Essay

Union Shops, Not Border Stops: Updating NLRB Sanctions to Help Organize Immigrant Workers After *Hoffman*

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Introduction: The Straitjacket of Labor Law

In *Hoffman Plastic Compounds, Inc. v. NLRB*,[1] the Supreme Court held that the National Labor Relations Board ("NLRB") could not award backpay to unauthorized workers[2] who were fired because of their union activity. At its core, *Hoffman* stands for a well-understood central proposition: in the twenty-first century, when labor law challenges immigration law in the courts, labor law loses. But *Hoffman* also stands for a rarely understood lesson: a clash between labor and immigration law is not worth the effort for either side. *Hoffman* is the straitjacket of labor law, the result of a perceived tension between labor and immigration law that restricts labor law the more labor law pulls on it. This tension is not only unnecessary, it is also self-

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

2 The term "unauthorized worker," as used in this Essay, includes aliens who enter the United States illegally and aliens who enter the United States lawfully but do not have work permits or remain beyond the time they are authorized to stay. *See* 8 U.S.C. § 1324a(h)(3)(B) (2006).

destructive to both labor and immigration law goals. Only by giving up this tension and reconciling with immigration law can labor law free itself from the effects of *Hoffman* and effectively organize the changing workforce of the new millennium.

This Essay suggests that when backpay for unauthorized workers is precluded under *Hoffman*, the NLRB should be empowered to levy a fine for the same amount from employers. This money should then be used to fund groups that organize immigrant workers.[3] This proposal is an attempt to ameliorate the tension between labor and immigration law while giving proper respect to the objectives of each.

Part I introduces the *Hoffman* decision and dissent, and uses them to illustrate that not only does a clash between labor and immigration law result in labor law losing, but also that the clash is self-destructive to the goals of each. Part II discusses and critiques proposals to award the backpay precluded by *Hoffman* to alternative recipients, such as government institutions or immigration enforcement agencies. Part III argues that this backpay should be used to fund groups that organize immigrant workers and discusses why only this proposal properly resolves the tension between labor and immigration law.

I. Hoffman*: A Choice Between a Rock and a Hard Place*

Hoffman held that unauthorized workers may not be awarded backpay by the NLRB under the authority of the National Labor Relations Act ("NLRA"),[4] even if they have been fired because of protected union activity.[5] Thus, where labor law directly challenged immigration law, labor law lost its greatest weapon—court-ordered backpay.[6] The *Hoffman* Court split 5–4.[7] The majority emphasized the importance of immigration law[8] and labor law remedies alterna-

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3 The term "immigrant" is used broadly in this Essay to include both individuals who have recently become U.S. citizens through the naturalization process and noncitizens residing in the United States, including lawful permanent residents; individuals lawfully present on temporary visas, asylees, and those who are not lawfully in the United States either because their status has lapsed, because they entered the country illegally, or for any other reason. The term "immigrant community" is likewise used to refer to the social group that encompasses these individuals.

4 National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–169 (2006).

5 *Hoffman*, 535 U.S. at 151.

6 *Id.* at 154 (Breyer, J., dissenting) (noting that, without backpay, the NLRB "has no other weapons in its remedial arsenal").

7 *Id.* at 139 (majority opinion).

8 *See id.* at 147.

tive to backpay.[9] The dissent, however, focused on the lack of effective alternative labor law remedies and on the decision's perverse effect of making the hiring of undocumented workers more attractive to employers.[10] Perhaps because of the adversarial nature of litigation, the majority viewed the conflict between labor and immigration law as a zero-sum conflict that necessitated choosing one body of law over the other.[11] In fact, this view has resulted in harm for both bodies of law.

A. The Majority Decision

The majority reached its conclusion by reasoning that, because it is illegal for an unauthorized alien to work in the United States, he should not be awarded backpay for work he was not allowed to do in the first place.[12] The Court focused on the importance of immigration enforcement[13] and the availability of alternative remedies.[14]

In reaching its holding, the Court emphasized the perceived tension between the NLRB and immigration law as expressed by the Immigration Reform and Control Act of 1986 ("IRCA").[15] On balance, the Court decided that labor law could not be allowed to infringe on immigration law: "[A]llowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."[16]

To justify abolishing backpay for undocumented workers, the Court emphasized what it called "significant sanctions" other than backpay that the NLRB may impose for labor law violations.[17] It pointed to a cease-and-desist order and an order requiring an employer to post notice to employees about their NLRA rights.[18] It emphasized that failure to comply with these orders could result in

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9 *See id.* at 152.

10 *See id.* at 154–55 (Breyer, J., dissenting).

11 *See id.* at 149–50 (majority opinion) (observing that "awarding backpay . . . not only trivializes the immigration laws, it also condones and encourages future violations").

12 *Id.* at 149.

13 *See id.* at 147.

14 *See id.* at 152.

15 *See* Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.); *Hoffman*, 535 U.S. at 149.

16 *Hoffman*, 535 U.S. at 151.

17 *Id.* at 152.

18 *Id.*

contempt sanctions.[19] For this reason, the Court concluded that these sanctions are "sufficient to effectuate national labor policy" even without the sanction of backpay.[20] Thus, even though in *Hoffman* labor law lost the battle with immigration law, the Court took pains to argue that labor law was not eviscerated.

B. The Dissent

Writing the dissent in *Hoffman*, Justice Breyer observed that a backpay order from the NLRB "will *not* interfere with the implementation of immigration policy. Rather, it reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent."[21] The dissent argued that abolishing this order was clearly contrary to labor law goals because when backpay for an unauthorized worker is lost, so is a clear disincentive for antiunion discrimination.[22] But the dissent also argued that abolishing the order was contrary to immigration law goals because there was no effective alternative remedy.[23] This remedial void, according to the dissent, creates a perverse incentive for employers to hire undocumented workers, which increases demand for these workers.[24]

The dissent went on to argue that without the threat of backpay, employers could discriminate against unauthorized workers participating in unions at drastically reduced costs. Responding to the majority's discussion of NLRB sanctions other than backpay, Justice Breyer stressed that

> [w]ithout the possibility of the deterrence that backpay provides, the Board can impose only future-oriented obligations upon law-violating employers—for it has no other weapons in its remedial arsenal. And in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity.[25]

It is only after a violation has occurred, a complaint is filed, and a court order with the contempt power behind it is entered that there is

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19 *Id.*

20 *Id.*

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

22 *See id.* at 154.

23 *See id.*

24 *Id.* at 156 ("[T]he Court's rule offers employers immunity in borderline cases, thereby encouraging them to . . . hire with a wink and a nod those potentially unlawful aliens whose unlawful employment (given the Court's views) ultimately will lower the costs of labor law violations.").

25 *Id.* at 154 (citation omitted).

any possible remedial penalty for an employer who continues to discriminate.[26] It may be a long time before an unauthorized worker risks exposure to the authorities by complaining about antiunion discrimination—so the employer may get multiple chances to discriminate without incurring any negative consequences.[27] Indeed, by the time an initial violation is reported, a union campaign may be broken.[28]

The drastically reduced costs of union discrimination could create an incentive for employers to hire unauthorized workers, and so create an incentive for illegal entry to the United States. Other disincentives to hiring unauthorized workers, such as immigration law sanctions, do remain,[29] and *Hoffman* may have only an attenuated effect on the net number of unauthorized workers in the United States. But the effect of creating any incentive to hire unauthorized workers is contrary to immigration law goals.[30] The dissent noted that the pre-*Hoffman* status quo, which included the possibility of backpay awards for unauthorized workers, did not increase the incentive for illegal entry because the award of these damages was so speculative.[31] By contrast, the dissent argued, denying backpay damages does increase an employer's "incentive to find and to hire illegal-alien employees" because the employer knows it will not have to remit backpay to these workers if it chooses to violate the NLRA.[32] The dissent further argued that this increased demand for unauthorized workers creates an incentive for aliens to illegally enter the United States and thus "accomplishes the precise opposite" of immigration law's goals.[33]

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26 *See id.* at 152 (majority opinion).

27 *See* Shannon Leigh Vivian, Note, *Be Our Guest: A Review of the Legal and Regulatory History of U.S. Immigration Policy Toward Mexico and Recommendations for Combating Employer Exploitation of Nonimmigrant and Undocumented Workers*, 30 SETON HALL LEGIS. J. 189, 214 (2005).

28 *See* Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1788 (1983) ("[T]he real purpose of such discharges is to break the momentum of the union's organizing campaign. By the time the discharged employee has been reinstated, much of the union's support may have melted away . . . ."); Robert M. Worster, III, Case Note, *If It's Hardly Worth Doing, It's Hardly Worth Doing Right: How the NLRA's Goals Are Defeated Through Inadequate Remedies*, 38 U. RICH. L. REV. 1073, 1090 (2004).

29 *See, e.g.*, 8 U.S.C. § 1324a(a)(1) (2006) (making unlawful the employment of unauthorized aliens).

30 *Hoffman*, 535 U.S. at 155 (Breyer, J., dissenting).

31 *Id.* at 155.

32 *Id.*

33 *Id.* at 156; *see also* Christine Dana Smith, *Give Us Your Tired, Your Poor:* Hoffman *and the Future of Immigrants' Workplace Rights*, 72 U. CIN. L. REV. 363, 372 (2003) ("*Hoffman* sends

C. The False Choice Between Labor and Immigration Law

When the practical effects of *Hoffman* are understood, it becomes clear that the real issue is not whether the Court should have chosen to favor labor over immigration law. Instead, the issue is whether it was appropriate to view labor and immigration law as in conflict at all. The majority is correct to point to real costs in immigration enforcement that would arise from choosing labor over immigration law. Backpay awards for unauthorized workers would at least have the symbolic effect of condoning their illegal behavior.[34] However, the dissent is also correct in that abolishing backpay for unauthorized workers not only hurts labor law, but also hurts immigration law.[35] Choosing to favor either labor or immigration law is a choice between a rock and a hard place. There are costs to favoring either body of law over the other, but both the majority and the dissent did just that. This points to the necessity of a third way: refusing to choose between labor law and immigration law at all.

II. Proposals to Award Backpay to Alternative Recipients: The Search for a Third Way

There have been a number of proposals suggesting that backpay, which may not be awarded to unauthorized workers after *Hoffman*, should still be collected from an employer and given to an alternative recipient. Such a reward would preserve backpay's disincentive for employers to fire unauthorized workers for protected union activities, and so protect labor law goals.[36] Further, it would combat the incentive to hire unauthorized workers created by the lack of backpay awards, while also avoiding tension with immigration law, because unauthorized workers would not receive the award.[37]

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the message to employers to seek out illegal labor because it is now cheaper and even easier to exploit—a result directly opposite that sought by the IRCA."). Smith also argues that the tension between labor law and immigration is unnecessary: "Congress arguably made efforts to express that the IRCA did not prevent illegal workers from seeking redress for violations of their rights under the NLRA." *Id.* However, the *Hoffman* Court did not read the statute in this manner. *Id.*

34 *Hoffman*, 535 U.S. at 150.

35 *Id.* at 155–56 (Breyer, J., dissenting).

36 *See id.* at 154.

37 *See The Supreme Court, 2001 Term—Leading Cases*, 116 HARV. L. REV. 392, 399 (2002) ("If the Board were permitted greater remedial flexibility, the award of backpay to a third party, such as the government, would be the Board's most sensible choice. This award would neither improperly enrich the undocumented worker nor create a remedial structure in which the cost of unlawfully firing an illegal alien differs vis-à-vis that of firing a legal worker."); Meghan Brooke Phillips, Note, *Using the Employee Free Choice Act as Duct Tape: How Both Active and Passive*

Such solutions run up against the problem of the NLRB's limited enforcement power. The NLRA does not explicitly authorize punitive damages, and this limitation has been interpreted to preclude punitive damages and fines.[38] An award of backpay to an alternative recipient would likely require congressional action to change the NLRA because, like punitive damages and fines, it is aimed primarily at deterring employer conduct, not at making employees whole.[39] Such congressional action may be forthcoming in the Employee Free Choice Act of 2009 ("EFCA"), a pending bill that would authorize damages, such as civil penalties and increased backpay, and that may possibly be read to permit alternative recipients.[40]

Deregulation of Labor Law Make the EFCA an Improper Mechanism for Remedying Working Class Americans' Problems, 111 W. VA. L. REV. 219, 278 (2008) ("Congress should seek to congressionally overrule the Supreme Court's 5–4 decision in *Hoffman Plastics*, by amending the [IRCA] to permit the NLRB to require that an employer . . . pay the back pay ordinarily due to the worker discharged for union activities into the general fund at the NLRB."). This Essay builds on the alternative-recipient idea present in these past proposals, while suggesting a new alternative recipient: groups that organize immigrant workers. *Cf.* Christopher Brackman, Note, Hoffman v. NLRB*, Creating More Harm than Good: Why the Supreme Court Should Not Have Denied Illegal Workers a Backpay Remedy Under the National Labor Relations Act*, 71 U. MO. KAN. CITY L. REV. 717, 729 (2003) (suggesting payment to the undocumented worker of a reduced backpay award "calculated from the time of illegal discharge to the discovery of illegal worker status"). Although proposals that would retain limited backpay awards to unauthorized workers attempt to reconcile labor and immigration law, they have the weakness of being inconsistent with *Hoffman's* blackletter holding that backpay may not go to unauthorized workers. *Hoffman*, 535 U.S. at 151.

38 Regarding general limitations on the NLRB's remedial authority, see *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940). In *Republic Steel*, the Supreme Court held that the NLRA "does not prescribe penalties or fines in vindication of public rights." *Id.* at 10. Therefore, the NLRB can only "make good to the employees what they had lost." *Id.* at 13. *See generally* Michael Weiner, Comment, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52 UCLA L. REV. 1579, 1600–01 (2005) (comparing *Republic Steel* to *Hoffman*). *Hoffman* illustrates these remedial limitations. *See id.* at 1600 ("Although *Republic Steel* did not take a starring role in *Hoffman Plastic*, its spirit dominated the case."); *The Supreme Court, 2001 Term—Leading Cases*, *supra* note 37, at 402 ("Denied the possibility of ordering a backpay award to a third party, the Board [in *Hoffman*] . . . strayed far afield and into conflict with another statutory scheme.").

39 *Hoffman* itself notes the possibility of congressional action. *Hoffman*, 535 U.S. at 152. *But see* Shahid Haque, Note, *Beyond* Hoffman Plastic*: Reforming National Labor Relations Policy to Conform to the Immigration Reform and Control Act*, 79 CHI.-KENT L. REV. 1357, 1379 (2004) (proposing delegating NLRB remedial powers to U.S. Immigration and Customs Enforcement ("ICE") to avoid the NLRB's remedial limitations).

40 Employee Free Choice Act (EFCA) of 2009, H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009). The Act would authorize treble backpay if there is discriminatory discharge during a union organizing campaign, and it would authorize civil fines of up to $20,000 per violation against employers who willfully violate employees' rights during such campaigns. *Id.* § 4(b). The Act does not add a general provision for compensatory or punitive damages, nor does it specifically mention the *Hoffman* problem or alternative recipients. Whether the Act will pass,

A. General Critiques of Alternative Recipients

There are strong structural critiques of proposals involving alternative recipients. These critiques argue that an award to alternative recipients is (1) unfair to an individual employee who suffered antiunion discrimination, and (2) would destroy the incentive for an individual employee to bring suit.

The first critique argues that an individual worker is not made whole when he suffers antiunion discrimination without the remedy of backpay.[41] Further, the unfairness to this individual worker is magnified and could even disrupt the entire labor market because of the nature of the collective bargaining system, in which workers are meant to bargain for employment benefits as a cohesive unit: "Once undocumented immigrants have obtained employment, regardless of whether they have breached federal law in doing so, their treatment by employers directly implicates the treatment received by all other employees . . . ."[42] Unequal treatment can affect broader wage scales and working conditions by undermining the legitimacy of the union as the exclusive bargaining agent.[43] This occurs when the union can only effectively protect some employees.[44] Uniform treatment of similarly skilled workers is essential to the worker unity that drives unions.[45] It can also place employers who do not use unauthorized workers at a competitive disadvantage.[46] Additionally, creating an underclass of workers that does not have equal remedies is antithetical not only to

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and whether these provisions show a congressional intent that will be enough for the Court to abandon the rule of *Republic Steel* or authorize alternative recipients in the *Hoffman* context, remains to be seen. *See* William B. Gould, IV, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?*, 70 LA. L. REV. 1, 29 (2009) (stating the award of fines in the EFCA "is long overdue and should have been available" after the *Hoffman* decision). *See generally Republic Steel*, 311 U.S. 7; *Hoffman*, 535 U.S. 137.

41 *See* Marianne Staniunas, Comment, *All Employees Are Equal, but Some Employees Are More Equal than Others*, 6 U. PA. J. LAB. & EMP. L. 393, 408 (2004).

42 *Id.* at 425.

43 Brackman, *supra* note 37, at 727; Staniunas, *supra* note 41, at 415.

44 *See* Staniunas, *supra* note 41, at 415.

45 Brackman, *supra* note 37, at 727 ("After the *Hoffman* decision, the further decline in union membership may result because of employee's fear that NLRA protections previously afforded to them are not as strong. Legal workers are in turn impaired when trying to organize union campaigns."); Staniunas, *supra* note 41, at 425.

46 *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892 (1984) ("'[A]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.'") (alteration in original) (quoting De Canas v. Bica, 424 U.S. 351, 356–57 (1976))); Phillips, *supra* note 37, at 243 (noting the effect of unreformed labor laws on employer competition).

the American union framework, but also to American democracy as a whole.[47]

The second critique builds on the unfairness argument by detailing its practical effect: if an employee does not receive a remedy for complaining of antiunion discrimination, he will not have an incentive to bring suit—especially when bringing suit could expose his illegal status to the authorities. The critique thus notes that,

> while the proposed solution of larger monetary sanctions would act as a stronger financial deterrent to employers seeking to hire undocumented workers [than the post-*Hoffman*, future-oriented sanctions], such changes would be inadequate in that they overlook the infrequency in which individual victims will bring such claims without the likelihood of financial benefit. . . . [M]any foreign-born workers, even those in the country legally, do not bring claims against their employers due to fears of retaliation or inquiry into their legal status.[48]

Even though complaints can deter antiunion practices, when there is no backpay award, reporting may not be worth the risk for a wronged worker.[49]

B. Suggested Alternative Recipients and Their Pitfalls

In addition to these structural critiques, many proposals for alternative recipients can be critiqued as too general because they fail to specify alternative recipients of the backpay award.[50] A few proposals, however, do suggest such specific alternative recipients, including government institutions and immigration enforcement agencies. Although these proposals have the strength of specificity, choosing these recipients would reflect an improper balancing of labor and immigration law goals.

1. Government Institutions: A No Man's Land for Immigrant Communities

The first set of proposals suggests awarding backpay to government institutions rather than unauthorized workers. Some proposals

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47 *See* Robert I. Correales, *Did* Hoffman Plastic Compounds, Inc.*, Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103, 138 (2003).

48 Vivian, *supra* note 27, at 214.

49 *See id.*

50 *See, e.g.*, *The Supreme Court, 2001 Term—Leading Cases*, *supra* note 37, at 399 (suggesting generally "the award of backpay to a third party, such as the government").

suggest giving this money directly to the Treasury.[51] Another proposal suggests that this money be given to the NLRB or be used to compensate employees who prevail through the NLRA over judgment-proof employers, such as employers who have gone out of business.[52] A strength of this latter proposal is that the money does go to facilitate collective bargaining, either through maintenance of the NLRB or through payment to a union worker. But even this proposal does not address the harm to the community that is denied backpay under *Hoffman*—namely, the immigrant worker community.

These proposals for awarding government institutions do not effectively address the harm to the immigrant community caused by *Hoffman*. Although these proposals may be politically neutral and feasible because they do not address hot-button immigration issues, while also preserving backpay's disincentive for employer discrimination, they also preserve a no man's land for the immigrant community. Under these proposals, and in order to avoid the perceived interference with immigration law that is shunned under *Hoffman*, the NLRB would not be allowed to step in and address harm to this specific community. And because the harm to this community would not be addressed by a complaint to the NLRB, unauthorized workers who are discriminated against because of protected union activity would not have an incentive to complain to the NLRB in the first place.[53] Because neither individual workers nor their communities would benefit from a complaint, backpay would rarely be collected by the government.

These proposals, in effect, perpetuate the status quo. Employers would still know that hiring undocumented workers insulates them from liability for backpay, and this knowledge would lead them to continue to employ undocumented workers, a result as bad for immigration policy as it is for labor law. These proposals read immigration law too broadly as precluding the exercise of NLRB power to help immigrant communities (even if the NLRB cannot help undocumented workers themselves) and, as a result, the harm arising out of the *Hoffman* labor-versus-immigration dichotomy remains.

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51 William B. Gould IV, *Labor Law and Its Limits: Some Proposals for Reform*, 49 WAYNE L. REV. 667, 669 n.7 (2003) (discussing a proposal by Representative Tom Campbell); *see also* Jarod S. Gonzalez, *Employment Law Remedies for Illegal Immigrants*, 40 TEX. TECH L. REV. 987, 999 (2008) (suggesting that, in cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006), lost wages from undocumented workers should be paid to the government generally).

52 Worster, *supra* note 28, at 1094; *see also* Phillips, *supra* note 37, at 278.

53 *See* Vivian, *supra* note 27, at 214.

2. Immigration Enforcement: Ratcheting Up the War

A different proposal suggests using backpay award money to enforce immigration laws, rather than giving it to undocumented workers.[54] A strength of this proposal is that it may be politically feasible in the post-9/11 climate.[55] However, at its core, this proposal takes the problems inherent in giving backpay to alternative recipients and adds them to the problems created by *Hoffman*, thereby magnifying the tension between labor and immigration law rather than ending it.

If money from a suit against an employer who discriminates against union activity goes towards immigration enforcement, this would not only be unfair to individual unauthorized workers, but also would constitute a disincentive to those workers reporting a violation. The proposal is unfair because not only does a worker not receive backpay, but the money he does not receive may also be used to further prosecute him or others like him in the immigrant community. This adds insult to injury: already a victim of an NLRA violation, the worker is revictimized when his supposed remedy is used against him. In such a situation, the worker not only has no real incentive to report; the worker also has a clear incentive not to report.[56] Using the reporting of NLRB violations to fund immigration enforcement would therefore only magnify the fear of reporting that is pervasive in the immigrant community, even where *Hoffman* does not apply.[57] Few employees would report solely to punish an employer if it would mean facing potential prosecution for their statuses as unauthorized workers.[58] Therefore, this proposal is a strong example of how alternative recipients could be unfair to an individual worker and create a disincentive to report violations of the NLRA.

Because it disincentivizes undocumented workers from reporting antiunion discrimination, using backpay awards to enforce immigration laws would retain the perverse incentive for employers to hire unauthorized workers. Employers would continue to discriminate

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54 *See* Haque, *supra* note 39, at 1380. The proposal also suggests that backpay money could be used for "monitoring the employer and ensuring compliance" with labor laws after the ruling against the employer, which is less controversial and more like the government institution proposals discussed above. *Id.*

55 *See generally* Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 CRIM L. BULL. 550, 560–61 (2004) (discussing the use of immigration law as part of the war on terror).

56 *Cf.* Vivian, *supra* note 27, at 196 (discussing fear of reporting in the immigrant community).

57 *See id.*

58 *See id.*

against unions because, while *Hoffman* prohibits backpay awards, the proposed regime effectively does the same thing by discouraging the reporting that would lead to backpay awards. Even though reporting would theoretically cost the employers and would act as a disincentive to antiunion conduct, it would cost an unauthorized worker more.[59] Reporting would therefore rarely happen. Thus, under this proposal, the perverse incentives to hire unauthorized workers that *Hoffman* created would remain.

Besides adding *Hoffman*'s effect of encouraging the hiring of unauthorized workers to the potential unfairness of alternative recipients, this proposal would also ratchet up the tension between labor and immigration law. The proposal to use backpay for immigration enforcement would essentially make the NLRB an enforcement arm of U.S. Immigration and Customs Enforcement ("ICE").[60] It would use NLRB statutory authority under the NLRA to collect backpay from employers, but then use the collected backpay for immigration enforcement rather than the encouragement of collective bargaining. The NLRB would be the collection man for ICE,[61] and the money would be used for ICE's goals. This proposal is thus an even broader reading of immigration law's power and scope than the proposals for government recipients, and clearly subjugates labor law to immigration law. This idea illustrates and exacerbates the perceived and unnecessary schism between labor and immigration law that motivated the *Hoffman* decision. True to the *Hoffman* outcome, when labor law is pitted against immigration law, labor law loses. This proposal's fidelity not only to the blackletter law of *Hoffman*, but also to its zero-sum perspective, unnecessarily cements the problems *Hoffman* has caused for the objectives of both labor and immigration law.

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59 *See id.* at 194–95. Conceivably, a backpay award from an employer who hires undocumented workers could be used to fund further investigation of that employer's affairs regarding immigration. This could potentially discourage the hiring of unauthorized workers by that employer by acting as a "double whammy"—the employer not only has to pay, but also risks having the money used against it (as it may be used in the proposals that give money to the NLRB). *See* Phillips, *supra* note 37, at 278; Worster, *supra* note 28, at 1094. But for this investigation to occur, a worker still has to risk deportation to report. Vivian, *supra* note 27, at 196. And this reporting is again so rare that an employer is unlikely to fear an investigation that results from such reporting, even if the costs of the investigation would be severe. *See id.* at 214.

60 *See* Haque, *supra* note 39, at 1379 (stating that "the remedial power of the NLRB should be delegated . . . to [ICE]" when undocumented workers are involved).

61 Even if ICE actually collected the award in order to avoid the NLRA's restriction on punitive damages, this collection would still be to remedy NLRA violations as determined by the NLRB. *See id.* (proposing delegating NLRB powers to ICE to avoid the NLRB's remedial limitations).

III. Union Shops, Not Border Stops: Using Backpay to Organize Immigrant Workers

When backpay for undocumented workers is precluded under *Hoffman*, the NLRB should be empowered to levy a fine for this amount of money on employers. This money should then be used to fund groups that organize immigrant workers.[62] The money could be paid to community activism groups or to unions with a special focus on immigrant workers.

In order to ensure fairness and foster worker participation, the NLRB should make a list of organizations that a worker could choose from. The NLRB would prepare a list of groups that organize immigrant workers and that meet other appropriate criteria, such as nondiscrimination. To ensure that tension with the *Hoffman* holding is avoided, the groups selected should not focus on organizing unauthorized workers. It could also be required that these groups not inquire into the legal status of the immigrants that they work with, in order to ensure that their focus is not on unauthorized workers. Once this list is prepared, a worker should be able to select a recipient of a possible backpay award when he reports an NLRA violation. Giving the worker this choice would help the most in incentivizing reporting by the worker, even if the worker were not the one to receive a backpay award. Involving the more professional and objective NLRB in turn would help to ensure that the organizations selected are appropriate.[63]

This proposal adopts the idea of an alternative backpay recipient and attempts to build on one of the idea's strengths—namely, its consistency with *Hoffman*.[64] It also counters weaknesses in that idea, including unfairness, the lack of reporting incentives, and the potential inconsistency with NLRA goals. When backpay is precluded, only funding for groups that organize immigrant workers best addresses the harms caused by antiunion discrimination aimed at unauthorized workers, because doing so will fund more organizing in the broader

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62 Note that the groups that will receive the funds organize immigrant workers in general—there is certainly no requirement that the groups focus on unauthorized workers, as this would be in conflict with immigration law policies.

63 The NLRB is also somewhat politically accountable for its choices. *See* 29 U.S.C. § 153(a) (2006) (NLRB members are appointed for terms of five years by the President with the advice and consent of the Senate).

64 When considering this proposal's consistency with *Hoffman*, it is important to recall Justice Breyer's argument that although denying a backpay award created an incentive for the hiring of undocumented workers, the prior availability of a backpay award did not create an incentive for illegal entry because the award was so speculative for any given individual worker. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 155 (2002) (Breyer, J., dissenting).

immigrant community. Thus, funding such organizing is consistent with both *Hoffman* and with the policy goal of the NLRA: fostering collective bargaining through unionization.[65]

A. Unfairness and the Lack of Reporting Incentives

Awarding backpay to the immigrant worker community is the best response to the unfairness and lack of reporting incentives that are inherent in any alternative recipient scheme where backpay does not go to the wronged employee. Using backpay to fund worker organizing in immigrant communities uses the money to promote the workers' collective voice—thereby promoting the well-being of the entire community. Since the direct award of backpay is precluded by *Hoffman*, the next best thing is giving the money to the employee's community. This keeps the award only one step removed from the employee himself. He may still feel the benefits of the award as a member of the community. Enjoyment of these diffuse benefits and recognition that the award could benefit those close to the wronged employee would help to minimize the unfairness of an alternative-recipient scheme. Concededly, unfairness is created by the preclusion of backpay from the *Hoffman* decision and it cannot be entirely ameliorated by a proposal consistent with the case.

The same is true for the lack of reporting incentives created when backpay money does not go to the wronged employee. Recognition by the employee that reporting will help his community—both by deterring unfair labor practices through the levying of backpay and by funding further organizing in the community through the award of backpay—would best preserve an incentive to report even absent direct private gain. This direct benefit to worker organizing in the immigrant community—unlike the diffuse benefit to the public under the government proposals or the potential harm to the immigrant community under the immigration-enforcement proposal—could still encourage reporting.[66] Again, the incentive to report is still weaker than

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65 *See* 29 U.S.C. § 151 ("It is hereby declared to be the policy of the United States to . . . [protect] the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.").

66 It should be noted that a wronged worker should still have standing in federal court to contest his treatment even though the worker himself would not collect a backpay award. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc., 528 U.S. 167, 185–87 (2000) (plaintiffs have standing to seek penalties that go to the U.S. Treasury rather than to the plaintiffs themselves). The Supreme Court also seemed to suggest a worker who cannot receive a backpay

it would be if the worker himself could recover backpay, but this lack of incentive cannot, consistent with the *Hoffman* decision, be ameliorated entirely.

B. Consistency of Alternative Recipient with NLRA Goals

This Essay seeks specificity in selecting a recipient, but it also seeks to select a recipient that is consistent with NLRA goals. The purpose of the NLRA is to encourage collective bargaining, and union organizing is central to this policy.[67] Antiunion discrimination harms worker organizing and so impedes NLRA goals.[68] Traditionally, backpay not only deters antiunion discrimination, but also ameliorates the effects of antiunion discrimination because making a wronged worker whole assures other workers that their union activity will be protected.[69] But in the absence of backpay, the harm to union organizing goes largely unaddressed.[70] The proposal for the NLRB as an alternative recipient of backpay awards partially addresses this problem because the NLRB would presumably use the award to encourage collective bargaining. But that proposal is not specific enough—encouraging collective bargaining generally does not necessarily encourage collective bargaining in the immigrant community. Even if it does, spreading out the NLRB's efforts without a focus on immigrant communities would only give diffuse benefits to that community. Therefore, the harm to the immigrant community caused by targeted antiunion discrimination of unauthorized workers would still not be addressed effectively. This Essay's proposal seeks to respond to this problem and specifically address the harm to immigrant communities and their efforts at unionization by funding future organization of these communities.

Unlike other funds for alternative recipients, this Essay's proposal reduces, rather than reinforces, the tension between labor and immigration law. It allows the NLRA and the IRCA, as well as their implementing administrative agencies, the NLRB and ICE, to pursue

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award would have standing to seek a cease-and-desist order or an order requiring an employer to post notice to employees about their NLRA rights. *See Hoffman*, 535 U.S. at 152.

67 *See* 29 U.S.C. § 151.

68 *See* Weiler, *supra* note 28, at 1769–70.

69 *See* Note, *NLRB Use of Back Pay Order to Reimburse Work Relief Agencies*, 50 YALE L.J. 507, 510 (1941) ("[Back pay] is necessary to redress the injury previously done the employees, and it is necessary to assure them of proper protection if they exercise their enumerated rights. In so serving, the back pay order also discourages an employer from a first violation of the Act.").

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

their policy goals in their respective zones of authority. It refuses to view labor and immigration law as inherently in tension and thus does not favor one over the other, as *Hoffman* did and as other proposals have done.[71] Under this Essay's proposal, the NLRB would not become an enforcement arm of ICE, as it would by using backpay awards for immigration enforcement. This proposal also avoids a no man's land for the immigrant worker community by specifically addressing harm caused to it. But labor law does not step on the toes of immigration law, in contrast to how a backpay award going directly to unauthorized workers might, and thus this proposal is still consistent with the demands of *Hoffman* and the Supreme Court's concern over rewarding illegal conduct.

In addition to following the *Hoffman* blackletter holding while seeking to reconcile labor and immigration law, this Essay's proposal attempts to reconcile *Hoffman*'s majority and dissenting opinions. It embraces the majority's emphasis on "significant sanctions" that can protect undocumented workers aside from backpay awards.[72] But, it also creates an alternative sanction with real teeth that can answer the dissent's concern that sanctions other than backpay are not strong enough to deter bad conduct on the part of employers.[73]

In the post-9/11 political environment, this Essay's proposal is concededly unlikely to be adopted by Congress or the courts—the political forces against unauthorized workers are just too powerful for these actors to endorse something that might be perceived as supporting illegal entry into the United States.[74] But this proposal may be feasible in the future, when there is a less passionate political environment, and where it can be explained that the current approach to backpay is as bad for immigration law as it is for labor law. And, more importantly, this proposal demonstrates both that labor and immigration law do not need to be in tension and that *Hoffman* need not be labor law's straightjacket. Options short of overruling *Hoffman* exist for labor law to be reconciled with immigration law, while still successfully organizing the changing workforce of the new millennium.

This Essay's proposal allows the NLRB to use labor law's power for labor goals while avoiding interference with immigration enforce-

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71 *See supra* Part II.

72 *Hoffman*, 535 U.S. at 152.

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

74 *See* Demleitner, *supra* note 55, at 560–61 (discussing the focus on immigration-related measures in the War on Terror).

ment, given that no backpay goes to unauthorized workers. It thus minimizes conflicts between labor law and immigration law and avoids a zero-sum mindset. It represents a practical third way, and a way to move ahead and organize unauthorized workers after *Hoffman*.

Conclusion: A White Flag in the Clash Between Labor and Immigration Law

When labor law goes toe-to-toe with immigration law, labor law loses. Therefore, labor law should refuse to fight. The tension between labor and immigration law must be broken, but proper respect must be given to both labor and immigration law goals. To harmonize these goals, when backpay for undocumented workers is precluded under *Hoffman*, the NLRB should be empowered to levy a fine for this amount of money from employers, and this money should be used to fund groups that organize immigrant workers.