁹ the defendants invoked the discovery rules to request documents confirming the immigration status of several workers.³³⁰ Pursuant to *Hoffman*, the defendants argued that such information was relevant to post-termination backpay.³³¹ The information requested covered a period during which the workers had been employed and a period after an offer for reinstatement had been made.³³² The court denied the requests on the basis that those particular periods were not relevant to a determination of post-termination backpay.³³³ The court hinted that had the requests been made about the period in dispute—post-termination but pre-reinstatement offer—it might have found the information relevant (and possibly discoverable).³³⁴ The case also involved an allegation that the employer had failed to verify the immigration status of the workers at the time of the original hiring.³³⁵ The court did not address that issue.

In *Topo v. Dhir*,³³⁶ a case involving allegations that the defendant had recruited the plaintiff into a life of virtual slavery, the court issued a protective order against discovery of the plaintiff's immigration status. In that case, the plaintiff alleged that the defendant recruited her for a domestic servant position.³³⁷ She also alleged that the plaintiff had paid her the equivalent of \$0.22 per hour for the first eight months of employment, and a total of \$50.00 for the remaining seventeen months of service.³³⁸ After the defendants indicated they would be asking about her immigration status during the discovery process, the plaintiff moved for a protective order, alleging that the defendant was attempting to use the discovery process to intimidate her into discontinuing her claim.³³⁹

The court granted the protective order. Finding that the plaintiff had satisfied the requirement of "good cause," the court reasoned that it did not need to find such onerous undertones to grant the motion.³⁴⁰ The court determined that, at most, the immigration status of the plaintiff was a collateral issue.³⁴¹ Significantly, the court also found that were the immigration status of the plaintiff a material aspect of the defense, a protective order would not be appropriate.³⁴² Importantly, the plaintiff's claims were brought under the Alien Torts Claims Act (and involved

327. *Id.*

328. For a comprehensive analysis of the interaction of Title VII and IRCA see, Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607 (1993-94).

329. 2002 WL 31007752, *1 (C.D. Ill. Sep. 4, 2002).

330. *Id.*

331. *Id.*

332. *Id.* at *2.

333. *Id.*

334. *De la Rosa v. North Harvest Furniture*, 2002 WL 31007752, *1 (C.D. Ill. Sep. 4, 2002).

335. *Id.*

336. 2002 WL 31050855, *1 (S.D.N.Y. Sep. 13, 2002).

337. *Id.* at *1.

338. *Id.*

339. *Id.*

340. *Id.* at *2.

341. *Topo v. Dhir*, 2002 WL 31050855, *1 (S.D.N.Y. Sep. 13, 2002).

342. *Id.*

payment for work already performed), and under a false imprisonment theory.³⁴³

In *EEOC v. New England Serum Company, Inc.*,³⁴⁴ a case involving allegations of sexual harassment, national origin discrimination and retaliation under Title VII by several female employees against two supervisors, the court ordered that the plaintiffs disclose in writing their immigration status. In response, the EEOC moved for a modification of the court's order to reflect the remedy sought by the various claimants, and for a protective order. The agency petitioned the court to restrict its order of disclosure of immigration status only to those plaintiffs for whom monetary damages other than compensatory and/or punitive damages were claimed.

The agency argued that the court's order forced the disclosure of information beyond the scope of discovery under the federal rules and that disclosure of that information under the circumstances would serve to chill the individual's rights under Title VII, undermining the EEOC's ability to vindicate the public's interest in enforcement of the anti-discrimination laws. The agency also moved for a protective order barring disclosure of immigration status of the claimants who were not making termination claims and for whom monetary damages other than compensatory and/or punitive damages were not being claimed. It also certified to the court that its attempts to confer with opposing counsel to resolve or narrow the issues raised by its motion had been unsuccessful. In support of its motions the agency reminded the court that Title VII protects all workers.³⁴⁵ That claim had not been decided as of this writing.

Predictably, as the cases cited demonstrate, lower courts have consistently ruled that *Hoffman* does not apply to unpaid wages or overtime, and that discovery of the plaintiff's immigration status would do more harm than good by chilling workers' willingness to report violations of employment statutes. A careful reading of *Hoffman* leads to no other possible conclusion. However, that fact has not kept defendants from using *Hoffman* in ways that can be considered harassing or intimidating. Curiously, some courts have hinted that they will allow those discovery requests when they deem immigration status "relevant" to the remedy requested.

That reasoning highlights another systemic advantage enjoyed by unscrupulous employers. For purposes of protecting the employer, a person's authorized immigration status is presumed once the INS I-9 form has been completed and documents that appear "good on their face" have been presented. That presumption protects employers who have attempted to comply with IRCA in "good faith." However, the same presumption is not available to undocumented employees, whose "discovery" in some cases may be postponed until the need arises. Those discovery requests attest to *Hoffman's* potential to become another vehicle for the continued intimidation of the undocumented workforce. The *Hoffman* Court's frontal assault on undocumented workers' violation of immigration law, its willingness to ignore the culpability of employers who knowingly violate immigration and labor law, its near complete elimination of legal consequences to

343. *Id.* at *1, 2, 3.

344. Civil Action No. 01-11672-JLT (on file with author)

345. *Id.* at 2 (citing *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (Title VII protects non-citizens against race, color, sex, religious and national origin discrimination)); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989) (plaintiffs were subject to Title VII protections notwithstanding their status as undocumented workers); *Rios v. Enter. Ass'n Steamfitters Local Union 638 of U.A.*, 860 F.2d 1168, 1173 (2d Cir. 1988) (same).

the employers, and the not so subtle message that undocumented workers must be reported to the INS once their identities are known, make the case a powerful device for intimidation, even when employers' requests for the workers' immigration status are unlikely to prevail.

The rapid proliferation of attempts to use *Hoffman* to argue for results which that case simply does not support, and the growing number of discovery requests of plaintiffs' immigration status, demonstrate that even if unsuccessful, defendants are aware of their new advantage. Allowing defendants to use *Hoffman* to pry information about a plaintiff's immigration status during discovery will provide an additional weapon to unscrupulous employers who hire with a "wink and a nod," even when they fully intend to use the workers' immigration status against them if they complain about working conditions or unfair wages.

A discovery request of a person's immigration status does not need to be granted to succeed as an intimidation device. The uncertainty over the possible outcome of such requests will be enough in many cases to deter undocumented immigrants from reporting violations of the nation's labor and employment statutes. Moreover, even if the discovery request is met with information establishing the plaintiff's authorized status, such requests will tend to chill other workers' willingness to report violations. Before responding to requests of workers' immigration status, courts should consider whether the documentation requested is relevant to the proceedings. *Hoffman* is limited to backpay awards for work not performed. Reinstatement of undocumented workers is already prohibited by IRCA. Absent such requests a person's immigration status is irrelevant.

C. Workers' Compensation

The question of whether workers' compensation benefits are available to undocumented workers has been resolved in favor of the workers in most jurisdictions.³⁴⁶ However, *Hoffman's* more general policy considerations could change the way workers' compensation issues are analyzed and may cause them to be revisited. For example, if the U.S. Supreme Court was concerned that the faint possibility of backpay at issue in *Hoffman* would encourage violations of the immigration laws, seemingly stronger arguments can be made that workers' compensation benefits, which are far more certain remedies than backpay under the NLRA, could serve as an even more potent "magnet" to lure unauthorized immigrants to the U.S. Though they have been rejected in the past, some of those unsupported arguments have been given new life by *Hoffman*. Even in the face of overwhelming precedent, defendants have relied on those general statements to argue for denial of all workers' compensation benefits, including medical attention, in several recent cases.

While petitions to deny medical coverage have been uniformly denied, one jurisdiction has relied partially on *Hoffman* to suspend wage-loss benefits, and another may do the same with respect to disability benefits. *Vazquez v. Eagle Alloy*

346. LARSON'S WORKERS' COMPENSATION LAW §66.03, noting most states recognize the right of undocumented workers to workers' compensation. The treatise cites Wyoming and Idaho as states that still deny such compensation by statute. However, the statute cited for Idaho, Idaho Code §72-1366 (19)(a) applies to unemployment compensation, not workers' compensation, leaving Wyoming as the only state explicitly denying benefits by statute.

Inc.,³⁴⁷ involved an undocumented worker who sustained an injury while working for Eagle Alloy, a Michigan company. Though finding that the plaintiff had become disabled, and that the plaintiff had been the defendant's employee when the injury occurred, a Michigan magistrate cut off benefits on the date he learned of the plaintiff's undocumented status. The magistrate reasoned that the plaintiff was ineligible for benefits because he could not perform work because of the commission of a crime. The magistrate's decision was affirmed in part by the Michigan Workers' Compensation Appellate Commission. A majority of the Commission agreed that the Michigan Worker's Compensation Act covers undocumented immigrants, but the Commission voted 4-3 to disqualify the plaintiff from receiving wage-loss benefits because of WDCA 361(1) (inability to obtain or perform work because of imprisonment or commission of a crime).

Relying partially on *Hoffman*, a Michigan Court of Appeals affirmed the Commission in a case consolidating the *Vazquez* appeal and another case raising the same issue.³⁴⁸ The Michigan statute in question³⁴⁹ provides that disabled injured employers shall be paid compensation in the form of weekly wage benefits. Those benefits are to be paid for the duration of the disability, but must cease for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime.³⁵⁰ Overlooking the vagueness inherent in a statute that does not require conviction of a crime, nor identifies the type of crime that would preclude a person from receiving benefits, the court reasoned that the workers in those two cases fell squarely within its coverage.³⁵¹

Similarly, in *Reinforced Earth Co. v. Workers' Compensation Appeals Board*³⁵² the employer asked the Pennsylvania Supreme Court to declare that providing workers' compensation benefits to undocumented workers violates Pennsylvania public policy.³⁵³ Ruling that undocumented workers are entitled to receive payment for medical treatment under the workers' compensation statute,³⁵⁴ the court nevertheless held permanent disability payments could be suspended as a result of the plaintiff's loss of earning power.³⁵⁵ According to the court, the loss of earning power even in the case of an undocumented worker who is permanently disabled from a work-related injury is due to his undocumented status, not the injury suffered at work. The case was remanded for findings consistent with the opinion.

Not surprisingly, despite the fact that the issue in the case was narrowly defined (whether the worker is entitled to wage-loss benefits), the employer in *Vazquez* argued that *Hoffman* leads to the conclusion that the worker was not entitled to any benefits. In support of this argument the employer relied on the *Hoffman* Court's unsupported assertion that to allow the board to issue backpay orders to undocumented workers would "encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations." The employer argued that the policy concerns were no

347. *Vazquez v. Eagle Alloy Inc.*, No.: 239592-G (Mich. Ct. App. 2003) (on file with author).

348. *Sanchez v. Eagle Alloy, Inc.*, 658 N.W.2d 510, 521 (Mich.App. 2003).

349. *Id.* at 510 (citing MICH. COMP. LAW § 418.361 (1) (2002)).

350. *Id.* at 521.

351. *Id.*

352. 810 A.2d 99 (Pa. 2002).

353. *Id.* at 100.

354. *Id.* at 109 n.12.

355. *Id.* at 108.

different in *Vasquez*. The same argument, that workers are entitled to no rights under workers' compensation after *Hoffman*, was made by the employer in *Reinforced Earth*.

The Michigan and Pennsylvania cases demonstrate some of the continuing contradictions in this area, and repeat mistakes made earlier in other jurisdictions. In all three cases the plaintiffs were provided medical services. However, the workers in Michigan were disqualified from receiving wage-loss benefits because, they had "engaged in the commission of a crime," which removed them from the job market. Similarly, in the Pennsylvania case, the worker's earning capacity may be eliminated by his undocumented status.

In essence, both cases turn on the workers' "unavailability" as a result of their unauthorized status. The notion that undocumented workers are "unavailable for work" and therefore removed from the workplace for purposes of workers' compensation has been rejected as a "legal fiction."³⁵⁶ Taking into account the real economic and social context of the lives of undocumented workers in the U.S., and the laxity of the enforcement of immigration law, courts have concluded that states' public policy is best served by providing workers' compensation benefits to undocumented immigrants. By ignoring a national trend to award those benefits to undocumented workers to protect the integrity of workers' compensation systems and to promote adherence to immigration law, the Michigan Court of Appeals, and perhaps the Pennsylvania Supreme Court, suddenly made it more cost-effective to hire undocumented workers for hazardous occupations.

In a minority of jurisdictions, including Michigan, wage-loss benefits are suspended while injured workers are incarcerated to avoid "double dipping." The reasoning is that because incarcerated persons are essentially placed in the public roll, by having their room, board, clothing and medical attention provided, wage-loss benefits would constitute double recovery. Most jurisdictions disagree with Michigan, focusing on the private nature of workers' compensation benefits and on the question of whether the crime committed by the worker was the proximate cause of the injury.³⁵⁷

A much less certain justification is offered for suspending benefits to people who have "committed a crime that prevents them from working." The Michigan statute is vague on its terms, and is silent on the purpose and application of that provision. A strict application of this statute could lead to absurd results. Taken literally, the reasoning of the Michigan decision could result in the discontinuation of benefits in the most trivial of cases. Does it apply only to felonies? Misdemeanors? What happens when the employer has also participated in the crime? What happens if the employee worked as a driver and on this day he is driving 5 miles over the speed limit? Are his benefits suspended whenever he drives over the speed limit and reinstated when he drives below the limit?³⁵⁸ How are courts to decide when to deny

356. See *Rivera v. United Masonry, Inc.*, *supra* note 215, at 776 ("Of course, it is a legal fiction that undocumented aliens cannot get any jobs; between applicant willingness to conceal, and employer inability or willingness to detect undocumented status, hirings occur.").

357. LARSON'S WORKERS' COMPENSATION LAW § 37.02 (violation of statute and commission of a crime are not generally accepted defenses to workers' compensation claims unless they are causally connected to the work-related injury).

358. The example of the driver who would alternate between coverage and lack of coverage as he drove his employer's rig over or below the speed limit (a result that would not be contemplated by any court) can be found in LARSON'S WORKERS' COMPENSATION LAW §37.02 at n. 10.

benefits? Given all those uncertainties in definition and application, the Michigan statute may be vulnerable to attack as a violation of due process under the U.S. Constitution.³⁵⁹ But a complete analysis of that issue is beyond the scope of this article.

However, even under Michigan law a strong argument exists that the *Sanchez* court misapplied the Michigan statute when it decided to suspend wage-loss benefits. The meaning of “commission of a crime” that would disqualify a worker from benefits was analyzed in *Sweatt v. Department of Corrections*.³⁶⁰ The *Sweatt* Court noted the “commission of a crime” language in the workers’ compensation statute was meant to be construed narrowly. In fact, the court could only identify one situation where that principle could be said to apply. Those unique circumstances involved a worker who pleaded guilty to a crime but who fled the jurisdiction before sentencing.³⁶¹ The court concluded that “[t]his circumstance alone, albeit narrow, justifies the “commission of a crime” language.³⁶²

Importantly, in addition to narrowing sharply the range of situations to which the “commission of a crime” language applies, the Michigan Court of Appeals stressed that the clear legislative intent behind the state workers’ compensation statute is to eschew permanent forfeiture of disability benefits.³⁶³ Consistent with that policy, the court explained that the statute was designed to temporarily suspend benefits from workers who had removed themselves from the workforce,³⁶⁴ by becoming incarcerated. In response to an argument that the employee had removed himself from the workforce because he could not work for his former employer (a state penitentiary) due to a criminal conviction, the court refused to place limits on the job market available to the worker.³⁶⁵

The court’s reasoning in *Sanchez* stands in sharp contrast to the findings in *Sweatt*. Contrary to the policy of the Michigan workers’ compensation statute against permanent forfeiture of benefits, the *Sanchez* decision to “temporarily suspend” wage-loss benefits to undocumented workers is all but permanent. Besides adjustment of immigration status (a highly unlikely possibility in most cases) there is nothing undocumented workers can do to establish they have not removed themselves from the workforce. Permanent suspension of benefits contradicts the policy of the Michigan statute, by creating a hardship not only upon the worker, but

359. *Neal v. Stuart Foundry Co.*, 250 Mich. 46 (1930) involved an undocumented worker whose benefits had been suspended while he was in jail for violation of immigration law. Responding to an argument that the benefits should be suspended because a jailed permanently disabled worker has no earning capacity, the court stated: “being in jail could hardly increase his already total inability. If the arrested employee were able to give bail, he would continue to receive the compensation under defendant’s theory: but if he could not give bail, both he and his dependents would be deprived of even the partial income represented by the award. The employee though innocent might be arrested and criminally charged. To summarily suspend on that account a fixed award would obviously deprive him of property without due process of law. *Id.* at 50.

360. 247 Mich. App. 555 (2001).

361. *Id.* at 568 (citing EDWARD M. WELCH, *WORKER’S COMPENSATION IN MICHIGAN: LAW & PRACTICE* (4th ed.) (1993), § 10.3, at 10-4, citing *Tanney v. Advance Sheet Metal, Inc.*, 1992 Mich. ACO 14; 4 MIWCLR 1287 (1992)).

362. *Id.*

363. *Id.* at 563-64.

364. *Id.* at 567.

365. *Id.* (After an injury, ‘reasonable employment’ job offers may come from various sources, and “[t]he fact that one particular job disappears says nothing about the employee’s decision to withdraw from the work force”) (citing *Perez v. Keeler Brass Co.*, 608 N.W.2d 45, at 51 (2000)).

also upon his dependents. In the case of undocumented workers many of the dependents will be American citizens or legal residents.³⁶⁶

The *Sanchez* court's reasoning not only ignores economic and social reality, but, in the worst of cases, it also ignores that *Sweatt* did not limit the worker's employment market to his original employer or to a particular locality. Thus, even deportation of the worker (another highly unlikely possibility given the economic and administrative constraints placed upon immigration authorities) should mean the worker becomes immediately eligible to participate in the job market in his country of origin, and therefore continues to be eligible for wage-loss benefits.³⁶⁷ The same reasoning should apply to disability benefits in Pennsylvania.

A worker's misrepresentation of immigration status has been rejected as a defense to a workers' compensation claim in the vast majority of jurisdictions that have considered the issue.³⁶⁸ Courts have generally held that no causal connection exists between the misrepresentation of immigration status and the work injury. The defense of misrepresentation in workers' compensation cases generally involves misrepresentation of the worker's medical condition at the time of hire.³⁶⁹ Misrepresentation defenses call on courts to apply the following factors: 1) the employee must have knowingly and willfully made a false representation as to his physical condition; 2) the employer must have relied on the false representation and this reliance must have been a substantial factor in the hiring; and 3) there must have been a causal connection between the false representation and the injury.³⁷⁰ The principle is so well established that even a court that refused to grant workers' compensation benefits to undocumented workers found no causal connection between undocumented status and work injuries.³⁷¹ This parallels the analysis that commission of a crime cannot be a bar to compensation unless it was causally connected to the work injury.

Recognizing that undocumented workers do not work in isolation, courts have found that refusing workers' compensation benefits to undocumented workers creates an incentive to evade workplace safety rules, to the detriment of all workers.³⁷² Courts have also warned that refusing workers' compensation benefits to undocumented workers makes them more desirable as employees to unscrupulous employers, reducing the numbers of jobs available to legal residents.³⁷³ They have

366. Undocumented workers generally do not travel to the United States without some social or economic connections. These connections often involve a family composed in part of American citizens or other legal residents. *See supra*, text accompanying notes 16 and 17.

367. *Sweatt*, 247 Mich. App. at 570 ("[T]he legislature similarly intended that compensation be suspended where a claimant could not obtain or perform work from *any source*." (emphasis added)). In Washington State, the workers' compensation statute makes provisions for payment of benefits in the worker's country of origin, see WASH. REV. CODE ANN. §51.04.030(2) (West 2003) providing payments to injured workers not residing in the United States shall not exceed those provided in the statute's fee schedule. To guard against abuses the statute provides the nonresident worker may be required to return to the United States for medical evaluations. WASH. REV. CODE ANN. §51.32.110(1) (West 2003).

368. LARSON'S WORKERS' COMPENSATION LAW § 66.03.

369. *See, e.g.*, *Champion Auto Body v. Gallegos*, 950 P.2d. 671, 672 (Colo. Ct. App. 1977) (holding entitlement to workers' compensation benefits is not derived from the worker's immigration status but from his status as a worker); *Testa v. Sorrento Rest. Inc.*, 197 N.Y.S.2d 560, 561 (1960).

370. *Granados v. Windson Dev. Co.*, 257 Va. 103, 106 (1999).

371. *Id.* at 107.

372. *See, e.g.*, *Mendoza v. Monmouth Recycling Corp.*, 288 N.J. Super. 240 (1996); *Fernandez-Lopez v. Jose Cervino, Inc.*, 288 N.J. Super. 14, 20 (1996).

373. *Id.*

also uniformly found that providing workers' compensation benefits to those workers does not constitute an incentive to enter the country without authorization.³⁷⁴

The *Hoffman* decision is likely to affect backpay under other statutes, like Title VII of the Civil Rights Act of 1964. However, that should not lead to the conclusion that wage-loss or disability benefits under workers' compensation should be treated the same. Though wage loss benefits substitute for pay, they are designed to compensate for work-related injuries. They are very different from the backpay remedy at issue in *Hoffman*. In *Hoffman* the court declared undocumented workers are not eligible for backpay even if they have been discharged in violation of the FLSA, for "work not performed, which could not have been performed legally in the first place." Unlike backpay under the NLRA, workers' compensation wage loss benefits are a tort substitute, a remedy that would be otherwise available to everyone, including undocumented immigrants, for physical injuries suffered at work.³⁷⁵ Moreover, those benefits are privately funded insurance contracts paid for by employers who then pass the cost on to the consumers of products or services, or to their employees through adjustments in wages.³⁷⁶

Hoffman must not be used to enable unscrupulous employers, and insurers to enjoy a windfall in workers' compensation savings at the expense of undocumented workers. If workers' compensation benefits become unavailable or reduced as a result of *Hoffman*, this vulnerable segment of the population will become even more desirable as a source of yet cheaper labor, to the detriment of the workers themselves, their families, legal resident workers, and law-abiding competitors.

D. Vocational Rehabilitation

Hoffman should have no effect upon the availability of vocational rehabilitation services to undocumented workers in jurisdictions where those services are provided.³⁷⁷ These programs are critical components of most state workers' compensation systems, and like other components of workers' compensation, they are also privately funded services bought through insurance providers and mandated by statute.

374. See *Dowling v. Slotnik*, 712 A.2d 396, 404 (Conn. 1998).

375. See Peter L. Reich, *Public Benefits for Undocumented Workers: State Law into the Breach Once More*, 21 N.M. L. REV. 219, 226 (1991) (discussing the availability of workers' compensation benefits for undocumented workers after IRCA).

376. See *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 201-02 (1917) (holding the cost of workers' compensation presumably would be reflected in the wages paid the workers). See also *DeAyala v. Florida Farm Bureau Cas. Ins. Co.*, 543 So. 2d 204, 207 (Fla. 1989), where speaking about a deceased worker's right to compensation, the court stated, "one of the primary benefits an employee works for is the satisfaction and well-being of providing for his or her family. The law did not afford petitioner's deceased husband different treatment while he was alive and working. He shared the same "burdens" as his fellow employees. He paid taxes and contributed to the growth of his company and the general economy. His labor, along with that of his American and Canadian co-workers, helped pay for the employer's insurance premiums required under the workers' compensation law."

377. Vocational rehabilitation services are not granted to undocumented workers in many jurisdictions because of perceived conflicts between certain components of those programs and IRCA. This article takes the position that vocational rehabilitation services, outside of job placement assistance or reassignment to light duty work, do not conflict with IRCA and should be provided to undocumented workers. The legal and public policy reasons in support of that position would require far more thoughtful and thorough analysis than is possible in this article.

Generally, in addition to helping restore workers' earning capacity, vocational rehabilitation programs assist qualified injured employees to return to work after job modifications have been made to account for any lingering disability.³⁷⁸ Vocational rehabilitation programs also provide job referrals or job placement assistance.³⁷⁹ Even in the most worker-friendly jurisdictions, these components of vocational rehabilitation have already been eliminated by IRCA.³⁸⁰ However, vocational rehabilitation is not limited to facilitating the return of a person to work with his former employer or a new employer.

The most critical component of vocational rehabilitation programs is the restoration of a person's earning capacity before that person is assisted in finding employment. Vocational rehabilitation programs range from physical or mental evaluations, to the retraining of disabled workers for completely different occupations, to job referrals and placement assistance, to a combination of all of the above.³⁸¹ In cases involving catastrophic injuries resulting in permanent disabilities, vocational rehabilitation can be as critical as the medical treatment following the disabling injury. Thus, while job placement assistance and reinstatement conflict with IRCA's mandates, physical rehabilitation and retraining to restore earning capacity clearly do not.

Under most systems, rehabilitation is not complete until the person reaches the maximum earning capacity attainable in light of the lingering physical impairment. Most states view rehabilitation as a multi-layer process. Rehabilitation begins with the medical treatment of the work-related physical injury.³⁸² It continues with therapy designed to restore physical skills of the injured worker, and it may also include vocational or educational retraining in appropriate cases.³⁸³ In many jurisdictions it also includes maintenance payments,³⁸⁴ which may be jeopardized by *Hoffman*.

The central focus of such programs when severe disabilities are involved, is the restoration of the individual's earning capacity, to enable the worker to return to gainful employment either in a modified job with the same employer, or by taking a job in a different field after regaining earning capacity similar to that which he enjoyed before the work-related injury. Return to employment does not have to take place in the United States.³⁸⁵ In cases involving severe disabling conditions, the process can be quite involved and difficult. Absent these services, individuals can be sentenced to lives of unemployment and disability.

378. See *Foodmaker, Inc. v. Workers' Comp. Appeals Bd.*, 78 Cal. Rptr. 2d 767, 770 n.2 (Ca. App. 2 Dist. 1998).

379. *Id.* at 770 n.3.

380. *Id.* at 776-79.

381. *Id.* at 772-74.

382. *Id.*

383. *Id.*

384. *Id.*

385. See *Tarango v. State Indus. Ins. Sys.*, 25 P.3d 175, 179 (Nev. 2001) (recognizing the possibility the undocumented worker's future employment lies outside the boundaries of the United States where vocational rehabilitation services can be put to use).

CONCLUSION

A. *Knowing Violators Must Not be Allowed to Avoid the Cost of Non-compliance*

Courts and Agencies charged with administration of the nation's labor and employment statutes must not allow knowing violators of labor, employment and immigration law to escape liability for all remedies that do not conflict with IRCA. Though *Hoffman* appears to undermine the possibility of backpay remedies even in cases involving employers who knowingly violate immigration law, the case also supports backpay against those violators. Breyer correctly noted that the case of an employer who "knowingly" violates immigration law was not before the court. The N.L.R.B.'s and EEOC's decision not to pursue backpay even in those cases is premature. To disallow backpay in those cases will provide a windfall to the worst offenders. Employers who knowingly hire undocumented workers cannot be allowed to evade the requirements of the NLRA or the discrimination laws. An interpretation of *Hoffman* that prohibits the N.L.R.B. from awarding backpay to workers who were intimidated, coerced and then discharged in violation of the NLRA by an employer who may have conspired to bring them to the U.S. cannot stand. Similarly, an interpretation of *Hoffman* that serves to limit or deny remedies under other statutes for "knowing violators" must not be allowed.

B. *Immigration Reform as a Remedy*

Prior to September 11, 2001, actors on both sides of the political spectrum proposed various reforms to the Immigration and Nationality Act as potential solutions to the problem of undocumented immigration. The prospect of immigration reform between the U.S. and Mexico, where most of the undocumented population originates, seemed particularly promising. Since then, the U.S. has taken a more cautious approach to any proposal. Though some support still exists, enthusiasm has decreased dramatically.

Even if immigration reforms ever come to pass, it is certain that many undocumented immigrants who are already in the country will be left out. Labor protections for those left behind cannot be de-coupled with immigration reform as has been done in the past. History shows that despite the most ambitious legislative efforts, an underground population of undocumented immigrants will continue to exist. For instance, when employer sanctions were passed in 1986, it was predicted that the threat of those sanctions to employers would result in the reduction and eventual elimination of jobs available to undocumented immigrants. That prediction never materialized. Instead, while IRCA was ostensibly designed to eliminate an underclass that could be taken advantage of because of its fear of detection and deportation, the effective date of the legislation virtually guaranteed the continued existence of this vulnerable group, by incorporating only a fraction of the people already here.

Though IRCA was passed in 1986, undocumented immigrants who arrived

after January 1, 1982 were not eligible to be legalized under that statute.³⁸⁶ Thus, those who arrived in the U.S. after January 1, 1982 were instantly marginalized, becoming even more vulnerable to exploitation than before the statute became effective.³⁸⁷ The combination of an available workforce of people who would take menial jobs and several periods of strong economic growth helped produce the present situation.

Similarly, the bureaucratic complications of the Bracero³⁸⁸ program, and the lack of enforcement of protections built into the agreement between the U.S. and Mexico, were instrumental in the continued flow of undocumented immigrants into this country. Anxious to escape oppressive living conditions, and frustrated by long delays in processing, which exacerbated their desperate condition as temporary border residents, undocumented immigrants who arrived at the U.S. border from southern Mexico in the 1940s, 50s and 60s simply ventured across the border, risking exploitation, detection and deportation for a shot at a better life.³⁸⁹ In addition, many more “skipped” out of the program once in the United States due to the oppressive conditions that prevailed in many farms, and the government’s inability to enforce guarantees such as adequate housing, cooking facilities and reasonably priced food.³⁹⁰ These are but two examples of forces that have contributed to the continuation of undocumented migration to the United States.

Importantly, despite the negative effect on the economy of the September 11, 2001 terrorist attacks, the perception prevails in many influential circles that there just aren’t enough workers to fill all the menial jobs Americans and other legal residents do not want.³⁹¹ The historical record and the ever-present perception that there just are not enough workers to fill certain kinds of menial jobs offer overwhelming evidence that this shadow population will continue to exist. As has been the case in the past, the limited solutions that are currently being contemplated are sure to leave out large numbers of undocumented individuals, who will become more vulnerable as a result.

Therefore, any solution designed to regularize large numbers of immigrants must include a clear Congressional statement that U.S. labor and employment laws will be invoked to protect the remaining undocumented population. Such a policy would not only respect the dignity of a person’s work, but would also help protect working conditions for everyone. It would also enable law-abiding employers to compete on equal footing.

386. Merino, *supra* note 256.

387. *Id.* at 410-13 (noting the ties that bind undocumented immigrants, like children, spouses or community ties, made it impractical, or even impossible, for unauthorized immigrants in the 1982 to 1986 subclass to leave the United States, rendering this class more vulnerable than post 1986 entrants).

388. In a 1942 treaty, the United States and Mexico agreed to a temporary workers program for agricultural employers. The so-called “Bracero” program provided for the recruitment, transportation, and placement of Mexican farm workers. Pub. L. No. 45 § 5(g), 57 Stat. 70, 73 (1943).

389. See GARCIA, OPERATION WETBACK, *supra* note 6, at 35-43 (discussing the way in which bureaucratic complications and corruption prompted many would be participants in the Bracero program to venture into the U.S. illegally where they were sure to find work, rather than come through the program).

390. *Id.* at 43-61 (discussing the reasons many Braceros chose to “skip” out of the contracts and return as undocumented workers).

391. Press Release, Essential Worker Immigration Coalition, EWIC Joins Labor, Advocate Groups to Renew Call for Reform (April 11, 2002) (on file with author). See generally <http://www.ewic.org>.

C. *Proposed Statutory Amendments*

Realistically, given the current political climate and the history of the passage of IRCA, it is very unlikely that immigration reform will take place in the near future. Therefore, in the alternative Congress can accept the Court's invitation, as it did after *Bildisco*, and amend IRCA or the NLRA to provide protection for undocumented workers, unless those protections conflict with IRCA (like reinstatement or job placement).

IRCA could be amended in the following ways. First, Congress could simply clarify the message already contained in IRCA's legislative history that labor protections apply to undocumented immigrant workers by incorporating that message into the statute. Second, Congress could establish incentives to report violations of the nation's labor laws by requiring the INS to provide deferred status to undocumented workers who risk detection by reporting violations until the cases involving violations of labor or employment laws are resolved. Employers who were not aware of the workers' unauthorized immigration status can be protected from sanctions under the immigration laws by the application of the after-acquired evidence rule, as was the practice at the N.L.R.B. before *Hoffman*. Those employers would be liable for backpay only until the time that they discovered the employee's undocumented status. More realistically politically, Congress could amend IRCA to prevent "knowing" violators from enjoying the windfall generated by their illicit conduct. Finally, and perhaps most importantly, Congress could directly charge the N.L.R.B., and other agencies to work with INS to harmonize the immigration law and statutes designed to protect workers, because, as history has taught us, undocumented immigration is at its most basic core, a labor issue.