Hoffman, Its Progeny, and the Status of Undocumented Workers

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COMMENT

Hoffman, Its Progeny, and the Status of Undocumented Workers

Scott C. Murray*

I. INTRODUCTION ...............................................................615
II. BACKGROUND ......................................................................618
   A. Labor and Employment Law .................................................619
   B. Cases Leading to Hoffman ...............................................621
   C. Immigration Law ..............................................................625
   D. The NLRA Still Applies to Undocumented Workers ..............626
   E. Status-Based Assignment of Rights ......................................627
III. ANALYSIS ........................................................................629
IV. CONCLUSION .....................................................................638

I. INTRODUCTION

Ramon Hernandez of Kent, Washington, was fired after filing several complaints that he did not receive thousands of dollars in unpaid wages.1 He worked at a local bakery for over two years; his wages were constantly withheld.2 Hernandez continued working at the bakery despite his repeatedly ignored complaints.3 Finally, after the sum he was owed reached nearly $20,000, Hernandez made one final complaint, which led to his termination.4 At first glance, Hernandez’s situation appears easily resolvable, but his status as an undocumented worker makes an otherwise routine foray into state labor and employment law a matter of national immigration policy. Given estimates that undocumented workers currently comprise five percent of the American workforce, Hernandez’s situation is hardly unique.5

* Candidate for J.D., University of Wyoming, 2011. I would like to thank the Wyoming Law Review Editorial Board, particularly Nick Haderlie, Devon Stiles, Kevin Daniels, and Amy Staehr for their hard work and insightful comments. I would also like to thank my faculty advisor, Noah Novogrodsky, for helping develop the ideas that led to this comment as well as providing guidance throughout the process of composing and refining it. Finally, such an endeavor would be meaningless without the help and support of friends and family. I give many thanks to all of those who offered their tremendous support and encouragement along the way.

2 Id.
3 Id.
4 Id.
The United States legal system continues to struggle with the daunting task of defining the rights and obligations of those lacking proper documentation living and working within its borders. The debate over immigration is largely rooted in discussions concerning the fate of the undocumented labor force. The seminal case, Hoffman Plastic Compounds, Inc. v. National Labor Relations Board, only confuses the already tenuous legal distinctions between documented and undocumented workers. In effect, Hoffman created a system that leaves undocumented workers—on the basis of their immigration status—without the remedies available to their authorized counterparts. Under Hoffman and its progeny, undocumented workers remain protected by labor and employment laws but lack the ability to pursue the legal remedies normally available to legal workers, thus placing them in an ill-defined legal space.

As recent events in Arizona, Oklahoma, Utah, and other states indicate, enforcing immigration laws has become a heated issue at the state level as well.

6 See id. (noting both the high percentage of undocumented immigrants in the workforce and the debate over the Obama Administration’s workplace-oriented immigration policies).


9 Keith Cunningham-Parmenter, Redefining the Rights of Undocumented Workers, 58 AM. U. L. REV. 1361, 1401 (2009) (“[Hoffman] constructs a world in which citizens are allowed to seek redress for incidents of discrimination, relegating unauthorized workers to a lawless remedial realm to match their lawless existence in the community.”).

10 See Hoffman, 535 U.S. at 153–54 (Breyer, J., dissenting) (noting the manner in which denying the National Labor Relations Board remedial power will snub undocumented workers); Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (“[Hoffman] did not specifically foreclose all remedies for undocumented workers under the [NLRA] or other comparable federal labor statutes….’’); see also Oppmann, supra note 1 (noting in some cases where the traditional remedies are not available, undocumented workers have resorted to protest politics, effectively shaming employers into compliance with labor and employment laws).

11 See, e.g., Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 869 (9th Cir. 2009), cert. granted, 130 S. Ct. 3498 (2010) (affirming the district court’s determination that an Arizona statute, which allows the State to revoke business licenses upon a showing that a business employed undocumented workers, is facially valid); Chamber of Commerce of the United States v. Edmondson, 594 F.3d 742 (10th Cir. 2010) (holding federal immigration law preempted an Oklahoma law designed to curb illegal immigration through various employment verification standards and by making it a discriminatory practice to discharge a citizen or legal worker while knowingly retaining an undocumented worker); Reyes v. Van Elk, Ltd., 56 Cal. Rptr. 3d 604, 618–19 (Ct. App. 2007) (holding “the prevailing wage law and the post-Hoffman statutes are not preempted by the IRCA,” therefore allowing plaintiffs to bring such claims despite their undocumented status); Piscitelli v. Classic Residence by Hyatt, 973 A.2d 948, 961 (N.J. Super. Ct. App. Div. 2009) (holding no express or implied private right of action is available against businesses employing undocumented workers); see also Lee Davidson, Senate Okays Utahns Sponsoring Immigrants, SALT LAKE TRIBUNE (Mar. 23, 2011), http://www.sltrib.com/sltrib/home/51389489-76/bill-immigration-niederhauser-senate.html.csp (discussing a bill that circumvents the federal immigration process and allows immigrants to live and work in Utah provided they pass a background check and health screening, among other things).
Groups like the Minuteman Project—whose goals consist of raising public awareness of what they label an ongoing “illegal alien invasion” and advocating for enforcement of immigration laws—increase the visibility of the debate, as well as exacerbate the rancorous divide it creates. A poll conducted in May of 2010 indicated fifty-three percent of respondents felt “illegal immigrants making low wages might make U.S. employers less willing to pay American workers a decent wage.” There is continuing pressure to address these issues at both the state and national levels.

Currently, the minimal rights afforded undocumented workers are in danger of erosion. Case law indicates the United States Supreme Court has created a hierarchy of national policies placing immigration status over considerations of civil liberties and human rights. The privileging of immigration law and policy above the policies of labor and employment law parallels a shift in the United States from a territorial conception of membership to a status-centric approach. This effectively creates a population of undocumented workers whose immigration status potentially eliminates protections under labor and employment laws.

12 Jim Gilchrist, An Essay by Jim Gilchrist, 22 GEO. IMMIGR. L.J. 415, 416 (2008) (discussing the goals of the Minuteman Project from the perspective of one of the group’s co-founders); see James Duff Lyall, Vigilante State: Reframing the Minuteman Project in American Politics and Culture, 23 GEO. IMMIGR. L.J. 257, 258 (2009) (noting the substantial impact the Minuteman Project and similar groups have on the debate surrounding immigration).


16 See Núñez, supra note 14, at 851–52 (noting the Hoffman majority held awarding a remedy afforded by labor laws runs afoul of the policies underlying immigration law).

Further, it runs contrary to the policies behind the labor, employment, and immigration laws purportedly informing court decisions.\textsuperscript{18} In order to further these policies and place undocumented workers in a clearly defined and coherent legal framework, Congress should amend the Immigration Reform and Control Act of 1986 (IRCA) to include language that expressly forbids immigration law from trumping other legal regimes.\textsuperscript{19}

This comment begins by discussing the National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA).\textsuperscript{20} These statutes—and the definitions contained within them—are at the center of an increasingly ambiguous interaction of labor, employment, and immigration law. After analyzing these statutes and associated case law, this comment discusses the IRCA, which makes it unlawful for employers to employ undocumented workers.\textsuperscript{21} After the passage of the IRCA, American courts began applying the NLRA and the FLSA with an eye to immigration law, an interaction that culminated in the United States Supreme Court’s decision in \textit{Hoffman}.\textsuperscript{22} This comment analyzes \textit{Hoffman} and its progeny, noting the potential danger in the continued application of \textit{Hoffman}’s reasoning.\textsuperscript{23} Analysis of the relevant statutes and case law reveals that by relegating undocumented workers to a legal realm in which remedies are scarcely available, the courts ultimately undermine the policies behind immigration, labor, and education law, thereby leaving the responsibility for correcting the confusing state of the law to Congress.\textsuperscript{24}

\section*{II. Background}

This section begins by explaining the labor and employment laws relevant to the discussion of the rights of undocumented workers.\textsuperscript{25} It then considers a number of cases focusing on provisions of those laws affecting undocumented workers.\textsuperscript{26} This section then discusses immigration law and a handful of related cases before examining the leading case in the area, \textit{Hoffman Plastic Compounds, Inc. v. National

\textsuperscript{18} See \textit{Hoffman}, 535 U.S. at 153 (Breyer, J., dissenting) (opining that awarding an undocumented worker a back pay award would further the goals of both labor and immigration laws).

\textsuperscript{19} See infra notes 183–85 and accompanying text.

\textsuperscript{20} See infra notes 29–49 and accompanying text.

\textsuperscript{21} See infra notes 50–95 and accompanying text (discussing employment and labor law cases); infra notes 96–100 and accompanying text (discussing immigration law, particularly the IRCA).

\textsuperscript{22} See infra notes 102–10 and accompanying text (discussing several cases leading to \textit{Hoffman}); infra notes 111–24 (discussing \textit{Hoffman}).

\textsuperscript{23} See infra notes 136–78 and accompanying text.

\textsuperscript{24} See infra notes 179–85 and accompanying text.

\textsuperscript{25} See infra notes 29–49 and accompanying text.

\textsuperscript{26} See infra notes 50–95 and accompanying text.
Finally, this section examines the traditional methods of assigning rights to immigrants as well as the implications of membership in obtaining rights.28

A. Labor and Employment Law

Largely as a response to the Great Depression of the 1920s, Congress passed the NLRA in 1935.29 In the NLRA’s policy declaration, Congress addressed the problems that spurred the legislation, claiming unequal relationships between employers and employees affected commerce because employers were able to maintain substandard wages and working conditions.30 Congress implemented a policy designed to eradicate those obstacles by encouraging collective bargaining and granting workers the right to organize.31 The NLRA stabilized the workplace by supporting unions and regulating the relationships between labor and management.32 Additionally, the NLRA created the National Labor Relations Board (NLRB) to administer and implement the provisions of the statute.33

The NLRA expressly defines employees’ rights regarding labor activity.34 The statute states that every employee has the right to self-organization, union activity,

27 See infra notes 96–110 and accompanying text (discussing immigration law, generally, and a select group of cases); infra notes 111–24 and accompanying text (discussing the Hoffman decision).
28 See infra notes 125–35 and accompanying text.
30 29 U.S.C. § 151 (2006). The NLRA contemplates the lopsided relationship between employers and employees:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Id.

31 Id.
32 Christopher Brackman, Note, Hoffman v. NLRB, Creating More Harm than Good: Why the Supreme Court Should Not Have Denied Illegal Workers a Backpay Remedy Under the National Labor Relations Act, 71 UMKC L. Rev. 717, 718 (2003) (discussing the genesis of the NLRA); Haque, supra note 14, at 79 (noting the NLRA’s focus on “labor-management relations of businesses engaged in interstate commerce”).
33 29 U.S.C. §§ 153–156; see Ellen Dannin, NLRA Values, Labor Values, American Values, 26 Berkeley J. Emp. & Lab. L. 223, 229 (2005) (indicating that the policies of the NLRA deem the manner in which workers are treated as central to a democratic society); Brackman, supra note 32, at 718.
and collective bargaining.\textsuperscript{35} Furthermore, employees generally have the right to refrain from engaging in such activities.\textsuperscript{36} The NLRA also describes unfair labor practices, which it then empowers the NLRB to prevent through cease and desist orders, reinstatement of employment, back pay, and possibly injunctive relief.\textsuperscript{37} As such, in order to receive the protections of the NLRA, one must be an employee.\textsuperscript{38}

The definition of “employee” is a source of much legal and political dispute. Under the NLRA, “employee” is a defined term and encompasses “\textit{any} employee.”\textsuperscript{39} The statute goes on to enumerate a list of seven exceptions to the otherwise expansive definition.\textsuperscript{40} Notably, none of the listed exceptions mention undocumented workers or immigration status.\textsuperscript{41}

In the seventy-five years since the NLRA’s passage, numerous decisions by the NLRB and American courts have addressed the manner in which the NLRA is applied to undocumented workers.\textsuperscript{42} Many of these cases have struggled to locate undocumented workers within the definitional framework of the NLRA, particularly on the issue of whether undocumented workers are “employees” under the statute.\textsuperscript{43} While labor laws like the NLRA deal with workers and their collective relationships with management, employment laws protect the individual rights of

\textsuperscript{35} Id.

\textsuperscript{36} Id.

\textsuperscript{37} Id. §§ 158, 160.

\textsuperscript{38} Id. § 157.

\textsuperscript{39} Id. § 152(3) (emphasis added). The definition includes those individuals whose employment was terminated because of any unfair labor practice or labor dispute:

\begin{quote}
The term “employee” shall include any employee . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . .
\end{quote}

\textit{Id.}

\textsuperscript{40} Id. The exceptions include agricultural laborers, domestic servants, individuals employed by their parents or spouses, independent contractors, supervisors, a person employed by an employer subject to the Railway Labor Act, and any other person employed by an employer that does not meet the statutory definition of “employer.” \textit{Id.}; see also id. § 152(2); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892 (1984) (noting that undocumented workers are not among the listed exceptions to the definition of “employee”).

\textsuperscript{41} 29 U.S.C. § 152(3).


\textsuperscript{43} See, e.g., Sure-Tan, Inc., 467 U.S. at 891–92; Del Rey Tortilleria, Inc. v. NLRB, 967 F.2d 1115, 1118–19.
employees.44 The FLSA, one of the preeminent employment laws, has experienced a similar trajectory as the NLRA with respect to undocumented workers.

Congress passed the FLSA three years after signing the NLRA into law.45 It provides employees with such protections as minimum wages and maximum hours to curb labor conditions that erode the “minimum standard of living necessary for health, efficiency, and general well-being of workers.”46 Like the NLRA before it, the FLSA defines “employee” in a specific, albeit broad manner.47 Generally, the FLSA’s definition includes all individuals employed by employers.48 Within the listed exceptions, there is no mention of undocumented workers, illegal aliens, or immigration status.49

B. Cases Leading to Hoffman

Both the NLRA and the FLSA were passed within a few years of each other as a part of the New Deal legislation.50 As such, the policies behind the statutes are similar, and both employ extremely broad definitions of “employee.”51 Accordingly, courts have used one statute’s definition of employee to give context to the other and often use the definitions interchangeably within the context of immigration.52

44 See Benjamin I. Sachs, Employment Law as Labor Law, 29 CARDOZO L. REV. 2685, 2688 (2008) (stating the traditional view “that labor and employment law constitute dichotomous, and in a fundamental respect incompatible, regulatory regimes”). Compare MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW: CASES AND MATERIALS 33 (6th ed. 2007) (noting that while collective bargaining is important to employment law, employment law addresses “individual rather than collective rights”), with BLACK’S LAW DICTIONARY (9th ed. 2009) (defining labor law as “governing the relationship between employers and employees, esp. law governing the dealings of employers and the unions that represent employees”).


47 Id. § 203(c).

48 Id. § 203(c)(1) (“Except as [otherwise] provided . . . the term ‘employee’ means any individual employed by an employer.”).

49 Id. Exceptions to the FLSA’s definition of employee include employees of public agencies, intra-family agricultural employees, and volunteers performing services for public agencies. Id. § 203(e)(2)–(4).

50 See Sean Farhang & Ira Katznelson, The Southern Imposition: Congress and Labor in the New Deal and Fair Deal, 19 STUD. AM. POL. DEV. 1, 2 (acknowledging both the NLRA and the FLSA were part of the “New Deal labor regime”).


52 See Rutherford Food Corp., 331 U.S. at 723; Patel, 846 F.2d at 703 n.3; Lewinter, supra note 51, at 526.
The United States Court of Appeals for the Ninth Circuit addressed the issue of whether undocumented workers fit within the NLRA’s definition of “employee” in *NLRB v. Apollo Tire Co.* In *Apollo*, an employee’s mother made a complaint to the Department of Labor regarding her son’s withheld overtime pay. She was given complaint forms for her son, which she also distributed to other employees. Six of the seven employees who filed complaints were laid off. The NLRB issued Apollo Tire a cease and desist order for its unfair labor practices under section 157 of the NLRA.

On appeal, Apollo contended that Congress meant to exclude undocumented workers from its definition of “employee” to avoid running afoul of national immigration policy. The court disagreed, finding the statutory language, combined with the NLRB’s past holdings, clearly placed undocumented workers within the scope of the NLRA. The court also noted that ruling otherwise would encourage employers to seek undocumented workers as employees, which would certainly run contrary to immigration policy.

The United States Supreme Court addressed this same issue in *Sure-Tan, Inc. v. NLRB.* In *Sure-Tan*, a disgruntled employer asked the Immigration and Naturalization Service (INS) to check the immigration status of several employees after they participated in union activities. When INS agents visited Sure-Tan’s grounds they arrested five employees, none of whom had proper documentation. In lieu of official deportation proceedings, the workers were permitted to leave the United States voluntarily and were on a bus for Mexico within a day. Upon hearing the case, the NLRB determined Sure-Tan violated the NLRA’s prohibition of unfair labor practices. Specifically, in reporting the workers to INS merely for their

53 604 F.2d 1180 (9th Cir. 1977).
54 Id. at 1181. Before going to the Department of Labor, she complained to the general manager, who responded by telling her husband that if his wife made a formal complaint she would be killed. Id.
55 Id.
56 Id. at 1182.
58 *Apollo Tire Co.*, 604 F.2d at 1182.
59 Id. at 1182–83.
60 See id. at 1183. Judge Kennedy argued in a concurring opinion that leaving undocumented workers without labor law protections “would leave helpless the very persons who most need protection from exploitative employer practices.” Id. at 1184.
62 Id. at 886–87.
63 Id. at 887.
64 Id.
65 Id. at 888.
support of the union, the NLRB found that Sure-Tan violated sections 158(a)(1) and (3) of the NLRA.\textsuperscript{66} As a result, the NLRB issued a cease and desist order requiring Sure-Tan to halt its unfair labor practices and ordered reinstatement of the employees with back pay.\textsuperscript{67}

The United States Court of Appeals for the Seventh Circuit affirmed the NLRB’s order but made several modifications regarding reinstatement and back pay.\textsuperscript{68} The court first determined that reinstatement would only be proper if the workers’ presence and work authorization were legal.\textsuperscript{69} Simply put, in order to get their jobs back, the workers must have first entered the United States legally or adjusted their immigration status and obtained official employment authorization.\textsuperscript{70} The court also found the NLRB’s decision allowing reinstatement within six months was inadequate and failed to give the employees a reasonable time to arrange for legal entry.\textsuperscript{71} The appellate court held that while back pay should not be given for any period of time during which the employees were ineligible to work—which in this case meant the entire duration of their employment—a minimum award must be set in order to “effectuate the policies of the [National Labor Relations] Act."\textsuperscript{72}

The United States Supreme Court affirmed the Sure-Tan decision in part and reversed it in part.\textsuperscript{73} The majority opinion analyzed the NLRA’s definition of “employee” to determine whether the provisions of the NLRA applied to undocumented workers.\textsuperscript{74} Acknowledging that the NLRB’s construction of the term deserved tremendous deference, the Court nonetheless conducted its own analysis of the statutory language.\textsuperscript{75} It found that undocumented workers plainly fall within the expansive category of “any employee” because they are not among the expressly listed exceptions.\textsuperscript{76} The Court also noted such a construction furthered the policies of the NLRA by “encouraging and protecting the collective-


\textsuperscript{67} Sure-Tan, Inc., 467 U.S. at 888–89.

\textsuperscript{68} Id. at 889–90.

\textsuperscript{69} Id. at 889.

\textsuperscript{70} See id.

\textsuperscript{71} Id. at 889–90 (ordering that the reinstatement offers be both written in Spanish and held open for four years).

\textsuperscript{72} Id. at 890 (quoting Sure-Tan, Inc. v. NLRB, 672 F.2d 592, 606 (7th Cir. 1982)).

\textsuperscript{73} See id. at 906.

\textsuperscript{74} Id. at 891.

\textsuperscript{75} Id.

\textsuperscript{76} Id. at 891–92.
bargaining process.”77 Further, the Court considered whether Sure-Tan’s reporting of its employees to the INS was an unfair business practice, thereby rendering the company liable.78 It determined that there are certain occasions in which it is proper for an employer to report an illegal alien—when reporting criminal activity, for example.79 In Sure-Tan, however, the evidence showed the reporting was solely in retaliation for the employees’ union activity, which was protected by the NLRA.80 As such, Sure-Tan’s acts violated the NLRA.81

Although the majority affirmed the Seventh Circuit’s holding regarding the application of the NLRA to undocumented workers, it disagreed with the appellate court’s remedial modifications to the NLRB’s order.82 The Court held that not only did the lower court exceed its authority, but that in doing so it forced the NLRB to act beyond its authority as well.83 Imposing a minimum six-month back pay period, the majority argued, was based entirely on speculation and ran counter to the remedial policies of the NLRA.84 Additionally, the appellate court’s modifications regarding the reinstatement orders were determined an intrusion on the significant deference afforded to the NLRB.85 The Court held that the NLRB was the appropriate body to fashion remedies, not the courts.86 As such, the Court remanded the case to the Seventh Circuit with instructions for it to remand the case back to the NLRB to create a remedial order in compliance with the Court’s opinion.87 Justices Brennan, Marshall, Blackmun, and Stevens joined in the decision but disagreed with the majority’s rejection of the remedial modification.88 They argued that the Court created a situation in which an undocumented worker entitled to protections under the NLRA could be left without any remedy.89

The United States Court of Appeals for the Ninth Circuit addressed the issue again in Local 512 v. NLRB, using the Sure-Tan decision as a guide.90 The NLRB held Felbro, Inc. violated the NLRA by refusing to engage in collective

77 Id. at 892.
78 Id. at 894.
79 Id. at 895.
80 Id. at 895–96.
81 Id.
82 Id. at 898–99.
83 Id. at 899–900.
84 Id. at 901.
85 Id. at 905.
86 Id.
87 Id. at 906.
88 Id.
89 Id. at 911 (“[T]he contradiction in the Court’s opinion is total.”).
90 Local 512, Warehouse & Office Workers’ Union v. NLRB, 795 F.2d 705 (9th Cir. 1986).
bargaining.\textsuperscript{91} The NLRB—based on its understanding of \textit{Sure-Tan}—modified its back pay order to be conditioned on a showing of the employees’ legal status.\textsuperscript{92} The Ninth Circuit found this reading of \textit{Sure-Tan} misguided.\textsuperscript{93} \textit{Sure-Tan}, it argued, in no way permitted the NLRB to look at an employee’s legal status in determining his eligibility for back pay.\textsuperscript{94} According to the Ninth Circuit, \textit{Sure-Tan}’s holding merely dealt with back pay to employees unavailable for work—and therefore ineligible for back pay—because they were out of the country with little prospect of legal reentry; their immigration status was incidental.\textsuperscript{95}

\textbf{C. Immigration Law}

The primary law governing immigration and related matters is the Immigration and Nationality Act (INA).\textsuperscript{96} The INA remained silent on the issue of employment of undocumented workers until 1986, when Congress passed the Immigration Reform and Control Act (IRCA).\textsuperscript{97} The IRCA made it unlawful for employers to knowingly hire undocumented workers.\textsuperscript{98} Further, it required employers to comply with an employment verification system designed to prevent the employment of undocumented workers.\textsuperscript{99} As such, it created an ostensibly conflict between immigration law and the protections previously given to undocumented workers under the NLRA and the FLSA.\textsuperscript{100}

Courts have interpreted the IRCA in a variety of ways.\textsuperscript{101} In \textit{Patel v. Quality Inn South}, the United States Court of Appeals for the Eleventh Circuit determined the IRCA did not prevent undocumented workers from receiving protection under the FLSA.\textsuperscript{102} It disagreed with the lower court’s contention that in passing

\begin{itemize}
\item \textsuperscript{91} \textit{Id.} at 708.
\item \textsuperscript{92} \textit{Id.}
\item \textsuperscript{93} See \textit{id.} at 716–17.
\item \textsuperscript{94} \textit{Id.} at 717.
\item \textsuperscript{95} \textit{Id.} at 716–17.
\item \textsuperscript{96} 8 U.S.C. \textsection{1101–1537} (2006).
\item \textsuperscript{97} \textit{Id.} \textsection{1324a}; see Lewinter, \textit{ supra} note 51, at 514–15; L. Tracy Harris, Note, \textit{Conflict or Double Deterrence? FLSA Protection of Illegal Aliens and the Immigration Reform and Control Act}, 72 Minn. L. Rev. 900, 900 (1988) (observing that prior to the passage of the IRCA, the INA “permitted employers to hire illegal aliens”).
\item \textsuperscript{98} 8 U.S.C. \textsection{1324a(a)(1)(A)}.
\item \textsuperscript{99} \textit{Id.} \textsection{1324a(a)(1)(B)}.
\item \textsuperscript{100} See Harris, \textit{supra} note 97, at 900.
\item \textsuperscript{101} See Kati L. Griffith, \textit{United States: U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law}, 31 \textit{Comp. Lab. L. \\& Pol’y J.} 125, 141 (2009) (noting the uncertainty of the interaction of immigration, labor, and employment law following the IRCA’s passage); \textit{infra} notes 102–24 and accompanying text.
\item \textsuperscript{102} 846 F.2d 700, 706 (11th Cir. 1988).
\end{itemize}
the IRCA, Congress implicitly altered the FLSA’s definition of “employee” by excluding undocumented workers.103 The court also determined that while the FLSA and the NLRA are often coextensive, Quality Inn South’s argument that Sure-Tan’s stance on back pay precluded Patel from remedial relief lacked merit.104 The decisions concerning remedies under the NLRA, the court concluded, had no bearing on the FLSA’s remedial scheme.105

In Del Rey Tortilleria, Inc. v. NLRB, the United States Court of Appeals for the Seventh Circuit considered whether an NLRB order requiring an employer issue back pay to several undocumented workers violated the IRCA.106 The court determined the employees were ineligible to receive back pay under Sure-Tan because they were not lawfully permitted to live and work in the United States.107 The workers were discharged before the IRCA became law, which led the court to acknowledge its holding only applied to pre-IRCA discharges.108 Despite that limitation, however, the court then stated that the IRCA “clearly bars” the NLRB from awarding back pay to undocumented workers.109 In 2002, this issue was examined by the United States Supreme Court in Hoffman Plastic Compounds, Inc. v. NLRB.110

D. The NLRA Still Applies to Undocumented Workers

In 1988, Jose Castro was hired by Hoffman Plastic Compounds, Inc. to prepare various pharmaceutical products.111 Shortly thereafter, Castro and several other employees joined a union-organizing campaign.112 In January of the following year, Hoffman fired Castro and several other employees who also participated in the unionizing activities.113 Three years later, the NLRB determined Hoffman terminated Castro and four others in violation of the NLRA.114 During

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103 Id. at 704 (finding nothing in the IRCA or its legislative history supporting the notion that Congress intended to limit the scope of the FLSA).
104 Id. at 705–06.
105 Id. at 706.
106 976 F.2d 1115 (7th Cir. 1992).
107 Id. at 1121–22.
108 Id. at 1122.
109 Id. In a footnote, the court distinguished Patel v. Quality Inn South because in that case the workers were seeking payment for work already performed, not for work that would have been performed. Id. at 1122 n.7. Interestingly, the Patel court used the same logic to distinguish its holding from Sure-Tan. See Patel v. Quality Inn S., 846 F.2d 700, 705–06 (11th Cir. 1988).
111 Id. at 140.
112 Id.
113 Id.
114 Id. at 140–41.
a subsequent hearing before an Administrative Law Judge (ALJ) to determine the amount of back pay Hoffman owed the workers, Castro reported he was neither born nor legally permitted to enter or work in the United States.\textsuperscript{115} Castro also testified that he used fraudulent documents to gain employment with Hoffman.\textsuperscript{116} Finding a back pay reward in direct conflict with immigration law, the ALJ refused to order payment to Castro.\textsuperscript{117} Four years later, the NLRB reversed the ALJ’s decision, finding that applying the protections and remedies of the NLRA was “the most effective way to accommodate and further the policies embodied in [the IRCA].”\textsuperscript{118}

The United States Supreme Court held the NLRB correctly applied the NLRA to undocumented workers but erred by granting back pay because immigration policy limited the NLRB’s remedial power.\textsuperscript{119} The majority argued immigration policy demands strict enforcement of laws enacted to curtail employment of illegal aliens; failing to do so would invite more violations of immigration law.\textsuperscript{120} Furthermore, the majority claimed that while immigration policy limited the remedies available to undocumented workers, Hoffman and other similar employers would not go unpunished, reciting a list of sanctions available.\textsuperscript{121}

Justice Breyer’s dissent focused on the practical inadequacy of denying undocumented workers the possibility of back pay because it motivates employers to seek out undocumented workers.\textsuperscript{122} The dissent also noted that applying labor laws equally to undocumented and documented workers would reduce incentive for workers entering the United States without going through the proper channels.\textsuperscript{123} Essentially, the dissent claimed the majority’s attempt to bifurcate the substantive and remedial rights of undocumented workers undermined both labor \textit{and} immigration law.\textsuperscript{124}

\textit{E. Status-Based Assignment of Rights}

The unstable distinction between the rights afforded to documented and undocumented workers is not just a problem of legal definition but also

\begin{itemize}
  \item \textsuperscript{115} \textit{Id.} at 141.
  \item \textsuperscript{116} \textit{Id.}
  \item \textsuperscript{117} \textit{Id.}
  \item \textsuperscript{118} \textit{Id.} (quoting Hoffman Plastic Compounds, Inc. and Casimiro Arauz, 326 N.L.R.B. 1060, 1060 (1998)).
  \item \textsuperscript{119} \textit{Id.} at 144.
  \item \textsuperscript{120} \textit{Id.} at 151.
  \item \textsuperscript{121} \textit{Id.} at 152.
  \item \textsuperscript{122} \textit{Id.} at 155.
  \item \textsuperscript{123} \textit{Id.} at 156.
  \item \textsuperscript{124} \textit{Id.} at 153.
\end{itemize}
of defining membership in a transitional and globalized society.125 In general, membership is defined—and thus rights are assigned—through either a territorial or status-based model.126 Territorial models treat physical, geographic presence as the basis of membership and its associated rights.127 The status-centric approach assigns rights to persons within a given territory according to their immigration status.128 Accordingly, in a status-based model, rights are assigned to members of a society based entirely on governmentally sanctioned and distributed labels.129 The United States and its immigration laws traditionally follow a territorial-based assignment of rights in which physical presence within the jurisdiction establishes a minimal set of rights.130

Some areas of the law are moving toward a more nuanced form of territorial-based membership.131 In the context of primary education for undocumented children, social factors like community involvement and maintaining family cohesion are usurping immigration status as the determinant factors.132 The

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126 See Ayelet Shachar, The Birthright Lottery: Citizenship and Global Inequality 35–36 (2009) (discussing the manner in which citizenship is the basis for participation in the governance of a given polity); Linda Bosniak, Being Here: Ethical Territoriality and the Rights of Immigrants, 8 Theoretical Inquiries L. 389, 390 (2007) (noting the two primary methods of assigning rights “derive from either . . . formal status under law or . . . territorial presence”).

127 See Bosniak, supra note 126, at 391 (noting the territorial method’s focus on “the normative significance of the physical fact of presence in the national space”); Núñez, supra note 14, at 825–26 (distinguishing between territorial and status-based models of membership, noting the former’s use of “geographic boundaries” in distributing rights); Rick Su, Local Fragmentation as Immigration Regulation, 47 Hous. L. Rev. 367, 391 (2010) (“[B]oundary lines not only determine which public resources are ours and which are theirs, but help to define who ‘we’ and ‘they’ are.” (quoting Gerald E. Frug, City Making 15 (1999))).

128 See Walzer, supra note 125, at 43 (noting “full membership” in a country often depends on nationality).

129 See Bosniak, supra note 126, at 390–91 (discussing the basics of the status-based approach, in particular the role of “a state’s immigration admissions and citizenship allocation systems” in creating various sets of rights depending on one’s status); Cunningham-Parmeter, supra note 9, at 1362 (“[A] person’s basket of rights fills as his immigration status formalizes.”); Núñez, supra note 14, at 826 (discussing the shortcomings of a status-based approach and its dependence on governmental categorization).

130 Núñez, supra note 14, at 819; see Cunningham-Parmeter, supra note 9, at 1363 (“Regardless of status, there is a floor on the level of protections enjoyed by all persons territorially present in the United States.” (emphasis added)).

131 See infra notes 132–34 and accompanying text.

132 See Plyler v. Doe, 457 U.S. 202, 223–24 (1982) (holding undocumented children have the right of access to public education because, inter alia, the American education system is instrumental in civic and community engagement); Jacquelyn Hagan, Brianna Castro & Nestor Rodriguez, The
issuance of driver’s licenses to undocumented workers raises similar issues.\textsuperscript{133} Labor and employment law, on the other hand, are becoming increasingly status-based.\textsuperscript{134} This shift has serious implications for workers—undocumented or not—as well as employers.\textsuperscript{135}

III. Analysis

This section begins by addressing the problems associated with a shift toward a status-based assignment of rights.\textsuperscript{136} It notes the danger of expanding the United States Supreme Court’s holding in Hoffman Plastic Compounds, Inc. v. NLRB and then discusses the unclear legal realm in which undocumented workers now reside.\textsuperscript{137} Further, this section evaluates the parallels between the history of African Americans and women with the current uncertainty faced by undocumented

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\textsuperscript{134} Núñez, supra note 14, at 848; see Ellen Dannin, Hoffman Plastics as Labor Law—Equality At Last for Immigrant Workers?, 44 U.S.F. L. Rev. 393, 412–13 (2009) (discussing the Hoffman Court’s focus on immigration status as the determining factor as to the availability of remedies and arguing such a focus was irrelevant to the NLRA); Brackman, supra note 32, at 725 (noting that protections under the NLRA vary depending on one’s immigration status).

\textsuperscript{135} Núñez, supra note 14, at 863; see Cunningham-Parmeter, supra note 9, at 1363–64 (noting that since Hoffman, employers have attempted to expand the Court’s holding to further limit the remedies available to undocumented workers); Griffith, supra note 101, at 160 (discussing how excluding undocumented workers from union-related activities hurts their legally employed counterparts by diminishing the collective bargaining power of the group).

\textsuperscript{136} See Núñez, supra note 14, at 863 (discussing how the encroachment of the status-based approach garners inconsistent and unpredictable legal outcomes and creates a reality in which immigration policy is undermined); Pham, supra note 14, at 1119–20, 1153–54 (noting the creation of “a new paradigm, where immigration borders are moving and multiple, affecting all residents, both in the interior and at the boundaries of the United States” and how these borders are detrimental to the rights of undocumented workers); infra notes 140–44 and accompanying text.

\textsuperscript{137} See infra notes 145–55 and accompanying text (discussing the implications of Hoffman); infra notes 156–60 and accompanying text (addressing the tenuous nature of life as an undocumented worker); see also David L. Hudson, Jr., Tales of Hoffman, 92-DEC A.B.A. J. 12, 12, 14 (2006) (noting the concern that courts have misinterpreted Hoffman and expanded its holding too far); Stephen H. Legomsky, Portraits of the Undocumented Immigrant: A Dialogue, 44 GA. L. Rev. 65, 157 (2009) (discussing how “undocumented immigrants are perpetually at risk of apprehension, arrest, detention, and deportation”).
workers.138 This section concludes with a consideration of potential solutions to the problems created by Hoffman.139

By failing to provide undocumented workers who are victims of illegal employer actions with any substantial remedy, the Hoffman decision embodies a logical disconnect between law and remedy and removes much of the punitive bite Congress delegated to administrative agencies in the NLRA and similar statutes.140 In doing so, the United States Supreme Court implicitly relegated the undocumented worker to a sub-class of societal membership, which is simultaneously protected by and excluded from the laws of the United States. Undocumented workers are protected by the NLRA, but Hoffman limits their recourse.142 Under the current legal regime, immigration status, more than any other categorization or trait, determines the rights of the undocumented worker.

Hoffman and its progeny indicate a shift toward the status-centric approach, which limits the rights of workers based on their immigration status.143 Limiting the rights of undocumented workers based on their status tolerates exploitation by unscrupulous employers, allows discrimination based on perceived immigration status, and negatively affects the entire workforce.144 Further, the shift toward a status-centric approach creates confusion and inconsistencies in other areas of law.

138 See infra notes 161–73 and accompanying text.

139 See infra notes 179–85 and accompanying text.

140 Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 156–57 (2002) (Breyer, J., dissenting) (noting that withholding remedies from undocumented workers “leave[s] helpless the very persons who most need protection from exploitative employer practices”); see Walsh, supra note 8, at 333–39 (explaining the Hoffman Court’s error in ignoring the congressional intent behind the IRCA and how that error negatively affects the NLRB’s discretionary powers).

141 See, e.g., Núñez, supra note 14, at 853–54 (discussing the manner in which Hoffman leaves undocumented workers in a “no-man’s-land” by deeming them protected by the NLRA, yet precluding the availability of a remedy); Walsh, supra note 8, at 339 (noting a loss of labor law protections affects “an entire class of people”).

142 Hoffman, 535 U.S. at 148–49.

143 See Núñez, supra note 14, at 849–50; infra note 152 and accompanying text.

Undocumented workers live a precarious life in the United States. The promise of better jobs with higher wages attracts workers from all parts of the world. Many of these workers are unable to obtain proper documentation, yet enter the United States nonetheless. Their method of entry is certainly illegal, yet many consider their very existence—not just their physical presence in the United States—illicit and contend that undocumented workers steal jobs from the legal American workforce. Yet these very same workers often fill valuable and needed roles in American society. If the trend toward a strictly status-based

145 See Cunningham-Parmeter, supra note 9, at 1362 (discussing the conditions that attract undocumented workers to the United States as well as the growing hostility toward their presence); Lewinter, supra note 51, at 509 (noting while many undocumented workers receive low wages and suffer poor working conditions, they are often afraid to report such abuses for fear of retaliation or deportation).

146 Hoffman, 535 U.S. at 155 (Breyer, J., dissenting) (noting the ‘attractive force of employment, which like a ‘magnet’ pulls illegal immigrants toward the United States’); see Phi Mai Nguyen, Comment, Closing the Back Door on Illegal Immigration: Over Two Decades of Ineffective Provisions While Solutions Are Just a Few Words Away, 13 Chap. L. Rev. 615, 623–24 (2010) (noting the most influential factor in undocumented immigration is lucrative job opportunities); see also Jeffrey S. Passel & D’Vera Cohn, A Portrait of Unauthorized Immigrants in the United States 21 (2009) (finding that while the majority of undocumented immigrants come from Mexico and other Latin American countries (81%), significant portions of the undocumented population come from Asia (11%), the Middle East (under 2%), and Europe (over 4%)).

147 See Lipman, supra note 125, at 11–13 (discussing how the demand for immigrant workers exceeds the availability of green cards or other forms of obtaining legal immigration status, thereby resulting in large numbers of undocumented workers); Nguyen, supra note 146, at 623–24 (noting the economic incentives for entering the United States illegally often outweigh the risks of life as an undocumented worker in the minds of potential immigrants).

148 See 8 U.S.C. § 1325 (2006) (subjecting an alien that “enters or attempts to enter” the United States illegally to a fine, imprisonment, or both); Legomsky, supra note 137, at 144–45 (discussing the ways in which immigration violations are viewed differently from other violations of law). Despite illegal entry being a misdemeanor under 8 U.S.C. § 1325(a), undocumented workers are often considered egregious lawbreakers, and by extension their presence is deemed illegal. Legomsky, supra note 137, at 144–45; see also Edmund Cahn, Law in the Consumer Perspective, in Confronting Injustice: The Edmond Cahn Reader 15, 26 (Lenore L. Cahn ed., 1966) (noting the manner in which the law reduces complex matters to overly simplistic truths using the example of how a juvenile delinquent is labeled a lawbreaker, ignoring “what else he may be”); Cunningham-Parmeter, supra note 9, at 1401 (noting how undocumented workers are viewed as violators that threaten “democracy and membership for those lawfully present”).

149 See Paul Weiler, Enhancing Worker Lives Through Fairer Labor and Worklife Law in Comparative Perspective, 25 Comp. Lab. L. & Pol’y J. 143, 147–48 (2003) (claiming illegal immigrants cause a ‘major competitive problem’ for the legal workforce); Brackman, supra note 32, at 717 (noting that undocumented workers “flood” job markets, leaving fewer and fewer jobs for legal residents); Nguyen, supra note 146, at 619 (observing that many in the United States consider undocumented immigrants a threat to legal job-seekers and a burden on the system).

150 Passel & Cohn, supra note 146, at iv. Undocumented workers comprise substantial portions of the farming, construction, and food service industries. Id.; see also Orrin Baird, Undocumented Workers and the NLRA: Hoffman Plastic Compounds and Beyond, 19 Lab. Law. 153, 160 (noting that forty-eight percent of agricultural workers are undocumented); Cunningham-Parmeter, supra
conception of membership continues, undocumented workers will find themselves even further removed from the protections of the laws of the United States.\textsuperscript{151}

Subsequent cases have attempted to extend the \textit{Hoffman} majority’s reasoning to broader issues such as the issuance of driver’s licenses to undocumented immigrants, inquiries into immigration status during discovery in discrimination suits, workers’ compensation, and changing definitions of “employee.”\textsuperscript{152} This trend further destabilizes the rights of undocumented workers through a presumption that their physical presence in the United States challenges notions of membership.\textsuperscript{153} They are physically present, yet legally invisible; they have

\textsuperscript{151} Lenni Benson, \textit{The Invisible Worker}, 27 N.C. J. INT’L L. & COM. REG. 483, 484 (2001). Benson, while discussing the potential pitfalls of focusing entirely on the undocumented worker’s immigration status, notes:

Legal definitions not only define who is a legal immigrant but also, by necessity, create the converse—the “illegal” or undocumented workers . . . [They] go far beyond being mere labels, and instead become the building blocks of legal status, creating intentional and unintentional interactions with other laws such as criminal law, family law, tax law, and labor and employment law. These labels . . . give rise to a class of invisible people. People who do not fit within the legal system . . . existing in an underground world—a world of invisible workers.

\textit{Id.} (emphasis added); see Cunningham-Parmeter, supra note 9, at 1414 (noting the Supreme Court’s portrayal of remedial relief for undocumented workers as the rewarding of illegal behavior threatens to further the decline in undocumented workers’ rights); Pham, supra note 14, at 1121 (arguing that by requiring proof of immigration status at various junctures within the United States’ borders, the trend toward status-based membership threats to banish undocumented workers from the periphery of society to the exterior).

\textsuperscript{152} Rivera v. Nibco, Inc., 384 F.3d 822, 823 (9th Cir. 2004) (Bea, J., dissenting) (arguing that allowing the plaintiff to bar inquiries into her immigration status during pretrial discovery was contrary to federal immigration law); Sanchez v. Iowa, 692 N.W.2d 812, 821 (Iowa 2005) (confirming the legality of Iowa’s “practice of denying driver’s licenses to illegal aliens”); Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 331–32 (Minn. 2003) (Gilbert, J., dissenting) (arguing that providing disability benefits to an injured undocumented worker would “reward him for staying in the United States illegally and encourage him to violate IRCA by finding further employment”); Crespo v. Evergo Corp., 841 A.2d 471, 476–77 (N.J. Super. Ct. App. Div. 2004) (holding a claim for discriminatory termination brought by an undocumented worker could not survive because her immigration status served as a statutory bar to employment, which precluded any damages pursuant to her termination); see Hudson, supra note 137, at 12, 14; Johnson, supra note 133, at 219–20 (noting that courts are hesitant to invalidate laws precluding undocumented immigrants from obtaining driver’s licenses).

\textsuperscript{153} See Núñez, supra note 14, at 817; Pham, supra note 14, at 1152 (noting immigration status now forms the primary division between the people that “belong in our national community” and those that should remain outside because they have not been granted the community’s permission to stay); see also Stephen H. Legomsky, \textit{Immigration, Equality and Diversity}, 31 COLUM. J. TRANSNAT’L L. 319, 335 (discussing the ways in which immigration issues challenge notions of community and communal values).
some minimal rights, but no means of enforcing those rights.154 Because a status-based approach creates a class of undocumented workers simultaneously included in American society but excluded from its legal system, *Hoffman* and its progeny threaten to push those workers further into the shadows.155

This dualistic existence leaves undocumented workers in an undefined realm.156 They have some rights, but not others; the law is unclear.157 This is known as partial inclusion.158 An undocumented worker enjoys some basic rights without obtaining any level of official immigration status.159 Yet this lack of immigration status prevents workers from obtaining and exercising other rights.160

The partial inclusion of African Americans and women in the United States legal system—often seen as proof that the system merely serves to maintain the status quo of political power—demonstrates the inverse of the undocumented worker's predicament.161 These groups, unlike undocumented workers, were protected by the immigration regime because they were citizens but were nonetheless denied certain civil rights.162 Given their status as citizens, however, the progress of women and African Americans had a legal foundation for advancing change unavailable to undocumented workers. In particular, the civil rights movement illuminates the manner in which the legal system addresses groups claiming some form of discrimination.163 Generally, such issues are viewed in one of two ways: from the perpetrator perspective or the victim perspective.164

154 See Benson, *supra* note 151, at 484; Pham *supra* note 14, at 1163 (discussing how using immigration status as a key to defining membership affects both documented and undocumented workers alike).

155 See Hudson, *supra* note 137, at 12, 14; Lipman, *supra* note 125, at 1–7 (noting that undocumented immigrants are required to pay taxes yet are barred from government benefits).

156 See Núñez, *supra* note 14, at 853.


158 Cunningham-Paramter, *supra* note 9, at 1403.

159 See Cunningham-Paramter, *supra* note 9, at 1363; Núñez, *supra* note 14, at 819.


162 Cunningham-Paramter, *supra* note 9, at 1402–03.


The perpetrator perspective, a dominant force in American jurisprudence, is employed when laws are crafted to detect and punish individual violators. The perpetrator perspective assumes that society as a whole is functioning properly and that “all we need do is identify and catch villains.” In the context of civil rights this meant that by passing legislation, which focused on racist violators of civil rights laws, the rest of society no longer bore any responsibility for the deeply ingrained and residual problems of racism. Yet a legal regime focused solely on apprehending and punishing a particular perpetrator often overlooks the actual problem.

to analyze Supreme Court antidiscrimination doctrine from the 1950s through the 1980s; Alan Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn. L. Rev. 1049 (1977) [hereinafter Freeman II]. Edmund Cahn discusses an analogous dichotomy. See Cahn, supra note 148, at 15–31 (explaining the “imperialist” and “consumer” perspectives). Cahn’s “imperialist” perspective assumes the point of view of government officials and seeks to instill efficiency and order. Id. at 17, 24. The “consumer” perspective, on the other hand, analyzes a law or principle according to the perspective of its targeted audience and how it affects the community. Id. at 25.


Freeman I, supra note 164, at 125; see Jerry Kang, Implicit Bias and the Pushback from the Left, 54 St. Louis U. L.J. 1139, 1146–47 (2010) (noting the perpetrator perspective's erroneous focus on "the misfiring neurons in a few pathological individuals"); Ian F. Haney López, Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama, 98 Cal. L. Rev. 1023, 1069 (2010) (noting "when conceptualized as bad acts by bad persons," conceptions of racism and discrimination overlook "disparate social outcomes"); Nielsen & Nelson, supra note 165, at 676 ("[L]aw has the more limited purpose of remedying specific intentional wrongs, rather than redressing systemic aspects of discrimination and inequality ... .")

See Freeman II, supra note 164, at 1073–74 (discussing the assumption that outlawing a practice indicates that practice was a deviation from the norm, which in turn implies the status quo precludes the practice). Accordingly, by simply passing anti-discrimination laws, society believes it is reinforcing an already existing norm. See id.; see also Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 325 (1987) (describing the perpetrator perspective mindset that if the law no longer discriminates, society is not responsible for a group's "subordinate position"); Thomas Ross, Innocence and Affirmative Action, 43 Vand. L. Rev. 297, 311–12 (1990) ("[W]e can claim the mantle of innocence only by denying the charge of racism. We as white persons and nonracists are innocent; we have done no harm to those people and do not deserve to suffer for the sins of the other, not innocent white people who were racists." (emphasis added)).

See Cahn, supra note 148, at 26 (noting how the law would benefit greatly from a "sensibility to human impacts"); Kang, supra note 166, at 1147 (arguing the perpetrator perspective is overly narrow and that society should look beyond “individual pathologies”); López, supra note
The victim perspective is concerned with the social conditions associated with a problem instead of the individual violators of a particular law. When social conditions plaguing an adversely affected group of people persist despite passage of a new law designed to prevent such conditions, that law is deemed ineffective. Instead of focusing on violations, the victim perspective proposes adopting laws and policies that effectuate change in social conditions. Thus, the victim perspective looks to actual results in the day-to-day lives of an adversely affected group, while the perpetrator perspective presupposes that the work has been done: as soon as the legislation was signed into law, society changed.

The Hoffman decision reinforces the perpetrator perspective. Under Hoffman, the undocumented worker's entry and presence renders him the original perpetrator. As such, the illegal immigrant, having never attained legal status, is always and already violating the rule of law. This reductive approach portrays an overly narrow-sighted depiction of the undocumented worker by fixing his identity to an illegal presence, by making him a perpetual perpetrator.

166, at 1069 (noting the perpetrator perspective “is neither natural nor obvious . . . [and] ultimately supplanted a developing structural conception of racial hierarchy”); Rebecca Davis, Comment, Opportunistic Hate Crimes Targeting Symbolic Property: When Free Speech Is Not Free, 10 J. GENDER RACE & JUST. 93, 104 (2006) (“When society views the hate act as ‘rational’ or as a ‘logical’ extension of a crime in process, rather than extreme or deviant, society itself ‘contributes to and reinforces the social environment that makes the practices seem useful or sensible to perpetrators.’” (quoting Lu-in Wang, “Suitable Targets”? Parallels and Connections Between “Hate” Crimes and “Driving While Black”, 6 Mich. J. RACE & L. 209, 235 (2001))).

169 See Arkles et al., supra note 165, at 597 (describing how the victim perspective views the problem as “those conditions of actual social existence as a member of an underclass”); Devon W. Carbado, (E)Tracing the Fourth Amendment, 100 Mich. L. Rev. 946, 970 (2002) (noting, in the context of racial discrimination in police searches, that the victim perspective is not concerned with individual “bad cop[s],” but rather with how race shapes the societal interactions between “police officers and nonwhite persons”); Freeman II, supra note 164, at 1053 (“[T]he problem will not be solved until the conditions associated with it have been eliminated.”).

170 See Freeman I, supra note 164, at 125; Lawrence, supra note 167, at 324 (arguing that anti-discrimination laws focused solely on culpably racist individuals lead “us to think about racism in a way that advances the disease rather than combating it”).

171 See Freeman II, supra note 164, at 1053 (noting actions to remedy racial discrimination should be centered around “affirmative efforts to change the condition”). Similarly, Cahn’s “consumer perspective” requires a consideration of the needs of those affected by the law. See Cahn, supra note 148, at 27.

172 See Freeman I, supra note 164, at 1053 n.16 (discussing the differences between the two perspectives); Cecil J. Hunt, II, Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence, 11 Mich. J. RACE & L. 477, 509–10 (2006) (noting the victim perspective “focuses on the injury or loss suffered by the victims,” while the perpetrator perspective “reinforces the notion that racism is primarily a function of individual actors”).

173 See Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 150–51 (2002) (noting the plaintiff’s presence was in itself a violation of the law); Cunningham-Parmenter, supra note 9, at 1414 (discussing how focusing on immigration status at the expense of other statuses is harmful).
If the undocumented worker is depicted as the perpetrator—if by his mere presence he is the signifier of problems resulting from illegal immigration and deemed to be illegal—then society no longer bears the responsibility of addressing the problems underlying illegal immigration.174 If membership derives solely from one’s immigration status, then the problems of illegal immigration will not simply remain unfixed; they will become exacerbated.175 The status-centric approach frames the issue of the undocumented worker’s rights in such a way that punishing and excluding those undocumented workers would solve the much larger problems of illegal immigration.176 Yet by dissuading workers from demanding (or at least denying their ability to exercise) employment rights, this approach encourages employers to continue hiring undocumented workers.177 If an employer can violate labor and employment laws knowing an undocumented worker has fewer means of legal retribution, she would be more likely to hire an illegal worker than his legal counterpart.178 In this way, the entire workforce is affected.

To address the problem at its root, energy must first be devoted to stabilizing the current system. Given the uncertainty of a status-centric approach to assigning rights to undocumented workers, bestowing the rights afforded to all documented workers on those without proper documentation would strengthen the system.179

174 See Dannin, supra note 134, at 400–03 (noting that in Hoffman, the United States Supreme Court shifted blame from the NLRA-violating company to the undocumented worker victim); Freeman I, supra note 164, at 1055 (discussing how the perpetrator perspective allows others in society to “not feel any personal responsibility for the conditions associated with discrimination”).

175 See Freeman I, supra note 164, at 1055 (noting that society feels a strong resentment for bearing the costs of eradicating discriminatory conditions, particularly when those costs are traditionally imposed on guilty parties); Hagan et al., supra note 132, at 1822–23 (noting stricter immigration enforcement adversely affects business, families, and communities).

176 Hoffman, 535 U.S. at 150 (“Indeed, awarding backpay in a case like this not only trivializes immigration laws, it also condones and encourages future violations.”).

177 See Griffith, supra note 101, at 140–41 (noting the negative effects of the current immigration scheme as being “catastrophic for the labor rights of immigrant and U.S. workers” (emphasis added) (quoting Rebecca Smith & Catherinence Ruckelhaus, Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immigration Reform, 10 N.Y.U. J. LEG. & PUB. POL’Y 555, 557 (2007))); Lewinter, supra note 51, at 537 (arguing that Hoffman allows employers to violate labor laws and encourages exploitation of undocumented workers).

178 See Lewinter, supra note 51, at 537; Rachel Bloomekatz, Comment, Rethinking Immigration Status Discrimination and Exploitation in the Low-Wage Workplace, 54 U.C.L.A. L. Rev. 1963, 1964 (2007) (“[M]any employers actually prefer to hire immigrants rather than U.S. workers, believing that the former are more easily exploitable.”). Employer preference for undocumented workers has given rise to a new breed of discrimination claims brought by U.S. workers against employers thought to hire according to immigration status. See Bloomekatz, supra, at 1985.

179 See Nuñez, supra note 14, at 853–54 (discussing how immigration status has “seeped” into many areas of the law, creating complex “new dimension[s]” of litigation); Walsh, supra note 8, at 339 (discussing how workers have historically depended on the labor and employment laws to maintain consistent working conditions); Brackman, supra note 32, at 728 (noting that all employees are affected when an alien is prohibited from exerting certain rights).
Giving undocumented workers equal rights in the employment sector would deter discriminatory labor practices and improve conditions for all workers by removing incentives for employers to hire undocumented workers or utilize illegal practices.180 With that in mind, it may also discourage those considering illegal entry from doing so.181

Solutions to problems created by and related to withholding remedial rights from undocumented workers may come in several forms. Courts could limit the holding of *Hoffman* to a very narrow set of factual circumstances. This approach, however, would nonetheless allow employers to hire and discriminate against undocumented workers.182 Given the statutory origins of the problem, a legislative solution would provide a more thorough treatment.

The legislature should amend IRCA to include language expressly preventing immigration status from trumping rights otherwise afforded under labor and employment statutes. The legislative history behind IRCA supports such a clarification of the statute’s scope and limitations.183 In doing so, Congress could dispel the ubiquitous confusion regarding the interaction between the IRCA and the NLRA, FLSA, and other statutes.184 Further, express language will bolster the policies supporting the various statutes by simultaneously discouraging behavior those statutes aim to curb.185

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181 See *Hoffman*, 535 U.S. at 155–56 (Breyer, J., dissenting) (noting that withholding back pay “could not significantly increase the strength of [the] magnetic force” that attracts undocumented workers to the United States); Harris, * supra* note 97, at 928–29 (noting that enforcing both immigration and labor laws will weaken employer incentives to hire undocumented workers).

182 See Lewinter, * supra* note 51, at 537 (noting the *Hoffman* decision “rewards employers who hire workers that they suspect have falsified documents by allowing these employers to flout NLRA protections without sanction”).


184 See Nguyen, * supra* note 146, at 639 (noting the confusion in lower courts since the United States Supreme Court’s decision in *Hoffman*).

185 See *Hoffman*, 535 U.S. at 153 (Breyer, J., dissenting) (“[I]t reasonably helps to deter unlawful activity that both labor laws and immigration laws seek to prevent.”).
IV. Conclusion

In Hoffman Plastic Compounds, Inc. v. NLRB, the United States Supreme Court could have clarified an extremely confused area of the law. Instead, it blurred the relationship between immigration, labor, and employment law even further. The NLRA and other statutes have specific definitions of “employee,” all of which are extremely broad. Immigration law remained silent on the issue of undocumented workers until Congress passed the IRCA. In Hoffman, the Court focused on the illegal presence, employment, and continued stay of an undocumented worker, citing national immigration policy as the impetus for this focus. The Court’s decision pushed undocumented workers further into the netherworld of illegal immigration by depriving them of legally prescribed remedies. In reality—and contrary to the majority’s contention—the holding in Hoffman did not bolster workers’ rights and immigration policy; it undermined them by focusing solely on immigration status.

Concern over the effects of illegal immigration on American job markets remains a hot-button political issue as well as a source of much legal contention. As efforts to combat a perceived torrent of illegal immigrants are taken up by the states, the federal government remains undecided on how to proceed. Unless corrected, the disconnect between labor, employment, and immigration law will only lead to greater uncertainty. Issues ranging from employment verification systems and collective bargaining to driver’s licenses and the right to education will remain unsettled. In order to harmonize these statutory frameworks, Congress should act to provide undocumented workers with the full protections of labor and employment laws and expressly forbid the IRCA from allowing immigration status to preclude the remedies Congress sought to provide.

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186 See Garcia, supra note 144, at 744 (noting the Hoffman Court “highlighted the ineffectiveness of immigration law, and labor law’s inability to protect all workers”); supra notes 140–60 and accompanying text.

187 See supra notes 29–95 and accompanying text (discussing these statutory frameworks).

188 See supra notes 102–10 and accompanying text (discussing relevant immigration statutes and case law).

189 See supra notes 111–24 and accompanying text (discussing Hoffman).

190 See supra notes 145–51 and accompanying text.

191 See supra notes 143–85 and accompanying text (discussing the dangers posed by Hoffman to immigration, employment, and labor laws).


193 See supra notes 11–13 and accompanying text.

194 See supra notes 179–85 and accompanying text.