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

Ruben J. Garcia*

INTRODUCTION .................................................. 659

I. THE ROAD TO IMMIGRANT INCORPORATION IN THE LABOR MOVEMENT ............................................ 663

II. THE HOFFMAN CASE: ITS ANCESTRY AND PROGENY ...... 665
    A. The Pre-Hoffinan Legal Climate .......................... 665
    B. The Hoffman Decision .................................... 666

III. THE IMMIGRANTS' RIGHTS MOVEMENT, 2002-PRESENT ... 668

IV. ASSESSING THE TRUE IMPACT OF HOFFMAN .............. 669

V. HOFFMAN AS LEGAL SYMBOL ................................. 673

CONCLUSION ...................................................... 674

INTRODUCTION

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

* Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. I am grateful to the editors of the Cornell Journal of Law and Public Policy and the Institute for Social Sciences at Cornell University, which organized the Symposium “Undocumented Workers: Crossing the Borders of Immigration and Workplace Law.” Many thanks to the entire team who put on the Symposium, especially to Kate Griffith, Proskauer Rose Assistant Professor of Labor and Employment Law, and to Annelise Traume. I also am indebted to my co-panelists Annette Bernhardt, Muzaffar Chishti and Leticia Saucedo and to the audience members for their questions and comments. This Article discusses one aspect of my talk, which I presented at the symposium. Thanks as well to all of those who participated in the Symposium, particularly to Lance Compa, Maria Cook, Michael Jones-Correa, and Risa Lieberwitz. Finally, thanks to my colleagues Jeanne Price and David McClure of the Wiener-Rogers Law Library.

(NLRA)\(^4\) may have an impact on strike rates. With union membership in the private sector below eight percent\(^5\), however, the effect on society as a whole is difficult to measure. The effects of such cases are even harder to measure when the workers involved lack authorization to be in the United States.

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

*Hoffman* has been the subject of much criticism since the Supreme Court announced its decision in 2002.\(^8\) I have previously argued that *Hoffman* dichotomized labor and immigration laws in tension with each other and left workers less protected.\(^9\) I have also argued that denying remedies to undocumented workers under the law makes all workers worse off because it facilitates an increased possibility that employers will exploit workers.\(^10\) Other commentators correctly predicted, however, that *Hoffman* would not apply to many cases outside the scope of the NLRA, such as those under the Fair Labor Standards Act (FLSA).\(^11\)

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


\(^7\) Id.


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

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

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

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


\(^{14}\) David v. Signal Int’l, 257 F.R.D. 114, 124 (E.D. La. 2009) ("*Hoffman Plastic* does not control plaintiffs’ claims for unpaid minimum and overtime wages for work already performed"); id. at 123, n.32 (listing cases holding that recognizing claims for work already performed did not conflict with federal immigration law); Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1278 (N.D. Okla. 2006) ("*Hoffman* does not purport to preclude a backpay award for work that was actually performed by undocumented workers"); id. (listing decisions by "[c]ourts in several jurisdictions [that] have found that Hoffman does not limit backpay for work already performed."); Serrano v. Underground Util. Corp., 970 A.2d 1054, 1064 (N.J. Super. Ct. App. Div. 2009) ("undocumented workers can recover damages arising out of statutory violations for ‘work already performed,’ such as wage claims under the FLSA"); id. (listing cases so holding); Pineda v. Kel-Tech Const., Inc., 832 N.Y.S.2d 386, 393 (N.Y. Sup. Ct. 2007) ("Moreover, the IRCA does not preempt New York Labor Law with regard to the payment of the prevailing wage to workers under New York Labor Law Article 8."). See also
Apart from its actual effect on cases or organizing campaigns, *Hoffman* stands as a powerful legal symbol of exclusion for immigrant workers. While some Supreme Court decisions, whether they be about the right of women to get an abortion,\(^1\) of African-Americans to attend integrated schools,\(^2\) or of gays and lesbians to engage in private consensual sex,\(^3\) send an inclusive message to groups in society; the Court's decision in *Hoffman* sends a message of exclusion to undocumented workers, and by extension, to many immigrant workers in society. In spite of this message, immigrant workers have continued to organize politically and in the workplace.\(^4\)

In the end, a legal symbol like *Hoffman* sends messages to both employers and unions that will have long lasting effects. The evidence suggests that many immigrant workers have not been deterred from organizing in the nearly ten years that *Hoffman* has been the law of the land.\(^5\) On the other hand, as Justice Breyer predicted,\(^6\) and as several recent studies show,\(^7\) the *Hoffman* decision has done little to deter employers from exploiting undocumented workers.

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

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\(^1\) Roe v. Wade, 410 U.S. 113 (1973).
\(^3\) Lawrence v. Texas, 539 U.S. 558 (2003).
\(^4\) See infra Part III.
\(^5\) See infra Part III.
In Part III, I examine the rise and fall of comprehensive immigration reform and how workers organized in spite of *Hoffman* and the odds against them. In Part IV, I look for the true impact of *Hoffman* on immigrant worker organizing. Finally, in Part V, I describe how *Hoffman* is a powerful labor law symbol for the exclusion of a whole group of vulnerable workers from a democratic society.

I. THE ROAD TO IMMIGRANT INCORPORATION IN THE LABOR MOVEMENT

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

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

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

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27 Id. at 32–33.
migrant workers. Soon, it became apparent that as long as employers could use the employee’s false documents as a pretext to thwart organizing drives, the employer sanctions regime created by the Immigrant Reform and Control Act of 1986 was actually a deterrent to organizing.

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

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

28 Id. at 43–45.
29 RINKU SEN, THE ACCIDENTAL AMERICAN: IMMIGRATION AND CITIZENSHIP IN THE AGE OF GLOBALIZATION 58–59 (2008) (“Research suggests that sanctions may have far greater impact in preventing immigrant workers from resisting exploitation . . . . As the demographics of entire industries shifted to become dominated by immigrant labor, employers frequently used the threat of deportation to bust union organizing campaigns.”); Fine & Tichenor, supra note 25, at 105 (“Rather than preventing employers from hiring the undocumented, the sanctions actually gave them cover. Although the law required them to ask for documents, it did not require employers to verify their authenticity. As a consequence, employers were able to follow the letter of the law but still hire large numbers of undocumented workers. Growing evidence suggested that some employers were following a strategy of selective verification as a tool for foiling union organizing drives.”); DAVID BACON, ORGANIZING SILICON VALLEY’S HIGH-TECH WORKERS, PART 5, http://dbacon.igc.org/Unions/04hitec5.htm (last visited Dec. 16, 2011) (“When Shine became aware that its workers had organized, it suddenly told them they had to present verification of their legal residence in order to keep their jobs. The company cited the requirement, under the employer sanctions provision of the Immigration Reform and Control Act, that it maintain written proof of employees’ legal status. When almost none of Shine’s workers could present the required documents, they were fired. The company never questioned the documentation provided by workers when they were hired, or at any other time until the union drive began.”).
30 PETER L. FRANCIA, THE FUTURE OF ORGANIZED LABOR IN AMERICAN POLITICS 41–42 (2006); David Bacon, Labor Fights for Immigrants, THE NATION, May 21, 2001, at 15 (“Since 1986 it has become common for companies to use the employer sanctions as a weapon to resist organizing drives. Recognizing this, in February 2000 the AFL-CIO passed a historic resolution calling for the repeal of sanctions and for a legalization program that would allow undocumented immigrants to normalize their status.”); Frank Swoboda, Unions Reverse on Illegal Aliens; Policy Seeks Amnesty, End to Sanctions, WASH. POST, Feb. 17, 2000, at A1.
31 See supra, note 30.
32 Telephone interview with Subject #1 (Jan. 26, 2010).
33 Ginger Thompson & Steven Greenhouse, Mexican ‘Guest Workers’: A Project Worth a Try?, N.Y. TIMES, Apr. 3, 2001, at A4 (“[Vicente Fox’s] campaign took a significant step forward in February when he and President Bush agreed to begin negotiations on a range of immigration policies. And in Washington on April 4, Mexican officials are to hold the first in a series of meetings to discuss migration policy with top Bush administration officials.”); Ginger Thompson, U.S. and Mexico to Open Talks on Freer Migration for Workers, N.Y. TIMES, Feb. 16, 2001, at A1 (“After they meet on Friday, President Bush and President Vicente Fox of Mexico are expected to announce the start of high-level discussions aimed at addressing the web of immigration issues that have long bedeviled relations among the neighboring nations. American officials said that an ‘immigration working group’ would discuss a range of proposals including Mexican goals to open the border to a freer flow of Mexican guest workers and
The plan would include a guest-worker program and an earned legalization program.\textsuperscript{34} Less than two months after that announcement, the attacks of September 11, 2001 took place. There were more than 3000 casualties on that day, and it soon became clear that immigration reform would also be a casualty of a reinvigorated fear of immigrants.\textsuperscript{35}

II. THE HOFFMAN CASE: ITS ANCESTRY AND PROGENY

A. The Pre-Hoffman Legal Climate

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

Two years after the \textit{Sure-Tan} decision, Congress passed the Immigration Reform and Control Act of 1986 (IRCA).\textsuperscript{40} For the first time, the IRCA criminalized the hiring of workers without legal status.\textsuperscript{41} In sev-
eral cases after 1986, however, the courts did not see a tension between following the IRCA and granting rights under labor and employment statutes.\textsuperscript{42} The NLRB followed the \textit{Sure-Tan} decision closely by consistently finding that undocumented workers were employees entitled to protection of the NLRA; \textit{NLRB v. A.P.R.A. Fuel Buyers} is a prime example of the way that the courts reconciled IRCA with the NLRA to find the workers protected.\textsuperscript{43} Because the employer in \textit{A.P.R.A.} knew that the workers he was hiring were undocumented, the United States Court of Appeals for the Second Circuit ordered reinstatement of the employees, conditioned upon the employees eventually showing that they were authorized to work in the United States.\textsuperscript{44}

\textbf{B. The Hoffman Decision}

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

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


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

\textsuperscript{44} \textit{Id.} at 56–57.


\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textit{Id.}


\textsuperscript{49} Hoffman, 535 U.S. at 140–41.

\textsuperscript{50} \textit{Id.} at 141.

\textsuperscript{51} \textit{Id.}

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

\textsuperscript{53} \textit{Id.}
mission, the ALJ recommended neither reinstatement nor back pay for Castro.  

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

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

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

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

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54 Hoffman, 535 U.S. at 141.  
55 Id.  
56 Id. (citing Hoffman Plastic Compounds, Inc., 326 N.L.R.B. 1060, 1060 (1998)).  
57 Id. at 141–42.  
58 Hoffman, 208 F.3d 229.  
60 Hoffman, 535 U.S. at 149–50.  
61 Id. at 145 (internal quotation marks omitted) (citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892–93 (1984)).  
62 Id.  
as a cudgel over employees.\textsuperscript{64} The threat had little to do with whether the workers would be entitled to back pay or not; instead, employers used \textit{Hoffman} to threaten deportation, even though the denial of a back-pay remedy to a worker would have little to do with whether or not that worker would be deported.\textsuperscript{65}

\textbf{III. The Immigrants' Rights Movement, 2002–Present}

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

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

\begin{itemize}
\item \textsuperscript{64} See Cleetland, supra note 63.
\item \textsuperscript{65} See Raquel E. Aldana, \textit{The Subordination and Anti-Subordination Story of the U.S. Immigrant Experience in the 21st Century}, 7 Nev. L.J. 713, 721 (2007) (“Despite its narrower holding, employers took the \textit{Hoffman} decision as a green light to contend that undocumented workers lack state and federal workplace rights. In doing so, employers have resorted to intimidating discovery practices during litigation to compel courts to release the plaintiffs' immigration status, which, even when unsuccessful, deter plaintiffs from coming forward.”); David Weissbrodt, \textit{Remedies for Undocumented Noncitizens in the Workplace: Using International Law to Narrow the Holding of \textit{Hoffman} Plastic Compounds, Inc. v. NLRB}, 92 Minn. L. Rev. 1424, 1432 (2008) (“Post-\textit{Hoffman}, employer attempts to determine the immigration status of plaintiff-employees have drastically increased, and employers have also attempted to intimidate current workers with these discoveries.”). \textit{See generally} Cleetland, supra note 63.
\item \textsuperscript{66} See, e.g., Irene Bloemraad et al., \textit{The Protests of 2006: What Were They, How Do We Understand Them, Where Do We Go?}, in \textit{RALLYING FOR IMMIGRANT RIGHTS: THE FIGHT FOR INCLUSION IN 21ST CENTURY AMERICA} 3 (Kim Voss & Irene Bloemraad eds., 2006).
\item \textsuperscript{67} Id. at 24.
\item \textsuperscript{68} See id. at 3–4, 7, 24.
\item \textsuperscript{69} See generally id.
\item \textsuperscript{70} See generally id. at 46–47.
\end{itemize}
In her 2006 book, L.A. Story: Immigrant Workers and the Future of the Labor Movement, Ruth Milkman surveyed the mass protests and concluded that, despite the complications Hoffman provides, immigrants are an important part of the future of the labor movement. This is in part because many immigrant workers have experience with anti-union violence in their home countries.

IV. ASSESSING THE TRUE IMPACT OF HOFFMAN

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

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

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73 See generally id. at 114–45, 189.
74 See Lance Compa, Unfair Advantage: Workers’ Freedom of Association in the United States Under International Human Rights Standards xxii (2004) (“Immigrant workers’ defenselessness creates a vicious cycle of abuse. Fearful of being found out and deported, undocumented workers shrink from exercising rights of association or from seeking legal redress when their workplace rights are violated. Fully aware of workers’ fear and sure that they will not complain to labor law authorities or testify to back up a claim, employers heap up abuses and violations of their rights.”); David P. Weber, (Unfair) Advantage: Damocles’ Sword and the Coercive Use of Immigration Status in a Civil Society, 94 MARQ. L. REV. 613, 619 (2010) (“In terms of workplace conditions, threats to report immigrants to ICE, and the inability to adequately defend oneself against a dominant party, employers have long taken advantage of unauthorized immigrants’ precarious legal position.”); Weissbrodt, supra note 65, at 1433.
75 See Compa, supra note 74 at xxii (stating that Hoffman “highlights the human rights dimensions of a crisis in immigration policy”); Cunningham-Parmeter, supra note 13 at 1370–71 (noting how some scholars view Hoffman as “a human rights crisis that will cause a great shift in the workplace rights of unauthorized immigrants”).
76 See, e.g., Garcia, supra note 10, at 1.
77 See Weissbrodt, supra note 65, at 1428–29 (“Other lower courts have widened their application of the Hoffman holding. These courts have considered Hoffman relevant in various ways to workplace claims by noncitizens.”). See also Oro v. 23 E. 79th St. Corp., 810 N.Y.S.2d 779, 782 (N.Y. App. Term. 2005).
78 Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151 (2002) (“We therefore conclude that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA.”).
courts have refused to extend *Hoffman* to cases involving Title VII of the Civil Rights Act, the Fair Labor Standards Act, and the Occupational Safety and Health Act.\(^7\)

Although immigrant workers have continued organizing both in their workplace and in social movements, employers have continued to exploit immigrant workers, documented and undocumented.\(^8\) Where the NLRA and other federal laws like the FLSA do not apply, as in agriculture and domestic services, the holding of *Hoffman* is necessarily limited.\(^8\)

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\(^7\) See Cunningham-Parmer, *supra* note 13, at 1370 ("Soon after *Hoffman*, employers began to argue that unauthorized immigrants could no longer sue under Title VII, the FLSA, or any other workplace protection. To date nearly every court to rule on the issue has refused to extend the backpay limitation in NLRA cases to minimum wage and overtime protections."); *id.* at 1370 nn. 55–58 (listing supporting cases); Connie de la Vega & Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Migrant Workers’ Rights in the United States*, 3 HASTINGS RACE & POVERTY L.J. 35, 52 (2005) ("Fortunately, courts have refused to extend *Hoffman* to deny workers’ compensation for work already performed, and many agencies have released position papers in support. The U.S. Department of Labor has stated it will fully and vigorously enforce the Occupational Safety and Health Act (OSHA), Fair Labor Standards Act of 1938 (FLSA), Migrant and Seasonal Agricultural Worker Protection Act (AWPA), and the Mine Safety and Health Act, without regard to whether an employee is documented."); Weber, *supra* note 74 at 630–31 ("Interestingly, it appears that both federal and state courts have since limited *Hoffman*’s scope. In 2004, the Ninth Circuit Court of Appeals held that *Hoffman* does not apply to Title VII discrimination claims. In *Rivera*, the Ninth Circuit noted that, in contrast to the NLRA, Title VII requires private enforcement, the policies behind Title VII are to strongly punish and deter violators, and Title VII is interpreted by courts rather than an administrative body. Primarily because of these differences as well as the great weight of authority on its side, the court concluded, ‘In sum, the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases.’ Other courts have similarly concluded that Hoffman does not apply to Fair Labor Standards Act claims or workers compensation claims."); *see also* Rivera v. NIBCO, Inc., 364 F.3d 1057 (9th Cir. 2004); Equal Emp’l Opp. Comm’n v. Rest. Co., 490 F. Supp. 2d 1039 (D. Minn. 2007); Flores v. Amigon, 233 F. Supp. 2d 462 (E.D.N.Y. 2002).

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

\(^8\) Fortunately for workers in California, the state legislature there passed a statute preventing the extension of *Hoffman* into the state law remedies that already existed for immi-
Most advocates recognize that immigrant workers will not truly be free in the workplace until they have legal status to remain in the country. But as the guest worker programs that have been part of the American workplace for over half a century have shown, it is not enough simply to have legal status to protect the rights of workers. There have been numerous cases of exploitation of guest workers, all of whom have legal status. Thus, legal status is necessary but not sufficient to protect immigrant workers. There must also be attention to the enforcement of existing rights for immigrants and citizens alike.

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

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

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

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

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83 See Garcia, supra note 82, at 3.


85 See id. at 59.


wages. However, he said, "it could affect the remedies for [for legal violations]. This was about pay for work not performed." Beyond McCortney’s prediction that the decision’s impact will be broad, other effects are quite possible. First, the way that Hoffman resolved the tension between immigration control and labor policy might prove to be a model for the policy objectives of other statutes to be ceded to the prerogatives of immigration control. The Hoffman rule also puts at risk any remedy obtained for an undocumented worker that is not “pay for work not performed.”

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

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

91 Id.
92 Id.
93 See Hoffman, 535 U.S. at 160.
94 Transcript of Oral Argument at 32, Hoffman, 535 U.S. 137 (No. 00-1595).
95 Agri Processors Co. v. NLRB, 514 F.3d 1, 3–4 (D.C. Cir. 2008).
96 Id. at 9.
97 See Hoffman, 535 U.S. at 150.
making the long and dangerous journey into the United States. Economics is a major determinant of why people migrate.

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

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

V. Hoffman as Legal Symbol

Ellen Dannin has written that the Court in Hoffman sent an ironic message to immigrant workers: you are just like all other of the millions of "employees" in the U.S. who lack true protection under the Act. Although clearly not categorically excluded from receiving back pay like all workers who are either hired without or lose authorization to work during employment, Dannin's broader point about the ineffectiveness of labor law for all workers is well taken. However, Hoffman is not only a symbol of the weakness of labor protections, but the ways in which immigrants are excluded from the American community, even though they contribute so much to building it. Hoffman is also a symbol that not all employees are equal.

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

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98 Veronica Puente, Deciding to Migrate, in Recession without Borders: Mexican Migrants Confront the Downturn 63, 68 (David Scott FitzGerald et al. eds., 2011).
99 Id.
100 See Hoffman, 535 U.S. at 154 (Breyer, J., dissenting).
101 Id.
103 See Annette Bernhardt, Unregulated Work: The Perfect Storm of Economic Restructuring and Immigration Policy, Undocumented Workers: Crossing the Borders of Immigration and Workplace Law Workshop, Cornell University (September 23, 2011).
105 See supra note 104.
whether Hoffman has had an impact on particular organizing campaigns. Jayesh Rathod has done excellent work to identify and go beyond "the chilling effect" in terms of the effect that occurs in OSHA enforcement because of lack of immigration status.107 A new generation of scholars in the "immployment" field, a term coined by Kati Griffith, can continue to look at the ways that immigration status and law affects the enforcement of labor and employment law.108

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

Conclusion

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

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


110 Id. at 4.

111 Id.

112 Id. at 1.

113 Id.

114 Id. at 4–6.
grated immigration and labor reforms languish. Until changes in labor law and a human rights paradigm receive more attention, immigrant workers will remain on the political and legal margins of our society.