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GHOST WORKERS IN AN INTERCONNECTED WORLD: GOING BEYOND THE DICHOTOMIES OF DOMESTIC IMMIGRATION AND LABOR LAWS

Ruben J. Garcia*

Beginning with the September 11, 2001 ("9/11") terrorist attacks, the labor movement's plans to organize immigrant workers and achieve immigration reform have met serious challenges. After 9/11, the political climate surrounding immigrants put the AFL-CIO's hopes for legislative reform on hold, because of socially perceived connections between immigrants and terrorism. Then, in a March 2002 decision titled Hoffman Plastic Compounds, Inc. v. NLRB, the U.S. Supreme Court held that undocumented immigrant workers could not collect back pay under the National Labor Relations Act (NLRA) when their rights to join unions are violated. According to the Court, back pay for undocumented workers would trench upon the employer sanctions regime expressed in the Immigration Reform and Control Act of 1986. In this Article, Professor Garcia analyzes the challenges facing the labor movement and immigrant workers from several perspectives. The Hoffman decision raises questions about the effectiveness of domestic labor law for all workers, as well as international human rights issues. Before the Hoffman decision, immigrant worker organizing took place in a legal environment that was at best indifferent, if not hostile, to the rights of immigrants and all workers. The Article addresses the effects the Hoffman decision and the post 9/11 climate have had on immigrant worker organizing and immigration reform. Then, Professor Garcia discusses reforms that could ameliorate the impact that Hoffman has had on immigrant workers' rights, and the likelihood those reforms will be enacted. This Article concludes that an integrated vision of labor and immigration law reform is necessary in light of an increasingly globally interconnected society.

INTRODUCTION

The catastrophic events of September 11, 2001 (9/11) left many victims in its wake, including many immigrants who will never be

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counted.¹ The number of immigrant workers among the dead at the World Trade Center is difficult to determine, partly because of the nature of the disaster, and partly because many of the workers were undocumented immigrants, whose families were afraid to seek financial assistance for fear of deportation. Many of the victims were union members who worked at the Windows on the World Restaurant atop One World Trade Center, a high-priced restaurant serving New York's elite.² The families of these undocumented victims have been unable to claim federal benefits like Social Security, unemployment, and Federal Emergency Management Assistance because of the victims' immigration status.³

Immigration reform was another casualty of 9/11. Because the terrorists were non-citizens, the political landscape has been dominated by the popular paradigm of the immigrant as terrorist, spawning various pieces of regressive legislation aimed at immigrants.⁴ In addition, the talks that began in the summer of 2001 between Mexican President Vicente Fox and President Bush regarding proposed guestworker programs and amnesty for undocumented workers were tabled after 9/11.⁵

Six months after 9/11, the immigrant workers' movement suffered another severe and shocking setback when the U.S. Supreme Court decided *Hoffman Plastic Compounds, Inc. v. NLRB* in March 2002.⁶ This decision dealt a crushing blow to the millions of "ghost workers" who toil in the shadows of our economy—always present

1. Ginger Thompson, *Family Mourns a Breadwinner and a Dream that Perished*, N.Y. Times, September 12, 2002, at B19; Evan Osnos, *Loved Ones of Missing Migrants Face Dilemma*, CHI. TRIB., Oct. 14, 2001, at C1.

2. Lynne Duke, *The Clouds of Memory: Windows on the World Restaurant Lost 72 Workers*, Wash. Post, Sep. 8, 2002, at F1.

3. Lorenza Muñoz, *Their Story Didn't Die With Them*, L.A. TIMES, July 19, 2002, at F14.

4. See, e.g., Victor Romero, *Decoupling "Terrorist" from "Immigrant": An Enhanced Role for Federal Courts Post 9/11*, 7 J. GENDER RACE & JUST. 201 (2003).

5. Terminology in this area is always loaded legally and politically, and one term cannot fully describe the population discussed here. I tend to favor "undocumented worker" in most cases because the individuals I write about here are simply working without documents. Some of these workers also want to immigrate (i.e. settle permanently) in the United States and are thus undocumented immigrants, but even that may not apply to an increasingly transnational and dual citizenship-holding immigrant population. See Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and LatCrit Theory*, 55 FLA. L. REV. 511 (2003) [hereinafter Garcia, *Borders*]. IRCA refers to "unauthorized aliens" as those noncitizens who are not authorized to work in the United States (which may include students, who are authorized under some other provision of the immigration laws). "Illegal alien" will not be not used, except in quoting others. See Ruben J. Garcia, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 118 n.1 (1995) [hereinafter Garcia, *Proposition 187*].

6. 535 U.S. 137 (2002).

and yet denied existence by the law and courts.⁷ In *Hoffman*, the Court held that an undocumented worker fired for union organizing was not entitled to the statutory monetary remedy because back pay would “trench upon federal policies expressed in the Immigration Reform and Control Act of 1986 (IRCA).”⁸ The decision represented a collision at the crossroads of two bodies of law—labor law and immigration law.

This is not the first time that people of color and immigrants have found themselves at the margins of intersecting structures of law. They have frequently fallen victim to a legal interpretation that privileges one policy interest over another. Critical legal scholars have powerfully argued that this fragmentary approach to legal interpretation has adversely affected people of color in a variety of different legal contexts.⁹ The *Hoffman* case raises these questions anew: How can laws which concern immigrants, workers, and people of color be reconciled to better address their employment, housing and human rights needs? In deciding *Hoffman*, the Court had an opportunity to reconcile immigration and labor law in a way that would benefit all workers, but it instead highlighted the ineffectiveness of immigration law, and labor law’s inability to protect all workers.

The *Hoffman* decision is an example of this dichotomized approach to immigration and labor laws. Before *Hoffman*, it was clear to many scholars and activists that either labor law or immigration law needed to be reformed.¹⁰ Labor law reform has not been seriously discussed by Congress for nearly twenty years. Immigration reform has been more of an immediate priority. In the summer of 2001, there were high-level talks between the United States and Mexico on possible immigration reform, such as amnesty for the

7. See also Lenni B. Benson, *The Invisible Worker*, 27 N.C. J. INT’L & COM. REG. 483 (2002).

8. 525 U.S. at 144. See Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1 (2002).

9. See Elizabeth Iglesias, *Structures of Subordination: Women of Color at the Intersection of the NLRA and Title VII. Not!* 28 HARV. C.R.-C.L. L. REV. 395 (1993) (discussing *Emporium Capwell, Inc. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975); Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 356 (David Kairys ed., 3d. ed. 1998) (discussing *DeGraffenried v. Gen. Motors*, 413 F. Supp. 142 (E.D. Mo. 1976), *aff’d* 585 F.2d 480 (8th Cir. 1977); *Moore v. Hughes Helicopter*, 708 F.2d 475 (9th Cir. 1983); *Payne v. Travenol*, 416 F. Supp. 248 (N.D. Miss. 1976)).

10. See, e.g., James Pope et al., *Toward a New Labor Rights Movement*, 4 WORKINGUSA 8, 26 (2001); Richard B. Freeman & Joel Rogers, *A Proposal to American Labor*, THE NATION, June 24, 2002, at 18.

undocumented or a guestworker program. However, the events of 9/11 engendered a backlash that closed the window of opportunity for immigration reform and scuttled hope for an amnesty program for the near future. Such a program would have represented only a marginal victory for immigrants anyway, because far more sweeping reform of immigrants' workplace rights is needed. Furthermore, the aftermath of the 9/11 terrorist attacks left many lawful immigrants unemployed and in fear of government repression.

Historically, immigration law and labor law have not been linked in the policymaking process. This disconnect has led to a failure to see immigration as a labor issue and vice versa. At the Supreme Court, this dichotomous view led to a statutory construction in *Hoffman* that pitted one policy goal (immigration control) over another (the right to organize). Even activist groups and the AFL-CIO have tended to talk about immigration reform and labor law reform separately. Typically, activists have focused on ending sanctions against employers who hire undocumented immigrants, and providing a general amnesty for undocumented immigrants residing in the U.S.¹¹ There is little talk about strengthening protections for immigrants' right to organize. This is not surprising in an environment where there is little policy concern regarding the many citizens who are denied the right to organize on a daily basis.¹²

This Article argues that a new amnesty, coupled with the end of employer sanctions, represents only the beginning of a comprehensive strategy for organized labor to incorporate immigrants into their ranks. This Article also argues that immigration reform should be a priority for the labor movement. Further, this Article questions whether immigration reform can be meaningfully undertaken

11. See Statement of Maria Elena Durazo, President of Hotel Employees and Restaurant Employees (HERE) Local 11, in reaction to the Hoffman Plastic Compounds, Inc. v. NLRB decision available at <http://www.hereunion.org/herenews/HN020517Immigr.html> (last visited December 16, 2003). Even recently proposed legislation to strengthen the NLRA continues to have a dichotomized view of labor law and immigration law. The Kennedy-Miller Free Choice Act (S. 1925 and H.R. 3619), introduced in Congress on November 21, 2003, would triple back pay and for the first time impose civil penalties for violations of the NLRA. The legislation fails to address whether any of these enhanced remedies would be available to undocumented workers. See <http://www.aflcio.org/aboutunions/voiceatwork/upload/freechoicesum.pdf>.

12. In 1994, the NLRB reinstated 2,000 illegally fired workers (1 in 48 who voted for the union). In the 1950s, that ratio was one in 689. Lance Compa, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards*, available at <http://www.hrw.org/reports/2000/uslabor/index.htm#TopOfPage>. Absent employer interference, the interest in unions remains strong. The Worker Representation and Participation Survey conducted by Richard B. Freeman and Joel Rogers in the early 1990s found that 44% of workers between the ages of 18 and 24 would vote for a union if an election were held at their workplace. RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 71 (1999).

without labor law reform. The *Hoffman* decision is a prime example of the need for an integrated approach to labor and immigration reform.

Part I places recent events within the context of immigration, unionization and globalization. Part II examines the post 9/11 legal environment for immigrants, which is marked by repressive legislation. Although the labor movement's need to organize more immigrants is not disputed by the leadership of most unions, some scholars continue to argue that immigration is bad for labor. Part III contends that, even in the post 9/11 environment of economic downturn and immigrant-bashing, organized labor should continue to embrace immigrants. Part IV presents suggestions for ameliorating the impact of *Hoffman* and its effect on immigrant worker organizing. Finally, Part V argues that successful immigration reform can only be accomplished through an integrated strategy that merges labor and immigration reform.

I. THE CONTEXT: IMMIGRATION, UNIONIZATION AND GLOBALIZATION

There are varying views about the optimal elements of a successful immigration policy, ranging from open borders, to more restrictive immigration quotas, to guestworker programs.¹³ Adopted in 1986, IRCA created the current employer sanctions paradigm, which makes the employment of unauthorized aliens unlawful and places sanctions on employers who hire unauthorized immigrants.¹⁴ It is apparent to many observers, however, that this strategy has failed to substantially decrease undocumented entry into the United States.¹⁵ In fact, the sanctions law has functioned only as an excuse to discharge workers when they have attempted to organize.¹⁶ The factors that push poor immigrants into the United States—poverty and the lack of decent wages in much of

13. See Kevin Johnson, *Open Borders?* 50 UCLA L. REV. 193 (2003); Mark Tushnet, *Open Borders*, in A COMMUNITY OF EQUALS (Joshua Cohen & Joel Rogers eds., 1999).

14. Immigration and Naturalization Act § 274A, 8 U.S.C. § 1324a (2003).

15. Maria Isabel Medina, *The Criminalization Of Immigration Law: Employer Sanctions And Marriage Fraud*, 5 GEO. MASON L. REV. 669 (1997) (arguing that criminalization of the employment relationship has not deterred illegal entry). See also Ricardo Alonso-Saldivar, *Number of Illegal Migrants Growing*, L.A. TIMES, Feb. 1, 2003, at 7.

16. Muzaffar Chishti, *Employer Sanctions Against Immigrant Workers*, 3(b) WORKINGUSA at 71 (2000).

the world—still exist and indeed have been exacerbated in recent years.¹⁷

The relative weakness of the current labor movement compared to its height in the mid-20th Century must be part of any discussion of immigration and unionization. Unionization is now at about 10% of the private sector force—falling from around 40% in the 1950s.¹⁸ Unionization has declined in part because of globalization, specifically the increasing mobility of capital across borders. The increasing competitiveness of the global economy is responsible for much of the attrition of manufacturing jobs in the United States, jobs whose relocation has hastened domestic de-unionization.¹⁹ In addition, there has been a documented rise in employer resistance to unionization, facilitated in part by the lack of severe sanctions for employers who violate workers' right to organize. To employers, these sanctions appear weak when compared to the remedies available in other civil rights and employment statutes.²⁰ Weak labor remedies mean that the cost of violating the National Labor Relations Act (NLRA) is often less than the cost of unionization to the employer. Sometimes employers' animus towards organizing drives is not based on economics alone. Rather, it is based on a number of factors, including general views about unions, and the race, gender, or immigration status of the workers demanding better treatment.

Some have argued that increased numbers of immigrants harm the labor movement and drive down wages.²¹ Prior to the late 1990s, the leadership of the labor movement had been opposed to increased immigration, and many unions expressed hostility toward immigrants and "foreigners." However, the leadership of the AFL-CIO and its affiliate unions awoke in 2000 to both moral

17. Free trade agreements are often touted as way to reduce undocumented immigration by improving the economies of developing nations. However, in the ten years since the North American Free Trade Agreement (NAFTA) was enacted in 1993, unauthorized immigration from Mexico and the number of deaths along the U.S.-Mexico border have increased. Dr. Guillermo Alonso Meneses, *Human Rights and Undocumented Migration Along the Mexican-U.S. Border*, 51 UCLA L. REV. 267 (2003).

18. *Union Membership Dips Slightly to 13.2 % of Workers*, Daily Lab. Rep. (BNA) Feb. 26, 2003.

19. Marianne Bertrand, *The New Employment Landscape: Assessing the Role of Globalization*, in GLOBAL COMPETITION AND THE AMERICAN EMPLOYMENT LANDSCAPE AS WE ENTER THE 21ST CENTURY: PROCEEDINGS OF NEW YORK UNIVERSITY 52ND ANNUAL CONFERENCE ON LABOR 3 (Samuel Estreicher ed., 2000).

20. Kate L. Brofenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 75, 80 (Sheldon Friedman et al. eds., 1994) (finding that more than 75% of employers ran anti-union campaigns that utilized both legal and illegal means to prevent unionization).

21. This view will be discussed in depth in Part III.

interest and self-preservation and changed its policy on undocumented immigrants.²² The AFL-CIO now calls for a general amnesty and an end to employer sanctions for hiring undocumented immigrants. While some scholars have pointed to this turnaround as detrimental to increasing unionization and wage equality, other scholars have more powerfully pointed to the change as indicative of beliefs that (1) increased capital mobility demands greater worker mobility; and (2) immigrant workers, particularly undocumented immigrants, are more interested in unionization than their native-born counterparts.²³

With the trend towards organizing immigrants, immigration and labor have become interrelated and joined in practice. Paradoxically, the law treats these issues independently, with separate and conflicting bodies of law addressing immigration, labor organizing, and other aspects of employment law. It is up to the courts to reconcile and harmonize these various bodies of law in a way that serves Congressional aims of immigration control and worker protection.

One thing is clear: the current system of employer sanctions and border control has failed to decrease undocumented migration into the United States. For example, "Operation Gatekeeper," a border enforcement program begun in 1994, has been effective in making border crossing more dangerous, but it has not slowed the flow of immigrants.²⁴ In fact, recent government statistics suggest that the undocumented population increased by almost 2 million from 1990 to 2000.²⁵ Likewise, Immigration and Naturalization Service (INS)²⁶ interior enforcement operations such as "Operation Prime Beef," which targeted undocumented workers in the meat-packing industry, have only served employers' interests in maintaining an exploitable workforce.²⁷ IRCA's employer sanctions provision requires employers to verify the immigration status of their workers before hiring. Lack of enforcement and employers'

22. See AFL-CIO Executive Council Statement on Immigration, Feb. 16, 2000, New Orleans, LA, available at <http://www.aflcio.org/aboutaflcio/ecouncil/ec0216200b.cfm>.

23. See HECTOR L. DELGADO, *NEW IMMIGRANTS, OLD UNIONS: ORGANIZING UNDOCUMENTED WORKERS IN LOS ANGELES* (1993).

24. Robert Collier, *Desert Kills 5 More Migrants from Mexico*, S.F. CHRON., Jul. 18, 2002 at A3. See Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L. L. & POL'Y 121 (2001).

25. Ricardo Alonso-Zaldivar, *Number of Illegal Migrants Growing*, L.A. TIMES, Feb. 1, 2003 at A14.

26. In 2002, the Immigration and Naturalization Service was renamed the Bureau of Immigration and Customs Enforcement.

27. Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Legal Protection and the Need for Reform*, 34 HARV. C.R.-C.L. L. REV. 345, 359-60 (2001)

need for immigrant workers has rendered the employer sanctions provisions ineffective in deterring employers from hiring undocumented workers “with a wink and a nod.” At the same time, even in a weak economic climate, the business world had an insatiable appetite for more workers to fill low-skilled, low-paying jobs. The vectors of poverty and social dislocation that push immigrants into the U.S. have not lessened and have been exacerbated in some ways by globalization and “free trade.”

After 9/11 and *Hoffman*, the age-old question of what immigration reform should look like is even more critical. This Article argues that policymakers should approach immigration and labor reform in an integrated fashion, rather than in the hierarchical and disjointed manner that led the court in *Hoffman* to decide that immigration control should trump labor rights. The Article concludes by offering some suggestions to better adapt labor and immigration reform to an interconnected global workplace.

The Supreme Court majority in *Hoffman* failed to take an integrated view of immigration and labor law. Indeed, the decision illustrates the failure of labor laws originally enacted in the 1930s to respond to a changed global economic landscape, and showcases the need for labor and immigration reform that examines this landscape holistically, and not disjointedly. The Court’s decision failed to appreciate the interconnected nature of the global economy and instead chose to dichotomize two bodies of law, ultimately trouncing worker protections in the name of immigration control.

II. “EVERYTHING OLD IS NEW AGAIN”

A. *The World Before 9/11*

The events of 9/11 made “immigrant” synonymous with “terrorist.” The recent violations of immigrants’ civil liberties justified under the questionable rubric of “homeland security” have affected the lives of many noncitizens.²⁸ In addition, potential immigration reforms that looked somewhat promising before 9/11

28. See, e.g., DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003) (arguing that the treatment of non-citizens presages the denial of liberties for all Americans); Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849 (2003); Victor C. Romero, *Non Citizen Students and Immigration Policy Post-9/11*, 17 GEO. IMMIGR. L.J. 357 (2003).

seemed to vanish after the terrorist attacks. While 9/11 has resulted in a more hostile environment for immigrant workers, the pre-9/11 world also posed challenges for immigrant workers. Prior to 9/11, the legal landscape for immigrant workers was muddled and unfavorable. The question of what to do about the employment rights of undocumented workers had occupied the courts and administrative agencies both before and after passage of IRCA in 1986.

The Supreme Court first addressed the issue of whether undocumented workers were covered by protective labor laws such as the NLRA in the 1984 *Sure-Tan, Inc. v. NLRB* decision.²⁹ There, the employer responded to a union organizing campaign by calling in the INS to deport undocumented workers at the factory. The National Labor Relations Boards (NLRB) found the employer's actions to be an unfair labor practice in retaliation against workers who were trying to organize a union. The question was whether the employer was liable for the clear unfair labor practice committed against the deported workers. The Supreme Court held that undocumented workers were "employees" within the meaning of the NLRA, but that their remedies could be limited by certain factors. For example, the workers in *Sure-Tan* had been deported to Mexico, and thus the court held that they were unable to collect back pay without violating immigration law. Reinstatement, the most basic remedy available under the NLRA, was also foreclosed, because it would have required unauthorized reentry into the U.S. In short, because the unauthorized employees were not "available for work," they were not entitled to the same remedies as other workers.

The *Sure-Tan* ruling, followed by Congressional enactment of the employer sanctions law two years later, left courts in a state of flux as to the extension of remedies under other labor and employment statutes. Even after the passage of IRCA, most courts held that the NLRA and other protective labor statutes covered undocumented workers, even though the courts differed as to the exact remedies workers were entitled to receive.³⁰

Proposals to reform immigration laws gathered steam due to the continuing anomaly of a class of workers having rights without remedies. Organized labor made ending employer sanctions and a

29. 467 U.S. 883 (1984).

30. Compare *Del Rey Tortilleria v. NLRB*, 976 F.2d 1115 (7th Cir. 1992) (undocumented workers not entitled to back pay under the NLRA) with *EEOC v. Tortilleria "La Mejor"*, 758 F. Supp. 585 (E.D. Cal. 1991) (undocumented workers are covered by Title VII of the Civil Rights Act of 1964 and are entitled to all remedies thereunder).

general amnesty a centerpiece of their legislative efforts. The actual proposals floated by the Bush Administration in early 2001, however, were not a panacea for immigrant workers or the labor movement. The “front burner” proposal was a guest worker program modeled after the *Bracero* Program, a World War II-era program that brought Mexicans to the United States to serve as temporary farm labor. In order to deal with a purported shortage of labor, the U.S. and Mexico were discussing a proposal that would expand the current H-2A temporary farmworker program to include a wide variety of other industries.

While the actual provisions of a guestworker program were not fully articulated, the plan met with stiff criticism from immigrant rights’ groups and labor, which instead favored a new amnesty program for undocumented workers. These advocates highlighted the abuses of the original *Bracero* program, such as the prohibition against unionization of *Braceros*, and the failure of many *Braceros* to be fully compensated.³¹ The events of 9/11 scuttled the possibility of an amnesty for undocumented workers in the near future.³² However, there have been some signs of life in negotiations toward a new guestworker program.³³

B. Bad to Worse: The Hoffman Decision

As bad as the situation was for immigrant workers before 9/11, their status deteriorated markedly when the *Hoffman* case was decided in March 2002.³⁴ The *Hoffman* story began in May 1988,

31. See, e.g., *Cruz v. United States*, 219 F. Supp.2d 1027 (N.D. Cal. 2002) (*Braceros*’ complaint seeking return of withheld monies dismissed on statute of limitations grounds).

32. Evan Osnos, *Attacks Halt Movement Toward Migrant-Friendly Policies*, CHI. TRIB., Oct. 26, 2001, at N7. As the 2004 elections approach, however, the importance of winning Latino/a votes might bring the issue to the forefront again. In early December 2003, Homeland Security Chief Tom Ridge broached the possibility of a new amnesty for undocumented workers, but early and vocal resistance to the proposal has already been mobilized. Philip Shenon, *Ridge Favors a Status Short of Citizenship of Illegal Immigrants*, N.Y. TIMES, Dec. 11, 2003, at A30.

33. Peter Slevin and Mary Beth Sheridan, *Administration, Mexico ‘Advancing’ on Immigration Issues*, WASH. POST, Jan. 11, 2002, at A2. For an essay on the relative merits of a guestworker program, see Howard F. Chang, *Liberal Ideals and Political Feasibility: Guest-Worker Programs as Second-Best Policies*, 27 N.C. J. INT’L L. & COM. REG. 465 (2002).

34. The *Hoffman* case has already generated substantial critical commentary. See Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, The New Bracero Program, and the Supreme Court’s Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1 (2003); Robert I. Corrales, *Did Hoffman Plastic Compounds, Inc. Produce Disposable Workers?* 14 BERKELEY LA RAZA L.J. 103 (2003); Thomas J. Walsh, *Hoffman Plastic Compounds, Inc. v.*

when Jose Castro was hired to operate various blending machines that mix and cook plastics formulas in south Los Angeles. Although he was not authorized to work in the United States, Castro presented a false birth certificate to obtain employment at Hoffman. In December 1988, the United Rubber, Cork, Linoleum and Plastic Workers of America began a union organizing campaign at Hoffman. After coercive interrogation about their union activities, Hoffman laid off employees who had engaged in organizing activities, including Castro.³⁵

Castro filed an unfair labor practice charge with the National Labor Relations Board for coercive interrogation and termination based on his union activities. The Board found cause to issue a complaint against Hoffman, which put the matter before an Administrative Law Judge (ALJ). The ALJ sided with the Board and the complaint proceeded to a determination of remedies before a different ALJ. Under the NLRA, unlike other employment statutes, the primary remedies are back pay and reinstatement; there are no punitive damages, nor is there a private right of action.³⁶ Back pay is what the worker would have earned after the unlawful termination, minus any earnings the worker actually earned with another employer, plus interest. During the hearing on remedies, Hoffman's attorney began to question Castro about his citizenship and the Board attorney objected. The ALJ sustained the objection, but not before Castro had answered and stated he was a Mexican national and that he had borrowed documents from a friend to gain admission to the U.S. On the basis of this admission, the ALJ denied back pay. Reinstatement to his former job was possible only if Castro could show eligibility to work. In 1998, the Board in Washington reversed the ALJ's decision and ordered back pay. The Board found that the most effective way to promote the policies of IRCA and NLRA is to provide the protection and remedies of the

NLRB: *How The Supreme Court Eroded Labor Law And Workers' Rights In The Name Of Immigration Policy*, 21 LAW & INEQ. 313 (2003).

35. 29 U.S.C. § 157.

36. Front pay is a monetary award for anticipated lost future earnings resulting from past discrimination. Although front pay is not explicitly provided as a remedy under the NLRA, in 2000 the NLRB General Counsel encouraged Board attorneys to seek front pay in appropriate cases, particularly where reinstatement is unavailable. NLRB Gen. Counsel memorandum 00-01: Guideline Memorandum Concerning Front Pay (*available at* 2000 WESTLAW 33728415). Front pay might have been sought where reinstatement is unavailable, such as the case of undocumented immigrants, before *Hoffman*. The Court's reasoning concerning pay for "work not performed" would seem to apply equally to front pay as it does to back pay. Indeed, a federal court has found front pay to be unavailable in a Fair Labor Standards Act case. *Renteria v. Italia Foods, Inc.*, 2003 WL 21995190 (N.D. Ill. 2003).

NLRA “in the same manner as to other employees.”³⁷ The Board found that Castro was entitled to \$66,591, plus interest. Finding the award egregious, Hoffman appealed the Board’s order to the D.C. Circuit. A panel of three judges enforced the Board’s order. The case was reheard *en banc*, and the D.C. Circuit again enforced the Board’s order.

Hoffman appealed to the Supreme Court, which agreed with the employer and reversed the D.C. Circuit. In a 5–4 decision, split along the familiar ideological fault lines that have characterized many of the Court’s decisions, the Court held that the back pay award conflicted with federal immigration policy, and that any back pay for undocumented immigrants was foreclosed by the NLRA. The Court thus found a conflict between labor law and the 1986 immigration law and decided that the *Sure-Tan* ruling must be read “in a landscape significantly changed”³⁸ by IRCA. However, the Court did not overrule *Sure-Tan* outright; undocumented workers are still entitled to basic coverage under the NLRA. For example, if an employer terminates an undocumented worker in violation of the NLRA, the worker would not be entitled to back pay or reinstatement, but the employer would be required to post a notice to employees stating that the employer violated the NLRA. This hollow remedy is emblematic of what is wrong with labor law today, not just for undocumented workers but for all employees who attempt to organize.

The Hoffman decision reaffirmed the basic holding in *Sure-Tan*—that undocumented workers are employees under the NLRA. *Sure-Tan* had been unclear as to whether undocumented workers could receive remedies available to other employees. The *Hoffman* decision clarified that undocumented workers could not be granted remedies under the NLRA because of their immigrant status. This creates a conundrum: undocumented workers are “employees” under the NLRA but enjoy none of the remedies available to other employees. In other words, not all “employees” are treated equally before the NLRB when it comes to remedies.

In oral argument before the Supreme Court, Hoffman argued that the back pay award was contrary to immigration law. Hoffman’s lawyer also stressed at oral argument that denying the back

37. 326 N.L.R.B. 1060 (1998). “Jose Castro” is actually the name of the person whose birth certificate Casimiro Arauz borrowed to obtain work at Hoffman. For the purposes of this Article, and in the spirit of Arauz as a “ghost worker,” I will continue to refer to him as Jose Castro. The Court makes much of this document fraud, ignoring the employer’s illegal behavior in firing “Castro,” and the typical *wink and a nod* with which most undocumented workers are hired in the United States today.

38. 122 S. Ct. 1275, 1282 (2002).

pay remedy under the NLRA would not affect immigrant worker rights under minimum wage law. Hoffman's lawyer, Ryan McCortney, argued that minimum wage was for "work performed" and could therefore be compensated. In contrast, back pay was for "work not performed" and should therefore be unavailable for undocumented immigrants.³⁹ The Court adopted McCortney's argument:

Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations. The Board asks that we overlook this fact and allow it to award back pay to an illegal alien for years of *work not performed*, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud. We find, however, that awarding back pay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer.⁴⁰

The Court's construction of back pay in the passage above is problematic for three reasons. First, the characterization of back pay as money for "work not performed" is misleading since, by that logic, back pay for any worker would not be tenable. Back pay is by necessity a proxy, an informed prediction of what a worker would have done but for the unlawful discrimination. Second, the *Hoffman* decision could be used to deny liquidated damages available under the FLSA, because they are pay for "work not performed."⁴¹ Even assuming minimum wage and overtime premiums might be owed to the undocumented worker, the doubling of those amounts under the federal Fair Labor Standards Act and comparable state

39. Transcript of Oral Argument at 18, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (No. 00-1595) [hereinafter *Transcript*]. In fact, one Justice pressed McCortney as to why the minimum wage should be available to the undocumented: "Even though they—it was a crime to do any work? Why—if you're sticking with your theory that everything that this person did on that job, from presenting the false documentation on, was unlawful, so why should he be paid anything for unlawful activity? You're making a distinction between the Fair Labor Standards Act and the NLRA, but your theory, I think, would cover both." *Id.* at 15.

40. 535 U.S. at 146 (2002) (emphasis added).

41. 29 U.S.C. § 216(b).

laws might be foreclosed by the Court's logic as money that is not "for work performed." Finally, the majority's overriding concern about immigration control, would seem to prevent even minimum wage and overtime pay for undocumented workers.

On the most basic level, the Court majority denies that the work performed by undocumented immigrants has any value. The Court's attitude leads to a devaluation of the work performed by all immigrants in our society. This raises legal and philosophical questions about unjust enrichment. The legal questions might be argued away by pointing to the illegality of the employment relationship itself (which might indeed preclude recovery under an unjust enrichment theory) but the broader philosophical questions about our society's responsibility and debt to those within our borders regardless of status do not go away so easily. During *Hoffman's* oral arguments, the issue of whether the undocumented immigrant can lawfully look for another job after being discharged, a prerequisite for any worker to receive back pay, brought out hostile sentiment toward undocumented workers.⁴² The negative and misinformed views of individual Justices toward undocumented immigrants were evident. Justice Scalia asked Paul Wolfson, the deputy solicitor general representing the NLRB and the INS, about the undocumented worker's duty to mitigate damages.⁴³ Scalia said that the smart undocumented worker would "sit at home and eat

42.

QUESTION: In most back pay situations where the employer has committed an unfair labor practice and dismisses an employee improperly, the amount he's going to be stuck with for back pay is limited by the fact that the person unlawfully fired has to mitigate. He has to find another job. If he could have gotten another job easily and doesn't do so, the employer doesn't have to pay. Now, how is this unlawful alien supposed to mitigate? . . .

QUESTION: If he's smart he'd say, how can I mitigate, it's unlawful for me to get another job.

MR. WOLFSON: Justice Scalia—

QUESTION: I can just sit home and eat chocolates and get my back pay.

Transcript supra note 41, at 31–33.

43. Wolfson, an attorney in the Solicitor General's office, was representing not only the NLRB's position but also *the INS* view that the back pay award did not conflict with IRCA. This prompted a scolding exchange with Justice Scalia, who snapped that "[the INS had] no choice" in what the Solicitor General argued before the Supreme Court. *Id.* at 28. When Wolfson responded that the position he was arguing was developed in consultation with the INS and that they agreed with it, Scalia snapped, "[W]ell, I have no—it explains why we have a massive problem of illegal immigration, if that's how the INS feels about this." *Id.* at 28.

chocolates” because it was unlawful for him or her to mitigate damages. Besides being out of touch with reality, Scalia’s obsessions with the “illegal alien’s” transgressions and the “massive problem of illegal immigration” blind him and the rest of the Court majority to the violations of the “illegal employer.”⁴⁴ The social construction of the unauthorized worker as a born lawbreaker runs deep through judicial language and contemporary politics.⁴⁵ Society applies the “illegal for all purposes” label to no other class of lawbreakers. For example, we never hear employers who rampantly violate labor laws named as “illegal employers,” corporate executives who violate securities laws called “illegal executives,” or people who evade taxes as “illegal taxpayers.” The “illegal alien” label is simply another reminder of mainstream society’s association of criminality with the noncitizen—an association only further embedded in the minds of Americans by the current “War on Terror.” Thus, the decision in *Hoffman* could hardly be surprising with oral argument occurring four months after 9/11 and the decision rendered two months later in March 2002.

Scalia’s comments at oral argument are emblematic of the Court’s policy preference for immigration control over labor law enforcement. The preference for one policy objective over another is contrary to the administrative law rule of deference to the agency’s reasonable construction of the statute.⁴⁶ The Court’s privileging of immigration law over labor law is particularly puzzling in *Hoffman* given that the INS and the NLRB agreed that back pay awards to undocumented immigrants supported the goals of immigration control *and* labor law enforcement.

44.

QUESTION: I would have thought, Mr. Wolfson, that when you said, you know, there are 7 million illegal aliens in this country, that what you would follow that with is not, that’s an awful lot of people not to give back pay to. I would have thought you would follow it with, we have to do something to reduce this massive number of 7 million illegal aliens.

MR. WOLFSON: And what—

QUESTION: And what you don’t want to do to reduce it is to give them back pay.

Id. at 43.

45. See Garcia, *Proposition 187*, *supra* note 5, at 135–36.

46. Chevron, U.S.A. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (agency action should receive deference from court unless it is “arbitrary, capricious or manifestly contrary to the statute.”).

The restrictive impact of *Hoffman* currently applies by its terms only to back pay and reinstatement under the NLRA. However, like *Sure-Tan*, courts will give some weight to the Supreme Court's interpretation of the NLRA in analyzing remedies available to undocumented workers under other labor and employment statutes. Employers have already seized upon the decision by limiting the exercise of rights by undocumented workers under other protective labor laws such as federal and state discrimination and wage laws.⁴⁷ Still, courts have thus far limited the reach of *Hoffman* into other areas, such as antidiscrimination law and workers' compensation.⁴⁸

C. The World After Hoffman

The *Hoffman* case raises troubling questions about the United States' compliance with relevant international human rights law. International Labor Organization (ILO) Convention 87 protects the right of workers "without distinction whatsoever" to establish and join organizations of their own choosing.⁴⁹ ILO Convention 98 requires "adequate protection against acts of anti-union discrimination."⁵⁰ On November 10, 2002, the AFL-CIO filed a complaint with the ILO alleging that the *Hoffman* decision nullifies these rights.⁵¹

47. Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191 (S.D.N.Y. 2002) (defendant's discovery request for immigration status of plaintiffs in a garment workers' wage and hour suit denied); Rivera v. Nibco, 2001 WL 1688880 (E.D. Cal. 2001) (defendants motion seeking modification of an existing protective order prohibiting inquiry into plaintiff's immigration status denied; on appeal to the Ninth Circuit Court of Appeals).

48. Sanchez v. Eagle Alloy, Inc., 658 N.W. 2d 510 (Mich. Ct. App. 2003) (reconciling Michigan law and *Hoffman* to allow workers' compensation benefits up until the time the employer discovered the workers' undocumented status); Singh v. Jutla, 2002 WL 1808589 (N.D. Cal. 2002) (*Hoffman* does not apply to compensatory, punitive, or injunctive relief under the anti-retaliation provisions of FLSA, especially where employer knew about the worker's undocumented status for three years); Flores v. Albertsons, Inc., 2002 WL 1163623 (C.D. Cal. 2002) (in an FLSA case, denying discovery request for immigration status, recognizing the chilling effect that such requests have). *Hoffman* has been extended to limit recovery of future lost earnings in tort cases. See Hernandez-Cortez v. Hernandez, 2003 WL 22519678 (D. Kan. 2003); Majlinger v. Casino Contracting Corp., 766 N.Y.S. 2d 332 (N.Y. Supp. 2003).

49. Convention (ILO No. 87) Concerning Freedom of Association and Protection of the Right to Organize, July 9, 1948, 68 U.N.T.S. 17.

50. Convention (ILO No. 98) Concerning the Application of the Principles of the Right to Organize and Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257.

51. AFL-CIO Complaint Filed with International Labor Organization, Daily Lab. Report (BNA), Nov. 12, 2002 at E36.

The complaint illustrates the AFL-CIO's new position with regard to immigrant workers. It also highlights that we live in a global economy and that domestic labor laws must be viewed in the context of international human rights.⁵² However, the ILO's lack of enforcement powers, and the United States' general flouting of international authority, dims the prospects that the AFL-CIO complaint will be anything more than symbolic. A more promising avenue might be filing a complaint under the NAFTA labor side agreement, which would tie *Hoffman* to the labor rights and trade debate;⁵³ A NAFTA complaint would go a long way towards making the link between migration, trade and labor rights more clear.⁵⁴ In addition, the Inter-American Court of Human Rights recently found that the United States is not in compliance with international human rights after the *Hoffman* case.⁵⁵ The opinion, though nonbinding, is a symbol of Mexico's anger with the United States over the *Hoffman* decision.

Despite the rhetoric that undocumented workers will be paid for all "work performed," the *Hoffman* decision effectively extinguishes

52. But see Kevin R. Johnson, *The Moral High Ground? The Relevance of International Law to Remediating Racial Discrimination in U.S. Immigration Law*, in MORAL IMPERIALISM: A CRITICAL ANTHOLOGY 285 (Berta Esperanza Hernández-Truyol ed., 2002) (expressing skepticism about the power of international human rights instruments to remedy racial discrimination in immigration law); Alan A. Stevens, *Give Me Your Tired, Your Poor, Your Destitute Laborers Ready to Be Exploited: The Failure of International Human Rights Law to Protect the Rights of Illegal Aliens in American Jurisprudence*, 14 EMORY INT'L L. REV. 405, 408 (2000) (arguing Congress should extend Title VII protection to undocumented workers). The Supreme Court has recently cited to international law in two major decisions, *Grutter v. Bollinger*, 123 S. Ct. 2315, 2347 (Ginsburg, J., concurring) (citing the International Convention on the Elimination of all Forms of Racial Discrimination) and *Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (citing a decision of the European Court of Human Rights).

53. North American Agreement on Labor Cooperation, Sept. 14, 1993, Can.-Mex.-U.S. 32 I.L.M. 1499, 1502-03, entered into force Jan. 1, 1994. Article 4, §§ 1-2 state: "Each Party [to NAFTA] shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law. Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under: (1) its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and (2) collective agreements, can be enforced." Labor Principle 11 is even more clearly violated by the decision in *Hoffman*, in that it provides "migrant workers in a Party's territory with the same legal protection as the Party's nationals in respect of working conditions." See DOUGLAS S. MASSEY ET AL., *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* (2002) (arguing that regional economic integration through neoliberal trade agreements necessitate greater labor mobility between the U.S. and Latin American countries).

54. The relationship between NAFTA and increased migration from the Mexican countryside to the cities (and ultimately, to the United States) is just beginning to be felt. See Ginger Thompson, *NAFTA to Open Floodgates, Engulfing Rural Mexico*, N.Y. TIMES, Dec. 19, 2002, at A3.

55. See *The Week in Mexico*, SAN DIEGO UNION-TRIB., Sept. 28, 2003, at A28.

the right of undocumented workers to organize and improve their employment conditions. Given the recent emphasis of international organizations on the problem of slavery and conditions of servitude in the global labor market, it may be useful to examine whether the *Hoffman* case encourages a new form of slavery in the global economy. While some may consider the term “slavery” too strong a descriptor, undocumented workers share many of “badges and incidents” of slavery under common and legal understandings of the term. While distinguishable from traditional notions of slavery—where slaves were bought and sold as chattels on the open market under compulsion—the trafficking of undocumented workers in the global economy parallels some aspects of the North American slave trade.⁵⁶ For example, immigrant workers’ prospects for leaving employment are nil because of their legal status. In addition, they are more likely to be under compulsion to stay with their employer, due to threat of deportation. In the *Slaughterhouse Cases*, the Supreme Court made clear that the Thirteenth Amendment was not intended to be limited to African slavery alone and could apply to adverse immigrant labor conditions.⁵⁷ “New” forms of slavery in the global economy require a new analytic framework.⁵⁸ Labor historians have traced to the Thirteenth Amendment an ideology that equated slavery with a lack of collective bargaining rights. Indeed, this corresponds to what Lea VanderVelde has termed the “labor vision of the Thirteenth Amendment.”⁵⁹ Further, recent global slavery episodes involving undocumented workers make calling the conditions of undocumented workers “slavery” more plausible. For example, Thai workers were held captive at a sweatshop in El Monte in 1995.

56. David Kyle & John Dale, *Smuggling the State Back In: Agents of Human Smuggling Reconsidered* in GLOBAL HUMAN SMUGGLING: COMPARATIVE PERSPECTIVES 52 (David Kyle & Rey Koslowski eds., 2001); KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* (1999).

57. *Slaughterhouse Cases*, 83 U.S. (16 Wall) 69, 72 (1872).

58. See Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973 (2002); Baher Azmy, *Unshackling The Thirteenth Amendment: Modern Slavery and A Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 982 (2002); Fang-Lian Liao, Note, *Illegal Immigrants in Garment Sweatshops: The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*, 3 SW. J.L. & TRADE AM. 487 (1996). Liao argues that illegal immigrants in sweatshops should be considered enslaved pursuant to the prohibition against slavery and servitude found in Article 4 of the Universal Declaration of Human Rights “when they have no choice but to work in atrocious conditions” or to be “reported to the authorities and deported.” *Id.* at 502.

59. Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 485–95 (1989). See also James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 105–12 (2002); Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1668–80 (2001).

In addition, some unauthorized workers have been trafficked as slaves and then worked for large corporations while working to pay off their traffickers.⁶⁰

The Supreme Court majority in *Hoffman* failed to take into account emerging global labor norms. These norms represent an integrated approach to labor and migration. Indeed, the decision has shown the failure of traditional labor law to respond to a changed global economic landscape, and the need for labor and immigration reform that looks at this landscape holistically, rather than in a fragmented manner. Further, the Court's decision failed to appreciate the interconnected nature of the global economy and instead chose to dichotomize two bodies of law, ultimately choosing to trounce worker protections in the name of immigration control.

III. LABOR'S DILEMMAS

A. Is Law the Problem or the Solution?

Even before 9/11 and the *Hoffman* decision, many observers called for immigration reform, but not necessarily for immigration liberalization.⁶¹ Cornell labor economist Vernon Briggs is the most vocal proponent of the view that increased immigration is bad for the fortunes of the labor movement.⁶² Using data on immigration and union membership trends, Briggs argues that increased immigration is counter to the fortunes of the labor movement. He argues that by keeping migration levels low, we help those who are already here, including immigrants, women, people of color, and those at the lower end of the wage scale. The most important solution to low wages and declining unionization, according to Briggs,

60. Dina El Boghdady & Greg Schneider, *Immigration Officials Raid Wal-Mart Stores*, WASH. POST, Oct. 24, 2003 at E1.

61. Economist Philip L. Martin has also argued against greater liberality in immigration policies. See, e.g., Philip L. Martin & Michael L. Teitelbaum, *The Mirage of Mexican Guest Workers*, 80(6) FOREIGN AFFAIRS 117-31 (Nov.-Dec. 2001); Philip L. Martin, *Illegal Immigration and the Labor Market*, in 8 DEFENSE OF THE ALIEN 67-73 (1985); PHILIP L. MARTIN, PROMISE UNFULFILLED: UNIONS, IMMIGRATION & THE FARM WORKERS (2003).

62. Vernon M. Briggs, Jr., IMMIGRATION AND AMERICAN UNIONISM (2001), Vernon M. Briggs, Jr., *Reining in a Rogue Policy: The Imperative of U.S. Immigration Reform*, 30 U. MIAMI INTER-AM. L. REV. 611 (1999); VERNON M. BRIGGS, JR., MASS IMMIGRATION AND THE NATIONAL INTEREST: POLICY DIRECTIONS FOR THE NEW CENTURY (3d. ed. 2003). See also GEORGE BORJAS: HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY (1999).

is to stem the flow of illegal immigration, thereby decreasing the supply of workers at the bottom of the wage scale. Briggs posits a causal relationship between increases in immigration to the U.S. and a decline in unionization.

Since 1965, immigration has indeed risen while unionization has declined. However, the causes for the decline in unionization are more complex than Briggs's data suggests. The inverse relationship between immigration and unionism became a self-fulfilling prophecy because of unions' antipathy towards immigrants. The increasing numbers of immigrants in the labor force only meant more workers that unions refused to organize—contributing to a decline in the percentage of the workforce that is unionized. Second, the impact of increasing employer resistance to unionization cannot be underestimated in accounting for labor's decline from 1950s levels.

The watershed moment for anti-unionism occurred when President Reagan broke the Professional Air Traffic Controllers Organization (PATCO) strike in 1981. However, PATCO was merely a symptom of a broader trend toward union busting. Companies began seeking labor in the developing world as an alternative to an increasingly competitive domestic economic environment.⁶³ Briggs also ignores numerous recent studies that point to immigrants, undocumented or otherwise, as major forces in the revitalization of the labor movement today.⁶⁴

One must look at the central economic reason employers hire undocumented workers—the desire to reduce labor costs. The undocumented will accept lower wages than native-born workers. As Briggs points out, studies show that most undocumented workers get the minimum wage.⁶⁵ If mandatory wage levels were set at “living wage” levels rather than at the minimum that they are set at

63. See Bertrand, *supra* note 19.

64. In immigrant-populous California, a recent study done by the University of California Institute of Labor and Employment showed that non-U.S. citizens have the highest propensity to vote for a union than their U.S. citizen counterparts. Margaret Weir, *Income Polarization and California's Social Contract*, in THE STATE OF CALIFORNIA LABOR (2002) (percentages of nonunion Californians saying they would vote for union: native-born U.S. citizen, 42%, foreign-born U.S. citizen, 54%, non-U.S. citizens, 66%); Roger Waldinger & Claudia Der-Martirosian, *Immigrant Workers and American Labor: Challenge . . . or Disaster?*, in ORGANIZING IMMIGRANTS: THE CHALLENGES IN CONTEMPORARY CALIFORNIA 49 (Ruth Milkman ed., 2000); Ruth Milkman, *New Workers, New Labor, and the New Los Angeles*, in UNIONS IN A GLOBALIZED ENVIRONMENT: CHANGING BORDERS, ORGANIZATIONAL BOUNDARIES, AND SOCIAL ROLES 103 (Bruce Nissen ed., 2002).

65. Briggs, *supra* note 62, at 125. Recent evidence suggests that some jobs have come to be seen as jobs that only immigrants are supposed to do. ROGER WALDINGER & MICHAEL I. LICHTER, *HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR* (2003).

now, native-born workers might take the jobs that currently fall to undocumented workers. Some jobs, however, will be undesirable enough that a modest increase in the minimum wage will not lead them to be filled by documented workers. Based on this information, immigration law needs to take into account labor market needs and should adapt to changes in the labor market.

Briggs's historical data is accurate, but changed times demand a new perspective. It follows that when the labor movement was hostile to immigrants, the percentage of the work force that is unionized declined as immigration increased. Given labor's new positive orientation toward immigrants, however, the "oversupply" of immigrant workers is actually an opportunity for organized labor to increase its share of the labor market.

To his credit, Briggs does acknowledge that change is needed in labor law, but he focuses mostly on repealing section 14(b) of the Taft-Hartley Act, which paved the way for so called "right to work" states.⁶⁶ That provision allows states to prohibit union security clauses that require workers to become members of the union bargaining representative at their workplace and is a major reason for union weakness in the Southern United States. However, section 14(b) reform alone would not lead to the revitalization of labor. More emphasis should be placed on protecting workers' freedom to join unions, and creating a private right of action for immigrants whose rights to organize are violated. It is, as Justice Scalia suggested in the oral argument in *Hoffman*, an anomalous situation when immigrants have the right to go into court to seek back wages under the Fair Labor Standards Act but not for violations of the NLRA. The solution is not, as Justice Scalia suggests, to also take away the rights of undocumented immigrants under minimum wage laws, but instead to recognize the rights of these same immigrants under federal labor law.

Briggs attempts to mesh immigration policy with the nation's labor needs. This approach recognizes the clear connection between labor and immigration policies. However, this kind of orchestration leads to the view that non-U.S. citizens are only here when we need them and are only here to work. This view has contributed to abusive programs like the World War II-era *Bracero* program, where temporary laborers were supposed to be guaranteed minimum working conditions but in many cases were denied

66. 29 U.S.C. § 164(b).

even the wages that they had been promised upon their return to Mexico.⁶⁷

Ultimately, Briggs views immigration and labor in an atomized manner, just as the Supreme Court did in *Hoffman*. For both Briggs and the Supreme Court, domestic immigration control must override nationally and internationally recognized rights to organize and bargain collectively. This view is detrimental to all people of color within the jurisdiction of the United States in two ways: (1) many, if not most, of the immigrants who are denied the right to organize by the *Hoffman* decision are people of color; and (2) any reduction in union organizing caused by the decision will lead to lower wages for all workers, particularly in service sector industries where immigrant-centered organizing has been predominant.

B. Immigration and Global Unionism

Briggs's argument is also an example of isolationism, counter to trends in the labor movement both in the U.S. and in the rest of the world. Immigrants have been the lifeblood of recent innovations in the labor movement, such as the Justice For Janitors movement, where immigrant janitors have successfully sought higher wages.⁶⁸ Moreover, on a global scale, labor leaders throughout the world are seeing the need to integrate immigrants and persuade governments to change immigration policy.⁶⁹ As Julie Watts argues in a recent book, the AFL-CIO's change in position on immigration was a response to a globalized economy.⁷⁰ Watts describes the labor movement in countries such as Spain and France also recently awoke to the need for more liberal immigration policies. These examples show that American unionism can no longer exist in isolation.

67. See *Cruz v. United States*, 219 F. Supp.2d 1027 (N.D. Cal. 2002).

68. Briggs challenges the wage increases of the 2000 Justice for Janitors contract settlement in Los Angeles as being insufficient. Briggs, *supra* note 62 at 176. While one could, in retrospect, say that the janitors should have obtained higher wage increases from the building owners, it would be a mistake to measure the strike's success by the wage increases alone. The strike's positive effect on the morale of the labor movement should not be underestimated. See Christopher Erickson et al., *Justice for Janitors in Los Angeles: Lessons from Three Rounds of Negotiations*, 40 BRITISH J. INDUSTRIAL REL. 543 (2002); Harold Meyerson, *Enter the Janitors*, L.A. WEEKLY, Apr. 14–20, 2000.

69. JULIE WATTS, IMMIGRATION POLICY AND THE CHALLENGE OF GLOBALIZATION: UNIONS AND EMPLOYERS IN AN UNLIKELY ALLIANCE (2002).

70. *Id.* at 144–147.

Still, the question might be asked: why should undocumented immigrants get back pay? Why should they get anything at all? While Briggs might argue that the rule of law is better served by “refusing to reward illegal conduct,” our constitutional values and “rule of law” might be better upheld by affording remedial protection and social benefits to those who are within our borders.⁷¹

IV. HOLISTIC LABOR AND IMMIGRATION LAW REFORM IN A GLOBAL ECONOMY

A. *The Limits of Law?*

Before discussing how specific immigration and labor reforms might improve conditions for immigrant workers in the global economy, debates within the labor movement about the limits of law must be addressed. The labor movement’s reliance on law and legal process, some argue, led to the taming of the movement from its radical roots in the 1930s.⁷² Immediately after the *Hoffman* decision, labor leaders vowed to respond with a call for a new amnesty program.⁷³

Despite the twin challenges presented by 9/11 and *Hoffman*, hope remains for immigration reform. The AFL-CIO recently declared its resolve to continue working for comprehensive immigration reform, and for an “Immigrant Workers Freedom Ride” in September 2003.⁷⁴ In the view of the labor movement, immigration reform must include the end of sanctions against employers who hire undocumented immigrants and a general amnesty. But would that be enough? This Part argues that the current call for a general amnesty and an end to employer sanctions

71. Owen Fiss, *The Immigrant as Pariah*, in A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS (Joshua Cohen & Joel Rogers eds., 1999).

72. Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978); WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1994); JAMES ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1990).

73. David G. Savage & Nancy Cleeland, *High Court Ruling Hurts Union Goals of Immigrant Labor*, L.A. TIMES, Mar. 28, 2002, at A20 (quoting SEIU vice president Eliseo Medina and United Farm Workers President Arturo Rodriguez on the need for a new amnesty program in light of the decision).

74. AFL-CIO Executive Council Action, *Immigrant Workers Freedom Ride: On the Road to Citizenship*, Chicago, IL, available at <http://www.aflcio.org/aboutaflcio/ecouncil/ec0807d2002.cfm> (last visited Aug. 7, 2002).

would not be enough to change the current bleak outlook for immigrant worker organizing under the current labor law.

B. Building a Better Guestworker Program?

Some have argued that guestworker programs integrate the needs of labor and immigration. However, this Article finds shortcomings to this approach. Much of the opposition by immigrant worker advocates to expanded guestworker policies centers on fears of a return to the abuses of the Bracero Programs of the mid-20th Century. These programs were infamous for their lax and “self-enforcing” labor standards that made exploitation a foregone conclusion. For example, the Braceros were paid “prevailing wages” in the agricultural labor market. In practice, that meant being paid by the piece at whatever price the employer was willing to pay.⁷⁵ This often amounted to well below the minimum wage.

But what if the Bracero program could be reformed? What if the new guestworkers could be guaranteed at least the minimum wage and the right to organize into unions as well? Any new guestworker program would have to take workers’ internationally-recognized rights into account, but these rights were also in existence when the original Bracero program was in effect. Perhaps the North American Free Trade Agreement (NAFTA) labor-side accords with Mexico and discussions of a hemispheric trade agreement would provide more leverage for Latin-American and other countries to seek these protections in any new guest worker program. However, it is unclear whether a new guestworker program could be made more fair, especially since employers are interested in guestworkers because of their willingness to work for less than native-born workers. In addition, because of the exemption for agricultural employers from the NLRA, any collective bargaining rights for guestworkers would have to be established through the guestworker program itself.⁷⁶ Ultimately, it is unlikely that a guestworker program could be designed to satisfy capital’s interests, the labor movement, and the guestworkers themselves at the same time.

75. KITTY CALAVITA, *INSIDE THE STATE: THE Bracero PROGRAM, IMMIGRATION AND THE INS* 69 (1992).

76. 29 U.S.C. § 152 (exempting agricultural employers from the NLRA).

*C. Going A Few Steps Further: Looking at the
NLRA and IRCA Together*

The most immediate reaction to a decision like *Hoffman* that misconstrues federal statutes is to argue for legislative reversal—i.e. allowing undocumented workers to receive back pay. However, this strategy does not address the complexities these workers face because of their undocumented status. Employer sanctions make it difficult for undocumented immigrants to gain employment. In addition, these workers are always under threat of deportation. Many have argued for ending the employer sanctions provisions of IRCA and have promoted a general amnesty. However, such reform is limited by the eerie post-9/11 political landscape. Congress could also accomplish partial reform by codifying the NLRB's pre-*Hoffman* practice: awarding back pay up until the point that the employer learned of the worker's undocumented status.⁷⁷

Another response to *Hoffman* might be initiation of more statutory and common law employment claims by immigrants, instead of administrative actions.⁷⁸ For example, the right to organize and to bargain collectively might be enforced in U.S. courts under the federal Alien Tort Claims Act.⁷⁹ The Act provides a mechanism for non-citizens to enforce customary international law, such as human rights prohibitions on slavery, torture and murder. While legislative

77. A.P.R.A. Fuel Buyers, Inc., 320 N.L.R.B. 408 (1995), *enforced*, 134 F.3d 50 (2d Cir 1997) (undocumented immigrants are entitled to back pay up until the time that the employer learns of their immigration status). California has acted quickly to restore the state of the law before *Hoffman*. CAL. LAB. CODE § 1171.5. A similar attempt to do the same thing in Arizona died in the legislature. See http://www.azleg.state.az.us/legtext/45leg/2r_/summary.

78. Even though *Hoffman* does not directly apply to Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission (EEOC) responded to *Hoffman* by signaling a move away from administrative enforcement for undocumented workers, at least with regard to back pay. See EEOC Directives Transmittal No. 915.002, Recission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (rescinding for reconsideration the Agency's November 26, 1999 memorandum on the availability of back pay to undocumented workers in light of *Hoffman*, since "the Commission's 1999 Enforcement Guidance relied on NLRA cases to conclude that undocumented workers are entitled to all forms of monetary relief—including post-discharge backpay—under the federal employment discrimination statutes . . .").

79. See Michael Wishnie, *Immigrant Workers and the Enforcement of International Labor Rights*, 4 U. PA. J. LAB. & EMP. L. 529 (2002). As Michael Wishnie points out, alien workers in the United States may use the Alien Tort Claims Act, 28 U.S.C. § 1350, to challenge conditions of international norms such as slavery in the United States. However, it is less clear that international standards such as the freedom of association and the right to bargain collectively are enforceable as *jus cogens* norms against private parties.

reversal of *Hoffman* is a necessary step, litigation is also necessary to uphold the internationally-recognized rights to free association and collective bargaining. Thus, other alternatives should be explored—including those modeled on prior efforts, and others that entail a major overhaul of laws governing immigration, union organizing, and wages.

1. *Joint Enforcement Actions*—Although separate federal bureaucracies manage immigration and labor law, there is precedent for the kind of joint enforcement action that would bring together these two agencies and their dichotomous bodies of law. In 1999, when eight Latino/a workers at a Minneapolis Holiday Inn Express engaged in union activities, they were fired on the pretext of their undocumented status.⁸⁰ Because the firing of these workers was so blatantly retaliatory, their cause became the primary focus of their union, the Hotel Employees and Restaurant Employees Union, Local 17. The union organized demonstrations and protests, ultimately winning the freedom of the workers. The joint enforcement action of the INS, the Department of Justice and the Equal Employment Opportunity Commission took place on an ad hoc basis, but it could serve as a model for other enforcement efforts.

2. *Conditional Reinstatement and Special Status for Immigrants Involved in Enforcement Proceedings*—As a policy, the NLRB presses for reinstatement, regardless of a worker's immigration status. Once reinstatement is granted, the employer can then require the worker to present evidence of authorization to work in the United States. NLRB attorneys are advised to seek reinstatement in every case, and only after liability on the unfair labor practice is established, can the workers' immigration status be considered in the remedial phase of the administrative process. It is at this so-called "compliance" hearing that the immigration status of Castro, the fired worker in *Hoffman*, was first discovered. At that point, Hoffman Plastics had no obligation to reinstate Castro, and indeed could have been criminally liable had they done so. Thus, back pay was available to Castro and other undocumented immigrants before the Supreme Court decided he was unable to return to his job and continue his unionizing efforts at Hoffman Plastics. Many employers would willingly succumb to back pay liability in lieu of continued union organizing at their place of business. However, allowing the employer to use the usually small sum of back pay as a union-avoidance policy does not serve the purposes of the Act and

80. Kimberly Hayes Taylor, *Illegal Workers Get to Stay in U.S.* MINNEAPOLIS STAR TRIB., Apr. 26, 2000, at 1B.

rewards employers' unlawful conduct just as the Court's elimination of the back-pay remedy in *Hoffman* does.

Labor and immigration laws could be amended to preclude inquiry into a worker's immigration status until all appeals have been exhausted by the employer.⁸¹ Professor Lori Nessel's proposal to amend immigration laws to create special visas for workers who are attempting to vindicate their statutory rights also should be seriously considered.⁸² Nessel points to the "S" visa categories created for undocumented witnesses in criminal prosecution, and the "T" visa category for the victims of trafficking as models for labor enforcement. Such measures would recognize the importance of inter-agency cooperation in the enforcement of minimum labor standards on behalf of immigrants and all other workers who benefit from their activism.

3. *Open Borders?*—Because no single alternative discussed in this Article will revive the labor movement. One might ask why the labor movement has not advocated for open borders. To some, the idea of open borders in the post-9/11 world might seem unduly dangerous. Still, there are good arguments for the increasing mobility of labor across borders to better correspond with increased capital mobility.⁸³ Moreover, "open borders" does not necessarily mean the end of immigration control. Indeed, the current limits on legal immigration were ineffective in preventing the 9/11 terrorists from executing their plot. Immigration control would still exist, but the current limits on how many people can immigrate to the United States would be eliminated. Many would argue, however, that open borders would lead to more immigrants than the nation could handle.

Although an open borders policy is politically unlikely, it represents the most consistent approach to recognizing the human worth of those who do the work in our society. It is also in tension, as discussed, with economic theory on the effect of a greater labor supply on the wages of all workers. Thus, for an open borders regime to work, minimum wage levels in the United States would

81. Current Board practice is that immigration status is not relevant until the compliance proceeding conducted by an Administrative Law Judge, where issues of back pay are determined. Memorandum to All Regional Directors from Arthur Rosenfeld, General Counsel, No. GC 02-06, at 1 (July 19, 2002) (*available at* <http://www.nlrb.gov/gcmemo/gc02-06.html>).

82. Nessel, *supra* note 27.

83. Mark Tushnet, *Open Borders*, in *A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS* (Joshua Cohen & Joel Rogers eds., 1999) (disputing whether open borders would lead to an unmanageable influx of newcomers); *See also* Johnson, *supra* note 14 (arguing for the benefits of open borders).

have to be raised and substantial new resources would have to be committed to the enforcement of those laws. Raising minimum wages and increasing enforcement of wage laws would protect against wage undercutting in the lower skill levels that would result from a larger supply of labor.

While there is near unanimity among union leaders that some supply of undocumented labor is to be expected and should be organized into unions, most labor leaders have not called for open borders. Under certain conditions, however, it might be a palatable option. First, a gradual easing of restrictions would minimize any negative wage effects. Also, greater attention to the inadequate and under-enforced minimum wage in conjunction with a proposal for liberalized immigration would make the effect on overall wages less severe. Finally, as argued in Part III, labor's new orientation toward immigrants should mean that there does not have to be an inverse relationship between immigration and unionism. However, a gradual easing of restrictions might be necessary to ensure that the already struggling labor movement is able to effectively organize the newcomers.

While there is near consensus among worker and employer advocates alike, worker advocates may not necessarily want to return to the pre-employer sanctions days of *Sure-Tan*, when back pay might have been available but so was deportation. An open borders regime allows the workers to stay in the U.S.—sometimes the most important determinant as to whether union organizing will take place among immigrants. But an open borders regime would not be sufficient without making union organizing less threatening to workers' continued employment.

What if reform does not occur? What if Congress does not reverse *Hoffman*? Both of these scenarios are quite likely given today's political realities. However, immigrants have continually pressed for social change and unionization despite their status and despite unfriendly laws.⁸⁴ Indeed, many immigrant rights groups hold a notion of citizenship that transcends legal status.⁸⁵ This suggests that immigrant-unfriendly legal and political eras such as the current one are unlikely to slow the progress toward immigration reform. Whatever immigration and labor reforms take place, both

84. HÉCTOR L. DELGADO, *NEW IMMIGRANTS: OLD UNIONS: ORGANIZING UNDOCUMENTED WORKERS IN LOS ANGELES* (1993).

85. See Garcia, *Borders*, *supra* note 5. See also Paul Johnston, *The Emergence of Transnational Citizenship among Mexican Immigrants in California*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* 253 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

the courts and legislators need to take into account the current interconnected global context.

V. CONCLUSION

Work and the movement of people across borders have been intertwined phenomena throughout history. This movement of workers is in tension with the political reality that has created borders around nations and borders around bodies of law governing work and migration. The Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB* is an example of how the privileging of one body of law (immigration) over another (labor law) can be detrimental to the interests of immigrants, workers of color, and, ultimately, all workers.

Law reform takes place in an environment of political expediency. It is often not realistic or possible to believe that all aspects of a problem can be addressed at one time. The courts also have explicitly approved of such piecemeal approaches to law-making.⁸⁶ Certain social phenomena are so interlinked, however, that the courts have a special obligation to attempt to reconcile potentially conflicting policy objectives. On the books, immigration law and labor law are separate bodies of law, but in action they are interconnected statutory schemes. Labor law and immigration law reform are both needed, but until that happens, courts must reconcile separate bodies of law in a way that serves the stated policy objectives of both statutory schemes. In *Hoffman*, the Supreme Court majority failed to do this. But the failure raises broader questions about the inadequacy of both domestic labor law and national immigration law in an increasingly global environment. Domestic labor law has been shown to be inadequate to protect workers' rights in the international economy, and national migration laws have proved inadequate to control migration or to respect international human rights. Thus, until both bodies of law are reformed to better reflect international realities, courts need to interpret these laws in a way that better reflects our interconnected world.

86. See, e.g., *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949).

