

TEN YEARS AFTER *HOFFMAN PLASTIC COMPOUNDS, INC. V. NLRB*: THE POWER OF A LABOR LAW SYMBOL

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INTRODUCTION

The impact of United States Supreme Court decisions on the everyday lives of people is a difficult thing to measure. Some cases, such as those upholding the right to have an abortion,¹ attend integrated schools,² or engage in private same-sex activity,³ can have an immediate and widely felt impact. This might be particularly true of cases that announce principles that apply to the entire nation and can only be modified by constitutional amendment. Other cases, particularly those interpreting specific statutes, have more subtle effects. For example, cases limiting the right to strike under the National Labor Relations Act

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¹ *Roe v. Wade*, 410 U.S. 113 (1973).

² *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

³ *Lawrence v. Texas*, 539 U.S. 558 (2003).

(NLRA)⁴ may have an impact on strike rates. With union membership in the private sector below eight percent⁵, however, the effect on society as a whole is difficult to measure. The effects of such cases are even harder to measure when the workers involved lack authorization to be in the United States.

On March 27, 2002, the United States Supreme Court decided *Hoffman Plastic Compounds, Inc. v. NLRB*.⁶ In *Hoffman*, the Court held that an undocumented worker who was fired for union organizing was not entitled to back pay.⁷ In this Article, I will reflect upon the impact of *Hoffman* over the past decade. *Hoffman* has had a significant impact on the law and remedies for fired undocumented workers under the NLRA. As with many legal decisions, the number of workers *Hoffman* will deter from organizing is hard to measure; this is particularly hard with regard to undocumented workers, who are already deterred because of their lack of immigration status. As I will discuss in this Article, however, the real impact could be broader and longer lasting.

Hoffman has been the subject of much criticism since the Supreme Court announced its decision in 2002.⁸ I have previously argued that *Hoffman* dichotomized labor and immigration laws in tension with each other and left workers less protected.⁹ I have also argued that denying remedies to undocumented workers under the law makes all workers worse off because it facilitates an increased possibility that employers will exploit workers.¹⁰ Other commentators correctly predicted, however, that *Hoffman* would not apply to many cases outside the scope of the NLRA, such as those under the Fair Labor Standards Act (FLSA).¹¹

⁴ See, e.g., NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) (holding that employers have the right to hire replacement workers during an economic strike).

⁵ Bureau of Labor Statistics, USDL-11-0063, Union Members 2010 (2011).

⁶ Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

⁷ Id.

⁸ See, e.g., Robert I. Correales, *Did Hoffman Plastic Compounds, Inc. Produce Disposable Workers?* 14 LA RAZA L.J. 103 (2003); Maria L. Ontiveros, *Immigrant Workers Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651 (2004); María Pabón López, *The Place of the Undocumented Worker in the United States Legal System after Hoffman Plastics: A Comparative Assessment*, 15 IND. INT'L & COMP. L. REV. 301 (2005).

⁹ See Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Labor and Immigration Law*, 36 U. MICH. J.L. REFORM 737, 739–41 (2003).

¹⁰ See RUBEN J. GARCIA, *MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION* (2012).

¹¹ 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, 5 (2003); see also Jarod S. Gonzalez, *Employment Law Remedies for Illegal Immigrants*, TEX. TECH L. REV. 987, 990 (2008) (noting that courts have distinguished *Hoffman* in the FLSA context).

The fact that *Hoffman* might apply to a more limited number of cases than originally feared, or only to the remedy of back pay for all immigrants, does not make it less of a threat to the labor rights of all immigrants. The specter of *Hoffman* has sometimes been used more effectively than the reality; employers have tried to use *Hoffman* to seek discovery of immigration status in depositions and to deny workers' compensation in some cases.¹²

My criticisms notwithstanding, there is a question about the actual impact has been on immigrant worker organizing, particularly in light of the numerous developments that have affected immigrant workers over the past decade—everything from the aftermath of the September 11th terrorist attacks, to splits in the labor movement, to the hope and the demise of comprehensive immigration reform.

Clearly, *Hoffman* was a bad decision for immigrant workers who are the victims of unfair labor practices and are seeking back pay. The holding of *Hoffman* has also been extended to other statutes where the remedy could be classified as pay for “work not performed.”¹³ In other statutory contexts such as minimum wage and overtime protections, courts consistently have held that claims arising out of “work already performed” are not foreclosed because of a person’s status as an undocumented worker.¹⁴

¹² See Rivera v. NIBCO, Inc., 364 F.3d 1057 (9th Cir. 2004) (rejecting employer’s inquiry into employees’ immigration status precluded until liability was determined and entitlement of undocumented workers to remedies was relevant).

¹³ See Renteria v. Italia Foods, Inc., No. 02C495, 2003 WL 21995190 (N.D. Ill. Aug. 21, 2003) (applying *Hoffman* in the context of a wage retaliation claim); Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895 (S.D. Tex. 2003) (a sexual harassment claim); Sanchez v. Eagle Alloy, Inc., 658 N.W.2d 510 (Mich. Ct. App. 2003) (a workplace injury claim); Crespo v. Evergo Corp., 841 A.2d 471 (N.J. Super. App. Div. 2004) (a pregnancy discrimination claim); see also Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1363–64 (2009) (“Employers have attempted to expand this remedial limitation from the unionized setting (i.e., ‘traditional labor law’) to other workplace protections, such as wage and antidiscrimination laws, with limited success. For example, women in New Jersey who are unauthorized immigrants can no longer recover backpay for pregnancy discrimination. The same is true for sexual harassment claims in Texas, workplace injury claims in Michigan, and wage retaliation claims in Illinois.”).

¹⁴ David v. Signal Int’l, 257 F.R.D. 114, 124 (E.D. La. 2009) (“*Hoffman Plastic* does not control plaintiffs’ claims for unpaid minimum and overtime wages for work already performed”); *id.* at 123, n.32 (listing cases holding that recognizing claims for work already performed did not conflict with federal immigration law); Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1278 (N.D. Okla. 2006) (“*Hoffman* does not purport to preclude a backpay award for work that was actually performed by undocumented workers”); *id.* (listing decisions by “[c]ourts in several jurisdictions [that] have found that Hoffman does not limit backpay for work already performed.”); Serrano v. Underground Util. Corp., 970 A.2d 1054, 1064 (N.J. Super. Ct. App. Div. 2009) (“undocumented workers can recover damages arising out of statutory violations for ‘work already performed,’ such as wage claims under the FLSA”); *id.* (listing cases so holding); Pineda v. Kel-Tech Const., Inc., 832 N.Y.S.2d 386, 393 (N.Y. Sup. Ct. 2007) (“Moreover, the IRCA does not preempt New York Labor Law with regard to the payment of the prevailing wage to workers under New York Labor Law Article 8.”). See also

Apart from its actual effect on cases or organizing campaigns, *Hoffman* stands as a powerful legal symbol of exclusion for immigrant workers. While some Supreme Court decisions, whether they be about the right of women to get an abortion,¹⁵ of African-Americans to attend integrated schools,¹⁶ or of gays and lesbians to engage in private consensual sex,¹⁷ send an inclusive message to groups in society; the Court's decision in *Hoffman* sends a message of exclusion to undocumented workers, and by extension, to many immigrant workers in society. In spite of this message, immigrant workers have continued to organize politically and in the workplace.¹⁸

In the end, a legal symbol like *Hoffman* sends messages to both employers and unions that will have long lasting effects. The evidence suggests that many immigrant workers have not been deterred from organizing in the nearly ten years that *Hoffman* has been the law of the land.¹⁹ On the other hand, as Justice Breyer predicted,²⁰ and as several recent studies show,²¹ the *Hoffman* decision has done little to deter employers from exploiting undocumented workers.

In Part I of this Article, I describe how efforts to incorporate immigrant workers in the labor movement began in the 1990s and was stunted by the anti-immigration climate that was exacerbated by September 11th, 2001. In Part II, I discuss the *Hoffman* case and its immediate aftermath.

Zavalav. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 325 (D.N.J. 2005) ("Plaintiffs should not be precluded, as a matter of law, from obtaining relief under the FLSA for work already performed, merely by virtue of their undocumented status."); Safeharbor Emp'r Servs. I, Inc. v. Cinto Velazquez, 860 So. 2d 984 (Fla. 1st Dist. App. 2003) (unauthorized immigrant's status did not prevent workers' compensation benefits); Anne Marie O'Donovan, *Immigrant Workers and Workers' Compensation After Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 30 N.Y.U. Rev. L. & Soc. CHANGE 299 (2006) (focusing on workers' compensation cases); John E. Winters, *Undocumented Workers' Legal Rights: What Are the Rules After Hoffman?*, 44 TENN. B.J. 18 (2008). For a discussion of federal preemption issues, see Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 239 n.21 (2d Cir. 2006) (listing the "[s]everal other state and federal district courts [that] have considered the intersection between IRCA and state tort laws in the wake of *Hoffman Plastic*, with varying results."); Coma Corp. v. Kansas Dept. of Lab., 154 P.3d 1080, 1086 (Kan. 2007) (discussing state courts that have examined the relationship between state labor law and federal immigration law).

¹⁵ Roe v. Wade, 410 U.S. 113 (1973).

¹⁶ Brown v. Bd. of Educ., 347 U.S. 483 (1954).

¹⁷ Lawrence v. Texas, 539 U.S. 558 (2003).

¹⁸ See *infra* Part III.

¹⁹ See *infra* Part III.

²⁰ Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 156–57 (2002) (Breyer, J., dissenting).

²¹ ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES (2009), available at <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>; KATE BRONFENBRENNER, NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING 12 (2009); available at <http://www.epi.org/publications/entry/bp235/>; ABEL VALENZUELA JR. ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES 14 (2006), available at <http://www.today.ucla.edu/portal/ut/document/onthecorner.pdf>.

In Part III, I examine the rise and fall of comprehensive immigration reform and how workers organized in spite of *Hoffman* and the odds against them. In Part IV, I look for the true impact of *Hoffman* on immigrant worker organizing. Finally, in Part V, I describe how *Hoffman* is a powerful labor law symbol for the exclusion of a whole group of vulnerable workers from a democratic society.

I. THE ROAD TO IMMIGRANT INCORPORATION IN THE LABOR MOVEMENT

To understand the effect that *Hoffman* had on immigrant worker organizing, it is necessary to see where the case fits in the continuum of immigrant incorporation in the labor movement. For many years, immigrant workers and racial minorities had been excluded by the labor movement and discriminated against because of their minority status and the perception that they undercut native-born workers in wages and benefits.²² After immigrants showed an interest in organizing, and with the passage of Title VII of the Civil Rights Act of 1964, which made it unlawful for unions to discriminate on the basis of race or national origin, immigrants became an accepted part of the labor movement.²³

Immigrants were at the forefront of several high profile labor struggles in Southern California and elsewhere.²⁴ Labor leaders began to sense a desire for unionization among the immigrants that were increasingly doing jobs in industries that had been formerly unionized.²⁵ In 1995, the AFL-CIO elected three individuals to the leadership of the federation: John Sweeney as President, Richard Trumka as Vice President and Linda Chavez-Thompson as Secretary-Treasurer.²⁶ Their so-called “New Voice” platform emphasized more organizing, even at the expense of member servicing and business unionism.²⁷

One of the goals of the New Voice campaign was to build a more inclusive labor movement and to encourage more organizing among im-

²² See May Chen & Kent Wong, *The Challenge of Diversity and Inclusion in the AFL-CIO, in A NEW LABOR MOVEMENT FOR A NEW CENTURY* 213, 215–219 (Gregory Mantosis ed., 1998).

²³ See PAUL FRYMER, BLACK & BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY (Ira Katznelson et al. eds., 2008) (discussing the role of Title VII of the Civil Rights Act in desegregating unions).

²⁴ See generally Ruth Milkman & Kent Wong, *Organizing the Wicked City: The 1992 Southern California Drywall Strike, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA* (Ruth Milkman ed., 2000).

²⁵ VERNON M. BRIGGS JR., *IMMIGRATION AND AMERICAN UNIONISM* 161–69 (2001); Janice Fine & Daniel Tichenor, *A Movement Wrestling: American Labor's Enduring Struggle with Immigration, 1866-2007*, 23 STUD. IN AM. POL. DEV. 84, 106–08 (2009).

²⁶ Jeremy Brecher & Tim Costello, A “New Labor Movement” in the Shell of the Old?, *in A NEW LABOR MOVEMENT FOR THE NEW CENTURY*, *supra* note 22, at 29, 31.

²⁷ *Id.* at 32–33.

migrant workers.²⁸ Soon, it became apparent that as long as employers could use the employee's false documents as a pretext to thwart organizing drives, the employer sanctions regime created by the Immigrant Reform and Control Act of 1986 was actually a deterrent to organizing.²⁹

Thus, at its Convention in 2000, the AFL-CIO called for an end to employer sanctions.³⁰ These efforts generated some good will from the immigrant advocate communities.³¹ One long time immigrant organizer said, "The AFL-CIO saw that immigrants wanted to organize, and that's why they changed their policy."³²

In the summer of 2001, President George W. Bush announced that he would seek a migration compact with the government of Mexico.³³

²⁸ *Id.* at 43–45.

²⁹ RINKU SEN, THE ACCIDENTAL AMERICAN: IMMIGRATION AND CITIZENSHIP IN THE AGE OF GLOBALIZATION 58–59 (2008) ("Research suggests that sanctions may have far greater impact in preventing immigrant workers from resisting exploitation As the demographics of entire industries shifted to become dominated by immigrant labor, employers frequently used the threat of deportation to bust union organizing campaigns."); Fine & Tichenor, *supra* note 25, at 105 ("Rather than preventing employers from hiring the undocumented, the sanctions actually gave them cover. Although the law required them to ask for documents, it did not require employers to verify their authenticity. As a consequence, employers were able to follow the letter of the law but still hire large numbers of undocumented workers. Growing evidence suggested that some employers were following a strategy of selective verification as a tool for foiling union organizing drives."); DAVID BACON, ORGANIZING SILICON VALLEY'S HIGH-TECH WORKERS, PART 5, <http://dbacon.igc.org/Unions/04hitec5.htm> (last visited Dec. 16, 2011) ("When Shine became aware that its workers had organized, it suddenly told them they had to present verification of their legal residence in order to keep their jobs. The company cited the requirement, under the employer sanctions provision of the Immigration Reform and Control Act, that it maintain written proof of employees' legal status. When almost none of Shine's workers could present the required documents, they were fired. The company never questioned the documentation provided by workers when they were hired, or at any other time until the union drive began.").

³⁰ PETER L. FRANCIA, THE FUTURE OF ORGANIZED LABOR IN AMERICAN POLITICS 41–42 (2006); David Bacon, *Labor Fights for Immigrants*, THE NATION, May 21, 2001, at 15 ("Since 1986 it has become common for companies to use the employer sanctions as a weapon to resist organizing drives. Recognizing this, in February 2000 the AFL-CIO passed a historic resolution calling for the repeal of sanctions and for a legalization program that would allow undocumented immigrants to normalize their status."); Frank Swoboda, *Unions Reverse on Illegal Aliens; Policy Seeks Amnesty, End to Sanctions*, WASH. POST, Feb. 17, 2000, at A1.

³¹ See *supra*, note 30.

³² Telephone interview with Subject #1 (Jan. 26, 2010).

³³ Ginger Thompson & Steven Greenhouse, *Mexican 'Guest Workers': A Project Worth a Try?*, N.Y. TIMES, Apr. 3, 2001, at A4 ("[Vicente Fox's] campaign took a significant step forward in February when he and President Bush agreed to begin negotiations on a range of immigration policies. And in Washington on April 4, Mexican officials are to hold the first in a series of meetings to discuss migration policy with top Bush administration officials."); Ginger Thompson, *U.S. and Mexico to Open Talks on Freer Migration for Workers*, N.Y. TIMES, Feb. 16, 2001, at A1 ("After they meet on Friday, President Bush and President Vicente Fox of Mexico are expected to announce the start of high-level discussions aimed at addressing the web of immigration issues that have long bedeviled relations among the neighboring nations. American officials said that an 'immigration working group' would discuss a range of proposals including Mexican goals to open the border to a freer flow of Mexican guest workers and

The plan would include a guest-worker program and an earned legalization program.³⁴ Less than two months after that announcement, the attacks of September 11, 2001 took place. There were more than 3000 casualties on that day, and it soon became clear that immigration reform would also be a casualty of a reinvigorated fear of immigrants.³⁵

II. THE HOFFMAN CASE: ITS ANCESTRY AND PROGENY

A. *The Pre-Hoffman Legal Climate*

Hoffman was not the first case where the Supreme Court examined the labor rights of undocumented workers. In 1984, the Court decided *Sure-Tan, Inc. v. NLRB*.³⁶ There, the Court held that “employee” status under the NLRA was not affected by the worker’s immigration status.³⁷ The employer in that case, the Sure-Tan Leather Company, called in immigration law enforcement (then called the Immigration and Naturalization Service) in response to an organizing drive at the employer’s plant in Chicago.³⁸ The Court held that the employer’s actions violated Section 8(a)(1) of the NLRA because it tended to coerce and restrain “employees” in the exercise of their rights to engage in concerted activities which are protected by Section 7 of the NLRA.³⁹

Two years after the *Sure-Tan* decision, Congress passed the Immigration Reform and Control Act of 1986 (IRCA).⁴⁰ For the first time, the IRCA criminalized the hiring of workers without legal status.⁴¹ In sev-

to grant legal residency to hundreds of thousands of undocumented Mexicans now working in the United States.”).

³⁴ Eric Schmitt, *Bush Says Plan For Immigrants Could Expand*, N.Y. TIMES, July 27, 2001, at A1 (“The president was broad in his praise for the working group that produced the recommendations, including the idea of limited legalization, and for the working group’s negotiations with their Mexican counterparts that he and President Vicente Fox of Mexico set in motion when they met in Mexico in February.”); Eric Schmitt, *Bush Aides Weigh Legalizing Status of Mexicans in U.S.*, N.Y. TIMES, July 15, 2001, at 1.

³⁵ VICENTE FOX, REVOLUTION OF HOPE: THE LIFE, FAITH, AND DREAMS OF A MEXICAN PRESIDENT 230 (2007) (“Instead, four days after I left Washington, the men of hate flew airplanes full of passengers into the World Trade Center, the Pentagon, and a field in Shanksville, Pennsylvania, killing more than three thousand innocent people. . . . Overnight the world changed. America’s borders clanged shut. Our revolution of hope came face-to-face with the walls of fear.”); PHILIP MARTIN, MICHAEL FIX & J. EDWARD TAYLOR, THE NEW RURAL POVERTY: AGRICULTURE & IMMIGRATION IN CALIFORNIA 78–79 (2006) (“The September 11, 2001, terrorist attacks stopped the debate over new guest worker proposals”); PAUL R. SPICKARD, ALMOST ALL ALIENS: IMMIGRATION, RACE, AND COLONIALISM IN AMERICAN HISTORY AND IDENTITY 442 (2007) (“In the wake of [the terrorist attacks of September 11, 2001], Americans were fearful of foreigners and not in the mood to consider a [guest worker] program that might bring several hundred thousand more foreigners into the country each year.”).

³⁶ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

³⁷ *Id.* at 881–82.

³⁸ *Id.* at 886.

³⁹ *Id.* at 887–88.

⁴⁰ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

⁴¹ *Id.* § 101, 100 Stat. at 1360–61, 1368.

eral cases after 1986, however, the courts did not see a tension between following the IRCA and granting rights under labor and employment statutes.⁴² The NLRB followed the *Sure-Tan* decision closely by consistently finding that undocumented workers were employees entitled to protection of the NLRA; *NLRB v. A.P.R.A. Fuel Buyers* is a prime example of the way that the courts reconciled IRCA with the NLRA to find the workers protected.⁴³ Because the employer in *A.P.R.A.* knew that the workers he was hiring were undocumented, the United States Court of Appeals for the Second Circuit ordered reinstatement of the employees, conditioned upon the employees eventually showing that they were authorized to work in the United States.⁴⁴

B. *The Hoffman Decision*

In May of 1988, Hoffman Plastic Compounds, Inc. hired Jose Castro to operate various blending machines that mix and cook the particular plastics.⁴⁵ Before being hired, Castro presented documents that appeared to verify his authorization to work in the United States.⁴⁶ In December 1988, an affiliate of the Steelworkers began a union organizing campaign.⁴⁷ After what the Board later described as “coercive and restraining” interrogation of union supporters,⁴⁸ Hoffman laid off each employee who had engaged in organizing activities, including Castro.⁴⁹

After finding that the employer fired Castro in retaliation for his union activity, a compliance hearing was held to determine the proper computation of back pay.⁵⁰ Castro appeared at the hearing, testifying through an interpreter.⁵¹ When Hoffman’s attorney began to question Castro about his citizenship and authorization to work in the United States, the Board’s General Counsel objected.⁵² The Administrative Law Judge (ALJ) sustained the objection, but not before Castro stated that he born in Mexico and that he borrowed the birth certificate he had used to gain employment at Hoffman from a friend.⁵³ On the basis of this ad-

⁴² See, e.g., EEOC v. Tortilleria “El Mejor,” 758 F. Supp. 585 (E.D. Cal. 1991) (holding that undocumented workers are covered by Title VII of the Civil Rights Act of 1964); Patel v. Quality Inn S., 846 F.2d 700 (11th Cir. 1991) (holding that undocumented workers are covered by the Fair Labor Standards Act of 1938).

⁴³ See *NLRB v. A.P.R.A. Fuel Oil Buyers Grp., Inc.*, 134 F.3d 50 (2d Cir. 1997).

⁴⁴ *Id.* at 56–57.

⁴⁵ *Hoffman Plastic Compounds, Inc. v. NLRB* 535 U.S. 137, 140 (2002).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Hoffman Plastic Compounds, Inc.*, 306 N.L.R.B. 100, 106 (1992).

⁴⁹ *Hoffman*, 535 U.S. at 140–41.

⁵⁰ *Id.* at 141.

⁵¹ *Id.*

⁵² *Hoffman Plastic Compounds, Inc. v. NLRB*, 208 F.3d 229, 232 (D.C. Cir. 2000).

⁵³ *Id.*

mission, the ALJ recommended neither reinstatement nor back pay for Castro.⁵⁴

In 1998, the NLRB reversed, granting back pay and conditioning its reinstatement order on Castro's ability to verify eligibility to work.⁵⁵ The NLRB stated that the most effective way to promote the policies of the IRCA and the NLRA is to provide the protection and remedies of the NLRA to undocumented workers "in the same manner as to other employees."⁵⁶ The NLRB found that Castro was entitled to \$66,951 in back pay, plus interest.⁵⁷

Following *A.P.R.A.*, the Court of Appeals for the District of Columbia Circuit upheld the NLRB's enforcement order that awarded an undocumented worker back pay as a result of Hoffman's unfair labor practices.⁵⁸ Because the D.C. Circuit seemed to be applying the principles that were well established before 2002, immigrant and worker advocates saw it as a bad sign when the United States Supreme Court agreed to hear Hoffman's appeal.⁵⁹

In the Supreme Court's majority opinion, Chief Justice Rehnquist wrote that awarding back pay to Castro would conflict with the IRCA's employer sanctions scheme.⁶⁰ With respect to back pay, he wrote, "the employees must be deemed unavailable for work (and the accrual of back pay therefore tolled) during any period where they were not lawfully entitled to be present and employed in the United States."⁶¹ In light of the practical workings of immigration laws, such remedial limitations were appropriate even if they led to the "probable unavailability of the NLRA's more effective remedies."⁶²

In the immediate aftermath of the *Hoffman* case, many reports emerged of employers trying to use the decision to scare workers from organizing or asserting their rights and to try to deny housing to people perceived as foreign or undocumented.⁶³ Clearly, there were many employers who used *Hoffman* as a green light for exploitation, or holding it

⁵⁴ *Hoffman*, 535 U.S. at 141.

⁵⁵ *Id.*

⁵⁶ *Id.* (citing Hoffman Plastic Compounds, Inc., 326 N.L.R.B. 1060, 1060 (1998)).

⁵⁷ *Id.* at 141–42.

⁵⁸ *Hoffman*, 208 F.3d 229.

⁵⁹ See generally Catherine L. Fisk & Michael J. Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights Without Remedies for Undocumented Immigrants*, in *LABOR LAW STORIES* 399 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

⁶⁰ *Hoffman*, 535 U.S. at 149–50.

⁶¹ *Id.* at 145 (internal quotation marks omitted) (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892–93 (1984)).

⁶² *Id.*

⁶³ See Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law & LatCrit Theory*, 55 FLA. L. REV. 511, 520–21 (2003); Nancy Cleland, *Employers Test Ruling*, L.A. TIMES, May 28, 2002, at C1.

as a cudgel over employees.⁶⁴ The threat had little to do with whether the workers would be entitled to back pay or not; instead, employers used *Hoffman* to threaten deportation, even though the denial of a back-pay remedy to a worker would have little to do with whether or not that worker would be deported.⁶⁵

III. THE IMMIGRANTS' RIGHTS MOVEMENT, 2002–PRESENT

Despite the mostly negative environment for immigrants and immigration in the ten years after *Hoffman*, there have been a number of ways in which immigrant workers have organized politically to make their concerns known.⁶⁶ In 2003, immigrant workers organized freedom rides throughout the country.⁶⁷ In 2006, workers filled the streets of Los Angeles and many other cities with tens of thousands of people calling for comprehensive immigration reform.⁶⁸ Events like these usually had three core messages: (1) immigration raids must be stopped; (2) no human is illegal; and (3) comprehensive immigration reform must be enacted as soon as possible.⁶⁹ While the Immigrant Workers Freedom Ride (IWFR) has been a stalwart in supporting immigrant rights, the legislative correction of *Hoffman* is not one of the IWFR's priorities. Instead, immigration reform and status for the undocumented have been the movement's goals.⁷⁰

Further, *Hoffman* has not stopped the AFL–CIO from reaching out to groups like the National Day Labor Organizing Network or being an active participant in many campaigns to try to organize carwash workers, both areas where undocumented workers are heavily concentrated.⁷¹

⁶⁴ See Cleeland, *supra* note 63.

⁶⁵ See Raquel E. Aldana, *The Subordination and Anti-Subordination Story of the U.S. Immigrant Experience in the 21st Century*, 7 NEV. L.J. 713, 721 (2007) (“Despite its narrower holding, employers took the *Hoffman* decision as a green light to contend that undocumented workers lack state and federal workplace rights. In doing so, employers have resorted to intimidating discovery practices during litigation to compel courts to release the plaintiffs’ immigration status, which, even when unsuccessful, deter plaintiffs from coming forward.”); David Weissbrodt, *Remedies for Undocumented Noncitizens in the Workplace: Using International Law to Narrow the Holding of Hoffman Plastic Compounds, Inc. v. NLRB*, 92 MINN. L. REV. 1424, 1432 (2008) (“Post-*Hoffman*, employer attempts to determine the immigration status of plaintiff-employees have drastically increased, and employers have also attempted to intimidate current workers with these discoveries.”). See generally Cleeland, *supra* note 63.

⁶⁶ See, e.g., Irene Bloemraad et al., *The Protests of 2006: What Were They, How Do We Understand Them, Where Do We Go?*, in RALLYING FOR IMMIGRANT RIGHTS: THE FIGHT FOR INCLUSION IN 21ST CENTURY AMERICA 3 (Kim Voss & Irene Bloemraad eds., 2006).

⁶⁷ *Id.* at 24.

⁶⁸ See *id.* at 3–4, 7, 24.

⁶⁹ See generally *id.*

⁷⁰ See generally *id.* at 46–47.

⁷¹ Steven Greenhouse, *Labor Federation Forms a Pact with Day Workers*, N.Y. TIMES, Aug. 10, 2006, at A18; Sonia Nazario, *At Carwash, Taking a Stand*, L.A. TIMES, Mar. 27, 2008, at B1.

In her 2006 book, *L.A. Story: Immigrant Workers and the Future of the Labor Movement*, Ruth Milkman surveyed the mass protests and concluded that, despite the complications *Hoffman* provides, immigrants are an important part of the future of the labor movement.⁷² This is in part because many immigrant workers have experience with anti-union violence in their home countries.⁷³

IV. ASSESSING THE TRUE IMPACT OF *HOFFMAN*

The true impact of *Hoffman* may be hard to determine. One reason is that undocumented workers are unlikely to complain even before their status becomes known; further, once their status does become known, workers are reluctant to speak up for their rights.⁷⁴ And yet, *Hoffman* remains a powerful symbol of what is wrong with American labor law, especially as it relates to immigrant workers.⁷⁵ Others have argued that *Hoffman* is simply a reflection of the weakness of labor law for all workers.⁷⁶

The courts have generally not extended *Hoffman* past the issue of back pay under the NLRA, but the breadth of the Court's holding can be applied to remedies other than back pay.⁷⁷ The Court held that awarding an undocumented immigrant "pay for work not performed" would trench upon the regulation of immigration.⁷⁸ Despite this broad language,

⁷² See RUTH MILKMAN, *L.A. STORY: IMMIGRANTS AND THE FUTURE OF THE U.S. LABOR MOVEMENT* 187–193 (2006).

⁷³ See generally *id.* at 114–45, 189.

⁷⁴ See LANCE COMPA, *UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS* xxi (2004) ("Immigrant workers' defenselessness creates a vicious cycle of abuse. Fearful of being found out and deported, undocumented workers shrink from exercising rights of association or from seeking legal redress when their workplace rights are violated. Fully aware of workers' fear and sure that they will not complain to labor law authorities or testify to back up a claim, employers heap up abuses and violations of their rights."); David P. Weber, (*Unfair Advantage: Damocles' Sword and the Coercive Use of Immigration Status in a Civil Society*, 94 MARQ. L. REV. 613, 619 (2010) ("In terms of workplace conditions, threats to report immigrants to ICE, and the inability to adequately defend oneself against a dominant party, employers have long taken advantage of unauthorized immigrants' precarious legal position."); Weissbrodt, *supra* note 65, at 1433.

⁷⁵ See COMPA, *supra* note 74 at xxi (stating that *Hoffman* "highlights the human rights dimensions of a crisis in immigration policy"); Cunningham-Parmenter, *supra* note 13 at 1370–71 (noting how some scholars view *Hoffman* as "a human rights crisis that will cause a great shift in the workplace rights of unauthorized immigrants").

⁷⁶ See, e.g., GARCIA, *supra* note 10, at 1.

⁷⁷ See Weissbrodt, *supra* note 65, at 1428–29 ("Other lower courts have widened their application of the *Hoffman* holding. These courts have considered *Hoffman* relevant in various ways to workplace claims by noncitizens."). See also *Oro v. 23 E. 79th St. Corp.*, 810 N.Y.S.2d 779, 782 (N.Y. App. Term. 2005).

⁷⁸ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002) ("We therefore conclude that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA.").

courts have refused to extend *Hoffman* to cases involving Title VII of the Civil Rights Act, the Fair Labor Standards Act, and the Occupational Safety and Health Act.⁷⁹

Although immigrant workers have continued organizing both in their workplace and in social movements, employers have continued to exploit immigrant workers, documented and undocumented.⁸⁰ Where the NLRA and other federal laws like the FLSA do not apply, as in agriculture and domestic services, the holding of *Hoffman* is necessarily limited.⁸¹

⁷⁹ See Cunningham-Parmeter, *supra* note 13, at 1370 (“Soon after *Hoffman*, employers began to argue that unauthorized immigrants could no longer sue under Title VII, the FLSA, or any other workplace protection. To date nearly every court to rule on the issue has refused to extend the backpay limitation in NLRA cases to minimum wage and overtime protections.”); *id.* at 1370 nn. 55–58 (listing supporting cases); Connie de la Vega & Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Migrant Workers’ Rights in the United States*, 3 HASTINGS RACE & POVERTY L.J. 35, 52 (2005) (“Fortunately, courts have refused to extend *Hoffman* to deny workers’ compensation for work already performed, and many agencies have released position papers in support. The U.S. Department of Labor has stated it will fully and vigorously enforce the Occupational Safety and Health Act (OSHA), Fair Labor Standards Act of 1938 (FLSA), Migrant and Seasonal Agricultural Worker Protection Act (AWPA), and the Mine Safety and Health Act, without regard to whether an employee is documented.”); Weber, *supra* note 74 at 630–31 (“Interestingly, it appears that both federal and state courts have since limited *Hoffman*’s scope. In 2004, the Ninth Circuit Court of Appeals held that *Hoffman* does not apply to Title VII discrimination claims. In *Rivera*, the Ninth Circuit noted that, in contrast to the NLRA, Title VII requires private enforcement, the policies behind Title VII are to strongly punish and deter violators, and Title VII is interpreted by courts rather than an administrative body. Primarily because of these differences as well as the great weight of authority on its side, the court concluded, ‘In sum, the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases.’ Other courts have similarly concluded that *Hoffman* does not apply to Fair Labor Standards Act claims or workers compensation claims.”); see also *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004); *Equal Empl’t Opp. Comm’n v. Rest. Co.*, 490 F. Supp. 2d 1039 (D. Minn. 2007); *Flores v. Amigon*, 233 F. Supp. 2d 462 (E.D.N.Y. 2002).

⁸⁰ See Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 914 (2008) (“Although the decision struck a blow to immigrant worker protection, causing some employers to believe that they could violate undocumented workers’ labor rights with impunity, it also had the effect of stimulating greater coordination among immigrant rights advocates and greater investments in immigrant rights from organized labor.”); Ruth Milkman, *Immigrant Workers, Precarious Work, and the US Labor Movement*, 8 GLOBALIZATIONS 361, 364–65 (2011), available at http://www.ruthmilkman.info/Site/Articles_files/globalizations%202011.pdf (“Although unauthorized immigrants in the contemporary United States are denied other basic civil rights, in principle they are protected by nearly all laws covering wages, hours, and union representation. However, in recent years those laws have been widely violated by employers. Payment below the minimum wage, failure to pay legally mandated overtime premiums, ‘off the clock’ work, outright wage theft, and retaliation against those who complain or attempt to organize their co-workers have become commonplace.”); Mary Beth Sheridan, *Pay Abuses Common for Day Laborers, Study Finds*, WASH. POST, June 23, 2005, at A1.

⁸¹ Fortunately for workers in California, the state legislature there passed a statute preventing the extension of *Hoffman* into the state law remedies that already existed for immi-

Most advocates recognize that immigrant workers will not truly be free in the workplace until they have legal status to remain in the country.⁸² But as the guest worker programs that have been part of the American workplace for over half a century have shown, it is not enough simply to have legal status to protect the rights of workers.⁸³ There have been numerous cases of exploitation of guest workers, all of whom have legal status.⁸⁴ Thus, legal status is necessary but not sufficient to protect immigrant workers. There must also be attention to the enforcement of existing rights for immigrants and citizens alike.⁸⁵

There have been a number of other factors that may have restricted rights more than *Hoffman*; for example, there have been laws over the past decades that have restricted the rights of undocumented and Latino workers, such as Proposition 187 and its progeny.⁸⁶

More empirical work must be done to measure the impact of *Hoffman* on union organizing. Trends over the last fifty years show a steady decline in private sector unionization, from a high in the 1950s of approximately one-third of workforce in unions, to the current rate below eight percent.⁸⁷

Nothing in the *Hoffman* decision limits the ruling to the NLRA. During oral arguments, Ryan McCortney, the lawyer for Hoffman, argued that a finding in the NLRB's favor would affect the possibility of recovering back pay under Title VII.⁸⁸ Indeed, some courts, most prominently the United States Court of Appeals for the Fourth Circuit, have even held that undocumented workers are not employees at all under Title VII.⁸⁹ This finding has continued to be undisturbed, and may provide a greater threat to immigrant worker organizing than *Hoffman*.

When asked about the effect of the *Hoffman* decision, McCortney said the decision would not change the employer's duty to pay minimum

grant workers in California. See 2002 Ca. Legis. Serv. Ch. 1071 (West) (codified at Cal. Lab. Code § 1171.5 (West 2011)).

⁸² See generally DAVID K. SHIPLER, THE WORKING POOR: INVISIBLE IN AMERICA, 113–14 (2005); Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade and the Democracy Deficit*, 10 IOWA J. GEND., RACE AND JUSTICE 27 (2006).

⁸³ See Garcia, *supra* note 82, at 3.

⁸⁴ *Id.* at 51 (citing Southern Poverty Law Center, *Beneath the Pines: Stories of Migrant Tree Planters* 14–15 (2005), available at http://splcenter.org/images/dynamic/main/ijp_beneaththepines_web.pdf).

⁸⁵ See *id.* at 59.

⁸⁶ See Ruben J. Garcia, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 120–122 (1995).

⁸⁷ Bureau of Labor Statistics, USDL-11-0063, Union Members 2010 (2011).

⁸⁸ Transcript of Oral Argument at 15, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (No. 00-1595).

⁸⁹ See Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 188 (4th Cir. 1998).

wages.⁹⁰ However, he said, “it could affect the remedies for [for legal violations]. This was about pay for work not performed.”⁹¹

Beyond McCortney’s prediction that the decision’s impact will be broad, other effects are quite possible.⁹² First, the way that *Hoffman* resolved the tension between immigration control and labor policy might prove to be a model for the policy objectives of other statutes to be ceded to the prerogatives of immigration control. The *Hoffman* rule also puts at risk any remedy obtained for an undocumented worker that is not “pay for work not performed.”⁹³

Second, with *Hoffman*, the seeds for revisiting the basic protection of undocumented workers as “employees” had been planted. During oral argument, Justice Kennedy questioned the government as to whether they thought undocumented workers should be allowed to be in a bargaining unit at all, even though that was not at issue and the Court did not disturb *Sure-Tan*’s holding that undocumented workers were employees.⁹⁴ In *Agri Processors Co. v. NLRB*, the employer tried to use this invitation to question whether a bargaining unit of documented workers and undocumented employees could be challenged on the basis that the unit was not appropriate.⁹⁵ The Court of Appeals for the District of Columbia Circuit rejected the challenge, however, holding that the “community of interest” required by the NLRB in certifying bargaining units had to do with similarity of work and working conditions, and not immigration status.⁹⁶

In the end, the decision in *Hoffman* boiled down to an empirical question as to whether granting or refusing a remedy under the NLRA would result in more immigration or more exploitation of workers? Chief Justice Rehnquist and the four justices who joined his majority opinion based their decision in part on the fear that upholding the NLRB’s and the D.C. Circuit’s award of back pay would “encourage future violations [of immigration laws] by undocumented workers.”⁹⁷ While the number of undocumented immigrants has indeed gone down over the last ten years, most analysts point to the weakening of the economy over that time to explain why more people have refrained from

⁹⁰ David G. Savage & Nancy Cleeland, *High Court Ruling Hurts Union Goals of Immigrants*, L.A. TIMES, May 28, 2002, available at <http://articles.latimes.com/2002/mar/28/news/mn-35142>.

⁹¹ *Id.*

⁹² *Id.*

⁹³ See *Hoffman*, 535 U.S. at 160.

⁹⁴ Transcript of Oral Argument at 32, *Hoffman*, 535 U.S. 137 (No. 00-1595).

⁹⁵ *Agri Processors Co. v. NLRB*, 514 F.3d 1, 3–4 (D.C. Cir. 2008).

⁹⁶ *Id.* at 9.

⁹⁷ See *Hoffman*, 535 U.S. at 150.

making the long and dangerous journey into the United States.⁹⁸ Economics is a major determinant of why people migrate.⁹⁹

Writing for the four dissenters, Justice Breyer was more concerned about the possibility of exploitation if no real penalties existed for labor law violations beyond a posting and the possibility of a contempt charge for repeat offenders.¹⁰⁰ The employer will get “one free bite at the apple,” by being required to post a notice and only being subject to a more serious contempt sanction.¹⁰¹

Justice Breyer’s concern that employers would use the majority’s position in *Hoffman* to deny workers the protection of “every labor law under the sun” was raised at oral argument.¹⁰² The evidence gathered by the National Employment Law Project and other researchers shows that Justice Breyer was prescient that the lack of deterrence for violating the NLRA would only further incentivize employer misconduct.¹⁰³

V. *HOFFMAN AS LEGAL SYMBOL*

Ellen Dannin has written that the Court in *Hoffman* sent an ironic message to immigrant workers: you are just like all other of the millions of “employees” in the U.S. who lack true protection under the Act.¹⁰⁴ Although clearly not categorically excluded from receiving back pay like all workers who are either hired without or lose authorization to work during employment, Dannin’s broader point about the ineffectiveness of labor law for all workers is well taken.¹⁰⁵

However, *Hoffman* is not only a symbol of the weakness of labor protections, but the ways in which immigrants are excluded from the American community, even though they contribute so much to building it. *Hoffman* is also a symbol that not all employees are equal.

More empirical work needs to be done. Shannon Gleeson has examined whether immigrants as labor rights holders manifest consciousness about their claims.¹⁰⁶ The problem is that there is little data on

⁹⁸ Veronica Puentes et al., *Deciding to Migrate, in RECESSION WITHOUT BORDERS: MEXICAN MIGRANTS CONFRONT THE DOWNTURN* 63, 68 (David Scott FitzGerald et al. eds., 2011).

⁹⁹ *Id.*

¹⁰⁰ See *Hoffman*, 535 U.S. at 154 (Breyer, J., dissenting).

¹⁰¹ *Id.*

¹⁰² Transcript of Oral Argument at 15, *Hoffman*, 535 U.S. 137 (No. 00-1595).

¹⁰³ See Annette Bernhardt, *Unregulated Work: The Perfect Storm of Economic Restructuring and Immigration Policy, Undocumented Workers: Crossing the Borders of Immigration and Workplace Law Workshop*, Cornell University (September 23, 2011).

¹⁰⁴ ELLEN DANNIN, *TAKING BACK THE WORKERS’ LAW: HOW TO FIGHT THE ASSAULT ON WORKERS’ RIGHTS* (2006); Ellen Dannin, *Hoffman Plastics as Labor Law: Equality at Last for Immigrant Workers?*, 44 U.S.F. L. REV. 393 (2009).

¹⁰⁵ See *supra* note 104.

¹⁰⁶ See Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Status in Claims Making*, 35 L. & SOC. INQUIRY 3 (2011); Shannon Gleeson, *Making Rights Real: The*

whether *Hoffman* has had an impact on particular organizing campaigns. Jayesh Rathod has done excellent work to identify and go beyond “the chilling effect” in terms of the effect that occurs in OSHA enforcement because of lack of immigration status.¹⁰⁷ A new generation of scholars in the “*immplacement*” field, a term coined by Kati Griffith, can continue to look at the ways that immigration status and law affects the enforcement of labor and employment law.¹⁰⁸

One final bit of evidence of the continuing impact of *Hoffman* comes from the NLRB’s recent decision in *Mezonos Maven Bakery*.¹⁰⁹ There, the employer hired undocumented workers without getting the authorization required by the IRCA.¹¹⁰ When working conditions at the bakery worsened and the employees tried to unionize, the employer retaliated and the employees brought charges to the NLRB.¹¹¹ The question before the NLRB was whether the employer’s failure to follow the immigration laws distinguished the case sufficiently from *Hoffman* to allow for back pay to the undocumented workers.¹¹² The NLRB held that *Hoffman* was categorical in its exclusion of back pay from undocumented workers under the NLRA.¹¹³ Despite a long, reluctant concurring opinion arguing why *Hoffman* was bad labor and immigration law,¹¹⁴ the chances for *Hoffman* being reversed either legislatively or by the Supreme Court remain slim in this political climate.

CONCLUSION

In the ten years since *Hoffman*, migration to the United States has decreased, but it is likely that employers will continue to exploit immigrant workers, and that immigrants will continue to organize unions. Despite the political organizing of immigrants, however, *Hoffman* will continue to be one of many obstacles to effective immigrant worker organizing. If unions provide a measure of democratic participation for workers, undocumented immigrants will be foreclosed from that opportunity to affect and change their work; this means that they will do the work for us while still receiving legal messages and symbols of exclusion. Despite their organizing work and large marches, the goals of inten-

¹⁰⁷ See Jayesh M. Rathod, “*Beyond the Chilling Effect*: Immigrant Worker Behavior and the Regulation of Occupational Safety and Health”, 14 EMP. RTS. & EMP. POL’Y J. 267 (2010).

¹⁰⁸ See Kati L. Griffith, *Discovering “Immplacement” Law: The Constitutionality of Sub-federal Immigration Regulation at Work*, 29 YALE L. & POL’Y REV. 389, 393–394 (2011).

¹⁰⁹ *Mezonos Maven Bakery*, 357 N.L.R.B. No. 47, at 10 (2011).

¹¹⁰ *Id.* at 4.

¹¹¹ *Id.*

¹¹² *Id.* at 1.

¹¹³ *Id.*

¹¹⁴ *Id.* at 4–6.

grated immigration and labor reforms languish. Until changes in labor law and a human rights paradigm receive more attention, immigrant workers will remain on the political and legal margins of our society.

