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## Still in 'The Jungle': Labor, Immigration, and the Search for a New Common Ground in the Wake of Iowa's Meatpacking Raids

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# STILL IN ‘THE JUNGLE’: LABOR, IMMIGRATION, AND THE SEARCH FOR A NEW COMMON GROUND IN THE WAKE OF IOWA’S MEATPACKING RAIDS

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## I. INTRODUCTION

“There are able-bodied men here who work from early morning until late at night, in ice-cold cellars with a quarter of an inch of water on the floor—men who for six or seven months in the year

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never see the sunlight from Sunday afternoon till the next Sunday morning—and who cannot earn three hundred dollars in a year.”<sup>1</sup>

In 1906, Upton Sinclair described the conditions of the Chicago meatpacking industry and the struggle of an immigrant worker in an industrial workforce. In 2008, immigration authorities raided the nation’s largest kosher slaughterhouse uncovering hundreds of undocumented employees, and revealing Agriprocessors, Inc. as a prime example of the egregious employer exploitation that will occur amidst a broken immigration system.<sup>2</sup> This raises questions; what will it take to bring justice to the workplace and how much longer will it take for positive change in employment practices to take root?

Current immigration laws often obstruct enforcement of labor and employment laws. National immigration policies, codified specifically in the Immigration Reform and Control Act (“IRCA”),<sup>3</sup> the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”),<sup>4</sup> and the Supreme Court’s decision in *Hoffman Plastic Compounds, Inc., v. NLRB*,<sup>5</sup> undermine the legislative force needed to uphold and implement fair and nondiscriminatory practices in the workplace for all employees irrespective of immigration status.<sup>6</sup> Where laws inadequately protect immigrant workers, employers repeatedly take liberties to maximize profits at the expense of all workers. When employment laws are invoked, it is typically with little or no reprimand to the employer despite the fact that the companies’ hiring practices created an environment in which serious violations occurred. The publicity given to Postville, Iowa and the raids of the Agriprocessors meatpacking plant raised awareness of these issues nationwide. Stemming from the raid, federal court cases against Agriprocessors and its operators reinforce the position that the current law has little deterrent effect on employers.

For a transformation to take place, the United States (“U.S.”) must alter its view of global standards and enforcement, and businesses need to

<sup>1</sup> UPTON SINCLAIR, *THE JUNGLE* 15 (W.W. Norton & Co., Inc. 2003) (1906).

<sup>2</sup> UFCW, *RAIDS ON WORKERS: DESTROYING OUR RIGHTS* 38 (2009), available at <http://www.ufcw.org/docUploads/UFCW%20ICE%20rpt%20FINAL%20150B%5F061809%5F130632%2Epdf?CFID=10217037&CFTOKEN=65919529>.

<sup>3</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

<sup>4</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 401-421, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1324a).

<sup>5</sup> 535 U.S. 137 (2002) (precluding the NLRB from awarding backpay to undocumented workers).

<sup>6</sup> See Leticia M. Saucedo, *A New “U”: Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 894 (2008).

take the lead as part of a broader corporate responsibility to uphold the law. But other than doing the “right” thing, what mechanisms are in place to change the way we look at the intersection of labor laws, immigration laws, and good business practice? The law must be enforceable, it must be manageable, and it must be reasonable; it cannot overly burden business in such a way that employers focus on methods of successfully circumventing the law. In a society in which the immigrant population is so tightly woven into the workforce, these laws need to make the employer equally responsible to all workers regardless of legal status.

The deliberate nature with which many labor violations are present in the workplace calls for rethinking the law and requires doing so with particular attention to migrant workers. In meatpacking plants, other industrial work, and even more critically in service industries where workers do not regularly congregate, the breakdown in union representation means the bargaining power of workers is at an all time low. Where the workers are immigrants, employers are typically less concerned that their violations will be recognized or reported by workers who are more concerned with staying in the U.S. and maintaining whichever job they have acquired. *If* these workers know they can enforce their right to work for minimum wage in a safe and clean environment, they often forego taking a stand in hopes of remaining undetected by immigration authorities.

This comment will analyze the particular failures that arise where labor and immigration intersect while considering the general forces that curb or drive corporate behavior; it will provide two ways in which the law might better deter violative behavior and transform the global interpretation of labor rights.

This comment will begin by examining the current intersection between immigration and labor laws using key case examples, like *Hoffman Plastic*,<sup>7</sup> to illustrate the ways in which the law has failed to move in the same direction as economic activity with respect to workplace demands, failed to provide protection to workers, and failed to offer guidance to employers. The first part will look at key statutes where immigration and labor intersect and consider their influence on the current climate for migrant workers by pointing to the specific provisions that inadequately afford protection or inadequately make enforcement a priority. This part will also address the *Hoffman* decision directly and the court precedents on which it relies in order to propose a change in the

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<sup>7</sup> 535 U.S. 137 (2002).

current rationale, which so often leads to policies that undermine equal treatment for migrant workers. The second part will cover the evolution of the meatpacking industry and union presence in the U.S. by exploring the factors that have contributed to the role unionization plays (and does not play) in today's workforce. It will also address theories about how immigration factors complicate the traditional union model for organizing workers in order to provide the context under which exploitation of workers becomes as pervasive as it does in particular industries, like meatpacking.

Third, this comment will closely look to the 2008 raids in Iowa that led to the filing of multiple criminal cases against employees, managers, and the company itself, Agriprocessors, Inc. This part will focus on the parties' assertions and motions and consider the relevance of particular discourse used to serve the parties. This part will also address the legal claims raised about the Agriprocessors plant in an effort to illustrate the egregious nature of the company's continued flagrant disregard for the law. This case study will provide one of the leading examples of why reform is needed in U.S.' immigration and labor policies.

Finally, the article will discuss two key ways in which a shift in the model used to understand the relationship between the worker and the employer must be reshaped. First, a pre-*Hoffman* concept of "employee" status under the law ought to be revived to disincentivize illegal recruitment of migrant workers by employers and to forestall flagrant violators like Agriprocessors. Second, there ought to be internationally harmonized rules enforceable in the U.S. that capture this arena by incorporating the obligations the U.S. has already made to the international community in the arena of human rights. These changes should be adopted in light of the reality that businesses cannot and must not be entrusted with making a choice between profit margins and the greater good.

## II. THE LABOR MOVEMENT AND IMMIGRATION LAWS

The link between labor and immigration is increasingly brought to our attention though it has always been a part of the American life. Since this intersection is overwhelmingly unsupported by existing laws, practices, and policies that lack enforcement mechanisms, each set of laws is undermined by the other. The inadequacies in IRCA, IIRIRA, and the Supreme Court's decision in *Hoffman*, are significant standing alone. However, the legal shortcomings are even more drastic when considered in the context of Agriprocessors' continued employment of

undocumented workers, the company's obvious attempts to circumvent union representation in their plants, and Agriprocessors and its operational manager, Sholom Rubashkin's attempts to avoid liability under IRCA.

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

Prior to 1986, immigration law did not often discuss employment explicitly. Initially, the Immigration and Nationality Act ("INA") criminalized "knowing or reckless" attempts to "encourage[ ] or induce[ ] an alien to come to, enter, or reside" in the U.S.<sup>8</sup> In the same vein, it established a criminal penalty for anyone who "conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation,"<sup>9</sup> but there was no prohibition against employing undocumented immigrant workers.

The Immigration Reform and Control Act ("IRCA"), enacted in 1986, was the first modern attempt at combining the two areas of law.<sup>10</sup> It was not very useful in reconciling the market competition for low-wage employment or the attractiveness of an American job because it focused entirely on the need to change behavior and motivations.<sup>11</sup> IRCA made it unlawful to "hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien."<sup>12</sup> This "knowingly" standard established that for an employer to be charged with violating the law, the government would have the burden of proving that the employer had knowledge that the worker was undocumented and that he or she employed the worker anyway.<sup>13</sup> This provision quickly became ineffective because employer scienter was nearly impossible to prove.<sup>14</sup>

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<sup>8</sup> Immigration and Nationality Act, 8 U.S.C. § 1324(a)(1)(A)(i)-(iv) (1952).

<sup>9</sup> *Id.* § 1324(a)(1)(A)(iii).

<sup>10</sup> IRCA was not the first employment-related immigration law in the U.S. The Contract Labor Act of 1885 prohibited importing immigrants by means of a labor contract. It remained in effect until the INA was passed in 1952. *See* The Contract Labor Act of 1885, ch. 164, 23 Stat. 332 (repealed 1952) (prohibiting any person or company "to prepay the transportation, or in any way assist or encourage the importation or migration of . . . any foreigner . . . to perform labor or service of any kind in the United States . . .").

<sup>11</sup> *See* NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 56 (2d Cir. 1997) (arguing that "IRCA . . . demonstrates Congress's intent to focus on employers, not employees, in deterring unlawful employment relationships . . .").

<sup>12</sup> 8 U.S.C. § 1324a(a)(1)(A) (1996).

<sup>13</sup> *See id.* § 1324(a)(1)-(2).

<sup>14</sup> *See, e.g.,* Collins Foods Int'l, Inc. v. U.S. I.N.S., 948 F.2d 549, 555 (9th Cir. 1991) (holding that because Congress did not intend the statute to cause employers to become experts in identifying and

IRCA also implemented the requirement that employers examine documentation of all new employees.<sup>15</sup> A new employee is required under IRCA to establish his or her authorization to work and identity by showing proof of identity evidencing employment authorization.<sup>16</sup> The statutory standard for employers to confirm the validity of these documents rests in the document “reasonably appear[ing] on its face to be genuine.”<sup>17</sup> At first glance, this requirement of employer documentation verification appears to put the burden on the employer to verify the worker’s status and provide support to the “knowingly” standard by ensuring that there is a record of the employer having confirmed the worker’s documents before employing the individual. In effect, however, requiring only that the documents “reasonably appear[ ] genuine”<sup>18</sup> gives an employer tremendous leeway in escaping charges where the employees’ documents are false. So long as the employer acts in good faith, without knowledge of employees’ status and in formal compliance with the requirements, the employer cannot be regarded as *knowingly* employing the undocumented worker.<sup>19</sup> Thereby an employer establishes an affirmative defense if charges are brought.<sup>20</sup> As a practical matter, the assumption that an employer in any of the traditionally immigrant-dominated workplaces, such as a meatpacking plant, will be the best judge of valid documentation imposes a highly un-standardized process. Furthermore, the misplaced duty suggests that the drafters intended to impose a rather low burden on the employers after all.

If an employer knowingly hires an unauthorized immigrant in contravention of the statute, an administrative judge is statutorily required to issue a cease and desist order. This can carry civil fines ranging from \$250 to \$2,000 per unauthorized immigrant for the first violation and exponentially increasing amounts for each subsequent violation.<sup>21</sup>

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examining a prospective employee’s employment authorization documents, the employer complied with verification requirements. Thus, offering an alien a job prior to verification of these documents does not support a finding of constructive knowledge).

<sup>15</sup> See 8 U.S.C. § 1324a(b).

<sup>16</sup> The statute establishes that a driver’s license, passport or Social Security card are all acceptable documents for this purpose. See *id.* § 1324a(b)(1)(B).

<sup>17</sup> *Id.* § 1324a(b)(1)(A)(ii).

<sup>18</sup> *Id.*

<sup>19</sup> See *id.* § 1324a(a)(3).

<sup>20</sup> See *id.*

<sup>21</sup> See *id.* § 1324a(e)(4).

Employers are also statutorily barred from discriminating against job applicants or employees based on national origin or citizenship status.<sup>22</sup> Specifically, this provision prohibits an employer from asking an employee to produce “more or different documents than are required”<sup>23</sup> or from refusing to honor documents that reasonably appear to be genuine.<sup>24</sup> This provision does not appear to have had the intended effect,<sup>25</sup> and if enforced, would put employers in a precarious position in being *required* to accept documents that “reasonably appear genuine” even though they might not actually know the difference. The employer’s only other option is to face discrimination charges for trying to impose their own screening mechanisms.

The Department of Homeland Security’s Immigration and Customs Enforcement (“ICE”)<sup>26</sup> is in charge of enforcing IRCA,<sup>27</sup> still, the undocumented worker problem persists.<sup>28</sup> Because of the awkwardly imposed documentary standard that charges the employer with reviewing the workers’ documents, and because some of these documents are easily counterfeited, immigrants without legal status have been hired for jobs,

<sup>22</sup> See 8 U.S.C. § 1324b(a) (1996).

<sup>23</sup> *Id.* § 1324b(a)(6).

<sup>24</sup> *Id.*

<sup>25</sup> Since IRCA was enacted through 1990, it was “estimated [that] 227,000 employers (five percent of those surveyed) had begun not to hire individuals because of foreign appearances or accents.” Nicolas J. Watkins & Joel Stewart, *Employer Sanctions Update and the Employer’s Response*, 66 FLA. B.J. 60, 60 (May 1992) (referring to U.S. GEN. ACCOUNTING OFFICE, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 71 (1990)).

<sup>26</sup> When IRCA was originally adopted as legislation, the Immigration and Naturalization Service (“INS”) investigated and enforced workplace violations involving the employment of undocumented workers. See 8 C.F.R. § 274a.9 (2003). On March 1, 2003, the INS was removed from the Department of Justice to the Department of Homeland Security (“DHS”). See Authority of the Secretary of Homeland Security, 68 Fed. Reg. 10922 (proposed Mar. 6, 2003) (codified at 8 C.F.R. § 2.1). Immigration and Customs Enforcement (“ICE”) is now the sub-agency under the Department of Homeland Security that investigates IRCA violations. *Id.*

<sup>27</sup> See Homeland Security Act of 2002 §§ 441, 451, 471, 116 Stat. 2135, 2136-37.

<sup>28</sup> The Department of Homeland Security estimates that the number of undocumented workers in the United States reached 11.6 million in January 2008. See MICHAEL HOEFER ET AL., OFFICE OF IMMIG. STAT., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2008 2 (2009), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf). There are estimates that 4 to 6 million of these undocumented individuals are working in fields, factories, and on construction sites. See Rebecca Smith et al., *Low Pay, High Risk: State Models for Advancing Immigrant Workers’ Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 598-99 (2004) (citing B. LINDSAY LOWELL & ROBERT SURO, HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.-MEXICO MIGRATION TALKS 7-8 (2002), available at <http://pewhispanic.org/reports/report.php?ReportID=6>).



such as those in the meatpacking industry.<sup>29</sup> Armed with the knowledge of their typical workers' immigration status and of those workers' fears connected with reporting any problems in the workplace, the meatpacking industry and other immigrant-dominated industries have easily taken advantage of this influx of apprehensive, vulnerable, yet hard working individuals.<sup>30</sup> The mens rea requirements of IRCA laid the groundwork for creating scenarios like the raid of the Agriprocessors' meatpacking plant in Iowa. Workplace and labor loopholes slowly became the means by which the government could categorically enforce immigration standards.

## B. *Illegal Immigration Reform and Immigrant Responsibility Act*

### 1. *Basic Provisions*

In 1996, Congress amended IRCA with the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").<sup>31</sup> While it seems that IIRIRA clarifies some of the concerns raised under IRCA, IIRIRA still leaves something to be desired where undocumented workers continue to gain employment and employers avoid fidelity to both immigration and labor laws. First, IIRIRA's pilot programs,<sup>32</sup> such as E-Verify,<sup>33</sup> are voluntary.<sup>34</sup> Second, IIRIRA requires that employers take

<sup>29</sup> See Smith et al., *supra* note 28, at 598-99 (the dynamic described by Smith of 'low pay-high risk' is two fold; low-wage worker industries, like meatpacking, highlight this precisely because the pay is hourly, a high degree of skill is not required of the workers, and in turn employers tend to be less scrutinizing of employment documents in their hiring practices. Employers have been willing to take the risk of safety, immigration, and wage-payment violations because they can count on a lack of enforcement by federal and state agencies as to the employer's in-house practices. Generally, employers can rely on migrant employees not to report their employers because they want to avoid having their immigration documents scrutinized any more heavily.); JEFFREY L. RODENGEN & JON VANZILE, *THE LEGEND OF IBP: ESTABLISHED 1960* 181 (2000) ("The meat industry had always been a point of entry for immigrants joining American society.")

<sup>30</sup> See generally Rebecca Smith & Catherine Ruckelshaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immigration Reform*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 555 (2007); see also Jenny Schulz, Note, *Grappling with a Meaty Issue: IIRIRA's Effect on Immigrants in the Meatpacking Industry*, 2 J. GENDER RACE & JUST. 137, 145-46 (1998).

<sup>31</sup> See 8 U.S.C. § 1324a (1996).

<sup>32</sup> IIRIRA establishes three types of "pilot programs": a basic pilot program, a citizen attestation pilot program, and a machine-readable-document pilot program. See IIRIRA, Pub. L. No. 104-208, § 401(c)(1)-(3), 110 Stat. 3009-655 (1996) (codified at 8 U.S.C. § 1324a).

<sup>33</sup> The E-Verify program is one of the pilot programs established by IIRIRA and is an internet-based system operated by DHS in partnership with the Social Security Administration ("SSA") that allows participating employers to electronically verify the employment eligibility of newly hired employees. E-Verify electronically compares information provided by the Form I-9 with records contained in the SSA and DHS

additional steps in their hiring processes.<sup>35</sup> Where IRCA required that an employer review every new employee's identification and employment authorization documents,<sup>36</sup> IIRIRA requires that the employer contact immigration authorities for confirmation of work authorization within three days of hiring a new employee.<sup>37</sup> If the immigration authority does not confirm the employee's authorization to work in the United States within three business days, the employer is required to inform the employee of the non-confirmation.<sup>38</sup> At that time, the employee may choose to contest the non-confirmation. If the employee chooses not to contest it,<sup>39</sup> the employer is statutorily permitted to terminate the employment of the worker,<sup>40</sup> and in fact, is required to terminate the employment in order to avoid his or her own sanctions under the law.<sup>41</sup> If the employee contests the non-confirmation, immigration authorities will attempt to verify the employee's status a second time and will provide a final determination within ten working days.<sup>42</sup> If the INS issues the second non-confirmation, the employer must terminate the employee's working status.<sup>43</sup>

## 2. Concerns with IIRIRA's Application

Because the system imposed by IIRIRA is mostly voluntary<sup>44</sup> and is not one that is applied nationwide,<sup>45</sup> IIRIRA leaves open the possibility that undocumented workers circumvent the system by seeking employment with those employers who are not a part of one of the pilot programs. Even if the employers who voluntarily adopt it are actively applying the system, it is not effective as a comprehensive effort to encourage employers or immigrant workers to demand higher standards or enforcement of the law.

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databases. E-Verify is currently free to employers. See USCIS, E-Verify, <http://www.dhs.gov/e-verify> (last visited Feb. 11, 2010).

<sup>34</sup> IIRIRA § 402(a).

<sup>35</sup> See *id.* § 403(a).

<sup>36</sup> See 8 U.S.C. § 1324a(b) (1996).

<sup>37</sup> IIRIRA § 403(a)(3)(A).

<sup>38</sup> *Id.* § 403(a)(4)(B)(i).

<sup>39</sup> See *id.* § 403(a)(4)(B)(iii).

<sup>40</sup> *Id.* § 403(a)(4)(C)(i).

<sup>41</sup> See *id.* § 403(a)(4)(C)(iii).

<sup>42</sup> *Id.* § 404(c).

<sup>43</sup> See IIRIRA § 403(a)(4)(C)(iii).

<sup>44</sup> See *id.* § 402(a).

<sup>45</sup> See *id.* § 401(c).

Where employers are required to contact immigration authorities to search the government's immigration database for a worker's document verification, IIRIRA tends to resolve the practical problem that arose under IRCA, which required employers to assess the worker's documentation.<sup>46</sup> This is not a complete fix however as IIRIRA's complications resemble a sort of "witch trial" for the migrant worker.<sup>47</sup> An employer who subscribes to the E-verify system is supposed to verify all employees regardless of his or her citizenship, but in practice the system is not consistently used for every employee.<sup>48</sup> IIRIRA allows undocumented workers to gain employment in the U.S. by claiming U.S. citizenship – if an undocumented worker presents actual citizenship documents that belong to someone else the worker's status could remain otherwise unchallenged.<sup>49</sup> When a new hire attests to being a U.S. citizen, there is no additional check under IIRIRA to verify that those documents actually belong to that worker.<sup>50</sup> The employer simply retains the I-9 Form.<sup>51</sup> Moreover, if the worker was employed before an employer voluntarily signed on to the program, there is also no verification requirement for those employees.<sup>52</sup>

While IIRIRA is admittedly flawed in ways that fail to prevent undocumented workers from gaining employment, IIRIRA also fails in its effort to restrict employers from hiring undocumented workers. First, IIRIRA section 402(c)(2) gives the employer a choice of whether its participation will apply "to all its hiring" in the state(s) where the pilot program is operating, or "to its hiring" in one or more of the plants or

<sup>46</sup> See Schulz, *supra* note 30, at 152.

<sup>47</sup> The Salem witch trials were a series of hearings before local magistrates followed by county court of trials to prosecute people accused of witchcraft. See generally THE SALEM WITCHCRAFT PAPERS (Paul Boyer & Stephen Nissenbaum, eds., 1977). The popular concept of accused witches being subject to a "sink or swim test" where survival resulted in a presumption of guilt appears to ring true here. The analogy to the rubric used to test the immigration status of the employee exists where the migrant worker appears to be in a lose-lose situation if his or her documents are not initially verified by the immigration authorities.

<sup>48</sup> See USCIS, E-verify – Frequently Asked Questions, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543ffd1a/?vgnnextoid=42c000773c1a01110VgnVCM1000000ecd190aRCRD&vgnnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD> (last visited Sept. 27, 2010).

<sup>49</sup> See IIRIRA § 403(b)(3)(B).

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> See USCIS, E-verify – Frequently Asked Questions, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543ffd1a/?vgnnextoid=37cf00773c1a01110VgnVCM1000000ecd190aRCRD&vgnnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD> (last visited Sept. 27, 2010) ("The employer must initiate the query no later than the end of three business days after the new hire's actual start date.").

pilot program states, but it is nonetheless voluntary.<sup>53</sup> There is little or no incentive for the employer to “sign on” to the program. But, even if the employer does elect to participate, the provisions appear to be so relaxed with employers acting as the enforcers, one has to wonder whether the law has an effect at all or whether it was intended only for demonstrative purposes. IIRIRA also allows employers to avoid checking documentation without being sanctioned whether the employer receives notification from immigration services as to the employee’s status or not.<sup>54</sup> Finally, because the verification pilot program applies only to an employer’s hiring practices,<sup>55</sup> there is no retroactive application of the law for workers who have already obtained employment. There also seems to be no attempt to ensure that workers *remain* in status.

As a policy matter, because an employer cannot ask a work applicant about his or her citizenship status until after he or she is hired, employers are likely to preempt the issue and potentially commit illegal acts of discrimination in the hiring process and choose not to hire someone with limited command of the English language, a foreign sounding accent, or a different color skin in order to prevent the added step of checking with immigration services. This carries many of the same concerns about deterrence as IRCA, whereby employers attempt to manage the unwieldy system using their own screening techniques even though they may be discriminatory. Regardless, even this “preemption” does not impede the problem of employers hiring undocumented workers – migrant workers remain in search of work and employers continue to hire.<sup>56</sup>

Overall, IIRIRA amended IRCA by *relaxing* the standards for employers.<sup>57</sup> It is understandable, however, that the legislature recognized the need to take the employers out of the business of acting as an immigration screen. Relaxing the sanctions on the employer when he or she fails to comply is not the answer. *Compliance* with the law must remain mandatory and must be enforced. IIRIRA and IRCA have major

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<sup>53</sup> IIRIRA § 402(c)(2)(A)(i)-(ii).

<sup>54</sup> *See id.* § 402(b)(1)-(2).

<sup>55</sup> *See id.* § 402(c)(2)(A).

<sup>56</sup> *See* Julia Sellers, *Farmers Use Labor Programs to Hire Migrant Workers*, AUGUSTA CHRONICLE, May 15, 2010, available at <http://chronicle.augusta.com/news/metro/2010-05-15/farmers-use-labor-programs-hire-migrant-workers>.

<sup>57</sup> Under IIRIRA an employer “is considered to have complied with [the] requirement . . . if there was a good faith attempt to comply with the requirement.” IIRIRA § 411(a)(6)(A). Under IRCA, “good faith” is only considered as an affirmative defense to the employer knowingly employing an undocumented worker where a worker provided documentation that “reasonably appears . . . to be genuine” to the employer. 8 U.S.C. § 1324a(b)(1)(A), 1324a(3) (1996).

flaws; however, IRCA has had little deterrent effect on undocumented workers in U.S.' industries. For example, in the meatpacking industry, twenty-five percent of the workers were considered undocumented when IIRIRA took effect.<sup>58</sup>

Because of the migrant-worker dynamic and the transitory nature of immigrant work, labor laws that address immigration policy must account for the fact that, even if deported, workers who do not return to the workplace (although they often do) are replaced by other migrant workers who come and apply for those jobs.<sup>59</sup> Thus, immigration laws are failing to address issues both from the employer and the employee side – employers are not prevented from supplying the work and because undocumented workers know they can and will be hired, and migrant workers come regardless of the substandard working conditions.

### C. Fair Labor Standards Act

The Fair Labor Standards Act (“FLSA”) was passed in 1938 to eliminate “substandard labor conditions throughout the nation”<sup>60</sup> by regulating minimum wages, maximum hours of work, and child labor in industries affecting interstate commerce. This legislation was not enacted to specifically address immigrant employment. Nevertheless, it has long proven effective in enforcing violations against immigrant-employees.

FLSA mandates that U.S. employers pay FLSA-covered workers<sup>61</sup> their weekly wages at a rate no lower than the federal minimum wage for the first forty hours of work and no lower than one-and-one-half times the employee’s regular rate for hours worked above forty.<sup>62</sup> The term

<sup>58</sup> See Schulz, *supra* note 30, at 150 (citing Richard Brack, *Immigrants Being Drawn to Midwest*, DES MOINES REG., June 30, 1996, at 1).

<sup>59</sup> See Carlos Guerra, *Among The Big Losers in Iowa: Immigration As a Wedge Issue*, SAN ANTONIO EXPRESS-NEWS, Jan. 5, 2008, at 1B (“Iowa meatpackers actively recruited workers in Mexico” to have enough workers so that they could ship pork “from Iowa slaughterhouses to the rest of America.”); Perla Trevizo, *Guest Workers Labor Here to Support Families Back Home*, CHATTANOOGA TIMES FREE PRESS, Apr. 13, 2008, at A11 (reporting there are tremendous networks within Mexico to support U.S. employers looking for employees who will travel to the U.S. to work).

<sup>60</sup> *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 510 (1950); see also 29 U.S.C. § 202(b); see generally Fair Labor Standards Act, 29 U.S.C. § 202(a) (1938).

<sup>61</sup> Generally, a FLSA “employee” includes “any individual employed by an employer,” but, for example, independent contractors, and trainees are not included. Furthermore, employees of a company with annual dollar volume of sales or receipts less than \$500,000 are not included nor are commissioned sales employees or farmworkers. There is also a provision that covers “domestic service employment” and employees “engaged in interstate commerce.” 29 U.S.C. §§ 201 *et. seq.*

<sup>62</sup> *Id.* §§ 206-207.

“back pay” under FLSA is different from the “back pay” referred to under the National Labor Relations Act (“NLRA”) and other antidiscrimination laws. As referred to in *Hoffman*, back pay is payment of wages that the worker *would have earned* but for the unlawful or discriminatory termination.<sup>63</sup> Under FLSA, where courts and the parties refer to “back pay” they are referring to payment of wages and overtime the worker *actually earned* but was not paid for any number of reasons.<sup>64</sup>

FLSA permits deductions that would put the pay rate below minimum standards; “furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.”<sup>65</sup> Since a recruited worker’s relocation travel costs do not constitute “board” or “lodging,” there is often a question whether these costs constitute “other facilities,” but this gap nevertheless disfavors the migrant worker who may or may not be responsible for his relocation, visa, and periodic return to and from his or her home country to remain visa-eligible. According to the regulations, improper deductions can take the form of direct deductions or “de facto deductions.”<sup>66</sup> De facto deductions refer to the failure on the part of the employer to reimburse the employee for an employer expense, such as supplies or uniforms.<sup>67</sup> Other deductions listed in the regulations as primarily for the benefit of the employer include deductions for required uniforms and “transportation charges where such transportation is an incident of and necessary to the employment.”<sup>68</sup>

Furthermore, the U.S. Supreme Court and many of the U.S. Circuit Courts of Appeal have not directly answered whether a U.S. employer’s failure to pay travel costs of recruited foreign workers constitutes an improper deduction from FLSA’s minimum standards. The U.S. Court of Appeals for the Eleventh Circuit’s decision in *Arriaga v. Florida Pacific*

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<sup>63</sup> See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 141–42 (2002).

<sup>64</sup> See 29 U.S.C. § 216(b) (“Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.”); see also *id.* § 216(c) (“The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages.”).

<sup>65</sup> *Id.* § 203(m).

<sup>66</sup> See 29 C.F.R. § 531.35 (2010).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* § 531.32.

*Farms*,<sup>69</sup> represents the one federal appeals court that *has* directly confronted this question.<sup>70</sup> The *Arriaga* court relied heavily on the plain language of the U.S. Department of Labor (“DOL”) regulations in holding transportation and visa costs from Mexico to the U.S. for H2-A workers were “primarily for the benefit or convenience of the employer” and could not be counted as part of the employer’s wage calculations for purposes of compliance with FLSA’s minimum standards.<sup>71</sup> As evidenced by this case, FLSA’s legal language can provide for a more uniform application of the law and, essentially, level the playing field with regard to payment of wages. There is not specific language targeting the immigrant workforce, but because the law addresses “deductions,” and these include such things as travel costs and visas, FLSA does serve to put migrant workers on equal footing with any other worker. FLSA, unlike IRCA and IIRIRA, takes account of the policy implications inherent in hiring migrant workers including the intrinsic vulnerabilities of a more mobile population. FLSA tends to effectuate a more realistic approach to the labor market than does the immigration legislation that is barely enforced.

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

Further challenging the way in which statutory language was to be applied to undocumented workers, in 2002 the Supreme Court decided in *Hoffman Plastic Compounds, Inc. v. NLRB* that an undocumented worker is not entitled to back pay for the days he or she was prevented from working due to an illegal firing.<sup>72</sup> Under this decision, the undocumented worker is also not entitled to the statutory remedy of reinstatement in a dispute arising under the NLRA even when he or she is fired illegally.<sup>73</sup> In *Hoffman*, the plaintiff José Castro was terminated for engaging in union organizing activities and originally received the requested back pay from the NLRB, which recognized the need to protect this class of workers.<sup>74</sup> Ultimately however, the Supreme Court concluded that the NLRB did

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<sup>69</sup> 305 F.3d 1228 (11th Cir. 2002).

<sup>70</sup> *See id.* at 1238.

<sup>71</sup> *Id.* at 1241–44.

<sup>72</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151–52 (2002).

<sup>73</sup> *See id.* at 143 (although the Court found that the employer committed serious violations of the NLRA, the Court also determined that the Board lacked discretion to remedy those violations by awarding reinstatement with back-pay to employees who committed serious criminal acts as well).

<sup>74</sup> *Id.* at 141–42.

not have the power to grant back pay because the worker in question was not legally entitled to be working in the U.S.<sup>75</sup>

The decision further thwarted undocumented workers' rights to organize and demand their rights in the workplace.<sup>76</sup> *Hoffman* left undocumented workers without a substantial remedy where an employer overtly acted unlawfully during an organizing campaign. It gave undocumented workers no recourse in employment bargaining, made them fearful of complaining, and took away any of the disincentives for employers to further maximally exploit the undocumented labor force. In fact, in some respects it vitalized employers' attempts to argue that immigrant workers have no employment rights in the U.S. at all.

Generally, the failure to enforce legal standards has set the stage for a tumultuous relationship between immigration and labor laws.<sup>77</sup> For example, by not requiring that the employer provide back pay to the undocumented worker, the employer is able to profit from the employee as long as the employer continues to employ that employee. The employer suffers no significant consequences either for having employed someone illegally or for having subjected that worker to standards that would be impermissible if the employee were working legally. Arguably, *Hoffman* is one of the most conclusive statements the Court has made regarding the intersection of immigration and labor law. The sentiment was clear that imposing sanctions on undocumented immigrants was more of a priority than imposing sanctions on those who employed and exploited them.

Ultimately, *Hoffman* remains a frightening baseline – one that has created an even deeper divide among workers and a greater stigma for immigrants in the workplace. Nevertheless, some analysts will undoubtedly contend that undocumented workers should not be entitled to the same remedies as documented and citizen workers.<sup>78</sup> *Hoffman* has

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<sup>75</sup> See *id.* at 151-52.

<sup>76</sup> See *id.* (the Court prescribes that orders for *Hoffman* cease and desist its violations of the NLRA and that it conspicuously post a notice to employees detailing their rights under the NLRA are "significant sanctions").

<sup>77</sup> "In the ten-year period from 1992 to 2002, the number of investigations of employers of illegal aliens declined seventy percent, from 7053 to 2061, on-site job arrests of illegal aliens declined from 8027 to 451, and the fines imposed on employers declined from 1063 to thirteen—a staggering ninety-nine percent decrease." Hugh Alexander Fuller, *Immigration, Compensation and Preemption: The Proper Measure of Lost Future Earning Capacity Damages After Hoffman Plastic Compounds, Inc. v. NLRB*, 58 BAYLOR L. REV. 985, 1003 (2006).

<sup>78</sup> See, e.g., Jarod S. Gonzalez, *Employment Law Remedies for Illegal Immigrants*, 40 TEX. TECH. L. REV. 987, 994-99 (2008).



not detracted from the still strong incentive for employers to recruit and exploit the undocumented workforce. Instead, *Hoffman* effectively encourages the businesses or corporations, in light of employers' efforts to minimize costs and maximize profit, to employ many more vulnerable migrant workers who have no means with which to enforce their rights.

Since *Hoffman*, courts and the DOL have, with some success, narrowed the decision in the context of FLSA by contending that FLSA provides fundamental labor protections for workers and that immigration status does not affect the remedies available to a worker contending a FLSA violation.<sup>79</sup> They have read FLSA and Title VII<sup>80</sup> to include remedies that the judiciary, as opposed to the NLRB, had the power to enforce.<sup>81</sup> The U.S. Department of Labor Wage and Hour Division ("WHD"), which is responsible for administering and enforcing labor laws such as minimum wage, overtime, and child labor provisions of FLSA, has specifically stated that it will enforce FLSA irrespective of an employee's documentation.<sup>82</sup>

It is not certain that advocates will maintain this hold on FLSA in light of *Hoffman* as undocumented workers *have* been denied back pay and front pay for violations of the FLSA.<sup>83</sup> So far, however, there has not been a trend to suggest that undocumented workers will be deprived of their working wages because of their citizenship status. Such a position would compel exploitation to reach epic proportions. The majority's rationale in *Hoffman* is broad enough that one can envision this extreme application of the holding effectively rendering undocumented workers entitled to no remedies in the employment law context.<sup>84</sup> Whether because FLSA is not directly tied to immigration law, or because of the policy implications

<sup>79</sup> See U.S. Dep't of Labor, *Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division*, July 2008, <http://www.dol.gov/whd/regs/compliance/whdfs48.pdf> [hereinafter U.S. Dep't of Labor, *Fact Sheet #48*].

<sup>80</sup> Title VII prohibits employment discrimination based on race, color, religion, sex and national origin. "Title VII" refers to Title VII of the Civil Rights Act of 1964. See generally 42 U.S.C. § 2000e.

<sup>81</sup> See *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1068 (9th Cir. 2004); *Flores v. Amigon*, 233 F. Supp. 2d 462, 464-65 (E.D.N.Y. 2002) (upholding protective orders preventing inquiry into plaintiffs' immigration status in the process of discovery).

<sup>82</sup> See U.S. Dep't of Labor, *Fact Sheet #48*, *supra* note 79.

<sup>83</sup> See *Renteria v. Italia Foods, Inc.*, No. 02 C 495, 2003 WL 21995190, at \*6 (N.D. Ill. Aug. 21, 2003).

<sup>84</sup> The *Hoffman* majority relies on the statutory language of IRCA to suggest that an undocumented worker is engaging in illegal behavior by "subvert[ing] the employer verification system by tendering fraudulent documents" concluding that "it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148 (2002) (referring to 8 U.S.C. § 1324c(a)(1)-(3)).

such a decision to withhold wages would render viable, FLSA claims remain available regardless of a worker's status. As an enforcement mechanism, however, FLSA alone cannot be relied upon to require that employers pay undocumented workers the wages to which they are entitled. FLSA provides for recovery *after* wage violations have occurred, but does not impose any real penalty on the employer. Moreover, few undocumented workers will challenge their employers in a lawsuit for fear of the implications it will have on their ability to remain in the U.S. and generally FLSA violations are only brought to the attention of authorities when employees do so.<sup>85</sup> To that end, the current laws do not adequately deter employers from hiring undocumented workers.

Despite the ideological debates, the lack of effective enforcement mechanisms for undocumented workers in the workforce leaves many workers, regardless of citizenship or status, working in substandard conditions, fearful of losing their jobs, and being replaced by a new wave of undocumented workers.

### III. THE MEATPACKING INDUSTRY: HISTORY, DEVELOPMENT, AND TRANSFORMATION

The status of the law is just the first variable in the immigrant labor equation. Another factor has to do with the make-up of certain workplace environments. Particular industries, like meatpacking, have historical ties to immigrant and migrant workforces and "ancient" barriers remain intact to combine with devolving worker leverage. The history of meatpacking includes a long line of conflict between employer and employee. Through the 1860s, meatpacking was small-scale and typically served a local market – it was not a booming industry.<sup>86</sup> The work came to be associated with mostly immigrant labor because the industrialization process lent itself to the low-wage unskilled worker.<sup>87</sup> By the end of the 19th century, however, larger plants and work complexes began to

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<sup>85</sup> See Shahid Haque, *Beyond Hoffman Plastic: Reforming Nation Labor Relations Policy to Conform to the Immigration Reform and Control Act*, 79 CHI.-KENT L. REV. 1357, 1357 (2004).

<sup>86</sup> See LEWIS COREY, *MEAT AND MAN: A STUDY OF MONOPOLY, UNIONISM, AND FOOD POLICY* 37 (1950).

<sup>87</sup> The immigrant worker in the meatpacking industry was a "phenomenon" that occurred two different times in the evolution of the workforce. Both "waves" essentially illustrate the same thing – the employer's ability to exploit the immigrant workforce, pay lower wages, and drive down costs. See Donald D. Stull & Michael J. Broadway, *Killing Them Softly: Work in Meatpacking Plants and What it Does to Workers*, in *ANY WAY YOU CUT IT* 61, 62 (Donald D. Stull et al., 1995).

develop,<sup>88</sup> the workforce grew, and packers became organized.<sup>89</sup> Slowly, meatpacking became a unionized industry and alongside this development, wages increased and worker protections arose.<sup>90</sup>

From approximately the late 1930s through the 1970s, meatpacking workers' pay and conditions improved through master contracts that included the entire the industry.<sup>91</sup> In the 1960s and 70s, meatpacking workers' pay and conditions mirrored those of other industrial laborers who worked in the plants and maintained steady jobs with promising wages and benefits by means of the union.<sup>92</sup> "Meatpackers' wages remained substantially higher than the average manufacturing sector wage."<sup>93</sup> This effect did not last long. Automated facilities allowed the unskilled worker to organize line operations in a manner that diminished the need for skilled workers. This reopened the door to the employment of inexperienced and low-wage employees.<sup>94</sup>

By the 1980s, meatpacking work was not attractive to many Americans.<sup>95</sup> Companies began making more and more of the process automatic and eliminated the need for the paid, skilled employee.<sup>96</sup> This became a successful way to undercut the union-negotiated standards. Employers altered the industry and the power-structure during the 1980s from one in which workers were organized and bargaining by means of union, to one in which the employer recaptured the bargaining power with every employee scraping to keep his or her job.<sup>97</sup> As the traditional structure of the meatpacking industry disappeared making way for line

<sup>88</sup> See COREY, *supra* note 86, at 48-49.

<sup>89</sup> *Id.* at 61.

<sup>90</sup> See WILLIAM G. WHITTAKER, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS NO. RL33002, LABOR PRACTICES IN THE MEAT PACKING AND POULTRY PROCESSING INDUSTRY: AN OVERVIEW 3 (2006).

<sup>91</sup> HUMAN RIGHTS WATCH, BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS 12 (2004), available at <http://www.hrw.org/en/reports/2005/01/24/blood-sweat-and-fear> [hereinafter BLOOD, SWEAT, AND FEAR] (citing U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, INDUSTRY WAGE SURVEYS, 1960-2002).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> This was essentially the second "wave" of immigrant workers being exploited in the meatpacking industry. See WILSON WARREN, STRUGGLING WITH "IOWA'S PRIDE": LABOR RELATIONS, UNIONISM, AND POLITICS IN THE RURAL MIDWEST SINCE 1877 120-21 (2000).

<sup>95</sup> See *id.*; see also WHITTAKER, *supra* note 90, at 40.

<sup>96</sup> See BLOOD, SWEAT, AND FEAR, *supra* note 91, at 12.

<sup>97</sup> *Id.* at 13.

operators and less skilled labor the union support was destabilized and employers began to pay lower wages.<sup>98</sup>

Some plants then relocated, some closed, and others simply fired their long-time organized workers, and later reopened employing non-union immigrant or migrant workers.<sup>99</sup> This led to a dramatic change in the labor-management relationships in meatpacking companies.<sup>100</sup> As a consequence, the frequency of injuries in the workplace grew exponentially. Injury rates had been in line with other manufacturing sectors, but with the breakdown in union representation and national bargaining agreements meatpacking became the most dangerous factory job in America,<sup>101</sup> with injury rates more than twice the national average.<sup>102</sup> Declining work conditions emerged, as the typical meatpacker was now a non-union possibly undocumented worker, uninformed of his rights and afraid to challenge the norms of the industry.<sup>103</sup> The presence of these conditions illustrated the failures in labor and immigration laws; it called for reform and even foreshadowed the kind of breakdown in the system that allowed Agriprocessors to continue in its illegal behaviors for as long as it did.

While it is often stated that unattractive jobs involving “blood, unpleasant odors and repetitive tasks” are unable to be filled and are unwanted by Americans, meatpacking corporations have established policies that heighten the undesirable nature of these jobs for their own financial benefit.<sup>104</sup> A lack of job security, insufficient or nonexistent healthcare benefits, and failure to provide safety at the workplace, in conjunction with inadequate wage provision continues to plague the meatpacking industry because their workers – migrant workers lacking

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<sup>98</sup> WHITTAKER, *supra* note 90, at 40.

<sup>99</sup> BLOOD, SWEAT, AND FEAR, *supra* note 91, at 13; *see also, e.g.*, David Barboza, *Meatpackers' Profits Hinge on Pool of Immigrant Labor*, N.Y. TIMES, Dec. 21, 2001, at A26; Marc Cooper, *The Heartland's Raw Deal: How Meatpacking is Creating a New Immigrant Underclass*, THE NATION, Feb. 3, 1997, at 11 (reporting that “[w]ithin a few weeks, say several workers, even some of those deported to Mexico were back on the job. ‘They just got some new ID,’ says one worker. ‘And the same gringos who turned them in hired them back like nothing had happened.’”).

<sup>100</sup> *See* CAROL ANDREAS, MEATPACKERS AND BEEF BARONS: COMPANY TOWN IN A GLOBAL ECONOMY 59–82 (1994).

<sup>101</sup> HUMAN RIGHTS WATCH, ABUSES AGAINST WORKERS TAINT U.S. MEAT AND POULTRY (Jan. 25, 2005), available at <http://www.hrw.org/en/news/2005/01/24/abuses-against-workers-taint-us-meat-and-poultry>.

<sup>102</sup> *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, INCIDENCE RATES OF NONFATAL OCCUPATIONAL INJURIES AND ILLNESSES BY INDUSTRY AND SELECTED CASE TYPES 2001 (2002).

<sup>103</sup> *See* WHITTAKER, *supra* note 90, at 40.

<sup>104</sup> *Id.*

knowledge of their rights and sometimes fearful because of their alien status – will not be likely to unionize, or at least will rarely engage in the same level of rebellion against the norms that the employer seeks to establish.<sup>105</sup>

Meatpacking corporations have been able to enjoy the financial benefits of low-wage workers who do not demand better working conditions. Agriprocessors is a prime example of this. Productivity is maintained without any need to consider worker's rights, higher wages, or slower line speeds. Furthermore, the industry now *relies* on high worker turnover – “turnover is not regarded entirely negative by industry, it may be a mixed blessing.”<sup>106</sup> High turnover enables employers to limit health care coverage to people who have worked for a year or more, grant little or no vacation time, increase required production levels without fear of people quitting, and maintain low wages without fear of unionization.<sup>107</sup> Forty to one hundred percent of workers leave and must be replaced on a yearly basis,<sup>108</sup> but with turnover rates and a constant flow of undocumented or temporary migrant workers to replace those who leave, the industry can continue to exploit workers knowing that new workers can, and will, be recruited.

#### A. *The History of Unions and the Search for a New Model*

The tradition and transition of unions has its own story, but the disappearance of union leverage arguably played a significant role in creating a climate that has perpetuated exploitation of immigrant labor. This climate has led experts in the practice of organizing workers to reexamine the union model and to consider added complexities that build upon worker fears. While a migrant workforce does not preclude the possibility of unionization entirely, it substantially minimizes the likelihood that a union force will take root. The same fears that prevent migrant workers from complaining on an individual basis often prevent them from rallying together to demand change. Additionally, because migrant workers often change jobs or industries, union momentum among immigrant and migrant groups is more challenging.<sup>109</sup>

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<sup>105</sup> See BLOOD, SWEAT, AND FEAR, *supra* note 91, at 118.

<sup>106</sup> WHITTAKER, *supra* note 90, at 48.

<sup>107</sup> See Barboza, *supra* note 99, at A26.

<sup>108</sup> WHITTAKER, *supra* note 90, at 30.

<sup>109</sup> Native wage and salary workers are more likely to be union members than foreign-born workers. MIGRATION POLICY INST., IMMIGRANT UNION MEMBERS: NUMBERS AND TRENDS (2004), available at

Labor organization has taken a variety of forms, particularly from the late 1800s until the emergence of the New Deal. Between 1855 and 1955 the American Federation of Labor ("AFL") organized over 20,000 workers in various groups.<sup>110</sup> The AFL issued charters to independent groups directly permitting them to organize along the lines of individual professions or trades that connected workers depending on the issues they faced.<sup>111</sup> Along the way, unions have attempted to address the complications that have faced unionization. In instances of high mobility, unions stress affiliation with an industry rather than a particular job or placement. In these cases, the worker's primary relationship was with the union, and as members they were able receive benefits to which employers contributed funds.<sup>112</sup> This was most commonly seen with hotel and restaurant unions.<sup>113</sup> Nevertheless, the Taft-Hartley amendments<sup>114</sup> to the NLRA made the industry-wide attempts to unionize largely impossible where the amendments made hiring halls and agreements to hire only union employees illegal.<sup>115</sup>

Based on the status of the law and the factors previously discussed at play with a migrant workforce, the traditional model for leveraging worker rights through union organization typically fails. While undocumented and documented migrant workers serve many industries that once relied heavily on union support for their workers, recently arrived migrant workers are unlikely leaders for forcing workplace-wide

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[www.migrationpolicy.org/pubs/7\\_Immigrant\\_Union\\_Membership.pdf](http://www.migrationpolicy.org/pubs/7_Immigrant_Union_Membership.pdf); see also Rachel Sherman & Kim Voss, "Organize or Die": Labor's New Tactics and Immigrant Workers, in ORGANIZING IMMIGRANTS 81, 82 (Ruth Milkman ed., 2000) (union formation and membership requires a new kind of attention in industries dominated by migrant workers. The momentum that a union attempts to gather in a workplace to force change is often further challenged by the transitory nature of the migrant workers who in leaving their workplaces after a short period of employment take with them their mounting frustrations and stories of mistreatment. Union workers have been forced to reshape their model in order to have an effect on worker rights).

<sup>110</sup> See Dorothy Sue Cobble, *Lost Ways of Unionism: Historical Perspectives on Reinventing the Labor Movement*, in REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE TWENTY-FIRST CENTURY 82, 87 (Lowell Turner et al., eds., 2001).

<sup>111</sup> See Dorothy Sue Cobble, *Organizing the Postindustrial Work Force: Lessons from the History of Waitress Unionism*, 44 INDUS. & LAB. REL. REV. 419, 423 (1991).

<sup>112</sup> *Id.* at 423-24.

<sup>113</sup> *Id.*

<sup>114</sup> See 29 U.S.C. § 141 (1947). The Taft-Hartley Act of 1947 was designed to amend much of the NLRA of 1935. Most scholars agree that it was beneficial to management and detrimental to unions. It gives employees the right to refrain from participating in union activities and adds a series of prohibited unfair labor practices by unions. See HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 655 (1950).

<sup>115</sup> See National Labor Relations Act, 29 U.S.C. § 158(b) (1947).

change because even though some migrant workers are lawfully employed, others are undocumented and frequently change jobs and industries.<sup>116</sup> Short-term work and subcontracting jobs often place migrant workers outside of many workplace protection laws. Furthermore, unions were not historically interested in investing the effort where the benefits were unlikely.<sup>117</sup> Largely, immigrants organize around opportunities to learn about their rights.<sup>118</sup> Sometimes this creates a sense of empowerment and lets them know they are legitimate contributors to the workforce.<sup>119</sup> Ultimately, however, where the work is more dispersed, lower paying, and lower skilled, the climate is not ripe for the emergence of a union voice in migrant worker-dominated workplaces making worker exploitation more probable where the power balance between the employer and the employee is so disparate.

#### IV. AGRIPROCESSORS MEATPACKING PLANT: A SHOCKING EXAMPLE

##### A. *The 2008 Raid*

The raid of the Agriprocessors' Iowa meatpacking plant illustrates the modern day immigration policy's heightened criminalization where immigration status is at issue.<sup>120</sup> It is equally illustrative of the gaps in legislation and of trends in migrant worker exploitation. In May 2008, ICE raided Agriprocessors, Inc. of Postville, Iowa, carrying out a criminal enforcement operation amounting to the largest raid ever executed in a single workplace.<sup>121</sup> Three hundred eighty nine undocumented workers were arrested.<sup>122</sup> Of the original detainees, 314 were male, 76 were female, and 12 were juveniles.<sup>123</sup> ICE provided the U.S. Attorney's Office

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<sup>116</sup> See Sherman & Voss, *supra* note 109, at 82.

<sup>117</sup> See JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 3 (2005).

<sup>118</sup> See, e.g., Evelina Dagnino, *On Becoming a Citizen: The Story of Dona Marlene*, in 3 *MIGRATION AND IDENTITY: INTERNATIONAL YEARBOOK OF ORAL AND LIFE STORIES* 69, 74 (Rina Benmayor & Andor Skotnes, eds., 1994).

<sup>119</sup> *Id.*

<sup>120</sup> Abby Sullivan, *On Thin ICE: Cracking Down on the Racial Profiling of Immigrants and Implementing a Compassionate Enforcement Policy*, 6 *HASTINGS RACE & POVERTY L.J.* 101, 114 (2008).

<sup>121</sup> Julia Preston, *Immigrants' Speedy Trials After Raid Become Issue*, N.Y. TIMES, Aug. 9, 2008, at A12.

<sup>122</sup> Julia Preston, *2 Supervisors Are Arrested After Sweep at Meat Plant*, N.Y. TIMES, July 4, 2008, at A13 [hereinafter Preston, *Supervisors*].

<sup>123</sup> Erik Camayd-Freixas, Ph.D., *Interpreting After the Largest ICE Raid in US History: A Personal Account*, N.Y. TIMES, June 13, 2008, at 2.

with workers' information, and workers were criminally prosecuted for social security fraud.<sup>124</sup>

Most of the workers that ICE apprehended pleaded guilty to knowingly using false Social Security cards or legal residence documents to gain employment.<sup>125</sup> Few of the defendants actually knew or understood what a Social Security number was or what purpose it served.<sup>126</sup> Federal prosecutors convicted nearly 300 undocumented workers, most of who were from Guatemala.<sup>127</sup> The majority of the undocumented workers were sentenced to five months in prison.<sup>128</sup> Lower level supervisors were indicted first on counts of conspiracy to harbor undocumented aliens for profit, harboring and aiding and abetting the harboring of undocumented aliens for profit, conspiracy to commit document fraud and aiding and abetting document fraud.<sup>129</sup> Upper level supervisors were arrested and charged with encouraging illegal immigrants to reside in the U.S. and with aiding and abetting in the possession and use of fraudulent identification.<sup>130</sup>

Elizabeth Billmeyer, the former human resources manager for Agriprocessors, testified at trial that the human resources department received numerous "no match" letters from the federal government indicating that various Social Security numbers did not correspond with the name of the employee using the number.<sup>131</sup> Billmeyer indicated that just a week before the raid she instructed numerous employees to get new identification and Social Security numbers or they would be terminated. Many of these employees staged a walkout during business hours, but in response, Shalom Rubashkin, operating manager of Agriprocessors, told these employees that these issues could be resolved if they returned to work.<sup>132</sup> Brent Beebe and Juan Carlos Guerro-Espinoza, two other Agriprocessors managers, assisted various Agriprocessors meatpackers in

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<sup>124</sup> See Preston, *Supervisors*, *supra* note 122, at A13.

<sup>125</sup> Julia Preston, *An Interpreter Speaking Up for Migrants*, N.Y. TIMES, July 11, 2008, at A1 [hereinafter Preston, *Interpreter*].

<sup>126</sup> See Carnayd-Freixas, *supra* note 123, at 6.

<sup>127</sup> *Id.* at 2.

<sup>128</sup> Julia Preston, *Meatpacker Faces Charges of Violating Child Laws*, N.Y. TIMES, Sept. 10, 2008, at A16.

<sup>129</sup> Press Release, USCIS, ICE and DOJ Joint Enforcement Action at Iowa Meatpacking Plant (May 12, 2008), available at <http://www.ice.gov/pi/news/newsreleases/articles/080512cedarrapids.html>.

<sup>130</sup> See *United States v. Agriprocessors, Inc.*, No. 08-CR-1324 LRR (N.D. Iowa Nov. 13, 2008) (sentencing mem.) [hereinafter Sentencing Memorandum], available at [http://www.iand.uscourts.gov/e-web/decisions.nsf/0/F8D3CEF81A587C1486257749004DCB35/\\$File/LRR-08-CR-1324,+United+States+v.+Rubashkin,+Sentencing+Memorandum,+06212010.pdf](http://www.iand.uscourts.gov/e-web/decisions.nsf/0/F8D3CEF81A587C1486257749004DCB35/$File/LRR-08-CR-1324,+United+States+v.+Rubashkin,+Sentencing+Memorandum,+06212010.pdf).

<sup>131</sup> *Id.* at 10.

<sup>132</sup> *Id.*



obtaining fraudulent employment documents for a fee of \$4,500 that Rubashkin agreed to advance to the workers.<sup>133</sup>

According to an affidavit filed by an ICE agent in conjunction with the arrests, 76 percent of the 968 employees on the company's payroll over the three months leading up to the raid used false or suspect Social Security numbers.<sup>134</sup> The affidavit cited unnamed sources who alleged that some company supervisors even employed 15-year-olds and helped cash employee checks using fake documents.<sup>135</sup>

The owner of Agriprocessors meatpacking plant, Aaron Rubashkin, and his son Sholom, the top manager of the plant when the raid occurred, were later indicted in a state child labor case on the grounds that approximately 32 under-age workers, as young as 13, were employed by Agriprocessors and using saws, knives and other equipment prohibited for young workers.<sup>136</sup> In the spring of 2010, Shalom Rubashkin was found not guilty in the jury trial concerning the child labor violations.<sup>137</sup> This was just one small piece of Rubashkin's legal journey.

After much investigation and the re-filing of superseding indictments, the federal government charged Sholom Rubashkin with federal crimes including: conspiracy to harbor undocumented aliens for profit;<sup>138</sup> harboring and aiding and abetting the harboring of undocumented aliens for profit;<sup>139</sup> conspiracy to commit document fraud,<sup>140</sup> aiding and abetting

<sup>133</sup> *Id.* at 11.

<sup>134</sup> See *In re Search of Agriprocessors, Inc.*, No. 08-MJ-00110-JSS (N.D. Iowa, signed May 9, 2008) (application and affidavit for search warrant). Search Warrant and Affidavit available on the federal court password required electronic website (PACER).

<sup>135</sup> Spencer S. Hsu, *Immigration Raid Jars a Small Town: Critics Say Employers Should Be Targeted*, WASH. POST, May 18, 2008, at A1; see also Camayd-Freixas, *supra* note 123, at 2.

<sup>136</sup> See *State of Iowa v. Rubashkin*, No. 01031 SMCRO09341 (N.D. Iowa); see also Julia Preston, *Meatpacker Is Fined Nearly \$10 Million*, N.Y. TIMES, Oct. 30, 2008, at A22 [hereinafter Preston, *Meatpacker is Fined*].

<sup>137</sup> See Jeff Reinitz, *Not Guilty Verdict in Rubashkin Child-Labor Case*, KCRG-TV9 NEWS, June 7, 2010, available at <http://www.kcrg.com/news/local/95788809.html>.

<sup>138</sup> See 8 U.S.C. § 1324(a)(1)(A)(v)(I), 1324(a)(1)(B)(i) (2002) (making it a crime to engage in any conspiracy to harbor aliens in disregard of the fact that he or she has come to the U.S. in violation of the law. Punishment is accorded in those instances where the offense was committed for the purpose of "commercial advantage or private financial gain").

<sup>139</sup> See *id.* § 1324(a)(1)(A)(iii)-(iv), 1324(a)(1)(A)(v)(II), 1324(a)(1)(B)(i) (coupling conspiracy to harbor aliens in disregard of the fact that he or she has come to the U.S. in violation of the law and broadens the scope of the charge to those aiding and abetting in the harboring of those aliens).

<sup>140</sup> Cf. 18 U.S.C. § 371 (1948) (revealing how this provision is tied to the scheme whereby Agriprocessors' managers aided undocumented aliens in securing false Social Security numbers).

document fraud;<sup>141</sup> bank fraud;<sup>142</sup> false statements and reports to a bank;<sup>143</sup> wire fraud;<sup>144</sup> mail fraud;<sup>145</sup> money laundering and aiding and abetting.<sup>146</sup>

Eventually Postville workers were offered a uniform plea agreement and told by federal prosecutors through an interpreter<sup>147</sup> that they had three options.<sup>148</sup> The first option provided that they could plead guilty to “knowingly using a false Social Security number.”<sup>149</sup> By pleading guilty, the worker would serve five months in jail and be deported without a hearing.<sup>150</sup> In the alternative, if the worker pleaded not guilty, the individual would remain in jail for six to eight months before trial without the right to bail.<sup>151</sup> If the worker won at trial, the individual would be deported afterward anyway, and finally, if the worker pleaded not guilty and then lost at trial, he or she would go to jail for at least two years, and then be deported.<sup>152</sup> This plea offer was only available for seven days from the time of the raid.<sup>153</sup>

Labor law violations have also been considered in part of Agriprocessors' penalties. State labor authorities levied nearly \$9.6 million

<sup>141</sup> The prosecution will have to prove that the individual possessed or used a Resident Alien Card that was unlawfully obtained and that when the individual used it he or she knew it was unlawfully obtained. *See id.* § 1546(a). This provision expands the scope of the individuals encompassed in the document fraud by including others who commit “an offense against the United States or aids, abets, counsels, commands, induces or procures its commission.” *Id.* § 2.

<sup>142</sup> *See id.* § 1343.

<sup>143</sup> *See id.* § 1014.

<sup>144</sup> *See id.* § 1343.

<sup>145</sup> *See id.* § 1341.

<sup>146</sup> *See* 18 U.S.C. § 1956(a)(1)(A)(i), 1956(a)(1)(B)(i) (1986); *id.* § 2 (1948) (expanding the scope of the individuals encompassed in the money laundering by including others who commit “an offense against the United States or aids, abets, counsels, commands, induces or procures its commission.”).

<sup>147</sup> *See* Preston, *Interpreter*, *supra* note 125, at A1.

<sup>148</sup> Erik Camayd-Freixas, a professor of Spanish at Florida International University, was summoned as an interpreter to Iowa by court officials to translate in the hearings for the illegal immigrant workers arrested. He later detailed his account of the process involved in the days following the raid, which has illuminated many of the details concerning the proceedings. He noted, in particular, the fast pace of the proceedings and the pressure prosecutors brought to bear on the defendants and their lawyers by pressing criminal charges instead of deporting the workers immediately for immigration violations. *See* Camayd-Freixas, *supra* note 123, at 4-7.

<sup>149</sup> *Id.* at 5.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *See id.*; Kim Bobo, *Dispatches from the Workplace: Postville: Ground Zero for the Intersection of Immigrant and Workers' Rights*, RELIGION DISPATCHES, Aug. 6, 2008, available at [http://www.religiondispatches.org/archive/immigration/493/dispatches\\_from\\_the\\_workplace\\_postville\\_ground\\_zero\\_for\\_the\\_intersection\\_of\\_immigrant\\_and\\_workers%E2%80%99\\_rights](http://www.religiondispatches.org/archive/immigration/493/dispatches_from_the_workplace_postville_ground_zero_for_the_intersection_of_immigrant_and_workers%E2%80%99_rights).

in fines for illegal paycheck deductions: for example, the company made workers pay for “protective jackets and other uniforms that packinghouse workers were required to wear.”<sup>154</sup> Officials determined that workers wages were reduced by nearly \$200,000 and Agriprocessors also failed to give final paychecks to many of the workers arrested in the raid.<sup>155</sup> The company was also fined nearly \$400,000 for illegally deducting a sales tax from worker’s paychecks.<sup>156</sup> Furthermore, an investigation into Agriprocessors’ payroll records indicated that managers at the corporation’s headquarters might have violated overtime and record-keeping provisions of FLSA.<sup>157</sup> The raid was just the beginning of an ongoing dilemma that revealed to the rest of the country the extent of the immigration issues facing today’s workforce.

While the undocumented workers suffered no small penalty being jailed and eventually deported despite having suffered atrocious and illegal work conditions, the operators of Agriprocessors continued to face the wrath of the federal prosecutors and the media for months. After a year’s worth of procedural challenges by both the government and defendant-Rubashkin, in July 2009, Sholom Rubashkin was indicted on a total of 163 counts of federal violations including immigration and financial crimes.<sup>158</sup>

The saga continued for months. Rubashkin and his lawyers argued that the media backlash undermined Rubashkin’s right to due process. They put forth various motions to dismiss and a motion for change of venue.<sup>159</sup> In June 2009, the court granted Rubashkin’s motion to sever the financial-related charges from the immigration charges.<sup>160</sup> The motion for change of venue was resubmitted by Rubashkin and was granted in September 2009 moving the trial to South Dakota.<sup>161</sup> Sholom Rubashkin refused a plea bargain maintaining his innocence and a jury found the

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<sup>154</sup> Preston, *Meatpacker is Fined*, *supra* note 136, at A22.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> See Grant Schulte, *Postville Probe Focuses on 9 Detainees*, DES MOINES REGISTER, Oct. 2, 2008.

<sup>158</sup> See *United States v. Agriprocessors, Inc.*, No. 08-CR-1324 LRR, (N.D. Iowa 2008) (indictment) (after the initial indictment, filed in 2008, seven superseding indictments were filed leading up to the July 2009 indictment).

<sup>159</sup> See *United States v. Agriprocessors, Inc.*, No. 08-CR-1324 LRR, (N.D. Iowa 2008) (docket).

<sup>160</sup> See *United States v. Agriprocessors, Inc.*, No. 08-CR-1324 LRR, 2009 WL 1853218, at \*9 (N.D. Iowa June 25, 2009) (“The court holds severance is necessary to preserve the rights of Defendants Rubashkin and Agriprocessors to a fair trial.”).

<sup>161</sup> See *United States v. Agriprocessors, Inc.*, No. 08-CR-1324 LRR, (N.D. Iowa Sept. 1, 2009) (order granting defendant’s motion for change of venue).

Agriprocessors former manager guilty on 86 out of 91 financial fraud-related charges on November 13, 2009.<sup>162</sup>

Rubashkin was scheduled to stand trial on December 2, 2009 in Sioux Falls, South Dakota for the 72 immigration charges.<sup>163</sup> On November 19, 2009, Federal Judge Linda Reade dismissed the remaining immigration-related charges against Rubashkin in response to the government's motion.<sup>164</sup> Having convicted the former CEO on the more extensive financial fraud charges, the U.S. Attorney General insisted that, in the interest of conserving judicial resources, no additional proceedings would be necessary or desired.<sup>165</sup> Thus, one of biggest immigration raids of the century resulted in no immigration penalty actually being assessed against the employer-violator.

### B. *Legal Controversies: A Refusal to Change*

Legal controversy is not new to Agriprocessors, Inc. In a separate case, the company was confronted by legal challenges before, and at the time of, the raid. Agriprocessors was facing suits by the Environmental Protection Agency ("EPA")<sup>166</sup> and challenges by its New York workers trying to unionize.<sup>167</sup> Workers continued to allege that Agriprocessors paid below minimum wage, failed to pay overtime, and immediately terminated employment of workers who complained about conditions or wages.<sup>168</sup>

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<sup>162</sup> United States v. Rubashkin, No. 08-CR-1324 LRR (N.D. Iowa Nov. 13, 2009) (jury verdict); see also Grant Schulte, *Kosher Slaughterhouse Manager Convicted of Fraud*, USA TODAY, Nov. 13, 2009, available at [http://www.usatoday.com/news/nation/2009-11-13-slaughterhouse-guilty-verdict\\_N.htm](http://www.usatoday.com/news/nation/2009-11-13-slaughterhouse-guilty-verdict_N.htm).

<sup>163</sup> See United States v. Rubashkin, No. 08-CR-1324 LRR (N.D. Iowa Nov. 19, 2009) (United States' Motion to Dismiss) [hereinafter U.S. Motion to Dismiss].

<sup>164</sup> See United States v. Rubashkin, No. 08-CR-1324 LRR (N.D. Iowa Nov. 19, 2009) (order granting United States' Motion to Dismiss).

<sup>165</sup> See U.S. Motion to Dismiss, *supra* note 163.

<sup>166</sup> NICCW v. AgriProcessors, Inc., 469 F. Supp. 2d 666, 669-70 (N.D. Iowa 2006) ("On December 1, 2004, the United States, on behalf of the EPA, filed a Complaint against Defendant AgriProcessors, Inc. The Complaint allege[d] that AgriProcessors repeatedly violated various federal environmental laws, including the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11001 *et seq.*, and the Clean Air Act ("CAA"), 42 U.S.C. § 7470 *et seq.* . . . On December 14, 2004, a local environmental group, Northeast Iowa Citizens for Clean Water ("NICCW"), filed a motion to consolidate [with the U.S. suit]. NICCW also allege[d] that AgriProcessors stored and applied paunch waste without a permit, in violation of the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, and maintained an open dump, in violation of Iowa Code § 455B.307.").

<sup>167</sup> See Agri Processor Co., Inc. v. NLRB, 514 F.3d 1, 2-3 (D.C. Cir. 2008).

<sup>168</sup> See Nathaniel Popper, *In Rubashkins' Backyard, Another Tale of Labor Strife: Kosher Giant Turns to*

### C. A New York Case

In September 2005, workers at Agriprocessors' distribution site in Brooklyn, New York, voted to join the United Food and Commercial Workers union ("UFCW") and the vote succeeded but Agriprocessors refused to recognize the union.<sup>169</sup> Agriprocessors claimed that because the majority of workers who voted were in the U.S. illegally, their votes were invalid.<sup>170</sup> Agriprocessors appealed again and again.<sup>171</sup>

Agriprocessors refused to bargain with the union and in response the union filed unfair labor practice charges under section 8(a)(1) and (5) of the NLRA.<sup>172</sup> The National Labor Relations Board's ("NLRB") general counsel issued a complaint against the company where the Administrative Law Judge ("ALJ") "sustained the charged violations[ ] and ordered Agriprocessors to bargain with the union."<sup>173</sup> The company filed exceptions to the ALJ's decision.<sup>174</sup> The NLRB unanimously affirmed the ALJ's decision and again ordered Agriprocessors to bargain with the union.<sup>175</sup>

The company petitioned the D.C. Circuit for review of the decision.<sup>176</sup> In *AgriProcessor Co. v. NLRB*, Agriprocessors argued that since IRCA made it illegal to employ undocumented workers, these "employees" were not protected by the NLRA.<sup>177</sup> Furthermore, Agriprocessors argued that the undocumented workers could not belong

*Supreme Court in Fight with Immigrants*, JEWISH DAILY FORWARD, Aug. 14, 2008, available at <http://www.forward.com/articles/13997/> [hereinafter Popper, *In Rubashkins' Backyard*].

<sup>169</sup> See *id.*

<sup>170</sup> NLRA grants protection to undocumented workers for precisely these allegations. See National Labor Relations Act § 8(a)(1), (5), 29 U.S.C. § 158(a)(1), (5) (1974).

<sup>171</sup> See Popper, *In Rubashkins' Backyard*, *supra* note 168.

<sup>172</sup> *Agri Processor*, 514 F.3d at 2.

<sup>173</sup> *Id.* at 3.

<sup>174</sup> *Id.* at 2-3.

<sup>175</sup> *Id.* at 3.

<sup>176</sup> See *id.*

<sup>177</sup> See Brief of Petitioner at 25-26, *Agri Processor Co., Inc. v. NLRB*, 514 F.3d 1 (D.C. Cir. 2008) (No. 06-1329). Compare *Agri Processor*, 514 F.3d at 12 (Kavanaugh, J., dissenting) ("Applying the straightforward *Sure-Tan* analysis in the wake of IRCA, I would hold that an illegal immigrant worker is not an 'employee' under the NLRA because Congress has now made it illegal for illegal immigrants to be employed."), with 29 U.S.C. § 152(3) (1978) ("The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor . . . or by any other person who is not an employee as herein defined.").

to the same bargaining unit as the legal workers, and therefore the bargaining unit created by the NLRB was improper.<sup>178</sup> The D.C. Circuit denied these arguments and upheld the NLRB decision, ruling that Agriprocessors must recognize the union.<sup>179</sup> The court referred to *Sure-Tan v. NLRB*,<sup>180</sup> a 1984 U.S. Supreme Court decision granting undocumented immigrants protection under the NLRA, disagreeing with the Agriprocessors argument.<sup>181</sup> Moreover, the court found that nothing in the text of the IRCA expressly or implicitly alters the NLRA's definition of "employee."<sup>182</sup> The court also pointed to the legislative history of the IRCA, which showed that the IRCA was not intended to limit the scope of the term "employee" in the NLRA.<sup>183</sup> Agriprocessors appealed the decision, and at the end of June petitioned the U.S. Supreme Court to hear the case.<sup>184</sup>

The arguments presented in the Agriprocessors case challenging unionization in New York appear to undercut the statements made by the Agriprocessors' spokespersons following the Iowa raid regarding the company's *lack of knowledge* about the employment of undocumented workers at their facility.<sup>185</sup> The claim made in the Brooklyn case that the company had evidence that undocumented workers participated in the union vote indicates that, at a national level, the company was aware they were employing undocumented workers, and, in fact, were willing to maintain those workers' employ until the controversy regarding union membership arose.<sup>186</sup> In Iowa, Agriprocessors argued in the alternative that the employers had no such knowledge.<sup>187</sup>

It was in the middle of the strike that the company first made its legal objection to the immigration status of its workers; according to the company's Supreme Court petition, Agriprocessors verified the Social

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<sup>178</sup> Brief of Petitioner at 25-27, *Agri Processor*, 514 F.3d 1 (No. 06-1329).

<sup>179</sup> See *Agri Processors*, 514 F.3d at 8.

<sup>180</sup> 467 U.S. 883, 890 (1984) (holding undocumented aliens were included within the definition of "employee" for purposes of the NLRA and that the application of the NLRA to undocumented aliens was consistent with the mandate of the Immigration and Nationality Act, 8 U.S.C. § 1101 (1982)).

<sup>181</sup> See *Agri Processor*, 514 F.3d at 3. Despite *Sure-Tan* being a pre-*Hoffman* case the controlling opinion is wholly convinced that Agriprocessor's argument ignores the "plain language" of the Supreme Court's decision in *Sure-Tan*. *Id.*

<sup>182</sup> *Id.* at 4.

<sup>183</sup> See *id.*

<sup>184</sup> Popper, *In Rubashkins' Backyard*, *supra* note 168.

<sup>185</sup> See *id.*; Adam Belz, *Agriprocessors Hires Legal Assistance*, CEDAR RAPIDS GAZETTE, June 6, 2008, at

B1.

<sup>186</sup> See Popper, *In Rubashkins' Backyard*, *supra* note 168.

<sup>187</sup> Belz, *supra* note 185, at B1.

Security numbers of all the employees and “discovered that of the 21 workers who voted in the election, the Social Security numbers of only four matched Social Security records with the same name.”<sup>188</sup> This finding implies that the company knew that they were employing undocumented or at least improperly documented workers in New York and they were in the practice of verifying worker documents. Since the Iowa raid in May 2008, the company has not made the same distinctions it attempted in Brooklyn. Instead, Agriprocessors spokesmen have repeated that the company did not know it was employing undocumented workers.<sup>189</sup>

#### D. Back in Iowa

Further evidence of Agriprocessors’ knowledge about the staff’s immigration status appeared a year prior to the raid in Iowa. On May 18, 2007 the *Jewish Daily Forward* reported that earlier in the week workers engaged in a walkout in response to a letter Agriprocessors issued to many employees.<sup>190</sup> This was later reiterated in employee testimony.<sup>191</sup> Between 200 and 300 employees left their posts during the morning shift to protest a May 4 letter sent by the company’s management informing workers that in order to keep their jobs they would need to reconcile their Social Security numbers with federal records.<sup>192</sup> Again, this pattern of behavior on the part of Agriprocessors indicates the human resources department knew as early as 2002,<sup>193</sup> prior to the now infamous raid, that Agriprocessors was employing undocumented workers and that they engaged some rudimentary (albeit flawed) system of checking documents.<sup>194</sup>

Despite the fact that Rubashkin, the plant’s operating manager, was quoted in one newspaper as saying, “[t]he people that checked in [that] morning stayed until the end of the shift,”<sup>195</sup> the walkout was reported in

<sup>188</sup> Popper, *In Rubashkins’ Backyard*, *supra* note 168.

<sup>189</sup> *See id.*

<sup>190</sup> *See* Nathaniel Popper, *Kosher Slaughterhouse Hit with Lawsuits*, JEWISH DAILY FORWARD, May 18, 2007, available at <http://www.forward.com/articles/10740/> [hereinafter Popper, *Kosher Slaughterhouse*].

<sup>191</sup> *See* Sentencing Memorandum, *supra* note 130, at 10.

<sup>192</sup> Popper, *Kosher Slaughterhouse*, *supra* note 190.

<sup>193</sup> *See* Sentencing Memorandum, *supra* note 130, at 10.

<sup>194</sup> The only other possible explanation or argument that could be made on Agriprocessors’ behalf would be that the company believed the “threat” of terminating improperly documented workers would lay the groundwork for a later denial of their knowledge of illegal workers should a controversy arise.

<sup>195</sup> Josh Nelson, *Union Alleges Questions About Documentation Prompts Walkout at Agriprocessors*, THE

other local Iowa news outlets.<sup>196</sup> Workers from the strike told the *Jewish Daily Forward* that the walkout ended after Rubashkin came out and told the workers that he would try to fix the Social Security problem.<sup>197</sup> The mere fact that some workers' documents were not in order should have placed Agriprocessors on notice that they were employing at least some undocumented workers which undermines their submission that they were unaware of any undocumented employees on staff at the time of the May raid.<sup>198</sup>

Agriprocessors is arguably one of the most significant offenders of workplace regulation whether with regard to allegations of immigration, health and safety, payment violations, and even violation of child labor laws. In spite of the egregious nature of the violations, the ongoing and repetitive litigation is testament to the reality that the law fails to deter or prevent employers from engaging in violative behavior.<sup>199</sup>

The arguments put forth by Agriprocessors in its separate litigation efforts illustrate that there is a tremendous lack of cohesion in labor legislation permitting inconsistent submissions on the part of employers and that states are failing to cooperate or coordinate their efforts against like employers. This case illustrates the growing need for reform with regard to labor legislation, particularly emphasizing outside enforcement or monitoring and interagency, interstate cooperation.

## V. LOOKING OUTSIDE THE CASES: GETTING OUT OF THE BIND

Agriprocessors' conduct is illustrative of an extreme instance of what will occur when there is no deterrent for employers engaged in the practice of hiring undocumented migrant employees. As was the case, Agriprocessors maintained a position of weighing the cost of breaking the law against the cost of getting caught. For these employers, the choice is an easy one where they take advantage of a migrant workforce seeking employment opportunities that allow them to work "under the radar." Agriprocessors arrived at the conclusion that the litigation or potential

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COURIER, May 8, 2007, available at <http://www.wfcourier.com/articles/2007/05/08/news/regional/91ccb74803deba48862572d50041d5b9.txt>; see also Popper, *Kosher Slaughterhouse*, *supra* note 190.

<sup>196</sup> See Popper, *Kosher Slaughterhouse*, *supra* note 190.

<sup>197</sup> *Id.*

<sup>198</sup> The Rubashkin family denied any criminal activity to various news sources. Aaron Rubashkin said that he did not know "workers were illegal and that they had produced what appeared to be legitimate work documents." Ben Harris, *Rubashkin: It's All A Lie*, JTA: THE GLOBAL NEWS SERVICE OF THE JEWISH PEOPLE, June 3, 2008, available at <http://jta.org/news/article/2008/06/03/108898/aaronrubashkin>.

<sup>199</sup> Cf. Fuller, *supra* note 77, at 1003.



stigma of conducting business in this manner was less problematic than either paying minimum wages or employing legal workers.<sup>200</sup> The persistence with which companies like Agriprocessors maintain the position that their conduct is not illegal demands that legislators reexamine the laws and that the judiciary reconsider their inconsistent application of those laws.

The strongest opposition to advocating labor rights comes from those insisting on the need for flexibility as a requirement for economic growth. The argument posited by advocates of less regulation insists that because regulation generates higher production costs, making basic production more expensive – “developing countries lose the incentives they have to attract foreign investment and to develop through increased productivity.”<sup>201</sup> This position argues that the pursuit of basic human rights stagnates foreign economies. An improvement in labor standards should arise from increase in capital where productivity is enhanced, not an insistence on the rights themselves.<sup>202</sup>

There are many ways of looking at the issue of immigrant labor in the U.S., but two theories in particular have been adopted by popular culture. First emerges the idea that immigrant workers accept the jobs that industries need filled – jobs that most Americans will not take under the same conditions. With the ability to pay these workers less, the consumer benefits as well as the industry; suppliers can maintain lower prices in the marketplace. Looking at this issue in terms of cost-analysis and the economic benefits of profiting industry, migrant workers provide financial gain for all Americans and provide individuals in search of employment with a job.<sup>203</sup> The second theory posits that permitting undocumented workers to fill those jobs drives down the baseline for low-wage work and promotes employer exploitation of the worker; immigrant workers compete with American workers for low-level unskilled labor and are willing to take those jobs for less than minimum wage.<sup>204</sup>

Current immigration policy undoubtedly has had some role in the rising disparity in wealth distribution. “What we thus see is that immigration may help those . . . employers or service consumers, especially in the upper reaches of society, and it may help the immigrants

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<sup>200</sup> Cf. Preston, *Meatpacker is Fined*, *supra* note 136, at A22.

<sup>201</sup> Michael Pirret, *American Labor Unions and Free Trade Agreements: A Struggle for Compatibility*, 50 WAYNE L. REV. 1257, 1271 (2005).

<sup>202</sup> See *id.* at 1272.

<sup>203</sup> See BLOOD, SWEAT, AND FEAR, *supra* note 91, at 107.

<sup>204</sup> *Id.*

themselves. But immigration hurts those who are already in the most precarious economic and social situation[s].<sup>205</sup> It creates the ultimate bind for employers to tackle, and neither of the two commonly understood immigration paradigms provide employers with a good solution. Both paradigms tend to ignore the aspect of human rights and the obligations they impose in terms of health, safety, and a right to be paid. Furthermore, both ideologies also tend to suggest that market forces do not inherently realign the balance.

Two changes should occur. First, legislation should be revised so as to return to the pre-*Hoffman* era where the employer pays back pay.<sup>206</sup> This must come in the form of federal legislation to make the standard uniform throughout the country, regardless of the industry. Second, the U.S. should engage in serious conversation with the international community to establish more concrete standards of international labor rights that conform with a modern understanding that a right to work and be paid is a human right under international law regardless of nationality or immigration status.

#### A. *Rethinking Hoffman – One Avenue for Change*

This first proposition is not to suggest that the rights of undocumented workers should be unlimited; as it is, the undocumented workforce puts companies trying to abide by the laws in the position of competing with rival businesses who employ undocumented workers, break the law, and produce more cheaply by doing so.<sup>207</sup> To allow employers to profit from their own failure to uphold minimum legal standards, however, is the beginning of the demise of standards in the workplace. Justice Breyer foresaw precisely these consequences and expressed his position in his 2002 *Hoffman* dissent.<sup>208</sup>

In his dissenting opinion in *Hoffman*, Breyer attacked the policy-based arguments advanced by the majority which contended that federal immigration policy foreclosed the NLRB from awarding back pay because it “not only trivializes the immigration laws, it also condones and

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<sup>205</sup> David Abraham, *Doing Justice on Two Fronts*, 33 ETHNIC & RACIAL STUD. 968 (2009).

<sup>206</sup> I will elaborate on this further in Part V.A. I do not advocate that this back pay go directly to undocumented workers or in any way reward these individuals for their illegal behavior. I will propose that a federal fund be created whereby the employer does not continue to profit from employing illegal workers. See discussion *infra* Part V.A.

<sup>207</sup> See Peter H. Schuck, *The Morality of Immigration Policy*, 45 SAN DIEGO L. REV. 865, 883 (2008).

<sup>208</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 153-61 (2002) (Breyer, J., dissenting).

encourages future violations.”<sup>209</sup> Breyer argued that the legislature did not intend for the IRCA to remove any authority from the NLRB;<sup>210</sup> rather the predominant purpose of the IRCA was to diminish the forces that attract undocumented workers to seek employment in the U.S. Breyer argued that awarding back pay actually supports immigration policy – it does not undermine it.<sup>211</sup>

Justice Breyer did not believe that awarding back pay would play a large role in *pulling* undocumented workers into the United States. He reasoned that when the illegal workers are coming into the country they are not realistically considering the possibility of future employer abuses and the legal remedies available to them.<sup>212</sup> From the employer side, however, he contended that withholding back pay would increase the strength of the forces that draw employers to recruit and seek out undocumented workers because it makes it more profitable for employers to hire and exploit these workers in ways not possible with legally documented employees.<sup>213</sup> Apart from the NLRB requiring that an employer provide back pay as a remedial tool, the other remaining remedies only impose future obligations; the NLRB has no other control over past conduct. Justice Breyer argued that these remaining remedies are insufficient in their deterrent effect on employers.<sup>214</sup> With the ability to retain profits from unlawful labor practices and no real potential for anybody to rectify past acts, employers may be willing to take a chance on an unfair labor practice; employers can be assured that the worst-case scenario for an initial offense is being required to terminate the activity.<sup>215</sup>

Nevertheless, to the extent that the *Hoffman* majority relies on the statutory language of IRCA to suggest that an undocumented worker is engaging in illegal behavior by “subvert[ing] the employer verification system by tendering fraudulent documents,”<sup>216</sup> it would appear that they correctly conclude that, “it is impossible for an undocumented alien to obtain employment in the United States without some party directly

<sup>209</sup> *Id.* at 150.

<sup>210</sup> *See id.* at 157 (Breyer, J., dissenting) (citing H.R. Rep. No. 99-682, pt. 1 at 58 (stating that the Committee did not intend for employer sanctions provisions of the bill be used to undermine labor protections in existing law, or to limit the powers of federal or state labor relations boards)).

<sup>211</sup> *See id.* at 153.

<sup>212</sup> *Id.* at 155.

<sup>213</sup> *Id.*

<sup>214</sup> *See Hoffman*, 535 U.S. at 154 (Breyer, J., dissenting).

<sup>215</sup> *See id.* at 155-56.

<sup>216</sup> *Id.* at 148 (referring to IRCA, 8 U.S.C. § 1324c(a)(1)-(3)).

contravening explicit congressional policies."<sup>217</sup> But to this end, they do not go so far as to overturn *Sure-Tan*.<sup>218</sup>

As a matter of legal interpretation, there may be an argument that an undocumented worker cannot be an employee as contemplated by the NLRA, but the undocumented worker was *employed* and did work for the employer. The employer must not reap benefit from having violated the same law that constrains the undocumented worker from being able to obtain back pay.

Thus, if it was Congress' intent under IRCA to require that, "legality of residence be a pre-condition to employment,"<sup>219</sup> then the proper solution would encourage this conduct. Rather than explicitly prohibiting the NLRB from awarding back pay for undocumented workers, IRCA should require that the payment still be made, but that it be collected in a federal fund so as to prevent both the undocumented worker and the employer from reaping the benefit of his or her illegal acts.<sup>220</sup> This type of government-managed account might serve the more neutral middle ground by dis-incentivizing the exploitation of immigrant workers; it would neither penalize nor reward the employer for hiring undocumented workers, but simply put the employer in the financial position that the law in all respects requires. To some degree, such a solution resembles a pre-*Hoffman* stance, but it recognizes the need to deter employers from engaging in the sort of cost-benefit analysis that permits them to choose to break the law and simultaneously avoid rewarding the undocumented worker.

#### B. *Turning to the International Playing Field – A Second Avenue for Change*

A second and subsidiary method of restructuring the U.S. conception of immigration and labor requires looking at a global concept of workplace rights. The Agriprocessors raid and the failure of domestic law

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<sup>217</sup> *Id.*

<sup>218</sup> *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (affirming the NLRB's determination that the application of the NLRA to employment practices affecting aliens would not conflict with the terms of the INA). Somewhat ironically, in 2008 the D.C Circuit in *Agri Processor Co., Inc. v. NLRB* cites to *Sure-Tan* for the proposition that the text of IRCA neither expressly or implicitly alters the NLRA's definition of "employee." See *Agri Processor*, 514 F.3d 1, 4 (2008). This would seem to indicate the reemergence of a pre-*Hoffman* stance.

<sup>219</sup> See H.R. Rep. No. 99-682, pt. 2 at 12 (1986).

<sup>220</sup> There are any number of possible uses for the fund, including filtering the money back into bolstering immigration or labor enforcement, funding the deportation of the illegal workers to their home country, or funding the implementation of effective guestworker programs.

to restrain employers requires consideration of other means of reform. Characterizing workplace immigration violations as human rights abuses would recognize that jobs and employers in the U.S. are not above the law or the emerging global standards of human rights. Recognizing the aforementioned limitations of domestic law, and particularly in a globalized economy where goods as well as employees traverse national borders, theorists and analysts worldwide have begun to reconsider labor rights under the umbrella of human rights. Some suggest that the status of human rights themselves are still viewed contentiously and that it would, therefore, be a mistake to consider labor rights in that context.<sup>221</sup> Others contend that the framework for considering labor rights should be redirected to the context of moral-legal worldviews.<sup>222</sup> Ultimately, the global community agrees that hazardous work conditions, harsh discipline, and restrictions on freedom to associate are abuses that require regulation.<sup>223</sup> They echo forms of slavery and “provoke moral outrage.”<sup>224</sup> While it may not seem vital where no enforcement mechanism is in place, rhetoric does matter.

The Universal Declaration of Human Rights (“UDHR”) reflects common labor rights such as freedom from slavery,<sup>225</sup> non-discrimination and equal protection,<sup>226</sup> and freedom to associate.<sup>227</sup> These basic principles are recognized as rights under both the UDHR and the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”).<sup>228</sup> Furthermore, Inter-American Court on Human Rights also determined that various labor rights are fundamental and must be respected by member countries under the tenet of non-discrimination.<sup>229</sup>

<sup>221</sup> See Philip Alston, *Labour Rights as Human Rights: The Not So Happy State of the Art*, in LABOR RIGHTS AS HUMAN RIGHTS 1, 1 (Philip Alston ed., 2005).

<sup>222</sup> See David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523, 539-40 (2009).

<sup>223</sup> Charles Sabel et al., *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace* 4 (Columbia Law & Economic Working Paper No. 185, 2000), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=253833](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253833).

<sup>224</sup> *Id.*

<sup>225</sup> See Universal Declaration of Human Rights, G.A. Res. 217A, art. 5, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

<sup>226</sup> *Id.* art. 7.

<sup>227</sup> *Id.* art. 20.

<sup>228</sup> See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>229</sup> Where migrant workers are concerned, there are certain rights that the Universal Declaration of Human Rights assumes are of fundamental importance and yet are often violated. Some of these include the prohibition of obligatory or forced labor, the prohibition and abolition of child labor; special care for women

Because these are affirmative rights, they impose an affirmative duty as opposed to just a negative prohibition on an employer. For example, the Inter-American Court on Human Rights has also stated that once an immigrant worker enters into an employment relationship, "the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment."<sup>230</sup> The recognition that an employee *acquires* rights should impose a reciprocal duty on the employer to uphold those rights.<sup>231</sup>

Using this as the foundation, the international human rights platform has the potential to establish a dominant, homogeneous framework for labor rights on a world scale. Admittedly, because the enforcement mechanisms at the international level are not as strong as those in domestic contexts, it is difficult to imagine certain practical elements of enforcement. It is possible, however, to perpetuate the international platform in domestic rhetoric and look to international institutions to restructure the principles of workplace rights. Various international agreements like the North American Agreement on Labor Cooperation ("NAALC"),<sup>232</sup> and the North American Free Trade Agreement ("NAFTA") have already begun to do so in the international sphere.<sup>233</sup>

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workers, and the rights corresponding to freedom of association and to organize and join a trade union, collective negotiation, fair wages for work performed, social security, judicial and administrative guarantees, a working day of reasonable length with adequate working conditions (safety and health), rest and compensation. Protection of these rights for migrants has great importance based on the principle of the inalienable nature of such rights, which all workers possess, irrespective of their migratory status. Furthermore, the fundamental principle of human dignity is embodied in Article 1 of the Universal Declaration, according to which "[a]ll human beings are born free and equal in dignity and rights." Universal Declaration of Human Rights, UDHR, G.A. Res. 217A, art. 1, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

<sup>230</sup> Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion, OC-18, Inter-Am. C.H.R., Report No. 18/03 (2003).

<sup>231</sup> Arguably, this is precisely the notion that Hoffman rejected in stating that the immigrant, Castro, "was never lawfully entitled to be present or employed in the United States, and thus, under the plain language of *Sure-Tan*, he has no right to claim backpay." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148 (2002).

<sup>232</sup> NAALC was signed on September 14, 1993, by the Presidents of Mexico and the United States, and the Prime Minister of Canada, and became effective on January 1, 1994. NAALC was drafted as an addendum to NAFTA to provide a means by which member countries ensure the effective enforcement of domestic labor standards and laws without interfering with the functioning of the different national labor systems. See Secretariat of the Comm'n for Labor Cooperation, The North American Agreement on Labor Cooperation, <http://www.naalc.org/naalc.htm> (last visited Feb. 14, 2010).

<sup>233</sup> See generally North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057 (the goal of NAFTA was to do away with barriers of trade and investment between the U.S., Canada and Mexico. NAFTA eliminated tariffs on more than one half of U.S. imports from Mexico and more than one

Independently, the U.S. can use international law as a means of establishing a check on the internal U.S. policy concerning worker's rights. The argument can be made that the U.S. would have no motivation to turn over its authority to enforce legal obligations to an international body. Nonetheless, given the heated debates that exist regarding immigration that can be contrasted with the general consensus that the domestic laws are inadequate regardless of their purpose, it is time to look outside of box of strategies previously attempted. Domestic law can profit by including human rights discourse as a way of interpreting labor rights. Moreover, the U.S. is a poor example of a country attempting to implement international labor rights standards.<sup>234</sup> The U.S. illustrates a hypocrisy that weakens the American position on these principles when it attempts to advocate for labor rights abroad.

In recent years, the U.S. has denounced nations, such as China, for poor labor laws and human rights violations in the workplace.<sup>235</sup> This critical perspective toward foreign issues is being mismanaged if it is not also applied inward to domestic industry; the application of international law the U.S. demands from other countries must be implemented at home. While often the issue lies in enforcement capacity, other times "U.S. law itself fails to meet international norms."<sup>236</sup> International law, on the other hand, has a broader community of supporters and thus a broader community of critics. The international community enforces international law, but the U.S. often takes the lead in acting to enforce that legal code.<sup>237</sup> With labor law barely enforced, and immigration policed by ICE to address an immigration rather than labor agenda, the U.S. does not provide a promising example of how to proceed with effective labor regulation.

The International Labor Organization ("ILO") was established as an agency of the League of Nations in the Treaty of Versailles, which ended World War I.<sup>238</sup> It was intended that the ILO pursue a vision based on the premise that peace requires reasonable treatment of working people.<sup>239</sup> At

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third of U.S. exports to Mexico. These multinational agreements have the ability to leverage economic freedoms with implementation of international worker rights provisions).

<sup>234</sup> See Alston, *supra* note 221, at 3-4.

<sup>235</sup> See Paul Richter, *Hillary Clinton Promises to Press Rights Issues with China*, L.A. TIMES, Feb. 16, 2009, available at <http://www.latimes.com/news/nationworld/world/la-fg-clinton16-2009feb16,0,1047566.story>.

<sup>236</sup> BLOOD, SWEAT, AND FEAR, *supra* note 91, at 17.

<sup>237</sup> See *id.*

<sup>238</sup> See Carol Riegelman, *War-Time Trade-Union and Socialist Proposals*, in ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION 55-78 (James Brown Scott ed., 1934).

<sup>239</sup> See *id.*

its inception, there was significant controversy about the power retained by the ILO. The British proposed establishing an international parliament to enact labor laws that each member of the League would be required to implement.<sup>240</sup> The U.S. was opposed to the idea of an international parliament and proposed instead that the international body be authorized only to make recommendations and leave enforcement to the League of Nations.<sup>241</sup> In the end, the U.S. proposal was adopted and in 1946 the ILO became the first specialized agency of the UN.<sup>242</sup> Under this plan, and as it stands today, there is nothing forcing ILO's position or the standards it recommends.

Furthermore, while the ILO accepted the Declaration of Fundamental Principles and Rights at Work, a declaration the U.S. firmly supported, the U.S. "has not ratified some of the conventions related to the declaration's principles and rights."<sup>243</sup> As a member of the ILO, the U.S. is required to abide by these standards whether ratified or not; this lack of ratification, however, demonstrates a lack of cooperation on the part of the government to abide by regulations we demand from fellow members of the ILO. As the U.S. attempts to both eliminate the export of jobs and to eradicate violative working conditions abroad, American industry has itself begun importing "developing country employment conditions."<sup>244</sup> Because the U.S. and its citizens do not think about violations in domestic workplaces as human rights issues in the same way that these same individuals might think about them occurring abroad, there is a deep chasm in the most basic perspective that drives those most likely to voice a concern and catalyze the enforcement process.

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<sup>240</sup> See *id.* (describing proposals for an international body to govern labor laws after World War I).

<sup>241</sup> *Id.* at 76-78.

<sup>242</sup> *Id.*

<sup>243</sup> BLOOD, SWEAT, AND FEAR, *supra* note 91, at 20.

<sup>244</sup> The sort of low labor cost that employers and manufacturers look for in exporting production abroad are present in the United States along with the lax health, safety, and environmental enforcement, imposed upon vulnerable, exploited workers. If we are to even consider the argument that exporting labor to developing countries where workplace conditions are substandard on the premise that it has the potential to promote foreign economies, reverting to exploitative workplace practices in the United States represents a disconnect that does not align with that paradigm. See Lourdes Gouveia, *Global Strategies and Local Linkages: The Case of the U.S. Meatpacking Industry*, in FROM COLUMBUS TO CONAGRA: THE GLOBALIZATION OF AGRICULTURE AND FOOD 125, 128-29 (Alessandro Bonanno ed., 1994) (expressing the view that the United States, despite the market desire to export labor, has embraced developing country's work standards). *But see* Pirret, *supra* note 201, at 1271 (explaining that by increasing investment in developing countries improvement in productivity will eventually improve human capital, increase wages, and improve a nation's living standards).



The power to improve the common denominator concerning workplace standards rests in transnational regulatory bodies like the ILO or in finding mechanisms by which these standards can be applied in national domestic legislative bodies.<sup>245</sup> Employing the rhetoric of human rights provides the mechanism for advancing the rights of *people* regardless of their status without necessarily contravening the rights of the sovereign state. In the U.S., this is typically implemented as a policy statement that will fuel the attempt to achieve a greater goal where the state-level policy fails.<sup>246</sup> Simon Deakin, a professor of law at the University of Cambridge, asserts that this either encourages a race to the top or to the bottom, but neither result is assured.<sup>247</sup> Proposing this internationally recognized mechanism would not overshadow the state level policy, but rather act as the minimum standard by which workers seek relief as individuals.

Abroad, the purpose of establishing harmonized standards is not to replace or even supplement the state-level legislation. Rather, these standards seek to establish the baseline of rights beneath which no local level approach may descend.<sup>248</sup> Furthermore, this mechanism builds in a means of self-regulation where relevant provisions take effect by means of "workplace agreement."<sup>249</sup> By harmonizing the regulatory mechanisms in this way, the method does not diminish the perpetuation of diverse regulatory competition, but it does uniformly combat the "deregulatory effects of globalization."<sup>250</sup> Consequently, recognizing the ILO to have more of the type of power the British proposal required at its inception would give the ILO the force of law to truly regulate and enforce according to internationally recognized standards.

While an international solution does not account for all of the perverse incentives at home in the U.S. regarding immigration and low-wage labor, these mechanisms can serve to bolster the U.S. rhetoric against working environments that otherwise fall between the cracks of domestic labor and immigration laws.

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<sup>245</sup> See Simon Deakin, *Social Rights in a Globalized Economy*, in *LABOUR RIGHTS AS HUMAN RIGHTS* 25, 47 (Philip Alston ed., 2005).

<sup>246</sup> See *id.* at 49.

<sup>247</sup> *Id.* at 51.

<sup>248</sup> *Cf. id.* at 50.

<sup>249</sup> See *id.*

<sup>250</sup> *Id.* at 51.

### 1. Failed Corporate Responsibility

A “corporation” is rarely tied to one and only one individual; it is regarded as more of a nebulous entity and this detached rhetoric assists an employer in his or her capacity to reconcile workplace violations – the failure to pay minimum wage and the exploitation of vulnerable undocumented workers – strictly in terms of a cost-benefit analysis. As early in the United States’ history as 1819, in *Dartmouth College v. Woodward*,<sup>251</sup> Justice Marshall explained the legal standard for a corporation. “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.”<sup>252</sup> This “artificial” characterization does not alleviate the responsibility of the corporate entity from making decisions that comport with a sense of morality or with ethical norms.

Nevertheless, the characterization of a corporation is primarily effected by external factors including social and market forces as well as the individual consciences of the corporate managers.<sup>253</sup> Ultimately, the stigma of being characterized as a corporation that violates labor standards and avoids wage payment obligations has not had the deterrent effect one would expect. Many employers do what the law requires to avoid penalties for noncompliance,<sup>254</sup> but many also use the law as leverage over workers, authorized and unauthorized, to constantly threaten calling upon immigration enforcement.<sup>255</sup>

Steven Ratner, a professor of law at the University of Michigan, posits a model of enterprise liability that is cognizant of the diverse structure of varied corporations in assessing the appropriately attributable duties.<sup>256</sup> Using state responsibility as the analogy, Ratner indicates that corporate duties are the outgrowth of four other more precise factors: the “corporation’s relationship with the government, its nexus to the affected population, the particular human right[s] at issue, and the place of

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<sup>251</sup> 17 U.S. 518 (1819).

<sup>252</sup> *Id.* at 636.

<sup>253</sup> Colin P. Marks, *Jiminy Cricket for the Corporation: Understanding the Corporate “Conscience,”* 42 VAL. U. L. REV. 1129, 1150-51 (2008).

<sup>254</sup> See Fuller, *supra* note 77, at 1003 (noting that “penalties will not deter illegal immigration if they are never imposed.”).

<sup>255</sup> See GORDON, *supra* note 117, at 49-50.

<sup>256</sup> Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

individuals violating human rights within the corporate structure.”<sup>257</sup> He admits that the analogy to state responsibility is not a perfect one,<sup>258</sup> but indicates that the labor sphere has come the closest to recognizing this paradigm as one ripe for international regulation.<sup>259</sup> Ratner even cites the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries<sup>260</sup> as “hinting” at the notion of imposing corporate duties.<sup>261</sup> Thus, in the context of immigration and employment, the proper enforcement mechanism actually imposed on the business community would surround employers exercising due diligence over *both* its agents and its employees.

The key to both of the proposed changes in this comment; rethinking the *Hoffman* standard and devising an internationally enforceable set of harmonized labor laws that constitute human rights violations, is that they take the choice out of the hands of employers. Employers are faced with performing a cost-benefit analysis and come out “on top” by breaking the law.<sup>262</sup> Breaking the corporate detachment to consider the real exploitation that is taking place requires that the *individual* corporate leaders set aside those cost analyses.

The methodology has to be arranged in such a way that employers and corporations are not forced to choose because given the choice businesses are not making the rights-based one. “[E]ven when the societal stakes should be high, corporations can fail to meet legal standards based on a concern for profits.”<sup>263</sup> Nevertheless, there can, and should, be a level of business conduct that is compliant with the basic norms of society. Milton Friedman has qualified the responsibility of businessmen to make a profit with the need to do so “while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.”<sup>264</sup>

<sup>257</sup> See *id.* at 496-97.

<sup>258</sup> Cf. *id.* at 520 (indicating that strict liability does not adequately account for the corporate structure making the standards of command and control inapplicable to the average business or joint venture).

<sup>259</sup> See *id.* at 509.

<sup>260</sup> See *generally* International Labor Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, I.L.C. No. 169, 28 I.L.M. 1382.

<sup>261</sup> See Ratner, *supra* note 256, at 509.

<sup>262</sup> Daniel T. Ostas, *Cooperate, Comply, or Evade? A Corporate Executive's Social Responsibilities With Regard to Law*, 41 AM. BUS. L.J. 559, 569 (2004).

<sup>263</sup> Marks, *supra* note 253, at 1153.

<sup>264</sup> Milton Friedman, *The Social Responsibility of Business*, in THE ESSENCE OF FRIEDMAN 37 (Kurt R. Leube ed., Hoover Press Publication 1987).

Regardless, as a standard, the search for conformity in the business or consumer society has not encouraged compliance to date. Even corporate "goodwill" is often tempered by an opportunity to profit. Businesses may be given a tax deduction, wage a campaign, or receive incentives for some particular cause.<sup>265</sup> So if good corporate behavior is not actually altruistic, and it is actually more profitable, as in Agriprocessors' case, to hire undocumented workers, the only viable alternative is to actively pursue manageable enforcement mechanisms and incentivize best practices.

## VI. CONCLUSION

Because current immigration laws often obstruct enforcement of labor and employment laws, U.S. policies ought to mirror those principles we demand abroad. Further, we must recognize workplace rights as synonymous with human rights and change the discourse accordingly. Government policy and the force of the public behind those policies could gain the momentum to raise the demands on corporate responsibility to rival fiscal responsibility inherent in capital-driven markets and workplaces. As evidenced by the government's motion to drop the 72 immigration charges against Sholom Rubashkin and the judge's subsequent grant of that motion, it was duly agreed that failure to comply with the immigration laws was the lesser of Rubashkin's evils.<sup>266</sup> Current immigration law as it affects employer's gross violations of the law, simply has no teeth.

Moreover, a manageable solution must take account of an employer's interest in maintaining a fiscally responsible position in recruiting employees at a competitive rate, and it must not deprive working employees of legitimately earned wages. This must also be tempered by the unique vulnerabilities of migrant workers who are often most interested in making whatever money they can to send home to their families. Regardless of these vulnerabilities migrant workers are entitled to the same fundamental human rights as any other person. Where the right to a safe workplace and wages to pay that worker are frequently undersupplied and where the government maintains an inadequate system to enforce or even discourage these violations, the entire field of law is undermined. If the worker cannot lawfully be the recipient of the backpay, it should not preclude the employer from being required to pay.

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<sup>265</sup> See, e.g., Michael Barbaro, *Candles, Jeans, Lipsticks: Products With Ulterior Motives*, N.Y. TIMES, Nov. 13, 2006, at F33.

<sup>266</sup> See *supra* Part IV.A. for a discussion of the Rubashkin proceedings.

Paying those wages and other fines into a government-managed account could strike the proper balance.

Upton Sinclair had it right in the early 1900's, and his characterization of the meatpacking plant is not far off even today – Agriprocessors actions and the arguments they set forth in their own defense make this clear. The corporate climate does not allow for the kind of leeway that is present in today's immigration and labor laws and thus businesses must be held accountable for their illegal acts in hiring undocumented workers. The incentive to break the law, whether by entering the U.S. illegally in search of employment, or by employing undocumented workers only to pay them decreased wages for work performed in substandard conditions must come to an end. New paradigms must be considered and new power structures imagined in order to compete with the demand for employment.