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Andrew J. Glasnovich

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# A Solution to *Hoffman's* Choice for Unauthorized Workers: Creating New Incentives to Report Unlawful Workplace Discrimination

Andrew J. Glasnovich†

Maria and Sue are coworkers at ACME Factory. They are also neighbors and best friends. Additionally, Maria and Sue share the same supervisor at work, Ted. One day, Ted calls Maria and Sue into his office to discuss declining factory production quotas. Near the end of the conversation, Ted mentions that this quota problem could go away if Maria or Sue would go on a date with him. Maria and Sue glance to each other and politely dismiss the remark. Later that week, Maria and Sue decide to report Ted to management for his inappropriate behavior. Management informs Ted, and he immediately terminates Maria and Sue.

Distraught and unemployed, the friends take legal action. Maria and Sue go to the Equal Employment Opportunity Commission (EEOC). The EEOC finds that the friends were fired in retaliation for their complaint against Ted. An action commences in federal district court and the friends seek reinstatement, backpay, and compensatory and punitive damages.

As discovery closes, ACME uncovers that Maria does not have authorization to work in the United States. Thus, ACME claims Maria is ineligible to bring suit for employment discrimination, because she should never have been employed by ACME in the first place. The judge agrees and dismisses Maria's claim, but ultimately Sue wins her case and is awarded the entirety of her requested relief.

So what was different between Maria and Sue? Do workplace discrimination laws apply to authorized and unauthorized workers differently?[1] Maria and Sue were subject to

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†. J.D., University of Minnesota Law School; B.A., Stetson University.

1. This Article uses the term "unauthorized" to refer to non-citizens persons without valid work authorization and declines to use the terms "illegal" or "undocumented." It is not a crime per se, so long as one is honest about his or her unauthorized status, to be unauthorized and to work for a wage or to apply for a job. Arizona v. United States, 132 S. Ct. 2492, 2504 (2012) ("Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in,

the same harassment. Somehow ACME and Ted got away with mistreating Maria, but were held to account for mistreating Sue.

In 2012, the United States was home to 11.7 million people who did not have legal authorization to reside in the country.[2] Of those, approximately 8 million people were active in the work force.[3] Unauthorized workers will likely contribute $2.6 trillion over the next decade to the U.S. economy.[4] Those unauthorized persons are some of the most vulnerable members of society. Because of their status, some unauthorized workers fear that their choice to report employer misconduct will lead to their deportation or imprisonment.[5] State and federal laws prohibit employers from class-based discrimination against their workers—whether these workers are authorized or unauthorized.[6] Despite those laws, some employer misconduct is notably egregious and includes wage theft, unsafe labor conditions, race and sex discrimination, and sexual assault.[7] However, some unauthorized workers are

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unauthorized employment."). However, it is a crime for an employer to hire an unauthorized person or permit that person to continue work or for the unauthorized person to present that he or she is authorized to work. 8 U.S.C. § 1324a(a)(1)(A), (f)(1) (2014); 8 U.S.C. § 1324c(a) (2014). The unauthorized worker, however, is not the wrongful actor if an employer fails to verify or inquire of the worker's status. *See* 8 U.S.C. § 1324c (a).

2. Jeffery S. Passel et al., *Population Decline of Unauthorized Immigrants Stalls, May Have Reversed*, PEW RESEARCH CTR. (Sept. 23, 2013), http://www.pewhispanic.org/2013/09/23/population-decline-of-unauthorized-immigrants-stalls-may-have-reversed.

3. Jens Manuel Krogstad & Jeffrey S. Passel, *5 Facts About Illegal Immigration in the U.S.*, PEW RESEARCH CTR. (Nov. 19, 2015), http://www.pewresearch.org/fact-tank/2015/11/19/5-facts-about-illegal-immigration-in-the-u-s/.

4. *See* Raúl Hinojosa-Ojeda, *Raising the Floor for American Workers: The Economic Benefits of Comprehensive Immigration Reform*, CTR. FOR AM. PROGRESS (Jan. 7, 2010), https://www.americanprogress.org/issues/immigration/report/2010/01/07/7187/raising-the-floor-for-american-workers (stating that mass deportation would reduce the cumulative GDP of the United States by $2.6 trillion over 10 years "not including the actual cost of deportation").

5. This is the titular "*Hoffman's* Choice": to report the discrimination or to be deported. *See* S. POVERTY LAW CTR., INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE U.S. FOOD INDUSTRY 21–41 (2010) (describing the workplace violence and harassment faced by immigrant women), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/Injustice_on_Our_Plates.pdf.

6. TEX. P'SHIP FOR LEGAL ACCESS, EMPLOYMENT RIGHTS OF UNDOCUMENTED WORKERS (2014), http://texaslawhelp.org/files/685E99A9-A3EB-6584-CA74-137E0474AE2C/attachments/72479B16-CB87-4F1A-8B62-917F8FB74295/undocumented-workers-final-draft2-eff-pa.pdf.

7. *Id.*

brave enough to risk deportation and CHALLENGE their employers' unlawful practices.[8]

This Article will identify how federal law protects unauthorized workers from class-based discrimination and will define the proper scope of relief for violations of these laws. First, this Article examines a conflict in federal law that creates an incongruence between the purported right to a workplace free of discrimination and the corresponding claims for relief available to unauthorized workers. Next, this Article proffers a new analytical framework, based on state law examples, to resolve this legal quagmire, arguing that current jurisprudence does not apply to antidiscrimination statutes. Finally, this Article proposes that Congress amend Title VII of the Civil Rights Act of 1964 (Title VII) to correct the U.S. Supreme Court's misapplication of immigration law, which stripped unauthorized workers of the basic protections of dignity and workplace security.

## I. How the Law Disincentivizes Unauthorized Workers from Reporting Discrimination

Two seemingly unrelated statutes predominate this analysis: The Immigration Reform and Control Act (IRCA) and Title VII. In comparing the overarching policies of both statutes, one must resolve the question: Can unauthorized workers sue and receive monetary awards that purport to compensate for lost wages—wages that, under IRCA, these workers unlawfully earned? A cursory look at these two statutes illuminates the problem.

### *A. Immigration Law Creates Negative Consequences for Reporting Discrimination*

IRCA's goal is to discourage the flow of undocumented persons into the United States.[9] IRCA prohibits an employer from hiring a person not authorized to work in the United States, penalizing the employer for failing to confirm eligibility. This in turn has negative consequences for the unauthorized employee.[10] A violation of these provisions subjects the unlawful actor to both

8. *See* D. Carolina Núñez, *Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for the Undocumented Worker*, 2010 WIS. L. REV. 817, 855–60 (discussing legal strategies authorized employees have used to attempt to hold their employers accountable).

9. *See* Statement by President Ronald Reagan Upon Signing S. 1200, 1986 U.S.C.C.A.N. 5856.

10. 8 U.S.C. § 1324a(a)(1)(A) (2014) (making it unlawful to knowingly employ or recruit a non-citizen who is ineligible for employment in the United States).

civil fines and criminal penalties, including the possibility of deportation for an unauthorized person.[11] Congress did not, however, intend IRCA to block unauthorized workers' access to discrimination protections offered by other statutes.[12]

Paramount among these anti-discrimination statutes, Title VII protects an individual from unlawful employment practices based on his or her race, color, religion, sex, or national origin.[13] Congress enacted Title VII to rid the work place of invidious discriminatory practices.[14] Congress recognized that racial and sexual discrimination impose a high cost on society and that bringing to light this discrimination is a compelling governmental interest.[15] Title VII provides various remedies to the unlawful employment practice, including reinstatement, backpay,[16] and punitive and compensatory damages.[17]

The Supreme Court has held that, for analogous workplace claims under the National Labor Relations Act (NLRA), IRCA precludes unauthorized workers from obtaining wage-like damages.[18] In *Hoffman Plastic Compounds, Inc. v. NLRB*, the Court found that the National Labor Relations Board (NLRB), an administrative agency, did not have the authority to award backpay to an unauthorized worker.[19] The Court reasoned that the NLRB, in its capacity enforcing the NLRA, did not have the

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11. 8 U.S.C. § 1324a(e)(4), (f)(1).

12. *See* H. COMM. ON EDUC. AND LABOR, H.R. REP. NO. 99-682(II), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5758 ("[T]he committee does not intend that any provision of this Act would limit the powers of . . . the Equal Employment Opportunity Commission . . . in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.").

13. 42 U.S.C. § 2000e-2(a) (2014). Congress later strengthened Title VII with the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, Secs. 2, 3 ("The Congress finds . . . that additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace . . . .").

14. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 231 (1979) (citing U.S. Code Cong. & Admin. News 1964, at 2401).

15. *See* Univ. of Pa. v. EEOC, 493 U.S. 182, 193 (1990).

16. Backpay is one of the most common remedies awarded for a violation of Title VII. Though a court may consider many remedies, an award of backpay is a presumption that must be overcome. City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 719 (1978); Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

17. 42 U.S.C. § 2000e-5(g)(1) (2014); *see* Fogg v. Gonzales, 492 F.3d 447, 452 (D.C. Cir. 2007) (discussing backpay and frontpay remedies under Title VII).

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

19. *Id.* at 151–52.

authority to contravene the policy behind IRCA.[20] The Court, however, did not allow the employer-defendant to avoid liability, but instead found the NLRB could enforce other "'traditional remedies' sufficient to effectuate national labor policy regardless of whether . . . backpay accompanies them."[21]

The *Hoffman* Court declined to decide whether backpay, as a remedy, was per se foreclosed to unauthorized workers.[22] Critics of the *Hoffman* majority point out that hiring unauthorized workers would lower the employer's cost of violating labor laws, making unauthorized workers more attractive to hire and exploit.[23] This would thereby also undermine IRCA.[24] To critics, backpay would be an appropriate remedy, not just because it compensates the employee, but because it punishes the employer.[25]

### *B. Courts Place the Blame on the Worker Instead of the Discriminating Employer*

Though *Hoffman* soundly answered the question of what remedies were available to an unauthorized worker under the NLRA, it did not answer that question for Title VII.[26] Many lower courts have held *Hoffman* inapplicable to Title VII "because neither Title VII nor IRCA clearly expresses Congress's intent to exclude foreign nationals without proper work visas from Title VII's coverage . . . although [a plaintiff's] visa status and eligibility for employment may limit her remedies."[27]

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20. *Id.* at 149 ("[A]warding backpay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer.").

21. *Id.* at 152. *Contra* Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 186 (4th Cir. 1998). For an overview of how *Hoffman* affects the Fair Labor Standards Act, see Andrew S. Lewinter, Hoffman Plastic Compounds v. NLRB*: An Invitation to Exploit*, 20 GA. ST. U. L. REV. 509, 524–530 (2003).

22. *Hoffman*, 535 U.S. at 147.

23. *Id.* at 156 (Breyer, J., dissenting).

24. *Id.* at 157.

25. *Id.* at 160 ("After all, the same backpay award that compensates an employee in the circumstances the Court describes *also* requires an employer who has violated the labor laws to make a meaningful monetary payment.").

26. *E.g.*, Rivera v. NIBCO, Inc., 364 F.3d 1057, 1067 (9th Cir. 2004) (finding a Title VII case distinguishable from *Hoffman*); Iweala v. Operation Tech. Serv., Inc., 634 F. Supp. 2d 73, 79 (D.D.C. 2009); Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (holding plaintiff was barred from backpay but not from reinstatement after he obtained authorized status).

27. *Iweala*, 634 F. Supp. 2d at 80; *accord* Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299, 1307 (11th Cir. 2013) (holding that *Hoffman* does not put ICRA in conflict with the Fair Labor Standards Act); Maderia v. Affordable Hous. Found., Inc., 469 F.3d 219, 227 (2d Cir. 2006) (finding that federal immigration law does not preempt a New York state law allowing unauthorized workers to recover

Not all courts have found *Hoffman* to be irrelevant in the Title VII context. In *Escobar v. Spartan Security Services*, an unauthorized worker brought sexual harassment and sex discrimination claims under Title VII.[28] Subsequent to his employment and the discriminatory incidents at Spartan, Escobar obtained authorization to work in the United States.[29] However, Escobar's lost wages occurred prior to his work authorization. The court found that, although *Hoffman* only addressed claims under the NLRA, the logic of *Hoffman* "compels the conclusion that Escobar is not entitled to backpay on his claims under Title VII."[30]

In contrast, the Ninth Circuit rejected *Hoffman's* absolute bar to backpay under Title VII.[31] In *Rivera v. NIBCO, Inc.*, twenty-three immigrant plaintiffs alleged NIBCO's English language skills test had an adverse effect on their employment status based on their national origin.[32] The Ninth Circuit declined to enforce *Hoffman's* prohibition on backpay to Title VII.[33] The court found that, because Title VII and the NLRA have different statutory language and were enacted to serve different purposes, *Hoffman* was not directly applicable to Title VII.[34]

The agency that enforces Title VII, the EEOC, considers unauthorized workers to be protected by anti-discrimination laws.[35] The EEOC initially took the position that unauthorized workers are eligible for backpay and other remedies "to the same extent as authorized workers . . . ."[36] As case law evolved away from allowing backpay for unauthorized workers, the EEOC has

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compensatory damages for lost wages); *see* Christopher Ho & Jennifer C. Chang, *Drawing the Line After* Hoffman Plastic Compounds, Inc. v. NLRB*: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 499 (2005); Michael H. Leroy, *Overruling Precedent: "A Derelict in the Stream of the Law,"* 66 SMU L. REV. 711, 732–33 (2013) (noting cases that agree and disagree with *Hoffman*).

28. *Escobar*, 281 F. Supp. 2d at 896.

29. *Id.* at 896.

30. *Id.* at 897.

31. *Rivera*, 364 F.3d at 1067.

32. *Id.* at 1061.

33. *Id.* at 1068.

34. Importantly, Title VII protects individuals from invidious, class-based discrimination, while the NLRA ensures fairness in labor negotiations. *Rivera*, 364 F.3d at 1067 ("The NLRA and Title VII are different statutes in numerous respects. Congress gave them distinct remedial schemes and vested their enforcement agencies with different powers.").

35. *Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws*, EEOC, http://www.eeoc.gov/policy/docs/undoc.html (last visited Mar. 27, 2016).

36. *Id.*

held firm on its stance that unauthorized workers are, nonetheless, protected by the statutes the EEOC enforces.[37]

### *C. California Took a Stand for Unauthorized Workers*

In partial response to *Hoffman*, states took various approaches to shield their worker protection laws from IRCA's reach.[38] California, for example, enacted Senate Bill 1818 (S.B. 1818) to amend its Title VII equivalent, the Fair Housing and Employment Act (FHEA), to explicitly protect unauthorized workers.[39]

In *Salas v. Sierra Chemical Co.*, the California Supreme Court refused to apply *Hoffman*'s prohibition on backpay against unauthorized workers who sought relief under FHEA.[40] The court examined whether *Hoffman* preempted FHEA.[41] Similar to the Ninth Circuit in *Rivera*, the California Court decided both that the damages and the private cause of action found in the FHEA differed substantially from the administrative procedures in the NLRA.[42] Thus, the differing remedial goals of the NLRA and California's FHEA justified distinguishing *Salas* from *Hoffman*.[43]

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37. *EEOC Reaffirms Commitment to Protecting Undocumented Workers from Discrimination*, EEOC (June 28, 2002), http://www1.eeoc.gov//eeoc/newsroom/release/6-28-02.cfm.

38. *See, e.g.*, Solis v. SCA Rest. Corp., 938 F. Supp. 2d 380, 401 (E.D.N.Y. 2013) ("*Hoffman* does not preclude an award of backpay to undocumented workers."); Zaldivar v. Rodriguez, 819 N.W.2d 187, 194 (Minn. Ct. App. 2012) ("[T]he Minnesota Supreme Court rejected the reasoning of *Hoffman*. Our supreme court reasoned that the state legislature is the appropriate body to determine whether an unauthorized alien who is otherwise entitled to workers' compensation benefits should be disentitled on the basis of his or her immigration status.") (citing Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 331 (Minn. 2003)); *see also* Oliver T. Beatty, *Workers' Compensation and* Hoffman Plastic*: Pandora's Undocumented Box*, 55 ST. LOUIS U. L.J. 1211, 1233–34 (2011).

39. CAL. GOV'T CODE § 12921 (West 2014); S.B. 1818, 2002 Reg. Sess. (Cal. 2002) (enacted) ("All protections rights and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state."); *see* Kiren Dosanjh Zucker, *From* Hoffman Plastic *to the After-Acquired Evidence Doctrine: Protecting Undocumented Workers' Rights Under Federal Anti-Discrimination Statutes*, 26 WHITTIER L. REV. 601, 607 (2004).

40. Salas v. Sierra Chem. Co., 327 P.3d 797, 804–05 (Cal. 2014), *cert. denied*, 135 S. Ct. 755 (2014).

41. *Id.* at 800.

42. *Id.* at 804.

43. *Id.* ("Because of this critical difference between California's FHEA and the federal NLRA, relating to the role played by lost pay awards in achieving California's remedial legislative goal, we do not consider . . . *Hoffman* controlling here.").

In spite of this distinction, the California Supreme Court found that, once an employer has discovered a plaintiff's unauthorized status, an award of backpay would conflict with IRCA.[44] In *Salas*, however, the employer-defendant was aware of the plaintiffs' unauthorized status and continued to allow them to work.[45] Thus, the court held that the employer could not invoke the IRCA defense to avoid backpay damages.[46]

## II. How to Incentivize Unauthorized Workers to Report Discrimination

### *A. Provide Damages for Irreparable Harm*

Assuming *Hoffman* indeed bars claims for lost wages, an unauthorized worker may still recover compensatory and punitive damages.[47] Congress amended Title VII in 1991 to include awards for less tangible harms.[48] An award for these non-economic damages serves to ferret out invidious discrimination, furthering the policy behind Title VII. These irreparable damages, however, do not purport to compensate for lost wage, and thus do not obstruct IRCA's goal of dissuading unlawful immigration.[49]

Distinguishing between the remedial purposes of backpay and awards for irreparable harm is crucial to understanding why awards of irreparable harm avoid *Hoffman's* grasp. Compensatory damages under Title VII address harms stemming less concretely from a wrongful employment act, i.e. harms other than wage loss.[50] For instance, a manifestation of severe emotional injuries is enough to warrant compensatory damages.[51] Punitive damages, comparatively, punish egregious, willful discrimination by an employer; they do not purport to compensate for any individualized harm.[52]

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44. *Id.* at 811.

45. *Id.* at 812.

46. *Id.*

47. *See* Ho & Chang, *supra* note 2728, at 493; Cheryl Krause Zemelman, *The After-Acquired Evidence Defense to Employment of Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 208 (1993).

48. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, Sec. 2. (1991).

49. *See* Ho & Chang, *supra* note 27, at 493.

50. *E.g.*, EEOC v. Convergys Customer Mgmt. Grp., Inc., 491 F.3d 790, 797 (8th Cir. 2007) (exploring the type of non-economic damages available to a plaintiff under the Americans with Disabilities Act).

51. *Id.*

52. 42 U.S.C. § 1981a (2014).

Thus, *Hoffman's* logic[53] supporting a denial of backpay under IRCA does not similarly support a denial of non-economic damages under Title VII.[54] Compensatory and punitive damages should not be viewed as similarly repugnant to IRCA because they do not purport to compensate for unauthorized work; rather, they remedy the individual and societal effects of discrimination, punishing employers for their wrongful acts.[55] Therefore, relying on compensatory and punitive damages to deter an employer from discriminating fits both the majority's and the dissent's views in *Hoffman*.[56]

### *B. Allow the EEOC to Seek All Types of Damages*

While an employee-plaintiff's remedies are aimed at making him or her whole, the EEOC's core mission is to rid the workplace of discrimination.[57] By seeking monetary awards like backpay, the EEOC would dissuade employers from acting unlawfully in a way an individual plaintiff could not.[58] Thus, to achieve this mission, it is appropriate and necessary for the EEOC to seek those remedies that may be barred for unauthorized workers under current case law.

When the EEOC initiates an action in court to enforce Title VII, it does so not as the attorney of the plaintiff-employee, but on behalf of the public's interest in eliminating discrimination.[59] Though the plaintiff-employee may be barred from a monetary remedy, it is arguable that the EEOC may not be barred from seeking that same award from the employer.[60] When the EEOC

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53. Hoffman Plastic Compounds, Inc. v. NLRB. 535 U.S. 137, 150 (2002).

54. *See id.*; *Convergys Customer Mgmt. Grp.*, 491 F.3d at 797.

55. *Compare* 42 U.S.C. § 2000e-5 (2014) (outlining remedies that make a defendant whole), *with* 42 U.S.C. § 1981a (authorizing punitive damages).

56. *See* Zemelman, *supra* note 47, at 208. *Compare Hoffman*, 535 U.S. at 150 (Rehnquist, C.J.) ("[The employee] cannot mitigate damages, a duty our cases require . . . ."), *with id.* at 160 (Breyer, J., dissenting) ("[T]he same backpay award that compensates an employee in the circumstances the Court describes *also* requires an employer who has violated the labor laws to make a meaningful monetary payment.").

57. *See* Jennifer Miyoko Follette, *Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of After-Acquired Evidence*, 68 WASH. L. REV. 651, 652 (1993); Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237, 1240 (2010).

58. *See, e.g.*, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 153 (2002) (Breyer, J., dissenting) ("[Backpay] reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent.").

59. *See* Evangelina Fierro Hernandez, *EEOC Class Action Litigation*, PRAC. LITIGATOR, Mar. 2008, at 39, 40–41.

60. *See* EEOC v. Waffle House, Inc., 534 U.S. 279, 288 (2002).

discovers a class of individuals who have suffered discrimination during its investigation of another claim, the EEOC may collect an award on the newly discovered persons' behalf regardless of any encumbrances those individuals would have in bringing suit.[61]

IRCA does not explicitly compel the EEOC to verify a claimant's status because the EEOC is not their employer.[62] Nor is the EEOC collecting a wage on behalf claimants; rather, the EEOC is collecting damages for a wrongful act committed against workers and society.[63] By collecting on behalf of this group, the EEOC remedies the past discrimination, punishes the employer for its act, discourages future wrongful acts by the employer, and sends a message to other employers that these actions are intolerable.[64] This serves the EEOC's general goal of implementing Title VII.[65] It would greatly weaken Title VII if a court were to restrict the EEOC from implementing this important public policy because of one employee's wrongful act.[66] It is also inconsistent with other cases that hold the EEOC is not barred by conflicting statutory schemes.[67] For instance, the EEOC is not barred if a plaintiff-employee signs an arbitration agreement, despite the strong public policy interest the Supreme Court finds in upholding the validity of arbitration clauses.[68]

### *C. Congress Must Act to Amend Title VII*

In amending its employment discrimination laws, the California legislature signaled that its courts should uphold workplace protections for unauthorized workers.[69] Although

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61. *Id.* ("'[T]he EEOC is not merely a proxy for the victims of discrimination . . . .'") (citation omitted); *accord In re* Bemis Co., 279 F.3d 419, 421 (7th Cir. 2002) (noting the EEOC does not need to comply with class certification requirements).

62. *Compare Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination*, *supra* note 35 (discussing the remedies which the EEOC may seek on behalf of unauthorized employees), *with* Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1117 (7th Cir. 1992) (rejecting the NLRB's effort to require an employer to pay backpay to unauthorized immigrants) *and* 8 U.S.C. § 1324a (2012) (making it unlawful for an employer to knowingly hire an unauthorized employee).

63. *See* Follette, *supra* note 57, at 667.

64. *See Remedies for Employment Discrimination,* EEOC, http://www.eeoc.gov/employers/remedies.cfm (last visited Oct. 19, 2014).

65. 42 U.S.C. § 2000e-5 (2014).

66. Zemelman, *supra* note 47, at 194–95.

67. *See, e.g.*, EEOC v. Waffle House, Inc., 534 U.S. 279, 288 (2002) (declining to apply an arbitration limitation to the EEOC on policy grounds).

68. *Id.* at 288–89.

69. CAL. GOV'T CODE § 12921 (West 2014); S.B. 1818, 2002 Leg., Reg. Sess.

Congress similarly intended that IRCA not abrogate workplace protections, the Supreme Court has so far failed to resolve conflicts between IRCA and employment laws in line with Congress's intent.[70] It is therefore necessary to amend IRCA to make explicit Congress's intention to leave intact Title VII protections for all workers, including those without authorization to work. While California's S.B. 1818 worked to effect a worker-friendly result in *Salas*,[71] it is not enough for individual states to enact their own protections. *Salas* is the perfect example of how state statutes will fail to fully resolve the issues created by *Hoffman*. In *Salas*, though the California Court recognized the plaintiff's right to recover fully, it noted not all plaintiffs could obtain similar results, because ignorance of a worker's immigration status can still be used to invoke equitable defenses.[72]

The ultimate solution thus lies in the hands of Congress. A statute similar to California's S.B. 1818 would make clear that all "rights and remedies" available to authorized workers are also available to unauthorized workers; any equitable escape from liability should be denied to employers.[73] This amendment would match Congress's past attempts to protection Title VII from the Court.[74] It would further make Congress's original intent clear: IRCA is not an excuse for employers to engage in invidious, discriminatory conduct.[75]

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(Cal. 2002).

70. *Compare* H. COMM. ON EDUC. AND LABOR, H.R. REP. NO. 99-682, pt. 2, at 8 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5757, 5758 ("[T]he committee does not intend that any provision of [IRCA] would limit the powers of State or Federal labor standards agencies . . . ."), *and* 8 U.S.C. § 1324b(a)(1) (prohibiting employers, under IRCA, from discriminating based on "an individual's national origin" or "citizenship status"), *with* McKennon v. Nashville Banner Pub. Co., 513 U.S. 352 (1995) (allowing some backpay for a wrongfully discharged employee under the [Age Discrimination in Employment Act] even though the employer later discovered evidence of the employee's wrongdoing which would have led to her discharge) *and* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 150 (2002) (prohibiting backpay under NLRB for unauthorized employees). *But see Hoffman*, 535 U.S. at 157 (Breyer, J., dissenting) (stating that IRCA is not intended to undermine existing labor laws).

71. Salas v. Sierra Chem. Co., 327 P.3d 797 (Cal. 2014), *cert. denied*, 135 S. Ct. 755 (2014).

72. *Id.* at 812; *cf.* Avina v. Target Corp., No. 2:13-cv-07546-CAS, 2014 WL 3704544, at *7 (C.D. Cal. July 18, 2014) (applying *Salas* and rejecting defenses of unclean hands and after-acquired evidence to limit an employer's liability).

73. CAL. GOV'T. CODE § 12921 (West 2014).

74. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, Sec. 2. (1991).

75. *See* 8 U.S.C. § 1324b(a)(1); H. COMM. ON EDUC. AND LABOR, H.R. REP. NO. 99-682, pt. 2, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5758.

Further, an analogous federal statute would resolve the two lingering questions in federal courts about IRCA and Title VII. First, courts currently leave the question of whether unauthorized workers are *qualified* employees under Title VII unanswered.[76] This would be resolved by the language: "[a]ll protections . . . are available to all individuals regardless of immigration status who have applied for employment or who are or who have been employed . . . ."[77] This language refutes the presumption that authorized status is required for a cause of action under Title VII.

Second, the courts must answer the question: What precise remedies under Title VII does IRCA limit? This question would be answered by the language: "[a]ll . . . *remedies* available under [the] law . . . to all individuals regardless of immigration status."[78] This proposal represents a normative choice, rejecting the notion that extraneous factors, like a victim's immigration status, should excuse an employer's discriminatory conduct.

Congress must make a deliberate value choice when determining what wage-like remedies will remain unavailable to unauthorized persons. A Congressional amendment to IRCA should only exclude the remedies of frontpay and reinstatement for unauthorized workers because these remedies would certainly contravene IRCA's prohibition on unauthorized work. By awarding front pay and reinstatement, Congress would acknowledge the right of an unauthorized worker to *continue* to be paid in contravention of IRCA. This seems the most untenable option because of the Congress's express policy dissuading unauthorized workers from remaining in the United States.[79] Because these remedies could one day be an option for an unauthorized worker who later obtains authorization, reinstatement and front pay should only be excluded to those currently unauthorized.[80]

The status of backpay under an amendment to IRCA would likely be the most contentious. Backpay serves two distinct purposes. First, backpay compensates a wrongfully terminated worker.[81] Second, backpay punishes the unscrupulous employer.[82]

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76. *E.g.*, Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003).

77. CAL. GOV'T CODE § 12921 (West 2014).

78. *Id.* (emphasis added).

79. *See* Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 186–87 (4th Cir. 1998); Ho & Chang, *supra* note 27, at 499.

80. *E.g.*, *Escobar*, 281 F. Supp. 2d at 896; *see* Ho & Chang, *supra* note 27, at 499.

81. *See* City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 719 (1978).

Thus, if Congress's favored policy is to preclude unauthorized workers from obtaining wage-like remedies, it should prohibit backpay. If, however, Congress's favored policy is to discourage discrimination by creating an economic disincentive for employers, it should not exclude backpay. Congress should choose to include backpay as an explicit remedy for unauthorized workers because backpay compensates for the wrongful act of the employer. But for the employer's wrongful conduct, the unauthorized worker would have earned that pay. Congress should not punish unauthorized workers by erasing any hope of monetary compensation from a discrimination claim.

Though a statutory solution will provide the most decisive end to this debate, a resolution will be wrapped up in a larger battle in Congress for comprehensive immigration reform.[83]

## III. *Hoffman* Enacts an Unintended Punishment on Unauthorized Workers

None of the existing judicial or legislative solutions discussed in this Article allow an unauthorized worker to access the exact remedies are available to those authorized to work. This failure to provide equal protections in employment is a latent punishment in IRCA.[84] Though Title VII seeks to protect those historically disadvantaged groups, the Supreme Court's view of IRCA further marginalizes them.[85]

In passing S.B. 1818, California made clear its preference for protecting unauthorized workers from discrimination.[86] Congress should take similar, explicit action to prevent Title VII and IRCA from being subverted by the *Hoffman* Court.[87] Congress should pass an amendment to IRCA's existing, explicit prohibition on national origin discrimination. [88] The amendement should make it

82. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149 (2002) (Breyer, J., dissenting).

83. *See* Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES (Nov. 20, 2014), http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html.

84. *See* Zemelman, *supra* note 47, at 211.

85. *Compare* Civil Rights Act of 1964, Pub. L. No. 88-352 pmbl., 78 Stat. 241, *with Hoffman*, 535 U.S. at 153.

86. CAL. GOV'T CODE § 12921 (West 2014); S.B. 1818, 2002 Leg., Reg. Sess. (Cal. 2002).

87. *See* Thomas J. Walsh, Hoffman Plastic Compounds, Inc. v. NLRB*: How the Supreme Court Eroded Labor Law and Workers Rights in the Name of Immigration Policy*, 21 LAW & INEQ. 313, 329–38 (2003).

88. 8 U.S.C. § 1324b(a)(1); *accord* H. COMM. ON EDUC. AND LABOR, H.R. REP. NO. 99-682, pt. 2, at 12, (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5761 ("The

clear that a person's work-authorization status is not grounds to limit remedies under Title VII.[89] This would send a strong statement that the promises of the Civil Rights Act of 1964 truly do not depend on the condition of one's birth, but are rooted in the principles of equal opportunity for all.[90]

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Committee . . . strongly endorses this provision and the [sic] has consistently expressed its fear that the imposition of employer sanctions will give rise to employment discrimination against Hispanic Americans and other minority group members.").

89. *See, e.g.*, H. COMM. ON EDUC. AND LABOR, H.R. REP. NO. 99-682, pt. 1, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662.

90. *See* Civil Rights Act of 1964, Pub. L. No. 88-352 pmbl., 78 Stat. 241 (1964).