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## America's (Not So) Golden Door: Advocating For Awarding Full Workplace Injury Recovery to Undocumented Workers

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# AMERICA'S (NOT SO) GOLDEN DOOR: ADVOCATING FOR AWARDING FULL WORKPLACE INJURY RECOVERY TO UNDOCUMENTED WORKERS

## I. INTRODUCTION

Long before President John F. Kennedy famously proclaimed the United States of America a “nation of immigrants,”<sup>1</sup> the Statue of Liberty stood above New York Harbor as a beacon of our nation’s historically rich immigrant background. Since 1886, Lady Liberty has triumphantly posed as a proud symbol of freedom, refuge, and opportunity.<sup>2</sup> At the base of her iconic pose, Emma Lazarus’ immortal poem poignantly calls for the world’s tired and poor, and exhorts them to enter by the “golden door.”<sup>3</sup> Americana symbolism aside, this exhortation has proven quite paradoxical. Immigration has provided our country with unquestionable cultural richness, yet, at times, the country’s treatment of immigrants has contradicted fundamental notions of fairness and decency.<sup>4</sup> In recent decades, the bright light of the Statue of Liberty’s beacon and its underlying symbol have been dimmed and overshadowed by immigration controversy<sup>5</sup> and judicial im-

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1. President John F. Kennedy, Acceptance Speech for America’s Democratic Legacy Award at the Anti-Defamation League (Jan. 31, 1963), available at <http://archive.adl.org/immigrants/video.html#Uzrtpq1dVbU>.

2. See *History of the Statue of Liberty*, THE STATUE OF LIBERTY-ELLIS ISLAND FOUND., INC., [http://www.statueofliberty.org/statue\\_history.html](http://www.statueofliberty.org/statue_history.html) (last visited Apr. 14, 2014); *Statue of Liberty*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG., <http://whc.unesco.org/en/list/307> (last visited Apr. 14, 2014).

3. See JOHN F. KENNEDY, A NATION OF IMMIGRANTS 77 (1964); EMMA LAZARUS, THE NEW COLOSSALS (1883), available at <http://xroads.virginia.edu/~cap/liberty/lazaruspoem.html>.

4. THOMAS A. ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 2 (West-Thompson Reuters 7th ed. 2012); see also Jeff D. Holdsworth, Note, *In the Name of National Security: The Creppy Directive and the Right of Access to Special Interest Deportation Proceedings*, 3 CREIGHTON INT’L & COMP. L.J. 35, 35 (2012).

5. Following the astronomical influx of illegal immigration within the last two decades, a number of states have taken it upon themselves to “solve a crisis . . . [that] the federal government has refused to fix” by passing strict enforcement-based legislation in an effort to curb illegal immigration, most notably Arizona SB 1070. ALEINIKOFF ET AL., *supra* note 4, at 33. Federal immigration reform has yet to gain sufficient traction to transform hopes into reality. Recently, though, the Senate passed S. 744, which proposed a

migration enforcement practices, including using one's immigration status to limit the amount of recoverable workplace injury compensation.<sup>6</sup>

Many of today's seven million undocumented workers—roughly five percent of America's workforce<sup>7</sup>—find themselves between a rock and a hard place. Many have braved the risks of heat exhaustion, dehydration, hypothermia, life-threatening wild animal attacks, kidnapping, rape, and death in order to come to the United States.<sup>8</sup> In fact, studies show roughly 300 to 800 migrants die in U.S. territory every year trying to cross the border.<sup>9</sup> In most cases, these individuals leave behind their homes and family members in hope of a better life and an opportunity to pursue the "American Dream."<sup>10</sup> Even if these individuals successfully make it across the border, they still face the increasingly difficult road to socioeconomic prosperity. That road frequently begins with the harsh reality that the vast majority of available work is in some

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number of effective changes to our federal immigration system, including stronger worker eligibility verification standards and border security. Alan Silverleib & Tom Cohen, *Five Reasons Immigration Reform Isn't Close to the Finish Line*, CNN (July 12, 2013), <http://www.cnn.com/2013/07/11/politics/immigration-reform-5-things/index.html?iid=articleidebar>. However, partly because of partisan politics and partly due to attention towards other pressing matters like foreign policy, the national debt ceiling, and the Affordable Care Act, comprehensive immigration reform has failed to take substantial steps forward in the House and is not likely to pass in the immediate future. *Id.*; see also Gregory Ferenstein, *Immigration Reform Unlikely to Pass Before 2015, Says Rep. Issa*, TECHCRUNCH, (Jan. 7, 2014), <http://techcrunch.com/2014/01/07/immigration-reform-unlikely-to-pass-before-2015-says-rep-issa/> (noting that due to partisan animosity it will be difficult to reach a compromise in order to pass an immigration reform bill before the next election). Notwithstanding these challenges, immigration reform very much remains an "elephant in the room" when considering hot-bed American issues.

6. See *infra* Part III.C; see also Roxana Mondragón, *Injured Undocumented Workers and Their Workplace Rights: Advocating for a Retaliation Per Se Rule*, 44 COLUM. J.L. & SOC. PROBS. 447, 456 (2011) (noting that the Supreme Court's *Hoffman Plastic* decision has sparked some prejudicial side effects for undocumented workers, including creating a legal basis for employers to pry into immigration status and discouraging undocumented workers from seeking to enforce their workplace rights for fear of employer retaliation or deportation).

7. Stephanie E. Tanger, *Enforcing Corporate Responsibility for Violations of Workplace Immigration Laws: The Case of Meatpacking*, 9 HARV. LATINO L. REV. 59, 65 (2006) (citing JEFFREY S. PASSEL, PEW HISPANIC CTR., ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION 2 (Mar. 2005), available at <http://pewhispanic.org/files/reports/44.pdf>).

8. Alex Peña, *Migrants Face Higher Risks Illegally Crossing the Border*, NBC LATINO (Sept. 20, 2012), <http://nbclatino.com/2012/09/20/migrants-face-higher-risks-illegally-crossing-the-border/>.

9. *Id.*

10. See Sonia Nazario, Op-Ed., *The Heartache of an Immigrant Family*, N.Y. TIMES, Oct. 15, 2013, at A27.

of the most dangerous professions in the country,<sup>11</sup> with the frighteningly high possibility of death,<sup>12</sup> or at minimum, the high probability of a debilitating workplace injury during employment.<sup>13</sup>

When the high risk of injury in these dangerous jobs becomes reality, these undocumented workers face another daunting obstacle. Injured and unable to work, they are left with the difficult task of seeking workplace injury recovery knowing that because they are not citizens, their potential recovery—if any—will be severely limited due to their immigration status.<sup>14</sup> In this very real sense, the narrow issue of workplace injury recovery for illegal immigrants displays a microcosm of America's oxymoronic immigration history. The undocumented worker heeds Lady Liberty's outward exhortation for the world's tired and poor to find relief and opportunity through the "golden door," only to find that such relief is selectively given.

From one perspective, limiting workplace injury recovery on the basis of one's immigration status may appear sensible. After all, wouldn't allowing illegal immigrants to recover full damages for workplace injuries incentivize further illegal immigration? Moreover, why should we award illegal immigrants damages for injuries if they are neither citizens nor lawful permanent residents? While the reasoning underlying this position is not completely without merit, this comment will demonstrate that answers to these questions are not so straightforward. Indeed, this comment counterintuitively argues that awarding full damages to illegal immigrants who suffer workplace injuries better serves the United States' federal immigration objectives.

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11. REBECCA SMITH, NAT'L EMP'T LAW PROJECT, IMMIGRANT WORKER'S ENTITLEMENT TO WORKERS' COMPENSATION POST-HOFFMAN PLASTIC COMPOUNDS V. NLRB 2 (2008) [hereinafter NELP REPORT], available at <http://nwjp.org/wp-content/uploads/2012/04/Immigrant-Workers-Entitlement-to-Workers-Comp-9-7-10-by-Smith.doc>; see AFL-CIO, IMMIGRANT WORKERS AT RISK: THE URGENT NEED FOR IMPROVED WORKPLACE SAFETY AND HEALTH POLICIES AND PROGRAMS 9 (2005) [hereinafter AFL-CIO REPORT], available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1021&context=laborunions>.

12. NELP REPORT, *supra* note 11, at 1, 3. In 2012, 708 Hispanic or Latino workers were killed from work-related injuries—more than thirteen deaths per week, or nearly two Latino workers killed every day of the year. U.S. DEPT OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., *Commonly Used Statistics*, <https://www.osha.gov/oshstats/commonstats.html> (last visited Apr. 14, 2014).

13. NELP REPORT, *supra* note 11, at 3; see AFL-CIO REPORT, *supra* note 11, at 3.

14. See *infra* Part III.C.

Part II of this comment discusses the history and current state of recovery for injured illegal immigrants by examining the Immigration Reform and Control Act ("IRCA"), traditional avenues of workplace injury relief, and the seminal Supreme Court decision *Hoffman Plastic Compounds, Inc. v. NLRB*. Part II also briefly comments on United States Senate Bill 744 ("S. 744"), the recently proposed comprehensive immigration legislation, and its treatment of undocumented workers. Part III discusses both IRCA and *Hoffman Plastic's* applicability and effect on workplace injury recovery for illegal immigrants, revealing that while most courts have refused to completely prohibit the recovery of damages, many courts have used immigration status to limit the type and amount of damages recoverable. Part IV analyzes, and then challenges, the practice of limiting workplace injury recovery on the basis of immigration status. This comment argues that awarding full damages to undocumented workers supports our federal immigration objectives and is sound policy. Part IV closes by noting that implementing change to the current federal immigration laws ought to occur solely through the procedures prescribed by the Constitution.

## II. BACKGROUND

### A. *Immigration Reform and Control Act*

IRCA is currently the prevailing federal immigration law governing illegal immigrant employment. Passed in 1986, one of IRCA's main purposes was to address some of the issues that the Immigration and Nationality Act of 1952 ("INA") failed to address,<sup>15</sup> illegal immigration being one such prominent issue. IRCA seeks to reduce and deter illegal immigration by tightening border security and strengthening interior enforcement. With regard to the latter, one of IRCA's primary moves is to make it unlawful for an employer "to hire . . . an alien knowing the alien is an un-

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15. The INA was primarily concerned with preserving the national origins quota, establishing a system of preferences for skilled workers and immediate relatives of U.S. citizens and permanent resident aliens, and improving security and screening procedures. ALEINIKOFF ET AL., *supra* note 4, at 19. However, the INA failed to address, either in the initial legislation or in the 1965 Amendments, illegal immigration and, specifically, the employment of illegal immigrants. See generally *id.* at 19-21, 25 (noting that IRCA was the first federal legislation to make it illegal to hire an illegal alien).

authorized alien.”<sup>16</sup> IRCA also makes it illegal for an employer to continue to employ an already-hired alien after becoming aware that the alien is unauthorized.<sup>17</sup> Furthermore, IRCA requires employers to verify the immigration status of a prospective employee prior to hire.<sup>18</sup> IRCA does provide, however, a good-faith defense for employers who are otherwise compliant, but hired illegal immigrants based on the employee’s tendering of false or fraudulent work authorization documents.<sup>19</sup>

IRCA necessarily emphasizes deterrence of illegal immigration via the employer, as employers ultimately hold the keys to employment for illegal immigrants.<sup>20</sup> The operative rationale was that if employers eliminate the availability of jobs for illegal immigrants, supply and demand would sooner or later eliminate the incentive to immigrate altogether.

It is important to note, however, that whether intentional or not, IRCA does not criminalize an illegal immigrant’s mere presence in the United States.<sup>21</sup> Nor does IRCA expressly prohibit an illegal immigrant from gaining or maintaining employment in the United States.<sup>22</sup> IRCA simply prohibits an employer from knowingly hiring unauthorized aliens.<sup>23</sup> While the prudence of this distinction may be debated, it has not proven to be a trivial one.

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16. 8 U.S.C. § 1324a(a)(1)(A) (2012).

17. *Id.* § 1324a(a)(2).

18. *Id.* § 1324a(b)(1)(A). This employment verification requirement has recently been facilitated by an electronic verification database commonly known as E-Verify. However, E-Verify is far from being universally employed. *See infra* notes 198–201.

19. 8 U.S.C. § 1324a(a)(3).

20. *See generally id.* § 1324a(a)(1)(A)–(a)(2), (a)(6)(C), (b) (noting that most of the responsibilities in the statute are centered on obligating the *employer* to refrain from hiring illegals, continuing to employ illegals once an alien’s status is disclosed, and obligating the *employer* to verify immigration status in the hiring process).

21. *See id.* § 1324a. Nowhere in the statutory text does it contain the phrase “illegal immigrants may not be employed” or any similar phrase. *Id.* In this sense, the term “illegal immigrant” is somewhat of a misnomer because presence in the United States without proper documentation is only a civil offense. *See Jose Antonio Vargas, Immigration Debate: The Problem with the Word Illegal*, TIME (Sept. 21, 2012), <http://ideas.time.com/2012/09/21/immigration-debate-the-problem-with-the-word-illegal/>.

22. *See* 8 U.S.C. § 1324a.

23. *Id.* § 1324a(a)(1).

## B. *Traditional Remedies for Workplace Injury*

Workplace injury is typically governed and administered by the state or jurisdiction in which the injury was sustained. Before the rise of workers' compensation protection, which gained widespread traction in the late 19th and early 20th centuries,<sup>24</sup> the main recourse for an injured worker to receive compensation for his injury was through tort law.<sup>25</sup> Today, seeking compensation through tort litigation is often "untenable for undocumented workers [because they] often lack the resources to initiate litigation, have limited English proficiency, and fear the immigration consequences of appearing in court."<sup>26</sup> Nevertheless, some undocumented workers attempt to gain compensation through common law tort claims despite the many obstacles they face. Tort claims are only occasionally successful, and even when they are, the worker's immigration status often limits the type and amount of damages or benefits they receive from litigation.<sup>27</sup>

For these reasons, workers' compensation law has virtually preempted the desirability of pursuing a common law tort claim against an employer for a workplace injury.<sup>28</sup> Workers' compensation, as opposed to tort law, is a "no-fault" structured law that varies slightly by jurisdiction, but has a universally similar purpose and function: obligating employers to compensate an injured

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24. 1 ARTHUR LARSON & LEX. K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* §§ 2.07–2.08 (2012).

25. See MARION G. CRAIN ET AL., *WORK LAW: CASES AND MATERIALS* 863 (2005); see also Debra T. Ballen, *The Sleeper Issue in Health Care Reform: The Threat to Workers' Compensation*, 79 CORNELL L. REV. 1291, 1292 (1994) (explaining that the workers' compensation system arose in the context of increased injuries resulting from the Industrial Revolution and that before workers' compensation, injured workers had to file law suits to receive compensation).

26. Mondragón, *supra* note 6, at 455 (quoting Brief for the New Orleans Worker's Center for Racial Justice et al., as Amici Curiae Supporting Respondents at \*11–12, *Bolinger Shipyards, Inc. v. Rodriguez*, 604 F.3d 864 (5th Cir. 2010) (No. 09-60095), 2009 WL 6706826); see also CRAIN ET AL., *supra* note 25, at 863 (explaining that the shift towards workers' compensation occurred because recovery under the tort system hinged on determinations of fault and causation and not under need). Fearing the immigration consequences of appearing in court cannot be underestimated. Some undocumented workers who suffer workplace injury—even those workers whose injuries stem directly from their employer's negligence—elect not to risk being subjected to removal proceedings by having their true immigration status become known. See Mondragón, *supra* note 6, at 471–72.

27. See *infra* Part III.C.

28. Steven G. Biddle & Mary Jo Foster, *When Is Workers' Compensation the Exclusive Remedy in Sexual Harassment Cases?*, ARIZONA ATTORNEY, Dec 1996, available at <http://www.azbar.org/AzAttorney>; see Mondragón, *supra* note 6, at 454–55.

employee for his or her injury irrespective of how or why the injury occurred.<sup>29</sup> The employer can provide this relief in one of three ways: self-insuring, purchasing private insurance, or participating in a state administered workers' compensation fund.<sup>30</sup> However, whether the employer provides this relief directly out of pocket, indirectly through an insurance carrier, or through participation in a state workers' compensation fund, the employer is still the party responsible for compensating for the injury.<sup>31</sup>

Although workers' compensation strictly burdens employers to pay for any injury that occurs under their watch, regardless of circumstance, this is a necessary tradeoff for employers. Under workers' compensation schemes, employers avoid the expense and delay of litigation<sup>32</sup> and also avoid the potentially ruinous economic losses stemming from injured employees who bring successful tort claims.<sup>33</sup> Moreover, requiring employers to shoulder the burden of an employee's injury properly incentivizes the employer to promote and maintain a safe workplace.

There are a number of types of relief available for injured workers through workers' compensation. These include payment of medical bills, monetary compensation for the injury itself (which also works as a lost wages substitute), temporary total

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29. 1 LARSON & LARSON, *supra* note 24, at § 1.01; CRAIN ET AL., *supra* note 25, at 875. Workers' compensation laws stemmed from a dilemma that accompanied the rise of industry in America. *Id.* at 861. Flowing naturally from the increase of industry in the United States was the increase of workplace accidents. *Id.* ("The Workers' Compensation system developed in the early twentieth century in response to rising rates of industrial accidents and their devastating economic consequences for workers disabled or killed on the job and their dependents."). Increased litigation of these accidents uncovered a problem for both employees and employers. First, many workers were unable to recover due to a number of judicially created affirmative defenses that employers could claim. *Id.* at 868; *see also* Ballen, *supra* note 25, at 1292. But, if plaintiffs could overcome these defenses, employers became subject to debilitating liability costs outside of their individual insurance coverage. *Id.* Workers' compensation seemingly resolved this dilemma by allowing more workers to recover irrespective of fault and by ensuring that the employer's liability costs were not ruinously damaging.

30. CRAIN ET AL., *supra* note 25, at 876.

31. *See id.* In the case of an employer who is insured, the "out-of-pocket" expenses may not be as direct of a reality as is workplace injury compensation for employers who are either self-insured or non-insured. Nevertheless, either directly, or indirectly through increased insurance premiums, the employer will still feel the effect of this obligation.

32. *See* Mondragón, *supra* note 6, at 455.

33. Ballen, *supra* note 25, at 1292.

disability benefits, partial disability benefits, and permanent disability benefits.<sup>34</sup> Sometimes the relief might be some manner of vocational rehabilitation benefit, like training for a new job.<sup>35</sup>

Typically, an administrative law judge ("ALJ") will hear an injured worker's dispute about compensability or benefits.<sup>36</sup> If either the worker or the employer deems that the ALJ's decision in the hearing was erroneous, they may appeal to the state workers' compensation appeals board.<sup>37</sup> The board's decision may be appealed to the state's general courts of appeal.<sup>38</sup> In many cases, however, a worker's claim for benefits is not contested and is settled without the need for administrative or judicial intervention.<sup>39</sup>

Workers' compensation statutes have generally allowed recovery of benefits to injured undocumented workers as most states have either expressly or impliedly found that illegal immigrants are covered within the definition of "employee" for purposes of workers' compensation.<sup>40</sup> Nevertheless, even if the injured undocumented worker files his or her workers' compensation claim in one of the jurisdictions that allows recovery to illegal immigrants, he or she faces a real possibility that such damages will be limited due to his or her illegal status.<sup>41</sup>

### C. Hoffman Plastic Compounds, Inc. v. NLRB

The Supreme Court of the United States' decision in *Hoffman Plastic Compounds, Inc. v. NLRB* has unquestionably and profoundly impacted many sub-issues of workplace rights for illegal immigrants, including workplace injury.<sup>42</sup> Before *Hoffman Plastic*,

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34. CRAIN ET AL., *supra* note 25, at 875–76.

35. *Id.* at 876.

36. *Id.* at 877.

37. *Id.*

38. *Id.*

39. *Id.*

40. See *infra* Part III.B. As a general matter, workers' compensation laws only bar benefits to otherwise illegal immigrants "if (1) the employee knowingly and willfully made a false representation as to his or her physical condition; (2) the employer relied on the representation and the reliance was a substantial factor in the hiring; and (3) there was a causal relation between the false representation and the injury." 3 ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* 66-1 (2013) (emphasis added).

41. See *infra* discussion Part III.C.

42. 535 U.S. 137 (2002); 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, 661 (2012).

the Supreme Court first confronted the issue of a potential conflict between employment law and federal immigration policy in *Sure-Tan, Inc. v. NLRB*.<sup>43</sup> In *Sure-Tan*, a pair of undocumented workers had been terminated and reported to the Immigration and Naturalization Service, the primary immigration enforcement body at that time, in retaliation for union involvement.<sup>44</sup> The National Labor Relations Board ("NLRB") ordered the employer to reinstate the undocumented workers and award them backpay because the termination was in violation of the National Labor Relations Act ("NLRA").<sup>45</sup> The Supreme Court, however, reversed the NLRB's order and held—foreshadowing the holding in *Hoffman Plastic*—that the NLRB's order to award backpay and reinstate the illegal immigrants was precluded by federal immigration policy.<sup>46</sup>

Ironically, *Hoffman Plastic* did not address workplace injury law at all;<sup>47</sup> rather, in the case, an illegal immigrant had been terminated from his employment due to union activity<sup>48</sup> and the Court once again limited the recovery of lost wages.<sup>49</sup> The Court reasoned that awarding full recovery of lost wages would contradict the nation's immigration objectives.<sup>50</sup>

The facts of *Hoffman Plastic* were as follows. In May 1988, Jose Castro was hired to operate various machines for Hoffman Plastic Compounds, Inc. ("Hoffman").<sup>51</sup> Before Hoffman hired him, "Castro presented documents that appeared to verify his authorization to work in the United States."<sup>52</sup> Later, Castro and several other employees were laid off due to their involvement in a union organizing campaign.<sup>53</sup> Some years later, the NLRB discovered that Hoffman had intentionally laid off these employees, including

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43. 467 U.S. 883, 886 (1984).

44. *Id.* at 886–87.

45. *Id.* at 889.

46. *Id.* at 898, 903–05.

47. *See generally Hoffman Plastic*, 535 U.S. 137.

48. *Id.* at 140.

49. *Id.*

50. *Id.* at 151.

51. *Id.* at 140.

52. *Id.*

53. *Id.*

Castro, and did so “in order to rid itself of known union supporters,” a violation of the NLRA.<sup>54</sup> The NLRB then ordered Hoffman to offer reinstatement and backpay to these employees.<sup>55</sup>

The ALJ who presided over the compliance hearing determining the amount of backpay owed to each affected employee discovered that Castro had never been legally authorized to work in the United States.<sup>56</sup> Castro subsequently admitted to tendering false work authorization documents.<sup>57</sup> The ALJ found that the Board was precluded from awarding either reinstatement or backpay because doing so would contradict *Sure-Tan*.<sup>58</sup> Four years later, the NLRB reversed the ALJ’s decision with respect to backpay, however, on the grounds that “the most effective way to accommodate and further the immigration policies embodied in [IRCA] is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees.”<sup>59</sup>

A divided Supreme Court reversed the NLRB’s backpay and reinstatement order, holding that allowing the Board to award backpay to illegal aliens would contradict explicitly stated federal immigration goals.<sup>60</sup> The majority, in an opinion authored by Chief Justice Rehnquist, relied heavily on the plain language of the Court’s opinion in *Sure-Tan*, concluding that *Sure-Tan*’s express limitation of backpay to aliens “not lawfully entitled to be

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54. *Id.*

55. *Id.* at 140–41.

56. *Id.* at 141.

57. *Id.*

58. *Id.*

59. *Id.* at 141 (alteration in original) (quoting Hoffman Plastic Compounds, Inc., 326 N.L.R.B. 1060, 1060 (1998)) (internal quotation marks omitted). It is interesting and somewhat surprising to note that the primary federal agency over immigration at that time, the Immigration and Naturalization Service (“INS”), allied with the NLRB on certiorari, arguing that the award of backpay should be upheld because the INS had conceded that “border enforcement alone could not stop undocumented immigrants from entering the country in search of work.” Catherine L. Fisk & Michael J. Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights Without Remedies for Undocumented Immigrants* 373–74 (Duke Law Sch. Legal Studies, Research Paper No. 82, 2005), available at <http://ssrn.com/abstract=809205>. With this position, the INS was endorsing “further efforts to reduce the employment magnet.” *Id.* at 374. However, the positions of the INS came as quite the shock to Justice Scalia, as he so energetically expressed during oral argument. See *id.* at 378.

60. *Hoffman Plastic*, 535 U.S. at 151.

present and employed in the United States” foreclosed the award of backpay to Castro.<sup>61</sup>

The Court held that under IRCA, “it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies.”<sup>62</sup> Chief Justice Rehnquist said “[e]ither 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.”<sup>63</sup> The majority correctly pointed out that Castro’s claim for backpay was invalid given that Congress had “expressly made it criminally punishable for an alien to obtain employment with false documents.”<sup>64</sup> However, the Court did not limit its decision to Castro’s specific circumstance, but broadly held that awarding backpay to illegal immigrant workers “trivializes the immigration laws, [and] also condones and encourages future violations.”<sup>65</sup> The Court also held that because Castro was unable to work legally in the United States—also a liberal interpretation of IRCA—he was consequently unable to mitigate damages.<sup>66</sup> Because awarding backpay to illegal aliens would “unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA,” the Supreme Court reversed the NLRB’s decision to award Castro backpay damages.<sup>67</sup>

Justice Breyer, writing for the dissent, challenged the majority’s holding as flawed. First and foremost, the dissent questioned the majority’s contention that awarding backpay would condone future IRCA violations. Justice Breyer found the NLRB’s position persuasive—that awarding backpay to illegal immigrant workers does “*not* interfere with the implementation of immigration policy. Rather, [awarding backpay] reasonably helps to deter unlaw-

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61. *Id.* at 145 (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984)) (internal quotation marks omitted). This conclusion was premature, or even erroneous, in light of the fact that IRCA never explicitly states that an illegal immigrant may never be employed in the United States. *See supra* notes 20–22. Nor does IRCA state that mere presence is, in and of itself, illegal. *See supra* notes 20–22.

62. *Hoffman Plastic*, 535 U.S. at 148.

63. *Id.*

64. *Id.* at 149.

65. *Id.* at 150.

66. *Id.* at 150–51; *see supra* notes 20–22.

67. *Hoffman Plastic*, 535 U.S. at 151–52.

ful activity that *both* labor laws *and* immigration laws seek to prevent.”<sup>68</sup> Justice Breyer found the backpay award necessary to ensure the credibility of law enforcement because such an award would “make[] clear that violating the labor laws will not pay.”<sup>69</sup> Justice Breyer opined that if employers were not responsible for back pay, they could “violate the labor laws at least once with impunity,”<sup>70</sup> and further explained that the general purpose of IRCA’s employment prohibition was to diminish the attraction that would pull illegal immigrants to the United States.<sup>71</sup> Moreover, Justice Breyer challenged the majority’s reliance on IRCA’s preemptive powers, arguing that IRCA’s statutory language does not explicitly state how a violation of federal immigration policy is to affect other laws, such as the NLRA.<sup>72</sup> Instead, he explained that the Court’s ruling was based on its belief that it was “necessary . . . in order to vindicate what [the Court] sees as conflicting immigration law policies.”<sup>73</sup>

Shortly after the Supreme Court’s decision in *Hoffman Plastic*, questions arose as to its applicability in other areas of employment.<sup>74</sup> *Hoffman Plastic* was factually limited by virtue of its dealing with two federal laws, IRCA and NLRA.<sup>75</sup> It was also factually limited to scenarios in which the illegal immigrant affirmatively tendered false work authorization, which is an undisputed violation of IRCA.<sup>76</sup> However, the apparent breadth of the Court’s holding in *Hoffman Plastic* seemed to suggest that illegal immigrants have no workplace rights. Indeed, the *Hoffman Plastic* decision emboldened many employers to engage in workplace practices under a presumption that illegal immigrants have no workplace rights.<sup>77</sup>

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68. *Id.* at 153 (Breyer, J., dissenting).

69. *Id.* at 154 (Breyer, J., dissenting).

70. *Id.*

71. *Id.* at 155 (Breyer, J., dissenting).

72. *Id.* at 154–55 (Breyer, J., dissenting).

73. *Id.* at 160–61 (Breyer, J., dissenting). Lastly, the dissent argued that *Chevron* deference should have been awarded to the NLRB’s decision because its position was at least a reasonable one. *Id.* at 161 (Breyer, J., dissenting).

74. See Garcia, *supra* note 42, at 667–68.

75. *Hoffman Plastic*, 535 U.S. at 140.

76. 8 U.S.C. § 1324a(b) (2012); see *Hoffman Plastic*, 535 U.S. at 149.

77. Mondragón, *supra* note 6, at 454.

#### D. *Senate Bill 744*

In 2013, the Senate undertook the arduous task of writing new comprehensive legislation—in contrast to the House of Representatives' desire for piecemeal amendments to supplant IRCA.<sup>78</sup> Led by the effort of four Democrats and four Republicans, dubbed the "Gang of Eight," the Senate passed S. 744 on June 27, 2013, by a vote of sixty-eight to thirty-two.<sup>79</sup> President Obama characterized S. 744's passage as "a critical step" towards fixing the country's broken immigration system.<sup>80</sup> While it proposes reforms to interior enforcement through improved employment verification, the bill's primary focus is on strengthening the southern border and providing a path to citizenship for the eleven million illegal immigrants living in the United States.<sup>81</sup>

Almost from its outset, Republicans in the GOP-dominated House of Representatives opposed the comprehensive approach of S. 744.<sup>82</sup> The issue that most squarely divides the House Republicans was S. 744's path to citizenship for the illegal immigrants currently living within the nation's borders, as some of the Republican caucus views it as an unwarranted amnesty for individuals who have broken the law.<sup>83</sup> Aside from this ideological rift, the bill faces a number of hurdles before the House will pass it: the sheer number of Republicans in the House, their desire to have a piecemeal amendment approach, and their distrust of President Obama's policies toward border security all stand in the way of easy passage.<sup>84</sup> Notwithstanding partisan politics, immigration reform has taken a backseat to other pressing issues such as raising the debt-ceiling and the roll-out of the Affordable Care Act.<sup>85</sup> While S. 744 proposes a number of important changes

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78. David Espo & Erica Werner, *Broad Immigration Bill Cruising to Senate Passage*, ASSOCIATED PRESS (June 26, 2013), <http://news.yahoo.com/broad-immigration-bill-cruising-senate-passage-200518755.html>.

79. Alan Silverleib, *Senate Passes Sweeping Immigration Bill*, CNN (June 28, 2013), <http://www.cnn.com/2013/06/27/politics/immigration/>.

80. *Id.* At least one commentator believes that this legislation (if subsequently passed in the House) has the potential to be the crowning legislative achievement of the Obama administration's second term. *Id.*

81. Silverleib & Cohen, *supra* note 5.

82. *Id.*

83. *Id.*

84. *Id.*

85. Bert Eljara, *Immigration Reform Takes a Back Seat*, EXAMINER.COM (Oct. 7, 2013), <http://www.examiner.com/article/immigration-reform-takes-a-back-seat>.

to our federal immigration system, IRCA is likely here to stay for the near future.

How would S. 744 affect illegal immigrants who are injured in the course of their employment? The answer is that, if anything, it would provide more protections for the injured illegal immigrant. Most of S. 744's proposed changes do not drastically differ from the policies in IRCA and certainly do not weaken the enforcement provisions of IRCA.<sup>86</sup> For example, S. 744 does not touch the provisions of IRCA which make it illegal for an employer to knowingly hire an illegal immigrant or continue to employ an illegal immigrant after discovering his or her illegal status, thereby maintaining IRCA's burden placement on the employer.<sup>87</sup> S. 744 also maintains the express presumption that if the employer has hired an illegal immigrant and failed to make an inquiry to verify the individual's employment authorization status, he or she does so knowingly.<sup>88</sup>

However, in at least one important provision concerning remedies, S. 744 affirmatively strengthens the protections granted to undocumented workers. Subsection 8 of S. 744 section 3101 states that "all rights and remedies provided under any Federal, State, or local law relating to workplace rights, including *but not limited to* back pay, are available to an employee despite (i) the employee's status as an unauthorized alien during or after the period of employment."<sup>89</sup>

The language of this section is clear and unequivocal. It expressly states that an employee's immigration status is irrelevant to an illegal immigrant's workplace rights under *any* federal, state, or local law.<sup>90</sup> Thus, if S. 744 were to pass the House of Representatives and become law as written, it would not only re-endorse the emphasis that IRCA put on the employer for curbing employment of illegal immigrants, it would also emphatically bolster an illegal immigrant's workplace rights—specifically his or her right to recover in full for a workplace injury.

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86. Compare 8 U.S.C. § 1324a (2012), with S. 744, 113th Cong. § 3101 (2013).

87. See S. 744 § 3101 ("It is unlawful for an employer—(A) to hire, recruit, or refer . . .").

88. *Id.*

89. *Id.* (emphasis added).

90. *Id.*; see also *infra* Part IV.B (arguing that damages should not be limited by virtue of immigration status because this extrinsic characteristic is, in the majority of, if not all, instances, irrelevant to the injury suffered).

### III. IRCA AND *HOFFMAN PLASTIC*'S APPLICABILITY TO WORKPLACE INJURY

#### A. *State Courts Have Generally Held that IRCA Does Not Preempt an Illegal Immigrant's Right to Workplace Injury Recovery*

For Chief Justice Rehnquist and the *Hoffman Plastic* majority, one of the primary motivations for not allowing Jose Castro to receive backpay was that federal immigration policies, as expressed in IRCA, foreclosed such recovery.<sup>91</sup> Notwithstanding this holding, the vast majority of states allow illegal immigrants to recover damages under state workplace injury law.<sup>92</sup> Still, many employers argue that IRCA preempts these state laws.<sup>93</sup> Fortunately, most courts that have undertaken the determination of whether workplace injury recovery is foreclosed by IRCA's federal immigration policies have refused to find that IRCA preempts state law.<sup>94</sup>

The constitutional doctrine of federal preemption is derived from the Supremacy Clause<sup>95</sup> and a finding of preemption is largely determined by congressional intent.<sup>96</sup> The Supreme Court has recognized that federal laws may either expressly or impliedly preempt a state law or state-administered police power.<sup>97</sup> Express preemption occurs when Congress specifically precludes state or local regulation in a particular field.<sup>98</sup> In those instances, the federal law is binding on the states because federal law is supreme.<sup>99</sup>

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91. See *supra* Part II.C.

92. A number of state workers' compensation statutes explicitly provide coverage to illegal immigrants—or persons “whether lawfully or unlawfully employed”—including Arkansas, California, Colorado, Idaho, Kansas, Mississippi, Nevada, North Carolina, South Carolina, and Virginia. 3 LARSON & LARSON, *supra* note 40, § 66.03[2][a] & nn.4, 7, § 66.03[2][b] & n.10, § 66.03[2][c] & nn.12–13, 15.

93. *Id.* at § 66.03[3][a].

94. *Id.*

95. The Supremacy Clause dictates that the “Constitution, and the Laws of the United States . . . shall be the supreme law of the land.” U.S. CONST. art. VI, cl. 2.

96. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540–41 (2001); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992).

97. *Gade*, 505 U.S. at 98.

98. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 406 (4th ed. 2011).

99. *Gade*, 505 U.S. at 108 (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)) (“[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, ‘any

Implied preemption is a little more difficult to define. There are two types of implied preemption. The Supreme Court has recognized that implied field preemption occurs when "the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left *no room* for the States to supplement it.'"<sup>100</sup> The Supreme Court has also recognized that implied conflict preemption occurs when "compliance with both federal and state regulations is a physical impossibility,' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"<sup>101</sup>

Given that workplace injury recovery has traditionally been a state-administered remedy, most state courts have been reluctant to find that IRCA has the same preemptive powers that the Supreme Court found in *Hoffman Plastic*.<sup>102</sup> Those advocating preemption point to IRCA's language in section 1324a(h)(2) which states: "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."<sup>103</sup> However, some state courts are hesitant to apply this preemption section to the workplace injury context because workplace injury recovery, generally, does not involve civil or criminal sanctions.<sup>104</sup>

Some courts have refused to hold that IRCA either expressly or impliedly preempts state laws governing workplace injury recovery. Courts have dismissed preemption arguments on express preemption grounds, reasoning that there is no language in IRCA that explicitly states that it preempts state workers' compensa-

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state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.").

100. *Id.* at 98 (emphasis added) (quoting *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982)).

101. *Id.* (citations omitted) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

102. *See, e.g., Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 329 (Minn. 2003) ("[W]e conclude that the IRCA was not intended to preclude the authority of states to award workers' compensation benefits to unauthorized aliens."); *Safeharbor Emp'r Servs. I, Inc. v. Velazquez*, 860 So. 2d 984, 986 (Fla. Dist. Ct. App. 2003) (declining to find either express or implied preemption and concluding that "the Florida legislature's right to enact workers' compensation benefits for illegal aliens is not preempted by federal action").

103. 8 U.S.C. § 1324a(h)(2) (2012).

104. *See Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 239 (2d Cir. 2006); *see also Dowling v. Slotnik*, 712 A.2d 396, 403 (Conn. 1998) (rejecting the notion that workers' compensation benefits can be considered sanctions because they were intended to compensate a worker for work-related injuries without regard to fault).

tion laws.<sup>105</sup> As written, IRCA is silent on the issue of workplace injury.<sup>106</sup> For others, a finding of implied field preemption is difficult given that employment has largely been a state-governed remedy.<sup>107</sup> For example, the New York Court of Appeals, in *Balbuena v. IDR Realty LLC*, held that states “possess broad authority under their police powers to regulate the employment relationship to protect workers within the State’ . . . includ[ing] the power to enact ‘laws affecting occupational health and safety.’”<sup>108</sup> Other courts have also refused to find conflict preemption because awarding damages neither makes compliance with IRCA physically impossible nor sufficiently stands as an obstacle to its underlying purposes. For example, in *Curiel v. Environmental Management Services*, the South Carolina Supreme Court held that allowing benefits to injured illegal alien workers in no way conflicted with the express purposes of IRCA.<sup>109</sup>

Furthermore, as the determination of preemption hinges on congressional intent, Congress made clear that IRCA was not intended to “undermine or diminish in any way labor protections in existing law.”<sup>110</sup> A number of courts have rejected the arguments that IRCA preempts state workplace injury laws based on this congressional intent.<sup>111</sup> In conclusion, employers who have attempted to argue that IRCA preempts illegal immigrants from recovering damages have usually not prevailed in that argument.

#### *B. Most Courts Have Refused to Laterally Apply Hoffman Plastic to the Workplace Injury Context*

Notwithstanding the Supreme Court’s holding in *Hoffman Plastic* that illegal immigrants are precluded from receiving backpay under the nation’s federal immigration objectives, courts

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105. *Farmer Bros. Coffee v. Workers’ Comp. Appeals Bd.*, 133 Cal. App. 4th 533, 539 (Cal. Ct. App. 2005); see *Dowling*, 712 A.2d at 403–05.

106. See 8 U.S.C. § 1324a.

107. See, e.g., *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1256 (N.Y. 2006).

108. *Id.* at 1256 (quoting *De Canas v. Bica*, 424 U.S. 351, 356 (1976)).

109. 655 S.E.2d 482, 484 (S.C. 2007) (“[D]isallowing benefits would mean unscrupulous employers could hire undocumented workers without the burden of insuring them, a consequence that would encourage rather than discourage the hiring of illegal workers.”).

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

111. *Ruiz v. Belk Masonry Co.*, 559 S.E.2d 249, 252 (N.C. Ct. App. 2002); see *Curiel*, 655 S.E.2d at 484 (finding the *Ruiz* court persuasive in its analysis of congressional intent underlying IRCA).

have been reluctant to laterally apply *Hoffman Plastic* to bar workplace injury recovery. Courts have been hesitant to expand the breadth of *Hoffman Plastic* for several reasons.<sup>112</sup> First, the majority of state legislatures have made it clear that they prefer laws where illegal immigration status does not per se preclude recovery for workplace injuries.<sup>113</sup> Second, most courts have not found a sufficient causal connection between the injury and an individual's immigration status.<sup>114</sup> Lastly, courts have been careful to recognize that *Hoffman Plastic's* particular factual circumstances are not universally applicable to all workplace injury cases.<sup>115</sup>

Under our federalist system of government, states have considerable police power to regulate and enact laws for their citizens. Unquestionably, the reluctance of many state courts to laterally apply *Hoffman Plastic* to the workplace injury context partly stems from the fact that the state legislatures have made clear their intent not to do so. In traditionally state-governed and state-administered arenas, like workplace injury, state courts are naturally inclined to give effect to the intent of their own legislature unless there is a clear federal law which transcends or preempts the state law.<sup>116</sup> This inclination is sometimes referred to as the "presumption against pre-emption."<sup>117</sup> The Supreme Court has recognized this principle justifiably exists as a product of independent state sovereignty in our federal system and the historic primacy of state regulation in matters such as health and safety.<sup>118</sup> In all preemption cases, courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act."<sup>119</sup>

Since *Hoffman Plastic* is not a case about workplace injury, and in the absence of any prevailing federal workplace injury law that would preempt state laws, state courts apply their own laws and

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112. I have intentionally omitted a preemption argument whose reasoning follows identically from Part III.A's treatment of IRCA.

113. 3 LARSON & LARSON, *supra* note 40, at § 66.03[2][a] & n.4.

114. See, e.g., *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221, 224–25 (N.J. Super. Ct. App. Div. 1996).

115. *Solis v. SCA Rest. Corp.*, 938 F. Supp. 2d 380, 400 (E.D.N.Y. 2013).

116. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

117. See *id.*

118. *Id.*

119. *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (internal quotation marks omitted).

give effect to their own law's legislative intent. The response of the states on the question of whether illegal immigrants are covered under their state's workplace injury law has largely been to provide coverage.<sup>120</sup> A great number of states' workers' compensation statutes provide coverage to persons "whether lawfully or unlawfully employed."<sup>121</sup> Some states define "employee" as including "aliens" without reference to legality of employment.<sup>122</sup> Other states have allowed recovery because their courts have found "illegal aliens" to be included in the definition of covered "employees" despite the absence of any provision directly on the issue.<sup>123</sup> In fact, only Wyoming and Idaho expressly prohibit illegal immigrants from receiving workplace injury recovery.<sup>124</sup> As one commentator noted, the widespread legislative and judicial practice of *not* completely prohibiting workplace injury recovery because of immigration status "has made it possible for courts across the United States to determine that immigration status is irrelevant to a worker's eligibility for workers' compensation benefits."<sup>125</sup>

A second reason that explains why state courts have refused to laterally import *Hoffman Plastic* into the workplace injury context is relevance. Courts have asserted that there is a nonexistent or insufficient nexus between a suffered workplace injury and the injured employee's immigration status.<sup>126</sup> In other words, one's immigration status is largely, if not absolutely, irrelevant to an injury suffered at the workplace. In some cases, the relevance argument prevailed despite the undocumented worker's affirmative use of false work authorization or other identification.<sup>127</sup> For ex-

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120. See *supra* note 92.

121. 3 LARSON & LARSON, *supra* note 40, § 66.03[2][a] & n.4.

122. *Id.* § 66.03[2][a] & n.7.

123. *Id.* § 66.03[2][b] & n.10.

124. *Id.* § 66.03[2][c] & n.12-14; see also *id.* § 66.03[2][c] & n.15 (noting that Nebraska has denied vocational rehabilitation services by virtue of immigration status).

125. Mondragón, *supra* note 6, at 457.

126. See, e.g., *Farmer Bros. Coffee v. Workers' Comp. Appeals Bd.*, 133 Cal. App. 4th 533, 540 (Cal. Ct. App. 2005); see also *infra* Part IV.B.

127. See *Farmer Bros. Coffee*, 133 Cal. App. 4th at 543-44. The relevance argument is also stronger if the employer's lack of diligence or care in the hiring process becomes an intervening cause which overcomes any conceded impropriety on the part of the employee. Some courts have used IRCA's unambiguous burden placement on the employer to allow illegal immigrants to recover, even if they have used false documentation, and there is not a sufficient showing that the employer was compliant in good-faith and *relied* on that false representation. See *Coque v. Wildflower Estates Developers, Inc.*, 58 A.D.3d 44, 52-53 (N.Y. App. Div. 2008); *Silva v. Martin Lumber Co.*, No. M2003-00490-WC-R3-CV, 2003 WL 22496233, at \*2 (Tenn. Nov. 5, 2003); *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994,

ample, in a California case where an illegal immigrant affirmatively tendered false work authorization to the employer—a fake Social Security card—the California Court of Appeals held the individual's employment was the direct result of the false representation of the individual's immigration status, and not the injury.<sup>128</sup>

Thirdly, apart from the legislative intent and relevance arguments, many state courts have recognized that the particular factual pattern of *Hoffman Plastic* is not universally applicable to all workplace injury cases.<sup>129</sup> *Hoffman Plastic* can be distinguished on two fronts. First, it specifically dealt with two competing federal laws, IRCA and NLRA, and this is rarely the case in workplace injury disputes, whether the claims are based on workers' compensation or tort, because workplace injury is a traditionally state-administered arena.<sup>130</sup>

*Hoffman Plastic* can be factually distinguished on a second front. In *Hoffman Plastic*, the illegal immigrant, Jose Castro, affirmatively tendered false work authorization to the employer on which the employer reasonably relied in the hiring process.<sup>131</sup> Under IRCA, employers who reasonably rely on such false representation and are otherwise compliant are entitled to a good-faith defense.<sup>132</sup> Thus, according to the facts of *Hoffman Plastic*, the Supreme Court reached the correct result in not upholding Castro's relief from a statutory interpretation point of view. By affirmatively tendering false work authorization documents, Castro expressly violated IRCA under the language of the statute and

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1002 (N.H. 2005). Using this reasoning, the court opinions seem to reinforce that employers are only entitled to protection in the instances of an employee's false representation, if they have otherwise acted in good faith. Unless an employer can show that they reasonably relied on the documentation and were otherwise compliant in the verification process, their lack of diligence or negligence is presumed, and is a superseding intervening cause that vitiates the affirmative defense. 8 U.S.C. § 1324 a(a)(6)(C)(i) (2012).

128. *Farmer Bros. Coffee*, 133 Cal. App. 4th at 543–44; see also *Matrix Emp. Leasing v. Hernandez*, 975 So. 2d 1217, 1217 (Fla. Dist. Ct. App. 2008) (upholding an award of benefits to an undocumented worker who had presented his employer with a false social security card in the hiring process). These cases are consistent with the overall purpose of workers' compensation laws which are intended to provide compensation to the injured individual regardless of fault and regardless of any intrinsic or extrinsic characteristics of that individual. See *supra* text accompanying notes 29–31.

129. See, e.g., *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1258 (N.Y. 2006).

130. See *supra* Part II.B.

131. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140–42 (2002).

132. See *supra* text accompanying note 19.

Hoffman was entitled to a good-faith defense, regardless of the larger immigration policy concerns.

It is not so much the result that condemns *Hoffman Plastic's* universal applicability to the workplace injury context, but rather the *Hoffman Plastic* majority's underlying assumptions and reasoning. Not every illegal immigrant workplace injury case involves a situation where the undocumented worker affirmatively uses false documentation in the hiring process; indeed, the contrary is often the case.<sup>133</sup> Moreover, IRCA does not expressly criminalize mere illegal presence in the United States and does not, per se, prohibit an illegal immigrant from being employed.<sup>134</sup>

Many state courts have used this ground (that not every workplace injury case involves an illegal immigrant who has affirmatively tendered false work documentation) in refusing to give *Hoffman Plastic* universal applicability.<sup>135</sup> For instance, in *Balbuena v. IDR Realty LLC*, the New York Court of Appeals specifically stated, "*Hoffman [Plastic]* is dependent on its facts, including the critical point that the alien tendered false documentation" during the hiring process.<sup>136</sup> The New York Superior Court, in *Gomez v. F & T Int'l (Flushing, NY) LLC*, also recognized that unless the illegal immigrant fraudulently misrepresented his immigration status, which is a direct violation of IRCA, the illegal immigrant may not be exposed to criminal prosecution or penalties.<sup>137</sup> The *Gomez* court acknowledged that while "[a]n employer who knowingly violates the employment verification requirements . . . is subject to civil or criminal prosecution," it is "[o]nly in situations, unlike the present case, where the worker

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133. See, e.g., *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 223 (2d Cir. 2006); see also *Balbuena*, 845 N.E.2d at 1250 (finding that the question of work authorization documents only arose upon plaintiff's suit following the workplace injury); *Gomez v. F & T Int'l (Flushing, NY) LLC*, 842 N.Y.S.2d 298, 299 (N.Y. App. Div. 2007) (noting that plaintiffs were hired without having to fill out an application for employment or show any type of identification).

134. See *supra* text accompanying notes 21–23.

135. See, e.g., *Madeira*, 469 F.3d at 246; *Balbuena*, 845 N.E.2d at 1258; *Gomez*, 842 N.Y.S.2d at 301.

136. *Balbuena*, 845 N.E.2d at 1258. The *Madeira* court also premised a portion of its decision on the fact that the illegal immigrant worker had committed no fraud but that "it was the employer rather than the worker who knowingly violated IRCA by arranging for the employment." 469 F.3d at 223.

137. *Gomez*, 842 N.Y.S.2d at 301.

uses false documents to obtain employment" that the undocumented employee will be subjected to potential criminal prosecution or penalties.<sup>138</sup>

Thus, while *Hoffman Plastic* seemed to suggest that illegal immigrants have no rights in the workplace, this has not turned out to be the case. Many state legislatures have made clear in their statutes that immigration status does not preclude recovery for workplace injuries. Moreover, courts have noted the lack of causal connection between one's immigration status and the respective workplace injury. Lastly, courts have distinguished *Hoffman Plastic* factually from many workplace injury cases.

C. *Notwithstanding IRCA and Hoffman Plastic's Inapplicability, a Number of Courts Have Still Used an Illegal Immigrant's Status to Limit Workplace Injury Recovery*

Despite the fact that many courts have refused to find IRCA preemptory and are likewise reluctant to broadly apply *Hoffman Plastic* to the work injury context, many of these courts have unfortunately allowed a worker's immigration status to be taken into account in determining damages.<sup>139</sup> The remaining portion of this comment is dedicated to challenging this practice, which has so adversely affected the undocumented worker population.

One of the demonstrative cases using immigration status as a basis for limiting workplace injury recovery is *Balbuena v. IDR Realty LLC*.<sup>140</sup> In *Balbuena*, the Court of Appeals of New York confronted the issue of whether damages should be limited for an undocumented Mexican worker who obtained employment as a construction worker but suffered debilitating injuries when he fell from a ramp.<sup>141</sup> In *Balbuena*, the court used a faulty assumption<sup>142</sup>

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138. *Id.* at 300-01.

139. See, e.g., *Balbuena*, 845 N.E.2d at 1259; *Cano v. Mallory Mgmt.*, 760 N.Y.S.2d 816, 818 (N.Y. Sup. Ct. 2003); see also *Madeira*, 469 F.3d at 228 (apportioning part of its decision to allow recovery on the fact that the jury was able to consider immigration status and removability in the damages determination); *Mondragón*, *supra* note 6, at 465. ("[Even though] the majority of courts have found that *Hoffman Plastic* does not automatically prohibit undocumented workers from obtaining workers compensation benefits or tort damages from employers . . . the *Hoffman Plastic* line of reasoning has been used to limit the type and amount of benefits and remedies that undocumented workers may claim.").

140. 845 N.E.2d at 1259.

141. *Id.* at 1250.

142. The court stated that "[w]e recognize . . . that plaintiffs' presence in this country

to correctly conclude that an individual's immigration status standing alone is "insufficient to justify denying plaintiffs a portion of the damages to which they are otherwise entitled."<sup>143</sup> Notwithstanding this and without a clear legal explanation, the *Balbuena* court considered the undocumented worker's immigration status relevant for determining damages.<sup>144</sup> Specifically, the court opined that, "any conflict with IRCA's purposes that may arise from permitting an alien's lost wage claim to proceed to trial can be alleviated by permitting a jury to consider immigration status as one factor in its determination of the damages."<sup>145</sup>

Other courts have more explicitly identified an undocumented worker's alleged inability to mitigate damages as the primary justification for using one's immigration status to limit his or her recovery. For example, in *Cherokee Industries, Inc. v. Alvarez*, the Court of Civil Appeals of Oklahoma held that while illegal aliens may not be necessarily barred from recovery under the state workers' compensation statute, "[s]ome benefits such as vocational rehabilitation or medical treatment . . . may not be available to a claimant who cannot stay in this country."<sup>146</sup> In *Reinforced Earth Co. v. Workers' Compensation Appeal Board*, the Pennsylvania Supreme Court also held that while *Hoffman Plastic* does not preclude recovery based solely on immigration status, an individual's undocumented status might justify suspending medical benefits for temporary total disability.<sup>147</sup>

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without authorization is impermissible under federal law" even though mere unauthorized presence itself is not a violation of IRCA. *Id.* at 1258; see *supra* note 21; *infra* Part IV.C.3.

143. *Balbuena*, 845 N.E.2d at 1258.

144. *Id.* at 1259 (finding immigration status relevant for the determination of damages without citing any statute, regulation, binding precedent, or legal doctrine to justify this practice).

145. *Id.* The United States Court of Appeals for the Second Circuit similarly endorsed this principle by upholding the district court's consideration of the plaintiff's alien status in determining workplace injury recovery. *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 248–49 (2d Cir. 2006); see also *Cano v. Mallory Mgmt.*, 760 N.Y.S.2d 816, 818 (N.Y. App. Div. 2003) ("[T]he plaintiff's status is not a bar to recovery [but] it may act as a factual item to be presented to the trier of fact.").

146. 84 P.3d 798, 801 (Okla. Civ. App. 2004).

147. 810 A.2d 99, 108 (Pa. 2002) (assuming that because the claimant cannot apply for or accept lawful employment, his loss of earning power is caused by, rather than incidental to, his individual immigration status); see also *Sanchez v. Eagle Alloy, Inc.*, 658 N.W.2d 510, 521 (Mich. Ct. App. 2003) ("We . . . hold that the magistrate correctly reasoned that when defendant learned of plaintiffs' employment status and could not legally retain them as employees or find them other work, plaintiffs became unable to . . . perform work 'because of' the commission of crime within the meaning of [the relevant state statute which precludes benefits if the worker has committed a crime]."); *De Jesus Uribe v.*

Some jurisdictions have also used this mitigation argument to justify limiting damages or benefits not due to an alien's physical inability to return to work, but on an alien's legal inability to return to his or her former position or accept another employment offer without violating IRCA.<sup>148</sup> For example, Maine has enacted a statutory provision that declares that the inability of an illegal alien to accept a mitigated job offer by virtue of his or her immigration status is deemed a refusal of the offer.<sup>149</sup> Likewise, a Georgia court held that an illegal immigrant was disqualified from receiving future benefits (be it front pay or medical expenses) due to his legal inability to take a mitigated offer position because his status as an illegal alien prevented him from obtaining a license to operate a motor vehicle.<sup>150</sup>

In sum, the damaging effects that *Hoffman Plastic* could potentially have on the workplace injury rights of illegal immigrants have fortunately not been fully realized due to the hesitancy of many state courts to award it universal deference. However, many state courts have still found ways to penalize illegal immigrant workers for violations that IRCA squarely puts on their employers' shoulders.<sup>151</sup> While not accepting *Hoffman Plastic's* restrictions wholesale, these courts have used *Hoffman Plastic's* reasoning to empower themselves and juries to take immigration status into account in determining the amount of damages an injured employee can receive.<sup>152</sup> For these courts, considering immigration status in the damage determination process is a way to vindicate what they see as a conflict with federal immigration ob-

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Aviles, No. B166839, Ventura Cnty. Super. Ct. No. 201488, 2004 WL 2385135, at \*1, \*4 (Cal. App. Dep't Super. Ct. Oct. 26, 2004) (conceding that while *Hoffman Plastic* does not preclude recovery for workplace injury, immigration status can preclude an undocumented street sweeper who was severely injured by a drunk driver from future wage recovery and obtaining vocational rehabilitation benefits).

148. 3 LARSON & LARSON, *supra* note 40, § 66.03[4][a]; see *Cherokee Indus., Inc.*, 84 P.3d at 801.

149. ME. REV. STAT. tit. 39-A, § 218(8) (1991).

150. *Martines v. Worley & Sons Constr.*, 628 S.E.2d 113, 117 (Ga. App. 2006); see also *Mora v. Workers' Comp. Appeal Bd.*, 845 A.2d 950, 954-55 (Pa. Commw. Ct. 2004) (allowing an employer to suspend weekly wage benefits, but not medical benefits, if the injured employee was an unauthorized alien and referencing the doctrine established in *Reinforced Earth Co.*, 810 A.2d at 108-09, that an illegal alien may be entitled to some benefits, but if the employer seeks to suspend weekly disability benefits, the employer need not show job availability since the employee may not legally take any proffered employment).

151. See, e.g., *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1259 (N.Y. 2006).

152. *Id.*

jectives.<sup>153</sup> While workplace injury may not be completely barred altogether, limiting the amount and type of recovery allows these courts to effectuate a robust slap on the wrist of the injured employees. There are a number of problematic policy concerns with this practice.

#### IV. IMMIGRATION STATUS SHOULD NOT BE USED TO LIMIT WORKPLACE INJURY RECOVERY<sup>154</sup>

Workplace injury recovery, whether in the form of tort damages or workers' compensation, should *not* be limited because of one's immigration status for three important reasons. First, awarding full damages and benefits supports, rather than undermines, the nation's federal immigration objectives as expressed in IRCA. Second, there is no relationship between one's immigration status, an unrelated extrinsic characteristic, and the injury suffered. Third, the practice of limiting workplace injury recovery overlooks some significant policy considerations.

##### A. *Allowing Full Workplace Injury Recovery Supports Rather Than Undermines Our Federal Immigration Objectives*

The courts that have limited recovery to illegal immigrant workers by virtue of one's illegal status have done so under the assumption that limiting damages provides an incentive against illegal immigration, by punishing the alien for his or her illegal presence.<sup>155</sup> This assumption, similar if not identical to the Su-

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153. See *id.* ("In any event, any conflict with IRCA's purposes that may arise from permitting an alien's lost wage claim to proceed to trial can be alleviated by permitting a jury to consider immigration status as one factor in its determination of the damages . . ."); see also *Madeira v. Affordable Hous. Found. Inc.*, 469 F.3d 219, 248–49 (2d Cir. 2006) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 544 (1977) (Rehnquist, J., concurring in part and dissenting in part)) (noting that the jury instruction allowing immigration status to be considered "in this case serves . . . to preclude us from identifying the lost earnings award to Madeira as a 'direct and positive' obstacle to the attainment of IRCA's policy and purpose").

154. It is important to note that most of the policy arguments in this analysis pertain primarily, but not solely, to those situations in which the illegal immigrant commits no affirmative fraud or misrepresentation in the hiring process—as such false representation is an express violation of IRCA. Nevertheless, as reflected in Part IV.B, and as some courts have held, there is at least a viable argument that immigration status is completely irrelevant in a workplace injury claims regardless of false misrepresentation in the hiring process. See *infra* Part IV.B.

155. See *infra* note 225–26 and accompanying text.

preme Court's rationale in *Hoffman Plastic*,<sup>156</sup> rests on fundamentally flawed footing. Although counterintuitive at first glance, awarding full damages to injured undocumented workers does not undermine federal immigration objectives. To the contrary, *not limiting* workplace injury recovery actually strengthens the federal immigration objective of reducing illegal immigration. The three primary reasons supporting this proposition are spelled out below.

1. Illegal Immigrants Do Not Prominently Base Their Decision to Immigrate on the Likelihood of Workplace Injury Recovery

Those courts, including the Supreme Court in *Hoffman Plastic*, which have argued that limiting damages, or prohibiting them altogether, creates an adverse incentive for illegal immigrants to immigrate are fundamentally mistaken. The soundness of their reasoning rests on the assumption that illegal immigrants actually contemplate the likelihood of workplace injury recovery in their decision to chase the "American Dream." However, illegal immigrants do not substantially base their decision to immigrate on the likelihood of future workplace injury recovery.<sup>157</sup> Consequently, any incentive created by the assurance of full workplace injury recovery is simply marginal.

When illegal aliens decide to come to the United States, they often take significant risks and make great sacrifices along the way.<sup>158</sup> They do so with the hope of a better life and the hope that they will be able to somehow escape impoverishment.<sup>159</sup> While seeking the ultimate realization of the "American Dream," their focus is often narrow, predominated by the more temporal need of sustaining life or reuniting with loved ones.<sup>160</sup> If the illegal immi-

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156. See *Hoffman Plastic Compounds, Inc., v. NLRB*, 535 U.S. 137, 148 (2002) ("Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies.").

157. See Michel Marizco, *Are the Border Patrol's Deterrent Measures Working?*, FRONTERAS (Aug. 2, 2013), <http://www.fronterasdesk.org/content/are-border-patrols-deterrent-measures-working>.

158. See Peña, *supra* note 8.

159. *Illegal Immigration from Mexico*, U.S. IMMIGRATION SUPPORT, <http://www.usimmigrationsupport.org/illegal-immigration-from-mexico.html> (last visited Apr. 14, 2014) (noting that many individuals come to the United States from poverty stricken towns in order to achieve the "American dream" and that for many, employment at a low wage job provides a higher standard of living than in their home country).

160. One commentator has recognized that illegal immigration will persist because

grant defeats the odds and makes it to the United States, he or she is often consigned, by necessity rather than by choice, to take employment in a low paying, labor-intensive, and dangerous job.<sup>161</sup> Although the risk of serious injury or fatality is strikingly high in these jobs, they are often the only option for immigrants who lack proficiency in English and other skills.<sup>162</sup>

Because pursuit of a better life is paramount, illegal immigrants are not going to be deterred from taking high-risk employment simply because of the possibility that damages might be limited if a workplace injury occurs; rather, the decision to immigrate is based on more pressing, temporal needs which transcend any associated risks.<sup>163</sup> This principle was reinforced in a Connecticut Supreme Court decision in which the court found that “[p]otential eligibility for workers’ compensation benefits in the event of a work-related injury realistically cannot be described as an incentive for undocumented aliens to enter this country illegally.”<sup>164</sup>

A recent study by law professor Emily Ryo surprisingly found that the probability of arrest or criminal punishment is not a significant deterrent for Mexican illegal immigrants.<sup>165</sup> Rather, Mexican illegal immigrants base their decision to immigrate on more significant factors such as employment prospects in the United States and the ability to survive the trek across the United

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there are stronger forces at work than border fences: “[T]he more walls we put, [the] more technology, [the] more agents we put, people who find that they’ve got to cross—whether because they’re starving [or] . . . because they’ve got to come back and reunite with their families—they’re going further and further out into the more dangerous areas.” Carolina Moreno, *Border Crossing Deaths More Common As Illegal Immigration Declines*, HUFFINGTON POST (Aug. 17, 2012), [http://www.huffingtonpost.com/2012/08/17/border-crossing-deaths-illegal-immigration\\_n\\_1783912.html](http://www.huffingtonpost.com/2012/08/17/border-crossing-deaths-illegal-immigration_n_1783912.html) (internal quotation marks omitted).

161. NELP REPORT, *supra* note 11, at 1, 3.

162. *Id.*

163. Marizco, *supra* note 157.

164. *Dowling v. Slotnik*, 712 A.2d 396, 404 (Conn. 1998); *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 155 (2002) (“To permit the Board to award back-pay could not significantly increase the strength of this magnetic force, for so speculative a future possibility could not realistically influence an individual’s decision to migrate illegally.”) (Breyer, J., dissenting); *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988) (finding that procurement of employment at any wage, not the prospect of job-related protections, attracts illegal immigrants).

165. *Threat of Arrest and Punishment May Not Deter Illegal Immigration*, PHYS.ORG (Aug. 1, 2013), <http://phys.org/news/2013-07-threat-deter-illegal-immigration.html> [hereinafter *Threat of Arrest*]; Emily Ryo, *Deciding to Cross: Norms and Economics of Unauthorized Migration*, 78 AM. SOC. REV. 577 (2013), available at <http://www.asanet.org/journals/ASR/Aug13ASRFeature.pdf>.

States-Mexico desert.<sup>166</sup> It follows logically that if severe punishments like arrest and deportation are not sufficient deterrents, seemingly lesser punishments like the probability of a limited workplace injury damages award—if contemplated at all—cannot be said to be a stronger deterrent.

Professor Ryo stated that her findings “suggest[] that perhaps there is very little that immigration enforcement alone might be able to do to affect changes in people’s intentions to migrate illegally.”<sup>167</sup> So instead of heightened border enforcement or increased deportations, Professor Ryo suggests that reducing illegal immigration, as long as that is the desired goal, could be better accomplished through lessening the strength of the United States’ economic magnetic pull.<sup>168</sup> Applied through a workplace injury lens, these findings support the conclusion that limiting workplace injury damages does very little to accomplish the goal of reducing illegal immigration because it does not address the bigger picture: the employment disparity between the United States and countries such as Mexico.<sup>169</sup>

Even if the recovery of full remedies for workplace injury were at the forefront of the mind of the average illegal immigrant, this would only serve as a marginal deterrent at best. Professor Ryo’s study suggests that as long as the hope for a better life in the United States remains, illegal immigration will continue to persist despite criminal or civil punishments.<sup>170</sup> Empirical data provides further support for this contention. In the year following *Hoffman Plastic*, the population of illegal immigrants in the United States was about 9.7 million.<sup>171</sup> Throughout the next dec-

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166. Marizco, *supra* note 157; RYO, *supra* note 165, at 592.

167. *Threat of Arrest*, *supra* note 165.

168. Among Ryo’s specific suggestions was “to reallocate some of our current enforcement resources to increasing . . . employment-generating economic development of key [illegal immigrant] sending communities, which might make staying at home both an economically-viable as well as a morally-acceptable option for prospective migrants.” *Id.* The INS took a similar position in its surprising alliance with the NLRB in *Hoffman Plastic*. See *supra* note 59.

169. See *Dowling*, 712 A.2d at 404 (quoting *Montero v. INS*, 124 F.3d 381, 384 (2d Cir. 1997)) (“[T]here is no merit to the respondents’ argument that providing workers’ compensation benefits to undocumented aliens would stand as an obstacle to ‘removing the employment ‘magnet’ that draws undocumented aliens into the country.’”).

170. Ryo, *supra* note 165, at 585.

171. PROCON.ORG, POPULATION OF IMMIGRANTS IN THE COUNTRY ILLEGALLY COMPARED TO THE TOTAL U.S. POPULATION, at Chart II [hereinafter PROCON.ORG], available at <http://immigration.procon.org/view.resource.php?resourceID=000844>.

ade, this number steadily increased notwithstanding the *Hoffman Plastic* decision.<sup>172</sup> If limiting workplace injury recovery was in some way an effective deterrent, one would have expected to see this reflected statistically in the domestic population of illegal immigrants.<sup>173</sup> However, this has not been the case.

In fact, the only period within the last decade where there was a major decrease in the illegal immigrant population was in 2009, after the height of the recent economic recession.<sup>174</sup> Strikingly, from 2008 to 2009, the population of illegal immigrants in the United States declined by almost one million.<sup>175</sup> This was no coincidence, as the downturn of the economy was accompanied by the elimination of many employment sectors, like construction, that are mainstays for low-skilled illegal immigrant workers.<sup>176</sup> When jobs were unavailable, notice of the hardship that many illegal immigrants within the United States were experiencing traveled quickly, persuading more illegal immigrants to stay home.<sup>177</sup> With the economy slowly pulling itself out of the Great Recession, studies suggest that the decline in illegal immigration that accompanied the recent economic downturn has likely bottomed out, with the result being a continued increase in illegal immigration.<sup>178</sup>

One would assume that if the practice of limiting, but not completely prohibiting, workplace injury recovery had a real deterrent effect on illegal immigrants, illegal immigration would not have steadily increased in the years following *Hoffman Plastic*, especially when the practice of limiting workplace injury recovery

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172. *Id.* All the while, the number of deportations and removals have also steadily increased in the decade following *Hoffman Plastic*. See ALENIKOFF ET AL., *supra* note 4, at 923 tbl.9.1. In fact, right before the Great Recession, the number of unauthorized immigrants in the United States was close to 12.2 million. Jeffrey Passel & Ana Gonzalez-Barrera, *Population Decline of Unauthorized Immigrants Stalls, May Have Reversed*, PEW RES. HISPANIC TRENDS PROJECT (Sept. 23, 2013), available at <http://www.pewhispanic.org/2013/09/23/population-decline-of-unauthorized-immigrants-stalls-may-have-reversed/>.

173. Of course, no statistical estimate of population can be totally accurate. Surely, there are some illegal immigrants not accounted for in all the data. However, one would still expect to see some measurable decline in the domestic population of illegal immigrants if the practice of limiting workplace injury recovery were truly an effective deterrent.

174. PROCON.ORG, *supra* note 171; Passel & Gonzalez-Barrera, *supra* note 172.

175. PROCON.ORG, *supra* note 171.

176. Miriam Jordan, *Illegal Immigration to U.S. Slows Sharply*, WALL ST. J. ONLINE (Sept. 1, 2010), <http://online.wsj.com/news/articles/SB10001424052748703882304575465742670985642>.

177. *Id.*

178. Passel & Gonzalez-Barrera, *supra* note 172.

gained traction. But, this is far from reality. The sheer number of illegal immigrants in the United States today is evidence alone that limiting damages for workplace injury is not an effective deterrent to illegal immigration, whereas eliminating employment opportunities has, at least, had some measurable effect.<sup>179</sup>

In short, workplace injury is a real risk that illegal immigrants face,<sup>180</sup> but it is not one that substantially affects the decision of whether to immigrate. Even if illegal immigrants substantially contemplated such risks, the persistence of illegal immigration is evidence alone that such risks are not strong enough to slow this magnetic pull. Empirical data has shown that illegal immigrants respond to other macroscopic forces, such as job availability.<sup>181</sup> Because limiting workplace injury recovery does *not* substantially incentivize the illegal immigrant to stay in his country of origin, awarding full damages to illegal immigrants who suffer workplace injuries does not provide any more incentive for the alien to immigrate. To the extent that it does, this incentive is inconsequentially marginal at best.

## 2. Awarding Full Damages Provides More Incentives for Employers to Refrain from Hiring Illegal Immigrants

Awarding full damages, and not limiting them due to one's immigration status, actually provides more incentive for employers to refrain from hiring illegal immigrants. From a purely financial cost-benefit analysis, this point should be self-evident. Employers must pay for workers' compensation relief, and in successful tort suits employers pay either out of pocket or through their insurance carrier.<sup>182</sup> Thus, employers shoulder the financial burden of injuries that occur under their stewardship.<sup>183</sup> Obligating an employer to compensate an undocumented worker's injury in full—something that the employer would otherwise be able to avoid by arguing that the worker's immigration status should

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179. See *supra* notes 170–74 and accompanying text.

180. See NELP REPORT, *supra* note 11, at 3–4.

181. See *supra* notes 170–74 and accompanying text.

182. See *supra* notes 30–32 and accompanying text (noting that the establishment of workers' compensation schemes where the employer would be responsible to compensate irrespective of fault was a necessary trade-off for employers).

183. CRAIN ET AL., *supra* note 25, at 876; see also *supra* notes 15, 20 and accompanying text (noting that IRCA was unambiguous in its emphasis of curbing illegal immigration through employer incentives).

limit the amount of relief available—prevents the employer from profiting, both procedurally and monetarily, from a technicality. Most importantly, by preventing the employer from using immigration status as a scapegoat, the employer is forced to pay a higher price to compensate the illegal immigrant than they otherwise would have to. Thus, this obligation to pay in full may very well be seen as an extra cost to the employer that it would otherwise not have.<sup>184</sup> The result of this is an added financial incentive for employers to take more cautious measures to avoid the incursion of any such extra costs, notably encouraging employers to comply with IRCA's mandate to verify immigration status in the hiring process and to refrain from hiring illegal immigrants in the first place.

As opposed to raising concern for illegal immigrants,<sup>185</sup> the risk of having to pay full damages or benefits for workplace injuries that workers sustain while in the course of their employment is, or at least should be, at the forefront of the minds of employers.<sup>186</sup> Employers, especially those whose trade or occupation is one where the risk of injury is high, should be thinking about this possibility when they hire workers. Any injury that the employer is responsible for compensating only adds to its overhead costs. In the absence of the added financial incentive that a full compensation requirement would create (one that the employer would feel directly), employers would have fewer reasons to carefully comply with IRCA's employment verification mandate. Thus, limiting the recovery that an undocumented worker can receive by virtue of his or her immigration status actually provides more incentive for employers to be less scrupulous in verifying immigration status in the hiring process, another requirement that IRCA places unequivocally on the employer.<sup>187</sup>

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184. See *infra* notes 192–96 and accompanying text.

185. See *supra* Part IV.A.1.

186. Cf. *Gomez v. F & T Int'l (Flushing, NY) LLC*, 842 N.Y.S.2d 298, 301 (N.Y. App. Div. 2007) (“Given the status of the [construction] industry, it seems somewhat disingenuous for contractors and owners to seek disclosure of the status of an employee after the employee has been injured under the guise of attempting to mitigate a lost wage claim, a concern which apparently never entered their minds when the work was bid out.”) (emphasis added).

187. 8 U.S.C. § 1324a(b) (2012); see also *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1000 (N.H. 2005) (“To refuse to allow recovery against a person responsible for an illegal alien's employment who knew or should have known of the illegal alien's status would provide an incentive for such persons to target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions.”).

Much of the case law supporting this contention has focused on the availability of recovery for illegal immigrants and not simply whether such recovery should be limited or awarded in full. Nevertheless, the rationale for awarding full damages is simply a logical extension of allowing recovery in the first place. In a case involving an illegal immigrant nanny who sustained an injury in a fall in her employer's home, the Connecticut Supreme Court found that "excluding such [illegal immigrant] workers from the pool of eligible employees would relieve employers from the obligation of obtaining workers' compensation coverage for such employees and thereby contravene the purpose of the Immigration Reform [and Control] Act by creating a financial incentive for unscrupulous employers to hire undocumented workers."<sup>188</sup> In a more recent case, the Court of Appeals of Ohio rephrased this same point, holding that "[t]o refuse to allow illegal aliens injured on the job to recover . . . would be to encourage the hiring of illegal aliens and downgrade workplace safety."<sup>189</sup>

These same rationales can likewise be extended to conclude that limiting the amount or type of damages that an illegal immigrant can recover effectuates the same dilemma of encouraging employer complacency and noncompliance in the hiring process. If an employer is able to pay limited damages or benefits, an incentive is created whereby employers—especially those who work in fields where there is a high risk of workplace injury—would naturally gravitate toward hiring illegal immigrants simply because they cost less. In this sense, the employer may take advantage of the independent enforcement practice of limiting damages as a means to cut overhead costs. Thus, having an illegal immigrant is a "bonus" because it can translate into extra savings in the event of future workplace injury. Lower overhead costs translate into higher net profits, which will ultimately result in the hiring of more illegal immigrants. Therefore, awarding full damages not only financially incentivizes employers to comply with IRCA and refrain from hiring illegal immigrants in the first place, it also ensures that employers do not become unjustly en-

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188. *Dowling v. Slotnik*, 712 A.2d 396, 404 (Conn. 1998). Compare *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221, 225 (N.J. 1996) (finding that giving companies immunity from providing full compensation in workplace injury contravenes the policies of IRCA), with *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (striking down the denial of education to undocumented immigrants because the state's objectives were irrational, among which was protecting itself from an influx of immigrants).

189. *Rajeh v. Steel City Corp.*, 813 N.E.2d 697, 707 (Ohio Ct. App. 2004).

riched through their ignorance of a duty that IRCA puts squarely on their shoulders.<sup>190</sup>

Some may argue that because employers already have a duty to pay full damages to authorized workers that suffer workplace injuries under their watch, employers are consequently not incentivized further by the prospect of having to pay full damages to illegal immigrant workers who suffer workplace injury. However, this contention is flawed. Assuming that employers will act in their own pecuniary self-interest, most reasonable employers<sup>191</sup> who know that they can hire an illegal immigrant without being obligated to pay full damages if that employee suffers a workplace injury would prefer to hire an illegal immigrant over an authorized worker, all other considerations (that is, skill, knowledge, etc.)<sup>192</sup> held equal. One would assume that most employers would take advantage of every potential savings in overhead costs because doing so would maximize the employer's net profit.<sup>193</sup> Thus, while it may be true that employers already are on notice that they will have to pay their citizen employees full damages or benefits, ensuring that workplace injury recovery is not limited to injured undocumented workers on the basis of immigration status prevents employers from taking advantage of immigration status to cut costs.<sup>194</sup> By eliminating the ability for employers to use immigration status as a scapegoat, they will have no choice but to diligently adhere to IRCA's employment verification requirement

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190. See *supra* notes 16–19 and accompanying text.

191. Some altruistic employers might still prefer hiring a legal employee based on moral principles.

192. Excluded from this assumption is the prevalence of wage violations by employers of undocumented workers, an entirely separate discussion in itself. See Steven Greenhouse, *Low-Wage Workers Are Often Cheated, Study Says*, N.Y. TIMES, Sept. 2, 2009, at A12 (noting that low wage workers, including illegal immigrants, are routinely denied proper overtime pay and are often paid less than minimum wage).

193. Moreover, if the civil penalties for hiring an illegal immigrant under IRCA were more widely enforced, this would also encourage employer compliance in refraining from hiring illegal immigrants for the same reason. The higher likelihood of incurring a civil pecuniary penalty would provide yet another financial incentive for the employer to be cautious in the hiring process.

194. This reasoning can also be used to undermine another counterargument. Some may argue that the aforementioned incentive-based analysis is overemphasized, especially if employers are insured for workplace injury through private insurance. In these cases, it is true that the "out-of-pocket" expenses that the employer would otherwise have to pay to the injured worker would not be as direct or noticeable. Nevertheless, the employer would still have indirect costs through increased insurance premiums, especially those employers who are in the field with a high likelihood of workplace injury. Any increased costs will still ultimately be felt by the employer.

with every hire.<sup>195</sup> With this added incentive to comply with IRCA employment verification requirements, IRCA's immigration objectives would be more fully realized.

In sum, under a system where the recovery of damages may be limited by virtue of an employee's immigration status—as is the case with those courts which have not allowed recovery in full—the incentive to hire illegal immigrants still exists regardless of whether an employer already subjectively expects to pay full damages if a workplace injury occurs. Therefore, awarding full damages provides more of an incentive for employers to comply with IRCA's prohibition of hiring illegal immigrants and ensures that noncompliant employers will not use illegal immigrants as a way to cut costs and maximize profits. If illegal immigrants are awarded full workplace injury recovery, employers will be disincentivized from hiring illegal immigrants and the availability of jobs for illegal immigrants will gradually decrease. Thus, the nation's federal immigration objectives will be more fully realized because there will be less job opportunity for illegal immigrants and more aliens will be persuaded to remain in their home countries.<sup>196</sup>

### 3. Awarding Full Workplace Injury Recovery Avoids the Dilemma of Compliant Employers Becoming Disadvantaged

Aside from disincentivizing employers from hiring illegal immigrants, awarding full workplace injury recovery also has another key benefit: it provides more protections for employers in the same field who otherwise adhere to IRCA's provisions of verifying immigration status and refrain from hiring illegal labor. In other words, it solves the problem of compliant employers becoming disadvantaged by a competitor's noncompliance. It does so by ensuring that noncompliant employers—those employers who do not affirmatively verify immigration status and do hire illegal immigrants—are not able to profit from their intentional or ignorant complacency.

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195. Employers would obviously still have a choice to willingly ignore IRCA's employment verification mandates, but in so doing, they would subject themselves to civil or criminal prosecution and/or penalties. *See, e.g.*, *Gomez v. F & T Int'l (Flushing, NY) LLC*, 842 N.Y.S.2d 298, 300–01 (N.Y. Sup. Ct. 2007).

196. *See supra* notes 177–79 and accompanying text (discussing the need to more fully address the employment magnet force which drives illegal immigration as opposed to simply limiting workplace injury recovery); *see generally supra* Part IV.A.1.

Undoubtedly this problem has arisen in part because of the lack of widespread enforcement of IRCA's employment verification mandate.<sup>197</sup> In order to facilitate the accomplishment of this verification mandate, an electronic database known as "E-Verify" was created wherein employers can check the work authorization documents an employee presents against government databases in order to detect an individual's unauthorized work status.<sup>198</sup> Between 2006 and 2010, fourteen states enacted laws requiring state agencies and contractors to use E-Verify.<sup>199</sup> In four states, all employers within the state were required to use E-Verify.<sup>200</sup> However, notwithstanding these efforts, only four percent of employers were using E-Verify in 2010, and in that year, nearly eighty percent of all hires in the United States were made without verifying employment through E-Verify.<sup>201</sup> Thus, although the E-Verify program has seen an increase in use since its implementation, its potential is far from being realized.

The result of this lack of uniformity across similar sectors of employment means that some employers who are noncompliant with IRCA and E-Verify are able to hire cheaper illegal labor.<sup>202</sup> And because many of the major employers of undocumented workers are in the sectors of the economy that typically provide lower wages and more dangerous conditions, they can profit by not having to pay full damages in cases where an illegal immigrant employee is injured on the job, to the disadvantage of employers who do not hire illegal immigrants. These noncompliant employers can not only potentially save significant amounts of money by paying limited amounts of damages and benefits to the

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197. Especially in the years immediately following the passage of IRCA, the employer sanctions contained therein were only rarely enforced, with the number of employers actually sanctioned for violations never exceeding 1000 for any single year. ADRIANA KUGLER & PATRICK OAKFORD, CTR. FOR AM. PROGRESS & COMPREHENSIVE IMMIGRATION REFORM WILL BENEFIT AMERICAN WORKERS 2 (2013), available at <http://www.americanprogress.org/wp-content/uploads/2013/09/KuglerEmploymentBrief-1.pdf>.

198. ALENIKOFF ET AL., *supra* note 4, at 965. E-Verify was piloted in the late 1990s and both Congress and the Executive Branch have since expressed the desire to strengthen the system, starting with the emphatic support of the Bush administration and followed by that of the Obama administration. *Id.* at 965–66.

199. *Id.*

200. *Id.*

201. *Id.* at 966.

202. I reference this "cheap labor" both in the sense of the employer not being obligated by minimum wage mandates, as well as the savings in overhead costs which result from being able to pay less than full damages in the event of workplace injury.

injured employee,<sup>203</sup> but also easily replace cheap labor with other cheap labor as if these undocumented individuals were metal cogs in their business machines. And as E-Verify is currently under-enforced, these noncompliant employers can reasonably do so without any fear that IRCA's required civil sanctions or criminal penalties will be administered.<sup>204</sup>

Basic principles of supply and demand dictate that these employers would serve as a magnet to undocumented workers who would not be able to find employment with employers who are compliant with IRCA and E-Verify.<sup>205</sup> With this subsequent pull, the compliant employers face a significant pecuniary disadvantage in being obligated to pay full workers' compensation damages to an employee should that employee suffer any workplace injury.<sup>206</sup>

For example, consider the following hypothetical. Suppose Company A and Company B are both employed in road construction in a small rural town near the United States-Mexico border. Both companies are in a state that allows illegal immigrant workers to recover workplace injury compensation, but limits the amount of damages that such individuals may receive due to their inability to "legally mitigate" damages through obtaining lawful employment. Company A is compliant with IRCA and E-Verify, and inquires into each prospective employee's immigration status prior to hire. However, due to certain socio-demographics of this particular town, the supply for authorized labor is very low. The supply for unauthorized labor is very high because the

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203. See *supra* text accompanying notes 187–90.

204. See KUGLER & OAKFORD, *supra* note 197 at 2; see also *Design Kitchen & Baths v. Lagos*, 882 A.2d 817, 826 (Md. 2005) (noting the concern that denying workplace injury recovery would seriously undermine the state's significant interest in encouraging employers to maintain safe workplaces and lead employers to assume that they can "engage in unsafe practices with no fear of retribution, secure in the knowledge that society would have to bear the cost of caring for these injured workers").

205. See *supra* note 168 and accompanying text. This magnet is exactly what the IRCA was enacted to prevent in the first place. See *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 187 (4th Cir. 1998) (*per curiam*) (referencing that the IRCA was "enacted to reduce the influx of illegal immigrants into the United States by eliminating the job magnet").

206. Not to mention, it is a disadvantage by being bound by state minimum wage laws. See REBECCA SMITH & AMY SUGIMORI, NAT'L EMP'T LAW PROJECT, UNDOCUMENTED WORKERS: PRESERVING RIGHTS AND REMEDIES AFTER *HOFFMAN PLASTICS COMPOUNDS V. NLRB* 2 (2003), [http://nelp.3cdn.net/b378145245dde2e58d\\_0qm6i6i6g.pdf](http://nelp.3cdn.net/b378145245dde2e58d_0qm6i6i6g.pdf) (referencing a 2000 U.S. Department of Labor Study survey which found that one hundred percent of all poultry processing plants, a major employer of illegal immigrants, were non-compliant with federal wage and hour laws); *supra* text accompanying note 190.

economic production in this town is significantly better than the nearest border town. Nevertheless, Company A hires an authorized United States citizen knowing that should injury befall this employee, Company A would have to compensate the injury in full. To the contrary, Company B is noncompliant with E-Verify and takes advantage of the fact that its state has not vigorously enforced E-Verify compliance for all employers. Thus, not worried about workers' compensation obligations, Company B hires an individual who is unauthorized to work in the United States. Both employees from each company suffer a debilitating work injury in their employment and file for workers' compensation benefits.

Company B is in a better financial situation after the workplace injury, all other things held equal.<sup>207</sup> Company B does not have to pay the same benefits that Company A does to the injured employee. Furthermore, Company B can simply rehire from an already high supply of unauthorized labor and continue in its business venture quickly. On the other hand, Company A is obligated to pay full damages to its injured employee and has a significantly more limited pool of authorized United States citizens to choose from. Due to this scarcity of supply, Company A might experience delays in returning to the level of business output that it had before the employee's injury. Company B subsequently profits from the ability to be noncompliant with E-Verify and from avoiding the obligation to pay full damages. Furthermore, with the extra savings from not being obligated to pay full damages in cases of workplace injury, Company B has lower overhead costs and can reduce the prices of its products and services. The obvious result of this is that Company B can now take advantage of the natural draw to lower prices and attract significantly more clients. With this larger volume of clientele that comes to Company B because of the lower prices, Company A is even further disadvantaged.

Although a hypothetical, this situation is a reality for many small business owners. A strengthened E-Verify system does have its own costs, but compliant small business owners are like-

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207. For purposes of this hypothetical and comment in general, this does not take into account the real likelihood that such employers are also not likely paying minimum wages to their illegal immigrants, thus having even more savings for lower overhead costs. See *supra* text accompanying notes 187–90.

ly to see these costs to be worth the price in order to prevent their competitors from profiting off of their refusal to "play by the rules." For example, one small business owner who runs a power-washing business in Delaware said, "I am tired of losing work to people who cheat the system and undercut my prices because they don't have the same overhead as I have because I follow the rules . . . . I am for [a strengthened E-Verify system] simply because in the long run it will help my business."<sup>208</sup> The savings that noncompliant employers could have from avoiding paying full damages could be crippling to competing employers who abide by the law. If states allow courts to limit damage recovery to injured documented workers, this really works to the economic and pecuniary detriment of those employers who do not hire undocumented workers in the first place. Noncompliant employers should not be able to take advantage of this nuance to maximize their profits, especially if doing so will further disadvantage employers who obey the law.<sup>209</sup> Thus, eliminating the arbitrary judicial practice of limiting workplace injury recovery because of one's immigration status encourages more widespread compliance with IRCA and consequently reinforces equality among economic competitors.

In conclusion, awarding full damages to illegal immigrants who are injured in the course of their employment is more supportive of IRCA's purpose than limiting damages. Illegal immigrants do not prominently base their decision to immigrate on the likelihood of workplace injury recovery and thus will not be marginally deterred from immigrating by limiting the amount and type of recovery for workplace injuries. Also, awarding full damages or benefits actually provides more incentives for employers to refrain from hiring illegal immigrants. Lastly, awarding full damages or benefits also ensures that noncompliant employers cannot profit from their noncompliance to the disadvantage of their law-abiding competitors.

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208. Devon Merling, *Debating the Costs of E-Verify*, DESERET NEWS (Nov. 12, 2013), <http://www.deseretnews.com/article/865590414/Debating-the-costs-of-E-Verify.html>.

209. This logic circles back to the first two sub-sections discussed above in Part IV.A. Having to pay full damages to injured undocumented workers, employers will have less incentive to hire them in the first place because they will not be able to profit from having to pay less, should workplace injury occur. And if an employer's incentives to hire illegal immigrant workers are eliminated, there will be more uniform compliance with the IRCA's text and purpose. With that, there will be fewer jobs available for illegal immigrants and, consequently, a greater probability that illegal immigration will be realistically reduced.

B. *No Sufficient Causal Relationship Exists Between an Employee's Injury and the Employee's Immigration Status*

Aside from the incentives analysis discussed above, limiting compensation damages and benefits to undocumented workers who are injured in the course of their employment does not make sense from a causational standpoint because an employee's immigration status is hardly relevant to the injury that the employee suffered. In other words, there is not a sufficient causal relationship between the injury suffered and the individual's immigration status to justify limiting damages.

In the majority of cases, an individual's injury has little to do with immigration status. Either in personal injury tort litigation, where a jury must decide the amount of damages, or in a no-fault workers' compensation dispute, it is not clear why immigration status is at all relevant or necessary for determining the amount of relief to which an individual is entitled.<sup>210</sup> In fact, it is very difficult to imagine any scenario in which an individual's immigration status has any direct relevance to an injury suffered in the course of one's employment. An immigrant's status can be neither an actual or proximate cause of an injury. An individual's immigration status is exactly that: a status. It is not a tangible, intrinsic characteristic. It is a legal classification.<sup>211</sup> In this sense, limiting recovery based on immigration status alone is akin to limiting workplace injury recovery due to one's religion or sexual orientation, which would seem completely at odds with notions of equality and fundamental fairness.

Interestingly, the courts that have employed this relevance rationale to justify limiting workplace injury recovery have often been faced with factual situations where the illegal immigrant worker affirmatively submitted fraudulent work documents.<sup>212</sup>

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210. Cf. Mondragón, *supra* note 6, at 477 (arguing that employers ought to not be able to pry into immigration status following an injury in order to threaten or retaliate against their undocumented employees).

211. See generally Visas: Documentation of Immigrants and Nonimmigrants—Visa Classification Symbols, 74 Fed. Reg. 61,517 (Nov. 25, 2009) (illustrating the extensive use of one's immigration status as a "classification").

212. E.g., *Madeira v. Affordable Hous. Found., Inc. v. Silva*, 469 F.3d 219, 223 (2d Cir. 2006) (finding that an undocumented subcontractor contracted employment absent any affirmative use of false identification); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 326 (Minn. 2003) (finding that plaintiff's immigration status only became an issue after the injury); cf. *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1258 (N.Y. 2006) (citing

Among the reasons the courts have used for allowing general recovery is that the initial fraudulent conduct, using false work authorization documents, is not directly connected, and is thus irrelevant to, the injury giving rise to the workplace injury claim.<sup>213</sup> Logically applying this rhetoric to cases where the illegal immigrant did not use any fraudulent means to obtain employment, one may alter this analysis slightly and conclude that the initial fraudulent conduct of the employee (mere unauthorized presence instead of tendering false work documents) is not directly connected, and is thus irrelevant to, the injury giving rise to the workplace injury claim.

One example among the post-*Hoffman Plastic* cases where this rationale has been used to allow recovery of benefits is *Correa v. Waymouth Farms, Inc.*<sup>214</sup> In *Correa*, an undocumented worker sustained a work-related injury and was awarded workers' compensation lost wages and medical benefits.<sup>215</sup> He also partially mitigated damages by returning to Waymouth Farms and performing light-duty work while still receiving benefits.<sup>216</sup> However, Waymouth Farms later found out that Correa was never authorized to work in the United States and terminated him.<sup>217</sup> In the subsequent fight over discontinuation of compensation benefits due to Correa's immigration status, the Minnesota Supreme Court refused to allow discontinuation.<sup>218</sup> Among other things, it

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*Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149 (2002)) ("IRCA does not make it a crime to work without documentation. Hoffman [Plastic] is dependent on its facts, including the critical point that the alien tendered false documentation that allowed him to work illegally in this country.").

213. *E.g.*, *Coque v. Wildflower Estates Developers, Inc.*, 58 A.D.3d 44, 54 (N.Y. App. Div. 2008). In fact, even before *Hoffman Plastic*, this relevance/causal-connection argument was not completely foreign to courts. *See, e.g.*, *Dynasty Sample Co. v. Beltran*, 479 S.E.2d 773, 775 (Ga. Ct. App. 1996) (upholding an award of weekly indemnity benefits to an injured illegal worker following a workplace injury because "Dynasty failed to . . . show[] a causal connection between Beltran's misrepresentation and the injury he suffered"); *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221, 224-25 (N.J. Super. Ct. App. Div. 1996); *Billy v. Lopez*, 434 S.E.2d 908, 911 (Va. Ct. App. 1993).

214. 664 N.W.2d 324 (Minn. 2003).

215. *Id.* at 326.

216. *Id.*

217. *Id.*

218. *Id.* at 325.

held that entitlement to compensation and benefits was *not* conditioned upon the showing of lack of work authorization or immigration status, but upon “the establishment of a causal link *between the work-related disability and the inability to find and hold a job.*”<sup>219</sup>

Thus, some courts have hesitated to completely prohibit recovery to illegal immigrants absent a showing that the injured worker’s undocumented status is somehow related to the injury suffered.<sup>220</sup> And while these cases have dealt with the issue of illegal immigrants’ right to recover generally, there is nothing barring its application to the issues of the amount and type of recovery available. If it does not make sense to bar recovery for workplace injury by virtue of an extrinsic, intangible characteristic that is wholly unrelated to the activities which caused the injury, then limiting the amount of damages recoverable due to that intangible extrinsic characteristic is similarly nonsensical.<sup>221</sup>

There is another problematic consequence for using an extrinsic, intangible characteristic as a means to limit workplace injury damages. Inherent in the effectiveness of workers’ compensation is the notion of no-fault recovery.<sup>222</sup> Workers’ compensation schemes were established under the operative theory that if an individual is injured, he or she should be able to recover for their injury regardless of who was ultimately at fault.<sup>223</sup> If immigration

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219. *Id.* at 330 (emphasis added). Another example of a similar result is *Rajeh v. Steel City Corp.*, 813 N.E.2d 697 (Ohio Ct. App. 2004). In that case, an alien who had been found to be “deportable” by an immigration judge following a drug conviction suffered a work-related injury while his deportation was pending. *Id.* at 698–99. The appellee employer asserted that because the undocumented worker’s criminal conviction led to his inability to work legally, this precluded his ability to recover for the workplace injury suffered. *Id.* at 702. The Ohio appellate court rejected this contention on an attenuation theory, reversing the denial of benefits because the alien was an employee within the meaning of the state workers’ compensation statute. *Id.* The criminal activity was too far removed from the workplace injury suffered and the alien had done nothing, notwithstanding his immigration status, to cause himself to be excluded from coverage under the statute. *See id.* at 702–05.

220. This principle is also lucidly demonstrated by those states who have explicitly or implicitly declared that the right to recovery has very little to do with whether an individual has a green card. *See supra* note 92 and accompanying text.

221. *See also infra* Part IV.C.2 (explaining that if the majoritarian practice has been to refuse to let immigration status completely bar workplace injury recovery to illegal immigrants, it does not make sense to limit that recovery based on that immigration status).

222. *See* 1 LARSON & LARSON, *supra* note 24, at § 1.01.

223. *See id.* at § 1.03 (“The right to compensation benefits depends on one simple test: Was there a work-connected injury? Negligence, and, for the most part, fault . . . cannot affect the result. Let the employer’s conduct be flawless in its perfection, and let the em-

status becomes an exception to the no-fault requirement and employers are allowed to skirt around this bright-line operative policy, one can see that this might present a slippery slope. For example, if employers are allowed to use immigration status as a means to avoid having to compensate for injury in full, arguments might be made for the application of other similar exceptions that may be wholly unrelated to the injury, such as pre-existing conditions. Adding exceptions for certain characteristics, especially ones that do not have a satisfactory connection to the workplace injury, complicates the efficacy of workers' compensation laws.

Although it may not be explicit in every illegal immigrant workplace injury case, one's immigration status has little relevance when deciding the right to recover for injury. In short, there is rarely, if ever, a situation where one's immigration status plays a factor in the injury that gives rise to a workplace injury claim. And if the lack of a causal connection between immigration status and the alleged injury is not a ground to warrant the recovery of damages in the first place, it logically follows that such individuals are deserving of *full* recovery of damages.

### C. *The Practice of Limiting Damages Has Other Serious Negative Public Policy Effects*

The courts that have prohibited recovery based on immigration status or have limited it altogether also overlook some other important considerations. Borrowing the Supreme Court's rationale in *Hoffman Plastic*,<sup>224</sup> some courts have emphasized that limiting damages is justified because the illegal immigrant's employment is rendered invalid due to his illegal presence in the United States.<sup>225</sup> It would appear that these courts limit benefits because

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ployee's be abysmal in its clumsiness . . . if the accident arises out of and in the course of the employment, the employee receives an award.").

224. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148 (2002) ("Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies."); *id.* at 150–51 ("Similarly, Castro cannot mitigate damages . . . without triggering new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore IRCA and hire illegal workers.").

225. Sometimes this argument comes in the form that the illegal immigrant cannot mitigate damages by obtaining lawful employment after the injury. See *Madeira v. Affordable Hous. Found., Inc. v. Silva*, 469 F.3d 219, 248 (2d Cir. 2006); *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1259 (N.Y. 2006); *Sanchez v. Eagle Alloy, Inc.*, 658 N.W.2d 510, 518 (Mich. Ct. App. 2003). But see *Cherokee Indus., Inc. v. Alvarez*, 84 P.3d 798, 801

to do otherwise would ignore the moral wrong the alien might have committed through his illegal presence in the country.<sup>226</sup> In other words, these courts seem to limit damages because awarding full damages would condone illegal immigration, which is undesirable as a matter of policy. However, this rationale does not consider a number of countervailing policies, including: (1) but for the injury, the illegal immigrant would still be employed with their employer; (2) imposing limits on the type or amount of damages recoverable, without a legal justification for doing so, is arbitrary; and (3) the argument that limiting damages reflects the illegal immigrant's inability to mitigate damages is misplaced and overemphasized.

1. But for the Injury, the Illegal Immigrant Would Still Be Working at His or Her Job

Perhaps one of the more obvious policy reasons for awarding full damages to undocumented alien workers who suffer work-related injuries is that, but for the injury, the illegal immigrant would still be working at his or her job. In this sense, limiting the recovery of damages based on immigration status punishes only one party, the alien worker, for his or her illegal presence, but completely ignores the employer's fault in employing the illegal immigrant. The injury shifts from being a tragic accident that might permanently affect the ability of an individual to earn a livelihood into a "lucky break" for an employer who should have known better. If we assume that the employment of illegal immigrants is the evil sought to be remedied, IRCA is clear and unequivocal about the burden it places on *employers* to enforce illegal immigration.<sup>227</sup> Even assuming *arguendo* that the alien is morally at fault for his or her illegal presence, the greater fault under the law lies with the employer.<sup>228</sup> Therefore, allowing the employer to escape full liability essentially condones an activity for which the

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(Okla. Civ. App. 2003) (adopting the majority's approach in *Hoffman Plastic* and recognizing that an illegal immigrant's inability to stay in the country may warrant the limiting of certain vocational rehabilitation or medical remedies).

226. See *supra* note 152-53 and accompanying text.

227. See *supra* notes 16-19 and accompanying text.

228. It is not a violation of the law for an illegal immigrant to be employed in the United States; however it is illegal for an employer to knowingly hire an illegal immigrant or continue to hire an illegal immigrant once their alien status has been disclosed. See *supra* notes 20-22 and accompanying text.

employer *alone* is responsible under the statutory language of IRCA, and that would have presumably continued were it not for the injury.

Assuming employers are driven to maximize profits,<sup>229</sup> one can conclude that unless an injury occurs, or there are other reasons to terminate an illegal immigrant worker (for example, poor work performance), the employer will continue to employ that individual. Doing so makes the most economic sense from the standpoint of the employer because it takes time and money to replace an employee.<sup>230</sup> This was demonstrated in a pre-*Hoffman Plastic* case, *Billy v. Lopez*, where an illegal immigrant affirmatively misrepresented his immigration status for employment and then sustained a severe spinal cord injury, which made him a paraplegic.<sup>231</sup> After the injury and the disclosure of the illegal immigrant's affirmative fraud, the employer testified that even if he had known about Lopez's previous false misrepresentation, he still would have employed Lopez "because [he] was a good worker."<sup>232</sup> The Virginia appellate court used this rationale in part to reject the employer's claim that Lopez's award was not meritorious due to his immigration status.<sup>233</sup>

In short, limiting damages based on immigration status brings an ironic, unintended consequence. It condones an action that the employer alone has full responsibility to prevent; an action that should not happen in the first place and one that would have otherwise continued absent the injury. Although the illegal immigrant may have committed some wrong *malum in se* by their unauthorized employment, in the majority of cases, they have

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229. Cf. *Gomez v. F & T Int'l (Flushing, NY) LLC*, 842 N.Y.S.2d 298, 300-01 (N.Y. App. Div. 2007) ("Notwithstanding an employer's exposure to certain risks under IRCA . . . [these risks are] insufficiently high to deter the hiring of undocumented immigrants."); see *id.* at 301 ("Given the status of the [construction] industry, it seems somewhat disingenuous for contractors and owners to seek disclosure of the status of an employee after the employee has been injured under the guise of attempting to mitigate a lost wage claim, a concern which apparently never entered their minds when the work was bid out.").

230. Suzanne Lucas, *How Much Does It Cost Companies to Lose Employees?*, CBS NEWS (Nov. 21, 2012), <http://www.cbs.news.com/news/how-much-does-it-cost-companies-to-lose-employees/>.

231. 434 S.E.2d 908, 909 (Va. App. 1993).

232. *Id.*

233. *Id.* at 911. After stating that "[t]here [was] simply no evidence in the record that Lopez's alien status was in any way related to the consequent injury," the court held that because Billy testified that he still would have employed Lopez, the illegal immigrant would still be working for Billy but for the injury. *Id.*

committed no wrong *malum prohibitum*. A workplace injury should never become a “lucky break” for an employer to escape full liability for failing to fulfill its obligation under the law.

2. Imposing Limits on the Type or Amount of Damages or Benefits Recoverable, Without a Legal Reason for Doing So, Is Arbitrary

Awarding full damages and benefits is nothing but a simple, logical extension of the widespread practice of awarding damages in the first place. In other words, if the majority practice in most jurisdictions is to allow the recovery of damages, imposing limits on the type or amount of damages recoverable, without a legal reason for doing so, is arbitrary. As discussed at length in Part III, nearly forty-eight jurisdictions have refused to read IRCA as preempting state workers’ compensation laws.<sup>234</sup> Moreover, many state courts have refused a wholesale application of *Hoffman Plastic’s* broad holding to all workplace injury cases.<sup>235</sup> Notwithstanding these decisions, in allowing injured undocumented workers to recover generally, many state courts have been able to limit the amount or type of relief available based on immigration status.<sup>236</sup>

If damages are generally recoverable, then any limitation based on an individual’s immigration status is an arbitrary enforcement, especially given the fact that one’s immigration status is an extrinsic, intangible characteristic entirely unrelated to the injury in the majority of cases.<sup>237</sup> Awarding full damages in these cases is not extreme or liberal overreaching; it is a logical baby step. If immigration status should not preclude recovery generally, using immigration status to limit recovery is an unnecessary and arbitrary contradiction of the right to recover in the first place.

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234. See *supra* Part III.A.

235. See *supra* Part III.B.

236. See *supra* Part III.C.

237. See *supra* Part IV.B.

### 3. The Argument That Limiting Damages Is Justified Due to the Alien's Inability to Mitigate Damages Is Misplaced and Overemphasized

Many defend the practice of limiting workplace injury damages to illegal immigrants under the theory that, as an illegal immigrant, the alien cannot lawfully obtain employment and "mitigate [his] damages."<sup>238</sup> This argument largely borrows from the Supreme Court's language in *Hoffman Plastic* that it is "impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies."<sup>239</sup> This, however, is a misguided contention.

It is not impossible for undocumented workers to mitigate their damages by obtaining other employment under the law, nor is it a foregone conclusion that the illegal immigrant will never be able to work in the United States again.<sup>240</sup> An illegal immigrant may mitigate damages and become employed in a number of ways, including self-employment or through his development of independent contractor skills such as roofing or plumbing.<sup>241</sup>

A New York court in *Gomez v. F & T Int'l (Flushing, NY) LLC* noted the flaws in the mitigation of damages argument.<sup>242</sup> Indeed, the *Gomez* court referenced the *Balbuena* court's decision, which limited damages due to the inability to mitigate and described the assumption upon which that decision rested as fallacious.<sup>243</sup> The *Gomez* court said:

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238. *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 330 (Minn. 2003).

239. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148 (2002).

240. *See supra* notes 20–22 (explaining that IRCA has done nothing to delineate that illegal immigrants may never be employed in the United States and only prohibits the employer from knowingly hiring such an individual or continuing to employ such individual once the alien's status is disclosed).

241. And even in a number of workplace injury cases, mitigation is not even possible due to the seriousness of the injury. *See Gomez v. F & T Int'l (Flushing, NY) LLC*, 842 N.Y.S.2d 298, 302 (N.Y. App. Div. 2007). In other words, when the workplace injury is so severe that it renders the individual physically unable to work, the alien's legal inability to obtain employment is a non-issue.

242. *Id.* (citing *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1253 (N.Y. 2006)).

243. *Gomez*, 842 N.Y.S.2d at 303; *see also id.* at 301 ("Given the status of the [construction] industry, it seems somewhat disingenuous for contractors and owners to seek disclosure of the status of an employee after the employee has been injured under the guise of attempting to mitigate a lost wage claim, a concern which apparently never entered their minds when the work was bid out.").

[M]itigation encompasses an employer proving that the injured employee cannot obtain employment in New York or the USA, but only in his country of origin. The fallacy of this mitigation argument, however, is that the construction industry, especially the sector that does demolition, would re-employ [the injured employee] without hesitation *because of the very fact* that he is undocumented and the employer may feel that it can pay less and not accord him the protection of the Labor Laws.<sup>244</sup>

After then addressing other policy concerns that prohibiting damages altogether might create,<sup>245</sup> the *Gomez* court said “[i]f defendants can somehow demonstrate that the demolition industry has all of a sudden agreed to abide by IRCA such that [the injured employee] could not obtain demolition work without proper authorization, the Court might reconsider its ruling. *But, we all know better.*”<sup>246</sup> Thus, the *Gomez* court recognized that the mitigation argument is not based in reality. Viewed in this light, the practice of limiting damages appears to be a judicially created method to vindicate what may be a moral transgression by an illegal immigrant, but what is not a violation of current federal immigration law.

Ultimately, the mitigation argument deserves a more thoughtful analysis than a premature finding that simply because an injured undocumented worker is an illegal immigrant, he or she cannot ever be employed lawfully in the United States. Mitigation is not necessarily impossible.<sup>247</sup> And when, under IRCA, “the onus is on the employer to make sure that it is hiring a person authorized to work,” the benefit of any doubt should not simply be granted to the employer by virtue of an individual’s immigration status.<sup>248</sup> Rather, the tide should turn the other way, especially when awarding full damages to the injured alien provides more incentives for the employer to comply with IRCA<sup>249</sup> and prevents the problem of competitors within the same industry becoming disadvantaged for obeying the law.<sup>250</sup>

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244. *Id.* at 302 (emphasis added).

245. For example, employers might seek retaliation after the individual’s immigration status surfaces or threaten to report the alien for deportation, tearing families apart. See Mondragón, *supra* note 6, at 465–67.

246. *Gomez*, 842 N.Y.S.2d at 303 (emphasis added).

247. *See id.*

248. *Id.* at 301.

249. *Supra* Part IV.A.2.

250. *Supra* Part IV.A.3.

*D. Desired Change Must Be Accomplished Through Necessary Means*

In our system of government, legislative power is vested in Congress. The legislative branch is the only branch of government that can enact new laws or amend existing laws.<sup>251</sup> If it is necessary to vindicate the moral impropriety of an undocumented immigrant's presence or subsequent employment, this is not for the courts to determine. If there is a desire to criminalize the employment of such individuals, this change must be accomplished through the means prescribed in the Constitution. The judiciary's role is to interpret the law and apply it to a specific case or controversy.<sup>252</sup> A court should not confuse its role in administering the law with creating or modifying the law. Under the current law, it is not a per se criminal offense for an alien to be present or even work in the United States<sup>253</sup> and it is the employer's sole responsibility to diligently enforce unlawful employment of illegal immigrants.<sup>254</sup> The propriety of this burden placement must be decided, and arguably has been decided, by the people.

While some progress has been made, there is no question that our immigration objectives would certainly be served by a strengthening of the E-Verify system and its more widespread implementation.<sup>255</sup> Encouraging widespread adoption of E-Verify would undoubtedly help reduce illegal immigration.<sup>256</sup> This comment has attempted to demonstrate that awarding full damages to undocumented immigrant workers who suffer work-related injuries would also strongly aid in the realization of these goals. When courts take it upon themselves to vindicate what they perceive to be an illegal activity, which is not in fact illegal, by limiting the recovery of damages to such individuals, it hinders the realization of those objectives. If the current law is not a reflection of the people's will, it must be modified through legislation and not by the judiciary.

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251. See U.S. CONST. art I, § 1.

252. See U.S. CONST. art III, § 1.

253. *Supra* note 21 and accompanying text.

254. *Supra* notes 16–19 and accompanying text.

255. Press Release, Dep't of Homeland Sec., Secretary Napolitano Strengthens Employment Verification with Administration's Commitment to E-Verify (July 8, 2009), available at <https://www.dhs.gov/news/2009/07/08/administration-commits-e-verify-strengthens-employment-verification>.

256. *Id.*

## V. CONCLUSION

For many of the seven million illegal immigrant workers<sup>257</sup> who have heeded the call to enter by the “golden door”<sup>258</sup> in search of a better life here in the “nation of immigrants,”<sup>259</sup> the light of Lady Liberty’s torch is extinguishing. Employers and state courts alike have been tempted by the Supreme Court’s *Hoffman Plastic* decision<sup>260</sup> to conclude that illegal immigrants have absolutely no workplace rights, including the right to recover for workplace injury. Fortunately, many jurisdictions have been reluctant to completely bar recovery.<sup>261</sup> Nevertheless, many of these same jurisdictions have condoned the practice of limiting the amount of damages recoverable to injured illegal immigrant workers by virtue of their immigration status.<sup>262</sup> This practice imposes a debilitating reality upon individuals who have, in more ways than one, risked their very lives chasing the “American Dream.”

No one can deny that the wave of illegal immigration in recent decades has created its fair share of problems to which there is no easy solution. However, the practice of limiting recovery to injured undocumented workers has in no way aided the realization of the nation’s end goal of deterring illegal immigration. Aside from the policy flaws of this practice,<sup>263</sup> awarding full benefits to injured illegal immigrants better serves our federal immigration aims by encouraging more widespread compliance with the law<sup>264</sup> and limiting the ways in which noncompliant actors may take advantage of their noncompliance for their personal financial enrichment.<sup>265</sup> The independent judicial efforts to prevent illegal immigration by limiting workplace injury recovery based on an employee’s immigration status not only frustrate the accomplishment of our federal immigration objectives, but also extin-

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257. Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security with Billions*, N.Y. TIMES, Apr. 5, 2005, at A1; Press Release, House Judiciary Committee, Smith Applauds E-Verify Expansion (Feb. 3, 2012), available at <http://judiciary.house.gov/index.cfm/2012/2/smithapplaudseverifyexpansion>.

258. LAZARUS, *supra* note 3.

259. See President John F. Kennedy, *supra* note 1.

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

261. *Supra* Part III.B–C.

262. *Supra* Part III.C.

263. *Supra* Part IV.C.

264. *Supra* Part IV.A.2.

265. *Supra* Part IV.A.3.

guish the beacon which has unquestionably brought so much political and social richness to our country. Although it may seem counterintuitive at first glance, awarding full damages and benefits to injured illegal immigrants will, in the long run, help reduce illegal immigration, help foster a more vibrant and just society, and kindle the dimmed light of our most important national symbol and ideal.

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