Immigration and Employment Federalism:

State Courts and Workers' Compensation for Unauthorized Workers

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Immigration and employment law embody disparate theories of the undocumented worker. Immigration law often treats them as someone who wrongfully obtained access to the labor market and ought not to be rewarded for it after the fact. By contrast, much of employment law treats the undocumented worker as a contributor to the labor market who, by virtue of expending their labor, has rights and deserves protection. Labor disputes involving undocumented workers thus often involve legal, conceptual, and normative tensions for courts.

At the federal level, Hoffman Plastic Compounds, Inc. v. NLRB *ignored those tensions in favor of federal immigration policy. In* Hoffman*, the Court held undocumented workers who were laid off in violation of the National Labor Relations Act were not entitled to backpay for work they did not perform after the illegal layoff. The Court's rationale was that it would be illogical to "award backpay to an illegal alien . . . for a job obtained . . . by a criminal fraud." But a very different picture emerges when looking at state law. When it comes to backpay under state workers' compensation schemes for work not performed, state courts near-unanimously reject* Hoffman*'s rationale and award backpay.*

As this Article shows, this difference in legal treatment stems from the fact that state law and federal law rest on vastly different conceptual and normative assumptions about the undocumented worker. At the federal level, the undocumented worker is a fraudulent entrant whose illegal entry is treated as blameworthy and taints their continued presence in the labor market. At the state level, the undocumented worker is a productive

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contributor to society who is treated with similar—though not the same—dignity as authorized workers and deserving of similar protections. State courts across the board have embraced a dignitarian view and have rejected the federal conception of undocumented workers as criminal intruders. Indeed, as this Article shows, state courts do not merely protect undocumented workers because reducing their vulnerabilities serves the interest of U.S. workers. Rather, state courts have developed conceptual and normative commitments to the dignity of undocumented workers for their own sake.

INTRODUCTION

The intersection of immigration law and labor law has generated deep disagreements over legal categories and normative commitments. Those disagreements were on full display in the Supreme Court's five-to-four split in *Hoffman Plastic Compounds, Inc. v. NLRB*, decided in 2002.[1] *Hoffman* asked whether Jose Castro, an undocumented worker who had been unlawfully laid off for unionizing activity, was entitled to reinstatement and backpay under the National Labor Relations Act (NLRA). The five-Justice majority opinion penned by Chief Justice Rehnquist said no, explaining that precedent had established a presumption that the NLRA did not protect conduct that violated other statutes—especially when that violation is criminal.[2] Here, Castro violated the Immigration Reform and Control Act (IRCA) by presenting a false birth certificate and Social Security number at the hiring stage.[3] The *Hoffman* majority thus bristled at the idea of "award[ing] backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud."[4] IRCA's policies thus trumped the NLRA's. The four dissenting Justices, in an opinion authored by Justice Breyer, proceeded from a very different presumption. In their view, the majority's "decisional background" that precluded NLRA remedies when a worker had acted criminally did not exist.[5] Instead, their reading of IRCA's text, its purpose, and Supreme Court precedent required that IRCA accommodate the NLRA such that unauthorized workers would receive the same NLRA remedies as authorized ones.[6]

1. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).
2. *Id.* at 143–46.
3. *Id.* at 141, 148.
4. *Id.* at 149.
5. *Id.* at 153–54 (Breyer, J., dissenting); *id.* at 146 (majority opinion).
6. *Id.* For the purposes of this Article, the terms "undocumented worker" and "unauthorized worker" are interchangeable. While some undocumented immigrants are authorized to work (*e.g.*, DACA recipients), and some documented immigrants are not authorized to work (*e.g.*, student visa holders seeking to work off their institution's campus), the Article is concerned with workers who arrived in the United States without documentation and, because of their undocumented status, are not authorized to work. *See Students and Employment*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Aug. 13, 2020), https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/students-and-employment [https://perma.cc/3N69-XQTY] (stating that student visa holders are not authorized to work off-campus); *Reminders for DACA Recipients and Employers*, U.S. DEP'T OF JUSTICE (Aug. 25, 2021)

Labor law scholars and activists have severely criticized *Hoffman* for its adverse impacts on undocumented workers. Some have argued that it gave employers additional leeway to exploit their workers.[7] Others have focused on the social hierarchies and exclusion *Hoffman* codified.[8] Yet others have discussed the incentives that *Hoffman* created in stifling the litigation of employment disputes involving possibly undocumented workers.[9] In short, scholars have criticized *Hoffman*'s adverse impact both on undocumented workers as a subgroup and on all workers seeking to organize under the protection of the NLRA.

Yet, none of these scholars has investigated the deeper conundrum at the heart of *Hoffman* regarding the use of labor law as an enforcement tool for immigration policy. Stripping immigrant workers of rights and remedies runs counter to labor law's principle of collective protection, creating deep disagreements over whether labor statutes should cover undocumented workers.[10] Much of this debate centers around the inherent tensions between

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https://www.justice.gov/crt/reminders-daca-recipients-and-employers [https://perma.cc/WKZ8-HTGC] (stating that DACA recipients, while undocumented, are authorized to work).

7. *See, e.g.*, Christopher David Ruiz Cameron, *Borderline Decisions:* Hoffman Plastic Compounds*, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 2–5 (2003) (arguing that that *Hoffman* amounted to a revival of the infamous Bracero Program of 1942–64, in which Mexican guest workers were exploited, trapped in their jobs, and "only a phone call away from being deported" if they overstayed their welcome or overstepped their bounds); Rebecca Smith & Maria Blanco, *Used and Abused: The Treatment of Undocumented Victims of Labor Law Violations Since* Hoffman Plastic Compounds v. NLRB, 8 BENDER'S IMMIGR. BULL. 890 (May 15, 2003) (predicting that employers would feel emboldened to violate labor statutes with impunity); Robert I. Correales, *Did* Hoffman Plastic Compounds, Inc., *Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103, 104–05 (2003) (maintaining that "[*Hoffman*'s] effect [would] be felt well before [the unionizing] process begins," would have ripple effects for "legal residents [who] work side-by-side with undocumented workers in occupations plagued by unsafe working conditions and low wages," and would serve "as a prying device to discover the immigration status of people who have filed claims under [the labor] statutes"); Rachel Bloomekatz, Comment, *Rethinking Immigration Status Discrimination and Exploitation in the Low-Wage Workplace*, 54 UCLA L. REV. 1963, 1965 (2007) (arguing that *Hoffman* incentivized employers to discriminate against U.S. workers at the hiring stage, given "[t]he reality is that many employers actually prefer to hire immigrants rather than U.S. workers, believing that the former are more easily exploitable").

8. *See, e.g.*, Catherine L. Fisk & Michael J. Wishnie, *The Story of* Hoffman Plastic Compounds v. NLRB*: Labor Rights Without Remedies for Undocumented Immigrants*, *in* LABOR LAW STORIES 351, 389 (David A. Martin & Peter H. Schuck eds. 2005) (arguing that *Hoffman* codified "two sets of rules for workers," one for citizens and legal immigrants that "provides full remedies and full deterrence," and one for undocumented workers that "provides few remedies and no meaningful protection."); Ruben J. Garcia, *Ten Years After* Hoffman Plastic Compounds, Inc. v. NLRB*: The Power of a Labor Law Symbol*, 21 CORNELL J.L. & PUB. POL'Y 659, 662 (2012) ("[*Hoffman*] stands as a powerful legal symbol of exclusion for immigrant workers," one that "sends a message of exclusion to undocumented workers, and by extension, to many immigrant workers in society.").

9. *See, e.g.*, Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27, 30 (2008) (arguing that *Hoffman* had produced a "shift toward invasive status-based discovery [that] not only dissuades immigrant employees from vindicating their workplace rights but also weakens the employment protections at issue").

10. *See infra* Part I.A.iii–B.ii (discussing IRCA's fraught history and clash with the NLRA's policies in *Hoffman*).

enforcement of the NLRA and federal immigration policy. However, this Article argues that *state* law has been overlooked as an arena in this conflict, one in which courts have articulated a robust commitment to protecting undocumented workers. Indeed, state courts do not protect undocumented workers merely because doing so serves the interest of American workers as a whole. Rather, state courts have developed conceptual and normative commitments to the dignity of undocumented workers for their own sake.

This Article proceeds in four Parts. Part I lays out the necessary background. That Part first discusses the history of the NLRA's problematic definitions of "employee" and "unfair labor practices," and the fact-intensive evaluation of each. A half-century later, IRCA further complicated the picture when it sought to discourage the influx of unauthorized workers into the labor market. In the process, IRCA created tensions between national immigration and federal labor policy that were left unresolved. *Hoffman* stumbled into this tension when it confronted a seemingly narrow legal question: Are undocumented workers who were laid off in violation of the NLRA entitled to backpay for work not performed due to the illegal firing? Under this narrow inquiry lurked a deeper question of principle: Should workers who were never authorized to enter the labor market be compensated for work they did not perform after they suffered an injury for which authorized workers would be compensated? IRCA's circuitous history does not provide the key to resolving this disagreement. Indeed, IRCA's disparate underlying policies lent plausibility to both the majority and the dissent. The majority leaned on IRCA's goal to make the labor market less attractive to undocumented immigrants by strengthening border enforcement and penalizing employers for knowingly employing unauthorized workers. The dissent, in turn, based its reasoning on IRCA's grant of a one-time amnesty to millions of unlawfully present immigrants, which served to prevent the creation of a vulnerable, exploited underclass. But both opinions couched their arguments in terms of economic incentives and allocations of burdens. They did not, as this Article argues, work out the deeper commitments that come with each position. Indeed, the conflicting underlying commitments in *Hoffman* point to a much deeper conceptual and normative dilemma.

Part II presents this Article's principal contribution by tackling *Hoffman*'s underlying dilemma head on. On a conceptual level, the dilemma running through *Hoffman* is establishing what is required for membership in the U.S. labor market. One side treats an unlawful entry as dispositive for denying membership and its accompanying benefits. The other side treats the unauthorized worker's presence in, and contribution to, the labor market as dispositive for granting membership and its benefits. The dilemma between these two positions becomes clear when taking them to their logical conclusions. On the one hand, the majority's legal formalism of insisting that an unlawful entry taints a worker's continued presence in the labor market

rings hollow when applied to workers who have contributed to the labor market (and their community at large) for years or even decades, yet are denied benefits upon injury at work. At some point, it seems, membership must be earnable, in that contribution to the community must outweigh unlawful entry. On the other hand, if, as the dissent insists, physical presence in the labor market from the moment of entry suffices, the category of membership seems to become meaningless.

On the normative level, the dilemma is one of deservingness. Does denying benefits to unauthorized workers render them second-class? On the other hand, does granting them benefits demote the worth of those who are lawfully present in the labor market? In other words, does the initial unlawful entry into the labor market taint the employment relationship so thoroughly as to preclude benefits? This Article ultimately argues that taking a side in the *Hoffman* debate implies deep, unaddressed, and fundamentally opposed commitments along both the conceptual and the normative dimension.

Part III widens the frame to discuss a similar phenomenon on the state level. Much like backpay for NLRA violations, workers' compensation laws compensate workers for work not performed after they have suffered an injury. After *Hoffman*, state courts were confronted with the question of whether *Hoffman*'s reasoning applied to workers' comp as well, and would thus preempt workers' comp benefits for undocumented workers. But state courts not only largely rejected this argument—they generally found workers' comp schemes to overwhelmingly favor undocumented workers. Reading representative cases from over two dozen jurisdictions, this Article shows that workers' comp schemes near-unanimously come out on one side of the dilemma: they fear perverse incentives for unscrupulous employers, they treat undocumented workers as productive members of the community, and they refuse to brand the undocumented worker as a criminal or otherwise blameworthy when it comes to recovering workers' compensation benefits. To be sure, workers' comp covers physical injuries, while backpay for NLRA violations covers legal injuries. But this distinction is not material to this Article's argument. The analysis here focuses on the impediments to performing work that law treats as compensable for citizens and documented workers, asking whether those impediments are similarly compensable for undocumented workers, and interrogating the conceptual and normative justifications for why that is or is not the case. In the end, layoffs in violation of the NLRA and worksite injuries each represent a break in a worker's earning potential due to forces beyond their control. It is therefore appropriate to ask why the law compensates documented workers in both scenarios, yet undocumented workers in just one.

Part IV briefly provides some corroborating evidence of this phenomenon in the state law context of recovering lost wages for work actually performed.

This Article shows that states can provide a check against federal policies that undermine labor statutes and marginalize the undocumented worker. After identifying the dilemma at the heart of *Hoffman* and examining its conceptual and normative dimensions, this Article observes that, in the context of workers' comp, state courts have consistently come out differently than the *Hoffman* majority. Importantly, state law has embraced and defended a dignitarian view of the undocumented worker that is not merely instrumental to protecting American workers as a whole, but recognizes undocumented workers for their own sake.

I. *HOFFMAN* AND THE CLASH BETWEEN THE NLRA AND IRCA

A. The NLRA's Regulatory Regime

1. The NLRA's Fraught Definition of "Employee"

The NLRA guarantees employees the rights to unionize, collectively bargain, and settle labor disputes through the NLRB.[11] Enacted in 1935, the NLRA provided stronger protections than its predecessor, the National Industry Recovery Act (NIRA).[12] The key sections of the NLRA, as amended, are sections 7 and 8. Section 7 states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[13] Section 8 defines and prohibits unfair labor practices by both employers[14] and labor unions.[15] Employers may not "interfere with, restrain, or coerce employees in the exercise of" their section 7 rights,[16] "dominate or interfere with the formation or administration" of unions,[17] fire or discriminate against employees who exercise their NLRA rights,[18] refuse to bargain with a union,[19] or discriminate against union

11. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2018)).

12. *See* Pub. L. No. 73-67, 48 Stat. 195 (1933). For example, the NIRA did not prohibit company-dominated unions or an employer's anti-union efforts, and it did not require the employer bargain with a union the employees had chosen. *See* BENJAMIN J. TAYLOR & FRED WHITNEY, U.S. LABOR RELATIONS LAW: HISTORICAL DEVELOPMENT 153–55 (1992) (describing the purpose, effect, nature, and enforcement of the NIRA). The Supreme Court held the NIRA was unconstitutional in 1935. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935).

13. 29 U.S.C. § 157 (2018).

14. *Id.* § 158(a).

15. *Id.* § 158(b).

16. *Id.* § 158(a)(1).

17. *Id.* § 158(a)(2).

18. *Id.* § 158(a)(4).

19. *Id.* § 158(a)(5).

sympathizers when deciding to hire, fire, or change "terms and conditions" of employment.[20]

The NLRA's protections extend to everyone who qualifies as an "employee." While the NLRA does not clearly define the term,[21] section 2(3) explicitly excludes "any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home."[22] Historically, those exceptions "intentional[ly] exclu[ded] black employees from the [New Deal] statutes' federal protections," because the majority of agricultural and domestic workers were Black.[23] Today, these exceptions effectively deny NLRA protections to large swaths of unauthorized workers. Even though section 2(3) does not exclude unauthorized workers on its face,[24] Department of Labor estimates show that 50 percent of crop farmworkers are unauthorized migrants.[25] An estimated 15.6 percent of domestic workers are unauthorized compared to 5.2 percent for the total labor force in all sectors.[26] In addition, section 2(3) disproportionately affects unauthorized workers by excluding "independent contractor[s]" from its definition of "employee."[27] Construction[28] and gig work[29] are two sectors in which subcontracting is widespread and which have higher-than-average percentages of unauthorized workers. Even though some courts have begun to question gig workers'

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20. *Id.* § 158(a)(3).

21. The Fair Labor Standards Act circularly defines "employee" as "any individual employed by an employer." *Id.* § 203(e)(1).

22. *Id.* § 152(3).

23. Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 100 (2011).

24. Indeed, the Supreme Court held in *Sure-Tan, Inc. v. NLRB* that unauthorized workers *are* employees for the purposes of the NLRA. *See* 467 U.S. 883, 893–94 (1984).

25. Econ. Research Serv., *Legal Status and Migration Practices of Hired Crop Farmworkers*, U.S. DEP'T OF AGRIC. (Feb. 18, 2022), https://www.ers.usda.gov/topics/farm-economy/farm-labor#legalstatus [https://perma.cc/2TTL-JX3Y] (most recent data available for FY 2016).

26. Heidi Shierholz, *Low Wages and Scant Benefits Leave Many In-Home Workers Unable to Make Ends Meet*, ECON. POLICY INST. (Nov. 26, 2013), https://www.epi.org/publication/in-home-workers [https://perma.cc/2ER3-3BWY].

27. 29 U.S.C. § 152(3) (2018).

28. *Compare, e.g.*, Jeffrey S. Passel & D'Vera Cohn, *Occupations of Unauthorized Immigrant Workers*, PEW RESEARCH. CTR. (Nov. 3, 2016), https://www.pewresearch.org/hispanic/2016/11/03/occupations-of-unauthorized-immigrant-workers [https://perma.cc/72Y9-8T9U] (showing 15 percent of construction workers in 2014 were unauthorized), *with* Paul Emrath, *Subcontracting: Three-Fourths of Construction Cost in the Typical Home*, NAT'L ASS'N OF HOME BUILDERS (Sept. 1, 2015), https://www.nahbclassic.org/generic.aspx?genericContentID=247385 [https://perma.cc/7UZM-XM72] (showing subcontracting in construction is widespread).

29. Lauren Markham, *The Immigrants Fueling the Gig Economy*, THE ATLANTIC (June 20, 2018), https://www.theatlantic.com/technology/archive/2018/06/the-immigrants-fueling-the-gig-economy/561107 [https://perma.cc/UT3P-4TTG] (discussing how gig economy workers are often subcontractors, and the industry often serves as an initial access point to the labor market for undocumented immigrants).

classification as independent contractors,[30] the general threat of being misclassified as an independent contractor—and thus being deprived of the protection of many labor statutes—remains.[31] While undocumented workers are not facially excluded from the NLRA's protections, many are nonetheless effectively excluded due to the sectors in which they work.

2. The NLRA's Broad Characterization of Unfair Labor Practices

Unfair labor practices encompass a wide range of conduct. In broad strokes, an employer might interfere with either the formation of a union or the functioning of an existing union. At and before the formation stage, courts have held that employers engage in unfair labor practices if they prohibit employees from discussing unions or the terms and conditions of their employment, discriminate against pro-union employees in providing work opportunities, or stifle the dissemination of union information on employee bulletin boards.[32] Other prohibited conduct at this stage includes refusing worksite access to union organizers or threatening or retaliating against employees for filling out union complaint forms.[33] Even actions not explicitly prohibited may nonetheless violate the NLRA if they can be applied or construed to "restrict the exercise of [s]ection 7 rights" are unfair labor practices.[34] Some of these determinations involve fact-intensive inquiries. And while appellate courts give "considerable deference" to decisions "based on the Board's expertise,"[35] they occasionally wade into nuanced line-drawing exercises.[36]

30. *See, e.g.*, Razak v. Uber Techs., Inc., 951 F.3d 137, 144–47 (3d Cir. 2020) (holding, in the Fair Labor Standards Act context, a genuine issue of material fact existed as to whether "Uber Black" drivers were "independent contractors" or "employees").

31. See, e.g., Kenneth G. Dau-Schmidt, The Problem of "Misclassification" or How to Define Who Is an "Employee" Under Protective Legislation in the Information Age, *in* THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY (Richard Bales & Charlotte Garden eds. 2020).

32. *See, e.g.*, NLRB v. Starbucks Corp., 679 F.3d 70, 72 (2d Cir. 2012) ("Starbucks does not challenge the Board's determination that [prohibiting employees from discussing unionization efforts or their terms of employment with each other, discriminating against pro-union employees, and stifling the dissemination of union information] violated the [NLRA].").

33. DHSC v. NLRB, 944 F.3d 934 at 938 (D.C. Cir. 2019).

34. Flex Frac Logistics, LLC v. NLRB, 746 F.3d 205, 209 (5th Cir. 2014) (quoting Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646, 646 (2004)).

35. *Starbucks*, 679 F.3d at 77. Of course, legal conclusions are reviewed de novo. *See, e.g.*, Parsons Elec. v. NLRB, 812 F.3d 716, 719 (8th Cir. 2016); *Flex Frac*, 746 F.3d at 207.

36. The Second Circuit, for instance, reversed an NLRB ruling that allowed unionizing Starbucks workers to wear multiple pro-union buttons on their uniforms. The court held Starbucks' dress policy limiting its workers to displaying *one* pro-union button did not constitute an unfair labor practice. *Starbucks*, 679 F.3d at 78 (emphasis added). Even though "the right of employees to wear union insignia at work has long been recognized as a [protected] form of union activity" under the NLRA, *id.* at 77 (quoting Republic Aviation Corp. v. NLRB, 423 U.S. 793, 802 n.7 (1945)), that right can be curtailed if the employer can show a "special circumstance," *id.* (quoting Guard Pub. Co. v. NLRB, 571 F.3d 53, 61 (D.C. Cir. 2009)). A recognized special circumstance is a "legitimate, recognized managerial interest," *id.* at 78 (quoting District Lodge 91 v. NLRB, 814 F.2d 876, 880 (2d Cir. 1987)), one of which, the *Starbucks*

Once a union has been formed and certified by the NLRB, the NLRA creates new obligations for the employer. Most straightforwardly, an employer may not refuse to bargain with a certified union.[37] Similarly, an employer must notify and negotiate with the union before the employer can make a "material, substantial, and significant" change to a term or condition of employment. [38] Disputes can thus arise over what qualifies as a "term and condition of employment," and when a change to it is material, substantial, and significant.[39] When unions and employers do come to the negotiation table, section 8(d) of the NLRA requires that both sides negotiate in good faith.[40] A party can only break off negotiations when they have reached a genuine impasse. Absent such an impasse, an employer cannot end negotiations or unilaterally implement changes to the terms and conditions of employment.[41] If workers go on strike in such a situation, an employer may hire replacements for the time of the strike but cannot lock its employees out without a legitimate and substantial business justification,[42] or condition their return to work on signing a petition to decertify their union.[43] The NLRA, in other words, prohibits employers from undermining the negotiations process with a certified union and from bypassing the union and directly settling terms and conditions of employment with its employees.

The NLRB has jurisdiction to enforce the NLRA.[44] Regional officers exercise power delegated by the General Counsel to investigate disputes involving unfair labor practices, union elections, and others.[45] ALJs commonly adjudicate those disputes and issue a recommendation, which the

court held, was to "display[] a particular public image through the messages contained on employee buttons," *id.*

37. *DHSC*, 944 F.3d at 937.

38. *Parsons*, 812 F.3d at 720 (quoting Rangaire Co., 309 N.L.R.B. 1043, 1043 (1992)).

39. In *Parsons*, for instance, the Eighth Circuit affirmed an NLRB order finding that a company break policy is a term and condition of employment, and that refusing fifteen-minute "afternoon breaks or early departures in lieu of breaks" where company policy had previously allowed for those breaks was a material, substantial, and significant change that required negotiation. 812 F.3d at 719. The court deferred to the Board's finding that such a change was not a mere clarification of existing policy or practices, and instead "granted Parsons unfettered discretion to determine whether employee breaks would be permitted at all[,] . . . when they would occur[,] and how long they would last." *Id.* at 720. It did not matter that the existing collective bargaining agreement did not speak on employee breaks. *Id.* at 722.

40. 29 U.S.C. § 158(d) (2018).

41. *See* Wayneview Care Ctr. v. NLRB, 664 F.3d 341, 347–48 (D.C. Cir. 2011) (listing some factors the NLRB considers in determining whether there is a genuine impasse, "including the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of the negotiations" (internal quotations omitted)).

42. *Id.* at 350–51.

43. *Id.* at 352–53.

44. 29 U.S.C. § 160.

45. Jon O. Shimabukuro & David H. Bradley, Cong. Research. Serv., R42526, FEDERAL LABOR STATUTES: AN OVERVIEW 25 (2014).

Board will adopt if neither party objects.[46] Employers can appeal NLRB decisions to the federal courts, which review legal conclusions de novo[47] but defer to the NLRB's factual findings.[48] By the same token, the NLRB may petition a federal appeals court to enforce an order if the employer refuses to comply.[49] The remedies that the NLRB can order are cease-and-desist letters (coupled with a requirement to post them in a conspicuous place at the worksite), reinstatement of a worker fired in violation of the NLRA, and backpay (minus mitigation from other employment).[50] Under section 10(j) of the NLRA, the NLRB may also petition a district court to enjoin the unfair labor practices of employers and unions.[51] The NLRA's purpose is thus preventive and remedial, rather than punitive.[52] And as discussed above, so long as a worker falls under the statute's definition of "employee," the NLRA does not facially exclude undocumented workers from its protections. Embedded in the statute is a recognition that employees' rights to bargain collectively cannot be ensured unless all workers in a certain sector are protected. In other words, a group is protected as a whole only if each of its members are protected.

3. IRCA's Economic Policies: Eliding the Deeper Conceptual and Moral Choices

The fundamental principle that collective rights require individual protection had to contend with countervailing considerations about a half-century after the NLRA's passage. By the 1980s, national labor and immigration policies were in an uneasy tension. Spurred by an influx of undocumented workers into the labor market, the Select Commission on Immigration and Refugee Policy issued a comprehensive report in 1981 that made several recommendations, including increased immigration enforcement at the southern border, penalties for employers that knowingly hire unauthorized workers, and granting legal status to those who were

46. *Id.*

47. *See, e.g.*, Parsons Elec. v. NLRB, 812 F.3d 716, 719 (8th Cir. 2016); Flex Frac Logistics, LLC v. NLRB, 746 F.3d 204, 207 (5th Cir. 2014).

48. *See, e.g.*, DHSC v. NLRB, 944 F.3d 934, 939 (D.C. Cir. 2019) ("On substantial evidence review, we defer to the Board's reasonable reading of the testimony."); NLRB v. Starbucks Corp., 679 F.3d 70, 77 (2d Cir. 2012) ("Factual findings of the Board will not be disturbed if they are supported by substantial evidence in light of the record as a whole." (citation omitted)).

49. 29 U.S.C. § 160(e) (2018).

50. *Id.* § 160(c); SHIMABUKURO & BRADLEY, *supra* note 45, at 22–23.

51. 29 U.S.C. § 160(j) ("The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court . . . for appropriate temporary relief or restraining order. Upon the filing of any such petition the court . . . shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.").

52. SHIMABUKURO & BRADLEY, *supra* note 45, at 22.

already present in the United States so as to combat their exploitation.[53] These policy goals informed Congress's efforts to pass IRCA, which had previously had died twice, first in 1982[54] and then in 1984,[55] before its ultimate passage in 1986.[56] The difficulties in passing IRCA arose from the strong criticisms received from different interest groups and ideological camps.[57] These sounded mostly in the register of economic incentives, burden allocation, and potential interference with the supply of authorized workers to the labor market, while eliding the deeper conceptual and moral choices that were at stake.

One policy goal of IRCA was to ramp up the government's gatekeeping role at the border. When it came to border enforcement, IRCA authorized an additional $422 million for the Immigration and Naturalization Service (INS) in fiscal year 1987, followed by an additional $419 million a year later.[58] While President Ronald Reagan ultimately requested only a fraction of those funds,[59] the border enforcement budget has grown steadily ever since.[60]

As several scholars have pointed out, IRCA deliberately chose to penalize employers, rather than unauthorized employees.[61] IRCA sought to deputize employers as the "inside" gatekeepers that would police access to U.S. jobs[62] that were, according to Congress, the main "'magnet' pull[ing]

53. Select Comm'n on Immigration & Refugee Policy, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY WITH SUPPLEMENTAL VIEWS BY COMMISSIONERS 11–13 (1981) [hereinafter HESBURGH COMMISSION REPORT]; *see also* Muzzaffar Chishti, Doris Meissner & Claire Bergeron, *At Its 25th Anniversary, IRCA's Legacy Lives On*, Migration Policy Inst. (Nov. 16, 2011), https://www.migrationpolicy.org/article/its-25th-anniversary-ircas-legacy-lives [https://perma.cc/JA89-KJWY].

54. Immigration Reform and Control Act of 1982, H.R. 7357, 97th Cong. (1982); Immigration Reform and Control Act of 1982, S. 2222, 97th Cong. (1982).

55. Immigration Reform and Control Act of 1983, H.R. 1510, 98th Cong. (1983); Immigration Reform and Control Act of 1983, S. 529, 98th Cong. (1983).

56. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of the U.S. Code).

57. Chishti et al., *supra* note 53. IRCA also created a new temporary work visa program for agricultural workers and implemented a few other policies. They are not the focus here.

58. IRCA § 111(b)(1), 8 U.S.C. § 1101 (2018).

59. Catherine L. Merino, Note, *Compromising Immigration Reform: The Creation of a Vulnerable Subclass*, 98 YALE L.J. 409, 410 n.6 (1989).

60. For a chart showing a steadily growing border enforcement budget from 1990 to 2020, see AM. IMMIGRATION COUNCIL, THE COST OF IMMIGRATION ENFORCEMENT AND BORDER SECURITY 2 fig.1 (July 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf [https://perma.cc/5CGU-HF9K].

61. Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment that Fails*, 2007 U. CHI. LEGAL F. 193, 204; Garcia, *supra* note 8, at 664; James Meehan, Note, *Undocumented Workers, the National Labor Relations Act, and the Immigration Reform and Control Act: Irreconcilable Differences or a Match Made in Legal Heaven?*, 43 HOFSTRA L. REV. 601, 608–09 (2014).

62. Wishnie, *supra* note 61, at 200.

illegal immigrants toward the United States."[63] To restrict access to employment for unauthorized workers, Congress created a comprehensive registration and verification scheme. Under that scheme, employers were—and still are—required to verify every prospective employee's work authorization.[64] Employers are also prohibited from hiring or continuing to employ someone whom they know is undocumented.[65] Employers who violate those prohibitions can incur civil penalties for first, second, and repeated offenses,[66] and criminal fines and imprisonment for a pattern or practice of such violations.[67] This decision to penalize employers rather than unauthorized employees followed the Select Commission's conclusion that penalizing unauthorized workers would be "unnecessary and unworkable,"[68] and was made over the objection of business interests.[69]

IRCA's third goal was to protect those undocumented workers who were already in the United States from becoming a vulnerable underclass.[70] The law created a track towards lawful status, bringing a large group of unlawfully present immigrants into the American mainstream by providing two main paths to citizenship. Everyone who had continuously resided in the United States before January 1, 1982 could apply for adjustment within twelve months.[71] Over 1.6 million people legalized through that provision,[72] although the five-year residency requirement left a large group of immigrants in undocumented status.[73] Separately, IRCA put 1.1 million seasonal

63. *See, e.g.*, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 155 (2002) (Breyer, J., dissenting) (citing H.R. REP. NO. 99-682, at 45 (1986)). For a distinction between immigration policy as border control and extended social control, see generally DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2010).

64. IRCA § 101(b), 8 U.S.C. § 1324a(b) (2018).

65. *Id.* §§ 101(a)(1)(A), (a)(2), 8 U.S.C. §§ 1324a(a)(1)(A), (a)(2).

66. Under current regulations, an employer may incur the following fines (assessed for each unauthorized worker):

Date of last violation	First offense	Second offense	Third offense & beyond
Before Mar. 27, 2008	$275 – $2,200	$2,200 – $5,500	$3,300 – $11,000
On Mar. 27, 2008, before Nov. 2, 2015	$375 – $3,200	$3,200 – $6,500	$4,300 – $16,000
On or after Nov. 2, 2015	$583 – $4,667	$4,667 – $11,665	$6,999 – $23,331

8 C.F.R. § 274a.10(b)(1)(ii) (2020).

67. 8 C.F.R. § 274a.10(a) (2020).

68. HESBURGH COMMISSION REPORT, *supra* note 53, at 65–66. *See also* Arizona v. United States, 567 U.S. 387, 405 (2012) ("The legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment.").

69. Lawrence H. Fuchs, *The Corpse that Would Not Die: The Immigration Reform and Control Act of 1986*, 6 REVUE EUROPÉENNE DES MIGRATIONS INTERNATIONALES 111, 122–26 (1990).

70. Merino, *supra* note 59, at 410, 415-16.

71. IRCA § 201(a), 8 U.S.C. § 1255a(a) (2018).

72. Chishti et al., *supra* note 53.

73. Merino, *supra* note 59, at 412–13.

agricultural workers who had worked in that capacity during the twelve months preceding January 1, 1986 on the path to citizenship.[74] These newly legalized permanent residents were eligible for IRCA's state legalization impact-assistance grants, which provided $1 billion annually for four years to assist the integration of immigrants.[75] This major (albeit one-time) effort to bring large swaths of the undocumented workforce into American society assuaged concerns of agricultural employers, who did not want to give up access to cheap labor.[76] Given the diverging economic, political, and ideological interests surrounding federal immigration reform, the bill's passage caused Representative Dan Lundgren of California, one of IRCA's key drivers, to comment: "We thought we had a corpse. But on the way to the morgue, a toe began to twitch."[77]

But the economics-focused debate around IRCA elided the deeper conceptual and normative choices that its drafters had made. In fact, those choices were marked by internal tensions. As a result, IRCA does not provide a clear answer on how to treat unauthorized workers who make it past the gatekeepers. Should they be treated as equal contributors to the labor market, at least so long as their status is not discovered? By the same token, neither IRCA's text nor purpose are clear on how the statute affects remedies for unauthorized workers under existing labor statutes such as the NLRA. The Supreme Court in *Hoffman* had little guidance when confronting the question of whether IRCA affords equal dignity to unauthorized and authorized workers. Before delving into how state courts have addressed the deeper conceptual and normative questions at stake, it is therefore worth looking into the disagreement between *Hoffman*'s majority and dissent. Even though each side proceeds from different assumptions, both couch the debate in economic terms that fail to articulate a deeper justifying principle.

B. Hoffman *and IRCA*

1. Hoffman*'s Intervention in the NLRA Regime*

In 2002, *Hoffman Plastic Compounds v. NLRB* brought the conflict between national immigration policy and federal labor law that Congress had skirted to the fore. The Court reviewed the case of Jose Castro, an

74. IRCA § 302(a), 8 U.S.C. § 1160; Chishti et al., *supra* note 53.

75. IRCA § 204(a), 8 U.S.C. § 1255a note. When President Reagan signed IRCA into law, he expressed his hope that "[t]he legalization provisions . . . will go far to improve the lives of a class of individuals who now must hide in the shadows, without access to many of the benefits of a free and open society [and allow them] to step into the sunlight." Ronald Reagan, *Statement on Signing the Immigration Reform and Control Act of 1986*, AM. PRESIDENCY PROJECT (Nov. 6, 1986), https://www.presidency.ucsb.edu/documents/statement-signing-the-immigration-reform-and-control-act-1986#axzz1dKCIUhsf [https://perma.cc/63NP-QBXL].

76. Fuchs, *supra* note 69 at 122–26.

77. Chishti et al., *supra* note 53.

undocumented worker who was laid off in violation of the NLRA. Castro operated machines for Hoffman Plastic Compounds to mix, blend, and cook chemical formulas until he was laid off for engaging in unionizing activities.[78] In charges filed with the NLRB, Castro argued that the layoff violated sections 8(a)(1) and 8(a)(3) of the NLRA.[79] The NLRB issued a complaint, and the Administrative Law Judge (ALJ) hearing the complaint agreed that Hoffman Plastic had broken the law when it fired Castro.[80] But when it came to determining the amount of backpay Castro was owed, Castro inadvertently revealed in a compliance meeting that he was neither lawfully present nor authorized to work in the United States, and that he had obtained his job at Hoffman Plastic using his friend's birth certificate.[81]

Following this revelation, the ALJ denied backpay and reinstatement, ruling that those remedies were foreclosed by IRCA and recent precedent.[82] Upon review, the NLRB reversed the ALJ and awarded Castro backpay for the period between his unlawful termination and the date when his employer learned of his undocumented status, which spanned four and a half years. The Board reasoned that "the most effective way to [promote] the immigration policies embodied in [IRCA was] to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees."[83] This amounted to an award of $66,951 plus interest.[84] After the D.C. Circuit affirmed,[85] the Supreme Court again reversed. Agreeing with the ALJ's initial determination, the *Hoffman* Court found that granting backpay claims to unauthorized workers who had been laid off for engaging in NLRA-protected activity "would unduly trench upon explicit statutory prohibitions critical to federal immigration policy."[86]

Justice Breyer, writing for four Justices, dissented. For the dissenters, the NLRA and IRCA could be reconciled, and nothing in IRCA's statutory text,[87] its purpose,[88] or Supreme Court precedent[89] suggested otherwise.

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

79. Section 8(a)(1) prohibits employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in [section 7 of the NLRA]." Section 8(a)(3) prohibits employer discrimination "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." NLRA §§ 8(a)(1), (3), 29 U.S.C. §§ 158(a)(1), (3) (2018).

80. Hoffman Plastic Compounds, Inc. and Casimiro Arauz, 306 N.L.R.B. 100, 100 (1992).

81. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. at 141.

82. Hoffman Plastic Compounds, Inc. and Casimiro Arauz, 314 N.L.R.B. 683, 685–86 (1994).

83. Hoffman Plastic Compounds, Inc. and Casimiro Arauz, 326 N.L.R.B. 1060, 1060 (1998).

84. *Id.* at 1061–62.

85. Hoffman Plastic Compounds, Inc. v. NLRB, 208 F.3d 229 (D.C. Cir. 2000), *aff'd*, 237 F.3d 639 (D.C. Cir. 2001) (en banc).

86. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151 (2002).

87. *Id.* at 154–55.

88. *Id.* at 155.

89. *Id.* at 157–59.

Indeed, denying backpay for NLRA violations would lower an employer's costs for employing unauthorized workers and create a "perverse economic incentive" to hire workers whose authorization is unclear "with a wink and a nod."[90]

At first glance, it appears that the *Hoffman* Court's majority and dissent disagreed over a fairly narrow legal question, as it only concerned backpay for work not performed.[91] Moreover, *Hoffman*'s immediate impact, was far from clear. Unionization rates were at a historic low,[92] *Hoffman*'s holding did not comment on its applicability to other labor statutes,[93] undocumented workers often fell outside the NLRA's definition of "employee" for other reasons,[94] and were generally unlikely to come forward with complaints due to their vulnerable status.[95] And the Court indicated that backpay for work actually performed and alternative remedies such as cease-and-desist orders, employer-posted notices, and injunctions of unfair labor practices may still be available.[96]

But on a closer look, it becomes clear that the Court split sharply over a dilemma with deep policy, conceptual, and normative implications. To uncover this dilemma, it is thus important to briefly reconstruct IRCA's history and the *Hoffman* Court's clashing views of IRCA.

2. The Hoffman *Majority and Dissent's Competing Interpretations of IRCA*

The majority in *Hoffman* found that enforcing backpay remedies under the NLRA for unauthorized workers would be irreconcilable with the IRCA

90. *Id.* at 155–56.

91. There is disagreement on the question. On the one hand, the Government Accountability Office estimated in a 2002 report that "[the] group of workers potentially affected by [*Hoffman*] numbers about 5.5 million." U.S. GEN. ACCOUNTING OFFICE, COLLECTIVE BARGAINING RIGHTS: INFORMATION ON THE NUMBER OF WORKERS WITH AND WITHOUT BARGAINING RIGHTS GAO-02-835 18 (2002), https://www.gao.gov/assets/240/235562.pdf [https://perma.cc/SZ3C-Y7LA]. On the other hand, even Christopher Ruiz Cameron, who strongly criticized *Hoffman*, acknowledged the tangible impact of *Hoffman* may be slight since undocumented workers are already hesitant to press NLRA violations. *See* Ruiz Cameron, *supra* note 7, at 5 ("The ill effects of *Hoffman* will be confined mostly to the ever shrinking world of the [NLRA], where undocumented aliens have long lived in the shadows.").

92. *See* Megan Dunn & James Walker, *Union Membership in the United States*, U.S. BUREAU OF LABOR STATISTICS 2 (Sept. 2016), https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/pdf/union-membership-in-the-united-states.pdf [https://perma.cc/N997-AMXS] (showing a steady decline in union membership from 1983 onwards).

93. *See* Ruiz Cameron, *supra* note 7, at 5; *see also* U.S. DEP'T OF LABOR WAGE & HOUR DIV., FACT SHEET #48: APPLICATION OF U.S. LABOR LAWS TO IMMIGRANT WORKERS: EFFECT OF *HOFFMAN PLASTIC*'S DECISION ON LAWS ENFORCED BY THE WAGE AND HOUR DIVISION (2008) (emphasizing that the Division would "continue to enforce the [Fair Labor Standards Act] and [Migrants Seasonal Worker Protection Act] without regard to whether an employee is documented or undocumented" post-*Hoffman*).

94. *See supra*, notes 29–33 and accompanying text.

95. See Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 L. & SOC. INQ'Y 561, 563 (2010).

96. *See, e.g.*, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 152 (2002) ("Lack of authority to award backpay does not mean that the employer gets off scot-free.").

regime. But instead of starting from the statutory text, purpose, or legislative history, the majority first established a "decisional background" according to which the Court had "consistently set aside [NLRB] awards of reinstatement or backpay to employees found guilty of serious illegal conduct in connection with their employment."[97] Chief Justice Rehnquist cited to decisions denying the NLRB the discretion to award reinstatement or backpay when, for example, employees had committed "acts of trespass and violence" during a strike,[98] or had violated federal maritime laws by mutinying.[99] Neither was an NLRB ruling entitled to deference where it rested on an interpretation of another statute,[100] nor did the NLRB's remedial authority include the ability to override limitations imposed by other statutes such as the Immigration and Nationality Act.[101] In sum, the majority's "decisional background" inferred that the NLRB's remedial authority ceased where other federal statutes came into conflict with the NLRA.

The *Hoffman* majority found that a similar conflict existed in Jose Castro's case. Under IRCA, the immigration statute prohibited the making, use, or attempted use of false documents for the purpose of obtaining employment,[102] and made them criminally punishable.[103] The majority thus found it unnecessary to parse the statutory text or legislative history to discern whether Congress had specifically intended to preserve NLRA backpay for unauthorized employees, or to reconcile the NLRA with IRCA.[104] Congress's decision to criminalize the use of false documents in obtaining employment created a presumption against NLRA protections and removed the question from the NLRB's purview.[105] Consequently, a federal court, rather than the Board, could decide the question of remedies in the first instance. Given the precedent of denying remedies in such circumstances, the Court denied them again in *Hoffman*. The majority ultimately declared that IRCA's policy did

97. *Id.* at 143, 146.

98. *Id.* at 143 (citing Labor Bd. v. Fansteel Metallurgical Corp., 306 U.S. 240, 255–59 (1939) (holding that the NLRA did not protect strikes that violated the employer's property rights)).

99. *Id.* at 143–44 (citing Southern S.S. Co. v. NLRB, 316 U.S. 31, 40–47 (1942) (holding that the NLRA lacked authority to reinstate a seaman because his continued disobedience of lawful commands aboard a ship constituted mutiny, a criminal act)).

100. *Id.* at 144 (citing NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527–34, 529 n.9 (1984) (holding the NLRB's finding of an unfair labor practice is not entitled to deference where the finding relied on an interpretation of the Bankruptcy Code—here, a provision preventing a business owner who has turned into a debtor-in-possession after voluntarily initiating Chapter 11 proceedings from rejecting a prior collective bargaining agreement as an executor contract)).

101. *Id.* at 144–45, 151 n.5 (citing Sure-Tan v. NLRB, 476 U.S. 883, 892–94, 902–05 (1984) (holding the NLRB correctly ruled that an employer's reporting unionizing undocumented workers intending to cause their deportation violated NLRA section 8(a)(3), but that the NLRA did not authorize readmitting those workers into the country once they had been deported)).

102. 8 U.S.C. §§ 1324c(a)(1)-(4) (2018).

103. 18 U.S.C. § 1546(b) (2018).

104. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149 (2002).

105. *Id.*

not permit awarding backpay for "work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud."[106]

Justice Breyer, in dissent, took a different approach. For him, there was no basis to proceed from the majority's "decisional background" that supposedly established that the NLRB lacks discretion to award reinstatement and backpay where the employee has acted criminally. Without this presumption, IRCA's statutory text, its legislative purpose, and the Court's precedent had to be parsed in the first instance to see whether IRCA in fact intended withdraw the NLRB's remedial authority under the NLRA. That intent, Justice Breyer contended, was "[c]ertainly not in [IRCA's] statutory language."[107] On its face, IRCA did not speak to the remedies available for unauthorized employees under other labor statutes, and the majority did not point to any such language.

Looking to IRCA's purposes, the dissent concluded that it did not intend to diminish the NLRB's remedial authority.[108] Justice Breyer argued that "the general purpose of the immigration statute's employment prohibition is to diminish the attractive force of employment, which like a 'magnet' pulls illegal immigrants toward the United States."[109] Leaving intact the NLRB's power to award backpay to unauthorized workers did not significantly increase that "attractive force" while stripping the NLRB of this power would "ultimately lower the costs of labor law violations" to employers, creating a "perverse economic incentive" that could drive unscrupulous employers to hire "with a wink and a nod" those workers whose authorization was unclear.[110] Making unauthorized workers cheaper—and therefore more attractive to exploitative employers—was at odds IRCA's purpose.[111]

Justice Breyer next distinguished the cases on which the majority relied, refuting the majority's "decisional background" that had created a presumption against NLRB discretion.[112] Lastly, since nothing suggested to Justice Breyer that the NLRB had been stripped of its discretion to award

106. *Id.*

107. *Id.* at 154–55.

108. *Id.*

109. *Id.* at 155.

110. *Id.* at 155–56.

111. *Id.* The majority responded to Justice Breyer's argument regarding economic incentives by contending that Congress's intent in IRCA was simply not clear. The majority did so by questioning the authority of the source from which Justice Breyer derived IRCA's objective to decrease the magnetic pull of U.S. jobs on illegal immigrants: "Justice Breyer . . . point[s] to a single Committee Report from one House of a politically divided Congress, . . . which is a rather slender reed. Even assuming that a Committee Report can shed light on what Congress intended in IRCA, the Report cited by Justice Breyer says nothing about the Board's authority to award backpay to illegal aliens." *Id.* at 149 n.4.

112. *Id.* at 146, 157–59.

backpay to unauthorized workers, he concluded that its decision should have received *Chevron* deference.[113]

In sum, the majority and dissent in *Hoffman* each put forth internally consistent and plausible theories that would make sense of a statute with divergent purposes, while none of those purposes squarely resolved the narrow legal issue before the Court. *Hoffman*, in putting forth those competing interpretations and approaches, thus pointed to much deeper tensions that remained unresolved.

II. *HOFFMAN*'S IMPLICATIONS: TWO MODALITIES OF AN UNDERLYING DILEMMA

The unresolved question between the *Hoffman* majority and dissent is: If an unauthorized worker commits an unlawful act to obtain a job for which she is not eligible, does that act "render[] [the] underlying employment relationship illegal"?[114] Does unauthorized "entry" into the job market strip an entrant of all (or some) rights that are available to their peers who are legally present? To Chief Justice Rehnquist, the answer was yes—at least on the narrow question of backpay for work not performed due to a wrongful discharge. But the theory that a worker's illegal entry into the labor market deprives them altogether of legal rights requires a justification, not a simple say-so. Indeed, immigration law is rife with difficult decisions as to which rights are available to both lawfully and unlawfully present immigrants. Justice Breyer, in turn, answered "no" to the surface question that *Hoffman* posed. "[T]he assumption that the immigration laws' ban on employment is not compatible with a backpay award . . . is not justified."[115] But he, too, did not explain his view that a worker's illegal entry did *not* taint their continued presence. Instead, Justice Breyer reverted to the canon of constructing two statutes such as to avoid conflict where possible. Thus, while silent statutory text, diffuse congressional intent, and flexible caselaw created room for a plausible theory on each side in *Hoffman*, neither based its position a principled justification.

As a first step toward explaining these choices, it is important to spell out the conceptual and normative commitments that each side of the debate entails. In teasing out those implications, I will show the conceptual and normative disagreements all capture a different aspect of the same deep dilemma: does an "original sin" in entering a community permanently taint one's membership status in that community and its concomitant rights? This discussion seeks to clarify the principles that underlie each side of the debate.

113. *Id.* at 161.

114. *Id.* at 146; *see also id.* at 158 (Breyer, J., dissenting).

115. *Id.* at 158 (Breyer, J., dissenting).

A. The Conceptual Dilemma: The Murky Category of Membership

Conceptually, the question of whether to grant or deny remedies creates a dilemma that goes to the heart of what it means to have full membership in a community—and the role of work in earning that membership.[116] On the one hand, denying remedies to someone who entered the job market without authorization is, for legal purposes, to say that the individual has never truly entered it.[117] It sidesteps the issue that the individual has *factually* entered the job market, has benefited from and contributed to it, built ties, and become part of the surrounding community. At some point, the tension between the legal fiction of non-entry and fact of physical presence becomes too stark to ignore. If, for example, an individual came to the United States as a child, worked in the United States for decades without ever breaking the law, had no opportunity to become a citizen, and is subsequently denied the remedies under labor statutes that authorized workers receive, insisting on illegal entry as the dispositive criterion rings hollow.

On the other hand, taking the factual entry as dispositive and granting remedies to someone who entered the job market without authorization ignores the illegality of that act. From this perspective, another logical absurdity emerges: If someone who entered the job market illegally were to *always* receive the same remedies as everyone else, there would be no meaningful difference between those legally authorized to be part of the labor market and those who are not.[118] Membership would be not a legal category, but a social fact, based on residence, ties, standing in the community, and other intangibles. If the legal status of lawful or unlawful presence in the labor market is to have meaning, it seems that remedies cannot be available to the illegal entrant in every instance.

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116. For an in-depth treatment of the logical, political, and moral implications of earned citizenship (and the role of work in earning citizenship), see Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV. 257, 273–90 (2017).

117. The entry fiction in immigration law has occupied the Supreme Court for decades. *See, e.g.*, Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206, 215 (1953) (holding that when, pursuant to congressional statute, a lawfully present alien loses his resident status upon return from an extended stay outside the country, he is treated as a first-time entrant); Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) (holding an unlawful entrant, apprehended twenty-five feet from the border within hours of entry, is treated as still being at the border and thus not entitled to constitutional due process). *See also* Zainab A. Cheema, Note, *A Constitutional Case for Extending the Due Process Clause to Asylum Seekers: Revisiting the Entry Fiction After* Boumediene, 87 FORDHAM L. REV. 289 (2018). The same reasoning and conceptual tensions come into play when considering unauthorized entrants into the U.S. job market.

118. The literature on the meaning of citizenship is too vast to do justice here. For a presentation of three different frameworks to capture the underlying principles of immigration law, see HIROSHI MOTOMURA, AMERICANS IN WAITING (2006) (discussing immigration as "contract" (citizenship conditional upon fulfilling certain expectations), immigration as "affiliation" (citizenship earned through building ties with, and contributing to the community), and immigration as "transition" (citizenship as a result of living in the United States for a certain time)).

Every decision to grant or deny a remedy thus negotiates the tension between legal and factual membership in a community and the rights that effectively attach to such membership. In *Hoffman*, the Court's denial of NLRA backpay for work not performed effectively denied unauthorized workers the right to unionize (since the employer can lay them off without serious repercussions).[119] If this interpretation were to go further and deny the right to recover backpay for work actually performed, it would raise questions as to whether an unauthorized immigrant has the right to contract at all in the labor space. If it denied recovery under antidiscrimination statutes, it would call into question whether such an entrant could even be a full "person" under the law. Conceptually, the *Hoffman* majority determined that IRCA did not afford protection of workplace organizing activities to unauthorized workers. It affirmed that unauthorized workers are less-than-full members of the labor market, somewhere between full members and non-members.

B. The Normative Dilemma: Deciding Who Deserves What

The conceptual position one takes in this debate is not normatively neutral. Each position comes with implicit value judgments and moral commitments.[120] On one hand, denying remedies to workers who entered the labor market without authorization affirms there is a moral difference between them and those who did not enter it unlawfully. Under this view, only full members of the labor market deserve all of its rights, protections, and remedies. Criminalizing unlawful entry puts the mark of moral condemnation on those nonmembers.[121] The *Hoffman* majority's language has unmistakably moral overtones when it concludes that IRCA did not permit backpay for "work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud."[122] Indeed, the *Hoffman* majority's reasoning hinges on the fact that Congress did not merely forbid, but criminalized the use of false documents to get a job. The less-than-full member's illegal entry trenches upon the

119. Despite the *Hoffman* majority's insistence that employers still face sanctions through cease-and-desist letters, requirements to conspicuously post labor law violations at the work site, and contempt charges for failure to comply with those sanctions, *Hoffman*, 535 U.S. at 152, the NLRA is now essentially toothless when it comes to undocumented workers.

120. Again, this debate can be traced in the greater field of immigration law. In the context of immigration preemption, for example, Lucas Guttentag has discussed the conflict between Congress's immigration control goals and the equality norm between citizens and immigrants that Congress had established with the Civil Rights Act of 1870. Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL'Y 1 (2013).

121. *Compare, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984) (reasoning unlawful presence constitutes "a continuing violation of the immigration laws"), *with id.* at 1057–58 (White, J., dissenting) (rejecting the majority's view that the law treats unlawful presence as a "continuing crime").

122. *Hoffman*, 535 U.S. at 149.

entitlements that the full members deserve by virtue of their status as full members.[123]

On the other hand, granting remedies to unauthorized workers treats their unauthorized entry into the labor market as morally irrelevant. Instead, it can be understood through the systemic factors that Justice Breyer identified: Employers who are attracted to a cheaper, more vulnerable labor force.[124] Critics of this position would object that it decreases the moral worth of those who did not violate the law to enter the labor market. Proponents would respond that the moral distinction an "illegal entry" imposes should not matter and is itself morally suspect. Instead, unauthorized workers should be seen as equal contributors in need of the same protection as those who are authorized to work. The moral dilemma that runs through the *Hoffman* majority and dissent is thus: Do lawfully present workers deserve a higher moral standing (and are illegal entrants trenching on that standing), or are unlawfully present ones morally equivalent (and is the proposed distinction itself morally questionable)?

C. Looking Beyond Hoffman*: Other Benefits for Work Not Performed*

The majority and dissent in *Hoffman* thus exemplify a rift along conceptual and normative lines. To be sure, those rifts were not of the Court's own making, but resulted from an immigration statute that embedded conflicting purposes and value choices. In *Hoffman*, the Court narrowly determined that Congress through IRCA had made the conceptual choice that illegal entry would create a separate legal class of employment for the purposes of post-entry NLRA protections, the policy choice that not all NLRA remedies were available to unauthorized entrants, and the normative choice that the employment relationship was illegal because of a criminal (and thus blameworthy) act. The unauthorized worker is thus a less-than-full member of the labor market for the purposes of the NLRA, and their contributions to it are not enough to entitle them to the full protection of the NLRA.

After *Hoffman*, the question arose whether that reasoning could extend to other labor statutes and protections. Did the majority's "decisional background" that criminal conduct in the course of obtaining employment canceled entitlement to backpay under the NLRA for work not performed extend to other contexts involving unauthorized workers making claims for the same remedy? Could the principle sweep even more broadly and cancel remedies for work actually performed (such as wage theft under the Fair

123. This is, of course, not to say that the *Court* is making a moral pronouncement. Rather, *if* its reading of IRCA and the NLRA are correct, the Court pronounces the moral commitments embedded in the congressional scheme.

124. *Hoffman*, 535 U.S. at 156.

Labor Standards Act [FLSA]),[125] or remedies for other violations of work law(such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, or the Family Medical Leave Act?[126]

Most attempts to extend *Hoffman* never got serious traction.[127] For a while, however, more serious efforts to export *Hoffman* into workers' comp laws were underway. As the next Part will discuss, those efforts failed in nearly every instance. State statutory regimes have long embedded the conceptual and normative commitments that align with Justice Breyer's thinking in *Hoffman*. Based on a survey of state court cases on workers' comp, I argue that IRCA—its regulatory changes notwithstanding—has not affected these deeper principles as they are embedded in state workers' comp law. They survived because state courts either rejected that *Hoffman*'s reading of IRCA preempted state workers' comp schemes, or because state courts simply did not address *Hoffman* and expounded their state's own compensation regime.

III. THE CONCEPTUAL AND NORMATIVE COMMITMENTS OF STATE WORKERS' COMPENSATION SCHEMES

A. Background: State Workers' Compensation Schemes

Unlike the NLRA, workers' comp is largely under the auspices of the states. With the exception of federal employees and workers in a few specific sectors,[128] state regulatory regimes set the rates, conditions, and procedures for drawing benefits for injuries sustained on the job.[129] In each state, workers' comp runs through an exclusive state fund, a private insurance scheme, or a hybrid system in which state and private funds compete with

125. WAGE & HOUR DIV., *supra* note 93.

126. Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Reaffirms Commitment to Protecting Undocumented Workers from Discrimination (June 28, 2002), https://www.eeoc.gov/newsroom/eeoc-reaffirms-commitment-protecting-undocumented-workers-discrimination [https://perma.cc/U8YR-DRXB].

127. *See, e.g.*, Rivera v. NIBCO, Inc., 364 F.3d 1057 (9th Cir. 2004) (declining to extend *Hoffman* to the Title VII context); Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1370 n.55 (2009) (listing several district court cases declining to extend *Hoffman* to the FLSA context).

128. *See Workers' Compensation*, U.S. DEP'T OF LABOR, https:// www.dol.gov/general/topic/workcomp [https://perma.cc/GA5G-BVFH] (listing the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101 *et seq.* (covering federal employees); the Longshore and Harbor Workers' Compensation Act of 1927 (LHWCA), 33 U.S.C. § 901 *et seq*. (covering private-sector maritime workers who load, unload, build, or deconstruct vessels in the navigable waters of the United States); the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA), 42 U.S.C. § 7348 *et seq.* (covering workers involved in the research, development, and testing of atomic weapons); and the black-lung benefits program for coal miners, 30 U.S.C. § 901 *et seq.*).

129. SCOTT D. SZYMENDERA, CONG. RESEARCH SERV. R44580, WORKERS' COMPENSATION: OVERVIEW AND ISSUES 1 (2020) https://fas.org/sgp/crs/misc/R44580.pdf [https://perma.cc/KA6C-ZUF9].

one another.[130] Employers that are able to set aside sufficient assets also have the option to self-insure in some cases.[131]

Historically, workers' comp schemes replaced a common-law tort system in which an injured worker had to pursue a court action to prove the employer was at fault.[132] Today, forty-nine states have adopted compulsory workers' comp regimes in which an administrative board adjudicates and awards benefits for covered injuries regardless of who is at fault.[133] In most instances, workers' comp is the exclusive remedy, which is to say that workers cannot sue in state court for covered injuries even if they wished to do so.[134] This administrative system represents a tradeoff. On the one hand, it reduces litigation costs and uncertainty on both sides, and makes benefits available to all qualifying workers.[135] On the other hand, benefits are typically lower than what could be obtained in a successful tort action for compensatory or punitive damages.[136]

Intentional torts are an exception to this regime. For example, under Connecticut law, an injured employee can bring a tort action where he can "demonstrat[e] that his employer . . . (1) actually intended to injure [the employee] . . . or (2) intentionally created a dangerous condition that made [the employee's] injuries substantially certain to occur."[137] However, this exception is "narrow," as injuries from reckless or negligent conduct are typically funneled into administrative systems.[138] Violations of safety standards usually do not satisfy the intentional tort exception.[139] Liability for such violations thus has to be established through Occupational Safety and Health Act actions, often yielding only a nominal amount.[140]

There are three main types of workers' comp benefits: medical benefits, which fully compensate the medical costs related to covered injuries; cash (or disability) benefits, which partially compensate for wages lost due to reduced earning capacity; and vocational rehabilitation services that aim to return the employee to work in some capacity.[141] If the workplace incident

130. *Id.* at 9.

131. *Id.*

132. *Id.* at 3–4. *See also* John F. Burton Jr. *Workers' Compensation in the United States: A Primer*, 11 PERSPECTIVES ON WORK 23, 23 (2007).

133. SZYMENDERA, *supra* note 129, at 1, 2. The only exception is Texas. *Id.* at 6, 22.

134. *Id.* at 8–9.

135. *Id.* at 3, 16.

136. *Id.* at 17.

137. Motzer v. Haberli, 15 A.3d 1084, 1092 (Conn. 2011) (quoting Sullivan v. Lake Compounce Theme Park, Inc., 889 A.2d 810, 815 (Conn. 2006) (alterations in original, except for first two)).

138. *Id.* at 1094.

139. *See id.* at 1093 (citing cases).

140. *See, e.g.*, Compass Env't, Inc. v. Occupational Safety & Health Review Comm'n, 663 F.3d 1164 (10th Cir. 2011) (imposing a $5,000 OSH Act fine where failure to train a newly arrived trench hand had resulted in an excavator's contact with a nearby powerline and killed the trench hand).

141. Burton, *supra* note 132, at 23. SZYMENDERA, *supra* note 129, at 12–14, 17.

leads to the worker's death, cash benefits are also available to surviving dependent family members.[142] Disability benefits are usually awarded when a worker loses their full earning capacity at their prior job (or a suitable job at the same or a similar employer),[143] and the injury arose in the "course and scope" of employment.[144]

Whether an injury arose in the course and scope of employment can be a fact-heavy inquiry. For instance, in *1912 Hoover House Restaurant v. Workers' Compensation Appeal Board (Soverns)*, the Pennsylvania Commonwealth Court affirmed a Workers' Compensation Judge's finding that a dog bite during an employer-sanctioned smoke break in a designated smoking area occurred within the course and scope of employment and was thus compensable.[145] Even though the incident occurred during a break, the court explained that such a "small temporary departure from work . . . did not break the course of [the claimant's] employment."[146] The court analogized this incident to a case in which claimant "suddenly jumped to touch a basketball rim" in a driveway while unloading furniture.[147] By the same token, it distinguished the dog bite from another case in which an employee left his machinery for a few minutes to "polish[] a bolt for his child's go-cart" with company tools and injured himself.[148] The former incident was "an inconsequential departure from delivering furniture for [e]mployer,"[149] while the latter was a "departure from the course of his employment [that] was strongly marked[,] not trivial," and a "'pronounced and significant' divergence from his duties."[150] Moreover, the court found workers' comp appropriate because the injured employee's act was neither "premeditated, deliberate, extreme, and inherently of a high-risk nature,"[151] nor did it cease to further his employer's business interests.[152] These fact-intensive standards for determining whether an injury occurred in the course and scope of employment, which vary slightly from state to state, indicate how much

142. SZYMENDERA, *supra* note 129, at 16.

143. *Id.* at 13.

144. *See, e.g.*, 1912 Hoover House Rest. v. Workers' Comp. Appeal Bd. (Soverns), 103 A.3d 441 (Pa. Commw. Ct. 2014); Wait v. Travelers Indem. Co. of Ill., 240 S.W.3d 220, 225 (Tenn. 2007).

145. *Hoover House*, 103 A.3d at 445–50.

146. *Id.* at 447 (adopting language from The Baby's Room v. Workers' Comp. Appeal Bd. (Stairs), 860 A.2d 200 (Pa. Commw. Ct. 2004)).

147. *Id.* at 448 (citing The Baby's Room, 860 A.2d 2000).

148. *Id.* at 447 (citing Trigon Holdings v. Workers' Comp. Appeal Bd. (Griffith), 74 A.3d 359, 361 (Pa. Commw. Ct. 2013)).

149. *See id.* at 448, 450 (quoting *The Baby's Room*, 860 A.2d at 202).

150. *See* 1912 Hoover House Rest. v. Workers' Comp. Appeal Bd. (Soverns), 103 A.3d 441, 447 (Pa. Commw. Ct. 2014) (quoting *Trigon Holdings*, 74 A.3d at 364–65).

151. *Id.* at 449 (quoting Penn State Univ. v. Workers' Comp. Appeal Bd. (Smith), 15 A.3d 949, 954 (Pa. Commw. Ct. 2011)).

152. *Id.* at 447.

costlier litigating such matters through common-law torts in the first instance would be.

Workers' comp is not designed to make the injured worker whole. While medical costs are covered in full, disability benefits only replace part of the wages that the worker lost due to their reduced earning capacity. Thus, even if the worker receives total disability benefits, those benefits are usually capped at two-thirds of their pre-disability wages.[153] States calculate partial disability benefits as a percentage of total disability benefits.[154] Benefits can be temporary or permanent. However, permanent benefits are not necessarily paid until the end of the worker's life (or when they would retire). Several partial permanent disabilities are calculated according to the state's "meat chart." Formulas vary, but generally a lost body part is unceremoniously converted into an equivalent number of work weeks and multiplied with the average weekly wage.[155] In 2015, ProPublica published an interactive report that allowed individuals to calculate how much different limbs are "worth" in each state.[156] A hand in Alabama is compensated at $37,400. In Nevada, it is compensated at $738,967.[157]

The funding for workers' comp insurance comes from employers, who deduct a percentage of their payroll. Numbers show that workers' comp costs in 2017 were $97.4 billion, or $1.25 per $100 in covered payroll.[158] However, research suggests that, while workers' comp is technically free to employees, employers have shifted those costs to them through lower wages.[159] Moreover, workers who get injured through no fault of their own incur the indirect cost of the inevitable pay cut that comes with workers' comp benefits.

These variations among state regimes exist because workers' comp runs almost entirely without federal supervision or coordination. The preemption provision of the federal Employee Retirement Income Security Act

153. SZYMENDERA, *supra* note 129, at 13.

154. For example, if the employee is 50 percent disabled, they receive 50 percent of what the total disability benefits would be, (*i.e.,* a maximum of *one third* of their pre-disability wages). *See id.*

155. For a detailed summary of all state formulas, see Elaine Weiss, Griffin Murphy & Leslie I. Boden, *Workers' Compensation: Benefits, Costs, and Coverage (2017 Data)*, NAT'L ACAD. OF SOC. INS. 77–82 (2019) [hereinafter *NASI Report*], https://www.nasi.org/sites/default/files/nasiRptWkrsComp201710_31%20final(1).pdf [https://perma.cc/83QD-BMHL].

156. Michael Grabell & Howard Berkes, *How Much Is Your Arm Worth? Depends on Where You Work*, PROPUBLICA (Mar. 5, 2015), https://www.propublica.org/article/how-much-is-your-arm-worth-depends-where-you-work [https://perma.cc/3PTA-MLDA].

157. Lena Groeger & Michael Grabell, *Workers' Comp Benefits: How Much Is a Limb Worth?*, PROPUBLICA (Feb. 27, 2015), https://projects.propublica.org/graphics/workers-compensation-benefits-by-limb [https://perma.cc/CE2R-W9AL]. The national average is $144,930. *Id.*

158. *National Academy of Social Insurance Report*, *supra* note 155, at 2.

159. *See* Jonathan Gruber & Alan B. Krueger, *The Incidence of Mandated Employer-Provided Insurance: Lessons from Workers' Compensation Insurance*, *in* 5 TAX POLY & THE ECON. 139 (David Bradford ed. 1991) (arguing that employers shifted "a substantial portion of the costs" of workers' compensation to the employees through lower wages).

(ERISA)[160] rarely reaches workers' comp scenarios because ERISA's regulatory focus is on employer-provided benefit plans.[161] But federal legislative efforts intending to more directly regulate workers' compensation regimes failed to become law. When the National Commission of State Workmens' Compensation Laws issued a report in 1972 calling for substantial coordination and federal supervision,[162] bills that would implement these recommendations were soon introduced in the House and Senate.[163] However, neither bill passed, and since then workers' comp schemes have evolved along their own paths in the states.[164]

But while federal coordination would likely have improved some benefits for workers as a whole, its lack may have been a boon for the undocumented workers among them. In the early 2000s, proponents of curtailing undocumented workers' rights sought to extend *Hoffman*'s ruling on backpay for NLRA violations to the workers' comp context.[165] As the next section will show, this effort halted because state courts easily rejected the preemption arguments on which it was based.

B. State Courts' Refusal to Find Preemption After Hoffman*, and Two Exceptions*

1. States Refusing to Find Preemption

Since the Supreme Court's *Hoffman* decision, at least twenty-two state courts have faced the question of whether IRCA preempted undocumented workers from receiving workers' comp benefits, and one had faced it before. Twenty-one state courts found no preemption, while two found partial preemption. For instance, in 2011, the Kentucky Supreme Court in *Abel Verdon Construction v. Rivera* held that *Hoffman*'s reading of IRCA did not preempt awarding benefits to undocumented workers under Kentucky's workers' comp statute.[166] The statute defined an employee as "[e]very person, . . . whether lawfully or unlawfully employed, in the service of an employer."[167] The employer conceded that Miguel Rivera was covered by the terms of the state statute but argued that the law was federally preempted

160. 29 U.S.C. § 1144 (2018).

161. *See, e.g.*, Salus v. GTE Directories Serv. Corp., 104 F.3d 131, 135 (7th Cir. 1997) (explaining that, to show an interference with her ERISA rights, employee must either provide direct evidence or prevail under the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

162. *See* NAT'L COMM'N ON STATE WORKMEN'S COMP. LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 117–19 (1972).

163. *See* S. 2008, 93d Cong. (1973); H.R. 8771, 93d Cong. (1973).

164. SZYMENDERA, *supra* note 129, at 20–21.

165. Correales, *supra* note 7, at 105.

166. Abel Verdon Constr. v. Rivera, 348 S.W.3d 749, 754–56 (Ky. 2011).

167. *Id.* at 752 (citing KY. REV. STAT. ANN. § 342.640(1) (West 2011)).

under *Hoffman*'s reading of IRCA.[168] The court rejected the claim after conducting a standard preemption analysis, finding that there was no preemption, whether expressly stated or implied by the statute.[169] Starting from the observation that IRCA neither expressly preempts state worker's comp for undocumented workers in its text, nor does federal law solely occupy the field,[170] the court went on to reject the argument that the state law was in direct conflict with the federal regime.[171] Similarly, the Kentucky statute did not pose an obstacle to achieving federal regulatory goals, because compensation under the statute was not triggered for a "termination of an employment."[172] Lastly, the *Rivera* court pointed out that the Kentucky statute was owed a presumption against preemption because its workers' comp scheme was enacted under the state's traditional police powers, and that caselaw in other jurisdictions supported its reasoning.[173] State high and appellate courts' preemption analyses have been similar across in many states, such as Florida,[174] Georgia,[175] Maryland,[176] Illinois,[177] and Tennessee.[178] Other states have declined to find preemption on more

168. *Id.* at 752–53.

169. *Id.* at 754–55.

170. *Id.*

171. *Id.* at 755.

172. *Id.* at 754–55.

173. *Id.*

174. Safeharbor Emp. Servs. I Inc. v. Cinto Velazquez, 860 So. 2d 984, 986 (Fla. Dist. Ct. App. 2003) (finding IRCA created no express, field, or conflict preemption of state workers' compensation scheme and that "workers' compensation is an area where states have authority to regulate under their police powers").

175. Cont'l PET Techs., Inc., v. Palacias, 604 S.E.2d 627, 629–31 (Ga. Ct. App. 2004) (finding the plain meaning of the NLRA's term "employee" did not exclude undocumented workers and concluding that "the [IRCA] does not preempt, either expressly or impliedly, the [traditional] authority of the states to award workers' compensation benefits to undocumented aliens").

176. Design Kitchen & Baths v. Lagos, 882 A.2d 817, 829–30 (Md. 2005) (holding that IRCA did not expressly preempt state workers' compensation statute, and that *Hoffman*'s reading of IRCA did not raise implied preemption issues).

177. Econ. Packing Co. v. Ill. Workers' Comp. Comm'n, 901 N.E.2d 915, 922–23 (Ill. App. Ct. 2008) ("The PTD benefits awarded in this case are fundamentally distinct from the back pay at issue in *Hoffman*. . . . Based on the foregoing analysis, we find that the IRCA does not preempt, either expressly or implicitly, an award of PTD benefits to an undocumented alien. In so concluding, we note that courts in other jurisdictions have almost uniformly held that the IRCA does not preclude undocumented aliens from receiving workers' compensation benefits.") (collecting cases).

178. Sandoval v. Williamson, No. M2018-01148-SC-R3-WC, 2019 WL 1411217, at *2–3 (Tenn. Workers Comp. Panel Mar. 28, 2019) (finding there was no express, field, or conflict preemption). It is also noteworthy that, as a starting matter, only Arizona excludes undocumented workers from the protections of its workers' compensation statute. Gamez v. Indus. Comm'n of Ariz., 141 P.3d 794, 796 (Ariz. Ct. App. 2006) (Barker, J., specially concurring) (citing ARIZ. REV. STAT. ANN. § 23-901(6)(b) (Supp. 2005)). Equally noteworthy is that Virginia's and Wyoming's legislatures amended their workers' compensation statutes after *Hoffman* to include undocumented workers and overrule existing caselaw in their states. *See* Marblex Design Int'l, Inc. v. Stevens, 678 S.E.2d 276, 279 (Va. Ct. App. 2009) (recognizing statutory supersession of *Granados v. Windson Dev. Corp.*, 509 S.E.2d 290 (Va. 1999) (excluding undocumented workers from coverage)); *In re Arellano*, 2015 WY 21, 344 P.3d 249, 253 n.3

summary grounds,[179] while others found IRCA inapplicable even before *Hoffman* was handed down.[180]

2. Two Exceptions

Only two state courts have found that IRCA preempts monetary damages for undocumented workers under state workers' comp statutes: Nevada[181] and California.[182] Neither decision turned on *Hoffman*'s reading of IRCA, but instead on an independent analysis of the state statute.[183] Both courts faced narrower and more technical questions than those involved in the above cases. In *Tarango v. State Industry Insurance System*, the Nevada Supreme Court dealt with a workers' comp statute that created a so-called "priority scheme": injured workers who received partial disability benefits were to return to their prior jobs in a reduced capacity or find work at a similar employer.[184] If neither was possible, the worker was to receive vocational training.[185] In Angel Tarango's case, the state insurer discovered his unauthorized status while seeking to place Tarango with an employer.[186] The state insurer thus could not return Tarango to work without causing an employer to violate IRCA.[187] The narrow question before the Nevada Supreme Court was whether Tarango could receive vocational training in lieu of receiving employment.[188] The court said no. It held that, where the statute triggers vocational training for a worker only because his unlawful

(Wyo. 2015) (recognizing statutory supersession of *Felix v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 986 P.2d 161 (Wyo. 1999) (excluding undocumented workers from coverage)).

179. Minnesota: Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 329, 331 (Minn. 2003) ("As written, the IRCA does not prohibit unauthorized aliens from receiving state workers' compensation benefits generally or temporary total disability benefits conditioned on a diligent job search specifically. . . . Because the IRCA does not preclude payment of temporary total disability benefits and the language of [the state statute] is clear, we do not have occasion to consider the policy question [raised by *Hoffman*]."); Pennsylvania: Reinforced Earth Co. v. Workers' Comp. Appeal Bd. (Astudillo), 810 A.2d 99 (Pa. 2002).

180. *See, e.g.*, Dowling v. Slotnik, 712 A.2d 396, 405 (Conn. 1998) ("[T]he Immigration Reform Act does not preempt, either expressly or impliedly, the authority of the states to award workers' compensation benefits to undocumented aliens."); Ruiz v. Belk Masonry Co., 559 S.E.2d 249 (N.C. Ct. App. 2002).

181. Tarango v. State Indus. Ins. Sys., 25 P.3d 175, 183 (Nev. 2001).

182. Salas v. Sierra Chem. Co., 327 P.3d 797, 803–09 (Cal. 2014).

183. *Salas* explicitly distinguished *Hoffman*. *Id.* at 803–05; *see also id.* at 804 ("California's [Fair Employment and Housing Act] differs significantly from the NLRA . . . . California's legislature sought to safeguard the rights of all persons to seek, obtain, and hold employment . . . ."). The Nevada high court decided *Tarango* shortly before *Hoffman*, but it was aware of the D.C. Circuit's ruling in the case. 25 P.3d at 187 n.28 (Maupin, C.J., concurring and dissenting).

184. *Tarango*, 25 P.3d at 179 (majority opinion) (citing NEV. REV. STAT. § 616C.530 (2000)).

185. *Id.* (citing NEV. REV. STAT. § 616C.530 (2000)).

186. *Id.* at 177.

187. *Id.* at 180.

188. *See id.*

immigration status makes him ineligible for higher-priority services, awarding vocational training is preempted by IRCA.[189]

The Nevada court was explicit, however, that it would only bar a remedy where the law unequivocally required it. The court thus did not overturn the permanent partial disability benefits that the workers' comp board had awarded Tarango before the insurer discovered his undocumented status.[190] The court drew the line at the obvious IRCA violation of knowingly hiring a worker without documentation, while awarding monetary benefits for which no such documentation was required. Despite preemption by IRCA, the Nevada court relied on a very different set of statutory assumptions than the *Hoffman* majority did in its reading of the NLRA and IRCA. It did not treat Tarango as a criminal whose illegal entrance had tainted his continued presence. Rather, the Nevada high court sought to limit IRCA's effect as much as it could.

In *Salas v. Sierra Chemical Co.*, decided by the California Supreme Court, Vicente Salas sought backpay and other damages for his employer's failure to reasonably accommodate his disability, and for its retaliatory refusal to rehire him after he had filed workers' comp claims.[191] Salas was a seasonal worker in California who had injured his back on the job.[192] After a seasonal layoff, his employer refused to rehire him because hiring an injured worker was against company policy.[193] Salas thus brought claims under California's Fair Employment and Housing Act (FEHA). The California legislature had enacted FEHA shortly after the U.S. Supreme Court had handed down *Hoffman* to ensure employee protections remained available to all workers "regardless of immigration status."[194] Salas, an undocumented worker, filed a motion in limine informing the court that he planned to invoke his Fifth Amendment privilege against self-incrimination if he were asked about his immigration status.[195] This motion prompted Sierra Chemicals to investigate Salas's immigration status and subsequently find out that he was undocumented. They thus argued that IRCA preempted FEHA's protection of undocumented workers.[196] The California high court had to decide whether it would apply *Hoffman*'s reasoning to Salas's FEHA claim: Were backpay

189. *Id.* at 180–81.

190. *Id.* at 183.

191. Salas v. Sierra Chem. Co., 327 P.3d 797 (Cal. 2014).

192. *Id.* at 801.

193. *Id.*

194. *See id.* at 803 ("The California Legislature enacted Senate Bill No. 1818 in 2002 in response to the United States Supreme Court's decision earlier the same year in *Hoffman Plastic*.") (case citation omitted) (citing CAL. GOV'T CODE § 7285(a) (West 2012) and S.B. 1818, 2001–02 Sess. (Cal. 2002)).

195. *Id.* at 802. Salas acknowledged producing fraudulent documents in obtaining employment was a crime. *Id.*

196. *Id.* at 802–03.

awards unavailable to an undocumented worker for work he had not performed, even if his layoff violated a labor statute?

The California Supreme Court split the difference between Salas's and Sierra Chemical's positions. On the one hand, IRCA's prohibition against knowingly employing unauthorized workers preempted paying out benefits or damages where the award determination required valid work authorization. On the other hand, IRCA did not preempt backpay awards for the period *before* the unlawful status is discovered.[197] For the pre-discovery period, the California Supreme Court reasoned, there was no conflict between FEHA and IRCA's prohibition against *knowingly* hiring or continuing to hire undocumented workers.[198] In reaching this conclusion, the *Salas* court rejected arguments based on after-acquired evidence and the unclean hands doctrine.[199] Neither the fact that the employer later found evidence of Salas's ineligibility, nor that Salas's unauthorized status "tainted" the employment relationship from the start, was convincing to the court.

The courts' grappling with *Hoffman*'s reasoning in *Tarango* and *Salas* provide examples of state law regimes that, while denying undocumented workers certain labor rights due to potential conflicts with federal immigration law, nonetheless adhere to very different conceptual and normative commitments than the *Hoffman* majority. Both take the moment of discovery as the cutoff point, not the moment when the worker is discharged. Moreover, any benefits awarded before the unauthorized status was discovered would stand, even if payments for that award extend past the moment of discovery. In other words, the Nevada and California high courts only cut off benefits to undocumented workers where it is impossible to do otherwise. Even though the *Hoffman* majority had repudiated the NLRB for reconciling IRCA and the NLRA,[200] the California and Nevada courts strove to reconcile their statutory schemes with IRCA wherever possible.[201] Under these readings, the labor statutes at issue reflected a policy decision that employers and state insurers were gatekeepers of the labor market and that unauthorized workers were contributing members for as long as their status was not revealed and were normatively deserving of those benefits. These decisions reflect the broader conceptual and normative commitments state

197. *Id.* at 806–07.

198. *Id.* at 807–08.

199. *Id.* at 809–12.

200. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149 (2002).

201. *See* Tarango v. State Indus. Ins. Sys., 25 P.3d 175, 178 (Nev. 2001) ("[T]he issue before this court is not whether Tarango can receive workers' compensation under [Nevada's] laws; rather, we must determine whether an injured undocumented worker's access extends to the full depths of the workers' compensation scheme."); *Salas*, 327 P.3d at 806 ("This [preemption] inquiry requires us to distinguish here between (1) the period dating from the occurrence of the employer's alleged wrongful act until the employer's discovery of the employee's ineligibility under federal immigration law to work in the United States . . . and (2) the period after the employer's discovery of that ineligibility.").

workers' comp schemes, commitments that I argue ultimately repudiate the underlying commitments of *Hoffman*.

C. The States' Conceptual Choice: The Undocumented Worker as a Contributing Member

State workers' comp schemes overwhelmingly stand for the conceptual choice that undocumented workers are members of the labor market regardless of their unlawful entry. The New Mexico Supreme Court in *Gonzalez* explicitly rejected the labor market entry fiction when it faulted the court below for "turn[ing] a blind eye to the reality of undocumented workers."[202] Just "because [a] [w]orker is not allowed to work," the law cannot assume that he "cannot work, [and therefore] does not work."[203] Instead, undocumented workers are part of the labor market. As the concurrence makes even clearer, "[t]he reality is that undocumented workers are part of the history of New Mexico, having contributed the fruits of their labor to improve our economy and fill a void in the labor market."[204]

Similar reasoning drove the Arkansas Court of Appeals decision in *Packers Sanitation Services v. Quintanilla*.[205] There, the court squarely held that undocumented workers are eligible for workers' comp even if the employee's undocumented status is known at the time of filing for benefits.[206] In Cecilia Quintanilla's case, her status was revealed via the filing of her compensation claim, which led to her firing.[207] But even though "[t]here is no dispute that Cecilia assumed a fictitious name and Social Security card to gain employment at Packers, and this court does not condone these actions in the slightest," the court found that there was no changing that "Cecilia was performing services for Packers and receiving compensation for it."[208] And since "[s]he was fired before the period of her disability ended [and] did not leave voluntarily, she is entitled to temporary total-disability benefits for the duration of that disability."[209] The Arkansas court—which mentioned neither IRCA nor *Hoffman*—straightforwardly drew this rationale from the state workers' comp statute, which treated unauthorized and authorized workers as equal contributors to the labor market.[210]

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202. Gonzalez v. Performance Painting, Inc., 303 P.3d 802, 806 (N.M. 2013).

203. *Id.*

204. *Id.* at 810–11 (Chávez, J., concurring).

205. Packers Sanitation Servs. v. Quintanilla, 518 S.W.3d 701, 706–07 (Ark. Ct. App. 2017).

206. *Id.* at 707.

207. *Id.* at 703.

208. *Id.* at 707.

209. *Id.*

210. *Id.* at 705 (citing ARK. CODE ANN. § 11-9-102(9)(A) (2016)). For similar decisions awarding workers' compensation to undocumented workers, see Del. Valley Field Servs. v. Melgar-Ramirez, 61 A.3d 617 (Del. 2013); Asylum Co. v. D.C. Dep't of Emp't Servs., 10 A.3d 619, 625 (D.C. 2010); Dowling v. Slotnik, 712 A.2d 396, 399 (Conn. 1998).

Idaho's Supreme Court reached a similar result in *Marquez v. Pierce Painting*, finding there was "no dispute" that "[t]he plain language of the [Idaho workers' comp statute] establishes that unlawfully employed persons are entitled to workers' compensation coverage."[211] The only remaining question in this case was whether undocumented workers could get benefits in excess of their impairment.[212] There, the court held that undocumented status was a factor to be considered by the Industrial Commission—Idaho's administrative decisionmaker in workers' comp disputes—but was not an automatic bar to benefits.[213]

Tarango and *Salas*, as discussed above, are two cases that are more neutral on the conceptual question of whether undocumented workers are members of the labor market.[214] In both, the cutoff occurred for benefits that were newly awarded after the worker's unlawful status was discovered.[215] The laws in California and Nevada are thus forward-looking when it comes to membership determinations: Past determinations are not disturbed, but when an unauthorized worker has to make a new "entry" under the law, status can no longer be ignored.

The only state workers' comp scheme that does not treat undocumented immigrants as members of the labor market is Arizona's. While *Gamez v. Industrial Commission of Arizona* was resolved on evidentiary grounds, with the court finding that the worker was not permanently impaired,[216] the concurring opinion pointed out that "[u]nder our current legislative scheme, an undocumented immigrant is not an 'employee' for purposes of the Arizona Workers' Compensation Act."[217] This exception nonetheless throws into relief how widely the states agree in their treatment of undocumented workers as members of the labor market, and how uniformly they repudiate *Hoffman*'s rationale to deny backpay for "work not performed, for wages that could not lawfully have been earned" by virtue of that unauthorized status.[218]

D. The States' Normative Choice: The Dignity of the Undocumented Worker for Their Own Sake

State courts broadly agree on their normative stance as well. *Hoffman* not only denied NLRA backpay because the work in question had not been performed, but also because the "job [had been] obtained in the first instance

211. Marquez v. Pierce Painting, 423 P.3d 1011, 1016 (Idaho 2018).

212. *Id.* at 1016–17.

213. *Id.*

214. Tarango v. State Indus. Ins. Sys., 25 P.3d 175, 178 (Nev. 2001); Salas v. Sierra Chem. Co., 327 P.3d 797, 803 (Cal. 2014).

215. *See supra* notes 181–201 and accompanying text.

216. Gamez v. Indus. Comm'n of Ariz., 141 P.3d 794, 796 (Ariz. Ct. App. 2006).

217. *Id.* (Barker, J., specially concurring) (citing ARIZ. REV. STAT. ANN. § 23-901(6)(b) (2005)).

218. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149 (2002).

by a criminal fraud."[219] The initial illegal act tainted the employment relationship through the point of awarding compensation. By contrast, state courts facing a similar question in workers' compensation contexts have broadly rejected the illegal taint theory. For instance, the Iowa Supreme Court in *Staff Management v. Jimenez* agreed that Pascuala Jimenez had entered the employment contract illegally.[220] Yet, the court held that "an employment contract with an undocumented worker does not inherently have an illegal purpose, and it is not void as illegal [i.e., in violation of IRCA] merely because the contract is with an undocumented worker."[221] In distinguishing illegal entry into a contract from an illegal purpose, the Iowa court relied on case law from other jurisdictions, particularly a New York decision which had explained that "[a]n undocumented alien performing construction work is not an outlaw engaged in illegal activity, such as bookmaking or burglary. Rather, the work itself is lawful and legitimate; it simply happens to be work for which the alien is ineligible or disqualified."[222] An undocumented worker performing work, the Iowa and New York courts reasoned, is not so blameworthy for that transgression as to deserve exclusion from the workers' comp scheme.

In *Dowling v. Slotnik*, the Connecticut Supreme Court took a similar position.[223] A detailed inquiry into the legislative intent and underlying policies of the workers' comp statute made it clear to the court that "[v]iolation of statute or commission of a crime does not affect a [worker's] compensation claim where the illegal feature of the conduct was not the causative factor in producing the injury."[224] State courts have thus found a clear normative message embedded in their states' workers' comp schemes: Illegal acts in procuring the employment relationship are not so damning as to preclude protection under the workers' compensation laws.[225]

Even where a state's statutory regime criminalizes or penalizes the undocumented worker's unauthorized entry into an employment contract,

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219. *Id.*

220. Staff Mgmt. v. Jimenez, 839 N.W.2d 640 (Iowa 2013)

221. *Id*. at 651.

222. *Id.* at 651 (quoting Majlinger v. Cassino Contracting Corp., 25 A.D.3d 14, 29 (N.Y. App. Div. 2005)).

223. Dowling v. Slotnik, 712 A.2d 396 (Conn. 1998).

224. *Id.* at 412 (brackets in the original) (internal quotation marks and citation omitted). The *Dowling* majority's normative stance becomes especially clear in contrast with the dissenting opinion's remark that "[p]ursuant to the Immigration and Nationality Act . . . entering into the contract was illegal, the parties committed a criminal act by doing so, and the [employment] contract required the alien to commit [the] criminal act" of working in the United States. *Id.* at 415–16 (McDonald, J., dissenting).

225. *See also* Artiga v. M.A. Patout & Son, 671 So. 2d 1138, 1140 (La. App. Ct. 1996); Mendoza v. Monmouth Recycling Corp., 672 A.2d 221, 248 (N.J. Super. Ct. 1996); Coma Corp. v. Kan. Dep't of Labor, 154 P.3d 1080, 1089–91 (Kan. 2007) (surveying state cases for the proposition that illegal entry into an employment contract generally does not preclude falling under labor statutes' definition of "employee").

some courts still find wiggle room to protect the worker. In *Sanchez v. Eagle Alloy, Inc.*, the Michigan Court of Appeals faced two appeals from the state Worker's Compensation Appellate Commission (WCAC).[226] Michigan's workers' comp statute explicitly specified that using fraudulent work authorization was a crime that disqualified applicants from receiving workers' comp benefits.[227] In each of the two cases, the employer was aware of the worker's undocumented status. They then argued to the magistrate that fraudulent use of another's Social Security cards constituted a disqualifying crime under the Michigan statute.[228] When each case came up to the WCAC, the WCAC awarded worker's comp benefits beyond the discovery of the unlawful status in one and cut off benefits at the termination stage in the other.[229]

Much like the Nevada Supreme Court's decision in *Tarango*[230] and the California Supreme Court's decision in *Salas*,[231] the Michigan Court of Appeals corrected both decisions by awarding benefits up until the moment when the unlawful status was discovered.[232] The court reasoned that "[t]his construction most accurately reflects the two-pronged language of the statute, requiring *not only* the commission of a crime *but also* that the employee is unable to work because of that crime."[233] Notably, the court pointed out that it found *Hoffman*'s reasoning around Jose Castro's criminal violation of the immigration statute "highly instructive," and fashioned a decision that purportedly "accord[ed] with the policy of the federal government as set forth in *Hoffman*."[234] What the Michigan court ignored, however, was that *Hoffman* overturned an NLRB backpay award for the period between the unlawful termination and the discovery of the unlawful status[235]—precisely what the Michigan court allowed. Indeed, the dispositive factor for the Michigan court was that, unlike in *Hoffman*, a crime by itself is not enough. As long as information about the worker's unlawful status is not discovered, Michigan law does not distinguish between the authorized and unauthorized worker, nor does it reach back in time to correct the defect. Even here, the normative stance is more nuanced than in *Hoffman*: An employee's criminal act does not create retroactive penalizing effects.

226. Sanchez v. Eagle Alloy, Inc., 658 N.W.2d 510, 513 (Mich. App. Ct. 2003).

227. *Id.* at 520–21.

228. *Id.* at 513, 520–21 (citing MICH. COMP. LAWS ANN. § 418.361(1) (West 2002)).

229. *Id.* at 513–14.

230. *See supra* notes **Error! Bookmark not defined.**–200 and accompanying text.

231. *See supra* notes 191–201 and accompanying text.

232. *Sanchez*, 658 N.W.2d at 521.

233. *Id.* (emphases added).

234. *Id.* at 519, 521.

235. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 142 (2002).

IV. EXTENSION OF THE THEORY: BACKPAY TO UNDOCUMENTED WORKERS FOR WORK ACTUALLY PERFORMED

State courts' favorable views on undocumented workers are not constrained to workers' comp. Courts have often shielded backpay for work *actually* performed from *Hoffman* preemption challenges. For example, the New York Court of Appeals, which has embraced the worker-friendly rationales discussed in Part III, made no distinction between past and future lost earnings in *Balbuena v. IDR Realty LLC*.[236] In declining a *Hoffman* preemption challenge, the *Balbuena* court stressed that undocumented workers contributed to the labor market and thus should not be treated as criminals,[237] regardless of whether they sued to recover wages for work actually performed or for loss of earning capacity due to injury on the job. Analyzing both remedies under the same framework suggests that state courts share a broader commitment to treating undocumented workers as non-criminal contributors to the labor market, independent of the workers' compensation context.

The set of cases in this area is smaller than the workers' compensation cases discussed above. This is because the Fair Labor Standards Act (FLSA) establishes a federal floor for the minimum hourly wage,[238] overtime pay,[239] child labor standards,[240] and other requirements.[241] States have selectively gone above the federal floor in different areas, but oftentimes they have not.[242] Wage recovery claims thus often arise under federal law, and fewer litigants choose to file in state court. In addition, many such claims never appear in *any* court because minimum wage claims usually first go through an administrative enforcement process, either in the federal Department of Labor or its state equivalents.[243] Nonetheless, state courts that can hear claims

236. Balbuena v. IDR Realty LLC, 845 N.E.2d 1246, 1259 (N.Y. 2006).

237. *See id.* at 1257–58.

238. DAVID H. BRADLEY, CONG. RESEARCH SERV., R43089, THE FEDERAL MINIMUM WAGE: IN BRIEF 1 (2021), https://fas.org/sgp/crs/misc/R43089.pdf [https://perma.cc/6QT8-XEUY].

239. David H. Bradley, Cong. Research Serv., R44138, OVERTIME PROVISIONS IN THE FAIR LABOR STANDARDS ACT (FLSA): FREQUENTLY ASKED QUESTIONS 1 (2016), https://crsreports.congress.gov/product/pdf/R/R44138/4 [https://perma.cc/8BC8-SAA3].

240. CONG. RESEARCH SERV., RL31501, CHILD LABOR IN AMERICA: HISTORY, POLICY, AND LEGISLATIVE ISSUES 1 (2013), https://www.everycrsreport.com/reports/RL31501.html [https://perma.cc/QU9A-FSUN].

241. *See* CONG. RESEARCH SERV., RL34510, THE FAIR LABOR STANDARDS ACT: CONTINUING ISSUES IN THE DEBATE (2008), https://www.everycrsreport.com/reports/RL34510.html [https://perma.cc/TP8Y-DELA] (providing a history on select provisions of the FLSA).

242. *See, e.g.*, U.S. DEP'T OF LABOR WAGE & HOUR DIV., CONSOLIDATED MINIMUM WAGE TABLE, (2021), https://www.dol.gov/agencies/whd/mw-consolidated [https://perma.cc/Q8KA-QWC4].

243. *See, e.g.*, U.S. DEP'T OF LABOR WAGE & HOUR DIV., EMPLOYMENT LAW GUIDE (2019), https://webapps.dol.gov/elaws/elg/minwage.htm#Penalites [https://perma.cc/DV8U-MS9H]; N.Y. DEP'T OF LABOR DIV. OF LABOR STANDARDS, INFORMATION ABOUT FILING A CLAIM (2021), https://dol.ny.gov/system/files/documents/2021/03/ls223.2.pdf [https://perma.cc/T2HF-VRPV].

for unpaid wages under state law have consistently drawn on workers' comp cases and their underlying theories. There are concededly too few cases on point to argue that state courts across the country have affirmatively embraced the "non-criminal contributor" theory in the paid-wage recovery context. However, none of the cases I found conflicted with this theory.

In *Coma Corp. v. Kansas Department of Labor*, the Kansas Supreme Court heard a *Hoffman* preemption challenge to the Kansas Wage Payment Act (KWPA).[244] Cesar Martinez Corral had filed a claim against his employer with the Kansas Department of Labor (KDOL), alleging that Coma had failed to pay him wages he had earned.[245] After the KDOL awarded the requested wages plus interest, the Kansas state trial court partially reversed on the grounds that undocumented workers could not legally enter into employment contracts. In turn, a court could not enforce those contracts under the KWPA.[246] On direct appeal to the Kansas Supreme Court, Coma defended the judgment by arguing that, under *Hoffman*, IRCA preempted state wage payment laws like the KWPA.[247]

The *Coma* court rejected this preemption argument. In so doing, the court explicitly surveyed and relied on state workers' comp cases from a broad range of jurisdictions.[248] Upon concluding its survey, the court explicitly endorsed both the conceptual stance that undocumented workers are contributors to the labor market and the normative stance that undocumented workers are not blameworthy criminals. On the conceptual side, it quoted language that stressed Congress's intent to bar the entry of undocumented workers into the United States, but also noted that Congress refrained from "rendering their [employment] contracts void and thus unjustifiably enriching employers of such alien laborers."[249] On the normative side, the *Coma* court was similarly explicit: "An undocumented alien performing construction work is not an outlaw engaged in illegal activity, such as bookmaking or burglary. Rather, the work itself is lawful and legitimate; it simply happens to be work for which the alien is ineligible or disqualified."[250]

Appellate courts in California and the Michigan Court of Appeals have similarly recognized undocumented workers' rights to recover unpaid wages under their state FLSA equivalents. In *Reyes v. Van Elk, Ltd.*, the California

244. Coma Corp. v. Kan. Dep't of Labor, 154 P.3d 1080, 1083–84 (Kan. 2007).

245. *Id.* at 1082.

246. *Id.*

247. *Id.* at 1084–85.

248. *Id.* at 1085–87 (citing state cases from New York, New Jersey, Maryland, Oklahoma, Florida, Connecticut, Kansas, and California, as well as several federal cases).

249. *See id.* at 1090 (quoting Gates v. Rivers Constr. Co., 515 P.2d 1020, 1023 (Alaska 1973)).

250. *See id.* (quoting Majlinger v. Cassino Contracting Corp., 25 A.D.3d 14, 29 (N.Y. App. Div. 2005)).

appellate court addressed both a *Hoffman* preemption challenge and a claim that *Hoffman* deprived undocumented workers of standing to bring a suit for lost wages.[251] Interestingly, the court rejected both claims on a theory that applied the California statute's policies to undocumented workers without even arguing that undocumented workers, too, fell under those policies.[252] Rather, the court straightforwardly reasoned that *Hoffman* did not preempt the California statute, that the California statute did not discriminate between documented and undocumented workers, and that its protective policies equally applied to both.[253] This line of reasoning goes beyond establishing undocumented workers are labor market contributors and presumptively non-criminal. Instead, it assumes those propositions to be obvious.

The last representative exponent in the trickle of state court cases involving undocumented workers' disputes over earned wages is *Cabrera v. Ekema*.[254] Here, the two plaintiffs, Mayra Cabrera and Norma Portillo, appealed a discovery order that sought to compel disclosure of their social security numbers to ascertain their immigration status.[255] Even though the plaintiffs had brought this case under the federal FLSA, the Court of Appeals of Michigan agreed forcing the two plaintiffs to disclose their immigration status would mainly serve to intimidate them "from exercising their rights" and create a danger of "destroying the[ir] cause of action."[256] The court rejected the *Hoffman* preemption challenge on the theory that there was no conflict between federal immigration policy and state labor laws.[257] The court's overriding concern in holding that disclosing plaintiffs' social security numbers was that it would deter undocumented workers from vindicating their lawful statutory rights.[258]

As noted above, the evidence that state courts treat undocumented workers as non-criminal contributors to the labor market when it comes to recovering wages for work *actually* performed is thin. But this may be due to the logic that if undocumented workers are entitled to equal recovery when it comes to work *not performed*, it is, a fortiori, the case that they should be entitled to equal recovery for work they *actually performed*. Not many

251. Reyes v. Van Elk, Ltd., 56 Cal. Rptr. 3d 68, 70 (Cal. App. Ct. 2007).

252. *See id.* at 73 ("The Legislature has declared that it is the public policy of California 'to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect employers who comply with the law from those who attempt to a gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.'") (citation omitted).

253. *See id.* at 74–76.

254. Cabrera v. Ekema, 695 N.W.2d 78 (Mich. Ct. App. 2005).

255. *Id.* at 79.

256. *Id.* at 79, 82.

257. *Id.* at 82.

258. *Id.* at 83.

employers, in other words, would even think to bring a *Hoffman* preemption challenge in the state wage law context. Be that as it may, the absence of cases advancing a contrary theory is at least corroborating evidence that state courts tend to treat undocumented workers as equally protected (and of similar dignitary status as documented workers) under their state labor laws.

CONCLUSION

Compensating workers who entered the labor market illegally for work they did not actually perform—be it due to unlawful layoffs under labor statutes or because of injuries they incurred at the workplace—is a contentious topic. It implicates thorny questions of incentives, membership, deservingness, and dignity. As this Article has shown, nearly all state workers' comp regimes resolve these questions in favor of undocumented workers, in sharp contrast to the Supreme Court's conceptual and normative stance in *Hoffman*. Workers' comp thus stands as an illustrative example in which the states have exercised their traditional police powers to protect the most vulnerable individuals in their midst.