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MEZONOS, HOFFMAN, AND THE NOTION OF INTENT

Jon L. Dueltgen¹

Abstract:

In Mezonos, the National Labor Relations Board (NLRB) for the first time had the opportunity to factually distinguish from Hoffman Plastics a case where the employer, rather than the employee, violated the Immigration Reform and Control Act. The legislative history and prior case law shows that immigration control is clearly compatible with traditional labor rights, thus the Hoffman majority has no statutory basis for reading the purposes of IRCA as entirely displacing the traditional enforcement of the National Labor Relations Act. As correctly set forth in Hoffman, a plaintiff who has the intent to violate IRCA by providing fraudulent documents should not be rewarded with backpay under the NLRA, but an employer should similarly be held accountable for backpay remedies where the employer, and not the employee, is at fault for violating IRCA and the NLRA.

This paper investigates the motives of employers and undocumented workers, the intent of the Congressional drafters of these two compatible statutes, and analogizes to fault principles in tort and contract law to determine the proper reading of Hoffman.

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Several months after the terrorist attacks of September 11, 2001, the Supreme Court found that since someone using the credentials of Jose Castro had violated the Immigration Reform and Control Act (IRCA) by providing fraudulent papers in his employment application at Hoffman Plastics, he would be ineligible for the central remedy of backpay typically awarded under §10(c) of the National Labor Relations Act (NLRA) for engaging in protected “concerted activities for the purpose of collective bargaining or other mutual aid or protection.”² The case deeply split the Supreme Court justices 5-4, with Justice Breyer writing a vociferous dissent shared by the liberal-leaning members of the Court.³ The majority opinion by Justice Rehnquist, if broadly interpreted, essentially strips away the already limited labor remedies of the 11.2 million unauthorized immigrants living in the United States, or 5.4% of the labor force in 2010.⁴

Before the showdown in *Hoffman Plastics v. NLRB*, the Supreme Court had already resolved the legal dilemma of providing remedies to undocumented workers in *Sure-Tan v. NLRB*, where in “computing backpay, the employees must be deemed ‘unavailable’ for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States” and backpay ““must be conditioned

² *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding that an unauthorized worker using Castro’s papers was foreclosed under IRCA from backpay remedies given his immigration status, despite being terminated for supporting a labor union’s organizing campaign and distributing authorization cards to coworkers, which are protected activities under the NLRA). *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984) (“[T]he Court has repeatedly interpreted this statutory command as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review”). *But cf. National Labor Relations Act*, 29 USCS § 157 et seq (guaranteeing statutory remedies, including backpay and reinstatement, for employees engaging in either union-related or other protected concerted activities under § 7 of the NLRA).

³ *Id.*

⁴ Jeffrey S. Passel & D’Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, available at <http://pewhispanic.org/reports/report.php?ReportID=133>. An empirical or temporal analysis is not useful with regards to pre- and post-Hoffman immigration flows due to the macro-effects of the national U.S. economy compared to Mexico’s, as suggested by the recent peak and decline in light of the recession which began in 2008, and the myriad of other socioeconomic influences in pushing and pulling workers across borders. *Id.*

upon the employees' legal re-admittance to the United States.”⁵ Moreover, the Court affirmed the NLRB's decision to categorize undocumented workers as employees under § 2(3) of the NLRA because it would help effectuate labor, and even immigration, policy. In the words of Justice Breyer, if undocumented workers were not afforded legal protections under the law from intimidation and employer violations of labor law, “there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining.”⁶ However, between *Sure-Tan* and *Hoffman*, Congress enacted IRCA in 1986 to further clamp down on unlawful immigration, focusing on the workplace with the I-9 verification processes and criminal sanctions for non-compliance, but there is no part of the statute written or intended to counteract pre-existing labor and employment statutes.⁷

In light of IRCA, the Supreme Court, when faced with a similar set of facts in *Hoffman*, found the once sound rationale explicated in *Sure-Tan* outmoded. Instead, Justice Rehnquist wrote that the “question presented here [is] better analyzed through a wider lens, focused as it must be on a legal landscape now significantly changed [since the implementation of IRCA],”⁸

⁵ *Sure-Tan*, 467 U.S. at 901 (1984) (“By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided.”); *see also Immigration and Naturalization Act*, 8 USCS. § 1101 et seq (The INA, which is the immigration statute in question in *Sure-Tan*, made it illegal for non-citizens to enter the United States without authorization, but did not make it illegal to find work without documentation.).

⁶ *Id.* at 894 (arguing that authorized workers also have their rights infringed upon by the chilling effect resulting from the non-punishment of labor law violations involving undocumented workers).

⁷ *See Immigration Reform and Control Act*, 8 USCS §§ 1324a, 1324c (imposing sanctions on employers each time they fail to receive and verify documents from workers to ensure that they appear to be genuine and relate to the person presenting them and is permitted to work in the United States, while later amended in 1990 to prohibit fraudulent submission of these documents by employees and added antidiscrimination provisions).

⁸ *Hoffman*, 535 U.S. at 147.

and arguably in a world much changed after the terrorist attacks.⁹ To the extent that IRCA is now considered as part of the nation's counterterrorism strategy, it is under the purview of the Department of Homeland Security, created after 9/11, and the enforcing agency is now ICE (formerly the Immigration and Naturalization Service). Indeed, Ryan McCortney, counsel for the employer, sought to connect the immigration control issue as a matter of national security in oral argument, but realized that the Justices already realized this firsthand when the Supreme Court was evacuated due to an anthrax attack blamed on foreign-born agents.¹⁰ Scholars have harped on this connection, remarking that "the decision in *Hoffman* could hardly be surprising with the oral argument occurring four months after 9/11 and the decision rendered two months later in March 2002."¹¹ In times of war, the Supreme Court has had a challenged history of declaring constitutional what was earlier agreed upon to be impingements on individual rights under the law, especially for those of foreign-origin.¹² By adopting a fault-based rule in *Mezonos*, the

⁹ Catherine Fisk and Michael Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights without Remedies for Undocumented Immigrants*, in *LABOR LAW STORIES* 352, 373 (Laura J. Cooper & Catherine L. Fisk, eds., 2005) (recounting the stories of the parties involved in the *Hoffman* decision).

¹⁰ *Id.*

¹¹ Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737, 750-51 (2003) ("Scalia said that the smart undocumented worker would 'sit at home and eat chocolates' because it was unlawful for him or her to mitigate damages. Besides being out of touch with reality, Scalia's obsessions with the 'illegal alien's' transgressions and the 'massive problem of illegal immigration' blind him and the rest of the Court majority to the violations of the 'illegal employer.' The social construction of the unauthorized worker as a born lawbreaker runs deep through judicial language and contemporary politics."); see also *Who Goes There?: The War on Terrorism May Both Hinder, and Help, Mexican Immigrants*, *ECONOMIST*, Jan. 19, 2002, at 28 (After 9/11, "[t]he most significant change is probably in America's willingness to turn a blind eye to the contradictions between its economic needs and its immigration laws.").

¹² See e.g. *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding as a constitutional exercise of executive power the internment of Japanese-Americans during World War II, but also finding that racially discriminatory laws deserve strict scrutiny review; this raises the question of whether IRCA disproportionately affects particular racial or national origin groups, a concern Congress acknowledged when later amending IRCA to prohibit discrimination on these grounds).

NLRB could have limited the fallout from *Hoffman* for undocumented workers, authorized workers and law-abiding employers alike.

The Administrative Law Judge (ALJ) in *Mezonos Maven Bakery* factually distinguished cases where the employee did not actually violate IRCA in the exercise of their traditional labor rights.¹³ After almost five years, the Board finally decided to reverse ALJ Davis's findings in *Mezonos* that *Hoffman* required a fault analysis, particularly for the doubly-liable employer, and rather chose to rescind backpay for the undocumented worker who did not actually violate IRCA. It is important to note the political context for this decision and its delay. From 2007 to 2009, the Board's decisions were legally insignificant because the then two-person board operated without a quorum due to partisan wrangling over nominees.¹⁴ In 2011, House Republicans had 176 votes to entirely defund the NLRB out of operation, which was an unprecedented poignant attack on an independent agency.¹⁵ Additionally, the intense political scrutiny of the Board's adjudication of Boeing allegedly moving a plant due to antiunion animus and the adoption of new rules to expedite unionization elections became the fodder for a right-wing assault on Board's operations.¹⁶ This political onslaught doubtlessly shadowed the Board's

¹³ *Mezonos Maven Bakery, Inc.*, 2011 NLRB LEXIS 422 (Aug. 9, 2011) (reversing ALJ Davis's decision from *Hoffman* where he factually distinguished a case where an employer, rather than employee, violates IRCA by not bothering with I-9 verification, presumably knowing that they were undocumented, and then terminating the workers at a Brooklyn bakery); see also *Handy Fat Trading*, 2007 NLRB LEXIS 327 (Aug. 14, 2007), *Majestic Rest. & Buffet*, 2009 NLRB LEXIS 277 (Sept. 4, 2009) (Based on similar facts to *Mezonos*, this detailed decision by ALJ Fish did not hear from a Board appeal because the employer had since gone out of business.).

¹⁴ See *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010) (finding that two years of a two-person Board membership did not suffice the requirements for a quorum, while Justice Kennedy writing for the dissent argued that Congress surely did not intend for a defunct Board either).

¹⁵ See Melanie Trottman, *NLRB Defunding Fails But Agency Remains GOP Target*, available at <http://blogs.wsj.com/washwire/2011/02/17/nlr-defunding-fails-but-agency-remains-gop-target> (commenting on how the GOP continues to target the NLRB).

¹⁶ See Felicia Sonmez, *House passes bill to limit NLRB authority, in battle over Boeing ruling*, available at http://www.washingtonpost.com/blogs/2chambers/post/house-passes-bill-to-limit-nlr-authority-in-battle-over-boeing-ruling/2011/09/15/gIQAtL9LVK_blog.html (summarizing a Republican spearheaded effort to legislatively preempt the outcome of an NLRB adjudication on Boeing's relocation of a factory allegedly based on antiunion

decision to shrink away from a view which would be seen as defending undocumented workers at the expense of American workers. Notwithstanding, outgoing Chairwoman Liebman and incoming Chairman Pearce concurred in an “unusual critique”¹⁷ of *Hoffman*, protesting the peculiar result of the Board’s majority opinion due to the *Hoffman* precedent.

By “widening the lens” of the Supreme Court’s review beyond the holding in *Sure-Tan*, the majority in *Hoffman* sought to send a strong signal against unauthorized immigration and punish Castro’s criminal behavior in fraudulently submitting his working papers to the employer.¹⁸ At some point, IRCA made Castro’s actions unlawful, but the question arises of whether the Court’s decision should be construed only to its facts, or if the broad-sweeping dictum that garnishes Justice Rehnquist’s decision should be understood as the holding of the case. After all, in 1990, “IRCA made it unlawful for undocumented workers to knowingly use fraudulent documents to obtain employment... [but] specifically did not make it unlawful for an undocumented worker who did not use fraudulent documents to work or accept employment.”¹⁹ The Board erred in not distinguishing *Mezonos* based on its facts, where the employer, rather than the employee, is at fault for violating IRCA. When future courts confront an instance of an

animus, though this case was later settled through a new collective bargaining agreement); *see also* Jeffrey Hirsch, *Hayes To Quit To Block Election Rules?* http://lawprofessors.typepad.com/laborprof_blog/ (noting the rumors that Member Hayes would resign in order to block the election rule changes such as to create an inadequate quorum), Chris Isidore, *NLRB could be shut down in new year*, available at <http://money.cnn.com/2011/12/23/news/economy/nlrb/> (describing the real possibility that Republicans may block recess appointments to the Board, such that it would again lack an adequate quorum to function).

¹⁷ *Mezonos*, 2011 NLRB LEXIS 422, at *17. It is likely that the substance of the NLRB’s concurrence would have been the source of a majority decision but for the political turmoil and the fact that there were only three members sitting for the case.

¹⁸ *See supra* text accompanying note 8.

¹⁹ Kati L. Griffith, Case Comment, *A Supreme Stretch: The Supremacy Clause in the Wake of IRCA and Hoffman Plastic Compounds*, 41 CORNELL INTL L.J. 127, 129 (2008). *But cf. Hoffman Plastics Compounds, Inc.*, 1991 NLRB LEXIS 372, *16 (Feb. 28, 1991) (The original fact-finder found that the person who assumed Castro’s identity was “hired in May 1988,” before IRCA specifically criminalized the fraudulent submission of documents for employment.).

employee not actually violating IRCA, they should view it as reconcilable with *Hoffman* because *Hoffman* should be controlled by the fact that Castro fraudulently submitted papers (in violation of IRCA as it is currently written). This remains a critical question facing labor and immigration law practitioners, and a question that will continue to confront the courts in various labor and employment statutes.²⁰

THE STATUTORY PURPOSES OF THE NLRA AND IRCA

In determining that *Hoffman* should be limited to its critical facts, it is important to evaluate the comparative purposes of IRCA and the NLRA, and whether they are compatible as a broader comprehensive immigration control scheme in the workplace. In many respects, one's answer to this question colors whether one would side with the majority or the dissent in *Hoffman*.²¹ However, a fault-based rule, which does not conflict with the majority's holding and addresses the dissent's concerns, would align the goals and enforcement of national immigration and labor policy. Furthermore, a rule that better connotes liability with fault is morally superior and has a strong basis in common law doctrines from tort and contract law. Finally, the outcome of this discussion will be applied to the recent *Mezonos* decision, where the NLRB essentially rejected the proposed fault-based rule.

Enacted during the Great Depression, Senator Robert Wagner sponsored the NLRA to empower workers with rights and privileges in the workplace in order to promote the flow of

²⁰ Cf. *Mezonos Maven Bakery, Inc.*, 2006 NLRB LEXIS 491, *52 n. 13 (N.L.R.B., Nov. 1, 2006) (“[E]very case citing *Hoffman* since it was rendered has either distinguished itself from it or has limited it greatly.”) (citing *Cano v. Mallory Management*, 760 N.Y.S. 2d 816, 818 (N.Y.S.C. 2003)); see also *Zavala v. Wal-Mart Stores*, 393 F.Supp. 2d 295, 321-324 (D.N.J. 2005); *Singh v. Jutla*, 214 F.Supp 2d 1056, 1061-1062 (N.D. CA 2002); *Zeng Liu v. Donna Karan Intl., Inc.*, 207 F.Supp 2d 191 (S.D.N.Y. 2002); *Balbuena v. IDR Realty LLC*, 6 N.Y. 3d 338, 350-360, 845 N.E.2d 1246, 812 N.Y.S.2d 416 (Ct. Appeals 2006).

²¹ See Fisk and Wishnie, *supra* note 9, at 382 (“[T]he Court faced a choice between reading the labor and immigration laws as contradictory or, as the legislative history of IRCA seemed to indicate, as part of a comprehensive congressional scheme to protect wage levels in the U.S. while diminishing the incentive for outlaw employers to prefer unauthorized immigrants to legal workers.”).

commerce.²² Unlike any other piece of New Deal legislation, the NLRA endowed mostly collective, rather than individual, rights in a “process under which firms and their employees could define their own rights and obligations . . . [and] in which workers would have to channel their efforts into a collective voice in order to advance their interests.”²³ Under this landmark statute, the NLRB is the independent agency charged with investigating and enforcing mostly violations of §7 employee rights before the agency’s impartial ALJs, whose decisions can be appealed to a five-member Board that is nominated by the President and confirmed by the Senate.²⁴ Central to exercising these collective rights is that employees have “full freedom of association or actual liberty of contract” and their rights to “organize and bargain collectively” must be protected and remedied by federal law.²⁵

In pursuing these aims and weighing them against the interests of immigration control, the Court already determined in *Sure-Tan* that the INA and NLRA are “reconcilable”:

Application of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.²⁶

²² *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 1 (1937) (“The National Labor Relations Act is an exercise of the power of Congress to protect interstate commerce from injuries caused by industrial strife,” which helped mark the turning point of the Supreme Court’s decisions in finally upholding New Deal legislation as constitutional under the Commerce Clause.).

²³ See Lauren Cooper & Michael Wishnie, *supra* note 9, at 1 (“Workers could gain substantive rights under the NLRA only by joining together in labor organizations and using their collective economic power to persuade employers to grant employees’ rights in collective bargaining agreements.”).

²⁴ See *National Labor Relations Act*, 29 USCS § 157.

²⁵ *Id.*

²⁶ *Sure-Tan*, 467 U.S. at 893-94.

The question arises of whether the adoption of IRCA in 1986 prioritized immigration control over other statutory objectives. In *Hoffman*, the majority’s decision to toss out the rationale explicated in *Sure-Tan* indicated that the Court believed immigration concerns trumped labor rights. To correctly determine the answer, it is useful to investigate how IRCA compared to the INA and what the legislature intended to change in pre-existing labor law through IRCA’s implementation.

In addition to providing amnesty for already present undocumented workers and boosting border patrols, IRCA was focused on limiting the “employment magnet”²⁷ of the United States by regulating employers such that they would have to verify employment authorization using I-9 forms, including criminal sanctions for non-compliance.²⁸ Cognizant of the strong employer pull-factor for migrants, Congress purposefully implemented “employer sanctions” in IRCA as a “deliberate legislative choice that grew out of many years of congressional studies and commissions and the recognition that Congress could not hope to influence the supply of undocumented workers.”²⁹ Due to the inadequacies of the INA in regulating employer demand for undocumented workers, Congress fully intended to shift the burden to the employer in complying with immigration laws after IRCA because employers were in the best position to be deputized given their relative information and agency costs. Although the *Hoffman* majority

²⁷ *Hoffman Plastic Compounds, Inc. v. NLRB*, 208 F.3d 229, 240 (D.C. Cir. 2000) (When the Court of Appeals ruled for Castro, it noted in the legislative history that the statute appropriated funds to the Department of Labor ““in order to deter the employment of unauthorized aliens and remove the economic incentives for employers to exploit and use such aliens.”” (quoting Pub. L. No. 99-603, § 111(d), 100 Stat. 3359 (1986))).

²⁸ See 8 USCS § 1324a (“[Violators] shall be fined not more than \$3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.”).

²⁹ See Fisk and Wishnie, *supra* note 9, at 358-59 (citing Brief *Amici Curiae* of ACLU et al., No. 00-1595, 2001 WL 1631648)(“Employer organizations such as the U.S. Chamber of Commerce opposed the employer sanctions provisions as a costly, burdensome, and inefficient strategy to compel the private sector to enforce public immigration laws.... IRCA did not create penalties for unauthorized workers who accepted employment; instead, Congress chose a scheme of civil and criminal penalties for employers who knowingly hired or employed them.”).

correctly concluded that this would make the employment relationship founded on someone's illegal act, the congressional intent here was limited to punishing rogue employers (and later amended to punish undocumented workers who committed fraud in acquiring their job, like Jose Castro), but not employees for generally seeking employment.

When enforcing the Board's decision in *Hoffman*, the D.C. Court of Appeals cited a House Education and Labor Committee Report in the congressional record indicating that IRCA should not impinge upon pre-existing labor law or standards and that IRCA was in a sense a codification of the majority's rationale in *Sure-Tan* about avoiding a race to the bottom:

No provision of the law should 'limit the powers of State or Federal labor standards agencies such as the Occupational Safety and Health Administration, the Wage and Hour Division of the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, or Labor arbitrators, in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.³⁰

Nevertheless, when this legislative history was raised again by Justice Breyer in his dissent, Justice Rehnquist dismissed it as a "slender reed," which in the majority's view "showed only that Congress endorsed the *Sure-Tan* holding that undocumented aliens are employees, and said nothing about the Board's authority to award backpay."³¹ In other words, Justice Rehnquist accepted that undocumented workers remain § 2(3) employees as defined under the NLRA and as interpreted in *Sure-Tan*, but these very workers would not be entitled to the legal protections

³⁰ *Hoffman*, 208 F.3d at 239-40 (quoting H.R. Rep. No. 99-682(II) at 8-9 (1986), reprinted in 1986 U.S.C.C.A.N. 5758).

³¹ See Fisk and Wishnie, *supra* note 9, at 382; see also 535 U.S. at 150 (majority opinion). *But cf. id.* at 155 (Breyer, J., dissenting) ("For one thing, 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 towards the United States." (quoting H. R. Rep. No. 99-682, pt. 1, p. 45 (1986))).

of an “employee” as long as they were in violation of IRCA during their employment.³² In eliminating the Board’s critical remedy of backpay, the lackluster relief of notice-posting and unlikely reinstatement guts the legal significance of the title “employee” for this subclass of workers.

The *Hoffman* decision was emblematic of two divergent views on the immigration-control and labor rights dilemma. In sum, “the Court believes it is necessary to do so in order to vindicate what it sees as conflicting immigration law policies” whereas the dissent believes that this “implicit assumption” that the two statutes are at cross-purposes is simply “not justified.”³³ Statutory interpretation canon has resolved that “[w]hen two statutes appear to be in conflict they should be construed in a harmonious manner if at all possible,” and “[i]f there is a question as to whether the statutes are in conflict with one another, the intent of the legislature will be looked at if it is possible.”³⁴ Here, the legislative history clearly sought a harmonious reading,³⁵ and the *Sure-Tan* decision already explained why the two statutes would help reinforce the other in a comprehensive legal scheme.³⁶

³² *Hoffman*, 535 U.S. 137; cf. *supra* text accompanying note 5.

³³ *Hoffman*, 535 U.S. at 156-61 (Breyer, J., dissenting) (“[T]he immigration law foresees application of the Nation’s labor laws to protect ‘workers who are illegal immigrants.’” (quoting H. R. Rep. No. 99-682.)).

³⁴ 2B SUTHERLAND STATUTORY CONSTRUCTION § 51:2 n. 17 (7th ed.) (citing *Watt v. Alaska*, 451 U.S. 259 (1981) and *Calhoun v. FDIC*, 653 F. Supp. 1288 (N.D. Tex. 1987)) (finding that a ‘newer’ controls the ‘latter’ statutory construction takes hold only when the statutes are completely irreconcilable); see also 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, 6 (2003) (“In selected cases, the Court has set up an apparent conflict between the NLRA and some other federal legislative scheme, then resolved that conflict by effectively abrogating federal labor policy in favor of federal ‘other’ policy.”). But cf. *Southern Steamship Co. v. NLRB*, 316 U.S. 31(1942) (holding that the Board should undertake a “careful accommodation” of other statutes and their purpose).

³⁵ See *supra* text accompanying note 30.

³⁶ See *supra* text accompanying note 26.

“Certainly not in any statutory language”³⁷ does the majority have a basis to read IRCA so dominantly, as to suggest that it has cart blanche over a pre-existing labor regime that has existed since 1935, particularly when both statutes should be read complementarily and in support of each other’s goals. Although the philosophy presented by the dissent in this case is preferable in effectuating Congress’s intent for either statute individually or both acting together, this does not necessarily suggest that the result of *Hoffman* was incorrect, but rather that it should be construed as limited to the critical facts on which it was decided. Highlighting the narrow holding of the case, Justice Rehnquist says, “[w]hat matters here, and *what sinks* both of the Board’s claims, is that Congress has *expressly made it criminally punishable for an alien to obtain employment with false documents.*”³⁸

AN EMPLOYER’S GAME: THE PERVERSION OF ECONOMIC INCENTIVES

First, it will be useful to evaluate a hypothetical employer’s incentives under the different possible legal rules that can be interpreted out of *Hoffman*. By reading IRCA and the NLRA at cross-purposes, as done in *Hoffman*, weakens the viability of either statute being effective in its goals. However, by awarding backpay in instances where the employer, rather than the employee, is at fault for immigration and labor law compliance can help incentivize employers to obey both federal laws. Moreover, this instrumentalist approach benefits the law-abiding employer, by incentivizing compliance with both immigration and labor laws, while strengthening the law’s moral credibility by more closely associating liability with fault.

³⁷ *Hoffman*, 535 U.S. at 154 (Breyer, J., dissenting).

³⁸ *Hoffman*, 535 U.S. at 149 (emphasis added); see also Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 506-8 (2004) (“[T]he Board is precluded from awarding backpay to an undocumented worker who has fraudulently obtained employment by tendering false documents, even if the worker is still within the United States.”). *But cf. supra* text accompanying note 8 (“wider lens”).

The narrative would be as follows. In determining who to hire, the employer will decide based on certain heuristic assumptions about the expectations and traits of individuals or, in other words, rely on certain “schemas.”³⁹ The employer can reasonably assume that the documented American worker has strong community ties and access to political, legal and other civic resources. Hindered by fewer information costs, such as language barriers, the authorized worker can presumably become apprised of his rights under the law, that he is protected from discrimination in the workplace on the basis of race,⁴⁰ sex,⁴¹ national origin,⁴² age⁴³ and disability,⁴⁴ and even union views,⁴⁵ too. Moreover, he knows that he is guaranteed a minimum wage,⁴⁶ safe and healthy work conditions,⁴⁷ and social security⁴⁸ if he is injured or becomes too old to work. The employer looks differently at the Mexican-born worker or the Chinese-born laborer who, for whichever reason, appears to be unauthorized to work in the United States. She does not speak the language, possesses limited resources by virtue of her position, and thus has

³⁹ See, e.g., Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1194-98 (1995) (“...[A] stereotype can be understood as a “schema,” a network of elements representing a person’s accumulated knowledge, beliefs, and expectations about a particular category [of individuals].”); see also Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 208 (1973) (“A person is said to employ the availability heuristic whenever he estimates frequency or probability by the ease with which instances or associations could be brought to mind.”).

⁴⁰ See Title VII, 42 U.S.C. §§ 2000e-2000e-17.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Age Discrimination in Employment Act*, 42 U.S.C. §§ 12101-12102.

⁴⁴ *Americans with Disabilities Act*, 29 U.S.C. §§ 621-633a.

⁴⁵ *National Labor Relations Act*, 29 U.S.C. §§ 151-169. *But cf. supra* notes 15 and 16 and accompanying text.

⁴⁶ *Fair Labor Standards Act*, 29 U.S.C. §§ 206-207d.

⁴⁷ *Occupational Safety and Health Act*, 29 U.S.C. §§ 651-652.

⁴⁸ *Social Security Act*, 42 U.S.C § 402.

great barriers to knowing the few workers' rights granted to her under the law.⁴⁹ Even if she did know she had rights under the law, she has neither the means nor the courage to access it for fear of expulsion.⁵⁰ With only tenuous ties to her new community, the costly risk that she will be deported back to the bare scrapings of a life she has given everything to escape is paramount.⁵¹

The American worker, if he becomes agitated with the working conditions, may organize a union, complain to a governmental agency, or pursue a private cause of action, where permissible, on the basis of one of those protected classes or traits.⁵² The employer knows if he undertakes an adverse employment action, such as terminating the documented worker, he may be sued by a government agency for violating workers' rights.⁵³ The worker would not even have to represent himself because the government agency or, though to an ever-lessening extent, his union can pay for and provide legal representation.⁵⁴ In the employer's eyes, the American worker is more costly, whether directly as to paid wages because of obligatory minimum wage laws or indirectly by defending against potential legal liability. Suit by the American worker is more probable, given his access to legal resources, as well as more likely to result in damages, while the undocumented worker is less likely to be able and willing to sue, and even so, remedies

⁴⁹ See Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57, 58 (2002) ("Low-wage employees are apt to lack the knowledge and the resources to enforce their rights, and there simply are too few government inspectors to ensure compliance.").

⁵⁰ See Wishnie, *supra* text accompanying note 9, at 357 ("In *Sure-Tan*, an employer contacted the INS shortly after his employees voted in a union. The INS visited the factory and investigated the immigration status of all Spanish-speaking employees. The INS arrested five and, by the end of the day, all were on a bus ultimately bound for Mexico. The Board found that the employer, with full knowledge that they were undocumented, invited the raid solely because the employees supported the union.").

⁵¹ *Hoffman*, 535 U.S. at 156-57 ("Otherwise, as Justice Kennedy once put the matter, 'we would leave helpless the very persons who most need protection from exploitative employer practices.'" (quoting *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1184 (CA9 1979) (concurring opinion))).

⁵² See *supra* notes 40-48.

⁵³ *Id.*

⁵⁴ *Id.*

are a longshot after *Hoffman*.⁵⁵ So far as law shapes rational economic behavior on the margins, the current legal regime incentivizes employers to replace authorized American workers, who would not accept “unconscionable” working conditions or pay, with undocumented workers who are more willing due to their opportunity costs.⁵⁶ More succinctly, “[c]urrent law and practice creates a perverse economic incentive for employers to employ undocumented workers, because employers can deny undocumented workers the most basic workplace protections and escape responsibility by simply calling for an immigration inspection.”⁵⁷

With this unprecedented level of power over illegal immigrants, employers are discouraged from hiring the very American workers these immigration laws were designed to protect.⁵⁸ Justice Breyer aptly noted, “the Court’s rule offers employers immunity in borderline cases, thereby encouraging them to take risks, i.e., to hire with a wink and a nod those potentially unlawful aliens whose unlawful employment (given the Court’s views) ultimately will lower the costs of labor law violations.”⁵⁹ Some may argue that IRCA provides sanctions for employers, too, for knowingly committing the crime of “unlawfully employing illegal aliens,” and not immediately terminating them should the employer find out the employee’s immigration status in the course of the employment relationship. However, the limited “good faith” adherence requirement and high “knowing” culpability requirement narrows liability, while fines range

⁵⁵ See e.g. *supra* note 2. But cf. *Cano v. Mallory Management*, 760 N.Y.S. 2d 816, 818 (N.Y.S.C. 2003) (“[E]very case citing *Hoffman* since it was rendered has either distinguished itself from it or has limited it greatly.”).

⁵⁶ *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 NLRB 408, 414 (1995).

⁵⁷ *Id.*

⁵⁸ Brief *Amici Curiae* of Employers and Employer Organizations in Support of the NLRB, No. 00-1595, 2001 WL 1631729 (law-abiding employers are disadvantaged by these perverse economic incentives).

⁵⁹ *Hoffman*, 535 U.S. at 156 (Breyer, J., dissenting).

from as little as \$250 to \$10,000 per unauthorized worker,⁶⁰ which is often viewed by employers as a small expenditure in exchange for the indirect gains of flouting other, more costly, labor protections and expenses.⁶¹ Although repeated violations may result in a “pattern of practice” and increased criminal sanctions, practitioners have noted that employers often evade significant liability and that ICE is perceived to operate at employers’ behest.⁶² Ultimately, Justice Breyer summarized that the “denial [of backpay] lowers the cost to the employer of an initial labor law violation (provided, of course, that the only victims are illegal aliens). It thereby increases the employer’s incentive to find and to hire illegal-alien employees.”⁶³

Based on these inequitable outcomes, courts and commentators have sought out ways to either make the best of or distinguish from *Hoffman* altogether.⁶⁴ ALJ Fish agreed with legal scholars who found that an “estoppel or balancing of the equities argument is applicable here. Indeed, in my view that is what the Supreme Court did in *Hoffman* ... the court viewed IRCA violations by the employee as more substantial, and found that the Board was foreclosed from

⁶⁰ See generally *supra* note 28.

⁶¹ *N.L.R.B. v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 57 (2d Cir. 1997) (explaining, in a case involving a knowing employer, that “employers. . . may consider the penalties of the IRCA a reasonable expense more than offset by the savings of employing undocumented workers or the perceived benefits of union avoidance.” (quoting *A.P.R.A. Fuel*, 320 N.L.R.B. at 408, 415 (1995)).); see also *Mezonos*, 2011 NLRB LEXIS 422, at *25 (concurring opinion) (articulating, further, that the “employer already may have realized, or may be anticipating, savings that offset the risk of IRCA penalties. They will recognize that even if their employer incurs those penalties, it will escape backpay liability, and most likely it will have enjoyed labor-cost savings as a result of employing undocumented workers.”).

⁶² Rebecca Smith and Julie Martínez Ortega, *Iced Out: How Immigration Enforcement Has Interfered with Workers’ Rights*, available at http://www.nelp.org/page/-/Justice/ICED_OUT.pdf. (documenting numerous incidents where ICE agents targeted undocumented workers shortly after or during their exercise of workers’ rights); see also *Brief Amici Curiae of Employers and Employer Organizations in Support of the NLRB, No. 00-1595*, 2001 WL 1631729 (law-abiding employers are disadvantaged by these perverse economic incentives).

⁶³ *Hoffman*, 535 U.S. at 155 (Breyer, J., dissenting). Justice Breyer’s parenthetical note is alluding to the chilling effect on even authorized workers described in the text accompanying note 6.

⁶⁴ See *supra* note 20.

awarding backpay.”⁶⁵ As such, in the converse situation, where the employer is more at fault than the employee, the more blameworthy violator should bear the responsibility for the employer’s misfeasance or nonfeasance. It is important to weigh the fault liability and severity of a violation in determining for accountability of immigration and labor law violations, rather than have a violator-neutral rule with respect to backpay. Ultimately, a fault-based approach protects the quality of American jobs, held by authorized American workers, rather than enabling their deterioration. Employers’ incentives will be aligned with both statutes because to the extent that they undermine immigration policy by either turning a blind-eye to either fraudulent documents or failing to ask for them, employers shall equitably be held liable under both immigration and labor law. Moreover, undocumented workers will truly be held accountable for conduct intentionally violating the law, rather than being blamed for the employer’s nonfeasance, and thereby link liability with fault. Although initially proposed as an instrumentalist argument because it incentivizes compliance, this approach is heavily grounded in traditional moral justifications of law by relying on notions of intentionality and fault from relevant doctrines of law.

THE EMPLOYEE’S DILEMMA: ADOPTING A FAULT REGIME

In order to shed light on why a fault standard is preferable due to its moral superiority, it is helpful to first resolve which other doctrines of law can be beneficial to this labor-immigration law intersection. Labor law, in its regulation of contracts and duties between bilateral parties, has its main basis in private law, while IRCA, with its criminal sanctions, stems from public policy.

In the public law realm, such as with criminal law, a *mens rea* requirement satisfies society’s

⁶⁵ See *Majestic Rest.*, 2009 NLRB LEXIS 277, *218. See also Wishnie, *supra* note 38, at 512 (“[I]t is consistent with both immigration and labor policy to conclude that such an employer had waived, and is estopped from raising, any objection to an award of backpay based on an employee’s immigration status); see also *Singh v. Jutla*, 214 F. Supp. 2d 1056, at 1061 (N.D. Cal. 2002) (immunizing a knowing employer from backpay liability for undocumented workers under the FLSA undermines IRCA statute’s purpose).

interest in only punishing those who are morally blameworthy and thus fortifying the law's role in shaping behavior with its normative authority. On the other hand, in the bilateral adjudications of private law, this intent requirement is also generally applicable and manifested in the notion of "fault," serving to hold accountable only those who fall beneath a standard of care and do not satisfy their correlative duties with other individuals. The public-private confusion is accentuated here because it involves an intersection of the two realms, where national immigration (and labor) public policy interposes between what would traditionally be viewed as a private employment contract between individuals, thus lending itself to comparison with contract and tort law.⁶⁶

An apt analogy to the public-private law dilemma can be found in the contract doctrine of invalidity on grounds of illegality, where a private law claim is voided on account of public law. A "promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed by in the circumstances by a public policy against the enforcement of such terms," such that in balancing the interests, courts should weigh "(a) the parties' justified expectation, (b) any forfeiture that would result if enforcement were denied, and (c) any special interest in the enforcement of the particular term."⁶⁷ This is driven home by the common law principle of *in pari delicto potior est conditio defendentis*, suggesting that in cases of substantially equal fault, the party holding the benefits (in this case, the employer) would win without judicial

⁶⁶ Although only some form of fault-based intentionality requirement is advocated, perhaps as long as the Supreme Court chooses to wield the NLRA's remedies as implements of IRCA's criminal sanctions, these backpay remedies arguably become an extension of the criminal law and should by deduction require a finding of mens rea. Nonetheless, the central tenant of "fault" to punishment is universal in both private and public regimes. See also Jerome Hall, *Interrelations of Criminal Law and Torts*, 43 *COLUM. L. REV.* 760, 779 (1943) (There at least "appears to be a close correspondence between the entire law of crimes and that of torts by reference to a common set of principles of culpability.")

⁶⁷ *RESTATEMENT (SECOND) OF CONTRACTS* § 178 (1981).

interference⁶⁸ because “courts should not lend their good offices to mediating disputes among wrongdoers; and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality.”⁶⁹ However, the Restatement and case law both provide that if the parties are not equally blameworthy, or if public policy requires, then the plaintiff’s recovery should not be barred by *in pari delicto* because society is “best served by insuring that the private action will be an ever-present threat to deter anyone contemplating [illegal] business behavior.”⁷⁰ In IRCA, Congress has determined that the behavior of unscrupulous employers would be most responsive to deterrence measure⁷¹ and, arguably, it would be optimal for the party breaching both labor and immigration laws to be held accountable for both violations. Even if the worker is in some general or imputed sense of fault for seeking unauthorized employment when they do not actually violate a provision of IRCA, the undocumented worker’s extreme “inequality of condition” and public policy suggests that society would be better served to deter the employer from violating IRCA and the NLRA through the imposition of backpay.⁷²

One might argue that by going against the Congressional intent of prohibiting the employment of undocumented workers, these undocumented workers have a ‘general intent’

⁶⁸ *Accord Bateman-Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 306 (1985) (elucidating the doctrine of *in pari delicto*, while applying it in this case to Securities Law); *see also Black’s Law Dictionary* 1535 (9th ed. 2009).

⁶⁹ *See also* JOSEPH STORY, 1 COMMENTARIES ON EQUITY JURISPRUDENCE 300 (1886) (“One party may act under circumstances of oppression, imposition, hardship, undue influence, or great *inequality of condition* or age; so that his guilt may be far less in degree than that of his associate in the offence.”) (emphasis added); *Bateman-Eichler*, 472 U.S. at 306 (“inequality of condition”).

⁷⁰ *Accord Bateman-Eichler*, 472 U.S. at 308 (quoting *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 139 (1968)).

⁷¹ *See supra* text accompanying notes 26- 38 (implicating through the legislative history of IRCA and the incentives provided under *Sure-Tan* that it would be best suited for employers to be deputized in not hiring unauthorized workers).

⁷² *See Id.*, *supra* note 69; *see also* text accompanying notes 39-65 (detailing the dramatic imbalance in bargaining power faced by undocumented workers vis-à-vis their authorized comparators, which perhaps might even suggest that they are less morally blameworthy for seeking out a livelihood compared to the employer violating the country’s immigration policy by hiring these workers).

culpability. Under IRCA § 1326, re-entry by a deported person was found to be a ‘general intent’ offense, which is “the state of mind required for certain crimes not requiring specific intent or imposing strict liability,” such that “specific intent concerns willful and knowing engagement in criminal behavior, while general intent concerns willful and knowing acts. Thus, a defendant may not ‘specifically intend’ to act unlawfully, but he did ‘intend’ to commit the act.”⁷³ In this case, the “general intent of the defendant to re-enter the United States, which is analogous to voluntary action by the defendant, ‘may be inferred by the fact that a defendant was previously ‘deported’ . . . and subsequently ‘found in’ the United States,’ without consent.”⁷⁴ In other words, a general state of mind is presumed because the authorized person has previously violated the law and been deported, but to assume that all subsequent acts in the case of an initial illegal entry are fault-ridden is a tenuous, if not untenable, argument. As much as a clouded notion as “general intent” might be applicable to particular situations, such as re-entry under § 1326, it is inadequate to describe an undocumented worker seeking employment without authorization because there are many involuntary and quasi-voluntary factors pushing and pulling migrants across borders (not to mention those who may conceivably commit the act as a juvenile without the necessary *mens rea*). In the former case, ‘general intent’ is plausible for the person has already been found in violation once and been deported; however, reading in “general intent” for a first violation is akin to finding culpability on a “strict liability” basis, detracting from the normative quality of the law.

The *Hoffman* majority advances a standard akin to strict liability where the state of mind of the actors are irrelevant, just that there is a violation of some sort, no matter who is actually at

⁷³ *Berrios-Centeno*, 250 F.3d 294, 299 (5th Cir. 2001).

⁷⁴ *Id.*

fault, sufficiently spoils the baby and the bath water. In the view of the majority, the undocumented worker assumes a sort of strict liability for backpay remedies because only by virtue of applying or holding a job has gone against the spirit of IRCA. In tort law, strict liability is a standard usually applied to firms, and sometimes persons, “who pursue permissible but dangerous activities: storing explosives, running nuclear power stations, keeping wild animals, marketing drugs or other dangerous products....”⁷⁵ In this case, the Supreme Court has perceived unauthorized immigration as a dangerous activity, especially in light of the foreign-based terrorist attacks which shadowed its decision, and should be properly quelled. However, when the moral blameworthiness of the crime is disjoined from legal blameworthiness, even the Supreme Court has said that “strict liability should be prudently and cautiously attributed to criminal statutes”⁷⁶ and for “limited circumstances”⁷⁷ because excluding an intentionality requirement, as in strict liability, erodes the important norms-shaping virtue of the law. If strict liability were to be applied at all, the legislative history of IRCA would suggest that it should apply against employers,⁷⁸ though any strict liability regime would nonetheless be improper.

For time immemorial, the nexus between fault and liability has underpinned the various disciplines of law. The dilemma in this labor law context can best be analogized to the strict liability and fault-based negligence standards in tort law because tort law is the traditional basis for private law causes of actions concerning bilateral parties and their duties to one another. In tort law, a fault-based negligence scheme has been found preferable since it holds the specific

⁷⁵ See Tony Honore, *Responsibility and Luck*, 104 L.Q.R. 537-8 (1988).

⁷⁶ *United States v. Berrios-Centeno*, 250 F.3d 294, 298 (5th Cir. 2001).

⁷⁷ *Staples v. United States*, 511 U.S. 600, 607 (1994) (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978). *But cf.* *United States v. Garrett*, 984 F.2d 1402, 1409 (5th Cir. 1993) (declaring that “Congress is fully capable of creating strict liability crimes when” it actually intends to do so).

⁷⁸ See *supra* text accompanying note 29.

state of mind accountable for choosing to violate the law, rather than presuming some sort of general intent or imputed intent via strict liability. Hart explains that the idea behind intention is as

...one of the principal determinants both of liability to punishment and of its severity. All civilized penal systems make liability to punishment...dependent not merely on the fact that the person to be punished has done the outward act of a crime, but on his having done it in a certain state of frame of mind or will.⁷⁹

In other words, the inclusion of an intentionality requirement, i.e. a fault-based scheme, is central to the justification of any punishment or deprivation, such as those concerning statutory backpay rights in the instant case.

Likewise, an examination under the comparative fault scheme of tort law would doubtlessly suggest that the unscrupulous employer should burden a more significant share of the legal punishments due to the violation of not one, but two sets of federal statutes, as opposed to the single immigration-based violation of the undocumented worker. Even in contributory negligence jurisprudence, the “last clear chance doctrine” mitigates the harshness of the plaintiff forfeiting recovery should they be found even minimally at fault. Contributory negligence tracks the *Hoffman* and *Mezonos* reasoning since the worker forfeits backpay just for being somewhat at fault. Under the last clear chance doctrine, even a

...plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm, (a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and (b) the defendant is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm, when he (i) knows of the plaintiff's situation and realizes or has reason to realize the peril involved in it or (ii) would discover the situation and thus have reason to realize the peril, if he were to exercise the vigilance which it is then his duty to the plaintiff to exercise.⁸⁰

⁷⁹ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY, at 114 (Oxford University Press, 1968).

⁸⁰ RESTATEMENT (SECOND) OF TORTS § 478 (1977). *See also Davies v. Mann*, 152 ENG.REP. 588 (1842) (holding that even though plaintiff had carelessly and illegally bound a donkey in the roadway, the plaintiff could have still

The reasoning behind this doctrine is relatable to the situation of the undocumented worker, who although she put herself at risk by illegally entering the country, the employer had the last clear chance to avoid the violation by virtue of exercising reasonable care with regards to IRCA by verifying her employment authorization. If the employer exercises the good faith reasonable care mandated by IRCA, and the employee fraudulently submits papers, then the reasoning behind this doctrine would not protect the undocumented worker; conversely, if applied to the case where the employer fails to exercise reasonable care as mandated by IRCA and then abuses labor rights, then the employer should be held liable under both IRCA and the NLRA. If the undocumented worker is unable to accept the backpay based on their status, then the punitive effect of the award should suffice to deter employers, and could still benefit other workers who are owed backpay in other labor violations where funds could not be recovered.

CONCLUSIONS AND RECOMMENDATIONS: MEZONOS AS CASE STUDY

At this point, it is useful to revisit the NLRB's first opportunity to distinguish *Mezonos* from *Hoffman* on a fault-basis and to evaluate the reasons the Board put forth in finding *Mezonos* to be controlled by *Hoffman*.⁸¹ With Member Becker recused, the three remaining members of the Board were understandably unwilling to spring a political hot potato in a deeply anti-labor and anti-illegal immigrant climate, where the very agency's existence and its ability to continue enforcing the NLRA was jeopardized by partisan wrangling and the subversive influence of the Tea Party movement.⁸² Instead, they searched for guiding language that could cover for their cowed ambition, that "[t]he [Supreme] Court's every word and sentence cannot be read in a vacuum; its pronouncements must be read in light of the holding of the case and[,] to the degree

recovered because the defendant should have used ordinary care to avoid the accident).

⁸¹ See *supra* text accompanying notes 20-13.

⁸² See *supra* text accompanying notes 14-16.

possible, so as to be consistent with the Court's apparent intentions and with other language in the same opinion."⁸³ As often the case in the law, there is language which goes both ways in the *Hoffman* majority.

On the one hand, the *Mezonos* decision drew from the "key passage setting forth the policy rationale upon which the Court's holding is based," which stated that "*some party* directly contravene[d] explicit congressional policies" and "that awarding backpay to illegal aliens runs counter to policies underlying IRCA."⁸⁴ Inasmuch as the majority harped on past precedents limiting the Board's remedial powers, such as "hav[ing] consistently set aside awards of reinstatement or backpay to employees *found guilty of serious illegal conduct* in connection with their employment" and that "the Board had no discretion to remedy those violations by awarding reinstatement with backpay to employees who themselves had committed serious criminal acts,"⁸⁵ ALJ Fish astutely noted that this language foremost "emphasized the misconduct of Castro[] in its decision not to defer to the Board's choice of remedy and to find that the Board's choice conflicted with the federal statute (IRCA)."⁸⁶

⁸³ *Mezonos*, 2011 NLRB LEXIS 422, *8 n. 9 (quoting *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1291 (D.C. Cir. 1998) (en banc); see also *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) ("We adhere . . . not to mere obiter dicta, but rather to the well-established rationale upon which the Court based the results of its earlier decision. When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.")).

⁸⁴ *Mezonos*, 2006 NLRB LEXIS 491, *9 (quoting *Hoffman*, 535 U.S. at 148-49) ("Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.").

⁸⁵ *Hoffman*, 535 U.S. at 142-43 (discussing two cases, *Fansteel* and *Southern Shipping*, where the NLRB's remedies were set aside since employees had violated criminal laws in the exercise of their rights)(emphasis added)

⁸⁶ *Majestic Rest.*, 2009 NLRB LEXIS 277, *197.

Nevertheless, the Board points to the language in the majority opinion that the “misconduct includes ‘remain[ing] in the United States illegally’⁸⁷ (a violation of the law independent of IRCA) and ‘continu[ing] to work illegally.’”⁸⁸ However, this may be the very “interpretation of a statute so far removed from its expertise entitl[ing] no deference....”⁸⁹ Although Congress has great authority to regulate immigration matters, concluding that “undocumented immigrants working in the United States are party to an employment relationship the Court deems criminal”⁹⁰ begins to broach on unconstitutionality if just being an undocumented worker, like a vagabond, results in a “status offense,” as opposed to finding actual misconduct in light of a specific action.⁹¹ To avoid these potential pitfalls, as well as those of

⁸⁷ See 8 U.S.C. § 1182(a)(6)(A)(i) (“An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.”); *id.* § 1227(a)(1)(B) (“Any alien who is present in the United States in violation of this chapter or any other law of the United States . . . is deportable.”)

⁸⁸ *Hoffman*, 535 U.S. at 149.

⁸⁹ *Id.* at 143-44. (“Although the Board had argued that the employees’ conduct did not in fact violate the federal mutiny statute, we rejected this view, finding the Board’s interpretation of a statute so far removed from its expertise entitled no deference from this Court.”)

⁹⁰ *Mezonos*, 2006 NLRB LEXIS 491, *9 (citing *Hoffman*, 535 U.S. at 146) (“characterizing the proffer of fraudulent documents as ‘misconduct that renders an underlying employment relationship illegal under explicit provisions of federal law’.”).

⁹¹ Complaint at ¶ 23, *United States v. Arizona*, 2010 WL 2653363 (D.Ariz. July 6, 2010). The United States argued:

Congress, which holds exclusive authority for establishing alien status categories and setting the conditions of aliens’ entry and continued presence, has affirmatively decided that unlawful presence – standing alone – should not subject an alien to criminal penalties and incarceration although unlawful presence may subject the alien to the civil remedy of removal. See 8 U.S.C. §§ 1182(a)(6)(A)(i), 1227(a)(1)(B)&(C). However, unlawful presence becomes an element of a criminal offense when an alien is found in the United States after having been previously removed or after voluntarily departing from the United States while a removal order was pending. See 8 U.S.C. § 1326. Further, unlawful entry into the United States is a criminal offense, see 8 U.S.C. § 1325.

Id. Cf. Robinson v. California, 370 U.S. 660 (1962) (standing for the proposition that the due process clause of the Fourteenth Amendment prohibits as cruel and unusual the punishment of status); *see also* U.S. CONST. amend. VIII § 1 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”), U.S. CONST. amend. XIV § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law”).

criminalizing conduct without accounting for direct and specific intent, future courts should use a fault-based regime in interpreting violations of both IRCA and the NLRA.

Decided in a post-9/11 world, the *Hoffman* decision subjugated individual and collective labor rights to concerns about immigration control and national security. It was a decision which, without any statutory basis in the language and intent requirements of IRCA, ignored the rationale proffered by the Court in *Sure-Tan* when reconciling these same principles, and in so doing unjustifiably pitted the statutes at cross-purposes, rather than following the statutory interpretation canon of reading laws consistent with one another. As a result, undocumented workers are subjected to abuse, immigration authorities are used at the behest of nefarious employers who knowingly hire undocumented workers, and law-abiding employers are disadvantaged. Whereas the signal discouraging immigration is likely negligible compared to the chilling of labor rights, for undocumented and authorized workers alike, the *Hoffman* decision, if read narrowly, can still effectuate both labor and immigration policies by relying on the proposed fault-based regime.

By analogizing to tort law's strict liability and negligence standards, the last clear chance doctrine in contributory negligence schemes, and contract law's invalidity doctrine due to illegality, an approach that attaches responsibility to fault, such as negligence, is preferred because the nexus between moral blameworthiness and the law is preserved. In limiting *Hoffman* to its controlling facts, the actual IRCA violator will be punished and both laws would reinforce one another in spite of what *Hoffman* initially seemed to suggest. To read *Hoffman* more broadly than its controlling facts, as the NLRB did with *Mezonos*, would be to undermine the moral credibility of the law, the protection offered by the labor rights, and perversely increase the demand for undocumented workers as they become more attractive to unscrupulous

employers who can wield immigration status to stomp out labor disputes. Thus, by adopting a fault regime, moral credibility and economic incentives synergize to promote compliance with both of Congress's laws in formulating a compatible, if not comprehensive, immigration-labor scheme.