

Symposium Articles and Essays

Emerging Issues for Undocumented Workers

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Immigrant families and their communities have experienced extraordinary pressures since the terrorist attacks of September 11, 2001. A number of law enforcement initiatives have targeted Arab and Muslim immigrants in particular,¹ but many others, such as the efforts by the current Administration to enlist state and local police in the routine enforcement of immigration laws, have swept more broadly.² A weak economy has left many employees, especially vulnerable low-wage immigrant workers, unable to resist employer demands for lower pay, longer hours, and other reductions in the terms and conditions of employment. The erosion of the social safety net for non-citizens, occasioned by 1996 reforms to the federal welfare statutes and the subsequent state and local implementation of these changes, have greatly restricted access to public benefits for even legal immigrants, leaving little to fall back on should an immigrant wage-earner lose her job.³ The prospect of a broad amnesty for undocumented immigrants in the United

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1. Measures targeting Arab and Muslim immigrants have included: the dragnet arrests of more than 1000 Arab and Muslim immigrants in the immediate aftermath of the September 11 attacks; the program of "voluntary" interviews of Arab and Muslim men launched in November 2001 and expanded the following spring; the Absconder Apprehension Initiative, singling out for arrest some 5000 Arab and Muslim immigrants with outstanding orders of deportation, from among a set of more than 350,000 similarly situated non-citizens; and the National Security Entry-Exit Registration System (NSEERS), requiring the registration of men from predominantly Arab and Muslim nations. See MUZAFFAR A. CHISHTI ET AL., *AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11* 39-45 (Migration Policy Institute ed., 2003) (describing initiatives listed above); *id.* at 64 (noting that government has detained "more than 1,200 people" since the September 11 attacks).

2. *Id.* at 79-83.

3. See Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 511-18 (2001) (detailing statutory changes regarding access of non-citizens to federal and state welfare benefits).

States, however, remains remote.⁴

It may well turn out that the most important recent development in the lives of immigrant workers is the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*.⁵ In *Hoffman Plastic*, the Court addressed the scope of remedies available to undocumented workers under the National Labor Relations Act (NLRA), and by implication, under other labor and employment laws. The constellation of federal and state statutes that establish the modern "rules of the workplace" derive chiefly from laws enacted during the New Deal and the civil rights movement of the 1960s,⁶ as well as from state and local counterparts, many of which predate the federal regime and extend worker protections beyond the minimal federal standards.⁷ And while a number of the basic interpretive questions concerning these rules of the workplace were settled as early as the 1940s, courts and executive branch agencies have not often explored the applicability and operation of the rules of the workplace as they relate to non-citizens, especially to immigrants unauthorized to work in the United States. Although there may be as many as eleven million undocumented persons residing in the United States,⁸ *Hoffman Plastic* was only the second Supreme Court decision ever to examine the status of undocumented

4. See, e.g., Ginger Thompson, *Grown Cautious, Fox Expects Delay on U.S. Action on Migrants*, N.Y. TIMES, Mar. 4, 2004, at A6.

5. 535 U.S. 137 (2002) (holding that an undocumented worker fired for union-organizing activities, where employer was unaware of worker's illegal immigration status at the time of discharge, is ineligible for a backpay award under NLRA).

6. See, e.g., Federal Unemployment Tax Act of 1954, 26 U.S.C. §§ 3301-3311 (2000) (insurance programs for injured or unemployed workers); National Labor Relations Act (NLRA), 29 U.S.C. §§ 141-187 (2000) (guaranteeing the right to organize and to form or to join unions); Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219 (2000) (minimum wage and maximum hour provisions); Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651-678 (2000) (health and safety standards); Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e (2000) (anti-discrimination laws).

7. See, e.g., CAL. LAB. CODE § 1152 (West 2003) (guaranteeing right to organize to agricultural workers); CONN. GEN. STAT. ANN. § 31-58(j) (West 2003) (guaranteeing state minimum wage in excess of federal minimum wage); N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2 (2004) (requiring payment of overtime wages to workers exempt from federal overtime requirements, such as live-in domestic workers).

8. In 1999, the U.S. Immigration and Naturalization Service estimated that there were approximately six million undocumented persons in the United States. See 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 200 (1999) [hereinafter INS STATISTICAL YEARBOOK] (estimating undocumented population of five million as of October 1996 and annual growth of approximately 250,000 persons). Data from the 2000 census has prompted demographers to conclude that this figure substantially underestimates the undocumented population. See, e.g., Cindy Rodriguez, *Census Bolsters Theory Illegal Immigrants Undercounted*, BOSTON GLOBE, Mar. 20, 2001, at A4 (noting that government and academic estimates of the undocumented population now range from six to eleven million persons).

workers under any labor or employment statute.⁹

Behind debates about the labor rights of immigrants, and the legal limits on employer exploitation of immigrant workers, lie enduring arguments regarding the significance of international borders and the meaning of membership in the national community, the power of the government to deputize private employers as enforcers of public immigration policies, and struggles between labor and management regarding control of the workplace. Yet immigrant labor issues have sometimes made for strange alliances. In 1986, for example, employer organizations and immigrant rights groups opposed the enactment of “employer sanctions” provisions¹⁰ as burdensome government regulation and xenophobic; in contrast, labor unions and some civil rights advocates, concerned about protecting domestic labor markets and low-wage workers of color from competition from new immigrants, endorsed the measures. More recently, in the Supreme Court briefing on *Hoffman Plastic* itself, substantial business interests took the unusual step of joining labor and immigrant rights organizations in supporting the National Labor Relations Board (NLRB).¹¹

Part I of this paper examines labor and employment rules as applied to immigrants and their employers, and as interpreted by the Supreme Court in *Hoffman Plastic* and by other courts and executive branch agencies. Part II identifies and analyzes a set of emerging issues of particular importance to immigrant workers in the United States, including those prompted by the recent *Hoffman Plastic* decision.

I. THE SETTLED “RULES OF THE WORKPLACE” FOR UNDOCUMENTED WORKERS

Before 1986, employers could legally hire or employ persons who lacked work authorization from the Immigration and Naturalization Service (INS),¹² although non-citizens present in this country without permission

9. 535 U.S. at 144-47. The first decision was *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (finding a violation of the NLRA where employer contacts the INS in retaliation for labor organizing, but holding undocumented workers who have left the country are ineligible for backpay or reinstatement).

10. 8 U.S.C. § 1324a (2000) (prohibiting employers from knowingly hiring or employing persons unauthorized to work).

11. Brief *Amici Curiae* of Employers and Employer Organizations in Support of the NLRB, No. 00-1595, 2001 WL 1631729 (arguing that rule the exempting outlaw businesses from back pay liability when they violated labor and immigration laws would result in unfair competitive advantage over law-abiding employers).

12. The INS estimates that about half of the undocumented population in the United States are persons who entered the country lawfully and overstayed a visa, and half are persons who entered the country without being inspected by the INS at the border. INS STATISTICAL YEARBOOK, *supra* note 8, at 199 (estimating that 41% of the 1996

were subject to arrest and deportation, and the INS regularly conducted worksite raids as part of its broader interior enforcement strategy.¹³ In 1986, Congress passed the Immigration Reform and Control Act (IRCA),¹⁴ which deputized private employers in the public effort to control “illegal immigration.” IRCA prohibits the knowing hiring or employment of unauthorized workers; requires employers to collect immigration status information on all of their employees and record it on INS Form I-9s; compels employers to make their I-9s available for INS review upon demand; and establishes civil and criminal penalties for employers who violate either the substantive prohibition on employment of undocumented workers or the technical I-9 paperwork requirements.¹⁵

Since the passing of IRCA, unlawful presence in the United States remains a ground for deportation for undocumented workers, as does working without INS authorization,¹⁶ and the INS has continued to rely on worksite raids as an important aspect of its interior enforcement operations.¹⁷ At the same time, millions of undocumented workers labor for long hours for substandard wages, often in dangerous conditions, and these workers have increasingly pressed claims for better treatment in the workplace. Thus, state and federal courts as well as executive branch agencies have been asked to reconcile the immigration law prohibition on employment of unauthorized workers with basic statutory guarantees of labor and employment rights.

A. *Undocumented Workers as Statutory “Employees”*

The threshold question in evaluating the labor and employment rights of undocumented workers is whether such workers are “employees” as that term is defined in the FLSA, NLRA, Title VII, and other federal and state statutes.

Even before the 1986 enactment of IRCA made the hiring and employment of undocumented workers unlawful, employers sometimes argued that these workers were exempt from statutory labor protections.

undocumented population were nonimmigrant overstays).

13. See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984) (rejecting Fourth Amendment challenge to INS worksite raid).

14. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

15. See 8 U.S.C. § 1324a (2000). In practice the INS rarely imposes civil penalties or collects them from employers, and criminal prosecutions are almost unheard of. See *INS STATISTICAL YEARBOOK*, *supra* note 8, at 165 (finding nationwide the INS issued only 862 notices of intent to fine employers in 1997).

16. 8 U.S.C. § 1227(a)(1) (2000).

17. See U.S. Immigration & Naturalization Serv., *Backgrounder* (Mar. 29, 1999) (announcing revised INS Interior Enforcement Strategy and identifying worksite enforcement as one of five priorities), available at <http://uscis.gov/graphics/publicaffairs/backgrounds/inenfbgr2.htm> (last visited Mar. 25, 2004).

Lower federal courts uniformly rejected the suggestion that Congress intended to exclude workers from statutory labor protections based on immigration status,¹⁸ generally reasoning, as then-Judge Anthony Kennedy put it, “If the NLRA were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices”¹⁹

Any lingering pre-IRCA doubts as to coverage of undocumented workers were eliminated by the Supreme Court’s 1984 decision in *Sure-Tan, Inc. v. NLRB*,²⁰ which held that undocumented workers are NLRA “employees.” There the Court reviewed the language, history, and purpose of the NLRA definition of “employee,” and easily concluded that while Congress had made numerous express exemptions to the statutory definition, none implied an exemption based on immigration status.²¹ The Court also had no difficulty harmonizing NLRA coverage with a worker’s violation of the immigration laws, for the Court readily perceived that enforcement of labor laws as to undocumented workers advances the purposes of the immigration laws as well:

If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.²²

The passage of IRCA prompted some employers to challenge again the statutory coverage of undocumented workers. The first post-IRCA decisions involved pre-IRCA conduct and were thus squarely controlled by

18. See, e.g., *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (holding that whether an alien is undocumented is irrelevant to coverage under the FLSA); *Donovan v. Burgett Greenhouses, Inc.*, 759 F.2d 1483, 1485 (10th Cir. 1985) (enforcing FLSA on behalf of undocumented workers); *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1183 (9th Cir. 1979) (noting that if undocumented workers were held exempt from NLRA, “[t]he result would be more work for illegal aliens and violations of the immigration laws would be encouraged”); see also *Fuentes v. INS*, 765 F.2d 886, 888 (9th Cir. 1985) (observing that to deport undocumented worker who filed FLSA suit would “place[] the Attorney General in the unenviable position of either advertently or inadvertently suborning the efforts of those who would violate the labor laws of this country”), *vacated as moot*, 844 F.2d 699, 700 (9th Cir. 1988).

19. *Apollo Tire*, 604 F.2d at 1184 (Kennedy, J., concurring).

20. 467 U.S. 883 (1984). Remedies for undocumented workers are discussed *infra* notes 65-94 & accompanying text.

21. *Id.* at 892-93. Only Justices Powell and Rehnquist dissented from this holding. *Id.* at 913 (Powell, J., concurring in part and dissenting in part).

22. *Id.* at 893-94.

Sure-Tan,²³ but even as cases concerning post-IRCA conduct reached the courts, the result was the same: federal labor and employment statutes did not exclude workers from protection based on immigration status.²⁴ Even after passage of IRCA, executive branch agencies charged with enforcing the labor and employment laws also concluded that Congress did not intend to exempt workers from coverage based on their immigration status.²⁵ The Supreme Court continues to cite with approval *Sure-Tan*'s holding regarding the definition of "employee,"²⁶ and even Chief Justice Rehnquist, one of the two *Sure-Tan* dissenters on this point, sidestepped an opportunity to revisit the issue in *Hoffman Plastic*.²⁷

23. See *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989) (applying *Sure-Tan* reasoning with respect to a Title VII claim); *Rios v. Enter. Ass'n Steamfitters Local 638*, 860 F.2d 1168, 1171-72 & 1172 n.2 (2d Cir. 1988) (same).

24. See *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997) (holding undocumented workers are to still be protected by the NLRA); *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988) (FLSA protections remain intact), *cert. denied*, 489 U.S. 1011 (1989); *EEOC v. Switching Sys. Div. of Rockwell Int'l Corp.*, 783 F. Supp. 369, 374 (N.D. Ill. 1992) (Title VII); *EEOC v. Tortilleria "La Mejor"*, 758 F. Supp. 585, 593-94 (E.D. Cal. 1991) (holding that IRCA does not alter scope of Title VII protection); *cf. Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 187 (4th Cir. 1998) (en banc) (per curiam) (implying undocumented workers not covered by Title VII as a temporarily unauthorized worker refused reinstatement after resignation cannot state claim under Title VII), *cert. denied*, 525 U.S. 1142 (1999).

25. See, e.g., Memorandum of Understanding Between Immigration & Naturalization Serv., Dep't of Justice, and Employment Standards Admin., Dep't of Labor (Nov. 23, 1998), *reprinted in* Daily Lab. Rep. (BNA), at E-1 (Nov. 25, 1998) (recognizing federal wage and hour laws apply to covered workers regardless of immigration status); *EEOC Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws*, in *EEOC COMPLIANCE MANUAL* § 622 app. B (Equal Employment Opportunity Commission ed., 1999) (same as to federal anti-discrimination statutes; rescinded, June 27, 2002); see also *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408 (1995) (same as to NLRA), *aff'd by* 134 F.3d 50.

26. See *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001); *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 90 (1995).

27. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149 n.4 (2002) (Rehnquist, C.J.) ("Our first holding in *Sure-Tan* is not at issue here and does not bear at all on the scope of Board remedies with respect to undocumented workers."). Since *Hoffman Plastic*, federal agencies have restated that covered workers are not exempted from statutory protections based on immigration status. See, e.g., Nancy Montwieler, *EEOC: EEOC Limits Undocumented Workers' Relief Based on Recent Supreme Court Decision*, 126 Daily Lab. Rep. (BNA) at A-2 (July 1, 2002) [hereinafter *EEOC Guidance*] ("[*Hoffman Plastic* decision] in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes."). See U.S. Dep't of Labor, Fact Sheet #48, *Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division* (Aug. 19, 2002), [hereinafter *DOL Fact Sheet*] (noting that after *Hoffman Plastic*, "[t]he Department's Wage and Hour Division will continue to enforce the FLSA and MSPA [Migrant and Seasonal Agricultural Workers Protection Act] without regard to whether an employee is documented or undocumented"), available at <http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm> (last visited Mar. 25, 2004).

In short, it is settled that undocumented workers are statutory “employees,” as defined in federal labor and employment statutes.²⁸ State courts have generally interpreted their laws as applying to all covered employees regardless of immigration status.²⁹

B. Retaliatory Employer Communications With the INS

It is axiomatic that employers may not retaliate against their employees for activities protected under labor and employment laws.³⁰ No doubt one of the most common forms of employer retaliation against undocumented workers is a threat to contact immigration authorities or, on occasion, actually communicating with immigration officials.³¹ But, there is also no doubt that retaliatory communications to immigration authorities are unlawful and expose employers to a range of penalties.³² The Supreme Court held as much in *Sure-Tan*,³³ and before and after *Hoffman Plastic*,

28. In addition to protection from retaliation and wrongful discharge, which are topics discussed *infra*, undocumented workers are, for example, entitled to vote in representation elections. *NLRB v. Kolkka*, 170 F.3d 937, 941-42 (9th Cir. 1999); *see also* *County Window Cleaning Co.*, 328 N.L.R.B. 190, 190 n.2 (1999)(overruling a challenge to undocumented worker’s voting).

29. The largest category of decisions interpreting state statutes concerns worker compensation schemes. *See, e.g.*, *Dowling v. Slotnik*, 712 A.2d 396, 405 (Conn. 1998) (holding that undocumented workers were eligible for workers’ compensation benefits), *cert. denied*, 525 U.S. 1017 (1998). The impact of *Hoffman Plastic* on state worker compensation laws is discussed *infra*.

30. *See, e.g.*, 29 U.S.C. § 158(a)(3) (2000) (prohibiting discrimination in terms or conditions of employment to encourage or discourage union membership); 29 U.S.C. § 215(a)(3) (2000) (prohibiting employer retaliation against workers who assert, or cooperate with other workers attempting to assert, their rights under FLSA); 42 U.S.C. § 2000e-3(a) (2000) (same, as to rights under Title VII); N.Y. LAB. LAW § 215 (McKinney 2004) (same, as to rights asserted under state wage and hour laws).

31. *See, e.g.*, *Montero v. INS*, 124 F.3d 381, 382 (2d Cir. 1997) (noting that an employer, in response to union organizing campaign, threatened to contact the INS; and, through its counsel, a former INS official, the employer contacted the INS to request a raid of its own employees). Because INS fines under the employer sanctions provisions are slight, 8 U.S.C. § 1324a (2000), and rarely imposed, *see supra* note 15, inducing an immigration raid may appear to some employers as a cost-efficient response to employee complaints.

32. *See* 29 U.S.C. § 216(b) (2000) (stating that an employer who violates anti-retaliation provision of FLSA “shall be liable for such legal or equitable relief as may be appropriate”); 42 U.S.C. § 2000e-5(g) (listing remedies available when employer engaged in unlawful employment practice).

33. *See* 467 U.S. at 894-896 (stating that employer’s retaliatory call to the INS, which then raided workplace and arrested unionizing workers, constituted “constructive discharge” in violation of § 8(a)(3) of the NLRA). *See also* *Hasa Chemical, Inc.*, 235 N.L.R.B. 903, 906 (1978) (holding that employer “remark that he would call the Immigration Department to have the illegal aliens hauled away if he lost the hearing . . . was violative of Section 8(a)(1) of the Act”).

district courts have applied the same reasoning to FLSA claims arising from an employer's retaliatory communications with the INS.³⁴

In addition, as Justice O'Connor explained in *United States v. Kozminski*,³⁵ "it is possible that threatening . . . an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude" in violation of federal criminal statutes.³⁶ Moreover, in 2000, Congress established criminal penalties for "forced labor," including circumstances involving a lesser degree of coercion than that required to prove "involuntary servitude."³⁷ Since threatening an immigrant with deportation may constitute the crime of involuntary servitude, *a fortiori* it is a violation of the lesser offense of "forced labor." Finally, such threats may also violate international prohibitions on involuntary servitude and forced labor, which immigrant workers in this country may enforce against their employer under the Alien Tort Claims Act (ATCA).³⁸

34. See *Singh v. Jutla*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002) (holding, in a post-*Hoffman Plastic* case, that an employer violates FLSA by contacting the INS in retaliation for an undocumented employee filing wage and hour complaint); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053 (N.D. Cal. 1998) (holding, in a pre-*Hoffman Plastic* case, that an employer violated FLSA by contacting the INS and the Social Security Administration in retaliation for employee filing wage and hour complaint).

35. 487 U.S. 931 (1988).

36. *Id.* at 948 (analyzing 18 U.S.C. § 1584 (2000), criminalizing involuntary servitude); see also *Humphries v. Various Federal USINS Employees*, 164 F.3d 936, 946 (5th Cir. 1999) (reversing dismissal of an involuntary servitude claim by man who claimed that the INS and the FBI coerced him "on several occasions with threats of deportation if he did not continue to work for them"); *United States v. Alzanki*, 54 F.3d 994, 1004-05 (1st Cir. 1995) (finding that employer threats of deportation support a conviction for holding domestic worker in involuntary servitude), *cert. denied* 516 U.S. 1111 (1996); *Kimes v. United States*, 939 F.2d 776, 778 (9th Cir. 1991) (affirming an involuntary servitude conviction in part based on evidence of threats of deportation), *cert. denied* 503 U.S. 936 (1992).

37. 18 U.S.C. § 1589 (1994), amended by Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 112(a)(2), 114 Stat. 1486-87; see also 22 U.S.C. §§ 7101(b)(6),(13) (2000) (recognizing, in legislative findings, that "psychological abuse" and "nonviolent coercion" may constitute involuntary servitude); 22 U.S.C. §§ 7102(2),(5) (2000) (defining "coercion" and "involuntary servitude" for purpose of new immigration trafficking provisions).

38. 28 U.S.C. § 1350 (2000) (establishing cause of action and district court jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"); see also Michael J. Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Rights*, 4 U. PA. J. LAB. & EMP. L. 529, 533-43 (2002) (analyzing the use of the ATCA by immigrant workers to enforce international labor rights). See *infra* notes 128-141 & accompanying text for a more detailed description of the implications of the ATCA on labor rights litigation.

C. Remedies For Wrongful Discharge

In recent years, the most contested terrain of the rights of undocumented workers has concerned remedies for wrongful discharge. The 2002 Supreme Court decision in *Hoffman Plastic* has answered some of these questions and left others, discussed in Part II(A) *infra*, still to be resolved.

The traditional make-whole remedies for an employee terminated in violation of state or federal labor law are reinstatement and backpay. However, court-ordered reinstatement of an employee known to lack INS work authorization would compel an employer to violate the employer sanctions provisions of the immigration laws.³⁹ Thus, courts have approved only those reinstatement orders that are conditioned on an undocumented worker securing INS work authorization within a reasonable period of time.⁴⁰

More troublesome has been the question of backpay. In *Sure-Tan*, the Supreme Court divided closely over this issue, with the 5-4 majority disapproving an award of six months backpay for workers who had accepted “voluntary departure”⁴¹ in lieu of deportation. The Court was concerned that an award of backpay in these circumstances might undermine “the objective of deterring unauthorized immigration that is embodied in the [immigration statutes],”⁴² as well as with the notion of a six-month backpay award imposed “without regard to the employees’ actual economic losses.”⁴³

Following *Sure-Tan*, a circuit split developed regarding the availability of backpay under the NLRA for undocumented workers who

39. See 8 U.S.C. § 1324a(a) (2000) (prohibiting the knowing hire or employment of unauthorized workers).

40. See, e.g. *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 902-03 (1984) (approving NLRB’s order conditioning reinstatement upon the wrongfully discharged undocumented employees’ “legal readmittance to the United States”); *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 56-57 (2d Cir. 1997) (approving order reinstating undocumented workers on condition “they present within a reasonable time, INS Form I-9 and the appropriate supporting documents”).

41. See generally 8 U.S.C. § 1254(e) (1988) (granting Attorney General discretionary authority to permit person in deportation proceedings to depart country voluntarily at own expense in lieu of deportation). Voluntary departure provisions are now codified at 8 U.S.C. § 1229c (2000).

42. *Sure-Tan*, 467 U.S. at 903.

43. *Id.* at 904. The Court left in place the Board’s cease and desist order, with the consequent possibility of contempt proceedings should the employer again contact the INS in retaliation for labor organizing. The Court was compelled to acknowledge, however, that reinstatement and backpay would “afford both more certain deterrence against unfair labor practices and more meaningful relief for the illegally discharged employees.” *Id.* at 905 n.13.

remain in the United States after discharge.⁴⁴ The Supreme Court resolved this split in *Hoffman Plastic*, holding that the Board is precluded from awarding backpay to an undocumented worker who has fraudulently obtained employment by tendering false documents, even if the worker is still within the United States.⁴⁵ Four Justices dissented.⁴⁶

The rationale of the *Hoffman Plastic* majority did not rest on the sweeping language of *Sure-Tan*, which one Court of Appeals had determined precluded backpay to workers within and without the country.⁴⁷ Instead, Chief Justice Rehnquist, writing for the majority, concluded that IRCA had significantly altered the “legal landscape,”⁴⁸ for it had “‘forcefully’ made combating the employment of illegal aliens central to ‘[t]he policy of immigration law.’”⁴⁹ The Court noted that immigration laws now prohibit employers from knowingly hiring or employing unauthorized workers,⁵⁰ but the heart of Chief Justice Rehnquist’s analysis of IRCA scrutinized the provisions prohibiting the use of fraudulent documents by workers.

The majority’s focus on “criminal fraud” by employees is apparent not only in its repeated invocation of the fraudulent document provisions of immigration law,⁵¹ but also in its attempt to align its holding with prior

44. Compare *Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639 (D.C. Cir. 2001) (en banc) (approving an award of backpay to an undocumented worker still in the United States), *rev’d* 535 U.S. 137 (2002), *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d at 50 (same, where the employer was aware of the worker’s unauthorized status), and *Local 512, Warehouse and Office Workers’ Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986) (holding that undocumented workers who remain in the country are eligible for backpay) with *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992) (finding undocumented workers who remain in the country ineligible for backpay). The Board itself had concluded that undocumented workers who remained in the country were eligible for backpay. *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408 (1995) *aff’d* by 134 F.3d 50; see also EEOC Guidance, *supra* note 27 (same, as to federal antidiscrimination laws).

45. 535 U.S. at 146-151.

46. *Id.* at 153 (Breyer, J., dissenting, joined by Justices Stevens, Souter, and Ginsburg).

47. *Id.* at 146-47 (noting that the “parties and the lower courts focus much of their attention” on language of *Sure-Tan*, but explaining that “whether isolated sentences from *Sure-Tan* definitively control, or count merely as persuasive dicta in support of petitioner, we think the question presented here better analyzed through a wider lens”).

48. *Id.* at 147.

49. *Id.* (quoting *INS v. Nat’l Ctr. for Immigrants’ Rights, Inc.*, 502 U.S. 183, 194 & n.8 (1991)).

50. *Id.* at 148.

51. *Id.* (“[IRCA] makes it a crime for an unauthorized alien . . . [to] tender[] fraudulent documents”) (citing 8 U.S.C. § 1324c(a) (2000)); *id.* (“Aliens who use or attempt to use such documents are subject to fines and criminal prosecution” (citing 18 U.S.C. § 1546(b)(2000))); *id.* at 149 (noting that backpay is inappropriate for loss of “a job obtained in the first instance by a criminal fraud”); *id.* (“What matters here . . . is that Congress has expressly made it criminally punishable for an alien to obtain employment with false documents”).

decisions denying reinstatement or backpay “to employees found guilty of serious illegal conduct in connection with their employment”⁵² and who “had committed serious criminal acts.”⁵³ In light of IRCA, and especially its “criminal fraud” provisions, the Court thus concluded that “allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy.”⁵⁴

The Court’s decision in *Hoffman Plastic* deserves criticism on many grounds.⁵⁵ As Justice Breyer explained in his dissent, nothing in the language or history of IRCA indicates any legislative intent to limit the Board’s broad discretion under section 10(c) of the NLRA to award backpay.⁵⁶ Nor do the nation’s immigration policies point in this direction; to the contrary, exempting employers of undocumented workers from backpay liability will encourage unscrupulous business practices and stoke the demand for such employees, thereby undermining efforts to deter illegal immigration.⁵⁷ The *Hoffman Plastic* decision thus promises both to frustrate immigration policy and to erode labor conditions for undocumented workers and other employees who work or compete with them.⁵⁸ Moreover, as employer organizations told the Court, the decision will be “bad for business,” because fair competition requires the uniform

52. *Id.* at 143 (involving trespass and violence against the employer’s property (discussing *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939))).

53. *Id.*

54. *Id.* at 138.

55. And it has begun to receive some. See, e.g. Marianne Staniunas, *All Employees are Equal, But Some Employees are More Equal Than Others*, 6 U. PA. J. LAB. & EMP. L. 393, 395 (2004) (Hoffman majority opinion “was both a usurpation of the Board’s authority and an act of reinterpretation of immigration and labor laws amounting to judicial legislation”); Dennise A. Calderon-Barrera, Note, *Hoffman v. NLRB: Leaving Undocumented Workers Unprotected Under United States Labor Laws?*, 6 HARV. LATINO L. REV. 119 (2003) (criticizing Hoffman majority opinion for emphasizing “clashes” rather than “common goals” of labor and immigration statutes); Thomas J. Walsh, *Hoffman Plastic Compounds, Inc. v. NLRB: How the Supreme Court Eroded Labor Law and Workers Rights in the Name of Immigration Policy*, 21 LAW & INEQ. 313, 333 (2003) (faulting Hoffman decision as establishing “myopic principle”); Beth L. Throne, Note, *Hoffman Plastic Compounds, Inc. v. NLRB: Empowering the Unscrupulous Employer and Stigmatizing the Undocumented Worker*, 17 TEMPLE INT’L & COMP. L.J. 595, 612 (2003) (“*Hoffman* arms unscrupulous employers with the tools and financial incentives to exploit undocumented workers”); Robert I. Correales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 LA RAZA L.J. 103 (2003) (same).

56. *Id.* at 154-55 (Breyer, J., dissenting).

57. *Id.* at 155-56 (Breyer, J., dissenting); see also Brief of Amici Curiae ACLU at *4-17, *Hoffman Plastic*, (No. 00-1595), available at 2001 WL 1631648 (noting that a detailed examination of IRCA legislative history demonstrates backpay award is consistent with overriding congressional intent to reduce employer incentives to hire undocumented workers).

58. See *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 58 (2d Cir. 1997) (“[T]he facts of this very case illustrate how illegal threats to, and discharges of, undocumented workers can harm the rights of legal workers under the Act.”).

application of regulatory burdens—not an exemption from ordinary backpay liability for those outlaw firms that violate labor laws and also hire undocumented workers.⁵⁹ Nevertheless, *Hoffman Plastic* is now law and, absent legislative amendments, at a minimum, undocumented workers who defraud their employers with false papers are ineligible for backpay under the NLRA and, in all likelihood, other federal statutes as well.⁶⁰

II. EMERGING ISSUES FOR UNDOCUMENTED WORKERS

In a recent survey of the legal needs of immigrant communities, non-citizens identified labor and employment issues as a preeminent concern.⁶¹ Many of the labor issues that are most important to immigrants involve basic enforcement issues, regarding labor standards, health and safety, and union organizing.⁶² The government and private resources are simply insufficient to enforce the laws that exist.⁶³ Other labor issues of significance to low-wage workers, such as debates regarding the status of contingent, temporary, and sub-contracted workers,⁶⁴ are of special importance to immigrants, who are concentrated in the low-wage sectors. Resolution of these low-wage sector issues, however, does not necessarily turn on the special legal status of undocumented workers.

Several of the emerging issues that bear directly on undocumented workers and implicate questions of immigration status are noted and briefly examined below.

59. Brief of Amici Curiae Employers and Employer Organizations at *8, *Hoffman Plastic* (No. 00-1595), available at 2001 WL 1631729. See also Correales, *supra* note 55, at 139-40 (discussing economic analysis of employer *amicus* brief in Hoffman).

60. See, e.g., EEOC Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, June 27, 2002 [hereinafter EEOC Rescission Notice] (rescinding prior guidance that had stated undocumented workers within the country are eligible for backpay under federal antidiscrimination laws). But see *Rivera v. Nibco*, 364 F.3d 1057, 1069 (9th Cir. 2004) (“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. Thus, we seriously doubt that Hoffman applies in such actions”).

61. Robert L. Bach, *Becoming American, Seeking Justice: The Immigrants’ Legal Needs Study* 28 (April 1996) (unpublished manuscript, on file with the University of Pennsylvania Journal of Labor and Employment Law) (demonstrating that survey results indicate that “employment was perhaps the most serious problem”).

62. Jennifer Gordon, *We Make the Road By Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 422-23 (1995) (describing lack of legal resources for immigrant workers).

63. *Id.*

64. See, e.g., CATHERINE RUCKELSHAUS AND BRUCE GOLDSTEIN, *FROM ORCHARDS TO THE INTERNET: CONFRONTING CONTINGENT WORK ABUSE* (2002).

A. *Remedies under Labor and Employment Statutes After Hoffman Plastic*

While *Hoffman Plastic* held that undocumented workers who defraud their employers are ineligible for backpay under the NLRA, it did not address a number of other important remedy issues.

First, where authorized by statute, undocumented workers appear still to be eligible for relief other than backpay and reinstatement, including unpaid wages for time actually worked, declaratory and injunctive relief, attorneys fees, and punitive, compensatory, and liquidated damages.⁶⁵ Employers might suggest otherwise, relying on some of the language of the *Hoffman* opinion⁶⁶ arguing that undocumented status, without more, is sufficient to exclude immigrant workers from all labor protections. But, such an interpretation would be inaccurate.

The Court in *Hoffman Plastic* refused to allow the Board to award backpay “for years of work not performed, for wages that could not lawfully have been earned.”⁶⁷ But, this reasoning does not necessarily extend to all other remedies under labor and employment statutes, as the opinion itself recognizes.⁶⁸ In addition to the surviving NLRA remedies enumerated by the majority, FLSA, AWPAs, and other statutes continue to require payment of minimum wages and overtime premiums for work that was performed, regardless of the immigration status of the employee. This conclusion has been echoed by the U.S. Department of Labor,⁶⁹ the National Labor Relations Board,⁷⁰ and the first courts to consider the issue

65. To the extent termination for union activities violates international labor law norms securing the right to organize, see HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (2000) (documenting violations of international rights of association and of organization committed in United States), backpay may even remain available to wrongfully discharged undocumented immigrants suing pursuant to the Alien Tort Claims Act (ATCA). See *infra* notes 128-41 & accompanying text (discussing domestic enforcement of international labor rights under ATCA).

66. See, e.g., 535 U.S. 137, 149 (2002) (“awarding backpay to illegal aliens runs counter to policies underlying IRCA”).

67. *Id.*

68. *Id.* at 152 (listing issuance of cease and desist orders, posting requirements, and contempt proceedings as NLRA remedies still available to wrongfully discharged undocumented workers).

69. See *Scalia Clarifies Labor Department Positions on New Supreme Court Employment Rulings*, 120 Daily Lab. Rep. (BNA), at C-1 (June 21, 2002) (reporting that Solicitor of Labor, Eugene Scalia, stated that the *Hoffman Plastic* decision “should not bar recovery of minimum wages” for undocumented workers under FLSA); DOL Fact Sheet, *supra* note 27. See also 2003 N.Y. Op. Atty. Gen. No. F3 (opinion of New York Attorney General that *Hoffman* decision does not bar undocumented workers' recovery under state wage and hour law for work already performed).

70. See *Tuv Taam Corp.*, 340 NLRB No. 86, at 4 & n.4 (where employer unlawfully

since *Hoffman Plastic*.⁷¹ Nor does the *Hoffman Plastic* decision preclude additional remedies other than backpay, such as those authorized under the FLSA anti-retaliation provision,⁷² and punitive or compensatory damages authorized under anti-discrimination statutes, as the EEOC has determined.⁷³ Finally, AWPAs statutory damages, providing compensation for violations of housing, transportation, and other requirements not related

reduced wages of employees, holding Hoffman does “not preclude awarding compensation [under NLRA] for undocumented workers for work previously performed under unlawfully imposed terms and conditions”).

71. See *Liu v. Donna Karan Int'l Inc.*, 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002) (holding that immigration status is still irrelevant to FLSA claims for time actually worked and denying discovery of status); *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002); *Flores v. Amigon*, 233 F. Supp. 2d 462, 463-65 (E.D.N.Y. 2002); *Flores v. Albertson's, Inc.*, No. CV0100515AHM(SHX), 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002); *Cortez v. Medina's Landscaping, Inc.*, No. 00 C 6320, 2002 WL 31175471 (N.D. Ill. Sept. 30, 2002); see also *Martinez v. Mecca Farms, Inc.*, 213 F.R.D. 601, 604-05 (S.D. Fla. 2002) (explaining that, under AWPAs, farm workers eligible for compensation for work already performed, regardless of immigration status, even after *Hoffman Plastic*); Record of Oral Argument at *14, *Hoffman Plastic* (No. 00-1595) (2002) (responding to a question about exempting undocumented immigrants from FLSA, counsel for Hoffman Plastic stated, “No, we would not advocate at all, and we have not, taking wages away from undocumented aliens that have been earned for work already performed”), available at 2002 WL 77224.

72. See *Singh v. Jutla*, 214 F. Supp. 2d 1056, 1060 (N.D. Cal. 2002) (noting that *Hoffman Plastic* does not bar declaratory, injunctive, or monetary damages sought by undocumented worker pursuant to FLSA anti-retaliation provision); see also *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1059 (N.D. Cal. 1998) (holding, in a pre-*Hoffman Plastic* case, that an undocumented worker is eligible for punitive and compensatory damages under FLSA anti-retaliation provision); cf. DOL Fact Sheet, *supra* note 27 (“The Department of Labor is still considering the effect of *Hoffman Plastic* on other labor laws it enforces, including those laws prohibiting retaliation for engaging in protected conduct.”). The DOL’s indecision may be attributed in part to the circuit split as to the availability of punitive damages under FLSA’s anti-retaliation provision. Compare *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 111 (7th Cir. 1990) (punitive damages available under FLSA), cert. denied, 502 U.S. 812 (1991) with *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 933 (11th Cir. 2000) (no punitive damages available under FLSA), cert. denied, 532 U.S. 975 (2001).

73. See *Rivera v. NIBCO*, 364 F.3d 1057, 1069 (9th Cir. 2004) (noting “serious doubt” that Hoffman even applies in Title VII actions); Montwieler, *supra* note 27, (reporting that the EEOC chair announced that after *Hoffman Plastic* undocumented workers were no longer eligible for backpay under federal antidiscrimination laws but the Commission “will continue to seek punitive and compensatory damages” without regard to immigration status of workers); Press Release, U.S. Equal Employment Opportunity Commission, EEOC Reaffirms Commitment to Protecting Undocumented Workers from Discrimination, June 28, 2002, (declaring that “claims for all forms of relief, other than reinstatement and backpay for periods after discharge or failure to hire, should be processed in accord with existing standards, without regard to an individual’s immigration status”) available at <http://www.eeoc.gov/press/6-28-02.html>; see also Record of Oral Argument at *17-18, *Hoffman Plastic* (No. 00-1595) (2002) (conceding that punitive and compensatory damages are available without regard to “the undocumented alien’s ability to work in this country”), available at 2002 WL 77224.

to wage payments, should remain available regardless of the worker's immigration status.⁷⁴

Second, the decision in *Hoffman Plastic* does not address the availability of backpay where an employer knowingly employs an undocumented worker.⁷⁵ Previously, in *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*,⁷⁶ the Second Circuit had adopted the Board's conclusion that, in such a circumstance, an employer forfeits any objection to a backpay award on the ground that an illegally discharged employee is undocumented.⁷⁷ Subsequent to the decision in *Hoffman Plastic*, however, the NLRB General Counsel revisited the question. Conceding that *Hoffman Plastic* "arguably" does not control this situation, the General Counsel nevertheless issued a memorandum directing NLRB attorneys not to seek backpay awards for undocumented workers, regardless of the employer's knowledge of the employee's work authorization status.⁷⁸ Other federal agencies, such as the EEOC and DOL, have not expressed an official view on this question. The one court to consider the issue has indicated in a FLSA case that, in light of the Supreme Court's emphasis on the employer's innocence, where an employer "was not just a knowing employer, but allegedly, actively recruited" an undocumented worker, then the rule of *Hoffman Plastic* does not apply.⁷⁹

The NLRB General Counsel's determination that an employer who knowingly employs an undocumented worker is immune from backpay liability is mistaken, however. The core of the *Hoffman Plastic* rationale is that the worker had defrauded his employer from the start of the employment relationship, in violation of immigration statutes penalizing the use of false documents: "[w]hat matters here, and what sinks both of the Board's claims, is that Congress has expressly made it criminally

74. See generally Martinez, 213 F.R.D. at 604-05 (noting that AWPAs remedies relating to work already performed are undisturbed by *Hoffman Plastic*, regardless of immigration status of workers); DOL Fact Sheet, *supra* note 27 (declaring that DOL will continue to enforce AWPAs provisions relating to time already worked, regardless of immigration status of worker).

75. 535 U.S. at 155 (Breyer, J., dissenting) (noting that circumstance of employer who knowingly employs unauthorized worker is "not before us today").

76. 134 F.3d 50 (2d Cir. 1997), *aff'd* 320 N.L.R.B. 408 (1995).

77. *Id.* at 52.

78. See Office of the Gen. Counsel, Nat'l Labor Relations Bd., Memorandum GC 02-06 § C(1)(July 19, 2002), at 3, available at <http://www.nlr.gov/gcmemo/gc02-06.html> (last visited Mar. 8, 2004). The General Counsel reasoned that the "thrust" of the *Hoffman Plastic* decision "focused on the employee's wrongdoing and applies in equal measure whether or not the employer knowingly hired undocumented employees." *Id.* The GC Memo did leave open the possibility that, where an undocumented worker can "lawfully mitigate backpay by some measure," damages may not be completely foreclosed. *Id.* at n.6.

79. Singh v. Jutla, 214 F. Supp. 2d 1056, 1061 (N.D. Cal. 2002).

punishable for an alien to obtain employment with false documents.”⁸⁰

Where an employee does not defraud an employer by tendering false documents, as in *A.P.R.A. Fuel Oil Buyers Group* or *Singh v. Jutla*, the worker violates no law; only the *employer* is liable under IRCA.⁸¹ In such a circumstance, the animating concern of the *Hoffman Plastic* majority—that awarding backpay would condone criminal conduct by an employee—is absent; the very same concern with “criminally punishable” conduct, however, should lead to the conclusion that an *employer* who fails to verify work authorization status or who knowingly hires an undocumented worker cannot thereby evade ordinary backpay liability. In short, where an employer knowingly hires unauthorized workers, or fails to verify their status, the *Hoffman Plastic* rationale does not bar backpay. To the contrary, it is consistent with both immigration and labor policy to conclude that such an employer has waived, and is estopped from raising, any objection to an award of backpay based on an employee’s immigration status.⁸²

Third, the decision in *Hoffman Plastic* does not address relief under state labor and employment statutes. Just as relief other than backpay and reinstatement provided by federal statutes remains available after *Hoffman Plastic*, states can still provide relief by authorizing an award of unpaid wages, compensatory, punitive, and liquidated damages, declaratory and injunctive relief, and attorneys fees and costs, for the same reasons that other forms of relief under federal statutes are unaffected.⁸³ Similarly, as with backpay under federal laws, the rationale of *Hoffman Plastic* should not operate to preclude an award of backpay under state or local law where an employee has not defrauded the employer by using false papers.

But what of the state law claims of a worker like the discriminatee in *Hoffman Plastic*—claims for backpay, for work not performed, where unbeknownst to the employer an employee has used fraudulent documents? The issue for the courts will be to determine whether Congress intended IRCA, and particularly the provisions of IRCA relied on by the *Hoffman Plastic* Court, to displace state law that would otherwise offer a backpay

80. 535 U.S. at 149 (emphasis added).

81. 8 U.S.C. § 1324a(a)(1)(A) (2000) (knowing employment of unauthorized worker); *id.* § 1324a(a)(1)(B) (2000) (failure to verify status of employee).

82. *See, e.g., Kelley v. NLRB*, 79 F.3d 1238, 1247-48 (1st Cir. 1996) (analyzing equitable estoppel under NLRA); *see also Singh*, 214 F. Supp. 2d at 1061 (stating that immunizing knowing employer from backpay liability to undocumented worker would create “perverse economic incentive, which runs directly contrary to the immigration statute’s basic objective”) (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 155) (2002)) (Breyer, J., dissenting).

83. *See supra* notes 65-74 & accompanying text. This was the law before *Hoffman Plastic*. *See, e.g., Nizamuddowlah v. Bengal Cabaret, Inc.*, 415 N.Y.S.2d 685, 685-86 (App. Div. 1979) (undocumented worker eligible for unpaid minimum wage and overtime premiums under state wage and hour law).

remedy. There is reason to predict that courts will conclude IRCA does not preempt backpay awards under state labor and employment law, even in such situations. There is no express preemption of backpay awards in IRCA, and Congress has not occupied the field of labor and employment regulation,⁸⁴ so the argument against backpay must be one of implied preemption. But in interpreting federal statutes, courts apply a strong presumption against preemption in areas, such as labor and employment matters, of historic state regulation.⁸⁵

Such a presumption is especially appropriate in interpreting the IRCA provisions relied on by the *Hoffman Plastic* court, because these very measures *do* contain an express preemption provision, which is silent as to an intent to preempt state labor and employment remedies. Section 1324a(h)(2) directs that state or local employer sanctions schemes are expressly preempted by IRCA.⁸⁶ Consistent with the canon of construction *expressio unius alterius est*, the inclusion of language expressly preempting certain state and local labor laws is powerful evidence that Congress did not intend to displace any others. This implication is also supported by IRCA's legislative history, which reveals an intent to preserve existing state labor law remedies.⁸⁷

State authorities appear to concur with this analysis. In the *Sure-Tan* era, one state intermediate court concluded that the Supreme Court's reconciliation of federal labor and immigration statutes does not preempt state labor remedies for undocumented workers identical to those that are foreclosed under federal law.⁸⁸ Since *Hoffman Plastic*, at least two state

84. Congress has occupied the field of immigration regulation. *See, e.g.,* *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States").

85. *See* *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) ("[W]here . . . the field which Congress is said to have pre-empted has been traditionally occupied by the States, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (internal citation omitted).

86. 8 U.S.C. § 1324a(h)(2) (2000) ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar law) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.").

87. H.R. REP. NO. 99-682 pt. 2, at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5752, 5758 ("The committee does not intend that any provision of this Act would limit the powers of State . . . labor standards agencies . . . in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies.").

88. *See* *Arizona Farmworkers Union v. Phoenix Vegetable Distribs.*, 747 P.2d 574, 576-77 (Ariz. Ct. App. 1987) ("*Sure-Tan* is not controlling in cases arising under the Arizona Act because federal law does not preempt statutory authority in Arizona allowing reinstatement of aliens not entitled to work in the United States"); *see also* Brief of Amici Curiae State of New York, et al. at *7-14, *Hoffman Plastic* (No. 00-1595) (gathering pre-

labor departments have determined that backpay under state law is not preempted.⁸⁹ Even more dramatically, the *Hoffman Plastic* decision prompted the California legislature to enact legislation specifying that remedies available under state labor and civil rights laws, “except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status.”⁹⁰

Although state courts have just begun to evaluate the impact, if any, of *Hoffman Plastic* on state law remedies, two New York trial courts have already concluded that in tort actions, the *Hoffman Plastic* decision does not preclude an undocumented immigrant from recovering damages for lost wages under state common law.⁹¹ A Texas intermediate court has reached the same conclusion.⁹² In addition, a number of state courts have concluded that immigration status is no bar to recovery of lost wages and other remedies under state workers’ compensation laws,⁹³ as had been the

Hoffman Plastic state decisions holding undocumented immigrants eligible for backpay and other remedies under state law), available at 2001 WL 1636790.

89. See, e.g., Cal. Dep’t of Indus. Relations, All California Workers Are Entitled to Workplace Protection, (after *Hoffman Plastic* decision, announcing labor agency will continue to seek backpay in retaliation cases “without regard to the worker’s immigration status”), at <http://www.dir.ca.gov/QAundoc.html> (last visited Apr. 2, 2004); Statement of Gary Moore, Wash. State Dep’t of Labor and Indus. (May 21, 2002) (stating that *Hoffman Plastic* decision will not affect availability of remedies under Washington state labor laws), available at <http://www.nelp.org/iwp/reform/state/appendixwadol.cfm> (last visited Apr. 2, 2004); see also New York Workers Compensation Board, Response to Questions Propounded by Mexico NAO in No. 01-01, at 3 (asserting that workers are eligible for benefits under New York Workers Compensation Law regardless of immigration status) (copy on file with the University of Pennsylvania Journal of Labor and Employment Law).

90. See CAL. LAB. CODE § 1171.5(a) (West 2003); CAL. CIV. CODE § 3339(a) (West 2004); CAL. GOVT. CODE § 7285(a) (West 2004). All three provisions were amended by enactment of Cal. Senate Bill 1818, c. 1071. See also NATIONAL EMPLOYMENT LAW PROJECT, LOW PAY, HIGH RISK: STATE MODELS FOR ADVANCING IMMIGRANT WORKERS’ RIGHTS 44 (2003) [hereinafter NELP] (describing campaign for California’s S.B. 1818).

91. *Cano v. Mallory Mgmt.*, 760 N.Y.S.2d 816 (Sup. Ct. Richmond Co. 2003) (holding undocumented status does not preclude worker from seeking compensation for lost wages in negligence action for burns suffered by worker when electric meter exploded during course of employment); *Balbuena v. IDR Realty*, (Sup. Ct. N.Y. Co. 2003), reprinted in N.Y.L.J., May 28, 2003, at 18 (concluding that worker injured in construction accident was not barred from seeking compensation for lost wages due to undocumented status). See also *Madeira v. Affordable Housing Foundation, Inc.*, 2004 WL 943154, at *1-2 (S.D.N.Y. Apr. 22, 2004) (holding that undocumented construction worker eligible for lost wages in workplace injury claim under New York law).

92. *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233, 242-44 (Tex. App. 2003) (holding undocumented status does not bar worker from seeking damages for lost wages in negligence action for injuries suffered by worker run into by forklift).

93. *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324 (Minn. 2003) (post-*Hoffman*, undocumented worker fully eligible for benefits under Minnesota workers’ compensation law); *Safeharbor Employer Services I, Inc. v. Velazquez*, 860 So.2d 984 (Fl. Ct. App. 2003) (same); *Cherokee Industries, Inc. v. Alvarez*, 84 P.3d 798, 801 (Ok. Civ. App. 2003) (same); *Wet Walls, Inc. v. Ledezma*, 2004 WL 614898, at *2 (Ga. App. Mar. 30, 2004) (same); see

dominant view before *Hoffman Plastics*.⁹⁴

There are two post-*Hoffman Plastic* workers' compensation decisions in which injured immigrant workers have not fared as well, however. The Supreme Court of Pennsylvania concluded that while *Hoffman Plastic* did not bar medical benefits nor exclude undocumented workers from the statutory definition of "employee," the decision may well operate to "suspend" an undocumented worker's eligibility for wage replacement benefits so long as the worker lacks immigration status.⁹⁵ A Michigan appellate court concluded that undocumented workers are statutory "employees,"⁹⁶ but went on to hold that after *Hoffman Plastic*, unauthorized workers who use false documents to secure employment are ineligible for wage-loss benefits, on the basis of a Michigan law denying benefits to those unable to work due to "commission of a crime."⁹⁷

These two workers' compensation decisions are out of step with the growing body of state executive branch interpretations and decisions in tort and workers' compensation cases in other states, and may be faulted on several grounds.⁹⁸ Importantly, though, neither rested on a conclusion that federal immigration laws preempt state remedies. Rather, the Pennsylvania and Michigan courts interpreted their state statutes, in light of the relevant text, history, purpose, and prior state precedent. Nothing in either opinion suggests that *Hoffman Plastic* preempts or in any way precludes a state from providing workers' compensation benefits without regard to the immigration status of the injured worker. Nor do either of the workers'

also *Medellin v. Cashman*, 2003 WL 231001186 (Mass. Dept. Ind. Acc. Dec. 23, 2003) (same).

94. See, e.g., *Dowling v. Slotnik*, 712 A.2d 396 (Conn. 1998) *cert. denied*, 525 U.S. 1017 (1998); *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221 (N.J. App. 1996); *Artiga v. M.A. Patout & Son*, 671 So. 2d 1138 (La. Ct. App. 1996); *Lang v. Landeros*, 918 P.2d 404 (Okla. Ct. App. 1996); *Gene's Harvesting v. Rodriguez*, 421 So. 2d 701 (Fla. Dist. Ct. App. 1982). One high state court had adopted a contrary view of its otherwise silent statute. See *Granados v. Windsom Dev. Corp.*, 509 S.E.2d 290 (Va. 1999) (holding undocumented worker was not eligible for workers' compensation benefits because he was not an "employee" as defined by law). However, Virginia promptly amended its state law to ensure coverage regardless of immigration status. VA. STAT. § 65.2-101, as amended effective April 19, 2000 (adding "aliens . . . whether lawfully or unlawfully employed" to definition of "employee").

95. *Reinforced Earth Co. v. Workers' Comp. Appeal Bd. (Astudillo)*, 810 A.2d 99, 108-09 & n.12 (Pa. 2002); see also *id.* at 109-12 (Newman, J., dissenting) (arguing that *Hoffman Plastic* renders undocumented workers completely ineligible for workers' compensation benefits).

96. *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510, 514-16 (Mich. Ct. App. 2003).

97. *Id.* at 518-19.

98. See Anne Marie O'Donovan, Note, *Workers' Compensation After Hoffman Plastic*, N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2004) (critically analyzing *Reinforced Earth* and *Eagle Alloy* opinions); NELP, *supra* note 90, at 48-49 (analyzing the same opinions); see also Jason Schumann, Note, *Working in the Shadows: Illegal Aliens' Entitlement to State Workers' Compensation*, 89 Iowa L. Rev. 709, 728-31 (2004) (same).

compensation statutes indicate that *Hoffman Plastic* should influence other state courts in the interpretation of their own workers' compensation statutes.

In sum, the Supreme Court's decision in *Hoffman Plastic* resolved a circuit split about the availability of backpay under the NLRA, where an employee tenders false documents to an employer ignorant of the worker's unauthorized status, but it did not address important questions about federal remedies other than backpay (and reinstatement), such as punitive, compensatory, and liquidated damages. Nor did the decision consider the circumstance of a knowing employer, in which instance there is no employee fraud and the criminal violations are committed only by the employer. Finally, *Hoffman Plastic* leaves open questions regarding the availability of state law remedies, including even backpay following wrongful discharge. These questions are likely to engage the courts in the coming years. Each should be resolved in favor of preserving remedies for workers regardless of immigration status.

B. Limitations on Employer-Initiated INS raids

Although it is unlawful for employers to communicate with the immigration authorities in retaliation for their employees' assertion of statutory labor and employment rights, may the INS or its successor, the Department of Homeland Security, Bureau of Immigration Enforcement ("ICE") lawfully initiate an investigation and worksite raid based on the retaliatory tip? Two Courts of Appeals have permitted such conduct by the INS,⁹⁹ but these courts are mistaken. Moreover, subsequent amendments to INS rules now restrict the agency's involvement in labor disputes.¹⁰⁰ One immigration judge has already applied these new agency rules to dismiss removal proceedings against two garment workers arrested in an INS raid prompted by a retaliatory tip from their employer.¹⁰¹

When Congress enacted the "employer sanctions" provisions in 1986, it unambiguously directed that those provisions not "be used to undermine

99. See *Montero v. INS*, 124 F.3d 381 (2d Cir. 1997) (determining the INS does not violate immigration statute or First Amendment by raiding worksite in midst of labor dispute based on retaliatory employer tip); *Velasquez-Tabir v. INS*, 127 F.3d 456 (5th Cir. 1997) (same). But see INS Operations Instructions 287.3a, reprinted in 74 INTERPRETER RELEASES 199 (1997), redesignated as § 33.14(h) of the INS SPECIAL AGENT FIELD MANUAL (April 28, 2000) [hereinafter OI 287.3a] (restricting INS raids on work sites engaged in labor disputes).

100. OI 287.3a, *supra* note 99.

101. *In re Herrera-Priego*, U.S. D.O.J. EOIR (July 10, 2003) (terminating proceedings based on INS violation of OI 287.3a), at <http://www.lexisnexis.com/practiceareas/immigration/pdfs/web428.pdf> (last visited March 30, 2004).

or diminish in any way labor protections in existing law,”¹⁰² including in particular the labor rights of undocumented workers.¹⁰³ To ensure that employer threats to contact ICE do not undermine national labor and immigration policies, ICE must exercise its “employer sanctions” authority in a manner that does not “in any way” undermine labor and employment rights of immigrants. This reconciliation of diverse statutory schemes is precisely the sort of task called for by the *Southern Steamship* principles applied by the Court in *Hoffman Plastic*.¹⁰⁴

To date, however, the INS and ICE have largely ignored the unambiguous congressional intent underlying enactment of the “employer sanctions” provisions. In an “excessive emphasis on its immediate task,”¹⁰⁵ immigration officials have made little effort to reconcile the INA with labor and employment statutes. The immigration agency’s abdication of its responsibility to interpret and apply its organic statute consistent with congressional intent stands in dramatic contrast to the efforts by the NLRB, EEOC, and U.S. Department of Labor to construe and apply the labor laws with due regard for the immigration laws. As the NLRB has explained, “IRCA and the NLRA can and must be read in harmony as complementary elements of a legislative scheme explicitly intended, in both cases, to protect the rights of employees in the American workplace.”¹⁰⁶

In fact, in limited circumstances, the Attorney General’s broad authority to enforce “employer sanctions”¹⁰⁷ must yield to the obligation of

102. H.R. REP. NO. 99-682, pt. 1, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662.

103. *Id.*; *see also* H.R. REP. NO. 99-682, pt. 2, at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5758 (determining impairment of the enforcement abilities of labor and employment agencies “would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment”); IRCA § 111(d), Pub. L. No. 99-603, § 111(d), 100 Stat. 3359, 3381 (1986) (appropriating funds for increased FLSA enforcement on behalf of undocumented workers “in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens”); *Immigration Reform and Control Act of 1985: Hearing on S. 1200 Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong. 27 (1985) (statement of Sen. Simpson, sponsor of IRCA) (“We are all aware that the answer to illegal immigration rests with increased border enforcement, and increased labor law enforcement.”).

104. 535 U.S. at 147 (“The *Southern S.S. Co.* line of cases established that where the Board’s chosen remedy trenches upon a federal statute or policy outside the Board’s competence to administer, the Board’s remedy may be required to yield.”); *see also* A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408 (1995) (harmonizing NLRA and INA) *aff’d by* 134 F.3d 50 (2d Cir. 1997).

105. *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942).

106. A.P.R.A. Fuel Oil, 320 N.L.R.B. at 408; *see also id.* at 415 (“To do otherwise would increase the incentives for some unscrupulous employers to play the provisions of the NLRA and IRCA against each other to defeat the fundamental objectives of each.”).

107. 8 U.S.C. § 1324a(e)(1)(2000) (directing Attorney General to establish procedures to accept and investigate complaints and prosecute violations of “employer sanctions”

immigration authorities to ensure they do not become the instrument of an employer's scheme to effectuate an unfair labor practice, or otherwise to retaliate against workers for their lawful exercise of state or federal labor rights. The failure of the INS properly to interpret its authority to enforce the "employer sanctions" provisions, and better to limit its involvement in labor disputes, "chill[s] severely the inclination of any unlawfully treated undocumented worker to vindicate his or her rights" before a labor or employment agency,¹⁰⁸ given that "deportation proceedings . . . [are] a likely consequence of filing a successful" complaint.¹⁰⁹ And, as the Ninth Circuit recently explained, "[a]s a result, most undocumented workers are reluctant to report abusive or discriminatory employment practices."¹¹⁰

Yet many labor and employment agencies depend on voluntary worker complaints to enforce their governing statutes, and the agency cannot act against an employer until an aggrieved party has requested such action.¹¹¹ As a consequence, the refusal of the INS to significantly restrict its involvement in labor disputes results in the *de facto* exclusion of undocumented workers from the protection of federal and state labor laws.¹¹²

Implementing the INA in light of the above principles would also bring the agency's enforcement activities into line with constitutional principles applicable in immigration proceedings. Deportation proceedings are governed by the dictates of the Due Process Clause of the Fifth

provisions).

108. Felbro, 795 F.2d at 719.

109. *Id.*

110. Rivera v. NIBCO, 364 F.3d 1057, 1065 (9th Cir. 2004). See also Michael J. Wishnie, Immigrants and the Right to Petition, 78 N.Y.U. L. Rev. 667, 676-79 (2003) (summarizing studies indicating undocumented workers under-report workplace violations).

111. See, e.g., 29 U.S.C. § 160(b)(2000) (noting the NLRB may issue a complaint only "[w]hen it is charged" that the NLRA has been violated); NLRB v. Scrivener, 405 U.S. 117, 122 (1972) (noting that the NLRB "does not initiate its own proceedings; implementation is dependent upon the initiative of individual persons" (citing Nash v. Florida Indus. Comm'n, 389 U.S. 235, 238 (1967))); NLRB v. Indus. Union of Marine & Shipbuilding Workers, 391 U.S. 418, 424 (1968); U.S. GENERAL ACCOUNTING OFFICE, GARMENT INDUSTRY: EFFORTS TO ADDRESS THE PREVALENCE AND CONDITIONS OF SWEATSHOPS 3 (1994) (finding that the DOL "typically targets workplaces for inspection based on complaints received from workers and other sources"), available at <http://www.gao.gov/archive/1995/he95029.pdf> (last visited Mar. 31, 2004); *id.* at 10 (noting that in the garment industry, "OSHA has chosen to rely on an employee complaint or a reported injury . . .").

112. With little analysis, the Second Circuit rejected the argument that, under *Southern Steamship* principles of administrative law, the INS must interpret its authority to enforce the "employer sanctions" provisions with due regard for the congressional objectives underlying the labor and employment laws, despite strong evidence in the legislative history of IRCA that Congress intended such a reconciliation. *Montero v. INS*, 124 F.3d 381, 385 (2d Cir. 1997) ("[E]xcluding evidence of an alien's illegal presence in the United States [from a deportation proceeding] because the evidence was obtained in connection with the unfair labor practice is wholly inconsistent with enforcement of the INA.").

Amendment.¹¹³ In a deportation proceeding, “the liberty of an individual is at stake” and “[m]eticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.”¹¹⁴ Thus, the Supreme Court has declined to authorize the admission in deportation proceedings of unlawfully obtained evidence in cases of “egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”¹¹⁵

The Ninth Circuit has excluded from deportation proceedings evidence acquired based on “egregious violations” of liberty in various circumstances,¹¹⁶ and INS complicity in an employer’s unlawful effort to retaliate against its workers should warrant exclusion of evidence as well. INS complicity in retaliatory employer schemes constitutes a flagrant violation of the First Amendment rights to speech, assembly, and petition implicated in labor organizing activity and the filing of complaints with labor agencies,¹¹⁷ as well of the Thirteenth Amendment right to be free of involuntary servitude¹¹⁸ and statutory labor rights established by the NLRA, FLSA, and other laws. The Fifth Amendment should therefore compel the exclusion of all evidence seized in a worksite raid when the INS knew or should have known that it was effectuating the discharge of employees because the employer objects to their exercise of First Amendment or statutory labor rights.¹¹⁹

113. See *Galvan v. Press*, 347 U.S. 522, 530-31 (1954); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

114. *Bridges*, 326 U.S. at 154.

115. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984); see also *In re Cervantes-Torres*, 21 I. & N. Dec. 351 (BIA 1996) (en banc); *In re Toro*, 17 I. & N. Dec. 340, 343 (BIA 1980) (“the manner of seizing evidence [may be] so egregious that to rely on it would offend the Fifth Amendment’s due process requirement of fundamental fairness”); *In re Garcia*, 17 I. & N. Dec. 319, 321 (BIA 1980) (barring admission of involuntary statements).

116. See *Orhorhaghe v. INS*, 38 F.3d 488, 503-04 (9th Cir. 1994) (excluding evidence where INS search and seizure based solely on person’s Nigerian sounding name); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1452 (9th Cir. 1994) (same); *Arguelles-Vasquez v. INS*, 786 F.2d 1433, 1435 (9th Cir. 1986) (same), *vacated as moot*, 844 F.3d 700 (9th Cir. 1988). See also *Martinez-Camargo v. INS*, 282 F.3d 487 (7th Cir. 2002) (recognizing *Lopez-Mendoza* suppression rule but declining to exclude evidence on facts of case); *Westover v. Reno*, 202 F.3d 475 (1st Cir. 2000) (same); *Ruckbi v. INS*, 285 F.3d 120, 125 (1st Cir. 2002) (same).

117. See *BE & K Constr. Co. v. NLRB*, 122 S. Ct. 2390, 2396 (2002) (“the right to petition extends to all departments of the Government”) (quoting *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)); *Thomas v. Collins*, 323 U.S. 516, 534 (1945) (organizing union implicates speech and assembly rights); *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 567 (5th Cir. 1988) (same).

118. See, e.g., James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-57*, 102 COLUM. L. REV. 1, 38-56 (2002) (describing Thirteenth Amendment grounding of Norris-LaGuardia and Wagner Acts).

119. *But see Montero v. INS*, 124 F.3d 381, 386 (2d Cir. 1997) (refusing to apply, in

Several principles should guide ICE in better interpreting its statutory authority to enforce the “employer sanctions” provisions so as to further labor and immigration policies, rather than to frustrate both. First, whenever ICE receives a tip regarding possible undocumented workers, it should consult with federal and state labor and employment agencies before conducting a worksite raid. If there are pending investigations by coordinate law enforcement agencies, ICE should refer the tip to the labor agencies for investigation of a possible retaliation claim. Second, if ICE learns of a pending labor dispute only after conducting a worksite raid – either because ICE’s pre-raid consultations failed to identify a pending labor investigation, or because the dispute has not yet ripened into formal government charges—then ICE should bar using any evidence obtained from the raid in removal proceedings against the workers. Adoption of such principles would enable the INS to enforce immigration laws with due regard for labor and employment laws.

There is some evidence that the INS has come to recognize its obligations under the INA, *Southern Steamship*, and the Constitution to enforce employer sanctions with due regard for labor and employment rights. In 1996, the INS adopted a new internal Operations Instruction, OI 287.3a, which restricts its involvement in labor disputes.¹²⁰ The OI establishes several obligations on the part of the agency. First, it requires that whenever ICE receives a tip, “consideration should be given to whether the information is being provided to interfere with the [labor] rights of employees[.]”¹²¹ Second, when information “received from any source creates a *suspicion* that an INS enforcement action might involve the Service in a labor dispute,” OI 287.3a requires that the agency must consult state and federal labor and employment agencies to “determine whether a labor dispute is in progress” and ask the informant a specified list of questions.¹²² Third, “where it appears that information *may* have been provided in order to interfere with or to retaliate against employees for exercising their [labor] rights,” ICE may not conduct a raid without approval from a senior official.¹²³ Finally, if ICE learns of a labor dispute after it has conducted a worksite raid, it must notify state and labor employment agencies and consider deferring deportation.¹²⁴ Violations of

immigration proceedings, exclusionary rule “for evidence obtained in violation of an individual’s First Amendment rights,” nor where the INS has intervened in labor dispute); *see also* *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (refusing to apply rule prohibiting selective prosecution, in immigration proceedings, based on First Amendment activity).

120. OI 287.3a, *supra* note 99, at 199.

121. *Id.* at 200.

122. *Id.* (emphasis added).

123. *Id.* at 201 (emphasis added).

124. *Id.*

OI 287.3a can result in the termination of proceedings against workers arrested.¹²⁵

Adoption of OI 287.3a, and the occasional willingness of immigration authorities to avoid entanglement in labor disputes,¹²⁶ suggests that the agency has finally begun to implement Congress's 1986 intent that immigration officials not use employer sanctions to undermine or diminish "in any way" labor protections for immigrant workers.¹²⁷

C. *Invocation of International Labor Law*

A final set of emerging issues for undocumented workers involves the use of the Alien Tort Claims Act (ATCA) in the domestic enforcement of international labor law.¹²⁸ The ATCA authorizes non-citizens to sue in tort for violations of the law of nations or a treaty of the United States,¹²⁹ and has been used most often in challenges to gross human rights violations such as torture and genocide.¹³⁰ However, in several instances, non-citizen workers have used the ATCA to sue for egregious labor abuses committed outside the United States,¹³¹ and, most recently, for labor violations within the United States.¹³²

125. *In re Herrera-Priego*, U.S.D.O.J. E.O.I.R. (July 10, 2003), at http://www.lexisnexis.com/practice_areas/immigration/pdfs/web428.pdf (last visited Apr. 1, 2004). The recent redesignation of OI 287.3a as a provision in the *INS Special Agent's Field Manual*, see *supra* note 99, does not alter its binding effect.

126. For instance, in 1999, the INS raided a Holiday Inn Express in Minneapolis in the midst of a substantial labor dispute, based on the employer's retaliatory tip. The INS agreed to grant "deferred action" and work authorization to seven of the eight undocumented workers it arrested; the eighth worker had a prior deportation order and was removed. See Kimberly Hayes Taylor, *Illegal Workers Get to Stay in U.S.*, MINNEAPOLIS STAR TRIB., April 26, 2000, at 1B.

127. See *supra* text accompanying note 102.

128. See generally Wishnie, *supra* note 38, at 533-43.

129. 28 U.S.C. § 1350 (2000).

130. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (alleging genocide, rape, and torture in former Yugoslavia); *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994) (alleging torture and false imprisonment in Haiti).

131. See *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001) (holding that forced labor allegations by Korean and Chinese workers state a claim under ATCA but dismissing claims as time-barred); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 443, 469 (D.N.J. 1999) (holding same, as to slave labor claims against German subsidiary of U.S. corporation); see also *Sinaltrainal v. Coca-Cola, Co.*, 256 F. Supp. 2d 1345, 1359 (S.D. Fla. 2003) (approving ATCA claim on behalf of trade unionist murdered in Columbia); *Doe v. Unocal Corp.*, No. 00-56603, 2002 U.S. App. LEXIS 19263 (9th Cir. Sept. 18, 2002) (approving ATCA theory based on allegations of forced labor and involuntary servitude by pipeline workers in Burma), *vacated, reh'g en banc granted*, 2003 U.S. App. LEXIS 2716 (9th Cir. 2003).

132. See *Manliguez v. Joseph*, 226 F. Supp. 2d 277 (E.D.N.Y. 2002) (ATCA allegations of involuntary servitude by former domestic worker from Philippines employed in private home); *Topo v. Dhir*, 210 F.R.D. 76, 78-79 (S.D.N.Y. 2002) (ATCA allegations of

ATCA suits arising from labor exploitation within the United States are likely to avoid the most common obstacles to litigation of international law claims, including the doctrine of *forum non conveniens*¹³³ and the difficulties of establishing personal jurisdiction over defendants.¹³⁴ Nor is the application of international law against private employers an impediment to suit, for as the Second Circuit has explained, “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”¹³⁵ The conduct for which private actors may be liable under ATCA includes at least piracy, slave-trading, involuntary servitude, forced labor, and trafficking.¹³⁶ Tellingly, all but the first of these implicates labor and employment abuses.

To date few immigrant workers in the United States have pressed international labor claims via the ATCA. Most cases thus far have involved claims by domestic workers compelled to live and labor as babysitters and housekeepers in private homes,¹³⁷ a population particularly vulnerable to threats of violence and legal and psychological coercion.¹³⁸

involuntary servitude and trafficking by former domestic worker from India); *Castillo v. Neave*, No. O3 Civ. 0763 (S.D.N.Y. filed Feb. 3, 2003) (ATCA allegations of involuntary servitude and forced labor by former landscaping employees from Mexico) (on file with the University of Pennsylvania Journal of Labor and Employment Law); *Richards v. Runcie*, No. H 01-1072 (S.D. Tex. filed Mar. 30, 2001) (ATCA allegations of involuntary servitude by former domestic worker from Jamaica) (on file with the University of Pennsylvania Journal of Labor and Employment Law); *Hikabanze v. Shamapande*, No. 00 Civ. 9712 (S.D.N.Y. filed Dec. 22, 2000) (same, by former domestic worker from Zambia) (on file with the University of Pennsylvania Journal of Labor and Employment Law); *Okezie v. Udogwu*, No. 99 Civ. 3345 (S.D.N.Y. filed May 7, 1999) (same, by former domestic worker from Nigeria) (on file with the University of Pennsylvania Journal of Labor and Employment Law).

133. *See, e.g.*, *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001) (dismissing ATCA claim on grounds of *forum non conveniens*) *aff'd* by 303 F. 3d 470 (2d Cir. 2002).

134. *See Sarah H. Cleveland, Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533, 1575 (1998) (reviewing HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE (Lance A. Compa & Stephen F. Diamond eds., 1996)).

135. *Kadic*, 70 F.3d at 239.

136. *See id.* at 239-41 (holding that non-state actors may be liable for piracy, slave trade, and certain war crimes under international law); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794-95 (D.C. Cir. 1984) (Edwards, J., concurring) (same, as to piracy and slave-trading); *Topo v. Dhir*, 2003 U.S. Dist. LEXIS 21937, at *12-14 (S.D.N.Y. Dec. 3, 2003) (recognizing ATCA claim for trafficking against private employers and denying summary judgment motion by same); *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14, 22 n.5 (D.D.C. Aug. 28, 2000) (“[T]he Court will accept the Second Circuit’s conclusion that ATCA jurisdiction extends to private parties for egregious acts of misconduct.”); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d at 445-46 (holding that non-state actor may be liable for forced labor under ATCA); *see also Cleveland, supra* note 134, at 1570 (“[I]nternational prohibitions of slavery, servitude, and forced labor apply to state actors and private entities alike.”).

137. *See supra* note 132.

138. *See, e.g.*, Human Rights Watch, *Hidden in the Home: Abuse of Domestic Workers*

But the trend is likely to continue, and it is probable that the judiciary will be called upon to interpret the scope of the international labor law norms, in particular the prohibitions on involuntary servitude, forced labor, and trafficking. Those international norms are more expansive than the domestic analogues codified in the Thirteenth Amendment and in Reconstruction-era statutes banning involuntary servitude and peonage.¹³⁹ Notably, one of the two antecedents of our contemporary involuntary servitude statute was the nineteenth-century Padrone Act, adopted to punish those who smuggled young Italian boys into the country and forced them to work as street musicians and beggars,¹⁴⁰ and evidence of the longstanding recognition that immigrant workers are particularly vulnerable to involuntary servitude.

These initial cases suggest that immigrant workers, including undocumented workers, may turn increasingly to international labor law in their efforts to redress workplace abuses committed in the United States. To some degree, ATCA claims may afford additional remedies to undocumented workers confronted by egregious working conditions, coercive employers, and retaliatory threats to contact immigration authorities, and their inclusion in workers' rights litigation may promote organizing campaigns in other ways as well.¹⁴¹

III. CONCLUSION

Despite the pressures of the economic downturn, post-September 11 anti-terrorism initiatives, the hollowing out of some federal labor law remedies occasioned by the *Hoffman Plastic* decision, and the erosion of the social safety net for immigrants, millions of low-wage immigrant

with Special Visas in the United States, HUMAN RIGHTS WATCH WORLD REPORT (Human Rights Watch, New York, N.Y.), June 2001 (examining treatment of domestic workers employed by international officials in the United States and documenting violations of international labor norms against involuntary servitude and forced labor).

139. The domestic prohibitions appear at U.S. CONST., amend. XIII § 1 (prohibiting slavery and involuntary servitude); 18 U.S.C. § 1581 (peonage); *id.* § 1584 (involuntary servitude); *id.* § 1589 (forced labor); 42 U.S.C. § 1994 (civil prohibition of peonage). See Joey Asher, Comment, *How the United States is Violating Its International Agreements to Combat Slavery*, 8 EMORY INT'L L. REV. 215, 219-20 (1994) (contending that judicial construction of crime of involuntary servitude is overly narrow and contrary to international law); Cleveland, *supra* note 134, at 1578-79 (discussing domestic and international bans on involuntary servitude and forced labor); Wishnie, *supra* note 38, at 535-38 (analyzing and contrasting same).

140. *United States v. Kozminski*, 487 U.S. 931, 947-48 (1988) (analyzing Padrone Act, one of two sources for the modern statute, 18 U.S.C. § 1584 (2000), criminalizing involuntary servitude).

141. See Wishnie, *supra* note 38, at 540-43 (suggesting ATCA litigation may be especially useful in furthering domestic and agricultural worker organizing initiatives).

workers and their families remain in this country, often laboring long hours for little pay in dangerous conditions. Important business interests have persisted in their requests for expanded guest-worker programs, and the global march toward increased mobility of goods, capital, and even labor proceeds. The reality is that substantial numbers of undocumented workers and other immigrants are part of this nation's future. These workers, including persons in various citizenship and immigration statuses, live and labor in households, workplaces, and communities. And these workers, together with their families and colleagues, are likely to continue to press their claims for dignity and respect in the workplace.

These efforts are evident in the passage of post-*Hoffman Plastic* legislation, such as the California bill preserving full state remedies for undocumented workers¹⁴² and the successful campaign of Domestic Workers United to persuade New York City to enact tighter measures regulating domestic worker employment agencies.¹⁴³ They are evident in the continuing willingness of immigrant workers to press their claims in court.¹⁴⁴ And they are evident in the numerous, ongoing grassroots and union-led efforts to organize low-wage workers and to support them in their demands for workplace justice.¹⁴⁵

The persistence of even the lowest-wage immigrant workers in asserting their workplace rights will compel the courts and executive branch agencies to grapple with the tensions between the nation's labor and immigration laws. Sound policy and principle counsel that over-zealous immigration law enforcement threatens to undermine both statutory regimes. Only through vigorous enforcement of the labor laws as applied to all workers, and immigration enforcement that is tempered by a respect for the rules of the workplace, will the nation's immigration and labor policies be advanced.

142. See *supra* note 90.

143. See Steven Greenhouse, *New Protections for Nannies Are Approved by Council*, N.Y. TIMES, May 15, 2003, at B3 (discussing bill passed by New York City Council requiring both domestic workers and their employers to acknowledge awareness of the worker's rights).

144. See *supra* notes 91-95 and accompanying text.

145. See, e.g., Jimmy Breslin, *Strikers Making a Stand, Literally*, NEWSDAY, May 8, 2003, at A2 (describing seven-day hunger strike by injured immigrant workers demanding reforms to New York State Workers' Compensation Board, in campaign organized by Chinese Staff & Workers Association and National Mobilization Against Sweatshops); Pete Donohue, *Time to Drive Up the Fare, Cabbies Say*, N.Y. DAILY NEWS, April 29, 2003, at 6 (describing campaign by New York City taxi drivers, a largely immigrant workforce, to increase fares); Bart Jones, *Freeport Hiring Site Works Out; Tide Turns for Laborer Haven*, NEWSDAY, July 4, 2003, at A28 (describing successful struggle by The Workplace Project and other immigrant advocates to establish day laborer site amidst contentious community debate).