Undocumented Workers and Concepts of Fault: Are Courts Engaged in Legitimate Decisionmaking?

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INTRODUCTION

This Article examines judicial decisionmaking in labor and employment cases involving undocumented workers. Labor and employment laws, designed to protect all workers regardless of immigration status, often conflict with immigration laws designed to deter the employment of undocumented workers. The absence of clarity as to how these differing policy priorities should interact leaves courts to resolve the conflict.

In 2002, the Supreme Court decided *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* ("NLRB") and held that undocumented workers are not entitled to backpay for violations of the National Labor Relations Act ("NLRA"). In *Hoffman*'s wake, attorneys representing employers began to argue that *Hoffman*'s force applies with equal vigor to workplace cases outside of the NLRA statutory scheme and to remedies beyond the NLRB's backpay remedy. Conversely, immigrant-rights advocates argued that *Hoffman*'s application should be confined to undocumented workers' claims for backpay under the NLRA. Courts are in the middle trying to balance the two competing policy priorities. The developing body of law is less than coherent.

Within the sometimes erratic patterns of decisionmaking that form this developing area of law, this Article names, categorizes, and analyzes "fault-based" decisionmaking—a line of judicial reasoning utilized by courts to resolve disputes between undocumented workers and their employers. Concepts of fault are not novel in our legal system, and a court's reliance upon such concepts to reach a decision is often appropriate. In many cases involving undocumented workers, however, courts fail to examine fault as it relates to the underlying claims, but instead evaluate the facts and circumstances of unlawful immigration or Immigration Reform and Control Act ("IRCA") violations[1] when ascribing and then analyzing the respective fault of

1. The IRCA mandates that employers verify employment authorization prior to hiring an employee and prohibits employees from utilizing false immigration papers to obtain work.

the parties to the litigation. This fault-based analysis forms the subject of this Article.

Using the taxonomy rooted in the *Hoffman* decision,[2] courts employ two broad constructs to help resolve cases involving undocumented workers: past fault as it relates to unlawful immigration, continued unlawful presence in the country, or IRCA violations; and future fault as it relates to the potential for prospective illegal acts.[3] In terms of past fault, courts tend to explore which party in the employment relationship may have committed a violation of the IRCA and base their decisions, at least in part, on the result of that inquiry.[4] Consistent with the structure of IRCA sanctions, courts generally consider whether the employee submitted fraudulent documents in contravention of the IRCA, whether the employer failed to verify the worker's eligibility documents in contravention of the IRCA, or whether the employer knew or should have known that the employee was an undocumented worker and nonetheless hired the worker or refused to fire the worker in contravention of the IRCA. A

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2. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 148–49, 150–52 (2002). In terms of fault as it relates to the employment relationship, roots of this reasoning can be found in the following *Hoffman* language:

> Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.

Id. at 148. In terms of fault as it relates to the potential for future illegal acts, roots of this reasoning can be found in the following *Hoffman* language: "Indeed, awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations." *Id.* at 150.

3. Part III of this Article identifies fault-based decisionmaking strands that are employed by courts. These cases are categorized broadly as past-fault or future-fault cases. The cases rooted in past-fault analysis are further categorized as those examining only employee misconduct; those examining only employer misconduct; those weighing relative fault; and those raising concern with, or refusing to engage in evaluation of, fault. The future-fault cases are further categorized into those that analyze whether the decision will encourage or discourage immigration violations and those that analyze whether the decision will encourage or discourage future violations of safety, labor, and employment laws. *See infra* Part III. After identifying the ways in which courts are actually deciding these cases, Part IV moves to an analysis of the legitimacy of fault-based decisionmaking. In this Part, the cases are categorized into three different areas that allow for an analysis of the legitimacy of the underlying decisionmaking. These categories include: future fault-based decisionmaking; past fault-based decisionmaking not rooted in existing doctrine; and past fault-based decisionmaking rooted in existing doctrine. *See infra* Part IV.

4. There are some courts that examine immigration law violations prior to employment. *See, e.g.*, Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115 (7th Cir. 1992) (finding that to provide a remedy to the undocumented worker would reward the worker for entering the United States illegally).

smaller number of courts examine the facts of unlawful immigration by the worker as part of their past-fault analysis.

In terms of future fault, courts often examine whether their ruling in a particular case will likely lead to future violations of the law or to other misconduct. Courts specifically analyze whether the decision will discourage or encourage future immigration violations or future violations of safety and labor laws. Where the remedy will likely result in a future immigration violation or will discourage compliance with workplace safety and labor laws, courts are inclined to deny such remedies. Where the remedy will not result in a future immigration violation or will encourage compliance with safety and labor laws, courts are inclined to award undocumented workers relief.

The temptation to adopt fault-based decisionmaking in employment cases involving undocumented workers is attributable, at least in part, to conflicting legislative priorities and the lack of legislative clarity about how the policy priorities should interact. On the federal level, Congress designed statutes, such as the NLRA, Fair Labor Standards Act ("FLSA"), and Title VII, to protect workers from workplace misconduct, regardless of status. In contrast, Congress designed the IRCA to prohibit undocumented workers from employment. Persuasive arguments can be made on both sides about which of these legislative priorities should trump the other, but, in the absence of clear guidance from Congress, courts are left to navigate the divide. On the state level, competing legislative priorities also exist. The states' desire to protect workers against wage theft, discrimination, or workplace injury is contrasted with the federal desire, through the IRCA, to prohibit the employment of undocumented workers. When state laws are involved, the tension between immigration policies and labor and employment policies gets played out through preemption arguments. Typically, one side argues that the IRCA conflicts with state laws and should override state police powers while the other side claims that there is an absence of conflict between the two laws and both can be effectively enforced. In this context, and without definitive guidance from Congress, courts are left to step into this murky area and sort out the conflicts.

Judicial decisions in this context fall into several categories: future fault-based reasoning; past fault-based reasoning that is not rooted in any existing doctrine; and past fault-based reasoning that is tied to an existing doctrine. Concerns about separation of powers and the respective roles of courts and legislatures are central to assessing the legitimacy of fault-based decisionmaking. At the least troubling end of the spectrum are courts that adopt future fault-based decisionmaking. These courts examine the potential impact of their

decisions upon future behavior as a way to give effect to, or to support, the policy decisions enacted by legislative bodies. As such, this line of reasoning is consistent with separation of powers principles and represents a judicially sound way to attempt resolution of competing policy objectives.

On the most problematic end of the continuum are courts that employ past fault-based decisionmaking that is untied to any existing doctrine. These courts examine concepts of immigration or work-status fault, which are unrelated to the underlying action, and use this factual information to help reach a decision. In these cases, courts are not looking at which party to the action caused the injury (tort cases), whether the employer discriminated against a protected employee (discrimination cases), whether the employer failed to pay the employee (wage-and-hour cases), or whether the worker suffered a workplace injury (workers' compensation cases).[5] Instead, courts are examining whether the worker provided false documents and whether the employer knew about the employee's status. When courts use immigration or work-status fault to reach decisions, without connection to any existing doctrine, they appear to be engaged in judicial policymaking. While judicial policymaking is not necessarily problematic, in the absence of any constraints on such policymaking, separation of powers implications arise.

In the middle are those courts that use past fault-based decisionmaking that is tied to existing doctrine. Each type of common workplace cases involving undocumented workers has doctrines or statutory provisions that are designed to bar remedies based on underlying misconduct. For example, statutory bars on willful misconduct can apply in the workers' compensation context; the outlaw doctrine or serious misconduct doctrine can apply in the torts context; the doctrine of unclean hands or estoppel can apply in the wage-and-hour context; and the after-acquired evidence doctrine can apply in the Title VII or state antidiscrimination context. Decisionmaking that analyzes fault in the context of existing doctrines is less problematic in that discretion is cabined by the application of an existing common law doctrine or statutory provisions. However, existing fault doctrines in these substantive areas often do not apply in the undocumented-worker context because of the insufficient nexus between the immigration wrong and the injury for which the worker is seeking redress. Thus, while courts are at least adhering to an

5. While the same can be said for past "fault-based" decisions that are tied to an existing doctrine, the application of an existing doctrine at least holds the potential to cabin some judicial discretion.

existing doctrine, the doctrine often is either inapplicable or improperly applied.

The Article begins in Part I with an exploration of the evolving link between immigration and employment laws, which lays the foundation for the importation of fault into undocumented workers' workplace claims. Part II then traces the judicial beginnings of fault-based decisionmaking. A series of pre-*Hoffman* cases and the *Hoffman* decision itself create the underpinnings of fault-based decisionmaking now being used by courts. Part III then creates a framework to explain the different ways in which courts utilize concepts of immigration and work-status fault in their decisionmaking. This Part then explores judicial decisions and distinguishes them along the two constructs of past fault related to the employment relationship and fault related to future illegal conduct. After identifying and categorizing the ways in which courts are actually deciding these cases, Part IV then separates fault-based decisionmaking into three different categories to analyze the legitimacy of the underlying decisionmaking. The legitimacy-analysis groupings include: future fault, past fault that is not tethered to an existing doctrine, and past fault that is rooted in existing doctrine. The Article concludes by examining whether these fault-based constructs are valid bases upon which to make judicial decisions. The identification of those areas where fault-based decisionmaking is problematic will provide a roadmap for courts confronting these difficult questions in the future.

I. THE EVOLVING LINK BETWEEN EMPLOYMENT AND IMMIGRATION: CREATING FERTILE GROUND FOR THE DEVELOPMENT OF FAULT-BASED DECISIONMAKING

Through much of recent history, immigration law and labor and employment law were separate and distinct from one another, allowing courts to navigate easily the respective policy objectives of each area.[6] This all changed in 1986 with the passage of the IRCA. At that point, the two previously discrete areas became entwined, and courts struggled to find the right balance between the two underlying competing policies: enforcing immigration laws that were designed to deter unlawful immigration through employer sanctions and enforcing

6. A federal statute enacted in 1885, providing that any contract of employment with an undocumented alien was void, was repealed in 1952 with the passage of the Immigration and Nationality Act. *See* Gates v. Rivers Constr. Co., 515 P.2d 1020, 1023 (Alaska 1973) ("Congress determined that the exclusion of certain aliens from admission to the United States was a more satisfactory sanction than rendering their contracts void and thus unjustifiably enriching employers of such alien laborers.").

labor and employment laws that were designed to prohibit unfair practices against employees, including undocumented workers, in the workplace.

The current inextricable link between immigration and employment laws is a relatively new development. Before the IRCA passed in 1986, the Immigration and Nationality Act ("INA"), which represented the controlling immigration legislation, merely regulated the terms and conditions upon which foreigners would be classified and admitted into the United States.[7] Prior to the IRCA's passage, there was no express prohibition on the hiring of undocumented workers. While there was a prohibition against "harboring" undocumented workers,[8] Congress expressly exempted employment from the definition of harboring.[9] In fact, an attempt to amend the bill to include penalties for knowingly employing undocumented workers was overwhelmingly rejected.[10] Thus, prior to 1986, employers suffered no legal consequences after hiring undocumented workers.[11]

In the absence of such a prohibition, courts examining the rights of undocumented workers had no difficulty harmonizing immigration and labor and employment laws, often finding in favor of the undocumented worker. Prior to the IRCA's passage, federal courts

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7. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 979.

8. Prior to passage of the INA, the United States and Mexico entered into a series of bilateral agreements, known as the Bracero Program, designed to control the flow of temporary farm labor into the United States. Robert I. Correales, *Did* Hoffman Plastic Compounds, Inc.*, Produce Disposable Workers?*, 14 LA RAZA L.J. 103, 116 (2003) (citing KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE INS 66–70 (1992)). With the program set to expire in 1952, the United States and Mexico entered into negotiations in which Mexico sought a way to reduce illegal immigration, including instituting a penalty for the employment of undocumented workers. *See id.* at 116–17. Instead of adopting such a penalty, Congress added a provision that "made it illegal to 'harbor, transport, and conceal' unauthorized immigrants." *Id.* at 117. This provision was later amended to include what became known as the "Texas proviso," which specifically stated that, "for purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." *Id.*

9. Immigration and Nationality Act § 274(a), 8 U.S.C. § 1324(a) (1976) (known as the "Texas proviso," this provision effectively made it lawful for employers to hire undocumented workers).

10. Correales, *supra* note 8, at 117 (citing CALAVITA, *supra* note 8, at 69).

11. *Id.* ("Thus, though not explicitly, the Texas proviso essentially legalized the labor of undocumented immigrants, at least with respect to employers. That was true, even as immigration law became more restrictive. The Texas proviso was in effect from 1952 until the passage of the Immigration Control Reform Act of 1986."); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 499–500 (2004) (explaining that while employers could hire or employ undocumented workers, the undocumented worker was still subject to arrest and deportation often effectuated through Immigration and Nationality Service ("INS") worksite raids).

routinely found that workplace protections covered undocumented workers despite employer challenges.[12]

In 1984, in *Sure-Tan, Inc. v. NLRB*, the Supreme Court issued its first decision expressly addressing the legal status of undocumented workers under federal law and found that undocumented workers were employees protected under the NLRA.[13] In reaching its conclusion, the Court did not find a conflict between the INA and the NLRA, reasoning instead that "[t]he central concern with the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens" and that the INA "evinces at best evidence of a peripheral concern with employment of illegal entrants."[14] The Court reasoned that since Congress had not made the hiring of undocumented workers a violation of the INA, no conflict existed between the INA and the protection of undocumented workers under the NLRA.[15]

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12. *In re* Reyes, 814 F.2d 168, 170 (5th Cir. 1987) (finding that the status of an alien as undocumented is irrelevant to FLSA protections); Donovan v. Burgett Greenhouses, Inc., 759 F.2d 1483, 1485–86 (10th Cir. 1985) (affording FLSA protections to undocumented workers); Moreau v. Oppenheim, 663 F.2d 1300, 1307–08 (5th Cir. 1981) ("Even assuming that violations of the immigration laws by the [plaintiffs] occurred, the remedy for these violations is . . . criminal sanctions, not denial of access to court. We seriously doubt whether illegal entry, standing alone, makes outlaws of individuals, permitting their contracts to be breached without legal accountability."); NLRB v. Apollo Tire Co., 604 F.2d 1180, 1183 (9th Cir. 1979) (finding that undocumented workers are protected under the NLRA); *see also* Wishnie, *supra* note 11, at 501 (explaining that lower federal courts uniformly rejected the suggestion that Congress intended to exclude workers from statutory labor protections based on immigration status, reasoning that to do so would leave the most vulnerable subject to exploitation).

13. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 886–87 (1984) (involving five undocumented workers who were reported to the INS in retaliation for having voted in favor of a union). A full discussion of *Sure-Tan*, the Supreme Court's only other case (pre-IRCA) to consider the appropriateness of backpay for undocumented workers (or to even discuss the legal status of undocumented workers under federal law), is beyond the scope of this Article. In *Sure-Tan*, the Court held that undocumented workers are not entitled to backpay for periods during which they are "unavailable" for work. *Id.* at 903. Most circuits had narrowly interpreted the *Sure-Tan* decision to bar backpay only for undocumented plaintiffs who (at the time of judgment) are outside the United States and who could not lawfully re-enter the country (i.e., are "unavailable"). *See* Christopher Ho & Jennifer C. Chang, *Drawing the Line After* Hoffman Plastic Compounds, Inc. v. NLRB*: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 480 n.29 (2005) (discussing a U.S. court of appeals decisions interpreting *Sure-Tan*). Nonetheless, the Court did not rely extensively on *Sure-Tan*, expressing as it did that the question in *Hoffman* was better analyzed "through [the] wider lens" of the IRCA. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002).

14. *Sure-Tan*, 467 U.S. at 892 (citing DeCanas v. Bica, 424 U.S. 351, 359 (1976)). In *Sure-Tan*, Justice O'Connor explained that "[f]or whatever reason, Congress has not adopted provisions in the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization." *Id.* at 892–93.

15. *Id.* at 893–94 ("Application of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer

Two years later, Congress passed the IRCA[16] in an attempt to "close the back door on illegal immigration."[17] The legislation consisted of several schemes, each designed to retard the growth rate of undocumented workers within U.S. borders.[18] Among them, Congress made it illegal for a U.S. employer to knowingly hire, retain, or refer an undocumented worker,[19] and it developed an employer sanction scheme designed to give force to these prohibitions.[20] The

realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws. The [NLRB's] enforcement of the NLRA as to undocumented aliens is therefore clearly reconcilable with and serves the purposes of the immigration laws . . . ."). Despite its finding that undocumented workers were considered employees protected under the NLRA, the Court concluded that the workers could not claim backpay "during any period when they were not lawfully entitled to be present and employed in the United States." *Id.* at 903. This part of the Court's decision was based upon the NLRB's practice of tolling backpay when the employee is physically unavailable to work. *Id.* Since the employees in this case were no longer in the United States, the Court determined they were ineligible for backpay. *Id.*

16. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.).

17. H.R. REP. NO. 99-682(I), at 46, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650.

18. Richard A. Johnson, *Twenty Years of IRCA: The Urgent Need for an Updated Legislative Response to the Current Undocumented Immigrant Situation in the United States*, 21 GEO. IMMIGR. L.J. 239, 244–45 (2007) (explaining that the IRCA called for a one-time amnesty program that granted citizenship status to undocumented workers who had both resided continuously in the United States prior to 1982 and already applied for temporary resident status).

19. 8 U.S.C. § 1324a(a)(1) (2006). As originally enacted, the IRCA did not make it unlawful for undocumented aliens to accept employment in the United States. It was not until the IRCA was amended in 1990 that Congress created penalties and sanctions for undocumented workers who sought employment in the United States. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 544(a), 104 Stat. 4978 (2010) (codified at 8 U.S.C. § 1324c). Even this provision, however, applied only to aliens who knowingly or recklessly used false documents to obtain employment. *See* 8 U.S.C. § 1324c(a), (f) (2006). Congress also increased budget allocations to bolster the INS's ability to enforce the employer sanctions mandated by the Act. *See* Johnson, *supra* note 18, at 245.

20. Bosniak, *supra* note 7, at 956 ("Designed to sharply curtail the number of undocumented immigrants working and residing in this country, the [IRCA's] centerpiece is a set of sanctions intended to penalize employers who knowingly hire undocumented workers."). However, statistical information suggests that executive efforts to enforce the employer sanctions provisions of the IRCA have been poor and that those employers that are investigated face significantly smaller fines than the statute provides for IRCA violations. *See* Ho & Chang, *supra* note 13, at 482 n.35 (fines substantially more modest than statutory maximum amounts); *Developments in the Law—Jobs and Borders*, 118 HARV. L. REV. 2171, 2235 (2005) (noting that from 1997 to 2003, the number of arrests resulting from employer investigations fell in every successive year, from 17,554 arrests in 1997 to only 445 nationwide in 2003). In order to avoid the potential impact of employers who might avoid hiring anyone they suspect might be undocumented, Congress enacted provisions that bar employers from discriminating against applicants or employees based upon their national origin or citizenship status. 8 U.S.C. § 1324b(a)(1) (2000).

IRCA included a new verification system, mandating that employers request and verify eligibility documents and fill out an I-9 form within three days of hire.[21] Employers who violate the IRCA by "knowingly" hiring an undocumented worker or by failing to comply with the verification requirements are subject to civil and criminal penalties.[22] Although the penalties primarily target the employer, undocumented workers also face serious civil and criminal penalties for any fraud (IRCA or otherwise) that they may commit upon an employer during the employment process, including the act of handing over fraudulent documents to satisfy the verification requirements.[23]

Congress intended for employer sanctions to be the primary method of deterring unlawful immigration.[24] The legislation was based on the assumption that employment is the "magnet" that attracts aliens to the United States and that employers would be deterred from hiring undocumented immigrants by threat of penalty,[25] which in turn, would deter immigrants from entering illegally.[26] While this framework created overlap between immigration and labor and

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21. 8 U.S.C. § 1324b(a)(1) (2000).

22. *Id.* Despite the clear failure of employer sanctions to deter illegal immigration (including the government's unwillingness to enforce the sanctions in the first place), every major effort at immigration reform since the IRCA has assumed that the employer sanctions regime would continue in similar form. *See* Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 197.

23. *See, e.g.*, 8 U.S.C. § 1324c(a) (2006) (penalizing the use of fraudulent documents); 18 U.S.C. § 1015 (2006) (prohibiting making a false claim of U.S. citizenship to engage in employment); 18 U.S.C. § 1546 (2006) (prohibiting a false statement on an I-9 form); 42 U.S.C. § 408(a)(7)(B) (2006) (prohibiting the false use of a Social Security number). The *Hoffman* majority emphasized the employer and employee sanctions to support its contention that the IRCA did in fact represent a new legal landscape in which combating the employment of illegal aliens (the IRCA's "policy"?) is paramount to the enforcement of immigration policy. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147–49 (2002).

24. Congress also sought to deter illegal immigration through the implementation of a legalization (amnesty) program. Johnson, *supra* note 18, at 244–45. For a condensed but informative discussion of the legislative history surrounding the IRCA, see Wishnie, *supra* note 22, at 198–204 (prohibiting the employment of unauthorized immigrants); *see also* H.R. REP. NO. 99-682, pt. 1, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650 ("The principal means of . . . curtailing future illegal immigration is through employer sanctions. . . . Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment."); *id.* at 52 ("[T]he primary reason for the illegal alien problem is the economic imbalance between the United States and the countries from which aliens come, coupled with the chance of employment in the United States . . . . The Committee, therefore, is of the opinion that the most reasonable approach to this problem is to make unlawful the 'knowing' employment of illegal aliens, thereby removing the economic incentive which draws such aliens to the United States as well as the incentive for employers to exploit this source of labor."); S. REP. NO. 99-132, at 1 (1985) ("The primary incentive for illegal immigration is the availability of U.S. employment.").

25. H.R. REP. NO. 99-682, pt. 1, *supra* note 24, at 1.

26. *Id.*

employment laws, the IRCA did not expressly address the effect that a violation of the IRCA's provisions has on other laws, including labor laws.[27] Although the statute is silent, the legislative history surrounding the IRCA's passage unequivocally indicates that Congress intended that the IRCA provisions should not be construed as excluding undocumented workers from extant labor protections.[28] Instead, Congress used employer sanctions and continued enforcement of labor laws to combat illegal immigration broadly by decreasing employer incentives to hire undocumented workers in the first place.[29]

II. THE EMERGENCE OF FAULT-BASED DECISIONMAKING IN JUDICIAL DECISIONS

With federal legislation creating an overlap between immigration and labor and employment laws, courts faced new dilemmas in trying to balance the competing policy objectives. Despite the IRCA's new prohibitions on the employment of undocumented workers and the availability of employer sanctions, there was no question that undocumented workers were still considered "employees" for purposes of protections afforded under federal labor and employment statutes.[30] While many courts interpreted *Sure-Tan*

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27. *Hoffman*, 535 U.S. at 154–55 (Breyer, J., dissenting).

28. The Judiciary Committee report accompanying the IRCA stated:

> It is not the intent of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees . . . .

H.R. REP. NO. 99-682, pt. 1, *supra* note 24, at 58. Despite the clarity of the Judiciary Committee's assertion, the *Hoffman* majority dismissed the force of this statement as an indicator of legislative intent, calling it a "rather slender reed." *Hoffman*, 535 U.S. at 149–50 n.4. Similar to the Judiciary Committee's report, the House Education and Labor Committee reported that to reduce labor protections for undocumented immigrants would "be counter-productive of [the] intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment." IRCA, 99th Cong., 2d. Sess. 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5758.

29. *See* Wishnie, *supra* note 22, at 204.

30. *See* NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50 (2d Cir. 1997) (holding that undocumented workers are entitled to protection under the NLRA); Patel v. Quality Inn S., 846 F.2d 700, 704 (11th Cir. 1988) (holding that undocumented workers are entitled to protections afforded under the FLSA); *In re* Reyes, 814 F.2d 168, 170 (5th Cir. 1987) (finding that both undocumented and documented workers are covered under the FLSA); Local 512, Warehouse & Office Workers' Union v. NLRB, 795 F.2d 705, 716 (9th Cir. 1986) (finding that undocumented workers are entitled to the protections afforded under the NLRA); EEOC v. Switching Sys. Div. of Rockwell Int'l Corp., 783 F. Supp. 369, 374 (N.D. Ill. 1992) (finding that undocumented workers are protected under Title VII); EEOC v. Tortilleria La Mejor, 758 F.

narrowly, denying backpay only to those employees who were not physically present in the United States,[31] a split eventually developed among lower courts regarding the remedies that undocumented workers were entitled to under federal labor and employment laws.[32]

At one end of the split, in *Del Rey Tortilleria, Inc. v. NLRB*, the Court of Appeals for the Seventh Circuit held that undocumented workers who are discharged in violation of the NLRA are not entitled to backpay or reinstatement.[33] In reaching its conclusion, the court characterized the NLRA as remedial, not punitive, in nature, and as such the statutory scheme was designed to compensate only individuals who have suffered harm.[34] According to the court, undocumented workers were not harmed in the "legal sense" in that they had no entitlement to be present or employed in the United States.[35]

Supp. 585, 593–94 (E.D. Cal. 1991) (holding that the IRCA does not change the scope of Title VII protections afforded undocumented workers).

31. *See A.P.R.A. Fuel*, 134 F.3d at 54; EEOC v. Hacienda Hotel, 881 F.2d 1504, 1517 (9th Cir. 1989); Rios v. Enter. Ass'n Steamfitters Local Union 638 of U.A., 860 F.2d 1168, 1173 (2d Cir. 1988); NLRB v. Ashkenazy Prop. Mgmt. Corp., 817 F.2d 74, 75 (9th Cir. 1987); Bevles Co. v. Teamsters Local 986, 791 F.2d 1391, 1393 (9th Cir. 1986); *Local 512, Warehouse & Office Workers' Union*, 795 F.2d at 717 (finding that the "speculative" nature of the damages focused upon in the *Sure-Tan* case did not exist when the plaintiff remained in the United States and that such undocumented workers might still be entitled to backpay); *see also* Correales, *supra* note 8, at 116 ("[C]ourts and the [NLRB] construed *Sure-Tan* to mean that undocumented workers were not entitled to backpay remedies only when they were not physically present in the United States."); Ho & Chang, *supra* note 13, at 480–81 ("Most Circuits, accordingly, interpreted *Sure-Tan* as barring backpay only to undocumented plaintiffs currently outside the United States who could not lawfully re-enter the country"). *But see* Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1121 (7th Cir. 1992) (holding that undocumented workers who are discharged are not entitled to backpay).

32. *Compare A.P.R.A. Fuel*, 134 F.3d at 56 (2d Cir. 1997) (holding that undocumented workers were eligible for backpay under the NLRA), *and Local 512*, 795 F.2d at 719–20 (same), *with Del Rey Tortilleria*, 976 F.2d at 1121–22; *compare* Memorandum GC 87-8 from Office of General Counsel, NLRB, The Impact of the Immigration Reform and Control Act of 1986 on Board Remedies for Undocumented Discriminatees, 1987 WL 109409, at 1–2 (Oct. 27, 1988) (reasoning that undocumented workers could not be awarded backpay because of the IRCA), *with* Memorandum GC 98-15 from Office of General Counsel, NLRB, Reinstatement and Backpay Remedies for Discriminatees Who May Be Undocumented Aliens in Light of Recent Board and Court Precedent, 1998 WL 1806350, at 1–2 (Dec. 4, 1998) (reasoning that undocumented workers could be awarded backpay notwithstanding the IRCA). There were a couple of post-IRCA decisions involving pre-IRCA conduct. These cases relied upon *Sure-Tan* in reaching their decisions in the context of Title VII claims. *See Hacienda Hotel*, 881 F.2d at 1517 (noting that existing case law indicated that the aliens were entitled to backpay under Title VII); *Rios*, 860 F.2d at 1171–72 n.2 (noting that the passage of the IRCA did not apply retroactively).

33. *Del Rey Tortilleria*, 976 F.2d at 1119–21 (citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903 (1984); *Local 512*, 795 F.2d at 725 (Beezer, J., dissenting in part)).

34. *Del Rey Tortilleria*, 976 F.2d at 1119.

35. *Id.* (adopting the reasoning of dissenting Judge Beezer in *Local 512*, 795 F.2d at 725); *see also* Montero v. INS, 124 F.3d 381, 385 (2d Cir. 1997) (rejecting the argument that the IRCA

By contrast, in *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, the Court of Appeals for the Second Circuit affirmed an award of backpay and conditional reinstatement to undocumented workers where the employer hired them knowing that they were undocumented and thereafter retaliated against them for union activities.[36] Based upon the IRCA's legislative history, the court found that the IRCA's structure of employer sanctions made it clear that "Congress's intent [was] to focus on employers, not employees, in deterring unlawful employment relationships."[37] Additionally, the IRCA did not limit the protections afforded undocumented workers nor did it curtail the NLRB's ability to provide remedies under the NLRA.[38] Thus, the court found that conditional reinstatement[39] and backpay[40] promoted the shared policy goals of the IRCA and the NLRA and allowed the employer to avoid conflicts with the sanction provisions of the IRCA.[41]

Despite divergent results, both cases address the respective fault of one of the involved parties, laying the groundwork for concepts of fault to be developed further in the *Hoffman* decision. The *Del Rey*

precluded the deportation of an undocumented alien based on evidence obtained in the course of a labor dispute and holding that "[w]hether or not an undocumented alien has been the victim of unfair labor practices, such an alien has no entitlement to be in the United States").

36. *A.P.R.A. Fuel*, 134 F.3d at 58. For other circuits finding undocumented workers eligible for backpay, see Hoffman Plastic Compounds, Inc. v. NLRB, 237 F.3d 639, 650 (D.C. Cir. 2001) (en banc) (supporting an award of backpay to an undocumented worker who was in the United States), *rev'd*, 535 U.S. 137 (2002); *Local 512*, 795 F.2d at 717 (finding that undocumented workers who remain in the United States are eligible for backpay). The Second Circuit had earlier decided in *Montero v. INS* that an undocumented worker is fully eligible for federal labor law remedies if "the alien is permitted by the INS to remain in the United States." 124 F.3d 381, 384–85 (2d Cir. 1997).

37. *A.P.R.A. Fuel*, 134 F.3d at 56.

38. *Id.* at 58 (concluding that an NLRB backpay award to an undocumented worker did not violate the principles underlying the IRCA because the award was simply compensation for economic injury caused by the employer's unlawful conduct and did not reestablish an illegal working relationship between the employer and any undocumented alien).

39. *Id.* (finding that conditional reinstatement could occur only upon verification of eligibility requirements).

40. *Id.* at 57 (finding that workers would be eligible for backpay from the date of unlawful discharge until the earliest of either reinstatement or failure within a reasonable time to produce verification documents).

41. *Id.* at 56–57 ("After considering the many complexities of the policies underlying both statutes, we conclude that the most effective way for the [NLRB] to accommodate—and indeed to further—the immigration policies IRCA embodies is, to the extent possible, to provide the protections and remedies of the NLRA to undocumented workers in the same manner as to other employees. To do otherwise would increase the incentives for some unscrupulous employers to play the provisions of the NLRA and IRCA against each other to defeat the fundamental objectives of each, while profiting form their own wrongdoing with relative impunity. Thus, these employers would be free to flout their obligations under the Act, secure in the knowledge that the [NLRB] would be powerless fully to remedy their violations.").

court focused on the wrongdoing of the undocumented worker, characterizing the award of backpay and reinstatement as a reward for the violation of immigration laws.[42] By contrast, the court in *A.P.R.A. Fuel* focused on the wrongdoing of the employer who knowingly hired the undocumented workers, encouraged them to provide false documentation, and then, only after those workers engaged in union activity, fired them.[43]

The Supreme Court resolved this circuit split in *Hoffman*. The case arose out of an unfair labor practice claim in which four employees, including Jose Castro, alleged that their employer, Hoffman Plastic Compounds, had unlawfully fired them in retaliation for their union-organizing activities.[44] After an NLRB decision that included an award of reinstatement and backpay,[45] Jose Castro testified, at a subsequent compliance hearing, that he had never been legally authorized to work in the United States and, critically, that he had gained employment at Hoffman Plastic Compounds by using a birth certificate of a friend who had been born in the United States.[46] The Administrative Law Judge ("ALJ") concluded that because Castro was undocumented, the NLRB did not have the authority to award backpay to him, as such an award would conflict with both the IRCA and *Sure-Tan*.[47] After a subsequent reversal by the NLRB of the ALJ's

42. Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1119 (7th Cir. 1992); *see also* Correales, *supra* note 8, at 121 (arguing that the *Del Rey* decision ignores the culpability of the employer and fails to recognize the causal connection between the injury inflicted and the remedy awarded). Specifically, the undocumented workers in question received an award of backpay because they were discharged in violation of the NLRA as opposed to being paid for entering the country without lawful authorization. *Id.*

43. *A.P.R.A. Fuel*, 134 F.3d at 52 (framing the issue as "whether an employer who knowingly hires undocumented aliens can use the immigration laws as a shield to avoid liability for the employer's later retaliatory discharge of the employees in violation of the [NLRA]").

44. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140–41 (2002).

45. The NLRB also ordered Hoffman to cease and desist from further violations of the NLRA and to post a detailed notice to Hoffman employees indicating the nature of the NLRB's remedial order. *Id.* at 140.

46. *Id.* at 141.

47. In *Sure-Tan*, the Court held that undocumented workers are not entitled to backpay for periods during which they are "unavailable" for work. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903 (1984). Most circuits had narrowly interpreted the *Sure-Tan* decision to bar backpay only for undocumented plaintiffs who (at the time of judgment) are outside the United States and who could not lawfully re-enter the country (i.e., are "unavailable"). *See* Ho & Chang, *supra* note 13, at 480, 481 n.29 (discussing circuit decisions interpreting *Sure-Tan*). Nonetheless, the *Hoffman* Court did not rely extensively on *Sure-Tan*, expressing as it did that the question in *Hoffman* was better analyzed "through [the] wider lens" of the IRCA. *Hoffman*, 535 U.S. at 147.

decision,[48] the D.C. Circuit denied review,[49] and the Supreme Court reversed in a 5–4 decision, vacating the backpay award.[50]

Instead of relying upon the holding in *Sure-Tan* as the lower courts had,[51] the Court explained that the case is "better analyzed through a wider lens."[52] In its broader analysis, the Court placed great emphasis on the wrongdoing, or lack thereof, of the involved parties. The Court's emphasis on the alien's illegal actions, both generally and IRCA related; its reliance upon precedent invoking "serious misconduct"; and the framework of inevitable current and future wrongdoing by one of the parties in the employment relationship evidences the Court's focus on wrongdoing.[53]

The opinion emphasized that Castro was never legally admitted to nor authorized to work in the United States[54] and that he utilized a false birth certificate to obtain the job with Hoffman Plastic Compounds.[55] The Court also noted that neither Castro nor the NLRB offered any evidence that Castro applied or intended to apply for legal authorization to work.[56]

In addition to the Court's emphasis on the alien's illegal or criminal acts, the opinion also repeatedly referred to the potential illegality involved in the IRCA's new "regime."[57] The Court not only detailed that the IRCA makes it a crime for unauthorized aliens to

48. *Hoffman*, 535 U.S. at 141 (finding instead that the best way to effectuate the IRCA's policies was to apply the full spectrum of protections and remedies of the NLRA, including backpay, to "undocumented workers in the same manner as other employees").

49. A three-judge panel of the D.C. Circuit originally denied Hoffman's petition for review, and an en banc panel later did the same. *Id.* at 142.

50. *Id.*

51. *Id.* at 146 ("The parties and the lower courts focus much of their attention on *Sure-Tan*, particularly its express limitation of backpay to aliens 'lawfully entitled to be present and employed in the United States.' "). While the lower courts utilized fault as part of the analysis, it was not the explicit focus of the decisions.

52. *Id.* at 146–47 (declining to resolve the lower-court split over the proper interpretation of *Sure-Tan* and stating, "whether isolated sentences from *Sure-Tan* definitively control, or count merely as persuasive dicta in support of petitioner, we think the question presented here better analyzed through a wider lens, focused as it must be on a legal landscape now significantly changed").

53. *Id.* at 147–48.

54. *Id.* at 141.

55. *Id.* (noting also that Castro utilized the false birth certificate to obtain a driver's license, a Social Security card, and other subsequent work); *see also* Affordable Hous. Found., Inc. v. Silva, 469 F.3d 219, 235 (2d Cir. 2006) (stating that the *Hoffman* Court "cited that alien's criminal procurement of employment with false documents as the fact that 'sinks' NLRB arguments in defense of the backpay remedy").

56. *Hoffman*, 535 U.S. at 141.

57. Wishnie, *supra* note 11, at 506 ("[T]he heart of Chief Justice Rehnquist's analysis of IRCA scrutinized the provisions prohibiting the use of fraudulent documents by workers."); *see also Hoffman*, 535 U.S. at 147–48 ("This verification system is critical to the IRCA regime.").

tender fraudulent documents,[58] or to use or attempt to use such documents to obtain employment in the United States,[59] but the Court also tied these provisions to Castro's actions as a way to deny him certain relief.[60] The Court stated, "The [NLRB] asks that we . . . allow it to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud."[61]

In terms of precedent for its decision, the Court expressly declined to rely upon *Sure-Tan* and instead focused its analysis upon a line of cases involving serious illegal conduct[62] in connection with interstate commerce,[63] bankruptcy,[64] and antitrust.[65] The Court emphasized two cases in particular, *NLRB v. Fansteel Metallurgical Corp.*[66] and *Southern S.S. Co. v. NLRB,*[67] to support the denial of an award of backpay or reinstatement when employees are found guilty of serious illegal conduct in connection with their employment.[68] The

58. 8 U.S.C. § 1324c(a) (2006); *Hoffman*, 535 U.S. at 148.

59. 8 U.S.C. § 1324c(a)(1)–(3); *Hoffman*, 535 U.S. at 148.

60. *Hoffman*, 535 U.S. at 148 ("There is no dispute that Castro's use of false documents to obtain employment with Hoffman violated these provisions."); *see also id.* at 148–49 ("The [NLRB] asks that we overlook this fact and allow it to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by criminal fraud.").

61. *Id.*

62. *Id.* at 143–46; *see also* Wishnie, *supra* note 11, at 506–07 ("The majority's focus on 'criminal fraud' by employees is apparent . . . in its attempt to align its holding with prior decisions denying reinstatement or backpay 'to employees found guilty of serious illegal conduct in connection with their employment' and who 'had committed serious criminal acts.' ").

63. Local 1976 United Brotherhood of Carpenters & Joiners of Am. v. NLRB, 357 U.S. 93, 108–10 (1958) (precluding the NLRB from selecting remedies pursuant to its own interpretation of the Interstate Commerce Act).

64. *Hoffman*, 535 U.S. at 143; NLRB v. Bildisco & Bildisco, 465 U.S. 513, 529 n.9 (1984) (refusing to defer to the NLRB's interpretation of the Bankruptcy Code).

65. *Hoffman*, 535 U.S. at 144; Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 626 (1975) (refusing the NLRB's claim that federal antitrust policy should defer to the NLRA).

66. *Hoffman*, 535 U.S. at 143; NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 257–58 (1939).

67. *Hoffman*, 535 U.S. at 143; Southern S.S. Co. v. NLRB, 316 U.S. 31, 46–48 (1942).

68. *Hoffman*, 535 U.S. at 143–46 (rejecting the NLRB's argument that *AFB Freight System, Inc. v. NLRB* supports the award of backpay). In *AFB Freight System, Inc.*, the Supreme Court permitted an award of backpay and reinstatement where an employee presented false testimony at a compliance proceeding. ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 322 (1994). In an attempt to distinguish this case, the Court presented three arguments. First, the Court argued that the "serious misconduct" at issue in *AFB Freight* was related to internal NLRB proceedings and thus did not address the *Hoffman* context where the misconduct was unrelated to the NLRB proceeding. Second, the *AFB Freight* case did not implicate other federal agencies. And finally, while the misconduct was serious, it was not as serious as the misconduct in *Hoffman* which rendered "an underlying employment relationship illegal under explicit provisions of federal law."

Court argued that these cases establish that the Supreme Court often disregards an NLRB interpretation or award when allowing such an interpretation or award would thwart other congressional objectives including, in this instance, the congressional objective of preventing the serious criminal acts committed by employees.[69]

By emphasizing current wrongdoing as well as the inevitable future wrongdoing of either the employer or the employee, the *Hoffman* Court laid the foundation for the development of fault constructs later employed by lower courts. The fault focused on by the majority does not directly relate to the underlying NLRA claims, but instead relates to the immigration status of the employee and work authorization process used by the employer and completed by the employee. In terms of past fault, the Court reasoned that under the IRCA, the employment of an undocumented worker automatically signals that one of the parties in the employment relationship has violated the IRCA—either the undocumented worker tenders fraudulent identification or the employer knowingly hires the undocumented alien in violation of its IRCA obligations.[70] In terms of future fault, the Court explained that the award of backpay would not only condone past violations but would also encourage future violations.[71] The Court's concern for condoning past violations stemmed from the fact that employment was obtained by submitting false documents; allowing backpay would thus condone and reward this past bad act.[72] The Court's concern for future violations stemmed from two different lines of reasoning. First, the Court found that backpay awards would encourage undocumented immigrants to seek employment in the United States or to stay in the United States to

69. *Hoffman*, 535 U.S. at 143–47 (finding in *Fansteel* that "the [NLRB] had no discretion to remedy [violations of the NLRA] by awarding reinstatement with backpay to employees who themselves had committed serious criminal acts").

70. *Id.* at 148 ("Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations."). As discussed below, this language may have been the logical starting point for the lower-court reasoning that examines the relative fault of the employer and the employee when evaluating claims which do not normally require such analysis.

71. *Id.* at 150.

72. *Id.* Presumably, this practical consequence of being eligible for backpay only by remaining illegally in the country not only "trivializes" immigration law by making backpay in such a context seem absurd, but it also "condones and encourages future violations" because it encourages the undocumented worker to stay in the United States in violation of immigration law. *Id.* at 150. Because illegally staying in the United States to maintain eligibility for backpay would always accompany an undocumented worker's request for backpay, this strike against awarding backpay would seemingly apply in all backpay cases, at least under the NLRA.

assure that they would qualify for the award (because by leaving they would forfeit their right under *Sure-Tan*). Second, the Court found that the mitigation required under the NLRA would necessarily entail a further IRCA violation by either the employee or the employer.[73]

With the concepts of fault originating from the circuit split, the *Hoffman* majority ultimately created two fault-related constructs that are commonly used by *Hoffman*'s progeny: past fault, which focuses on the employee's unlawful immigration-related behavior or the IRCA's employment prohibitions; and potential future fault, which focuses on how judicial decisions on this subject might encourage future wrongdoing.

III. IDENTIFICATION OF FAULT-BASED DECISIONMAKING STRANDS: HOW COURTS ARE ACTUALLY DECIDING CASES

Courts have employed (or have been asked by one of the parties to employ) fault-based reasoning after *Hoffman* in every major non-NLRB employment context, including wage claims,[74] discrimination claims,[75] workers' compensation claims,[76] tort claims,[77] and even

73. *Id.* at 150–51. Castro in fact did mitigate his damages by finding interim work during the NLRB and ALJ proceedings. But, as the Court emphasized, Castro did so through tendering false documents to his post-Hoffman employer. *Id.* at 141, 151.

74. *See, e.g.*, Chellen v. John Pickle Co., 446 F. Supp. 2d 1247 (N.D. Okla. 2006) (FLSA wage-claim case); Reyes v. Van Elk, Ltd., 56 Cal. Rptr. 3d 68 (Ct. App. 2007) (state wage claim); Coma Corp. v. Kan. Dep't of Labor, 154 P.3d 1080 (Kan. 2007) (state wage claim); Jara v. Strong Steel Doors, Inc., 872 N.Y.S.2d 691 (Sup. Ct. 2008) (state wage claim); Ulloa v. Al's Tree Serv., Inc., 768 N.Y.S.2d 556, 558 (Dist. Ct. 2003) (holding in an FLSA wage-claim case that because of the undocumented worker's status, the contract was "tainted with illegality," and thus the plaintiff was only entitled to recover at the minimum wage rate instead of the contract rate). It comes as no surprise that the great majority of attempts to bring fault-based argumentation into the wage-claim context have failed because, as noted above, courts have almost uniformly honored the distinction between wages for work already performed (FLSA and analogous state unpaid wages cases) and wages for work which has not yet been performed (backpay and lost wages).

75. *See, e.g.*, EEOC v. Restaurant Co., 490 F. Supp. 2d 1039 (D. Minn. 2007) (Title VII); Singh v. Jutla & C.D. & R's Oil, Inc., 214 F. Supp. 2d 1056 (N.D. Cal. 2002) (FLSA retaliation case in response to employee's request that employer compensate unpaid wages); Earth First Grading & Builders Ins. Group/Ass'n Serv., Inc. v. Gutierrez, 606 S.E.2d 332 (Ga. Ct. App. 2004); Crespo v. Evergo Corp., 841 A.2d 471 (N.J. Super. Ct. App. Div. 2004) (state antidiscrimination case).

76. *See, e.g.*, Farmers Bros. Coffee v. Workers' Comp. Appeals Bd., 133 Cal. App. 4th 533 (2005) (allowing workers' compensation benefits); *Earth First Grading*, 606 S.E.2d 332 (denying workers' compensation benefits); Design Kitchen & Baths v. Lagos, 882 A.2d 817 (Md. 2005) (allowing workers' compensation benefits); Sanchez v. Eagle Alloy, Inc., 658 N.W.2d 510 (Mich. Ct. App. 2003) (denying workers' compensation benefits), *vacated*, 471 Mich. 851 (2004); Reinforced Earth Co. v. Workers' Comp. Appeal Bd., 810 A.2d 99 (Pa. 2002) (allowing workers' compensation benefits).

contract claims.[78] Lower courts have latched on to immigration or work-status "fault" as part of their decisionmaking despite the fact that such fault is not typically relevant to the underlying case.[79] In reaching their decisions and attempting to support their ultimate conclusions, courts analyze fault along the two constructs identified in the *Hoffman* decision. Courts examine either past fault or fault as it relates to the likelihood of future illegal acts. When courts analyze past fault, they explore which party may have committed a violation of the IRCA by considering whether the employee submitted fraudulent documents, the employer failed to verify the worker's eligibility documents, or the employer knew or should have known that the employee was an undocumented worker and nonetheless hired the

77. *See, e.g.*, Affordable Hous. Found., Inc., v. Silva, 469 F.3d 219, 237 (2d Cir. 2006) (finding that the employer's IRCA misconduct (no evidence of employee misconduct) was one factor weighing in favor of allowing lost wages, subject to jury limitation); Veliz v. Rental Serv. Corp. USA, Inc., 313 F. Supp. 2d 1317 (M.D. Fla. 2003) (refusing to award any lost wages in a products liability case where the employee tendered fraudulent documentation to obtain employment); Rosa v. Partners in Progress, Inc., 868 A.2d 994 (N.H. 2005) (holding that employee fraud is only applicable if it actually induces the employer to hire the employee and that undocumented workers are eligible only for lost wages at the rate they would have received in their country of origin, unless the employee can prove that the employer knew or should have known about the employee's undocumented status, in which case the employee would be entitled to lost wages at U.S. pay rates); Balbuena v. IDR Realty LLC (*Balbuena II*), 845 N.E.2d 1246 (N.Y. 2006) (finding that absent proof of employee fraud in violation of the IRCA (no employee fraud), lost wages are appropriate for undocumented workers); Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d 314 (App. Div. 2004), *abrogated by Balbuena II*, 845 N.E.2d 1246 (holding that, regardless of relative fault, undocumented workers are only entitled to wage rates from country of origin).

78. *See, e.g.*, King v. ZirMed, Inc., No. 3:05CV-181-H, 2007 WL 3306100, at *6 (W.D. Ky. Nov. 6, 2007); Chopra v. U.S. Prof'ls, LLC, No. W2004-01189-COA-R3-CV, 2005 WL 280346, at *3–4 (Tenn. Ct. App. Feb. 2, 2005). The issue of the illegality of the underlying employment contract (an argument offered by defendants for the purpose of denying a number of different remedies) comes up in several cases where the employee sues under a cause of action other than breach of contract. In the two cases listed above, the actual cause of action the plaintiff sought to litigate was breach of contract. In *Coma* and *Design Kitchen*, for example, those courts rejected the notion that the workers' undocumented statuses rendered their underlying employment contracts illegal such that they were foreclosed from pursuing remedies for a wage claim and a workers' compensation claim, respectively. *Coma*, 154 P.3d at 1089; *Design Kitchen*, 882 A.2d at 829–30. Further, in *Continental PET Technologies v. Palacias*, *Earth First Grading*, and *Dynasty Sample Co. v. Beltran*, the Georgia courts inquired whether the act of tendering false documents had a causal connection with the injury suffered; because all three courts found in the negative, they allowed workers' compensation benefits, as the tendering of false documents did not render the employment contracts voidable under the "fraud in the inducement" rationale. *Earth First Grading*, 606 S.E.2d at 335; Cont'l PET Techs., Inc. v. Palacias, 604 S.E.2d 627, 631 (Ga. Ct. App. 2004); Dynasty Sample Co. v. Beltran, 479 S.E.2d 773, 774–75 (Ga. Ct. App. 1996).

79. *See, e.g.*, Morejon v. Terry Hinge & Hardware, No. B162878, 2003 WL 22482036 (Cal. Ct. App. Nov. 4, 2003) (involving claims by the employer that the employee submitted false documents to gain employment so she was barred from recovery for wrongful termination and state antidiscrimination violations under the doctrine of after-acquired evidence and unclean hands).

worker or refused to fire the worker.[80] A smaller number of courts examine the unlawful manner of entry by the immigrant as part of the past-fault analysis.

When courts analyze the potential for future fault, they ask whether their decisions will discourage or encourage future immigration violations or future violations of safety and labor laws.[81] Where the remedy would not result in a future illegal act or would encourage compliance with workplace safety and labor laws, courts are inclined to award the remedy. However, where awarding the remedy is likely to result in a future illegal act or would likely discourage compliance with workplace safety and labor laws, courts are inclined to deny such remedies.

A. Past Fault-Based Reasoning

The different ways that courts approach past fault appear to be rooted in part in the language used in *Hoffman*. In that opinion, the Court stated,

> Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.[82]

Utilizing the dichotomy set out by the *Hoffman* Court, some lower courts analyzing past fault examine only employee misconduct while others focus exclusively on employer misconduct. There are also a series of decisions in which courts actually examine the relative fault of both parties in reaching their decisions. Finally, there are some courts that express concern about making an evaluative judgment of fault and attempt to use other bases for their decisions.

While this Article identifies these different lines of reasoning as very distinct categories, it is not unusual for courts to employ more than one rationale in reaching their decisions.[83] Despite the overlapping lines of reasoning employed by some courts, this Section will categorize decisions into four discrete areas in order to tease out the rationales used by courts: decisions that examine only employee

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80. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 148, 150 (2002).

81. In terms of future fault, the *Hoffman* Court stated, "[A]warding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations." *Id.* at 150.

82. *Id.* at 148.

83. *See, e.g.*, Balbuena v. IDR Realty LLC (*Balbuena II*), 845 N.E.2d 1246, 1259–60 (N.Y. 2006).

misconduct; decisions that examine only employer misconduct; decisions that weigh the relative fault of the employer and employee; and decisions that raise concern with or refuse to engage in an evaluation of fault.

1. Examining Only Employee Misconduct

While there are a number of courts that analyze only employee misconduct, within this line of reasoning, courts reach disparate conclusions. Decisions within this category generally fall into one of two extremes: courts either allow a remedy despite employee fraud or bar claims and remedies based upon an employee's fraud.

Courts that find that employees' claims are not barred and damages are not reduced even when the employee is the sole IRCA violator[84] rely upon the absence of a nexus between the alleged fraud and the injury for which the worker is seeking relief.[85] Specifically, these courts find that even undocumented workers who engaged in fraud to obtain employment are generally allowed to recover full benefits unless there is a causal connection between the employee's fraud and the injury suffered.[86]

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84. *See, e.g.*, Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 331 (Minn. 2003) (tacitly holding that all workers' compensation claimants, including those who tender false documents, are eligible for temporary total disability benefits); Rosa v. Partners in Progress, Inc., 868 A.2d 994, 997 (N.H. 2005) (quoting Mendoza v. Monmouth Recycling Corp., 672 A.2d 221, 224 (N.J. Super. Ct. App. Div. 1996) (finding that undocumented workers are entitled to make a claim of lost wage/earning capacity in part because the "effect on the worker of his injury has nothing to do with his citizenship or immigration status")); Pineda v. Kel-Tech Constr., Inc., 832 N.Y.S.2d 386, 395–98 (Sup. Ct. 2007) (asserting that workers' claims for unpaid wages are not necessarily barred even though the workers presented false documents at the inception of their employment).

85. *See, e.g.*, Andrade v. Sun Valley Landscapes, No. 2305, 2008 WL 2882228, at *4 (Neb. Work. Comp. Ct. July 23, 2008); Majlinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56, 69 (App. Div. 2005) (citing Cont'l PET Techs., Inc. v. Palacias, 604 S.E.2d 627, 631 (Ga. Ct. App. 2004)); Silva v. Martin Lumber Co., No. M2003-00490-WC-R3-CV, 2003 WL 22496233, at *2 (Tenn. Workers Comp. Panel Nov. 5, 2003).

86. *See, e.g.*, Farmers Bros. Coffee v. Workers' Comp. Appeals Bd., 133 Cal. App. 4th 533, 544 (2005) (noting that an employee is barred from receiving compensation under the statute only when the compensation obtained would be a direct result of the fraudulent misrepresentation, but in the instant case, it was the employment (and acceptance of employment is not illegal) "not the compensable injury, that [plaintiff] obtained as a direct result of the use of fraudulent documents"); Earth First Grading & Builders Ins. Group/Ass'n Serv., Inc. v. Gutierrez, 606 S.E.2d 332, 335 (Ga. Ct. App. 2004) (citing *Cont'l PET Tech., Inc.*, 604 S.E.2d at 631; Dynasty Sample Co. v. Beltran, 479 S.E.2d 773, 775 (Ga. Ct. App. 1996)) (finding that the employer's reliance on language in Georgia's workers' compensation statute indicating that "no compensation shall be allowed for an injury . . . due to the employee's willful misconduct" was misplaced because "the employer fail[ed] to show a causal connection between the employee's misrepresentation and the work-related injury"); *Andrade*, 2008 WL 2882228, at *4 (rejecting the

The casual connection inquiry arises most frequently in the workers' compensation area. Whether courts are interpreting statutory provisions that condition the receipt of workers' compensation benefits on the absence of fraud[87] or common law doctrines that bar recovery based on fraud, the unifying theme in these cases is the lack of a causal nexus.[88] Employers used a variety of arguments to support their contention that undocumented workers should not be entitled to workers' compensation, including raising the affirmative defense of fraud and misrepresentation;[89] arguing that the contract was void for fraud in the inducement;[90] and arguing that the contract was voidable based upon employee misrepresentation.[91] In each case, the court relied upon the lack of causal connection between the false representation and the physical injury to support the finding that the undocumented worker was entitled to relief.[92]

One court also applied this nexus-based reasoning in the tort context, granting an award of full lost wages. In granting the remedy, the court separated IRCA-related duties from those imposed on the employer by tort law.[93] The court reasoned that because the employer's contractual, statutory, and common law duties to the employee are not predicated on the employee's compliance with the IRCA, the employer should be liable for his negligence independently

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employer's argument that the employee's inability to work is due to his illegal status and instead finding that the effect on the plaintiff from the injury is not connected to his immigration status).

87. These statutory provisions are general misconduct provisions that prohibit more than IRCA-specific fraud but can be applied to the undocumented-worker context.

88. *See, e.g.*, *Farmers Bros. Coffee*, 133 Cal. App. 4th at 544; *Earth First Grading*, 606 S.E.2d at 335 (citing *Cont'l PET Techs.*, 604 S.E.2d at 631); *Dynasty Sample Co.*, 479 S.E.2d at 775.

89. *Silva*, 2003 WL 22496233, at *2 (finding that the employer failed to prove two elements of the affirmative defense of fraud and misrepresentation, specifically that the false representation related to the claimant's physical condition and that there was a causal connection between the false representation and the physical injury).

90. *Dynasty Sample Co.*, 479 S.E.2d at 774–75 (explaining that in order for a contract to be void for fraud in the inducement the employer must demonstrate "(1) that the employee knowingly and willfully made a false representation at the time the employee applied for work; (2) that said false representation was relied on by the employer and was a substantial factor in its hiring decisions and (3) that there is a causal connection between the false representation and the injury for which the employee seeks benefits").

91. *Id.*

92. *Id.* (finding that the employee's claim was not barred even though the employee was the sole IRCA violator because the employer failed to demonstrate that there was a causal connection between the alleged fraud and the injury); *Silva*, 2003 WL 22496233, at *2 (finding no causal connection between the false representation and the physical injury).

93. Majlinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56, 62 (App. Div. 2005), *aff'd sub nom.* Balbuena v. IDR Realty LLC (*Balbuena II*), 845 N.E.2d 1246 (N.Y. 2006).

of the worker's status or submission of fraudulent documents.[94] In fashioning its remedy, the court, unlike most courts confronting similar cases, disentangled the employee's and employer's duties created by the underlying claim from the duties imposed on both parties by immigration law.[95]

Directly opposite the nexus cases described above are a group of cases that rely upon employees' actions or fraud to bar employees' claims for relief. At the extreme, a series of decisions finds the illegal nature, or mere acceptance, of unlawful employment itself is sufficient to deny workers' claims for relief. Other courts, taking a less extreme view, reason that any IRCA-related fraud committed by the employee bars that employee from particular remedies.

While the emphasis on illegal status or IRCA-related misconduct of the employee ties these decisions together, courts use these facts in different ways to support their denial of relief to the employee. In a series of decisions in which the employee did not present fraudulent documents to obtain employment, courts emphasize the illegal nature of mere employment as a basis to deny or limit remedies to undocumented workers. In a wage case, the mere illegal nature of employment proved the basis for the court's limitation on recovery to minimum wage despite a contract promising greater than minimum wage.[96] In the torts context, one court's dissenting opinion found that the illegal nature of the employee's acts barred the remedy of lost wages,[97] while another court determined that such illegality limited undocumented workers to country-of-origin wages.[98]

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94. *Majlinger*, 802 N.Y.S.2d at 64 ("As between an undocumented worker and the federal government, the act of submitting fraudulent documents in order to secure employment is unlawful . . . . As between the employer and the federal government, the act of hiring an undocumented worker knowingly or without verifying his or her employment eligibility is unlawful . . . . As between the undocumented worker and the employer, however, there is a contract of employment, under which the worker is entitled to be paid for his or her work. Moreover, as between the worker and an alleged tortfeasor, there are duties under the common law and the New York statutes governing workplace safety . . . . The contractual, statutory, and common-law duties owed to the worker are unrelated to, and do not depend on, the worker's compliance with federal immigration laws.").

95. *Id.*

96. Ulloa v. Al's Tree Serv., Inc., 768 N.Y.S.2d 556, 558 (Dist. Ct. 2003) (finding that the contract was "tainted with illegality," the court took the extreme view that if the employee had submitted fraudulent documentation to secure employment, the claim would have been "disallowed in its entirety"). The *Pineda* court (along with others) flatly disagreed with the *Ulloa* court ruling. Pineda v. Kel-Tech Constr., Inc., 832 N.Y.S.2d 386, 395 (Sup. Ct. 2007).

97. *Balbuena II*, 845 N.E.2d at 1261–63 (Smith, J., dissenting) (relying upon a common law tort doctrine that plaintiffs should not be awarded the benefit of an illegal bargain, the dissent argues that while the plaintiffs are not quite seeking the enforcement of illegal contracts, their employment violates federal law and as such, any tort claim for lost earnings should be prohibited). This case is another example of the overlapping nature of fault-based-reasoning

Other courts, while not going so far as to find workers ineligible for remedies based on misconduct stemming from their unauthorized status alone, have declared that any IRCA-related fraud committed by the employee bars that employee from particular remedies, regardless of employer IRCA-related fault. In the workers' compensation context, two courts linked fraud related to immigration status to a statutory prohibition that limits recovery of workers' compensation benefits. In one case, the court suspended workers' compensation benefits under a specific provision of state law that permits the suspension of benefits if the employee has committed a crime that causes the employee to be unable to work,[99] and the other court denied the remedy because it found that the employee's loss of earning power was caused by his immigration status, not his work-related injury.[100]

This emphasis on employee fraud was also used in a series of tort cases involving claims for lost earnings. In one case involving an auto accident, the court determined that an employee's fraudulent act in attaining employment must be considered when calculating future lost earnings to avoid a "windfall" for wages undocumented workers "could" have earned rather than "would" have earned.[101]

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categories. While this dissenting opinion is categorized as one that relies upon employee fault to deny the benefit, the dissent does refer to the lack of wrongdoing on the other side. In arguing that no exceptions apply to the rule that illegal activity bars recovery, the court distinguishes this case from others in which the employer (defendant) is at least as guilty of wrongdoing as the plaintiff. *Id*. at 1262. Thus, the case could be discussed in the Section on relative fault (*infra* Part III.A.3), but since the reference is not the focus of the dissent, I chose to categorize it as employee fault that bars a remedy.

98. Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d 314, 319–20 (2004) ("*Hoffman* compels the conclusion that plaintiff cannot recover lost United States wages he might have unlawfully earned, had he not been injured, whether it was Tower (by hiring plaintiff without requesting documentation of his right to work) or plaintiff himself (by tendering false documents to Tower) who committed the IRCA violation that resulted in the unlawful employment. In this regard, we *believe that plaintiff's acceptance of unlawful employment should be deemed to constitute misconduct contravening IRCA's policies whether or not he submitted false documents so as to expose himself to potential criminal liability*.") (emphasis added).

99. Sanchez v. Eagle Alloy Inc., 658 N.W.2d 510, 521 (Mich. Ct. App. 2003) (explaining that the statute requires both that (1) the employee commits a crime and (2) the crime the employee commits causes the employee to be unable to work. When determining whether the employee's conduct violated the statute, the court reasoned that the plaintiff's admitted use of false documents to obtain employment constituted the "commission of a crime," and once the employer learned of the plaintiff's status, the plaintiff became unable to obtain work "because of" the commission of the crime), *vacated*, 471 Mich. 851 (2004).

100. Reinforced Earth Co. v. Workers' Comp. Appeals Bd., 810 A.2d 99, 108 (Pa. 2002).

101. Cruz v. Bridgestone/Firestone N. Am. Tire, LLC, No. CIV 06-538 BB/DJS, 2008 WL 5598439, at *6 (D.N.M. 2008) (assuming that the initial submission of false documents could have eventually foreclosed an undocumented worker from continued employment, which would diminish that worker's wages).

The other tort cases denying remedies based exclusively on employee IRCA-related fraud each involved workplace injuries, and while each case raises questions about the employer's compliance with the IRCA, the courts ultimately focused their analyses on employee fraud. In a products liability case, despite obvious questions about the employer's compliance with the IRCA, the court refused to award any lost wages partly because the employee tendered fraudulent documentation to obtain employment and partly because "permitting an award predicated on wages that could not lawfully have been earned, and on a job obtained by utilizing fraudulent documents runs contrary to both the letter and spirit of IRCA."[102] In another case with questionable IRCA compliance by the employer, the court denied the plaintiff's claim for lost wages, relying upon the finding that the employer had discharged its duty to "examine" the fraudulent documents while at the same time invoking the distinction between an undocumented worker who commits fraud and one who does not.[103] Finally, a federal court utilized the fraud distinction to arrive at the conclusion that "undocumented workers *who violate IRCA* may not recover lost wages in a personal injury action based on a violation of New York Labor Law."[104] Relying upon post-*Hoffman* precedent determining that undocumented workers who did not engage in fraud were permitted to recover lost wages, the court concluded that the

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102. Veliz v. Rental Serv. Corp. U.S.A., Inc., 313 F. Supp. 2d 1317, 1335–36 (M.D. Fla. 2003). In this case, the name on the Resident Alien Card ("RAC") and the Social Security card provided to the employer didn't match the name of the employee; the photo on the RAC clearly didn't match the likeness of the employee; and the RAC and the birth certificate provided to the employer had conflicting dates of birth. Although the court did not explicitly state that employee fraud would act as a bar regardless of employer IRCA-related fault, the fact that the court ignored the employer's obvious failure to adequately verify the immigration-related documentation seems to indicate that the court adopted that position implicitly.

103. Macedo v. J.D. Posillico, Inc., No. 108316/06, 2008 WL 4038048, at *7–8 (N.Y. Sup. Ct. 2008). Despite language in the opinion explaining IRCA obligations of both employers and employees, the court focused on the employee violation only and failed to address what impact an employer violation of the IRCA might have on the plaintiff's ability to recover. In this way, a decision that could be categorized as a relative-fault decision ends up employing a more one-sided fault-based analysis.

104. Ambrosi v. 1085 Park Ave. LLC, No. 06-CV-8163(BSJ), 2008 WL 4386751, at *13 (S.D.N.Y. Sept. 25, 2008) ("[B]oth *Balbuena* and *Madeira* make clear that undocumented workers who suffer physical injury due to an employer's violation of New York Labor Law and who *do not* use false documentation to obtain that employment may recover lost wages. However, by explicitly noting that their allowance of lost wages is limited to workers who do not violate IRCA, *Balbuena* and *Madeira* suggest that workers who do use false documentation to obtain employment may not recover lost wages under New York Labor Law."). The court did not discuss what impact, if any, the employer's potential IRCA violations would have on subsequent holdings; this case therefore seems to stand for the principle that any employee fraud, even if paired with an employer's violation of the IRCA, is sufficient to destroy the employee's claim for lost wages. As such, this decision represents a one-sided perspective of fault-based analysis.

inverse must logically follow; employees who violate the IRCA may not recover lost wages.[105]

When examining the effect of employee fraud, even when the employee is the sole IRCA violator, a number of courts rely upon the absence of a nexus between the fraud and the injury to find that the employee's fraud does not bar the employees' claims or reduce the employee's damages. At the other extreme are those courts that find that the mere act of unlawful employment itself is a sufficient basis upon which to deny undocumented workers all legal relief. In the middle are those courts that find that fraud on the part of the employee justifies the denial of certain remedies to undocumented workers.

2. Examining Only Employer Misconduct

Rather than focusing exclusively on the employee's misconduct when using a one-sided fault-based approach, some courts focus exclusively on the conduct of the employer. These courts factor in the employer's wrongdoing when making decisions about whether (and to what extent) a particular remedy should be allowed, whether immigration status is discoverable, and whether the employee's claim is generally viable.[106]

In assessing whether and to what extent a particular remedy is allowed, courts examining only employer misconduct have taken different approaches. For example, one court found that the existence of a knowing employer, one who is aware of an employee's immigration status, entitles the employee to greater damages.[107] After stating that undocumented workers would usually only be able to recover lost wages at country-of-origin rates, the court recognized that tort deterrence principles would be furthered if lost wage claims at U.S. rates were allowed in cases where the employer knew or should have known that the alien was illegal.[108] Consistent with its balancing

105. *Id.* at *12–13.

106. Although each of these cases emphasizes employer wrongdoing, they do so in combination with an analysis of future fault. For a more detailed discussion of how courts examine future fault, see *infra* Part III.B.

107. Rosa v. Partners in Progress, Inc., 868 A.2d 994, 1001–02 (N.H. 2005).

108. *Id.* at 998. To refuse to allow recovery against a person responsible for an illegal alien's employment who knew or should have known of the illegal alien's status would provide an incentive for such persons to target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions. It would allow such persons to treat illegal aliens as disposable commodities who may be replaced the moment they are damaged. Such a result is incompatible with tort deterrence principles. *Id.* at 1000. Although the court couches its language as a discussion of "tort deterrence principles," the reasoning provided above could just as easily be applied to indicate that denying lost wages in cases of a knowing

of IRCA principles against tort principles, the court determined that whether the employee can recover lost wages at U.S. rates or country-of-origin rates turns solely on what the employee can prove about the IRCA-related (mis)conduct of the employer.[109] In an NLRA case before the NLRB, the ALJ found that where an employer violates the IRCA and the employee has committed no IRCA violations, the employee is entitled to backpay under the NLRA.[110] Absent the factual circumstances present in *Hoffman*—namely, that an award of backpay would condone criminal conduct by an employee—the ALJ focused on the mirror problem of not rewarding the employer for its knowing and intentional violation of the IRCA.[111]

Another court emphasized employer wrongdoing when analyzing whether employees had to disclose their immigration status.[112] In this case, two undocumented plaintiffs were working on construction demolition and sustained workplace injuries.[113] The court denied the employer's motion to compel disclosure of immigration status because the employer intentionally violated the IRCA by failing to have employees complete work applications, failing to obtain identification or Social Security numbers, and failing to use W2 forms.[114] The court questioned the genuineness of the employer's motives and found the following:

> Given the status of the industry, it seems somewhat disingenuous for contractors and owners to seek disclosure of the status of an employee after the employee has been

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employer would be contrary to "immigration deterrence" principles, since any of the above situations would also make employment of illegal aliens more attractive to employers. Further, tort deterrence principles could presumably be furthered even in cases of unknowing employers, as the "spur and catalyst" of lost-wage awards in those cases would still act as an incentive for employers to reduce the risk of workplace injuries.

109. *Id.* at 1002 ("A person *responsible* for an illegal alien's employment may be held liable for lost United States wages if *that illegal alien can show* that the person knew or should have known of his status, yet hired or continued to employ him nonetheless."). The court then added that an employee's violation of the IRCA by committing fraud will totally bar the employee only when the employer "reasonably relied upon those documents" when hiring the employee. *Id.*

110. Mezonos Maven Bakery, Inc., No. 29-CA-25476, 2006 NLRB LEXIS 491, at *14 (Nov. 1, 2006).

111. *Id.* at *42 ("[I]n failing to verify its employees' documentation and continuing to employ the seven discriminates with knowledge of their undocumented status, the [employer] is the wrongdoer while the employees are innocent of violating IRCA.").

112. Gomez v. F&T Int'l, LLC, 842 N.Y.S.2d 298, 302 (Sup. Ct. 2007) (allowing plaintiff's claim for lost wages to proceed because employees had not violated the IRCA by committing fraud).

113. *Id.* at 299.

114. *Id.* at 300 (recognizing that "[n]ow that plaintiffs are injured and seeking lost wages, the owner and general contractor are suddenly concerned with plaintiffs' alien status and income tax returns").

> injured under the guise of attempting to mitigate a lost wage claim, a concern which apparently never entered their minds when the work was bid out.[115]

Employer wrongdoing also impacted the viability of an employee's claim in an FLSA retaliation case. The court observed the distinction between a knowing employer and an unknowing employer when it denied a motion to dismiss, finding that *Hoffman* is implicated only when the employer is unaware of the worker's status.[116] In this case, the defendant actively recruited the plaintiff to come work in the United States and knowingly employed him for three years without proper work authorization.[117] The court found that denying a remedy to undocumented workers where the employer knowingly hired them would create the perverse incentive to violate immigration laws.[118] These cases illustrate that some courts exclusively examine employer wrongdoing to determine whether and to what extent to allow these remedies, whether immigration status is discoverable, and even whether undocumented workers can proceed with their claims.

3. Weighing Relative Fault

Contrary to the one-sided fault-based reasoning discussed above, other courts weigh the relative fault of the employer and the employee,[119] as part of either the courts' holdings or analytical frameworks. An underlying thread in these cases is courts' concern about fairness given the mutuality of fault.

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115. *Id.* at 301.

116. *See* Singh v. Jutla & C.D. & R's Oil, Inc., 214 F. Supp. 2d 1056, 1057–62 (N.D. Cal. 2002). The case involved an undocumented-alien employee who was recruited by the employer to come to work for him in the United States. *Id.* The employer promised the employee a place to live, tuition for education, and the eventual partnership in his business. The employee worked for the employer for almost three years and received no pay. *Id.* The employee then filed a wage claim with the State Department of Labor ("DOL"), and the employer threatened to report him to INS unless he dropped the claim. *Id.* The DOL awarded the employee just over $69,000, and the employer appealed. *Id.* The parties reached a settlement the day before court, and the day after signing the settlement, the INS arrested and detained the employee. *Id.* The employee remained in custody for fourteen months and filed a claim under the FLSA antiretaliation provisions. *Id.*

117. *Id.* at 1057.

118. *Id.* at 1061 (citing Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 155–56 (2002) (Breyer, J., dissenting), to support the conclusion that denial of a remedy would create economic incentive to hire undocumented workers).

119. Most of these courts also examine fault from another perspective. *See, e.g.*, Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 225–26, 248–49 (2d Cir. 2006) (employee focus); Rosa v. Partners in Progress, Inc., 868 A.2d 994 (N.H. 2005) (employer focus); Gomez v. F&T Int'l, LLC, 842 N.Y.S.2d 298 (Sup. Ct. 2007) (employer focus); Chellen v. John Pickle Co., 434 F. Supp. 2d 1069 (N.D. Okla. 2006) (employer focus), *amended by* Chellen v. John Pickle Co., 446 F.Supp.2d 1247 (N.D. Okla. 2006).

Two courts utilize a balancing of relative fault between the employee and the employer as part of their holdings and focus on what the employer knew or should have known about the immigration status of the employee. In the first case, the court concluded that the employee is permitted to seek lost wages, despite tendering false documents to obtain employment, where the employer also violated the IRCA by failing to verify documents.[120] In contrast to *Hoffman*, the court held that an employee's submission of false documentation alone does not bar recovery of damages for lost wages unless the conduct actually induces the employer to hire the worker.[121] In the second case, the court proceeded from the position that generally an illegal alien is barred from recovering lost U.S. earnings because such earnings are based upon unlawful employment, but the court concluded that if the employer was responsible for the illegal alien's employment because it knew or should have known of the worker's status, there exists a compelling reason to allow recovery.[122]

A series of other decisions balances the immigration-related wrongs as part of the general reasoning in the case, but not as an integral part of the ultimate holding. Several courts weave the balancing of fault into a conflict-preemption analysis.[123] Courts employ two distinguishable lines of reasoning to illustrate the absence of

120. Coque v. Wildflower Estates Developers, Inc. (*Coque II*), 867 N.Y.S.2d 158, 164 (App. Div. 2008).

121. *Id.* at 160. Therefore, the *Coque II* court reads *Balbuena II* narrowly, determining that an undocumented worker will lose his or her right to lost wages only if the fraudulent document that he or she presents "actually induce[s] the employer to offer employment to the plaintiff." *Id.* at 165. If a plaintiff submits false documentation in order to obtain his or her job, the result will be a denial of lost wages only if the "innocent employer is duped by fraudulent documentation into believing that the employee is a [U.S.] citizen or otherwise eligible for employment, as was the employer in *Hoffman*." *Id.* at 164. Therefore, if the employer hires the employee without verifying the employee's status or with knowledge of the employee's undocumented status, the employer has not been induced to hire the employee, and the employee has not obtained employment by submitting a false document. *Id.* at 165. The court reasoned that lost wages would be denied if the plaintiff submitted fraudulent documents "*to obtain employment*." *Id.* (emphasis added). However, "[i]f the employer was, or should have been, aware of the plaintiff's immigration status, and nonetheless hired the plaintiff 'with a wink and a nod,' the false document was not necessary 'to obtain employment.' " *Id.* (quoting *Hoffman*, 535 U.S. at 156).

122. *Rosa*, 868 A.2d at 1002 (finding that "[a] person *responsible* for an illegal alien's employment may be held liable for lost U.S. wages if that illegal alien can show that the person knew or should have known of his status, yet hired or continued to employ him nonetheless").

123. In addition to conflict preemption, Congress can convey its clear and manifest intent to preempt state law in two additional ways. First, Congress can explicitly state its intention to preempt state law (express preemption). *See* English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990). The second is by occupying the field, such as "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." Hillsborough Cnty., Fla. v. Automated Med. Labs., 471 U.S. 707, 713 (1985) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

conflict between the IRCA, which is designed to deter the hiring of undocumented workers, and state labor and employment laws, which are designed to provide protection to employees injured in the workplace. First, courts find that where the employer, not the employee, engaged in fraud or committed any IRCA violation, state laws do not subvert the IRCA's purpose.[124] If the employee violates the IRCA and is awarded a remedy under state law, then the conflict between the state and federal laws is more apparent because the remedy would function as an award for the IRCA violation; no such tension exists where the employer, not the employee, violates both state and federal laws.[125]

Second, some courts reason that where both the federal IRCA violation and the state law violation stem from the fault of the employer,[126] as opposed to the employee, denying the employee a remedy would subvert the policies underpinning both the IRCA and state labor and employment laws.[127] In the absence of a remedy, employers would have further incentive to hire undocumented workers and thereby undermine the federal goal of reducing illegal immigration.[128] Allowing recovery in such situations would not undermine federal immigration policy because the employer could avoid the remedy by declining to hire undocumented workers altogether.[129]

Other courts that balance immigration-related wrongs use the absence of employee fault to justify a particular remedy. Starting from the premise that the worker's unlawful presence in the United States alone is not sufficient to deny the remedy,[130] courts reason that since the employer, and not the employee, violated the IRCA, the employee is still entitled to recover.[131] Where the employee was not at fault, the

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124. *See* Balbuena v. IDR Realty LLC (*Balbuena II*), 845 N.E.2d 1246, 1258 n.8 (N.Y. 2006); Majlinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56, 69 (App. Div. 2005) (asserting that because there was no evidence of the presentation of false documents by the employee at the time he was hired, this case did not fall within the scope of the Court's decision in *Hoffman*), *aff'd sub nom. Balbuena II*, 845 N.E.2d 1246.

125. *See Balbuena II*, 845 N.E.2d at 1260; *Majlinger*, 802 N.Y.S.2d at 69.

126. *See* Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 248 (2d Cir. 2006).

127. *Id.* at 254 (holding that where the undocumented worker did not violate the IRCA, where the employer knowingly violated the IRCA at the outset of the employment relationship, and where the wrong being compensated was not authorized by the IRCA, there was no conflict between federal and state laws, and a remedy was allowed).

128. *See id.* at 248 (reasoning that refusing recovery would incentivize the hiring of undocumented workers).

129. *Id.*

130. *Balbuena II*, 845 N.E.2d at 1258.

131. *Id.* at 1258–59. The policy behind the decision that the court articulated is an example of the ways in which court reasoning can overlap. In this case, the policy reasons for its decision

Hoffman Court's concern that awarding backpay would condone the employee's criminal conduct does not apply.[132] In fact, where the employer knowingly hired the undocumented worker and continued his or her employment in violation of the IRCA, courts were more concerned that the employer not be allowed to evade its liability.[133]

Relative-fault analysis is also evident in cases where employers specifically sought out foreign workers, misrepresented the terms of the employment agreement, and led those workers to believe mistakenly that they were working lawfully in the United States.[134] In one case, the employer recruited and employed workers from India as welders, fitters, and electrical maintenance workers; housed them in very poor conditions; and restricted their "movement, communications, privacy, worship, and access to health care."[135] The court employed some balancing of fault when comparing the employees' and employer's actions, finding that the plaintiffs did not seek to enter and work in the United States illegally, but instead were

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focus more upon the potential for future fault. For a more detailed discussion of the future fault analysis, see *infra* Part III.B.

132. *See id.* (reasoning that since the employee did not commit a criminal act, *Hoffman* did not apply).

133. *See Balbuena II*, 845 N.E.2d at 1258 (finding no allegation that plaintiffs were even asked by their employers to present work documents); Mezonos Maven Bakery, Inc., No. 29-CA-25476, 2006 NLRB LEXIS 491, at *41–42 (Nov. 1, 2006) (noting that the employer was the wrongdoer and should not be able to evade liability for backpay*)*; *see also Balbuena II*, 845 N.E.2d at 1263 (Smith, J., dissenting). In reaching his conclusion, Judge Smith distinguishes the facts before him from those involving employees who were not paid for completed work. *Id.* In those other cases, Judge Smith would be more inclined to balance the wrongs between the employer and employee. *Id.* at 1261. He stated,

> Thus these are not cases, as some involving illegal arrangements are, in which to dismiss the claim is to give a windfall to a defendant at least as guilty of wrongdoing as the plaintiff, or in which to deny recovery is to leave a plaintiff uncompensated for work actually done.

Id. at 1262. In his analysis of the "illegal contract," he does acknowledge that there are some situations in which relative fault (or culpability) might be relevant:

> I agree with the majority here that the conduct of the undocumented alien in *Hoffman* was worse than the conduct of Balbuena and Majlinger. He committed a crime, and they did not. If Balbuena and Majlinger were suing their employers—who, on the facts of these cases, may well have acted criminally in hiring them without demanding documentation from them—the difference in culpability might be relevant; . . . a case in which a lesser offender is suing a greater one may sometimes (though not always) qualify for an exception to the general rule that lawsuits based on illegal transactions will not be countenanced.

Id. at 1264.

134. Chellen v. John Pickle Co. (*Chellen II*), 434 F. Supp. 2d 1069 (N.D. Okla. 2006) (awarding damages to employees who were recruited from India to work in the United States and whose employer violated both the FLSA and § 1981), *amended by* Chellen v. John Pickle Co., 446 F. Supp. 2d 1247 (N.D. Okla. 2006); Chopra v. U.S. Prof'ls, LLC, No. W2004-01189-COA-R3-CV, 2005 WL 280346 (Tenn. Ct. App. Feb. 2, 2005).

135. *Chellen II*, 434 F. Supp. 2d at 1080.

misled by the employer into believing their employment was lawful.[136] Relying on cases finding undocumented workers entitled to legal relief against a "knowing employer," the court found that the employees were entitled to damages under the FLSA, Title VII, and Section 1981.[137]

In a similar case involving claims of breach of contract and intentional misrepresentation, employers went to India and putatively hired an employee as a computer analyst on an H-1B visa.[138] Despite these promises, the employers had the employee working as a cashier at a gas station for less than minimum wage.[139] After a jury verdict in favor of the employee, the employers relied upon *Hoffman* on appeal to argue that the employee did not have standing to sue.[140] The court distinguished *Hoffman* by balancing the actions of the employers and employee, finding that the plaintiff did not violate the IRCA, but rather entered the United States legally and was legally entitled to work under an H-1B visa.[141] But for the defendants' actions, the plaintiff would have remained legally entitled to work during the period for which he sought damages.[142] The court reasoned that to deny the plaintiff standing would violate immigration policy by "permitting, if not encouraging, unscrupulous employers to fraudulently obtain H-1B visas to employ foreign nationals at less than minimum wage."[143]

Finally, one court laid the groundwork for examination of employee-immigration fault against employer-workplace fault.[144] Though not the basis for the court's ruling,[145] the court did recognize

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136. *Id.* at 1099 (finding the employer knew the plaintiffs could not be legally employed in the United States).

137. *Id.* at 1099, 1115.

138. *Chopra*, 2005 WL 280346, at *1.

139. *Id.*

140. *Id.* at *2.

141. *Id.* at *4 ("Unlike *Hoffman*, the case now before this Court is not one in which the plaintiff/employee seeks to subvert the IRCA.").

142. *Id.* at *2 ("As an initial matter, we note that Mr. Chopra entered the United States legally under an H-1B visa obtained by Appellants. Mr. Chopra's later illegal alien status resulted from Appellants' failure to fulfill their obligations under . . . 8 U.S.C. §1184(c)(5)(A), to pay for the reasonable costs of his return to India upon dismissal before the end of the period of authorized admission. We therefore find Appellants' reliance on Mr. Chopra's status as an illegal alien somewhat disingenuous.").

143. *Id.* at *4.

144. Crespo v. Evergo Corp., 841 A.2d 471 (N.J. Super. Ct. App. Div. 2004).

145. *Id.* at 473–77. In *Crespo*, the undocumented-alien plaintiff sought economic and noneconomic damages against her employer, claiming discriminatory termination. *Id.* at 472. The plaintiff had obtained her employment by using a false Social Security card. *Id.* at 473. The Court refused to award plaintiff either economic or noneconomic damages because of her "disqualification from legal employment." *Id.* at 476. The Court ultimately decided that because

that in some instances, where the workplace discrimination is so unconscionable as to outweigh the employee's illegal acceptance of employment, the employee would not be barred from seeking economic and noneconomic damages.[146]

Thus, there are a number of courts that weigh the relative fault of the employee and the employer and utilize that finding as part of either the holding or the reasoning in the case. Courts that balance fault as part of the holding incorporate this reasoning into the assessment of damages. However, courts that balance fault as part of the reasoning utilize it as part of a preemption analysis or as part of a general analysis of fairness.

4. Raising Concern with or Refusing to Engage in Evaluation of Fault

Despite the various ways courts utilize concepts of fault, several courts have expressed concern with evaluating fault or have refused to engage in a balancing of the respective fault of the parties.[147] While each of these courts necessarily discusses fault,[148] they have expressly declined to make an evaluative judgment about immigration-related fault and thus do not address how such an evaluation might affect their decisionmaking.

One court refused to engage in fault-based reasoning because it feared that doing so would require it to delve into endless evidentiary proceedings that would make the workers' compensation system an

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there was no " 'aggravated sexual harassment' or other egregious circumstances" on the part of the employer, the illegality of the plaintiff's employment precluded the right to recover either economic or noneconomic damages. *Id.* at 477.

146. *Id.* at 471. In *Crespo*, the court seemed to balance the employee's illegal acceptance of employment against non-IRCA related factors which sometimes accompany discrimination claims. This type of reasoning is not really an IRCA-related balancing, and, anyway, the analysis is clearly employee centered: just the act of accepting employment forecloses the remedy. *Id.* at 476–77 (citing Cedeno v. Montclair State Univ., 725 A.2d 38 (N.J. Super. Ct. App. Div. 1999)) ("We can conceive of other circumstances, such as the aggravated sexual harassment alleged in *Lehmann v. Toys 'R' Us, Inc.*, . . . where the need to vindicate the policies of the LAD or CEPA and to compensate an aggrieved party for tangible physical or emotional harm could lead to the conclusion that even a person who was absolutely disqualified from holding public employment should be allowed to seek compensation for harm suffered during that employment.").

147. *See* Farmers Bros. Coffee v. Workers' Comp. Appeals Bd., 35 Cal. Rptr. 3d 23 (Ct. App. 2005); Majlinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56 (App. Div. 2005), *aff'd sub nom. Balbuena II*, 845 N.E.2d 1246 (N.Y. 2006); Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d 314 (App. Div. 2004), *abrogated by* Balbuena v. IDR Realty LLC (*Balbuena II*), 845 N.E.2d 1246 (N.Y. 2006).

148. Each of these cases also falls into other categories—those where the employee fraud bars or does not bar the claim. While courts in each of these cases discuss fraud in these other contexts, the courts expressly refuse to make an evaluative judgment about that fault.

enforcer of the IRCA.[149] In another case involving lost wages, the court refused to evaluate fault because it found *Hoffman* and its emphasis on the employee's IRCA violation inapplicable in the tort context.[150] In reaching its conclusion, the court decoupled concepts of immigration-related fault from the underlying issues raised in the case and framed the discussion in terms of the parties' respective duties.[151]

Finally, in another lost earnings case, the court found that it made no difference whether it was the employer who violated the IRCA (by hiring the plaintiff without verifying his documents) or whether it was the employee who violated the IRCA (by tendering false documents).[152] Instead, the court limited the plaintiff's recovery to wages he could have earned in his home country and found that the plaintiff's acceptance of the unlawful employment was enough to "constitute misconduct contravening IRCA's policies whether or not he submitted false documents so as to expose himself to potential

149. *Farmers Bros.*, 35 Cal. Rptr. 3d at 28 ("If compensation benefits were to depend upon an alien employee's federal work authorization, the Workers' Compensation Appeals Board would be thrust into the role of determining employers' compliance with the IRCA and whether such compliance was in good faith, as well as determining the immigration status of each injured employee, and whether any alien employees used false documents. Benefits would be denied to the undocumented injured employee for the sole reason that he is undocumented. Thus, the remedial purpose of workers' compensation would take on an enforcement purpose, in direct *conflict* with the IRCA.") (citation omitted).

150. *See Majlinger*, 802 N.Y.S.2d at 69 ("We have concluded, however, that the *Hoffman* decision simply does not apply to awards of damages in personal injury actions. Therefore, we do not limit our holding to cases in which the plaintiff can prove that he or she has not submitted a fraudulent document in violation of the IRCA or that the employer was aware of his or her immigration status . . . .").

151. *Id.* at 64 ("As between an undocumented worker and the federal government, the act of submitting fraudulent documents in order to secure employment is unlawful. . . . As between the employer and the federal government, the act of hiring an undocumented worker knowingly or without verifying his or her employment eligibility is unlawful . . . . As between the undocumented worker and the employer, however, there is a contract of employment, under which the worker is entitled to be paid for his or her work. Moreover, as between the worker and an alleged tortfeasor, there are duties under the common law and the New York statutes governing workplace safety. . . . The contractual, statutory, and common-law duties owed to the worker are unrelated to, and do not depend on, the worker's compliance with federal immigration laws . . . .")

152. *See* Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d 314, 320–21 (App. Div. 2004), *abrogated by Balbuena II*, 845 N.E.2d 1246 ("*Hoffman* compels the conclusion that plaintiff cannot recover lost United States wages he might have unlawfully earned, had he not been injured, whether it was Tower (by hiring plaintiff without requesting documentation of his right to work) or plaintiff himself (by tendering false documents to Tower) who committed the IRCA violation that resulted in the unlawful employment. In this regard, we *believe that plaintiff's acceptance of unlawful employment should be deemed to constitute misconduct contravening IRCA's policies whether or not he submitted false documents so as to expose himself to potential criminal liability*.") (emphasis added).

criminal liability."[153] Contrary to the decisions discussed up to this point, these decisions reflect the reluctance of some courts to examine and weigh the immigration-related fault of the parties.

B. Future Fault-Based Reasoning

Courts employing future fault-based reasoning typically analyze whether a particular ruling has the potential to lead to future violations of the law or other misconduct. The roots of this analytical framework can be found in pre-*Hoffman* cases and the *Hoffman* case itself. Pre-*Hoffman* cases weighed in favor of the employee, finding that protection of undocumented workers in the labor and employment arena would discourage the hiring of undocumented workers and thus uphold immigration laws.[154] *Hoffman*, on the other hand, asserted that allowing backpay to undocumented workers under the NLRA would subvert the IRCA's important policy goals because it would both condone past violations and encourage future violations of the IRCA.[155] In terms of encouraging future violations, the Court emphasized that the employee could not technically mitigate damages, as required under the NLRB remedial scheme, "without triggering new IRCA violations either by tendering false documents to employers

153. *Id.* (limiting the plaintiff's recovery to what he could have earned *lawfully and* rejecting the *Balbuena I* dissent's suggestion that limiting the plaintiff's recovery to foreign wages was the equivalent of "punishment of the undocumented worker").

154. *See, e.g.*, Sure-Tan, Inc. v. NLRB., 467 U.S. 883, 893 (1984) (stating that the application of the NLRA to illegal aliens "helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If the employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened"); Patel v. Quality Inn S., 846 F.2d 700, 704 (11th Cir. 1988) (holding that "the FLSA's coverage of undocumented aliens goes hand in hand with the policies behind the IRCA. . . . If the FLSA did not cover undocumented aliens, employers would have an incentive to hire them. . . . By reducing the incentive to hire such workers the FLSA's coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA").

155. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 148–51 (2002). In terms of condoning past violations, presumably the Court's concern stemmed from the fact that in this particular case, Castro obtained his employment by submitting false documents; allowing backpay would thus condone his past act and others similar to it: "The [NLRB] asks that we . . . allow it to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job *obtained in the first instance by criminal fraud*." *Id.* at 148-49 (emphasis added). Presumably, the Court's concern for future violations stemmed from its perception of both the incentive that backpay awards would provide in encouraging undocumented immigrants to seek employment in the United States or to stay in the United States to assure that they qualify for the award (because by leaving they would forfeit their right under *Sure-Tan*), and its later argument that mitigation required under the NLRA would necessarily entail a further IRCA violation by either the employee or a subsequent employer.

or by finding employers willing to ignore IRCA and hire illegal workers."[156]

Post-*Hoffman* courts analyze whether their decisions will encourage or discourage both future immigration violations and future violations of safety and labor laws.[157] Among these two future-based fault approaches, courts most often discuss whether their decisions will encourage or discourage future immigration violations. In this context, courts analyze future fault from the perspectives of the employer and the employee.[158]

When analyzing future fault from the perspective of the employer, courts question whether the denial of a certain remedy will create an incentive for employers to violate immigration laws or whether the grant of a remedy will encourage employers' compliance with immigration laws. Denying employees standing or recovery lowers employers' potential liability and creates a financial incentive to violate immigration laws by hiring undocumented workers.[159]

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156. *Hoffman*, 535 U.S. at 150–51. Castro in fact did mitigate his damages by finding interim work during the NLRB and ALJ proceedings. But, as the Court emphasized, Castro did so through tendering false documents to his post-*Hoffman* employer. *Id.*

157. There is also a series of cases in which courts are trying to ascertain whether their decisions would create equity. Since these cases do not relate directly to the examination of future fault discussed above, they are not included in the text, but this line of reasoning arises frequently enough to warrant consideration here. One dissenting opinion and one court found that where the employee actually did the work, there is no unjust enrichment to the undocumented worker. *See, e.g.*, *Balbuena II*, 845 N.E.2d 1246, 1262 (N.Y. 2006) (Smith, J., dissenting) (distinguishing the lost earnings case from a case where plaintiff sues to recover wages already earned); *Coque II*, 867 N.Y.S.2d 158, 166 (App. Div. 2008). Other courts find that prohibiting damages to the employee would create a windfall to the employer, while allowing damages does not give the employee a windfall because the jury can take the employee's undocumented status into account in determining the amount of the award. *See, e.g.*, Coma Corp. v. Kan. Dep't of Labor, 154 P.3d 1080, 1087 (Kan. 2007) (citing Gates v. Rivers Constr. Co., Inc., 515 P.2d 1020, 1022 (Alaska 1973)) (reasoning that a guilty employer should not be allowed to profit at the expense of the employee); *Balbuena II*, 845 N.E.2d at 1262–63 (Smith, J., dissenting) (reasoning that in the case of some "illegal arrangements," denying recovery would give a windfall to a defendant who was at least as guilty as the plaintiff, or denying recovery would leave the plaintiff uncompensated for work he had already completed); *Coque II*, 867 N.Y.S.2d at 166 (finding that relieving an employer complicit in an illegal hiring would result in a windfall to the employer thus encouraging the employer to hire more undocumented workers). Another case is concerned for the public. Reyes v. Van Elk Ltd., 56 Cal. Rptr. 3d 68, 77 (Ct. App. 2007) (pointing out that the public does not benefit when employers save money by hiring undocumented workers, that the bids that the employers accept are based on prevailing wages, and that when the employer does not pay that wage, the employer "pockets the difference").

158. For a discussion of future fault from the perspective of the employer, see notes 153–162 and accompanying text. For a discussion of future fault from the perspective of the employee, see *infra* notes 163–68 and accompanying text.

159. *See* Madeira v. Affordable Hous. Found. Inc., 469 F.3d 219, 245 (2d Cir. 2006) (quoting Dowling v. Slotnik, 712 A.2d 396, 404 (Conn. 1998)) ("[E]xcluding [undocumented] workers from the pool of eligible employees would relieve employers from the obligation of obtaining workers' compensation coverage for such employees and thereby contravene the purpose of the

Courts reason that if they deny specific remedies to undocumented workers, employers could simply disregard the employment verification system and avoid future liability by hiring undocumented workers.[160] Conversely, if courts require employers to compensate

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Immigration Reform Act by creating a financial incentive for unscrupulous employers to hire undocumented workers."); *Balbuena II*, 845 N.E.2d 1246, 1257 (N.Y. 2006) (stating that barring recovery would "lessen the unscrupulous employer's potential liability to its alien workers and make it more financially attractive to hire undocumented aliens"); Balbuena v. IDR Realty LLC (*Balbuena I*), 13 A.D.3d 285, 288 (N.Y. App. Div. 2004) (Ellerin, J., dissenting) (noting "it is more likely to encourage employers to hire workers without examining their documents, contrary to the purposes of the IRCA"), *rev'd*, 845 N.E.2d 1246; Pineda v. Kel-Tech Constr., Inc., 832 N.Y.S.2d 386, 392–93 (Sup. Ct. 2007) (citing Garcia v. Pasquareto, 812 N.Y.S.2d 216, 217 (App. Term 2004)) (noting that New York courts do not dismiss causes of action for wages earned by undocumented workers because it would contravene the public policy of New York and the federal government); Chopra v. U.S. Prof'ls, LLC, No. W2004-01189-COA-R3-CV, 2005 WL 280346, at *4 (Tenn. Ct. App. 2005) (reasoning that to deny plaintiff standing would violate immigration policy by "permitting, if not encouraging, unscrupulous employers to fraudulently obtain H-1B visas to employ foreign nationals at less than minimum wage"); Mezonos Maven Bakery, Inc., No. 29-CA-25476. 2006 NLRB LEXIS 491, at *43 (Nov. 1, 2006) (denying a backpay award gives a financial incentive to the employer to hire more undocumented workers); *see also* Flores v. Amigon, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002) (noting that if employers know that they will be subject to criminal and civil liability when they hire illegal immigrants, but they are still required to pay them at the same rate as legal workers, then there is no incentive to hire undocumented aliens); Reyes v. Van Elk, Ltd., 56 Cal. Rptr. 3d 68, 77–78 (Ct. App. 2007) (citing Rivera v. NIBCO, Inc., 364 F.3d 1057, 1072 (9th Cir. 2004)) (finding that many employers want to find the cheapest work force possible, and thus they "turn a blind eye to immigration status"). Therefore, allowing employers to pay undocumented workers less than the prevailing wage conflicts with IRCA policy, because it encourages future immigration violations by employers and encourages employers to profit from undocumented workers and then exploit them later. Farmer Bros. Coffee v. Workers' Comp. Appeals Bd., 35 Cal. Rptr.3d 23, 28 (Ct. App. 2005); Mendoza v. Monmouth Recycling Corp., 672 A.2d 221, 224–25 (N.J. Super. Ct. App. Div. 1996) ("[I]mmunity from accountability [under Workers' Compensation Act] might well have the further undesirable effect of encouraging employers to hire illegal aliens in contravention of the provisions and policies [of the Immigration Reform Act]."); Montoya v. Gateway Ins. Co., 401 A.2d 1102, 1104 (N.J. Super. Ct. App. Div. 1979) (stating that if undocumented workers are unable to file claims based on injuries sustained, potential employers may be encouraged to employ more undocumented workers); Reinforced Earth Co. v. Workers' Comp. Appeals Bd., 749 A.2d 1036, 1039 (Pa. Commw. Ct. 2000), *superseded by statute*, 1996 Pa. Legis. Serv. 57 (West) (noting that denying workers' compensation to injured undocumented employees would provide employers with an incentive to violate immigration laws by "actively seek[ing] out illegal aliens rather than citizens or legal residents because they will not be forced to insure against or absorb the costs of work-related injuries").

160. *See* Mezonos Maven Bakery, Inc., No. 29-CA-25476, 2006 NLRB LEXIS 491, at *43 (Nov. 1, 2006). Perhaps this best sums the court's policy argument up:

> If a backpay remedy is denied, the seven employees would be held responsible for the Respondent's violation of IRCA. Denying an award of backpay would punish the employees, benefit the wrongdoer, condone the employment of undocumented workers and place the risk associated with such employment on the employees instead of the employer. However, by requiring the employer to pay backpay to undocumented workers, the employer will have no incentive to hire undocumented workers because there will be no benefit in violating the Act.

Id. at *51; *see also* Singh v. Jutla & C.D. & R's Oil, Inc., 214 F. Supp. 2d 1056, 1062 (N.D. Cal. 2002) (stating that the FLSA "discourages employers from hiring such workers because it

undocumented workers at the same rates as legal workers, the employer will have less incentive to hire the undocumented worker.[161] Further, courts reason that because undocumented workers are willing to work in more dangerous, less desirable, and lower-paid jobs than U.S. citizens and legal immigrants, disallowing recovery for lost wages would "actually increase employment levels of undocumented aliens," not decrease it as Congress intended when it passed the IRCA.[162] Some courts have also considered an additional dynamic at play here; because employers want to avoid being held liable for violations of immigration laws, they may ignore immigration laws when they hire, but they may be more likely to attempt to have the law selectively enforced when employees complain.[163] While the reasoning above represents the vast majority of decisions, one court found the opposite and reasoned that potentially limiting one type of damages is such a "remote and uncertain benefit" that it would not incentivize employers' hiring of undocumented workers.[164]

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eliminates the employers' ability to pay them less than minimum wage or otherwise take advantage of their status"); Amoah v. Mallah Mgmt., LLC, 57 A.D.3d 29, 33 (N.Y. App. Div. 2008) (quoting *Balbuena II*, 845 N.E.2d at 1257) ("[L]imiting a [reduced earnings] claim by an injured undocumented alien would lessen an employer's incentive to . . . supply all of its workers the safe workplace that the Legislature demands.").

161. *See* Flores v. Amigon, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002) (finding that employers know that "when they hire illegal aliens, . . . they will . . . be required to pay them at the same rates as legal workers for work actually performed, there are virtually no incentives left for an employer to hire an undocumented alien in the first instance"); *Pineda*, 832 N.Y.S.2d at 392 (citing *Garcia*, 812 N.Y.S.2d at 217).

162. *Balbuena II*, 845 N.E.2d at 1258 (N.Y. 2006); *see Madeira*, 469 F.3d at 248 (2d Cir. 2006) (stating that to refuse to allow recovery against an employer who knew or should have known of the undocumented worker's illegal status would incentivize such employers to " 'target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions' "); *Reyes*, 56 Cal. Rptr. 3d at 74 (noting that wages for work already performed did not conflict with federal immigration policy); Rosa v. Partners in Progress, Inc., 868 A.2d 994, 1000 (N.H. 2005) ("A policy that does not permit recovery will marginally lower the costs for the employment of illegal aliens, and 'employers might find it economically advantageous to hire . . . undocumented workers and run the risk of sanctions under the IRCA.'").

163. *See Rivera*, 364 F.3d at 1072 ("Regrettably, many employers turn a blind eye to immigration status during the hiring process; their aim is to assemble a workforce that is both cheap to employ and that minimizes their risk of being reported for violations of statutory rights. Therefore, employers have a perverse incentive to ignore immigration laws at the time of hiring but insist upon their enforcement when their employees complain."); *Reyes*, 56 Cal. Rptr. 3d at 77–78 (citing *Rivera*, 364 F.3d at 1072) (finding that employers also want to avoid being held liable for violations of immigration laws, and therefore, while they may ignore the law when they hire, they are likely to attempt to enforce the law when their employees complain).

164. Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d 314, 320 (App. Div. 2004) (finding that employers usually purchase insurance to cover such future tort actions, but they are also subject to civil and criminal penalties if they violate the IRCA). The court reasoned that just as the potential to recover lost wages in a future personal injury action is not enough to influence an immigrant to work illegally in the United States, the potential to limit lost earnings damages

The flip side of this analysis reveals that granting employees standing or allowing employees to recover actually prevents future illegal acts by denying employers the economic incentive to hire undocumented workers.[165] Thus, if courts actually uphold labor and employment protections, the IRCA's policy of reducing illegal immigration is supported because it "offset[s] the most 'attractive feature' of such workers—their willingness to work for less than the minimum wage."[166] Employers will be left with few, if any, incentives to hire undocumented workers,[167] and they will have less incentive to unlawfully fire undocumented workers as well.[168]

When analyzing the potential for future fault from the perspective of the employee, some courts find that granting a remedy will encourage future misconduct by undocumented workers or will reward an undocumented worker for previous misconduct. In its simplest analytical form, courts find that awarding a remedy to an undocumented immigrant provides an incentive for illegal aliens to seek work in the United States.[169] Courts reason that an award of U.S. wages would encourage future IRCA violations because the remedy assumes or requires that the undocumented worker will continue future employment in violation of immigration laws.[170] Courts also

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to the immigrant's home-country wages would not likely influence the employer's "hiring behavior." *Id.*

165. *See* Coma Corp. v. Kan. Dep't of Labor, 154 P.3d 1080, 1087 (Kan. 2007) (noting that payment of wages for work actually performed furthers federal immigration policy under the IRCA); Coque v. Wildflower Estates Developers, Inc. (*Coque II*), 867 N.Y.S.2d 158, 166 (App. Div. 2008) (noting that foreclosing employees from recovering lost wages encourages violations of federal law by employers); Majlinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56, 69 (App. Div. 2005) ("As we have noted, withholding lost wages from undocumented aliens would create a perverse incentive for employers to hire such aliens. Were employers, general contractors, and property owners allowed to escape liability for lost wages where they are purportedly unaware of an employee's undocumented status, an incentive would still exist for employers to remain willfully ignorant of prospective employees' immigration status and to hire undocumented aliens . . . .").

166. *Reyes*, 56 Cal. Rptr. 3d at 614 (citing Patel v. Quality Inn S., 846 F.2d 700, 703 (11th Cir. 1988)).

167. Flores v. Amigon, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002); *see also* Cabrera v. Ekema, 695 N.W.2d 78, 82 (Mich. Ct. App. 2005) ("Whatever benefit an employer might have . . . gained by paying less than the minimum wage is eliminated [by requiring payment of wages for work already performed] and the employer's incentive would be to investigate and obtain proper documentation from each of his workers.").

168. Mezonos Maven Bakery, Inc., No. 29-CA-25476, 2006 NLRB LEXIS 491, at *50 (Nov. 1, 2006).

169. *Coma*, 154 P.3d at 1093–94.

170. Renteria v. Italia Foods, Inc., No. 02 C 495, 2003 U.S. Dist. LEXIS 14698, at *19 (N.D. Ill. Aug. 21, 2003) ("[F]ront pay essentially assumes that the workers will continue to work for the employer in the future, which is against the law for an undocumented alien."); *see* Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d 314, 319 (App. Div. 2004) (providing a remedy to

conclude that requiring the employer to pay would "punish" the employer and "reward" the undocumented worker for remaining in the United States, working without authorization and intentionally violating the IRCA.[171]

While a limited number of courts fear that granting remedies to undocumented workers will encourage future violations of immigration laws, other courts find that the potential for a future award to the worker is too speculative to encourage illegal immigration. These courts reason that it is unlikely that an undocumented worker would submit fraudulent documents and immigrate to the United States illegally in the hopes that someday he or she could recover a large labor or employment violation award.[172] Further, some courts find that the award to the employee does not encourage immigrants to enter the United States;[173] immigrants come seeking work, not the protection of our labor laws.[174]

In addition to analyzing whether or not certain remedies will encourage or discourage future immigration law violations, courts

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undocumented workers would encourage future IRCA violations because the undocumented worker would be unable to mitigate damages without violating the IRCA).

171. *Sanango*, 788 N.Y.S.2d at 318 (stating that, like an award of backpay in *Hoffman*, a lost earnings award would compensate an undocumented worker for wages he could have earned "only by 'remain[ing] in the United States illegally, and continu[ing] to work illegally, all the while successfully evading apprehension by immigration authorities' "); *see also Coma*, 154 P.3d at 1093–94 (discussing the district court's holding, not the Kansas Supreme Court's holding, which found that a lost earnings award would wrongly compensate the plaintiff for work that he did illegally in the United States); Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 332 (Minn. 2003) (Gilbert, J., dissenting) (arguing that by allowing the employee to recover disability benefits predicated on a diligent job search, the employee was actually being rewarded for remaining in the United States illegally).

172. Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 246 (2d Cir. 2006) (finding that potential eligibility for workers' compensation benefits is not an incentive for undocumented aliens to obtain work in the United States illegally); Patel v. Quality Inn S., 846 F.2d 700, 704 (11th Cir. 1988) (noting that it is the procurement of employment at any wage, not the prospect of job-related protections under the labor laws, that attracts illegal immigrants, and that if the FLSA did not cover undocumented aliens, employers would have a greater incentive to hire them); Mezonos Maven Bakery, Inc., No. 29-CA-25476, 2006 NLRB LEXIS 491, at *51 (Nov. 1, 2006) ("It is too speculative to contend that people will enter the United States illegally only to obtain backpay in the event that they are illegally discharged."); Reyes v. Van Elk Ltd., 56 Cal. Rptr. 3d 68, 78 (Ct. App. 2007) ("We doubt, however, that many illegal aliens come to this country to gain the protection of our labor laws. Rather it is the hope of getting a job—at any wage—that prompts most illegal aliens to cross our borders."); Coque v. Wildflower Estates Developers, Inc. (*Coque II*), 867 N.Y.S.2d 158, 166 (App. Div. 2008); Balbuena v. IDR Realty LLC (*Balbuena I*), 13 A.D.3d 285, 288 (N.Y. App. Div. 2004) (Ellerin, J., dissenting), *rev'd*, 845 N.E.2d 1246.

173. *See, e.g.*, Mezonos Maven Bakery, Inc., No. 29-CA-25476, 2006 NLRB LEXIS 491, at *50 (Nov. 1, 2006) ("[I]n being awarded backpay, employees do not receive compensation for entering the United States without authorization.").

174. *Balbuena I*, 787 N.Y.S.2d at 37 (Ellerin, J., dissenting).

also, although to a lesser extent, question whether awarding a certain remedy will undermine workplace safety and other labor laws. Courts reason that to limit or deny awards to undocumented workers creates a disincentive for the employer to supply all workers with a safe workplace,[175] whereas awarding benefits to an injured, undocumented worker encourages employers' compliance with immigration and safety laws.[176] Thus, the denial of recovery for undocumented workers could actually promote unsafe worksite practices, undermining the objectives of state labor law.[177] Similar to the reasoning employed by courts that suggests undocumented workers should not benefit from their illegal actions, courts in this context find that an employer should not be rewarded for failing to provide a safe workplace for its employees.[178]

As the above discussion demonstrates, across many labor and employment cases involving undocumented workers, courts are applying concepts of fault, both past fault and fault as it relates to the potential for future wrongdoing. When utilizing past fault as part of their decisionmaking, courts take a range of different approaches. Some courts focus exclusively on the wrongdoing of the employee as the basis for their decisionmaking, while other courts focus exclusively on the wrongdoing of the employer. Other courts examine the relative fault of both parties to the litigation, yet others specifically reject the use of fault concepts altogether. There are also a number of different

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175. Design Kitchen & Baths v. Lagos, 882 A.2d 817, 826 (Md. 2005) ("[W]ithout the protections of the statute, unscrupulous employers could, and perhaps would, take advantage of this class of persons and engage in unsafe practices with no fear of retribution, secure in the knowledge that society would have to bear the cost of caring for these injured workers."); Mendoza v. Monmouth Recycling Corp., 672 A.2d 221, 225 (N.J. Super. Ct. App. Div. 1996) (denying compensation to illegal aliens may have the effect of encouraging employers to hire more illegal aliens and take less care to provide safe workplaces); Amoah v. Mallah Mgmt., LLC, 57 A.D.3d 29, 33 (" '[L]imiting a [reduced earnings] claim by an injured undocumented alien would lessen an employer's incentive to . . . supply all of its workers the safe workplace that the Legislature demands.' ") (quoting Balbuena v. IDR Realty LLC (*Balbuena II*), 845 N.E.2d 1246, 1257 (N.Y. 2006)).

176. *Madeira*, 469 F.3d at 246.

177. *See Design Kitchen*, 882 A.2d at 826 ("[W]ithout the protection of the [workers' compensation] statute, unscrupulous employers could, and perhaps would, take advantage of this class of [undocumented workers] and engage in unsafe practices with no fear of retribution, secure in the knowledge that society would have to bear the cost of caring for these injured workers."); *Balbuena II*, 845 N.E.2d at 1260 ("[A] per se preclusion of recovery for lost wages would condone the employers' conduct in contravention of IRCA's requirements and promote unsafe work site practices, all of which encourages the employment of undocumented aliens and undermines the objectives that both IRCA and the state Labor Law were designed to accomplish."); *Balbuena I*, 787 N.Y.S.2d at 37 (Ellerin, J., dissenting) (noting that an alien's ineligibility for backpay is likely to encourage employers to reduce their compliance with state safety laws).

178. Coque v. Wildflower Estates Developers, Inc. (*Coque II*), 867 N.Y.S.2d at 166.

approaches taken by courts that examine fault as it relates to the potential for future misconduct. Some courts emphasize the impact a decision will have on future immigration wrongdoing, whether from the perspective of the employer or employee. Other courts examine the impact a decision will have upon future labor and employment wrongdoing. In light of the fact that courts routinely invoke concepts of fault in employment cases involving undocumented workers, the next Part examines the validity of such reasoning.

IV. PROBLEMS WITH FAULT-BASED CONSTRUCTS

This Part follows the past and future fault taxonomy applied in *Hoffman* and its progeny to examine the legitimacy of fault-based decisionmaking. Specifically, this Part categorizes decisionmaking into three types: future fault-based decisionmaking, past fault-based decisionmaking that is not rooted in existing doctrine, and past fault-based decisionmaking that is rooted in existing doctrine. Two of the decisionmaking types raise separation of powers concerns[179] and fall along a continuum. At one end of the continuum is future fault-based decisionmaking in which courts evaluate the ways that a decision will impact future behavior and either effectuate or thwart legislative

179. An extended analysis of the doctrine of separation of powers is beyond the scope of this Article. For purposes of this Article, I only intend to identify potential separation of power implications and place the decisionmaking types onto a continuum. I do not intend to resolve whether in each case the court's decisionmaking violated separation of powers principles. The doctrine of separation of powers involves fundamental questions about our governmental structure, and the Supreme Court's attempts to define its contours in the context of an evolving modern administrative state have been inconsistent. *See* Matthew James Tanielian, Comment, *Separation of Powers and the Supreme Court: Done Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961, 961–62 (1995) (deconstructing the Court's modern separation of powers jurisprudence by examining the Justices who have defined the separation of powers debate and their decisionmaking methodologies). Scholars have divided the separation of powers doctrine into two categories: the formalist approach which emphasizes the functions and constraints in the text of the Constitution and the functionalist approach which focuses on finding the appropriate balance in the overlapping powers among the branches. *See* Linda D. Jellum, *"Which Is to Be Master," The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 860–878 (2009) (noting that the formalist approach emphasizes the need to maintain three distinct branches of government while the functionalist approach recognizes that overlap of beyond the core functions of the three branches is both necessary and desirable); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 229–35; Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 434–35 (1987); Peter R. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987); Tanielian, *supra*. *But see* Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1256 (1988) (arguing "that the current debate between a formalist and functionalist approach is to a large measure misconceived"). An in-depth exploration of the ways in which the doctrine of separation of powers implicates these cases presents the possibility of a subsequent article.

intent. Such reasoning, to the extent that it attempts to effectuate legislative intent, supports separation of powers principles and is the least problematic of the decisionmaking modalities. At the other, most problematic end of the continuum is past fault-based decisionmaking that is not rooted in any doctrine. These decisions are troubling as courts are not constrained in their decisionmaking by clear and applicable principles but instead appear to be engaged in judicial policymaking. While judicial policymaking is not necessarily problematic,[180] even those who identify the positive aspects of judicial policymaking temper their support with the caveat that some constraints need to exist.[181] The past-fault cases that are not rooted in existing doctrine appear to be simply courts' attempts to shape immigration policy through employment law cases. In the absence of any constraints, this approach raises separation of powers questions. In the middle are courts that apply past fault-based decisionmaking that is rooted in existing common law doctrine or statutes. These existing doctrines or statutes are designed to limit remedies for general, as opposed to immigration-specific, misconduct. This line of reasoning can be problematic in instances where courts improperly apply the general misconduct doctrines to immigration misconduct without identifying a sufficient nexus between the injury and the immigration wrongdoing.

A. Future Fault-Based Decisionmaking

Courts that employ future fault-based decisionmaking attempt to discern legislative intent and then examine ways in which a judicial decision would best effectuate that legislative intent. Courts adopting

180. There is debate among constitutional theorists regarding the legitimacy of policymaking by courts. *See* JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 2–3 (1980); Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195, 1254–55 (2009) ("Originalism and analytical jurisprudence both fail to produce workable standards of judicial role because each requires a timeless, transcendent definition of judicial activism. Such efforts cannot reconcile current judicial practice with our radically different past, much less can they accommodate the chance of future change."); Thomas C. Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703, 713 (1975) ("[I]t should be clear that an extraordinarily radical purge of established constitutional doctrine would be required if we candidly and consistently applied the pure interpretive model."); Richard B. Saphire, *Making Noninterpretivism Respectable: Michael J. Perry's Contributions to Constitutional Theory*, 81 MICH. L. REV. 782 (1983) (stating that Perry's justification for noninterpretive judicial review is based on the notion that only an activist court allows us as a polity to achieve our goal of ongoing moral reevaluation and growth).

181. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998) (arguing that the modern administrative state requires an active, policymaking judiciary and that there exist constraints on such policymaking).

future fault-based reasoning generally examine the potential impact of their decisions upon the future behavior of the litigants and potential litigants. By applying this approach, courts give effect to, or support, the policy decisions enacted by Congress and state legislatures. Specifically, courts analyze whether their decisions will encourage or discourage future immigration violations and future violations of safety and labor laws.

The future fault-based decisions assess incentives in different ways. A number of courts reason that denying undocumented workers recovery would create a financial incentive to violate immigration laws by hiring undocumented workers.[182] Whereas, requiring employers to compensate undocumented workers at the same rate as legal workers decreases the incentives to hire undocumented workers.[183] While the large majority of cases have adopted the reasoning above, one court found that potentially limiting damages to undocumented workers is so "remote and uncertain" a benefit to employers that it would not increase the incentives to hire undocumented workers.[184] There are a small number of courts that view the incentives from an entirely different angle. These courts find that granting a remedy will encourage future misconduct by undocumented workers or reward

182. *See, e.g.*, Madeira v. Affordable Hous. Found. Inc., 469 F.3d 219, 245 (2d Cir. 2006) (quoting Dowling v. Slotnik, 712 A.2d 396, 404 (Conn. 1998)) ("[E]xcluding [undocumented] workers from the pool of eligible employees would relieve employers from the obligation of obtaining workers' compensation coverage for such employees and thereby contravene the purpose of the Immigration Reform Act by creating a financial incentive for unscrupulous employers to hire undocumented workers."); *Balbuena II*, 845 N.E.2d at 1257 (stating that barring recovery would "lessen the unscrupulous employer's potential liability to its alien workers and make it more financially attractive to hire undocumented aliens"); *Balbuena I*, 787 N.Y.S.2d at 36 (Ellerin, J., dissenting) (noting that awarding damages for lost wages in tort cases would not have any significant impact on the IRCA's objective of "prohibiting" employment of aliens); Pineda v. Kel-Tech Constr., Inc., 832 N.Y.S.2d 386, 392–93 (Sup. Ct. 2007) (citing Garcia v. Pasquareto, 812 N.Y.S.2d 216, 217 (App. Term 2004)) (noting that enforcing wage payment laws for unauthorized immigrants furthers the policies underlying the IRCA by eliminating incentives for employers to hire undocumented immigrants); Chopra v. U.S. Prof'ls, LLC, No. W2004-01189-COA-R3-CV, 2005 WL 280346, at *4 (Tenn. Ct. App. 2005) (reasoning that to deny plaintiff standing would violate immigration policy by "permitting, if not encouraging, unscrupulous employers to fraudulently obtain H-1B visas to employ foreign nationals at less than minimum wage"); Mezonos Maven Bakery, Inc., 2006 NLRB LEXIS 491, at *43 (Nov. 1, 2006) (denying a backpay award gives a financial incentive to the employer to hire more undocumented workers).

183. *See, e.g.*, Flores v. Amigon, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002) (finding that because employers know that "when they hire illegal aliens . . . they will . . . be required to pay them at the same rates as legal workers for work actually performed, there are virtually no incentives left for an employer to hire an undocumented alien in the first instance"); *Pineda*, 832 N.Y.S.2d at 392 (noting that enforcing wage payment laws for unauthorized immigrants furthers the policies underlying the IRCA by eliminating incentives for employers to hire undocumented immigrants) (citing *Garcia*, 812 N.Y.S.2d at 217).

184. Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d 314, 320 (App. Div. 2004).

them for prior misconduct.[185] Other courts find that the potential for a future award is too speculative to encourage illegal immigration.[186]

Regardless of one's perspective on the underlying policy question, these courts, despite divergent outcomes, all attempt to effectuate legislative intent by assessing the ways in which a particular ruling would incentivize future behavior. In so doing, these courts may have gotten the underlying policy right or wrong, depending upon one's perspective, but the courts did so in an attempt to give effect to an identified legislative intent.

Courts employing the future-fault modality of decisionmaking attempt to effectuate legislative intent as part of the decisionmaking process. Scholars find legislatures to be superior to courts as policymakers because legislatures have the resources and ability to investigate problems and find facts in ways courts cannot.[187] Unlike judges, legislatures are accountable to the electorate and therefore should be more effective at implementing the preferences of the people.[188] Legislatures can also examine a wide range of costs and benefits, whereas the presence of individual litigants alters the court's perception of the costs and benefits for all.[189] Such analysis adheres to traditional notions of the respective roles of the judiciary and legislature, in which legislatures have the power to create law and

185. *See, e.g.*, Coma Corp. v. Kan. Dep't of Labor, 154 P.3d 1080, 1093–94, (Kan. 2007) (finding unpersuasive the district court's view that a statutory penalty to an illegal alien provides an incentive to illegal aliens to work in the United States and trivializes the IRCA); Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 332 (Minn. 2003) (Gilbert, J., dissenting) (arguing that by allowing the employee to recover disability benefits predicated on a diligent job search, the employee was actually being rewarded for remaining in the United States illegally); *Sanango*, 788 N.Y.S.2d at 318 (stating that, like an award of backpay in *Hoffman*, a lost earnings award would compensate an undocumented worker for wages he could have earned "only by 'remain[ing] in the United States illegally, and continu[ing] to work illegally, all the while successfully evading apprehension by immigration authorities' ").

186. *See, e.g.*, *Madeira*, 469 F.3d at 246 (finding that potential eligibility for workers' compensation benefits is not an incentive for undocumented aliens to obtain work in the United States illegally); Patel v. Quality Inn S., 846 F.2d 700, 704 (11th Cir. 1988) (noting that it is the procurement of employment at any wage, not the prospect of job-related protections under the labor laws, that attracts illegal immigrants, and that if FLSA did not cover undocumented aliens, employers would have a greater incentive to hire them); Mezonos Maven Bakery, Inc., No. 29-CA-25476. 2006 NLRB LEXIS 491, at *51 (Nov. 1, 2006) ("It is too speculative to contend that people will enter the United States illegally only to obtain backpay in the event that they are illegally discharged.").

187. David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 663 (2008); Richard S. Kay, *Judicial Policy Making and the Peculiar Function of the Law*, 40 CONN. L. REV. 1261, 1279–80 (2008); Ryan E. Mick, *Justifications For a Constitutional Jurisprudence of Deference to the States' Moral Judgments*, 12 KAN. J.L. & PUB. POL'Y 379, 385 (2003).

188. Mick, *supra* note 187, at 385 (finding that legislatures have democratic legitimacy and are well suited to reflect and enact public policy on behalf of constituents).

189. Kay, *supra* note 187, at 1279–80.

procedural rules to enforce law while the judiciary interprets the law.[190] In this way, future fault-based reasoning that attempts to effectuate legislative intent and adhere to separation of powers principles is the least problematic of the decisionmaking modalities.

B. Past Fault Not Rooted in an Existing Doctrine

Some courts examine fault unrelated to the underlying case, without rooting that examination in existing doctrine. Such analysis, not tethered to any existing doctrine and lacking a nexus to the defined elements of the underlying action, may result in unconstrained judicial policymaking. Basic to our notions of separation of powers is the idea that the legislature, as a body accountable to the people, makes the law while the judiciary interprets the law. When courts adhere to their role as a body that effectuates legislative intent, they uphold the concepts underlying separation of powers doctrines—namely, a tripartite governance system with checks and balances. However, when courts move away from effectuating policy and toward making policy, they are more likely to violate the principles underlying the separation of powers doctrine.

For example, in the wage-and-hour context, one court applied concepts of immigration fault unrelated to any existing doctrine. The court found that because the contract was "tainted with illegality," the undocumented worker was not entitled to recover the amount of wages due to him under the contract and was instead only eligible for minimum wage.[191] The court reached this conclusion based upon the mere fact that the employee was undocumented and further found that, had there been evidence that the undocumented worker utilized fraudulent documents to obtain employment, all remedies would have been denied.[192]

In a state discrimination case, one court, though declining to rely upon the after-acquired evidence doctrine, used general fault-based decisionmaking, unattached to any doctrine, when barring a claim for economic and noneconomic damages because of the underlying illegality of the plaintiff's employment.[193] The court found

190. Jellum, *supra* note 179, at 862–67.

191. Ulloa v. Al's Tree Serv., Inc., 768 N.Y.S.2d 556, 558 (Dist. Ct. 2003).

192. *Id.*

193. Crespo v. Evergo Corp., 841 A.2d 471, 477 (N.J. Super. Ct. App. Div. 2004). Interestingly, in this case, the plaintiff relied upon the court's prior case law in the after-acquired evidence arena to argue that she was still entitled to noneconomic damages, even if economic damages were barred, because of the underlying discriminatory harm done to her. *Id.*

that because there were no egregious discriminatory acts committed by the employer, the illegality of the plaintiff's employment precluded all recovery.[194] In these cases, in the absence of an existing fault-based doctrine, the decisions appear to be based upon the courts' improper attempts to influence immigration policy through adjudication of the specific employment issue.

In the torts context, in the absence of a viable existing doctrine that allows for the consideration of immigration fault, courts examine fault unrelated to any doctrine. There are two discernible approaches that courts take to limit undocumented workers' rights to damages in the torts context: denying all recovery because of fraud and limiting recovery to home-country wages. Courts that deny all recovery find that employee fraud is a sufficient basis upon which to deny recovery.[195] One court went so far as to deny all relief to a plaintiff who died as a result of an accident because it found that granting a lost-wages award in such circumstances would be tantamount to the court itself committing a violation of the IRCA.[196] The court found the

(citing Taylor v. Int'l Maytex Tank Terminal Corp., 810 A.2d 1109 (N.J. Super Ct. App. Div. 2002), to argue that the fact that the employer later learns of facts that would have caused her termination does not excuse the employer for noneconomic damages caused by discriminatory conduct).

194. *Id.*

195. Ambrosi v. 1085 Park Ave., LLC, No. 06-CV-8163(BSJ), 2008 WL 4386751, at *12–14 (S.D.N.Y. Sept. 25, 2008); Veliz v. Rental Serv. Corp. USA, 313 F. Supp. 2d 1317, 1336 (M.D. Fla. 2003); Macedo v. J.D. Posillico, Inc., No. 108316/06, 2008 WL 4038048, at *8 (N.Y. Sup. Ct. Aug. 13, 2008); *see also* Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d 314, 316–19 (App. Div. 2004). In this case, although the court couched its reasoning in preemption doctrine, its reasoning was misguided. Specifically, the court found that the mere acceptance of work by an undocumented worker constituted misconduct, regardless of whether the worker submitted false documents. *Id.* at 319–20. The court reasoned that allowing lost wages at U.S. rates would unduly encroach upon federal immigration policy because it would have allowed the worker to recover wages which, but for his injury, the employee could not have earned legally. *Id.* at 319. This perspective that the worker could only have earned his wages illegally is misguided to the extent that it ignores the fact that an employer may violate the IRCA by hiring an undocumented worker who does not violate the IRCA by merely accepting employment. From the perspective of the employee, he has done nothing illegal in this scenario, and he may still legally accept wages. Furthermore, as indicated above, courts in the wages-for-work-already-performed cases (FLSA and state wage claims) have uniformly allowed recovery of such wages. This court found that the undocumented worker would not be eligible for lost wages at U.S. rates regardless of fault, but could recover lost wages at country-of-origin rates. *Id.* at 316–17.

196. *Veliz*, 313 F. Supp. 2d at 1336 ("Following *Hoffman,* this Court finds that it cannot condone an award of lost wages here. In addition to trenching upon the immigration policy of the United States and condoning prior violations of immigration laws, awarding lost wages would be tantamount to violating the IRCA. Indeed, if this Court were an employer, it would be compelled to discharge Mr. Ignacio. Otherwise, it would face civil fines and criminal prosecution for knowingly compensating an undocumented alien in exchange for work. Awarding lost wages is akin to compensating an employee for work to be performed. This Court cannot sanction such a result.").

plaintiff's submission of fraudulent documents to be a significant factor to support its decision to deny lost wages.[197] In another case, one court took the extreme route of dismissing a lost-wages claim with prejudice because the employee, who presented false documents to obtain employment, filed his lawsuit using a false name; the court never reached the merits on the actual claim.[198]

Another line of cases creates a bifurcated recovery system in which undocumented workers either recover U.S. wages if the employer knew or should have known the workers were unauthorized or recover the wages the workers could have earned in their home country if the employer did not know they were undocumented.[199] In the absence of any preemption arguments and with an acknowledgement that *Hoffman* does not control, one court developed this bifurcated system by balancing the competing policy considerations.[200] On the one hand, allowing an illegal alien to recover lost wages at U.S. rates would create a paradoxical situation in which "an illegal alien can lawfully become entitled to the value of United

197. *Id.* The court noted that "it is apparent that the photo on the subject Resident Alien Card is not of the decedent." *Id.* Thus, it appears that the employer failed to discharge its IRCA verification responsibilities if the fraudulently tendered document was facially flawed. The court did not mention the employer's gullibility or relative fault and instead focused solely on the employee's fraud. The court in Coque v. Wildflower Estates Developers, Inc. (*Coque II*), 867 N.Y.S.2d 158 (App. Div. 2008), presumably would have found lost wages recoverable under these same facts because the employer violated the IRCA along with the employee.

198. Rodriguez v. Bollinger Gulf Repair, 985 So. 2d 305, 308 (La. Ct. App. 2008) (finding that the judicial process was violated by the plaintiff's "egregious conduct [of] lying about his true name, place and date of birth" to obtain work).

199. *See, e.g.*, Hernandez-Cortez v. Hernandez, No. Civ.A. 01-1241-JTM, 2003 WL 22519678, at *7 (D. Kan. Nov. 4, 2003) (applying bifurcated framework); Rosa v. Partners in Progress, Inc., 868 A.2d 994 (N.H. 2005) (same); Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d at 316–19 (same). The *Hernandez-Cortez* case arose when illegal immigrants were injured while being smuggled from the border when their smuggler-driver got into an accident with another driver. 2003 WL 22519678, at *1. The court was thus considering whether those undocumented persons, who had not yet worked a day in the United States, were eligible for lost wages as a result of the nonsmuggling driver's negligence. *Id.* This case can therefore be distinguished from other cases in which the undocumented workers had actually performed work before they filed suit for lost wages. Aside from distinguishing lost wages from wages for work already performed, the court noted that the defendants had conceded that the plaintiffs were entitled to lost wages at country-of-origin rates as a result of their diminished earning capacity from the accident. *Id.* at *6. The court then rejected one plaintiff's argument that the plaintiff should recover lost wages because the reality of the workplace economy dictated that he could have found employment despite his lack of status. *Id.* at *6 (noting that "while many illegal aliens do find employment in the United States, this argument does not overcome § 1324a and *Hoffman*"). The court concluded that the plaintiff's "status as an illegal alien precludes his recovery for lost income based on projected earnings in the United States." *Id.* at *7.

200. *Rosa*, 868 A.2d at 1000–01.

States wages only if he becomes physically unable to work."[201] On the other hand, tort deterrence principles are furthered by allowing lost-wage claims at U.S. rates where the employer was responsible for an illegal alien's employment because the employer knew or should have known that the alien was illegal.[202] Both of these considerations analyze the respective fault or wrongdoing of the parties.

In cases that deny remedies to undocumented workers based upon their illegal behavior or deny workers U.S. wages based on employee wrongdoing, the justifications for the limitations appear not to be rooted in any existing doctrine, but rather are rooted in the alleged improper actions of the employee. As such, these decisions appear to be courts' attempts to influence immigration policy through the application of fault-based concepts. Such decisionmaking, without any identifiable constraints, is the most troubling decisionmaking modality in terms of separation of powers concerns.

C. Past Fault-Based Decisionmaking Tied to Existing Fault Doctrine

In the middle of the continuum are those cases where courts use past fault-based decisionmaking but tie it to existing doctrine. Fault-related doctrines or statutory provisions that are not specific to undocumented workers exist in each of the major employment law

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201. *Id.* at 1000. The court's reasoning here is technically incorrect. Although the situation described would create a potential paradox, the paradox has been resolved in another arena: courts have uniformly held that undocumented workers are entitled to U.S. wages for work already performed, and thus entitlement to U.S. wages is not dependent solely on an injury. The paradox cited by the court, then, is somewhat of a red herring.

202. *Id.* ("To refuse to allow recovery against a person responsible for an illegal alien's employment who knew or should have known of the illegal alien's status would provide an incentive for such persons to target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions. It would allow such persons to treat illegal aliens as disposable commodities who may be replaced the moment they are damaged. Such a result is incompatible with tort deterrence principles."). Although the court couches its language as a discussion of "tort deterrence principles," it may be that the court was guided by other considerations. The reasoning provided above could just as easily be applied to indicate that denying lost wages in cases of a knowing employer would be contrary to "immigration deterrence" principles, since any of the above situations would also make employment of illegal aliens more attractive to employers. Additionally, tort deterrence principles could presumably be furthered even in cases of unknowing employers, as the "spur and catalyst" of lost wage awards in those cases would still act as an incentive for employers to reduce the risk of workplace injuries. It seems, therefore, that the court's exception to the rule (that knowing employers may be liable for U.S. wage rates) may be guided by considerations other than tort deterrence principles. The court hints at its other rationales when it later adds that employers under the rule can avoid this situation (where unlawful wages become lawful compensation through a lost wage award) "by refusing to employ the illegal alien in the first place" and when it discusses the fact that the IRCA places an affirmative duty on the employers to verify each worker's eligibility. *Id.* at 1001.

areas. At times employers invoke these doctrines or statutory provisions are as a way to argue that immigration-related misconduct, even if not directly related to the litigation, should bar employees' legal relief. For example, in the workers' compensation context, an employer might argue that the undocumented worker's crime or fraud should bar recovery of benefits under state statutory "willful misconduct" or "criminal conduct" prohibitions. In the torts context, the outlaw or serious misconduct doctrine,[203] designed to consider fault unrelated to the injury, could be invoked to argue that undocumented workers should be barred from legal relief for workplace injuries. In the wage-and-hour context, an employer might argue that the doctrine of unclean hands or estoppel bars relief to a worker who has acted fraudulently by obtaining work either without documentation or with improper documentation. Finally, in the Title VII/state antidiscrimination context, an employer may attempt to limit its liability by arguing that because the employee engaged in acts that would have led to termination had they been known, the employee's recovery should be reduced or prohibited. This Section explains the ways in which such doctrines have been used in the undocumented-worker context and postulates that strict application of the doctrines and statutory provisions may be misguided in the workers' compensation, torts, and wage-and-hour contexts because of an insufficient nexus between the injury and the wrongdoing.

1. Workers' Compensation

Under the workers' compensation system, an employee who is injured on the job waives his or her right to sue in tort and instead recovers under an insurance system financed by employers. The majority of courts and agencies have allowed undocumented workers unfettered access to workers' compensation remedies, either rejecting employer- and insurer-proffered arguments that the IRCA preempts awards of such benefits to undocumented workers,[204] offering policy reasons to conclude that undocumented workers may recover such benefits,[205] or finding that there is no causal connection between the employee's fraud and the compensable injury.[206]

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203. *See infra* notes 219-20 and corresponding text for a description of the "outlaw doctrine."

204. Anne Marie O'Donovan, *Immigrant Workers and Workers' Compensation After* Hoffman Plastic Compounds, Inc. v. NLRB, 30 N.Y.U. REV. L. & SOC. CHANGE 299, 307–14 (explaining the reasons why the *Hoffman* decision does not preempt state workers' compensation claims under preemption analysis).

205. Medellin, 17 Mass. Workers' Comp. Rep. 592, No. 03324300, 2003 WL 23100186, at *5 nn.10 & 17 (Dep't Ind. Acc. Dec. 23, 2003) (finding that awards of workers' compensation benefits

Despite this near consensus, several courts relied on statutory defenses to argue that undocumented workers should be excluded from workers' compensation benefits based on their immigration status.[207] There are four types of statutory defenses that could preclude undocumented workers' recovery of workers' compensation benefits, including: a complete bar to coverage for undocumented workers; willful misconduct; a violation of law or statute; and employee fraud provisions. Only two state workers' compensation statutes have provisions that operate to bar undocumented workers from coverage completely—Wyoming and Idaho.[208] And although

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to undocumented workers would further, or at least not frustrate, federal policy goals of the IRCA while denying benefits would undermine the valuable state interest, incident to the contract for employment, of compensating all workplace injuries and would also undermine the deterrent function of state workers' compensation laws in creating a windfall for both the insurer (no payment of benefits) and the employer (no increase in premium)).

206. *See* Farmers Bros. Coffee v. Workers' Comp. Appeals Bd., 35 Cal. Rptr. 3d 23, 31 (Ct. App. 2005) (noting that an employee is barred from receiving compensation under the statute only when the compensation obtained would be a direct result of the fraudulent misrepresentation, but in the instant case, it was the employment (and acceptance of employment is not illegal) "not the compensable injury, that [plaintiff] obtained as a direct result of the use of fraudulent documents"); Earth First Grading v. Gutierrez, 606 S.E.2d 332, 335 (Ga. Ct. App. 2004) (finding that the employer's reliance on language in Georgia's workers' compensation statute indicating that "[n]o compensation shall be allowed for an injury . . . due to the employee's willful misconduct" was misplaced because "the employer fail[ed] to show that a causal connection between the employee's misrepresentation and the work-related injury") (citing Cont'l PET Tech., Inc. v. Palacias, 604 S.E.2d 627, 631 (Ga. Ct. App. 2004)); Dynasty Sample Co. v. Beltran, 479 S.E.2d 773, 775 (Ga. Ct. App.1996) (finding that the employment contract was not voided because there was no causal connection between the employee's misrepresentation and the injury); Andrade v. Sun Valley Landscapes, No. 2305, 2008 WL 2882228, at *4 (Neb. Work. Comp. Ct. July 23, 2008) (finding that the worker's injury will render him unable to work, whether legally or illegally, in the United States or in his home country and rejecting employer's argument that illegal status is the cause of plaintiff's inability to work).

207. Arreola v. Admin. Concepts, 17 So. 3d 792, 793 (Fla. Dist. Ct. App. 2009); Doe v. Kan. Dep't of Human Res., 90 P.3d 940, 943–44 (Kan. 2004); Sanchez v. Eagle Alloy Inc., 658 N.W.2d 510, 521 (Mich. Ct. App. 2003) (barring the employee from workers' compensation wage-loss benefits under a specific provision of state law that allows for the suspension of benefits if the employee has committed a crime that causes the employee to be unable to work); Reinforced Earth Co. v. Workers' Comp. Appeal Bd., 810 A.2d 99, 108 (Pa. 2002) (suspending an award of temporary total disability benefits because the judge found that it was the employee's status, not the injury, that was the cause of the worker's inability to work).

208. IDAHO CODE ANN. § 72-1366(19)(a) (2010) ("Benefits shall *not be payable* on the basis of services performed by an alien *unless the alien was lawfully admitted* for permanent residence at the time such services were performed, was *lawfully present* for purposes of performing such services, or was *permanently residing* in the United States under color of law at the time the services were performed (including an alien who was lawfully present in the United States as a result of the application of the provisions of sections 207 and 208 or section 212(d)(5) of the immigration and nationality act.") (emphasis added)); WYO. STAT. ANN. § 27-14-102(a)(vii) (2011) (" 'Employee' means any person engaged in any extrahazardous employment under any appointment, contract of hire or apprenticeship, express or implied, oral or written, and includes legally employed minors, aliens authorized to work by the United States department of justice, office of citizenship and immigration services, and aliens whom the employer reasonably

roughly one-third of state workers' compensation statutes have disqualifying "willful misconduct" provisions,[209] most courts have found that the necessary causal connection between the employee's misrepresentation and the work-related injury is not met simply because the worker used false documents to obtain employment.[210]

However, there are some cases in which courts construe the worker's illegal status or use of fraudulent papers to be sufficiently criminal or fraudulent so as to fit within state-specific statutory bars. In one state, the court found that an undocumented worker's submission of false documents constituted the "commission of a crime" that barred the worker's recovery of benefits.[211] The state's statutory provision required that the "commission of a crime" make the employee unable to obtain or perform work.[212] The case construing such a provision found that undocumented status, as opposed to the workplace injury, was the cause of the worker's inability to work.[213] In another case, the court found that the worker's loss of earning power was caused by his unlawful immigration status as opposed to his work-related injury, and thus the employer was entitled to a suspension of benefits.[214]

Employers in other states have argued that statutory fraud provisions operate to bar a worker's recovery of benefits in the event that the worker provided false documents or a false identity to obtain either employment or workers' compensation benefits.[215] In one case, the court denied the worker coverage, concluding that the employee's provision of false documents constituted a "knowing or intentional" fraudulent statement "made with the intent" to obtain workers' compensation benefits.[216] In another case, the court concluded that although the worker was legally entitled to her benefits, because she used a false Social Security number and name in the workers'

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believes, at the date of hire and the date of injury based upon documentation in the employer's possession, to be authorized to work by the United States department of justice, office of citizenship and immigration services.").

209. Alabama, Arizona, California, Georgia, Maryland, Massachusetts, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming all have willful misconduct provisions. *See, e.g.*, ALA. CODE § 25-5-32 (1975); CAL. INS. CODE § 1871.4 (West 2011).

210. *See, e.g.*, *Earth First Grading*, 606 S.E.2d at 335 (finding lack of a causal connection fatal to employer's defense even though the worker used false documents to obtain employment); *accord Cont'l PET Techs.*, 604 S.E.2d at 629 (same).

211. *Eagle Alloy*, 658 N.W.2d at 518.

212. MICH. COMP. LAWS § 418.361(1) (2011).

213. *Eagle Alloy*, 658 N.W.2d at 518; *Reinforced Earth*, 810 A.2d at 105–07.

214. *Reinforced Earth*, 810 A.2d at 479-80.

215. Arreola v. Admin. Concepts, 17 So. 3d 792, 793–94 (Fla. Dist. Ct. App. 2009).

216. *Id.*

compensation proceedings, she was subject to penalties under the state workers' compensation act fraud provision.[217]

While these decisions rely upon specific state statutory provisions designed to limit access to workers' compensation benefits in the event of a crime or fraud, the decisions lack meaningful consideration of the tenuous nature of the nexus between the injury claimed and the alleged wrongdoing. Specifically, the underlying injuries which gave rise to the workers' compensation claim are inadequately related to the alleged fraud or illegality. In the absence of legitimate consideration being given to the impact of the underlying injury upon an employee's ability to work and the lack of nexus between the alleged fraud and the injury, these decisions appear to misapply statutory prohibitions in an attempt to address immigration policy concerns.

2. Torts

Concepts of fault are central to torts jurisprudence. The torts system itself is designed to allocate the costs associated with injuries among the parties at fault. Examining fault as it relates to the injuries at issue in the case is the most typical way in which concepts of fault get employed in torts cases. However, courts that deny or limit undocumented workers' remedies in the torts context are often not examining the undocumented workers' fault related to the accident but are, instead, considering fault related to their immigration and work status.[218]

While there exists a torts doctrine that allows courts to consider fault unrelated to the injuries, this doctrine has not been expressly cited by courts in torts cases involving undocumented workers. This doctrine, known as the "outlaw doctrine," is rooted in the idea that "the law will not allow a wrongdoer whose injury arises out of his serious misconduct to 'benefit' from his wrongdoing by recovering damages from a tortfeasor who otherwise might be liable for causally contributing to the injury."[219]

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217. Doe v. Kan. Dep't of Human Res., 90 P.3d 940, 943–44 (Kan. 2004).

218. *See, e.g.*, Veliz v. Rental Serv. Corp. USA, Inc., 313 F. Supp. 2d 1317 (M.D. Fla. 2003) (refusing to award any lost wages in products liability case where employee tendered fraudulent documentation to obtain employment); Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d 314, 319–20 (App. Div. 2004) (finding that worker's acceptance of unlawful employment based upon undocumented status prohibits recovery); Balbuena v. IDR Realty LLC (*Balbuena II*), 845 N.E.2d at 1261–63 (Smith, J., dissenting) (finding that undocumented workers should not be awarded the benefit of an illegal bargain).

219. Joseph H. King, Jr., *Outlaws and the Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY L. REV. 1011, 1017 (2002). The doctrine is also known as the

The outlaw doctrine operates to bar recovery only where the injury arises out of the misconduct. Thus, it would likely not serve as a bar to undocumented workers who seek recovery for workplace or other injuries because of the lack of a nexus between the misconduct and the injury. Since the lack of documents, or even the use of fraudulent documents to obtain work, is not the direct cause of the injury, the doctrine very likely does not apply.[220]

3. Wage-and-Hour Claims

Workers are statutorily entitled to seek compensation for work already performed through the FLSA on the federal level and state wage-claim statutes, and courts have found it irrelevant whether the worker was documented.[221] Despite the well-established principle that undocumented workers are protected under such laws, employers continue to challenge the right of undocumented workers to receive pay for completed work. At times, employers attempt to undermine applicable wage laws by using the existing fault doctrines of unclean hands and estoppel as affirmative defenses.[222] Although the Supreme

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"unlawful acts doctrine," the "unlawful conduct doctrine or defense," "unlawful acts rule," "ex turpi rule," "serious misconduct doctrine," "wrongful conduct rule," "illegality defense," and sometimes "in pari delicto." The outlaw doctrine is subsumed by contributory negligence principles, which serve as a complete bar to tort recovery, in those limited states that still adhere to a contributory negligence model. In the majority of states that utilize a comparative fault model and consider relative fault as a way to balance recovery, the outlaw doctrine can still be employed to limit the remedy.

220. Defendants could make a proximate cause argument that the worker would not be injured "but for" being unlawfully employed in the first place. However, the "but for" test is more specifically part of cause-in-fact analysis, while foreseeability is tied to the test for "proximate cause." Given the foreseeability issue, it appears tenuous that a worker's undocumented status would foreseeably lead to a workplace injury.

221. Patel v. Quality Inn S., 846 F.2d 700, 705–06 (11th Cir. 1988); Singh v. Jutla & C.D. & R.'s Oil, Inc., 214 F. Supp. 2d 1056, 1060–61 (N.D. Cal. 2002); Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002); Cortez v. Medina's Landscaping, No. 00 C 6320, 2002 WL 31175471, at *1 (N.D. Ill. Sept. 30, 2002); Flores v. Albertsons, Inc., No. CV0100515AHM(SHX), 2002 WL 1163623, at *5 (C.D. Cal., Apr. 9, 2002).

222. Unclean hands is described as follows: "[T]he equitable powers of the court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means, has gained an advantage." Torres v. Gristede's Operating Corp., 628 F. Supp. 2d 447, 464 (S.D.N.Y. 2008). "Equitable estoppel exists where one party, through his actions or words, leads the other party to act to its detriment." Curry v. High Springs Family Practice Clinic & Diagnosis Ctr. Inc., No. 1:08-cv-00008-MP-AK, 2008 WL 5157683, at *4 (N.D. Fla. Dec. 9, 2008); *see also* Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 59 (1984) (estoppel is an "equitable doctrine invoked to avoid injustice in particular cases"); Wlodynski v. Ryland Homes of Fla. Realty Corp., No. 8:08-cv-00361-JDW-MAP, 2008 WL 2783148, at *3 (M.D. Fla. July 17, 2008) ("Generally, federal courts reject equitable estoppel as an affirmative defense to an FLSA action . . . ."). There is, however, a limited exception to this rule in the FLSA context that allows an affirmative defense when "the employee affirmatively misleads the employer regarding the number of hours worked and the employer has knowledge of the employee's actual hours."

Court has held that "one cannot waive, release, or compromise his or her rights under the FLSA,"[223] and federal courts have repeatedly rejected unclean hands and equitable estoppel as affirmative defenses to FLSA actions,[224] some courts have found these defenses applicable in limited circumstances where the employee's wrongdoing is directly related to his claim and the employer is injured as a result.[225]

The two courts to consider cases in which employers attempted to invoke unclean hands or estoppel to bar recovery of wages by an undocumented worker rejected the applicability of these defenses. In one case, the court rejected the defendant's arguments on the grounds that they were based upon the incorrect assumption that the plaintiff's immigration status bars recovery in the wage-and-hour

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Robertson v. LTS Mgmt. Servs., LLC, 642 F. Supp. 2d 922, 933 (W.D. Mo. 2008) (quoting *Wlodynski*, 2008 WL 2783148, at *3); *accord Curry*, 2008 WL 5157683, at *4; Blanc v. Safetouch, Inc., No. 3:07-cv-1200-J-25TEM, 2008 WL 4059786, at *2 (M.D. Fla. Aug. 27, 2008); *Wlodynski*, 2008 WL 2783148, at *3.

223. Lee v. Askin Trucking, Inc., No. 05-14335-CIV-MARRA/LYNCH, 2006 U.S. Dist. LEXIS 97552, at *5–6 (S.D. Fla. Feb. 7, 2006) (citing Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706–07 (1945)) (holding that FLSA rights cannot be abridged by contract or otherwise waived because this would "nullify the purposes" of the statute and thwart the legislative policies it was designed to effectuate and stating that "[t]he legislative history of the [FLSA] shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce. To accomplish this purpose standards of minimum wages and maximum hours were provided."); s*ee also* Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981); Lynn's Food Stores, Inc. v. U.S. Dep't of Labor, 679 F.2d 1350, 1352 (11th Cir. 1982).

224. *Askin Trucking*, 2006 U.S. Dist. LEXIS 97552, at *6 (citing Caserta v. Home Lines Agency, Inc., 273 F.2d 943, 946 (2d Cir. 1959)) (finding that allowing such a defense would be "inconsistent with both the language and the policy of the FLSA"); Morrison v. Exec. Aircraft Refinishing, Inc., 434 F. Supp. 2d 1314, 1320 (S.D. Fla. 2005) (citing *Caserta*, 273 F.2d at 946) ("[T]he doctrine of estoppel is not recognized under the FLSA."); *see also Robertson*, 642 F. Supp. 2d at 933 (stating that "[g]enerally, estoppel is not allowed as a defense to a FLSA claim" but then explaining a limited exception to that proposition); *Wlodynski*, 2008 WL 2783148, at *3 ("Generally, federal courts reject equitable estoppel as an affirmative defense to an FLSA action, even in instances where an employee is required but fails to record any overtime hours worked."); *Askin Trucking*, 2006 U.S. Dist. LEXIS 97552, at *7 ("[I]t is well-established that the defenses of waiver and estoppel are precluded under the FLSA.").

225. *See, e.g.*, McGlothan v. Wal-Mart Stores, Inc., No. 6:06-CV-94-ORL-28JGG, 2006 WL 1679592, at *3 n.3 (M.D. Fla. June 14, 2006) (explaining that the unclean hands defense requires that the plaintiff's wrongdoing "is directly related to the claims against which it is asserted" and the defendant is injured by the plaintiff's conduct) (citing Calloway v. Partners Nat'l Health Plans, 986 F.2d 446, 450–51 (11th Cir. 1993)); *see also Wlodynski*, 2008 WL 2783148, at *4 (finding that the "affirmative defense of unclean hands may be applicable to FLSA claims in limited circumstances"); Green v. City & Cnty. of S.F., No. C 06-6953 SI, 2007 WL 521240, at *1 (N.D. Cal. Feb. 15, 2007) (finding that the equitable doctrine of unclean hands may bar recovery where the party engaged in "reprehensible conduct in the course of the transaction").

context.[226] In the other, the court struck the affirmative defense on the grounds that the plaintiff's claims were statutory claims seeking only monetary relief, and thus the equitable doctrine of unclean hands did not apply.[227]

Thus, in the context of wage-and-hour claims, courts have rejected the application of the existing fault-related doctrines of unclean hands and estoppel, finding instead that such defenses can only apply where there is a sufficient nexus between the employee's wrongdoing and his claim that results in an injury to the employer. In cases involving undocumented workers, the wrongdoing (being unauthorized to work or providing false documents to obtain work) is not the cause of the injury (nonpayment of wages) and, since the work has been performed, it is difficult to find injury to the employer.

4. Title VII and State Antidiscrimination Statutes

Under both Title VII and state antidiscrimination laws, undocumented and documented workers alike are entitled to be free from discrimination.[228] At the federal level, while it is settled that undocumented workers are considered "employees" under Title VII,[229] it is unclear whether undocumented workers are eligible for backpay under Title VII.[230] Under state antidiscrimination laws, the question

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226. Bailon v. Seok AM No. 1 Corp., No. C09-0548, 2009 WL 4884340, at *4 (W.D. Wash. Dec. 9, 2009).

227. Plaintiff's Federal Rule of Civil Procedure 12(f) Motion to Strike Defendants' Second Affirmative Defenses at 3, Villareal v. El Chile, Inc., 601 F. Supp. 2d 1011 (N.D. Ill. 2009) (No. 07 C 1656) (on file with author).

228. Additionally, undocumented workers may avail themselves of the protections of other federal nondiscrimination statutes, including the following: the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* (2006), and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* (2006). The Civil Rights Act of 1866, 42 U.S.C. § 1981 (2006), also protects the rights of "all persons" in the making, enforcement, performance, modification, and termination of contracts, on an equal basis. Section 1981 prohibits discrimination on the basis of alienage, race, or color. *See, e.g.*, Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419–20 (1948); Sagana v. Tenorio, 384 F.3d 731, 738 (9th Cir. 2001).

229. NLRB v. Kolkka, 170 F.3d 937, 940 (9th Cir. 1999) (finding that undocumented workers are considered "employees" under the NLRA); *see also* NAT'L EMP'T LAW PROJECT, UNDOCUMENTED WORKERS: PRESERVING RIGHTS AND REMEDIES AFTER *HOFFMAN PLASTIC COMPOUNDS V. NLRB* 8 (2007), *available at* http://nelp.3cdn.net/b378145245dde2e58d_0qm6i6i6g.pdf (citing EEOC guidance which states unequivocally that undocumented workers are covered employees under Title VII, the ADA, the ADEA, and all other federal nondiscrimination statutes).

230. *See* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1066–70 (9th Cir. 2004) (holding that the employer could not use the discovery process to find out the plaintiff-worker's immigration status because *Hoffman* did not make immigration status relevant for a Title VII claim); De La Rosa v. N. Harvest Furniture, 210 F.R.D. 237, 238–39 (C.D. Ill 2002) (asserting that *Hoffman* applied to an award of backpay by the NLRB but did not necessarily apply to remedies in federal court); *see*

of the availability of backpay for undocumented workers has not yet been answered fully, but one of the few state courts to address the issue precluded any form of damages, including backpay, under its state antidiscrimination statute.[231]

One of the ways in which employers attempt to undermine claims of discrimination by undocumented workers is to invoke the existing "fault-based" doctrine known as the after-acquired evidence doctrine.[232] The employer typically attempts to limit liability to a wrongfully terminated employee where the employer learns, subsequent to the termination, that the employee engaged in acts that would have led to the employee's termination.[233] The after-acquired evidence doctrine is equitable in nature and is usually applied to ensure that an employee does not benefit from the employee's own misconduct or misrepresentation.[234] Within the context of undocumented workers seeking Title VII remedies, employers argue that had they known the employee was undocumented or used false papers to obtain work, they would have fulfilled their statutory obligation to refuse to hire, or to terminate, the employee.

Balancing the competing interests of protecting employees from discrimination in the workplace and not infringing on the employer's lawful business prerogative to take action against employee wrongdoing, the Supreme Court found that in order to rely successfully upon the after-acquired evidence doctrine, the employer must establish that the wrongdoing was so severe that the employee

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also Ho & Chang, *supra* note 13, at 498–99 n.111 (explaining that the Supreme Court was clearly aware that the *Hoffman* decision might have repercussions for remedies under Title VII, but both the majority and the dissent were silent on the matter); María Pabón López, *The Place of the Undocumented Worker in the United States Legal System After* Hoffman Plastic Compounds, 15 IND. INT'L & COMP. L. REV. 301, 320 (2005) (finding that while "coverage and enforcement of the antidiscrimination laws under the EEOC's purview has remained the same after *Hoffman*," questions about the availability of Title VII remedies after *Hoffman* still exist). *But see* Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (holding that *Hoffman* necessitates that an undocumented worker is not entitled to backpay under Title VII due to his immigration status).

231. Crespo v. Evergo Corp., 841 A.2d 471, 477 (N.J. Super. Ct. App. Div. 2004) (denying undocumented worker economic and noneconomic damages based upon the "illegality" of her employment).

232. The after-acquired evidence doctrine emerged from common law contract and equity. Gregory S. Fisher, *A Brief Analysis of After-Acquired Evidence in Employment Cases*, 17 ALASKA L. REV. 271, 275 (2000). It derives from the contract principle that a breach of contract is not actionable if a legal basis is provided for excusing performance, even if a breaching party was unaware of the legal excuse. *Id.* The doctrine is also related to the equity doctrine of unclean hands, which bars a party from claims for relief if that party engaged in fraudulent, deceitful, or unfair conduct. *Id.*

233. Hyatt v. Northrop Corp., 80 F.3d 1425, 1431 (9th Cir. 1996), *withdrawn in part and reinstated in part by* 137 F.3d 1179, 1179 (9th Cir. 1998).

234. Silberstein v. Pro-Golf of Am., 750 N.W.2d 615, 626 (Mich. Ct. App. 2008).

would have been terminated on those grounds alone if the employer had known about the wrongdoing prior to the discharge.[235]

A couple of courts have grappled with the application of the after-acquired evidence rule in cases involving undocumented workers. In one case under Title VII and California's state antidiscrimination statute, the defense sought discovery of the employee's immigration status. The Ninth Circuit upheld the trial court's protective order, finding that the doctrine neither authorized the use of depositions to uncover illegal action by the plaintiff nor required the submission to such discovery as a prerequisite to pursuing a claim.[236] Most relevant to this inquiry, the court questioned whether an employer who independently found out that the plaintiff was undocumented would be able to meet the burden of proof required by the after-acquired evidence doctrine.[237] Specifically, the court emphasized that not only must the employer show that it could have fired the employee, but it must also show that it would in fact have done so.[238] Questioning whether employers could meet the burden in the context of undocumented workers, the court explained,

> Regrettably, many employers turn a blind eye to immigration status during the hiring process; their aim is to assemble a workforce that is both cheap to employ and that minimizes their risk of being reported for violations of statutory rights. Therefore, employers have a perverse incentive to ignore immigration laws at the time of hiring but insist upon their enforcement when their employees complain.[239]

In another case, the employer argued that an undocumented worker who had submitted a fraudulent Social Security card at the time of hiring was barred from seeking a remedy for unlawful termination based on disability discrimination because of the after-acquired evidence and unclean hands doctrines.[240] While that court found that summary judgment was inappropriate under the after-acquired evidence doctrine because questions of fact remained as to whether the employer had prior knowledge of the employee's immigration status, the court held that the unclean hands doctrine barred the plaintiff's claims in their entirety.[241]

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235. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362–63 (1995).

236. Rivera v. NIBCO, 364 F.3d 1057, 1074–75 (9th Cir. 2004).

237. *Id.*

238. *Id.* at 1072 (citing O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 758–59 (9th Cir. 1996)).

239. *Id.*

240. Morejon v. Terry Hinge & Hardware, No. B162878, 2003 WL 22482036, at *1 (Cal. Ct. App. Nov. 4, 2003).

241. *Id.* at *8–9.

Thus, in the Title VII/state antidiscrimination area, at least one court relied upon existing fault-based doctrines that are unrelated to the fault-based constructions discussed in *Hoffman*, including the after-acquired evidence doctrine and the unclean hands doctrine, to limit or bar recovery. While nexus concerns between the wrongdoing and the injury are not present in the Title VII/state antidiscrimination context, the after-acquired evidence doctrine may not be applicable. Pursuant to established precedent, in order to succeed on the after-acquired evidence defense, the employer must prove that it would have fired the undocumented worker on the basis of status alone. An employer may have difficulty proving this given the practice, in certain industries, of intentionally hiring undocumented workers. Whether the equitable doctrine of unclean hands can be applied in the Title VII/state antidiscrimination statutory context to bar relief to undocumented workers is an open question.

As undocumented workers seek the courts' protection against workplace abuses, courts appear to be struggling with the absence of definitive guidance from Congress as to how to balance competing legislative priorities—enforcing immigration laws designed to prohibit undocumented workers from employment and enforcing state and federal workplace laws designed to protect employees from workplace abuses. Relying upon the fault constructs that emanate from the *Hoffman* decision, courts examine the potential for future fault and past fault either rooted in an existing fault doctrine or not rooted in any existing doctrine. Courts' use of the future-fault construct upholds separation of powers principles in that it is designed to effectuate legislative intent. Judicial application of past fault, however, is problematic in two ways: either courts apply concepts of fault unrelated to any existing doctrine, raising concerns about judicial policymaking, or courts improperly apply existing fault doctrines to the undocumented-worker context by failing to require a nexus between the alleged wrongdoing and the claims. On each end of the decisionmaking spectrum, courts are either supporting or undermining separation of powers principles, and those decisions that undermine separation of powers principles are the most troubling. In the middle are courts that at least cabin their decisionmaking in the framework of existing doctrine, but problems arise where courts fail to require a nexus between the immigration wrong and the injury for which the employee is seeking redress.

CONCLUSION

In the absence of federal legislation designed to reform the immigration system, federal and state courts will continue to confront cases involving undocumented workers in the labor and employment context. Continued reliance by courts upon concepts of fault related to immigration status to resolve questions of how to balance the difficult competing policy objectives set forth in immigration and labor and employment statutes presents the potential for courts to legislate immigration policy from the bench. Until Congress acts, courts have to find alternative ways to resolve these thorny questions that uphold the concepts of separation of powers, transparency, predictability, and standards. Congress's failure to do so will exacerbate the development of an incoherent body of law surrounding the rights of undocumented workers.