## Undocumented Workers – 1AC

### Workplace Safety – 1AC

#### The Supreme Court’s decision in Hoffman Plastic Compounds vs. NLRB set a precedent that immigration law trumps labor law, which prevents undocumented workers from accessing remedies under all labor and employment laws. That creates a structural condition of exploitation where employers can violate workplace rights.

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The true impact of Hoffman may be hard to determine. One reason is that undocumented workers are unlikely to complain even before their status becomes known; further, once their status does become known, workers are reluctant to speak up for their rights.74 And yet, Hoffman remains a powerful symbol of what is wrong with American labor law, especially as it relates to immigrant workers.75 Others have argued that Hoffman is simply a reflection of the weakness of labor law for all workers. 76

The courts have generally not extended Hoffman past the issue of back pay under the NLRA, but the breadth of the Court's holding can be applied to remedies other than back pay.77 The Court held that awarding an undocumented immigrant "pay for work not performed" would trench upon the regulation of immigration.78 Despite this broad language, courts have refused to extend Hoffman to cases involving Title VII of the Civil Rights Act, the Fair Labor Standards Act, and the Occupational Safety and Health Act. 7 9

Although immigrant workers have continued organizing both in their workplace and in social movements, employers have continued to exploit immigrant workers, documented and undocumented.80 Where the NLRA and other federal laws like the FLSA do not apply, as in agriculture and domestic services, the holding of Hoffman is necessarily limited.81

Most advocates recognize that immigrant workers will not truly be free in the workplace until they have legal status to remain in the country. 8 2 But as the guest worker programs that have been part of the American workplace for over half a century have shown, it is not enough simply to have legal status to protect the rights of workers. 3 There have been numerous cases of exploitation of guest workers, all of whom have legal status. 84 Thus, legal status is necessary but not sufficient to protect immigrant workers. There must also be attention to the enforcement of existing rights for immigrants and citizens alike.85

There have been a number of other factors that may have restricted rights more than Hoffman; for example, there have been laws over the past decades that have restricted the rights of undocumented and Latino workers, such as Proposition 187 and its progeny.86

More empirical work must be done to measure the impact of Hoffman on union organizing. Trends over the last fifty years show a steady decline in private sector unionization, from a high in the 1950s of approximately one-third of workforce in unions, to the current rate below eight percent.87

Nothing in the Hoffman decision limits the ruling to the NLRA. During oral arguments, Ryan McCortney, the lawyer for Hoffman, argued that a finding in the NLRB's favor would affect the possibility of recovering back pay under Title VII.88 Indeed, some courts, most prominently the United States Court of Appeals for the Fourth Circuit, have even held that undocumented workers are not employees at all under Title VII.89 This finding has continued to be undisturbed, and may provide a greater threat to immigrant worker organizing than Hoffman.

When asked about the effect of the Hoffman decision, McCortney said the decision would not change the employer's duty to pay minimum wages.90 However, he said, "it could affect the remedies for [for legal violations]. This was about pay for work not performed." 91

Beyond McCortney's prediction that the decision's impact will be broad, other effects are quite possible.92 First, the way that Hoffman resolved the tension between immigration control and labor policy might prove to be a model for the policy objectives of other statutes to be ceded to the prerogatives of immigration control. The Hoffman rule also puts at risk any remedy obtained for an undocumented worker that is not "pay for work not performed." 93

Second, with Hoffman, the seeds for revisiting the basic protection of undocumented workers as "employees" had been planted. During oral argument, Justice Kennedy questioned the government as to whether they thought undocumented workers should be allowed to be in a bargaining unit at all, even though that was not at issue and the Court did not disturb Sure-Tan's holding that undocumented workers were employees. 94 In Agri Processors Co. v. NLRB, the employer tried to use this invitation to question whether a bargaining unit of documented workers and undocumented employees could be challenged on the basis that the unit was not appropriate. 95 The Court of Appeals for the District of Columbia Circuit rejected the challenge, however, holding that the "community of interest" required by the NLRB in certifying bargaining units had to do with similarity of work and working conditions, and not immigration status. 96

In the end, the decision in Hoffman boiled down to an empirical question as to whether granting or refusing a remedy under the NLRA would result in more immigration or more exploitation of workers? Chief Justice Rehnquist and the four justices who joined his majority opinion based their decision in part on the fear that upholding the NLRB's and the D.C. Circuit's award of back pay would "encourage future violations [of immigration laws] by undocumented workers." 97 While the number of undocumented immigrants has indeed gone down over the last ten years, most analysts point to the weakening of the economy over that time to explain why more people have refrained from making the long and dangerous journey into the United States.98 Economics is a major determinant of why people migrate.99

Writing for the four dissenters, Justice Breyer was more concerned about the possibility of exploitation if no real penalties existed for labor law violations beyond a posting and the possibility of a contempt charge for repeat offenders. 10 The employer will get "one free bite at the apple," by being required to post a notice and only being subject to a more serious contempt sanction.10

Justice Breyer's concern that employers would use the majority's position in Hoffman to deny workers the protection of "every labor law under the sun" was raised at oral argument. 10 2 The evidence gathered by the National Employment Law Project and other researchers shows that Justice Breyer was prescient that the lack of deterrence for violating the NLRA would only further incentivize employer misconduct.10 3

#### Supreme Court language is key. Hoffman created a “wider lens” approach that gives judges unilateral authority.

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The Supreme Court has stated that the goal of discouraging illegal immigration should be seen "through a wider lens."23 4 Viewed uncritically, this statement could lead to diminished rights in all cases.

When courts focus on the "wider lens" of incentives, rather than on the specific functional and policy-based arguments discussed above, they often compare unauthorized immigrants' employment relationships to illegal contracts. 2 35 But the comparison ignores the rules governing the enforcement of illegal contracts. Although courts generally refuse to give effect to contracts formed with an illegal purpose, the finding of "illegality" does not end the inquiry. For example, courts are more likely to enforce illegal contracts when failure to do so would result in disproportionate forfeiture. 236 Such forfeiture would certainly occur if an unauthorized immigrant could not recover wages for work performed.

Further, a contract that is made illegal by a particular regulation or statute may still be enforced if one of the contracting parties is a member of the class of persons protected by the statute.237 Although the IRCA bars the employment of unauthorized immigrants, Congress sought to protect the rights of unauthorized immigrants should they ultimately obtain employment. 3 8 Thus, the finding of illegality is only the starting point of the analysis, even if a wider lens is used.

Detached from the language or purpose of the IRCA, the wider lens approach becomes a Rorschach test for judges. Those strongly opposed to illegal immigration focus exclusively on the illegality of the employment relationship. 2 9 Because the Supreme Court has announced many factors relevant to cases involving unauthorized workers without formulating a hierarchy of factors, a plaintiffs unauthorized status becomes the sole focus of the analysis. ° Viewed broadly, the wider lens approach threatens not only the remedy of backpay, but also the ability of unauthorized workers to assert workplace claims at all.

Although still among the minority, several judges have utilized a wider lens to argue that unauthorized 24d cn workers should enjoy fewer rights under federal wage 24 and antidiscrimination 242statutes. These outcomes contradict most post-Hoffman decisions that continue to favor unauthorized workers' rights and remedies. They also ignore Hoffman's central premise, which is that courts may restrict remedies only to the extent that the underlying workplace protections remain intact. Nonetheless, the wider lens view offers an attractively simplistic analysis: denying recovery altogether discourages illegal employment relationships and supports national immigration objectives.

#### Employers face no consequences for workplace safety violations when workers can’t speak out. That threatens health and safety for the entire workforce.

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Denying Mr. Torres any remedies for retaliation based on filing a workers’ compensation claim would effectively deny him his right to be free from such retaliation. This is but an application of the ancient legal maxim ubi jus, ibi remedium—“Where there is a right, there is a remedy.”9

Undocumented workers compose a significant subset of the workforce in the U.S. and Tennessee in industries with high rates of workplace injuries. Fears of immigration and job-related retaliation make such workers particularly vulnerable to workplace abuse. Without meaningful anti-retaliation remedies, reporting becomes a “Hobson’s choice,” and “employees understandably might decide that matters had best be left as they are.” Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 293 (1960). Undermining workplace protections hurts not only undocumented workers; it also endangers the rights and safety of all workers. When remedies for injuries and retaliation are weakened, so too are the incentives for employers to rectify unsafe practices. “[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.” Id. at 292 (citing Holden v. Hardy, 169 U.S. 366, 397 (1898)).

Undocumented workers in the United States—of whom there are approximately eight million—are an integral part of the nation’s workforce and work alongside U.S. citizens.10 They are concentrated in industries with disproportionately high levels of injury and death, such as agriculture, manufacturing, construction, and food services.11 About half of all crop farmworkers in the United States—more than one million—are undocumented.12 Tennessee reflects these national trends; it is home to over 348,000 immigrants, of whom roughly 130,000 are undocumented.13 Tennessee’s undocumented community is overrepresented in similarly high-risk industries.14 Annually in the U.S., approximately 4,800 workers are killed on the job, and almost three million others become ill or injured, often in these same industries.15

Courts have recognized the extreme vulnerability of undocumented workers to workplace abuse.16 Undocumented workers face increased risks of harassment, injuries, wage violations, and other abuses.17 Studies reveal that while undocumented workers experience more workplace injuries and are subject to more wage violations than nonimmigrant workers, they report injuries and violations less frequently.18 Undocumented workers walk a tightrope to protect their jobs and health while avoiding workplace retaliation, which often includes immigration-related threats.19 Rendering workplace protections “inapplicable” to undocumented workers “would leave helpless the very persons who most need protection from exploitative employer practices[.]” N.L.R.B. v. Apollo Tire Co., 604 F.2d 1180, 1184 (9th Cir. 1979) (Kennedy, J., concurring).

Foreclosing remedies “virtually guts” anti-retaliation protections, Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 25 F. Supp. 2d 1053, 1058 (N.D. Cal. 1998), leaving workers without a critical means to uphold basic workplace rights. The experience of Maricruz Ladino exemplifies both the vulnerabilities of undocumented workers and the importance of remedies. She came forward to report rampant sexual assault and harassment among farmworker women despite her fears of immigration and job-related consequences, including termination.20 Indeed, once she spoke out, her employer threatened her and eventually fired her: “Then there were threats . . . that if I continued with the case, I would be deported.”21 Despite these risks, she sued the company and ultimately settled her claim.22

Workers speaking out can inform broader, industry-wide policy changes. Notably, due to cases like that of Ms. Ladino, farms in California with over 50 employees must now participate in sexual harassment trainings to ensure basic workplace safety.23

Conversely, without remedies for undocumented workers, employers lose a critical deterrent against unsafe policies, and all workers suffer. As the Ohio Court of Appeals analogously observed, “If illegal aliens were injured, the employer would not lose any money because the aliens could not collect workers’ compensation. Therefore, the employer may become lax in workplace safety, knowing it would suffer no consequences if its employees were injured at work.” Rajeh, 813 N.E.2d at 703. Employers who expose undocumented workers to unsafe or unhealthy conditions expose their entire workforce to the same risks.

Workers need meaningful anti-retaliation protections to freely report workplace injuries or labor violations. When those protections are weakened, even for just a subset of workers, more workers are more likely to stay silent, leading to preventable injuries. Cultural shifts in the reporting of sexual harassment illustrate the critical role of coworkers’ reporting in one’s decision to report abuse. According to a 2016 report by the U.S. Equal Employment Opportunity Commission, 60 to 70 percent of women have experienced sexual harassment during their careers, yet approximately 70 percent of those women never complained internally to their employers.24 The #MeToo movement, however, has encouraged more people to report illegal harassment.25 Simply put, when one employee reports a labor violation, it breaks down the culture of silence around reporting and uplifts conditions for all workers.

The COVID-19 pandemic only points to the need for meaningful antiretaliation protections that encourage workers to report problems. Currently, reports indicate that some employers are pressuring individuals to continue working despite extremely high risks of contracting COVID-19.26 At least one federal suit has been filed against a company for threatening to fire employees who did not continue working despite potential COVID-19 exposure.27 In recent months, COVID-19 outbreaks have been reported at farms and food processing plants nationwide.28 At one Tennessee farm, 100 percent of farmworkers tested positive for the virus.29 Safeguards against retaliation for reporting workplace injuries are paramount, since COVID-19 threatens the health and safety of all workers, and their broader communities, regardless of immigration status.

This Court should affirm that federal immigration law does not preempt the award of state-law remedies to Mr. Torres. Without a remedy, there is effectively no right. See Marbury, 5 U.S. (1 Cranch) at 163. Foreclosing meaningful relief to workers like Mr. Torres would exacerbate the unsafe working conditions and fear of retaliation already experienced by undocumented workers, leading to more dangerous workplaces for all.

#### Specifically, Hoffman incentivizes employers to violate paid sick leave requirements. That causes mass disease spread.

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Court cases furthered exacerbated IRCA’s negative impact on the employment and labor rights of im/migrant workers because they opened the door to limiting certain remedies for im/migrant workers, whose workplace rights had been violated. This case law is important to understand before examining why im/migrant workers fail to benefit from paid sick leave laws because it contextualizes im/migrant workers’ predicament when it comes to asserting rights in the workplace, such as the right to paid sick leave.

After IRCA “injected the nation’s immigration laws directly into the workplace,”[86] the Supreme Court, in Hoffman Plastic Compounds, Inc. v. NLRB, severely limited im/migrant workers’ rights under a leading federal labor rights law.[87] The National Labor Relations Act (NLRA) provides workers with the right to engage in union-related activities and concerted action in the workplace.[88] If a worker faces adverse employment action including, but not limited to, termination for participating in activity protected under the statute, the NLRA provides the worker with the sole monetary remedy of backpay.[89] Backpay means the earnings a worker would have made but for an employer’s retaliatory actions.[90] The National Labor Relations Board (NLRB) is the federal administrative agency tasked with bringing NLRA claims against employers and determining backpay awards.[91] In determining whether to award backpay under the NLRA, the NLRB can take into account whether a worker sought replacement employment in good faith after termination.[92]

Hoffman Plastic arose when Jose Castro, a worker in the polyvinyl resins and plastic pipework company, was fired by his employer for attempting to unionize his workplace.[93] The NLRB determined that Mr. Castro’s rights had been violated by Hoffman Plastic Compounds, Inc., and that he should be awarded $66,951 in backpay.[94] The employer appealed and argued that Mr. Castro, who lacked work authorization,[95] should not be entitled to backpay because IRCA made it unlawful to employ unauthorized workers.[96]

In an earlier case that arose before the passage of IRCA, the Court had held that unauthorized workers were covered by the NLRA because the Act states that the “‘term employee’ shall include any employee.”[97] In Hoffman Plastic, the Court followed its precedent that unauthorized workers like Mr. Castro were covered under the NLRB.[98] However, the opinion, written by then-Chief Justice William Rehnquist, went on to state that, due to IRCA having “significantly changed” the legal landscape, Mr. Castro could not be awarded backpay.[99] The Court asserted that IRCA made “combating the employment of [undocumented workers]” central to immigration law and policy and that awarding Mr. Castro backpay “runs counter to policies underlying IRCA.”[100] The Court’s opinion, however, ignored the legislative history clearly stating that IRCA should not be read to alter unauthorized workers’ rights under employment and labor laws since the very purpose of the NLRA’s backpay provision is to deter violations of workers’ rights to unionize.[101] Instead, the Court reasoned that, because IRCA prohibited Mr. Castro from legally working in the United States in the first place, it would contravene everything IRCA stood for to award him backpay. This reasoning is based on the notion that a worker would have been employed but for an employer’s unlawful action.[102] The Court went on to state that awarding backpay to unauthorized workers under the NLRA “condones and encourages future violations.” [103] This, it said, was because unauthorized workers would not be able to fulfill their duty to mitigate damages “without triggering new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore IRCA and hire illegal workers.”[104] Thus, the Court concluded that “allowing the Board to award backpay to [persons without work authorization] would unduly trench upon explicit statutory prohibitions critical to federal immigration policy.”[105]

The central dilemma in Hoffman Plastic perfectly illustrates the collision between immigration laws, like IRCA, and workers’ rights laws, like the NLRA. On the one hand, Hoffman Plastic Compounds, Inc. clearly violated Mr. Castro’s labor rights, and IRCA’s legislative history states that the rights of workers are not to be diminished by IRCA. On the other hand, the logic of backpay is that a worker would have been employed but for an employer’s bad actions. The Court could have chosen to adhere to the plain language of the NLRA, which does not require work authorization as a prerequisite for mitigation of damages under its backpay provision, but it did not.[106] Rather, the Hoffman Plastic Court chose to privilege immigration enforcement above workers’ rights.[107]

Refusing to award workers backpay when employers are liable for workers’ rights violations—what Professor Wishnie referred to as “functional immunity” from employment and labor laws—has done little to nothing to further IRCA’s prohibition on unauthorized employment but has significantly hurt labor rights.[108] Worse still, Hoffman Plastic brought the exact opposite result from what IRCA sought because the Court’s holding incentivizes employers to hire people without work authorization who are barred from seeking certain types of damages.[109]

By gutting NLRA backpay protections for unauthorized workers,[110] Hoffman Plastic signaled to employers that they could retaliate against im/migrant workers who dared engage in collective bargaining or other NLRA protected activities with impunity—even if they were found liable they would not have to make backpay awards.[111] Employers soon began pressing courts to apply Hoffman Plastic logic to damages under other federal employment and labor laws such as Title VII and the FLSA.[112]

The most recent battle over the reach of Hoffman Plastic arose in the context of a state workers’ compensation law. In Torres v. Precision Industries, Inc., Ricardo Torres hurt his back while working at Precision Industries.[113] He filed for worker’s compensation under Tennessee state law, and was terminated for doing so by his employer in contravention of that law’s anti-retaliation provision.[114] When Mr. Torres sued for retaliatory discharge, Precision Industries borrowed Hoffman Plastic logic to argue that the former employee should not be awarded any damages, not merely non-payment of backpay, because he lacked work authorization.[115] A federal district court in Tennessee initially agreed with the employer and prohibited Mr. Torres from recovering economic and non-economic damages based on IRCA.[116] Relying heavily on Hoffman Plastic, the Sixth Circuit Court of Appeals ultimately upheld the portion of the district court’s decision on remand that denied Mr. Torres backpay for the period in which he was unauthorized to work.[117] The appeals court concluded, however, that Mr. Torres could recover other types of damages because IRCA does not “preempt compensatory and punitive damage awards unrelated to an employee’s immigration status.”[118] The court made this distinction by focusing on that portion of the Hoffman Plastic decision pointing out that backpay mitigation requires an unauthorized person to seek employment.[119] Thus, the Sixth Circuit holding reasons that even though IRCA was created to “halt the hiring and continued employment of unauthorized [workers] . . . this does not mean Congress has occupied the entire field of employment regulation, including causes of action arising out of an individual’s employment, authorized or not.”[120]

The Precision Industries opinion, like the Hoffman Plastic opinion, straddles the intersection between immigration enforcement and workers’ rights. Both Precision Industries and Hoffman Plastic continue to indulge the legal fiction that situates im/migrant workers as impossible subjects forced to occupy a space that refuses to recognize their rights but that profits from their labor.[121] Even though these cases do not limit im/migrant workers’ rights to remedies under most employment and labor laws, the next Section explains how the collision between immigration enforcement and workers’ rights—created in part by IRCA and its resulting case law—largely strips im/migrant workers of meaningful access to employment and labor protections such as paid sick leave.

C. The Emergence of the “Brown Collar Workforce”

The COVID-19 pandemic has laid bare a twenty-first-century workforce that is highly stratified and segregated based on race and immigration status.[122] In this picture, im/migrant workers toil in occupations and industries that have come to be associated with laudable buzzwords such as “frontline” and “essential,” which really are code words for jobs that pay little, often are dangerous to health and safety, and have high rates of employment and labor law violations.[123] What led to the overrepresentation of im/migrant workers in these jobs[124] is a long and complicated puzzle, painstakingly put together by renowned scholars, such as historian Mae Ngai and sociologist Ruth Milkman.[125] Their work carefully traces the decades-long lineage of im/migrant workers’ concentration in certain types of jobs. It also shows that changes to the legal landscape between the mid-1960s and the mid-1980s ultimately resulted in the making of what often is referred to today as the “brown collar workplace.”[126]

With the passage of Title VII, which forbid workplace discrimination on the basis of race, national origin, ethnicity, sex and religion,[127] Black Americans, along with other less-educated Americans, began fleeing undesirable jobs made worse by the weaking of labor unions.[128] At the same time, as described above, the 1965 amendments to the INA and the first-time imposition of quotas on legal migration from Mexico resulted in a newly undocumented workforce desperate for work.[129] Twenty years later, IRCA’s passage in 1986 led to the Hoffman Plastic decision, workplace raids, and im/migrant workers’ increased sense of vulnerability.[130] This vulnerability is a key element in the making of the brown collar workforce because it creates subservience,[131] which is appealing to employers who engage in violations of workplace rights.[132] Indeed, researchers have shown that brown collar workers’ vulnerable status makes them less likely to engage in complaint-making when their employment and labor rights are violated.[133]

In addition to a lack of im/migrant worker complaint-making, there is also an enforcement problem. Employment and labor laws disincentivize violations of workplace rights by making employers pay when violations occur.[134] For example, the FLSA permits workers whose minimum wage and overtime rights have been violated to seek up to double the amount they are owed in unpaid wages;[135] the NLRA allows workers to be paid for time they could not work due to retaliatory discharge;[136] Title VII provides for backpay, frontpay, and compensatory and punitive damages;[137] and most local minimum wage and paid sick time laws allow workers to recover liquidated damages in addition to compensatory damages for employer violations.[138] These laws also come with strong prohibitions against retaliation when workers assert their rights, which can result in additional monetary damages.[139] Importantly, in order to get from violation to economic recovery for workers and punishment for employers, the system relies nearly exclusively on worker complaints.[140] This bottom-up method of workers’ rights enforcement does not function as intended when it comes to im/migrant workers.[141]

Employment and labor laws on federal, state, and local levels set up a dual system whereby enforcement action can be taken by the agency tasked with upholding the law at issue or by an individual worker or groups of workers under private rights of action.[142] Sometimes the two enforcement mechanisms work in tandem, such as when workers file complaints with the appropriate agency and then the agency investigates and, if necessary, takes legal action.[143] Over time, consistent starvation of agency budgets on the federal level as well as in many states has led to worker complaints being “the primary driver of enforcement activity.”[144] The legal system assumes that all workers have equal access to complaint-making. Several empirical studies conducted by economists over the past twenty years have disproved this assumption when it comes to the most vulnerable workers.[145]

In a 2004 study, David Weil and Amanda Pyles examined three years’ worth of complaint data at the U.S. Department of Labor (DOL) for violations under the FLSA and the Occupational Safety and Health Act (OSHA).[146] After deducing that “the annual probability of receiving an inspection for one of the 7.0 million establishments covered [by the FLSA or OSHA] is well below .001,”[147] the researchers concluded that holding employers who commit FLSA and OSHA violations responsible is mostly contingent upon worker complaint-making.[148] They then hypothesized that a worker is more likely to engage in the complaint-making process if the perceived benefits to the worker outweigh the costs.[149]

The researchers defined the cost of making a complaint not only as retaliatory behavior by the employer, but also the cost in time and energy required to research and understand the laws under which an employee’s rights may have been violated.[150] After sifting through the data, the researchers concluded that “the nature of the benefits and costs [of complaint-making] preclude many workers from exercising their rights in the first place, resulting in a modest-level of complaint activity.”[151] They theorized that workers who “feel vulnerable to exploitation,” including “immigrant workers,” are even less likely to assert their workplace rights.[152]

This research makes two important contributions to understanding the plight of im/migrant workers. First, it demonstrates that the existing system of bottom-up workplace rights enforcement wrongly assumes that all workers experiencing workplace violations have equal access to vindicating their rights by complaining either to agencies or through private rights of action.[153] Second, it shows that differently situated workers have differing benefit/cost ratios for engaging in complaint-making, and that the most vulnerable workers are unlikely to assert their workplace rights because the costs greatly exceed the benefits of complaining about workers’ rights violations.[154] Additional studies confirm that im/migrant workers often fall into this “most vulnerable” category and are less likely than other workers to engage in complaint-making when their workers’ rights are violated.[155]

Building on earlier studies, in 2014, economists Charlotte Alexander and Arthi Prasad examined the “powerful incentives [vulnerable workers have] to stay silent in the face of workplace problems” by specifically surveying im/migrant workers.[156] Reviewing data collected from over four-thousand workers in three of the largest U.S. cities, they found that im/migrant workers do not benefit from employment and labor laws for two main reasons: 1) they lack the legal knowledge “to identify violations of their rights and access the proper enforcement procedures,” and 2) the risks in complaint-making far outweigh the benefits for these workers.[157] The researchers further found that even when workers had knowledge of workplace rights and how to engage in complaint-making, “43 [percent] of workers who had experienced a workplace problem . . . decided not to make a claim”[158] and that “the most common reason” for im/migrant workers’ “silence was their fear of employer retaliation.”[159]

Other research shows that im/migrant workers often do not complain about workplace abuses because they anticipate retaliation before it occurs.[160] This has been well documented in im/migrant-heavy workplaces where employer threats—both spoken and unspoken—prevent workers from raising their workplace rights for fear of adverse employment action.[161] These silencing tactics are especially effective because, under the law, employees cannot state a claim for employer retaliation until after the retaliation occurs.[162] Thus, the mere threat of retaliation is often enough to foreclose im/migrant workers from making complaints.[163] Alexander and Prasad’s 2014 study also found that when im/migrant workers overcome the fear of retaliation and complain, roughly 43 percent “experienced some form of employer reprisal in response” and of these reprisals, 35 percent “constituted unlawful retaliation in violation of labor and employment laws.”[164] While the remainder of reprisals “likely did not rise to the level of an ‘adverse employment action’” as defined under employment and labor laws, they “nevertheless likely had a silencing effect on workers.”[165] Importantly, even when actionable retaliation occurs, anti-retaliation remedies in employment and labor laws “can be invoked only after the employee has suffered [harm], and offer, at best, the possibility of an uncertain remedy after a long delay.”[166]

For example, in Tolano v. El Rio Bakery, four im/migrant workers filed claims against their employer under the FLSA, NLRA, and state minimum wage law for failing to pay overtime or minimum wage and for engaging in retaliation against the workers when they collectively complained about these violations of their workplace rights.[167] After the case was filed in federal district court, the employer filed for bankruptcy, which led the district court to stay its case pending the bankruptcy court’s determination.[168] Almost a year later, the bankruptcy court rejected the employer’s bid for bankruptcy protection. In the intervening months, the employer shut down its business, sold all assets, and disappeared.[169] Thus, when the district court resumed the initial case and ultimately awarded the workers a combined $197,078 in monetary damages, there was little to no hope of actual recovery for the im/migrant workers who braved making a legal complaint.[170]

A similar situation developed with Turman v. Koji’s Japan, Inc., a class action that began in 2010 as a result of an employer systematically violating workers’ rights under the FLSA and state labor laws.[171] Like the employer in Tolano, the restaurant responded by shuttering its business and filing for bankruptcy, while the sole shareholder and director absconded with the assets.[172] Over eleven years of litigation and several court decisions later, an appellate court finally ruled that the restaurant’s sole shareholder and director was personally liable for violations of workers’ rights under both the FLSA and state law.[173]

Thus, even when vulnerable workers muster the courage to complain, despite the costs they are likely to encounter, they may never recover damages to make up for lost wages or time. Even when courts award damages, workers may have to wait many years for payment. Moreover, employers often avoid paying the steep prices needed to deter them from committing future workplace violations.[174] Thus, the logic behind enforcement of employment and labor laws, which depends on workers making complaints, has failed im/migrant workers.[175]

Viewed another way, the effectiveness of workers’ rights laws depend “significantly on worker ‘voice,’” and cannot help im/migrant workers when their voices are effectively silenced.[176] To be sure, this silencing is based, in large part, on fear of employer retaliation and the threat of immigration enforcement. But there is also another more insidious reason for this silencing. In 2010, Latin American Studies scholar Shannon Gleeson interviewed forty-one Latinx workers, both with and without work authorization, in the restaurant industry in two large U.S. cities to determine why im/migrant workers are less likely to engage in complaint-making.[177] Gleeson found that not only did rights enforcement face substantial barriers created by “limitations of an underresourced labor standards enforcement bureaucracy, lack of knowledge about rights, and employer intimidation,” but workers themselves had internalized a “legal consciousness” that prevented them from making claims when their workplace rights were violated.[178] Gleeson concluded that because the im/migrant workers she interviewed assumed a stance in which they did not believe they were worthy of accessing their workplace rights, “efforts toward reducing [barriers to workplace rights enforcement], while certainly necessary, may be insufficient to ameliorate the fundamental challenge that undocumented status poses.”[179]

In summary, the century-long collision between immigration laws and employment and labor laws has produced a brown collar workforce critical to the American economy but unable to benefit from basic workplace rights. The COVID-19 pandemic has revealed that this disenfranchisement reverberates beyond the well-being of individual workers by threatening entire industries, those they serve, and the public at large. One way to address this crisis is to locate im/migrant workers outside the binary of immigration enforcement versus workers’ rights and inside a public health matrix dependent upon the health and safety of frontline, essential workers. Paid sick leave laws are a portal through which this re-imagining can occur.

II. Paid Sick Leave in America

The pandemic has demonstrated that public health suffers when low-wage im/migrant workers do not have access to paid sick leave. This Section situates paid sick leave rights within a broader public-health policy conversation and highlights the importance of ensuring that im/migrant workers benefit from paid sick leave laws. It does so by describing the United States’ paid sick leave laws and the significant public health benefits they confer to multiple stakeholders.

A. The Legal Landscape

The federal government has never enacted a permanent, national, paid sick time law.[180] Indeed, America lags far behind nearly all of its counterparts among wealthy nations and even among many developing countries in this regard.[181] Congress tried but failed to enact the Pandemic Protection for Workers, Families, and Businesses Act after the 2010 H1N1 epidemic.[182] The Healthy Families Act, first introduced in Congress in 2004 and most recently re-introduced in 2019, has also failed to garner the Congressional votes required to become law.[183] Congress finally implemented a national paid sick leave mandate in the form of the Families First Coronavirus Response Act (FFCRA) after the COVID-19 pandemic hit U.S. shores. However, that mandate was temporary and expired six months before the deadly Delta variant gripped the nation in the summer of 2021.[184] Even when it was in effect, FFCRA was limited in scope because it excluded millions of U.S. workers, including those working at companies with more than 500 employees, those at workplaces with fewer than 50 employees,[185] and those designated by their employers as healthcare workers and first responders.[186]

The only paid sick leave laws in the United States today have been enacted by states and municipalities. Since 2006, when San Francisco became the first place in America to enact a paid sick leave ordinance, local paid sick time laws have burgeoned.[187] Although these laws vary, most are based on a system whereby workers earn one hour of paid sick time for every thirty to forty hours worked.[188] Workers may use a capped number of earned paid sick time hours per year[189] for a variety of reasons including preventative medical care for themselves or a family member, their own illness, caring for a sick family member, and in some cases, for domestic violence related reasons and during a public health emergency.[190] These laws also have a notice requirement; employers must notify their employees of their right to take sick leave and the terms under which they can use it.[191]

Contrary to some employer concerns that workers would abuse paid sick leave, studies of paid sick time laws in several jurisdictions have shown that workers are unlikely to use their earned paid sick days for reasons that don’t qualify for paid sick time.[192] Rather, “employees treat paid sick days not as an entitlement, but as insurance, to use when illness strikes the worker or a family member.”[193]

The modern patchwork of local paid sick leave laws has significantly increased the number of American workers with access to paid sick days. New York City’s law, for example, expanded paid sick leave coverage by 1.2 million workers.[194] Two years after San Francisco’s law went into effect, 99 percent of the city’s workplaces with twenty or more employees provided paid sick days and “[l]ow-wage workers . . . significantly benefitted from the ordinance, especially those working in food service and accommodation sectors.”[195] A survey of employers one year after Seattle’s paid sick time law passed found that “marginalized workers—those in low-paying and part-time positions—are likely to gain significant coverage through mandated paid sick leave policies.”[196] Connecticut’s paid sick leave law similarly resulted in “the largest increases in paid sick leave coverage . . . where workers needed the assistance most, e.g., healthcare, education and social services, hospitality, and retail.”[197]

B. Paid Sick Days Create Net Benefits

Numerous empirical and simulated studies show that paid sick days create net benefits because they achieve the twin goals of ensuring worker health and community safety. This research has revealed that workers without access to paid sick leave are more likely to engage in “presenteeism”[198] than their counterparts with leave, and that these sick workers subsequently infect others at high rates.[199] The converse also is true: when workers have access to paid sick leave, there is a correlative reduction in the spread of viral infections.[200]

Empirical data collected during the H1N1 epidemic of 2009–10[201] revealed that about eight million workers showed up to work with that dangerous influenza virus and went on to infect about seven million additional people.[202] A 2013 National Health Interview Survey concluded that “both full-time and part-time workers without paid sick leave are more likely to attend work while sick.”[203] Although no large-scale studies have yet discerned how many workers went to work infected with the novel coronavirus or how many additional COVID-19 cases resulted, an empirical study during the first summer of the pandemic showed that nursing home aides who engaged in presenteeism were responsible for 44 percent of COVID-19 spread among multiple nursing homes, co-workers, and older residents.[204]

A significant body of research has established that presenteeism is responsible for several large outbreaks of foodborne illnesses too. In 2008, a worker without paid sick leave at a Chipotle restaurant in Ohio came to work ill, prepared food, and subsequently infected 500 people, resulting in hundreds of dollars in cost to the local community.[205] A Wyoming norovirus outbreak in 2012 affected over three hundred people and was traced to restaurant workers who showed up to work sick.[206] Moreover, each year, “there are approximately seventy-six million instances of food-borne illness nationwide . . . and food-service workers who go to work despite being sick were the leading causes of such outbreaks.”[207] Looking beyond the costs incurred by workers, consumers, and communities when disease outbreaks occur, the Harvard Business Review has estimated that presenteeism costs “American companies . . . more than $150 billion” annually.[208]

On the flip side of presenteeism are paid sick leave policies, which have been shown to reduce disease outbreaks. For example, one study comparing the rate of foodborne illnesses in jurisdictions before and after they adopted paid sick leave laws found that the rate diminished by 22 percent after paid sick leave was mandated.[209] A Harvard School of Public Health survey showed that while paid sick leave did not eliminate presenteeism, it “greatly reduce[d] it.”[210] A simulated study using Google Flu Trends data demonstrated that when workers have access to paid sick leave policies that allow them to stay home when they are sick, infection rates decrease by about 10 percent.[211] At least three other simulated studies showed a similar and significant reduction in pandemic spread as a result of paid sick leave laws.[212] Yet another simulated study suggested that paid sick leave would encourage workers to abide by governmental quarantine recommendations.[213] Two other studies have shown that paid sick leave policies result in increased vaccination rates for a broad spectrum of workers.[214] One of these studies, based on Medical Panel Expenditure data from 2006–10, projects that higher vaccination rates due to paid sick days “would result in 18.2 thousand fewer health care visits” and “64 thousand fewer work absences from influenza” alone.[215]

Employees are not the only beneficiaries of paid sick time laws, which have also been linked to favorable conditions for employers. Studies have consistently “found a relationship between paid sick leave policies and economic benefits for employers such as improved employee productivity, reduced turnover and lower associated hiring and training costs as well as improved employee morale and loyalty.”[216] Moreover, several studies conducted in jurisdictions with paid sick leave mandates show that the “overall [negative] impact on businesses was minimal” in that employers reported experiencing “little or no additional costs” and that implementing paid sick days “had minimal effect on business operations.”[217] In New York City, where the paid sick time law covers 3.4 million workers, 94 percent of employers reported “the law ‘had no effect on business’ productivity, while 2 [percent] . . . reported that productivity actually increased.’”[218] Employers also reported little to no extra cost for implementation of the paid sick leave law.[219] Surveys collected from employers in San Francisco and Connecticut, two other jurisdictions with paid sick leave laws, show that most employers did not experience an increase in costs as a result of these laws.[220] Similarly, the California Chamber of Commerce, which originally opposed that state’s paid sick leave law, “reported that employers have not experienced the expected burden” of the law and reported little to no difficulty in complying with the law.[221] In short, a substantial and growing body of empirical data and research confirms “that paid sick leave can be used as an effective policy instrument for controlling epidemics”[222] without harming business interests.

C. Paid Sick Leave and Im/migrant Workers

Despite the demonstrable win-win-win that paid sick leave brings to workers, employers, and the public at large, low-wage workers—a workforce that includes large numbers of im/migrant workers, and everyone they come into contact with—are being excluded from these benefits. DOL figures reveal that “low-income workers still lag far behind in access to paid sick leave.”[223] Nationwide, “only about 65 [percent] of American full-time workers have access to sick leave” and in low-wage, part-time, and service sectors of the economy, this numbers drops precipitously to 20 [percent] of the workforce.[224] All in all, about “forty-four million workers—primarily within low-income brackets—lack access to even a single paid sick day in the United States.”[225] Moreover, using data from the Centers for Disease Control and the U.S. Bureau of Labor Statistics, researchers have estimated that “at least 20 million Americans go to work sick, which [researchers] attribute to lack of access to paid sick leave.”[226] Indeed, one worker survey found that “[o]nly 13 [percent] of low-income workers . . . reported beliefs that they could stay home during a pandemic outbreak.”[227] Many of these workers are im/migrants who work in essential industries performing frontline jobs.[228]

National surveys collected in the aftermath of the H1N1 Pandemic revealed that Latinx workers “had a higher risk of infection due to disproportionate lack of access to paid sick leave” and that these workers had “lower rates of paid-leave access” than their counterparts during that epidemic.[229] Not only were workers in these groups unable to stay home when ill or appropriately socially distance while at work, but they also faced increased hospitalizations and deaths.[230] These higher hospitalization and death rates among racial and ethnic minorities have been replicated during the current COVID-19 pandemic, with Black and Latinx individuals being three times as likely to contract coronavirus and twice as likely to die from it than individuals in other ethnic groups.[231]

While some portion of im/migrant workers’ lack of access to paid sick leave can no doubt be attributed to jurisdictions without paid sick leave laws, emerging research shows that even im/migrant workers who live in jurisdictions with paid sick leave mandates fail to benefit from these laws.[232] To date, no comprehensive study has gathered data regarding the extent to which im/migrant workers have been able to access paid sick leave when they live and work in jurisdictions with paid sick leave laws. The COVID-19 pandemic, however, has prompted researchers to begin looking at this important question since earlier disease outbreak data shows that paid sick leave laws among this group of workers significantly reduces the spread of contagious diseases and resulting fatalities. The largest such study so far to look at this issue was conducted in the middle of the COVID-19 pandemic by the University of Massachusetts Labor Center, which collected surveys from 1600 frontline, essential, low-wage workers.[233] The data revealed that workers felt unprotected from COVID-19 at work and that they could not quit due to economic concerns.[234] Thus, this study revealed information previous research had not unearthed—that despite a robust state paid sick leave law and temporary federal paid sick leave legislation then in effect, a large percentage of low-wage workers, many of whom identified as Latinx, did not receive paid sick days.[235]

Empirical researchers have yet to explore why im/migrant workers do not benefit from paid sick leave laws when such laws exist, although at least two small-scale studies have been launched by the Clinic.[236] The next Section utilizes critical legal theories to construct a framework within which to analyze im/migrant workers’ inability to access paid sick time in jurisdictions with paid sick leave laws.

#### Disease causes extinction, disrupts supply chains, and collapses food and water supply.

Sean ÓhÉigeartaigh 25, Associate Director (Research Strategy) and the Programme Director for the AI:FAR research programme at the Leverhulme Centre for the Future of Intelligence (CFI), "Extinction of the Human Species: What Could Cause It and How Likely Is It to Occur," Cambridge Prisms: Extinction, vol. 3, 2025, e4, 03/07/2025, https://doi.org/10.1017/ext.2025.4

Biological agents

Infectious disease has been a contributing factor in 3.7% of species extinctions known to have occurred between the years 1,500 and 2008 (Smith et al., Reference Smith, Acevedo-Whitehouse and Pedersen2009). In humans, the 1918 Spanish influenza outbreak killed 1–5% of world population (Johnson and Mueller, Reference Johnson and Mueller2002, Spreeuwenberger et al. Reference Spreeuwenberg, Kroneman and Paget2018).Footnote 6 Koch et al. (Reference Koch, Brierley, Maslin and Lewis2019) estimate that epidemics killed 90% of the indigenous population of the Americas as the result of diseases carried over by European colonists in the fifteenth and sixteenth centuries.

It is considered very unlikely that a naturally occurring pandemicFootnote 7 would be a primary cause of human extinction (Ord, Reference Ord2020), and the author is aware of no credible work presenting plausible pathways. Such a disease would need both to spread to nearly all humans across the world and be of extremely high lethality or cause infertility at extremely high rates. However, it seems plausible that pandemic disease could play a contributing role in combination with other factors in an extinction scenario.

A common concern is that advances in the biological sciences and biotechnology could enable the creation of more dangerous viruses and other forms of biological agent than exist in nature (Millett and Snyder-Beattie, Reference Millett and Snyder-Beattie2017). Biological weapon development and use are prohibited under the Biological Weapons Convention; however, leading states have developed major biological weapons programmes in the past, and it is conceivable that such directions might be pursued in future or are presently being pursued clandestinely (Riedel, Reference Riedel2004). Further, advances in these sciences lower the barrier to entry to the development of dangerous agents in terms of cost, expertise and equipment needed, potentially bringing globally catastrophic capabilities within the reach of small groups in future. While groups willing to bring about global catastrophe or even extinction would be expected to be rare, there have been notable examples of groups motivated by near-apocalyptic ideology such as the Aum Shinrikyo cult,Footnote 8 which attempted to weaponise Anthrax and carried out successful local nerve agent attacks (Lifton, Reference Lifton1999; Torres, Reference Torres2016). Gopal et al. (Reference Gopal, Bradshaw, Sunil and Esvelt2023) outline two scenarios leading to civilisational collapse: a “wildfire” scenario in which one or more pandemic agents leads to disruption of food, water, power supply and law enforcement and a “stealth” scenario in which an initially asymptomatic agent with long incubation time is spread to a majority of humanity. They consider both scenarios most likely to involve accidental or deliberate release of human-modified agents. Direct targeting of humans is only one plausible pathway to global harm; Monica Schoch-Spana et al. (Reference Schoch-Spana, Cicero, Adalja, Gronvall, Kirk Sell, Meyer, Nuzzo, Ravi, Shearer, Toner and Watson2017) note the potential pathogens targeting widespread eradication of food sources; and other forms of environmental harm are plausible.

The capability to re-engineer biology more fundamentally may create unprecedented risks. In 2024, a group of leading biological scientists called for a halt to research to develop “mirror bacteria,” designed to have an opposite chirality to that of all forms of existing life (Adamala et al., Reference Adamala, Agashe, Belkaid, Bittencourt, Cai, Chang, Chen, Church, Cooper, Davis, Devaraj, Endy, Esvelt, Glass, Hand, Inglesby, Isaacs, Wilmot, Jones, Kay, Lensky, Liu, Medzhitov, Nicotra, Oehm, Pannu, Relman, Schwille, Smith, Suga, Szostak, Talbot, Tiedje, Venter, Winter, Zhang, Zhu and Zuber2024). The group argues that it is likely these synthetic life forms would both resist predation and bypass immune systems in humans, animals and plants, potentially leading to risk “of unprecedented scope and scale” due to invasive spread and widespread lethal infection.

While robust likelihoods are not possible here, Millett and Snyder-Beattie (Reference Millett and Snyder-Beattie2017) deem the likelihood of full human extinction primarily from a bioweapon or engineered biological agent as “extremely low” but not ruled out, although Ord (Reference Ord2020) estimates as high as 1 in 30 for the coming century. Again for extinction, scenarios involving one or multiple pathogens in combination with other factors may be most plausible.

Nuclear war

The most credible global catastrophe scenarios resulting from nuclear war involve large-scale nuclear weapon exchange bringing about a catastrophic climate effect known as a nuclear winter. In these scenarios, smoke from burning cities, industrial facilities and oilfields enters the upper atmosphere, disrupting sunlight for a period of years and leading to wide-scale crop failures and famine. Disagreement exists between scientific teams modelling the climatic impact of nuclear exchanges. Xia et al. (Reference Xia, Robock, Scherrer, Harrison, Bodirsky, Weindl, Jägermeyr, Bardeen, Toon and Heneghan2022) estimate that over 2 billion people could die from nuclear war between Pakistan and India and over 5 billion between Russia and the USA. However, Reisner et al. (Reference Reisner, Koo, Hunke and Dubey2019) predict more limited generation and dispersal of soot, leading to less severe outcomes.

The size of nuclear warhead arsenals has been reduced from a combined global peak of over 70,000 in the 1980s (Kristensen and Norris, Reference Kristensen and Norris2013), but ~12,512 still exist, with the USA holding 5,244 and Russia holding 5,889 (Kristensen and Korda, Reference Kristensen and Korda2023). Recent years have seen increasing geopolitical tensions between nuclear powers, heightening of political rhetoric around nuclear weapons use, the non-renewal of key treaties such as New START (Williams, Reference Williams2023) and the development of new technology that might upset strategic balance (Bajema and Gower, Reference Bajema and Gower2022), leading to concerns that the risk of nuclear war remains high. A nuclear war appears unlikely to bring about extinction directly, but would severely undermine global ability to respond to other threats.

Artificial intelligence

Three plausible pathways to global catastrophe mediated by artificial intelligence (AI) have been proposed (Hendrycks et al., Reference Hendrycks, Mazeika and Woodside2023). The first relates to AI being used by humans to enact more powerful offensive warfare than in previous history or contributing to military escalation scenarios (Maas et al., Reference Maas, Matteucci, Cooke, Beard, Rees, Richards and Rios-Rojas2023). The second relates to AI accelerating development of other sciences and technologies such as bioscience (Sandbrink, Reference Sandbrink2023) relative to human understanding and governance, increasing any risks posed by these developments. The most discussed scenario, and that most directly linked to human extinction, involves the development and subsequent loss of control of artificial general intelligence (AGI) with autonomy and superhuman cognitive and strategic planning ability. The creation of AGI that is fully aligned with human goals and values is considered by many AI scientists a key challenge for future AI development (Russell, Reference Russell2019); a highly capable system that was not fully aligned might, for example, perceive human oversight as an obstacle to be bypassed and pursue actions (for example, large-scale modification of the Earth’s environment) that might lead to human extinction as a result of indifference to human survival. A rapidly growing number of research leaders consider the development of AGI feasible in coming decades or even years, and an open letter signed by many leading technologists in 2023 stated “Mitigating the risk of extinction from AI should be a global priority alongside other societal-scale risks such as pandemics and nuclear war.”Footnote 9 The topic remains controversial, with many research leaders considering such outcomes highly unlikely.Footnote 10 A recent survey of 2,778 AI authors found that between 37.8% and 51.4% (depending on framing of the question) of respondents gave at least a 10% probability to advanced AI causing human extinction or an equivalently bad outcome (Grace et al., Reference Grace, Stewart, Sandkuhler, Thomas, Weinstein-Raun and Brauner2024).

Physics experiments and unknown future technological developments

Concerns have been raised that particle physics experiments might have the potential to create consequences that could destroy the Earth: for example, creating a black hole, strangeletsFootnote 11 or triggering a phase transition that would rip the fabric of space (Rees, Reference Rees2021). According to Rees, the most favoured physics theories imply that the risks from such experiments “within our current powers” are zero; however, alternative theories imply the possibility of these catastrophic outcomes. Collisions between cosmic ray particles of much higher energies occur frequently without catastrophic consequence, offering some evidence against such concerns (Hut and Rees, Reference Hut and Rees1983). Kent (Reference Kent2004) discusses and critiques risk analysis estimates for the RHIC supercollider, for which probabilities of catastrophe ranged from 10−5 to 2 × 10−8 (Dar et al., Reference Dar, De Rújula and Heinz1999; Jaffe et al., Reference Jaffe, Busza, Wilczek and Sandweiss2000).

Concerns have also been raised about theorised but as yet undeveloped technologies such as atomically precise manufacturing (Phoenix and Drexler, Reference Phoenix and Drexler2004). More generally, many scholars have noted that some of the most powerful and potentially destructive technologies have been developed relatively recently in human history (Rees, Reference Rees2003; Bostrom, Reference Bostrom2013; Ord, Reference Ord2020). Given expectations of continued scientific advancement, it is likely that as-yet undeveloped technologies will pose catastrophic risks in coming decades and centuries and plausibly represent the greatest direct risk of human extinction.

Multiplicative stresses and civilisational vulnerability

A common theme across many of the risks discussed is that they may cause global catastrophe but are unlikely to wipe out the human species in isolation. However, it is realistic to expect that some catastrophes may trigger further catastrophic consequences across the categories above or otherwise occur in combination. The severity of some past major mass extinctions likely resulted from reinforcing interactions between multiple stresses, some playing out over thousands of years. The Permo-Triassic saw a cascade of global warming, ocean acidification and anoxia, and methane and hydrogen release Bond and Grasby (Reference Bond and Grasby2017). The Cretaceous-Paleogene saw the catastrophic consequences of the Chixhulub impact devastating a global environment already stressed by the Deccan Traps (Keller, Reference Keller and Talent2012).

Returning to modern times and shorter timescales, Kareiva and Carranza (Reference Kareiva and Carranza2018) argue that “it is the interconnections of stresses and the way we respond to environmental shocks that promulgates the greatest existential risk.”. Rees (Reference Rees2003) draws attention to the fragile nature of global supply chains: a catastrophe that resulted in higher order impacts, such as disruption of power and food supply chains, would quickly render cities uninhabitable. A civilisation reeling from one catastrophe might also be less resilient to further threats: a planet reeling from nuclear war may not be able to muster the resources to embark on a project to divert an asteroid. Nonetheless, total human extinction remains a very high bar, even for multiple of these threats in combination.

Analysing overall civilisational vulnerability and higher-order impacts of global-scale catastrophes is challenging. There is growing work in this direction. Baum and Handoh (Reference Baum and Handoh2014) propose a “Boundary Risk for Humanity and Nature” framework that combines concepts from global catastrophic risk and the planetary boundaries framework. This intersection is further explored in studies addressing the relationship between the sustainable development goals and existential risk (Cernev and Fenner, Reference Cernev and Fenner2020) and the role of planetary boundary breach in global catastrophe scenarios (Cernev, Reference Cernev2022). Jehn (Reference Jehn2023) examines the role of planetary boundary breach in exacerbating or mitigating the cascading impacts of nuclear war.

Liu et al. (Reference Liu, Lauta and Maas2018) present a taxonomy of existential hazards grouped by how global vulnerability and exposure to the hazards plays out. Avin et al. (Reference Avin, Wintle, Weitzdörfer, Ó hÉigeartaigh, Sutherland and Rees2018) analyse severe global catastrophic risk mechanisms by critical systems affected, global spread mechanism and prevention and mitigation failure. Cotton-Barratt et al. (Reference Cotton-Barratt, Daniel and Sandberg2020) propose a three defence layer model against extinction-level catastrophes, focusing on prevention, response and resilience. Kemp et al. (Reference Kemp, Xu, Depledge, Ebi, Gibbins, Kohler, Rockström, Scheffer, Schellnhuber, Steffen and Lenton2022) outline a research agenda around climate-triggered catastrophes and societal fragility. Maher and Baum (Reference Maher and Baum2013), MacAskill (Reference MacAskill2022) and Belfield (Reference Belfield, Centeno, Callaghan, Larcey and Patterson2023) explore factors that might contribute to either extinction or recovery following a civilisational collapse. Drawing on a range of concepts in systemic risk, Arnscheidt et al. (Reference Arnscheidt, Beard, Hobson, Ingram, Kemp, Mani, Marcoci, Mbeva, hÉigeartaigh, Sandberg and Sundaram2024) argue that emergent properties of the global system make important contributions to the risk of global catastrophic outcomes, noting that a focus on hazards in early global catastrophic risk research critically neglects factors such as amplification and vulnerability. Further valuable insights are likely to come from collaboration between existential risk, systemic risk and collapse research.Footnote 12

Estimating the unprecedented

I have used the term “estimate” in this review for expert assessments of extinction risks posed by hazards ranging from novel bioweapons through to physics experiments. These assessments are provided by scholars with substantial expertise, but there is frequently limited empirical evidence to draw on. Research on human extinction invariably involves at least one of three methodological challenges that make the assignment of robust probabilities difficult (for an analysis of likelihood estimation methods for existential hazards, see Beard et al., Reference Beard, Rowe and Fox2020). A first category of risks involves extremely rare events, where there is limited evidence to go on. A second category relates to entirely unprecedented developments, for which we must often primarily draw on experts’ subjective judgements. A third challenge relates to scenarios involving multiple interacting risks or trends; the complexity of these scenarios makes them challenging to assign likelihood to. Plainly put, humans are quite different from other species. We have no similar extinctions to draw on and so must fumble in the dark with what we have.

In The Precipice, Toby Ord judges the overall likelihood of an existential catastrophe in the coming century at about one in six. This figure is itself informed by subjective judgements across a range of individual risks where certainty is not possible. Ord caveats the purpose of these judgements as showing “the right order of magnitude, rather than a more precise probability“; even so, it would be reasonable to regard them as incorporating some element of guesswork given the presently unknowable nature of many of the informing variables. The majority of Ord’s overall estimate is contributed by Ord’s estimate of a one in ten likelihood of extinction from unaligned AI, with engineered pandemics and other anthropogenic risks making up most of the remainder. Even with these latter categories, Ord’s estimates have been critiqued as being too high for climate- and engineered pandemic-caused extinction (Thorstad, Reference Thorstad2023a, Reference Thorstad2023b). However, Ord’s overall estimate is similar to that derived from a 2008 survey of global catastrophic risk experts, which provided an overall risk of extinction of 19% prior to 2,100 (Sandberg and Bostrom, Reference Sandberg and Bostrom2008). The majority of this survey’s overall risk estimate was also linked to emerging or future technological development. These are also subjective estimates, and the previous discussion applies.

Ethical and social dimensions of human extinction

The social, ethical and political implications of human extinction and its study are hotly debated. Some scholarship emphasises the importance of reducing human extinction risk drawing on frameworks such as longtermism, which places a high moral value on the lives of unborn future generations and future achievements of humanity (MacAskill, Reference MacAskill2022). Critics contend that a focus on extinction of humanity as a whole or on the value of hypothetical future lives ignores or may detract attention from ongoing catastrophic impacts on existing peoples, particularly marginalised and indigenous peoples (Torres, Reference Torres2023a,Reference Torresb; Mitchell and Chaudhury, Reference Mitchell and Chaudhury2020).

Bostrom (Reference Bostrom2013)’s commonly used definition of existential risk includes both extinction and destruction of Earth’s desirable future potential as outcomes to avoid. “Desirable future potential” is open to interpretation within the definition; however, Bostrom’s own articulations of desirable futures have been criticised as heavily influenced by transhumanism and unlikely to be shared as an ideal by a majority of current people worldwide (Cremer and Kemp, Reference Cremer, Kemp, Beard and Hobson2024). It has also been argued that human extinction is a dangerous motivator: such high stakes could be used to justify extreme measures such as pre-emptive military action or authoritarian governmental action (Bostrom, Reference Bostrom2019; Cremer and Kemp, Reference Cremer, Kemp, Beard and Hobson2024).

Many themes overlap with discussions of the Anthropocene,Footnote 13 and similar critiques have been raised in relation to both literatures. It is argued that a universalist narrative portraying humanity as a single, unified agent risks obfuscating inequalities in responsibility for and vulnerability to present crises such as climate change (Todd, Reference Todd, Davis and Turpin2015; Head, Reference Head2016), as well as responsibility for harms such as the legacies of colonialism (Whyte, Reference Whyte2017; Yusoff, Reference Yusoff2018). Extractive practices associated with Global North countries have made disproportionate contributions to a range of environmental problems; it has similarly been argued that risks posed by nuclear weapons arsenals (Biswas, Reference Biswas2014) and advanced AI (Abungu et al., Reference Abungu, Iradukunda, Cass-Beggs, Pauwels, Kovacs, Roberts, Araya, He, Governance, Fay and Fumega2024) are borne by countries worldwide, while responsibility for their production lies mainly with a subset of Global North nations. Debates over the role of capitalism feature in both literatures. Moore (Reference Moore2015) proposes the Capitalocene as an alternative framework to the Anthropocene, arguing that the ecological crisis stems from specific patterns associated with capitalism. Ware (Reference Ware2024) similarly centres capitalism and the pursuit of economic growth as the driver of a range of crises threatening humanity. In contrast, Aschenbrenner and Trammell (Reference Aschenbrenner and Trammell2020) argue that over a long time frame, continued growth is likely to contribute to a richer global society better able to allocate resources to its safety.

A detailed treatment of these complex debates is out of scope for this review. However, they are important considerations, especially as calls grow for extinction risk mitigation to be incorporated into global policy decisions (Boyd and Wilson, Reference Boyd and Wilson2020).

Conclusion

The literature suggests that the likelihood of human extinction from exogenous threats, where we have more robust data to draw on, is extremely low. For anthropogenic threats, there is far greater uncertainty. For many anthropogenic threats such as nuclear war, pandemics and environmental degradation, the likelihood of such events and the scale of their catastrophic consequences strongly justify prevention and mitigation efforts. However, it is unclear how plausible they are as causes of extinction of homo sapiens. Through the lens of civilisational resilience, however, it can be argued that a global civilisation that avoids or robustly addresses these catastrophic threats will be far better placed to respond to any extinction-level threats it encounters; in terms of available resources, ability to coordinate and foresight and governance tools to identify and address emerging threats.

#### Immigrant workers can shape resilient economies during crises. The chilling effect forces workers to accept wage theft and treacherous working conditions.

Huyen Pham et al 24 - University Distinguished Professor of Law at Texas A&M University School of Law. Natalie C. Cook – M.A. candidate at Bush School of Government and Public Service. Ernesto Amaral - Associate Professor in the Department of Sociology at Teas A&M. Raymond Robertson - Professor of Economics and Government at Bush School of Government and Public Service. Suojin Wang – Professor of Statsitics at Texas A&M. “The Limits of Immigrant Resilience,” August 2024, Southern California Interdisciplinary Law Journal 33(3), pg 509-546.

Everyone reading this Article will have their own unique memories of the COVID-19 pandemic, but all of us will remember it as a singularly unprecedented event. The toll of the coronavirus on health, economic, and social outcomes was devastating. From 2020 through 2021, the COVID-19 virus caused an estimated 14.9 million deaths worldwide. 1 At the height of lockdowns in 2020, at least 1.5 billion students around the world were out of classrooms due to school closures,2 and the global economy was plunged into its deepest recession since World War II.3 The United States, despite its affluence and access to the world’s best healthcare, also experienced catastrophic consequences. In 2020, the first year of the pandemic, 6,658,111 Americans were hospitalized, and 1,167,441 Americans died from the virus. 4 The economic consequences in the United States were also devastating, as entire industries shut down in the immediate aftermath and other industries transitioned, haltingly, to remote or virtual operations.5 Before vaccines became widely available, 9.6 million Americans lost their jobs in 2020.6 Even after vaccines became available in early 2021, problems with vaccine distribution, vaccine skepticism, and particularly virulent strains of COVID19 continued to challenge the United States as infections and deaths continued to rise.7

Virologists, epidemiologists, and vaccine researchers rushed to study the origins and spread of the virus, as well as the implications for public health in future pandemics. The scientific consensus is that the virus originated in Wuhan, China, but there is substantial disagreement about whether the virus was man-made or naturally-occurring.8 An expert panel’s report published in the Proceedings of the National Academy of Sciences (“PNAS”) supports the zoonotic theory of COVID-19 origins, suggesting that the SARS-CoV-2 virus likely spread naturally from animals to humans without the involvement of a lab.9 However, that report itself was marred by controversy, emerging from a panel that was originally part of the Lancet COVID-19 Commission. The Lancet Commission was disbanded after its chair, Columbia economist Jeffrey Sachs, alleged that the Commission’s experts did not give sufficient credence to the lab-leak theory due to their conflicts of interest.10 Many researchers argue that the evidence strongly favors the natural origin hypothesis over the lab-leak theory but concede that the question of how COVID-19 originated has not yet been answered conclusively.11

Social scientists, meanwhile, are studying the continued impact of the virus on the economy, education, and health, especially on vulnerable groups within American society. In the United States, immigrants are a particularly vulnerable group, many of whom work low-wage jobs and lack lawful immigration status.12 An estimated 29% of foreign-born workers are undocumented, and approximately half of all immigrant workers earn less than 200% of the minimum wage.13 The existing research on the experiences of immigrants during the COVID-19 pandemic primarily focused on health issues. Those issues included the spread of infections in densely populated immigrant communities where members were employed in jobs that could not or did not transition to remote operations,14 the specific challenges that immigrants faced in accessing vaccines and other health care due to language barriers,15 and recommendations to prohibit immigration law enforcement around health care facilities.16

At this intersection of immigration and COVID-19 research, the economic experiences of immigrants as workers remain largely underexplored. Based on an analysis of the United States Census Current Population Survey (“CPS”), we find that foreign-born workers suffered worse economic consequences during the COVID-19 pandemic than their native-born counterparts.17 Using the restaurant industry as a case study, we find that during the pandemic and the immediate recovery, immigrant workers in the restaurant industry were more likely than their United States counterparts to lose their jobs or to drop out of the labor market altogether.18 This analysis shows that those native-born workers were more likely to be hired (or rehired) within the restaurant industry or to move on to betterpaying jobs in other industries than immigrant workers.

The restaurant industry gives a particularly good window into the economic well-being of immigrants during the pandemic. Although immigrants make up only 13.5% of the United States population, they represent 22% of restaurant industry workers,19 and in major cities like New York or Chicago, that proportion can be as high as 70%.20 Additionally, an estimated 37% of small restaurant owners are immigrants,21 and overall, the industry employs around 2.3 million foreign-born workers.22 The restaurant industry has long served as a welcoming refuge and first step for many foreign-born workers with limited education, language skills, and vulnerable legal status. In turn, immigrants have come to play an undeniably significant role in the successful operation of the industry.

These findings of immigrant labor hardship during the COVID-19 pandemic may not be surprising, considering the hardships that immigrants generally face in the American labor market.23 With limited English proficiency and lower educational levels, immigrant workers often work in more dangerous conditions for lower pay and experience workplace violations at higher rates than their native-born counterparts.24 But historically, one bright spot for immigrant workers has been their labor resilience, especially during periods of economic crisis. During the most recent financial crisis in the United States—the Great Recession in 2007 to 2008—foreign-born workers had better economic outcomes, along employment metrics, than their native-born counterparts across industries.25 In particular, foreign-born workers were more likely to remain continuously employed than native-born workers.26 Looking specifically at the restaurant industry during the Great Recession, that finding of continued employment also held true.27

How can the strikingly different economic experiences of foreign-born workers during these two economic crises be explained? Generally, immigrant workers are more vulnerable during economic downturns because they disproportionately hold low-skill jobs in sectors that are more sensitive to business cycles,28 which means that they are often fired first29 compared to native-born workers. Yet historically, immigrant workers have often been more resilient than their native-born counterparts.30 Because foreign-born workers prioritize remaining employed over other labor conditions, they are more likely to move to areas with job opportunities to stay employed. The uneven nature of job loss during the Great Recession—with the western and southern states experiencing the most job losses—facilitated and rewarded that geographical mobility.31 At considerable personal cost, immigrant workers during the Great Recession were more likely to accept lower wages, involuntary part-time work, poorer working conditions, and work outside of their sector.32 During the Great Recession, immigrant workers employed these strategies such that foreign-born labor force participation increased while the labor force participation of native-born workers decreased.33

This study of COVID-19, however, suggests important limits to immigrants’ labor resilience. During the COVID-19 pandemic, the United States experienced a near-national shutdown, particularly during the early months of the pandemic. The advantages that immigrant workers had during the Great Recession—geographical mobility and the willingness to shift to part-time work—were simply not helpful during the pandemic. In the restaurant industry in particular, 17% of restaurants (nearly one-hundred thousand businesses) shut down either permanently or for the long term during the first year of the pandemic, meaning there were fewer alternative restaurant jobs and fewer part-time opportunities within the restaurant industry as a whole.34 Moreover, the shutdown of the restaurant industry was fairly uniform across the country, especially during the initial months of the pandemic, so the willingness to move to a different geographical location would not be an advantage if workers were looking for work in the restaurant industry. Other industries that typically employ large numbers of low-wage immigrant workers, including manufacturing and other service jobs, also experienced extensive shutdowns.35 So, in other words, there was little opportunity for immigrant workers to escape from the negative economic consequences of the pandemic. That immigrant labor resilience—to take advantage of options that native-born workers have historically rejected— simply could not exist during the COVID-19 pandemic.

These findings are important for several reasons. First, the human welfare implications are severe. Without access to employment, the fate of immigrant workers and their families was even worse than the hardships that immigrants already experience, which should concern us all. Second, policymakers should reconsider the benefits of laws and policies that exclude immigrants, especially during times of crisis. The danger of extremely contagious illnesses—many of which are airborne—is growing and continues to threaten the operation of our economy and society.36 Given this continuing threat and the harsh implications for immigrants, lawmakers need to reconsider laws that exclude immigrants from health care and economic assistance.37

Finally, as many economists have concluded, the well-being of immigrant workers is inextricably linked with the well-being of native-born workers. There is compelling evidence that immigrant workers, because of economic complementarities, create jobs and increase wages for native-born workers. 38 That complementarity seems to depend, in part, on the economic resilience of immigrant workers. During the COVID-19 pandemic, the negative employment outcomes for immigrant workers may also have important implications for native-born workers and the larger economy, questions that the authors explore in future work.

This Article proceeds in three parts. Part I considers the important roles that immigrants play in the United States economy. Then, the Article examines economic experiences of immigrants during the Great Recession (the United States’ most recent economic crisis before COVID-19) and explore the resilience of immigrant workers during that crisis, as compared with native-born workers. Part II traces the spread of COVID-19 in the United States and the resulting shutdowns’ effect on the United States economy. This Article pays particular attention to the restaurant industry as one of the first and one of the most severely impacted industries to be negatively affected by the pandemic. Part III uses the restaurant industry as a case study to analyze the economic experiences of immigrant workers during the COVID-19 pandemic, drawing upon an analysis of CPS data. This Part underscores the contrasting experiences of immigrants during the COVID pandemic and the Great Recession. Part IV assesses some implications of these findings, for the academic literature and policy.

I. THE CENTRAL ROLE OF IMMIGRANT WORKERS IN THE UNITED STATES

The United States, as President Kennedy wrote, is a nation of immigrants. With over fifty million immigrants, the United States has more immigrants than any other country in the world.39 The main reason that people choose to come to the United States is to work,40 and from its earliest days, the United States has relied on immigrant workers to build railroads41 and to work on farms,42 factories,43 and fisheries.44 Many of these early immigrant workers came to the United States to flee harsh conditions in their native countries, such as crop failure, job shortages, and religious or political persecution.45

Between 1815 and 1865, the United States saw a major influx of immigrants that came predominantly from northern and western Europe.46 Ireland contributed around one-third of these newcomers as a result of the devastating famine the country experienced in the mid-nineteenth century.47 In the 1840s, in particular, about half of America’s immigrants came from Ireland alone.48 These Irish immigrants, who typically arrived impoverished, settled along the East Coast in cities near their ports of arrival.49 The United States also welcomed around five million German immigrants during the nineteenth century.50 These immigrants from Germany tended to settle in the Midwest, either in cities or on farms that they purchased.51 Starting during the mid-1800s, Asian immigrants also started migrating to the United States, drawn initially by the economic opportunity created by the California gold rush of 1849 but then settling into jobs building railroads and working in farms and fisheries.52

The largest wave of immigration to the United States came at the turn of the century (approximately 1880–1920).53 During this period of rapid industrialization and urbanization, over twenty million people immigrated to the United States. This new wave of immigrants originated largely from central, eastern, and southern Europe.54 A large proportion of the immigrants came from Italy, with four million Italian immigrants arriving during the forty-year period.55 Eastern European Jews also arrived in large numbers as they fled religious persecution in their home countries, with more than two million entering the United States during this time period.56 In 1907, the United States saw its largest wave of immigration in a single year, with approximately 1.3 million people entering the country.57 These turn of the century immigrants mostly lived in urban areas and worked in industrial manufacturing jobs.58 Immigrants were the anchor of the American industrial workforce during this time period, providing foundational labor for the country’s industrial revolution.59 Indeed, by 1920 more than two-thirds of all United States manufacturing jobs were held by immigrants and their children or grandchildren.60

Since the mid-1900s, the primary makeup of immigrants to the United States has changed from predominantly low-skilled older Europeans to working-age immigrants of Latin American and Asian descent with a range of skill levels.61 With more working-age immigrants, the percentage of immigrants in the United States civilian workforce has also risen to 17.4%, as of 2019.62 Compared with native-born workers, today’s immigrant workers are more likely to work in certain industries including services, natural resources, construction, maintenance, production, transportation, and material moving industries.63 Low-skilled immigrants, in particular, tend to work in more physically demanding jobs, such as the construction industry, that do not require high levels of English proficiency.64 Because the skill levels of immigrants tend to track with their country of origin, there are trends in the occupational choices of immigrant workers based on nationality. For example, more Eastern European, Chinese, South Asian, and Middle Eastern immigrants tend to enter the computer and engineering fields as they, on average, have higher skill levels, compared with Latin American immigrants who tend to work in the service industry.65

A. THE VULNERABILITY OF LOW-WAGE IMMIGRANT WORKERS IN THE UNITED STATES

This Article focuses on immigrants working in low-wage jobs for several reasons. First, large numbers of immigrants work low-wage jobs.66 Approximately half of all immigrant workers in the United States earn less than 200% of the minimum wage;67 while immigrants represent around 11% of the United States population, they make up a disproportionate 20% of the low-wage workforce.68 Thus, to understand the well-being of immigrant workers, we must examine what is happening in the low-wage sector. Moreover, immigrant workers in low-wage jobs are particularly vulnerable to wage theft, dangerous working conditions, and other adverse factors that have important human welfare implications.69 Finally, low-wage industries are important components of the American economy; as the nation collectively experienced during COVID-19, many of these industries are indeed “essential” to the smooth functioning of our economy and society— e.g., childcare, transportation, and critical retail-like grocery stores.70

This Article starts with more demographic information about low-wage immigrant workers. Some of this information pertains specifically to lowincome immigrant workers, and the Authors acknowledge that the two groups (low-income individuals and immigrants) are not entirely synonymous. Whether someone is low-income is usually determined at the household level. A household is commonly defined as low-income when the total household income is below 200% of the federal poverty level.71 The individuals in that household may or may not work in low-wage jobs, particularly if they are children or elderly. Nonetheless, there is overlap between low-income and low-wage immigrants, which means demographic information about low-income immigrant workers can also inform an understanding of low-wage immigrant workers.

In contrast to the pattern displayed by natives, labor force participation among low-wage immigrants is much higher for men than women, and this gender disparity is particularly pronounced among undocumented workers.72 Low-wage immigrant workers make up an especially large share of the workforce in private household services and farming—around 44% in each sector.73 Immigrant men and women tend to follow gendered patterns in employment with 23.1% of employed immigrant men working in construction, maintenance, and natural resource occupations, and 30% of employed immigrant women working in service occupations. 74 Immigrant workers play a significant role in agriculture and food production, and in recent years, about 70% of crop farm workers were immigrants.75

Immigrant workers, particularly low-wage immigrant workers, face a unique set of challenges in the United States labor market. This Section explores the vulnerabilities related to their status as foreign-born workers and, for some, as undocumented immigrants. One major challenge is a lack of proficiency in English. Census data from 2000 shows that almost half (47%) of low-wage immigrants had very limited to no English proficiency.76 Of these low-wage workers with limited English proficiency, the vast majority (73%) speak Spanish.77 The next most common languages are Chinese, Vietnamese, and Korean, which represent much smaller shares.78 Although proficiency in English can improve with time spent in the United States, 29% of workers who have lived in the United States for twenty years or more still have limited proficiency.79 Their lack of English skills makes it difficult for immigrant workers to find good jobs, creating a strong correlation between low-wage work and low English proficiency.80 Limited English proficiency is also correlated with low educational attainment: about 45% of low-wage immigrants have less than a high school education and over 25% have not completed the ninth grade.81 This combination of low educational levels and low English proficiency creates a severe disadvantage in the labor marketplace.

With these disadvantages, immigrant workers tend to work jobs that are more dangerous, pay lower wages, offer few or no benefits like health insurance, and are more vulnerable to exploitations such as wage theft.82 Due to a lack of options, immigrant workers are overrepresented in more dangerous industries, such as cleaning, agriculture, construction, and food preparation.83 The poultry and meatpacking industries, in particular, are often characterized as having the most dangerous factory jobs in America, and over half of frontline meatpacking workers are immigrants.84 Not surprisingly then, immigrant workers suffer 61,720 more injuries annually than nativeborn workers, and on the grim metric of workplace deaths, immigrant workers on average experience 1.79 more deaths per 100,000 workers than natives each year.85

Immigrant workers also earn less than their native-born coworkers. Immigrant workers, and undocumented immigrants in particular, are more likely to work in low-paying jobs, such as domestic work, food service, construction, agriculture, and day-labor.86 In the United States, immigrant workers on average earn 15.3% less than native-born workers.87 These lowpaying jobs are less likely to offer health insurance or other benefits.88 Because employers are the main source of health insurance in the United States, this means that one in four authorized immigrants and almost half of all undocumented immigrants are uninsured.89

Compared with native-born workers, immigrant workers are also more likely to experience workplace exploitation.90 Immigrant workers are more likely to be concentrated in industries where labor violations are common.91 The Immigration Reform and Control Act (“IRCA”) expressly prohibits employers from hiring workers who lack work authorization and imposes procedural obligations on employers to verify the work authorization of potential employees. The IRCA does not require employers to verify the work authorization—through Form I-9 verification—of independent contractors but does penalize employers who hire independent contractors “knowing” that they lack work authorization.92 Inconsistent enforcement of I-9 verification coupled with this independent contractor ambiguity puts immigrant workers in vulnerable employment situations.93 A survey by the National Employment Law Project found that 37% of undocumented immigrant workers reported being paid less than minimum wage.94 The Economic Policy Institute found that 2.4 million workers in the ten largest states lost $8 billion to minimum wage violations in 2017.95 There is additional wage theft associated with overtime violations.96 Workers are often hesitant to report violations for fear of losing the employment opportunity or fear of retaliation from their employers based on immigration status.97

For workers who lack work authorization, these workplace vulnerabilities are particularly heightened. Estimates indicate that 12.7 million of the 17.9 million foreign-born workers in the United States have some form of legal status (split fairly evenly between naturalized citizens and other authorized statuses, such as legal permanent resident or refugee status), but an estimated 29% are undocumented.98 Historically, within the low-wage immigrant labor force specifically, there has been a higher concentration of undocumented immigrants (typically 40%) and a lower concentration of naturalized citizens (less than 25%).99

Under federal law, employers are only permitted to hire workers with work authorization.100 There are small categories of lawful residents who do not have work authorization or have limited work authorization—namely, students who are in the United States on F-1 student visas are only allowed to work on campus and for a limited number of hours101—but many foreignborn persons with lawful status also have permission to work lawfully in the United States.102 Under the IRCA, employers who hire workers without lawful work authorization face fines and, for repeated and egregious violations, criminal penalties as well.103 Furthermore, the IRCA also requires that employers verify, through checking certain identification documents, that their employees are eligible to work in the United States (e.g., checking a passport or state driver’s license and a Social Security card). Some states and cities threaten to revoke the business license of an employer found to have hired undocumented workers.104

Though the enforcement of federal laws is reportedly lax,105 the prohibition against hiring undocumented workers leads many of these workers to work “under the table” for cash wages106 or to use someone else’s identification to circumvent the IRCA’s documentation requirements.107 In addition to the legal risks, these paths also tend to channel undocumented workers toward dangerous, low-paying jobs without health insurance or other benefits, where workplace exploitation is more common. These are, of course, challenges that authorized immigrant workers also face, but the vulnerabilities of undocumented immigrants are heightened by two factors. First, an undocumented immigrant’s ability to complain about or report workplace exploitation is constrained by concerns about their undocumented status.108 While federal workplace laws nominally protect all workers, regardless of immigration status,109 undocumented workers who want to report workplace violations face the possibility that their employer may retaliate by reporting them to Immigration and Customs Enforcement (“ICE”), resulting in their possible deportation from the United States.110

Second, undocumented immigrants lack access to safety net benefits that might make leaving an exploitative job more economically feasible.111 Workers who lack lawful immigration status are categorically ineligible for most need-based benefits like the Supplemental Nutrition Assistance Program (“SNAP”), Supplemental Security Income (“SSI”), or Temporary Assistance for Needy Families (“TANF”).112 They are also categorically ineligible for public health insurance programs like Medicare, Medicaid, the Children’s Health Insurance Program (“CHIP”), and the Affordable Care Act (“ACA”) Marketplace.113 A handful of states have created need-based programs that provide cash assistance or medical care without requiring proof of lawful immigration status, but the scope and size of those programs pale in comparison to the federal programs.114

#### Occupational safety in the construction sector solves reliable critical infrastructure. Workplace accidents cause delays and impede productivity.

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Infrastructure projects play a crucial role in improving societal well-being by facilitating access to essential systems, services, and utilities necessary for economic activities. However, the nature of these projects presents significant challenges and threats that can result in serious injuries to personnel and contractors, thereby necessitating effective management to prevent and mitigate such risks (Prochazkova and Prochazka, 2014). Unlike many other industries where project staff may not need to be present on-site at all times (Alaloul et al., 2020), all workers and technical engineers involved in infrastructure projects are required to work on-site, either to carry out operations or ensure project completion according to specifications (Balkhyour, Ahmad and Rehan, 2019). Therefore, the ability to manage unforeseen circumstances is imperative.

Construction and infrastructure projects encounter similar risks. In contrast, infrastructure projects often face additional challenges and safety issues that are uncontrollable, such as those related to OSH concerns, which is related to third-party public safety (Campbell, 2008). Infrastructure construction sites are perceived as inherently risky environments characterised by unstructured conditions, inadequate facilities, congested workspaces, and exposure to adverse weather conditions Eppenberger and Haupt, 2003). Therefore, ensuring the safety of workers and the general public is paramount in such projects.

Challenges to OSH in infrastructure projects are generally intertwined with construction challenges (Campbell, 2008), which is why prioritising infrastructure OSH is imperative for stakeholders, including owners, consultants, contractors, governments, and project participants (Reid, 2009). Continuously improving OSH conditions is essential for all countries, with an emphasis on enhancing the risk assessment process and the effectiveness of risk elimination or reduction decisions (Cagno et al., 2001).

Various factors contribute to the heightened risks and vulnerabilities of OSH in infrastructure projects compared to other types of construction projects. Such factors include construction methods, use of heavy equipment, workers’ casual attitudes towards safety, inadequate leadership, and limited client and project management involvement in OSH (Laryea, 2010). Furthermore, accidents affect not only the individuals involved, but also the project parameters, leading to delays and loss of productivity (Chileshe and Dzisi, 2012; Saad, 2016) emphasised that poor safety performance results in increased overall OSH expenses. This study focused on identifying the barriers and challenges to OSH in infrastructure projects. Contextual factors, which are often viewed as spin-offs of barriers, encompass variables that are indirectly related to OSH interventions but significantly influence their success (Stolk et al., 2012; Micheli et al., 2018). Evaluating OSH in infrastructure projects becomes challenging if these barriers are not addressed (Abu Aisheh et al., 2021).

Worksite incidents often occur due to failure to recognise or address inherently dangerous conditions, negligence, or disregard for safety protocols (Zerguine et al., 2016). Inadequate personal protective equipment (PPE), lack of safety training, absence of well-structured safety management systems and insufficient supervision also contribute to safety hazards in infrastructure projects (Hamid et al., 2008; Teo et al., 2008; Priyadarshani et al., 2013; Nawi et al., 2016).

Workers’ negligence, inability to follow job processes, high-level work, unsafe working conditions, poor site management, lack of skill and attitude towards safety all contribute to safety challenges in infrastructure projects (Ammad et al., 2020). Accidents are also attributed to a lack of safety awareness, educational training, company insurance and practical guidance, as well as unregulated activity and insufficient equipment (Enshassi et al., 2008).

A lack of safety training and policies are significant barriers to safety implementation in infrastructure projects (Saad, 2016). Safety training is vital for accident prevention and reduction (Yiu et al., 2018). Insufficient safety awareness and understanding among workers lead to unsafe behaviours and practices (Chileshe and Dzisi, 2012; Sobral and Soares, 2019). Thus, effective safety communication between managers and workers is crucial for safety management (Hanafi, 2018). Communication difficulties, including linguistic, religious, and cultural barriers, may hinder safety efforts on worksites (Mouleeswaran, 2014). Management’s inconsistent OSH behaviour, inadequate information and communication, and prioritisation of production over safety are the main barriers to safety implementation (Garnica and Barriga, 2018). The four key challenges to OSH implementation are an uncomfortable work environment, lack of safety awareness, absence of safety management programmes and industry norms discouraging safety programmes (Buniya et al., 2021). Meanwhile, factors such as poor project preparation, financial constraints, inadequate data, lack of emergency plans, hazardous conditions and overall project constraints further exacerbate the safety challenges in infrastructure projects, especially in developing countries (Nawaz et al., 2020)

Risky work environments, limited equipment accessibility, social isolation and individual obligations during the workday are significant concerns that affect safety performance (Pamidimukkala and Kermanshachi, 2021). Tight project schedules add pressure and stress, contributing to health and safety hazards and reduced productivity (Kartam, Flood and Koushki, 2000). Perceived OSH challenges include costs, lack of management commitment, inadequate safety culture, resource shortages, lack of enforcement, training deficiencies and lack of understanding of development (Dugolli, 2021). Poor data management makes estimating risk impact and taking corrective measures difficult (Khan, 2013; Revathi K et al., 2017). Alcohol consumption at work increases the risk of injury for drinkers and others, underscoring the importance of safety awareness and education (Meliá and Becerril, 2009; Arezes and Bizarro, 2011; Manjula and De Silva, 2014). Safety knowledge is crucial for promoting safety practices and behaviours (Manjula and De Silva, 2014).

A lack of safety regulations, procedures, standards, and effective communication of safety standards hinder safety programmes (Aksorn and Hadikusumo, 2008). Company culture plays a significant role in employee safety; a lack of commitment to safety and failure to follow safety regulations contribute to deficiencies in safety (Zhang and Gao, 2012). Workers’ failure to use PPE correctly is attributed to ignorance, negligence, apathy, and excessive trust, thereby underscoring the importance of safety awareness and training (Tan and Razak, 2014). Insufficient safety regulations, procedures, and standards, coupled with ineffective communication, further hinder safety efforts (Aksorn and Hadikusumo, 2008; Mahmoudi et al., 2014).

Table 1 presents a comprehensive compilation of the OSH challenges encountered in infrastructure projects, classified into distinct categories: Organisational factors; resource and infrastructure factors; legislative and regulatory factors; human factors; environmental and external factors; safety practices and procedures. Within each category, specific barriers identified from the literature review are delineated, along with corresponding references. This systematic categorisation facilitated a structured comprehension of the multifaceted challenges that are inherently present in ensuring OSH compliance within infrastructure projects.In infrastructure projects, OSH challenges are intricate and encompass various factors that significantly influence safety outcomes and project success. Understanding these challenges from organisational dynamics to regulatory frameworks and external factors is crucial. This discussion aimed to dissect different categories and factors of OSH challenges, emphasising those with the most impact and their implications for project stakeholders. Doing so enabled us to deepen our understanding of OSH management in infrastructure projects and identify areas for targeted interventions to improve safety outcomes and project performance.

• Most significant category and factors:

- Organisational factors: Our findings highlight the critical role of organisational factors, such as management commitment, resource allocation, safety culture and effective safety management practices, in ensuring worker wellbeing and project success (Nawaz et al., 2020; Al-Mhdawi et al., 2024). Strong commitment from top management is essential for fostering a safety-first culture and ensuring adequate resource provision for safe work practices (Nawaz et al., 2020; Al-Mhdawi et al., 2024). Conversely, a weak safety culture and lack of worker engagement present significant barriers to effective safety management (Nawaz et al., 2020; Al-Mhdawi et al., 2024). Implementing robust safety management systems, including planning, training, and monitoring, is vital for mitigating health and safety risks (Nawaz et al., 2020; Al-Mhdawi et al., 2024). Failures in safety management practices contribute to unsafe work conditions and undermine safety efforts (Nawaz et al., 2020; Al-Mhdawi et al., 2024), and inadequate planning and communication among stakeholders can further exacerbate safety challenges Nawaz et al., 2020).

- Legislative and regulatory factors: Adhering to OSH regulations is crucial for maintaining a safe work environment and upholding ethical standards in infrastructure projects (Nordengen and Roux, 2013). Non-compliance can lead to severe repercussions, underscoring the need for a robust regulatory framework and a culture of safety compliance in the industry Nordengen and Roux, 2013). Effective legislation, enforcement and awareness of safety requirements are essential for promoting safe work practices and ensuring stakeholders’ accountability (Nordengen and Roux, 2013). Compliance with OSH regulations is indispensable for meeting legal obligations, minimising le-gal liabilities and fostering a safety culture within infrastructure projects (Nordengen and Roux, 2013).

• Least significant category and factors:

- Environmental and external factors: Environmental and external factors are important, yet their direct impact on safety outcomes in infrastructure projects is perceived as less significant than that of organisational and legislative factors (McDonnell and Chung, 2002; Nekhoroshkov and Nekhoroshkov, 2018; Abolelmagd et al., 2023). However, proactive risk management remains crucial for addressing challenges and ensure project success (McDonnell and Chung, 2002; Nekhoroshkov and Nekhoroshkov, 2018; Abolelmagd et al., 2023). While environmental factors such as adverse weather conditions and regulatory changes can introduce complexities and risks, they are often beyond the direct control of project stakeholders (McDonnell and Chung, 2002; Nekhoroshkov and Nekhoroshkov, 2018; Abolelmagd et al., 2023). Effective risk management strategies and contingency planning can help mitigate their impact on safety and overall project performance (McDonnell and Chung, 2002; Nekhoroshkov and Nekhoroshkov, 2018; Abolelmagd et al., 2023).

- Safety practice and procedure factors: Safety practices and procedures are vital for creating a safe work environment. However, their influence on safety outcomes is considered relatively less significant than that of organisational and legislative factors (Nawaz et al., 2020; Bolsherotov, 2021; Al-Mhdawi et al., 2024). The effectiveness of safety practices depends on the support and compliance established at higher organisational and regulatory levels (Nawaz et al., 2020; Bolsherotov, 2021; Al-Mhdawi et al., 2024). Without robust organisational support and adherence to regulatory requirements, safety protocols may not be adequately implemented or enforced, limiting their direct impact on safety outcomes (Nawaz et al., 2020; Al-Mhdawi et al., 2024). Safety practices and procedures represent the implementation tier of safety management systems, and their efficacy is contingent upon support from organisational and regulatory levels (Nawaz et al., 2020; Al-Mhdawi et al., 2024).

4 Case studies and comparative analysis

Infrastructure projects and other construction ventures face distinct OSH challenges due to differences in scale, complexity, duration and impact on public safety and the environment. Recognising these variations is crucial for implementing effective safety management practices that address the specific hazards and regulatory requirements associated with each project type (Baniassadi et al., 2018; Greiman and Sclar, 2019; Indrayana and Suraji, 2022). Four case studies are represented, to illustrate the significant differences in OSH challenges between infrastructure projects and other forms of construction.

4.1 Infrastructure projects

4.1.1 Big Dig tunnel project (Boston, Massachusetts, USA)

• OSH challenges: The extensive scale and complexity of the Big Dig project in Boston introduced significant safety challenges, with workers encountering risks associated with confined spaces, underground utility handling and coordination with multiple stakeholders. Notably, the threat of tunnel collapses posed a considerable risk, exemplified by incidents such as the 2006 ceiling panel collapse, resulting in a motorist fatality (Albee, 1991).

• Key differences: Infrastructure projects such as the Big Dig involve specialised construction techniques and intricate underground work, such as tunnelling and bridge construction, necessitating tailored safety measures and equipment (Albee, 1991; Welsh, 1999).

4.1.2 Channel Tunnel (Eurotunnel)

• OSH challenges: The construction of the Channel Tunnel between the UK and France presented unique safety challenges due to its underwater nature. Workers navigated the underwater conditions, managed compressed air environments and prevented flooding during the construction process (Welsh, 1999).

• Key differences: Underwater or subsurface construction projects such as the Channel Tunnel pose distinct hazards related to water pressure and diving operations, requiring specialised expertise and equipment (Anner et al., 2013; Gueorguiev, 2019; Li et al., 2021).

4.2 Construction projects

4.2.1 Rana Plaza building collapse (Dhaka, Bangladesh)

• OSH challenges: The Rana Plaza disaster highlighted common safety issues in various construction contexts, such as inadequate building codes, poor structural integrity and unsafe working conditions. Workers, particularly in garment factories, faced risks such as overcrowding, absence of fire exits and structural deficiencies (Hossain, 2019; Trebilcock, 2020; Grier et al., 2023; Rehman et al., 2023).

• Key differences: Infrastructure projects focus on challenges related to scale and complexity, whereas other construction forms prioritise different safety aspects, such as fire safety and building integrity, necessitating tailored safety measures (Rudnik, 2018; Chen et al., 2022).

4.2.2 Grenfell Tower fire (London, UK)

• OSH challenges: The Grenfell Tower fire exposed systemic failures in fire safety, building regulations and construction practices. Issues such as inadequate fire safety pro-visions and confusing building regulations contributed to the tragic outcome (Mitchener, 2018; Chen et al., 2019; Ewen, 2023).

• Key differences: Residential construction projects such as Grenfell Tower prioritise fire safety and evacuation procedures, while infrastructure projects may emphasise hazards such as structural stability and environmental impact (Baniassadi et al., 2018; Indrayana and Suraji, 2022).

4.3 Comparative analysis

• Scale and complexity: Infrastructure projects typically involve larger scales and complexities due to their extensive nature, encompassing structures such as bridges, highways, airports and tunnels. Thus, managing safety across vast areas and intricate structures presents unique challenges (Masrom et al., 2015; Ayat et al., 2023). In contrast, other construction projects vary in size and complexity, with more standardised processes and less extensive spatial requirements (Dardiri et al., 2017).

• Workforce skills and training: Infrastructure projects demand a highly specialised workforce with expertise in various engineering disciplines, requiring training in specific safety protocols. Other construction projects may have a more generalised workforce with training focused on standard construction safety practices (Misra and Mohanty, 2021; Ahmed, 2023).

• Duration and timeline: Infrastructure projects typically have longer durations, which is why the possibility of accidents may increase over time. Other construction projects may vary in duration, affecting the intensity and duration of the OSH challenges faced by workers (Jones, Caudle and Pappworth, 1996).

• Regulatory compliance: Infrastructure projects are subject to complex regulations due to their significant impact on public safety and the environment. Compliance with OSH regulations, environmental regulations and industry standards adds complexity to safety management (Dimitrova et al., 2014; Mwelu et al., 2018).

• Public safety concerns: Infrastructure projects prioritise public safety because they have a direct impact on public wellbeing, involving hazards such as working near live traffic. Other construction projects may entail fewer public safety risks (Chi et al., 2016).

• Environmental impact: Infrastructure projects have significant environmental implications, requiring compliance with environmental regulations. While all construction projects must consider environmental impact, the scale and scope of these projects may vary (Alamgir et al., 2018; Saldaña-Márquez et al., 2019). Understanding these differences is essential for implementing tailored safety measures that address the unique challenges in each type of construction project.

5 Conclusion and recommendations

Infrastructure projects are indispensable for societal advancement, but strict adherence to OSH regulations to safeguard both individuals and property is necessary for such projects to be executed successfully. These projects, which are characterised by complexity and hazards, can give rise to hazardous environments and adverse environmental impacts if safety measures are not prioritised (Gámez-García et al., 2019). Inadequate OSH practices contribute significantly to the rate of injuries, fatalities, and property damage in construction projects, particularly in infrastructure projects. Infrastructure projects have long been associated with risks and incidents, resulting in project delays, escalated costs, diminished productivity, and negative reputational consequences (Sathvik et al., 2023). Hence, ensuring OSH compliance is essential to avoid accidents. Identifying impediments to OSH in the infrastructure sector is critical so that governments, organisations and policymakers can devise and implement effective interventions gradually to ameliorate these barriers and enhance OSH performance. This research identified major hurdles that need to be addressed to improve OSH performance in the infrastructure sector. The findings of this review can serve as a basis for further exploration of the identified challenges. This study is significant because it elucidates the OSH challenges and barriers in infrastructure projects, provides insights to improve OSH and educates professionals in the field. Addressing infrastructure challenges is imperative because they affect not only project deliverables, but also the safety of the involved personnel. In addition, the findings contribute to infrastructure safety by offering theoretical insights and a comprehensive understanding of stakeholder challenges during infrastructure development.

#### Critical infrastructure vulnerabilities cause extinction by amplifying the effects of interconnected environmental, social, and economic disasters.

Gianluca Pescaroli & David Alexander 18 - Professor in Operational Continuity and Disaster Resilience at University College London & s Emeritus Professor of Emergency Planning and Management at University College London. “Understanding Compound, Interconnected, Interacting, and Cascading Risks: A Holistic Framework,” November 2018, Risk Analysis 38(11), pg. 2245-2257.

1. INTRODUCTION

The development of concepts that describe compound, interconnected, interacting, and cascading risks is part of the process of creating new knowledge in order to increase societal resilience. Since the 1990s and the International Decade for Natural Disaster Reduction, our understanding of risk in the community has been influenced by the evolving role of science and technology (Aitsi-Selmi et al., 2016). Different perspectives from disciplines such as engineering and social sciences were merged together to provide a coherent approach to risk analysis, using a basis of knowledge about system performance and uncertainty assessments (Aven &Kristensen, 2005). Events such as the 2004 Indian Ocean Tsunami led to the development of the Hyogo Framework for Action, which provided an international plan endorsed by the United Nations to reduce disaster losses and build resilience between 2005 and 2015. According to the U.N. Office for Disaster Risk Reduction (UNISDR), disaster risk can be defined as: “The potential loss of life, injury, or destroyed or damaged assets which could occur to a system, society or a community in a specific period of time, determined probabilistically as a function of hazard, exposure, vulnerability and capacity” (www.preventionweb.net, updated February 2, 2017). Here, vulnerability is defined as those “conditions determined by physical, social, economic and environmental factors or processes which increase the susceptibility of an individual, a community, assets or systems to the impacts of hazards” (www.preventionweb.net, updated February 2, 2017).

The main consequence of this is a degree of circularity, in which the vulnerability of a system makes it more sensitive to risk, reflecting the complexity of socioeconomic factors that interact with the physical aspects of hazard (Alexander, 1993; Intergovernmental Panel on Climate Change, 2012; UNISDR, 2015). The work of the Society for Risk Analysis has highlighted the existence of other multidisciplinary aspects that have been used for models and theoretical frameworks, recommending a broad qualitative definition of risk and considering different types of ways of describing risk (Aven, 2010, 2016). At the same time, it has been suggested that there is a tendency in the engineering community to associate the definition of risk with the quantification of probabilities, but in order to be effective, the analysis of systemic accidents and unexpected events must address also uncertainties and their root causes (Aven, 2010). However, the literature suggests that further development is needed, “especially in relation to situations of large or deep uncertainty and emerging risk” (Aven, 2016).The complexity of networked society and the uncertainties inherent in threats, such as geomagnetic storms, challenge our approach to crisis management. After a long debate on unknown, low-probability, and high-impact events, it has been suggested that extreme scenarios could be more common than was previously supposed, and that this requires us to develop a new understanding of their drivers (Sornette, 2009).

The problem involves the whole anthropogenic domain. It cannot be limited to the analysis of hazards and must combine different human and natural factors that affect the magnitude of risks. It has also been shown that crises challenge the process of governance. They cross borders and involve many different aspects of society and the environment (Ansell, Boin, & Keller, 2010; Boin, Rhinard, & Ekengren, 2014; Galaz, Moberg, Olsson, Paglia, & Parker, 2011). On the other hand, global networks are becoming more interdependent and it is becoming harder to understand their vulnerabilities. In approaching safety issues and risk analysis strategies, a paradigm shift is required (Helbing, 2013). There is a need for a system-wide approach to resilience that is capable of employing penetrating analyses, innovative methods, and new tools in order to improve the operational management of complexity (Linkov et al., 2014).

In this context, in 2015, the U.N. member states adopted the Sendai Framework for Disaster Risk Reduction (SFDRR), which was designed to improve upon the Hyogo Framework for Action. This document identifies seven targets and four priorities areas to “prevent new and reduce existing disaster risk,” including better action to reduce exposure and vulnerabilities. The SFDRR defines “the need for improved understanding of disaster risk in all its dimensions of exposure, vulnerability and hazard characteristics.” The strategy for implementing the SFDRR requires innovation in this field and highlights the need to create policies on key topics such as the security of critical infrastructure and the mitigation of contextual factors in crisis situations (UNISDR, 2015).

Notwithstanding the rise of three- factor multihazard approaches, multidisciplinary integrations, and holistic knowledge sharing (Aitsi-Selmi et al., 2016), there are persistent gaps in the research and they need to be addressed. Our limited background knowledge of emerging risks suggests the need to improve assessment tools, and to achieve an adaptive balance between different strategies and mitigation measures (Aven, 2016). The fragmentation of the literature on compound, interconnected, interacting, and cascading risks can be seen as a part of this challenge, and obstacles must be overcome as the field develops (Kappes, Keiler, von Elverfeldt, & Glade, 2012; Leonard et al., 2014; Pescaroli & Alexander, 2015). Although concepts are very different in their possible applications, there is a tendency to use them as synonyms, which tends to cause redundancy and confusion.

This article aims to highlight the complementarities and differences inherent in compound, interconnected, interacting, and cascading risks. It aims to be compatible with the implementation of the SFDRR by supporting a better understanding of disaster risk and clarifying the underlying risk drivers. New forms of risk are still addressed generically in the framework and more clarity and precision are needed. Indeed, as noted in the literature, “the way we understand and describe risk strongly influences the way risk is analyzed and hence it may have serious implications for risk management and decision making” (Aven, 2016). Our aim is to produce a holistic framework that can support focused actions and research that will help reduce exposure and vulnerability and increase possible complementarities instead of duplicating efforts in research and practice. This is essential in order to maximize the impact and effectiveness of new political and practical recommendations that are steps in the implementation of SFDRR as shown in the recently published Words into Action Guidelines on National Disaster Risk Assessment where all the relevant elements are included (UNISDR, 2017). In other words, the scope of this article is to help scholars and practitioners to distinguish the different components of complex events that tend to overlap, supporting more focused actions in terms of measures for operational resilience and risk modeling.

To begin with, this article focuses on compound events, which have been associated mostly with natural hazards and climate change. Second, it approaches the fundamentals of interconnected and interacting risks, in which the environmental and human drivers overlap. Third, cascading risk is explained, distinguishing the complementarities of the social domain from the failure of critical infrastructure. The concluding section of this article presents a holistic framework that can be used to maximize the impact of future research and policies.

2. COMPOUND RISK

Compound risk is a well-known topic of discussion by scholars and practitioners who are interested in climate change. It involves both physical components, such as the understanding of environmental trends, and statistical ones, such as the implications of concurrence in forecasting and modeling. In contrast to interconnected and cascading risks, compound risks and disasters have been defined in official documentation as a clear area of competence. For example, the 2012 Special Report of the Intergovernmental Panel on Climate Change (Intergovernmental Panel on Climate Change, 2012) reported compounding drivers to be the possible sources of extreme impacts and associated them very clearly with the hazard component of crisis management. In other words, compound risk has been referred to as “a special category of climate extremes, which result from the combination of two or more events, and which are again ‘extreme’ either from a statistical perspective or associated with a specific threshold” (Intergovernmental Panel on Climate Change, 2012). The concept is fully explained in a section of the work in which its correspondence with the idea of “multiple” events is pointed out. Compound events could be: (1) extremes that occur simultaneously or successively; (2) extremes combined with background conditions that amplify their overall impact; or (3) extremes that result from combinations of “average” events. The examples reported include high sea-level rise coincident with tropical cyclones, or the impact of heat waves on wildfires. First, compounding events such as flooding that occurs in saturated soils may impact the physical environment. Second, health issues due to particular environmental conditions such as humidity can affect human systems.

Although compound risk can involve events that are not causally correlated, some exceptions have to be made for common driving forces, such as different phenomena that interact during El Niño, or when system-wide feedbacks between different components strengthen each other, as when drought and heat waves occur in regions that oscillate between dry and wet conditions. Understanding and assessing this level of interaction presents different challenges in relation to the forecasting and modeling of such phenomena. It has been suggested that, because of its implications in terms of discrete classes and artificial boundaries, the IPCC definition may be problematic for the quantification of risk. It could be better to promote a more general approach in which compound events are intended as extremes derived statistically from drivers with multiple dependencies (Leonard et al., 2014). Indeed, climate change could increase the complexity of the system and the possible sources of nonstationarity in the distribution of extremes, such as variable and dynamic combinations. With regard to impacts and dependencies between systems, these may need to be considered in a multidisciplinary way (Leonard et al., 2014).

A slightly different point of view is reported in the SFDRR (UNISDR, 2015), in which compounding drivers are associated with both the creation of new disaster risk and the need to reduce both exposure and vulnerability. This seems to contextualize cascading risk more than separate it completely from what was explained earlier. The Words into Action Guidelines on National Disaster Risk Assessment (UNISDR, 2017) refer to compounding factors as part of “underlying risk drivers,” such as climate change or urbanization, but the use of the term “compound effects” in two different chapters intends that it mostly be employed in line with the IPCC definition of concurrence and combined extreme events (e.g., riverine floods and coastal storms surges).

The next section will explain better the areas of convergence and complementarities with interacting and interconnecting risk. It will also discuss the causal background of cascades.

3. INTERACTING AND INTERCONNECTED RISK

The literature on interacting and interconnected risk focuses on how physical dynamics develop through the existence of a widespread network of causes and effects. Although the two concepts are intuitively very similar, interacting risks have been studied more in the context of earth sciences, while interconnected risks have generally been tackled under the headings of globalization and systems theory. The literature associated with this field has two main foci. It tends to overlap with compound risk in the hazard domain, and with cascading risk in the social and technological domains. A similar terminology is used in research on risk factors in health (Price & Macnicoll, 2015). Overall, the topic has particular implications for disaster risk reduction, complexity science, and emergency management. Common ground for improving the understanding of the composite nature of disasters has been a relevant part of disaster management and hazard assessment processes since the 1980s, for example, with respect to earthquake-induced landsliding (Alexander, 1993). However, events such as the 2011 tsunami, and the storm surge triggered by Hurricane Sandy, have increased the need to improve forecasting strategies and early warning methods by those public and private stakeholders who are in charge of critical infrastructure protection. Although the SFDRR (UNISDR, 2015) does not refer directly to interacting or interconnected risk, it refers to the need to strengthen capacity to assess “sequential effects” on ecosystems.

In the case of interacting risks, the mechanisms and combinations of hazards have been analyzed in their temporal and spatial domains, including reciprocal influences between different factors and coincidences among environmental drivers (Tarvainen, Jarva, & Greiving, 2006). Empirical studies have elucidated the relationships between primary hazardous events and secondary natural hazards of the same category or different categories (Marzocchi et al., 2009). Progress in this sector requires both risk assessment strategies and understanding of the components of earth systems and their multiple-hazard perspectives to be improved (Kappes et al., 2012). For example, Gill and Malamud (2014) studied systematically interactions between 21 natural hazards. They found that geophysical and hydrological hazards are receptors that can be triggered by most of the other types of hazard, while geophysical and atmospheric causes are the most common triggers. The results of such studies support a wider understanding of complex interactions that could be integrated into early warning systems and rapid response tools. Other studies have created new models based on the analysis of trigger factors, which enables them to understand relationships among hazards that are interdependent, mutually reinforcing, acting in parallel, or acting in series (Liu, Siu, & Mitchell, 2016).

However, for multiple-risk assessment to be effective, the complex nature of interacting and interconnected relationships between different triggers needs to be integrated into a holistic framework. Some allowance must be made for the social construction of disasters in a global systems perspective, including reciprocal influences among the social sphere and the built and natural environments (Hewitt, 1995; Mileti & Noji, 1999). In other words, risk can be understood as the result of interaction between changing physical systems and society, which also evolves over time (Weichselgartner, 2001). In various studies, Helbing (Helbing, 2013; Helbing, Ammoser, & Kühnert, 2006) analyzed the “interconnected causality chains” that generate and amplify disasters, framing the impacts of triggering events on both ecosystems and anthropogenic systems. In this sense, the paths of complex risks that generate secondary events are determined by physical elements (e.g., a landslide triggered by an earthquake), the built environment (for instance, critical infrastructure), and people (hence, behavior). The level of interconnection and interdependency may be determined by interactive causality chains, which can spread out in space and time. However, improved understanding of physical interactions has tended to shift national risk assessment toward multiple-hazard approaches; further attention should be given to contemporary society and the built environment. The global interdependency of human, natural, and technological systems can produce hazards and disasters, but it is increasingly hard to comprehend and control (Perry & Quarantelli, 2005). Networks have different levels of interaction and interconnection, perhaps with multiple sources of disruption and systemic failure (World Economic Forum, 2016). When events are triggered, the pathways that determine the scale of the impacts are influenced by the interlinkages between different domains, for example, the interactions by which an earthquake leads to a tsunami, along with the climate change drivers, and the components of infrastructure such as lifelines (OECD, 2011).

As the next step toward the derivation of a holistic framework, the following section will clarify the specific features of cascading risk.

4. CASCADING RISK

Among the phenomena analyzed in this article, cascading risk is the broadest. For many years, it was referred to vaguely as “uncontrolled chain losses.” Its early diffusion occurred in the 1980s, when it was used to refer to measurable links and nodes that could compromise information flows in networked systems (Millen & Schwartz, 1988). In the same period, in order to define the consequences of organizational failures that happen in tightly coupled and complex technological systems, cascades were included in the theory of “normal accidents,” or “systemic accidents” (Perrow, 1999). The literature has associated cascades with the metaphor of “toppling dominoes,” which since the late 1940s has been used in the chemical processing industry to refer to sequential accidents (Abdolhamidzadeh, Abbasi, Rashtchian, & Abbasi, 2011; Khan & Abbasi, 1998). This idea has been integrated into the early literature on NaTech disasters, interacting risk, and cascading events (Cruz, Steinberg, Vetere Arellano, Nordvik, & Pisano, 2004), but recently it has been pointed out that it could be an oversimplification and it could also decontextualize the problem (Pescaroli & Alexander, 2015; Van Eeten, Nieuwenhuijs, Luiijf, Klaver, & Cruz, 2011).

In the early 2000s, events such as Hurricane Katrina and the terrorist attacks on the World Trade Center shifted the focus of research on cascading risk to the protection of critical infrastructure, which is understood to be those systems or assets that are vital to the functioning of society. Millennial literature has approached cascading risk from the point of view of how one can model causal interdependencies and mitigate breakdowns (Millen & Schwartz, 1988), how one can study the processes that could cause blackouts and trigger cross-scale failures in power grids (Newman et al., 2005). Networked infrastructure was portrayed in both its functional and social domains, including hardware, services, and the secondary and tertiary effects of disruption (Little, 2002). However, cascading risk remained a fragmented subject that lacked both official definition and an intergovernmental dimension. It usually referred to a branching structure that originated with a primary trigger (May, 2007).

Although new models were used to defined thresholds and mitigation strategies, their applicability was limited by the absence of testing in real scenarios and networks (Peters, Buzna, & Helbing, 2008). In political analyses, although the presence of cascading effects was seen as a driver that could explain the scale of crises, it remained marginal to any broader considerations of resilience to extreme events with cross-border dimensions (Ansell et al., 2010; Boin & McConnell, 2007). The ecological debate focused on the implications of cascading risk for climate by associating it with complex causal chains, nonlinear changes, and recombination potential. The question of how to manage such crises was not solved (Galaz et al., 2011).

Only in the late 2000s were empirical data used to demonstrate that cascading failures are not as rare as was believed. When they were driven by disruptions to the energy, telecommunications, and Internet sectors, they were generally stopped quickly (Luiijf, Nieuwenhuijs, Klaver, Van Eeten, & Cruz, 2009; Van Eeten et al., 2011). After high-impact events such as the eruption of Eyjafjallajökull volcano (2010), the triple disaster in Japan (2011), and Hurricane Sandy (2012), the field evolved toward a greater understanding of the wider implication of cascades. A wider range of case studies provided new evidence of the disruption of social, cultural, and economic life, including cross-scale implications for global supply chains and humanitarian relief (Alexander, 2013; Berariu, Fikar, Gronalt, & Hirsch, 2015; Sharma, 2013). Improved technology stimulated a new phase in modeling the complexity of interactions and interdependencies among networked systems. It promoted a more coherent approach to climate, society, economics, the built environment, and cross-sector decision support systems (Greenberg, Lowrie, Mayer, & Altiok, 2011; Havlin et al., 2012). In order to understand both random failures and terrorist attacks on lifelines, critical factors began to be ranked (Buldyrev, Parshani, Paul, Stanley, & Havlin, 2010; Zio & Sansavini, 2011). Attempts were made to assess cascading disruptions on a cross-national basis (Galbusera, Azzini, Jonkeren, & Giannopoulos, 2016; Jonkeren, Azzini, Galbusera, Ntalampiras, & Giannopoulos, 2015). In order to assess the possible impact of cascading risk on emergency management and to translate it into generic tools that could raise awareness and information sharing in particular on electricity disruptions, the risk managers looked for practical and replicable approaches (Hogan, 2013). A few of the official scenarios tackled the loss of power supply caused by nonconventional triggers such as solar storms, but, in everyday reality, practice was still distinguished by a lack of buffering strategies and well-codified contingency plans (Pescaroli & Alexander, 2016).

The promotion of strategies designed to increase the autonomy and adaptive capacity of systems could be seen as a partial answer to these problems. In decision making and planning, decentralization and greater empowerment were sought (Helbing, 2015). However, guidelines for the adoption of coherent mitigation actions are still limited in their availability. In this sense, the SFDRR can be regarded as a first step (UNISDR, 2015). This document reflects the perception that, in order to reduce damage to critical infrastructure and loss of vital services, hardware and software are the joint adjuncts of policies and mitigation actions.

In the projects supported by the European Commission, in particular by the Seventh Framework Programmes such as FP7 FORTRESS, FP7 CASCEFF, FP7 SNOWBALL, FP7CIPRNet, or FP7 STREST, other drivers of research have emerged. Lack of awareness of critical infrastructure dependencies among planners and responders could be associated with extended impact of emergencies, requiring different levels of actions for mitigating worst-case scenarios and operational challenges (Luiijf & Klaver, 2013). Assessment and modeling of cascading failures in networks can be complemented by greater attention to the strategies that are required when disruption happens, as we suggested in some of our previous works (Nones & Pescaroli, 2016; Pescaroli & Alexander, 2015, 2016; Pescaroli et al., 2018; Pescaroli & Kelman, 2017).

In particular, our approach proposed that “cascading risk” should distinguish between “cascading effects” and “cascading disasters,” considering that, as time progresses, nonlinear escalation of a secondary emergency could become the main center of crisis (Pescaroli & Alexander, 2015). This shifts significantly from the “toppling dominos metaphor,” which, as suggested earlier (Boin & McConnell, 2007; Little, 2002; Newman et al., 2005; Peters et al., 2008; Van Eeten et al., 2011), has mostly been employed in the context of the process industry shifting attention to critical infrastructure, complex theory, and to the understanding of societal and organizational resilience in policy making and emergency management. Fig. 1, taken from a previous work of ours (Pescaroli & Alexander, 2016), shows that cascading events can be viewed as the manifestation of vulnerabilities accumulated at different scales, including socio-technological drivers. The possible environmental triggers, shown at the top of the figures, can be associated with compounding and interconnected risk, while critical infrastructure and complex adaptive systems may be the drivers that amplify the impacts of the cascade.

First, together with the literature on the loss of services, scholars suggested other possible drivers of escalation such as NaTech events, which considers that up to 5% of industrial accidents are caused by natural triggers that involve hazardous facilities (Krausmann, Cozzani, Salzano, & Renni, 2011). In both cases, gaps have been found in the existing legislative frameworks, where it is necessary to integrate different levels of risk and critical infrastructure mapping to increase the effectiveness of mitigation strategies for multiple-scale events (Nones & Pescaroli, 2016). Second, in order to increase the effectiveness of deployment and the organization of procurement in disaster relief, new data sets are needed. The analysis of different case studies suggests that the disruption of critical infrastructure can impact the logistics of emergency relief (Berariu et al., 2015). It also has the potential to orient international aid in order to rectify a shortfall of emergency goods and expertise caused by the disruption (Pescaroli & Kelman, 2017). Finally, it has been pointed out that cascading risk may require a change in methods of scenario building and contingency planning. Our previous work suggested that flexibility of response can be increased by considering possible escalation paths that are common to different categories of triggering event (Pescaroli & Alexander, 2016; Pescaroli et al., 2018). This approach is complementary to the perspective of broad impact-tree analysis (Macfarlane, 2015). Shifting from a focus on hazards to one on vulnerability assessment enables one to recognize the sensitive nodes that may cause secondary events to escalate. On the one hand, tipping points, or thresholds, can be associated with an increased demand for products and services during events such as blackouts. This drives the prioritization of recovery actions and introduces new questions and issues regarding coordination between public and private stakeholders (Münzberg, Wiens, & Schultmann, 2017). On the other hand, in order to consider the different components of risk in relation to one another, it is essential to introduce good practices into emergency planning and scenario building (Alexander, 2016; Pescaroli et al., 2018). The next section will propose a holistic framework that may be used by scholars and practitioners as the basis for improved work in this field.

#### Exploitation of migrant farmworkers threatens global food security. Safe working conditions boost productivity and stabilize the labor supply against growing pressures.

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3.2. Unique characteristics of employment

Agriculture operating in the global capitalist economic system can only increase its profit rates by reducing the cost of labor due to the peak in production; thus, it is increasingly dependent on profiting from the skimming of the economic value produced by migrant workers. This practice not only forces migrant workers into often inhumane and illegal working conditions but also threatens the stability of the labor supply of the entire global agricultural system due to epidemiological restrictions on international mobility (see e.g., [108]). Informal employment may worsen this situation [30,71]. In several Stud., the literature details the dependence of the agricultural sectors of developed countries on off-farm labor [15,16,18,26,35,40,46,51,98,105,113,115,132,140].

Based on this, for example, most of the seasonal workers in the US come from Mexico. The reason for this is Mexico's low economic growth compared to the US, as well as the labor-absorbing power of the rapidly developing sectors in the US, which are replaced by migrant workers [40]. Coincidentally, large US-based farms, significantly dependent on immigrant labor, are fierce advocates for the easier admission of seasonal workers [18]. Furthermore, nearly half of the migrant workers employed by US crop farms do so without a permit [140]. In many cases, most of the farms employ refugees due to their lower wages or flexible work schedules [20]. According to Avola [4], on the contrary, migrant workers have better employment opportunities in Mediterranean agriculture; however, it means low-skilled and low-paid jobs along with high segregation.

The recent wave of mechanization and digitization, according to American farmers, may and will reduce the use of migrant labor in agriculture [18], but according to German farmers, it will take a long time for machines to completely replace migrant workers. Digitization leads to increased work intensity and harsher working conditions, which further increases dependence on migrant workers who are forced to accept such working conditions [105,121]. Alarcón [2] found that the increase in agricultural mechanization and digitalization is an obstacle to integrating immigrants primarily through agricultural employment.

EU agriculture is also very dependent on migrant (and seasonal) workers: immigrants make up a significant part of the EU labor force employed in agriculture, who are concentrated on larger and more productive farms, and their presence is positively correlated with the productivity of the farms’ labor [26,44,46,98,131]. Being aware of this, the EU created a program for the training of migrants and refugees, which also tries to make it easier for migrants to join agriculture with special training and job search support [7]. This program is much needed, as there is a considerable number of injuries among the growing migrant workforce [16]. There are still great barriers for immigrants to establish their farms (even when land prices are low) due to the lack of connections and various types of capital [48,130]. Great Britain's agriculture is also struggling with a labor shortage, especially after the COVID-19 era, which they try to fill primarily with seasonal workers, mostly migrant workers, whose supply is also limited [1,94].

Some of the articles draw attention to the dangers of agriculture's increasing reliance on migrant workers. According to Molinero-Gerbeau and Avallone [89], in the current phase of capitalism, global agriculture is based on skimming the value produced by cheap migrant workers, even in the face of mechanization. The problem is present in the literature that examines North-America [15,106,143], Australia [113], Great Britain [1,27,121,122] and the EU [2,25,29,33,66,88,89,101,109,118]. For example, the increasing exploitation of Mexican migrant workers employed in the southern states of the US [114,143] often leads to their increasing organization and coordinated strikes [143]. Analyzing Canadian seasonal work programs, Preibisch [106] finds that low-skilled and low value-added workers have difficulty obtaining residence permits and citizenship, and family reunion is not supported. Rosewarne [113] warns about the state of migrant worker exploitation in seasonal labor-dependent Australia. In Great Britain, agricultural migrant workers face several types of exploitation, such as additional fees charged by job brokers, poor quality of allocated accommodation, and hazardous working conditions. Schewe and White (2017) found that the influencing factor of labor exploitation is not ownership structure (family or non-family farm), but farm size.

Due to their vulnerability, immigrants are considered a well-controlled workforce [1,27,89]. The phenomenon replicates in various European countries [29,66,88,101,109]. Paying smugglers and getting in debt is also part of migrant workers entering developed countries [101]. However, an American example shows that higher agricultural activity may lower crime rates [21]. All this is driven by competitive pressure in the global agricultural market led by the rise of large food retailers, which producers try to meet by minimizing wage costs, and the exploitable migrant worker sector contributes to this.

In general, off-farm labor related literature focuses on state temporary off-farm labor programs. Australia and New Zealand introduced special labor mobility programs, however, their employment impact is rather small [73,96,103,135]. In Spain, there are off-farm labor programs planned at the regional level, which create the legal framework for the employment of foreign workers in agriculture but, as mentioned before, they can still be considered a vulnerable group [39]. Migrant workers are legally required to return home after work is completed, thus preventing their settlement and integration into the Spanish economy [70]. The situation is similar with Canadian temporary off-farm labor programs [106,135], migrant workers come to pre-designated companies which had to assure the Canadian government that they cannot fill vacant positions with Canadian workers. In addition, migrant workers cannot bring their families with them, leading to higher utilization of workers by exclusion of family social activities. Regarding Canadian programs, Reid-Musson [110] notes that family farms limit the mobility of their employed migrant workers, further reducing their place of employment choice. In contrast to these examples, local producers in Italy never initiated the establishment of such programs, so they never appeared. Therefore, the southern regions of Italy are characterized by deregulated immigrant employment in agriculture [33,42]. Corsi and Salvioni [24] found that since past labor is a strong indicator of current off-farm work; policies should focus on education and the promotion of personal skills to foster off-farm employment.

Many Stud. discuss the positive aspects of seasonal work and outline structures in which seasonal work can be beneficial to both the farmer and the seasonal worker [43,50,67,90,95,137]. Nehring and his co-authors (2005) point out that in the United States, seasonal workers contribute significantly to increasing agricultural efficiency. In addition, American seasonal workers are more inclined to choose beef and chicken farms as jobs, as these places have lower economies of scale and, therefore, a greater demand for seasonal workers whose work is valued higher [43]. Migrant workers running their farms in the US are found to often operate sustainably and organically, but lack the education and resources to apply for the organic producer certificate [84]. Labrianidis and Sykas [67] discovered that Albanian migrant workers working in Greece can afford multiple trips due to the proximity of the countries, which helps their social progress. An interesting phenomenon in French agriculture is that full-time workers are being replaced by seasonal (even daily) employees [50]. Nye [95] deals with a special version of seasonal work in which the worker provides not only the work itself but also the tools themselves as a contractor; thus, this type of seasonal work offers the entrepreneur a higher bargaining position. Community-supported agriculture distributes the work among consumers who want to benefit from agricultural products [137].

The problem of farmers turning to off-farm work became important with the outbreak of the COVID-19 epidemic, when closures were introduced, which also limited mobility between countries. In the end, the EU or the USA was forced to make an exception to the measures restricting mobility for migrant workers [80,117]. Although this allowed agricultural production to continue, it led to COVID-19 outbreaks linked to migrant workers in several EU member states. Seasonal workers were particularly impacted by the lockdown measures related to the pandemic [117], and according to some Stud., there was an increase in bargaining power for employed workers [112]. In such circumstances, the role of social workers is essential [45]. The inhuman working conditions of the migrant workers exacerbated the problem. In the past, there was already a proposal to tie EU agricultural subsidies to fair working conditions, but this was rejected by the European Council. This should be renegotiated, as, in many cases, better rules and wages could lead to better housing, well-being and health conditions [25,117].

3.3. Differences between genders and gender equality

In recent years, the fewest publications have been published on gender and gender equality in developed conuntries. It is clear from the literature that women carry out monotonous, less appreciated, and less profitable agricultural activities. It was also observed that more women work in organic farms than in conventional agriculture. However, the increased participation of women cannot be explained by the ‘feminine’ values present in organic farming, for example, a higher level of attention and more care [52]. Shreck et al. [123] refuted that organic farming is more socially sustainable than conventional farming. Women who work in organic farming cannot secure the incomes and benefits available to workers in other sectors. Bernal [9], however, points out that women workforce in ecological farming leads to better economic results due to the characteristics of women and facilitates population settlement as well by providing flexible work hours.

Women also tend to leave farming due to their increased resistance to the traditional hard-working “farm-wife” role, or at least to strive for equal recognition within the industry [3,31]. Women’s unpaid family labor is a common characteristic of small and medium-sized farms [61]. Contzen and Forney [23] suggested that inequality is tied to the position on the farm and not gender. They remark that, with mutual recognition, even these asymmetric arrangements can lead to contented working family members. Reissig et al. [111] found that on organic family farms, women are more involved in family work and less in farm work. In terms of intensive and conventional agriculture, the training of the female workforce is decreasing, and the workforce is becoming feminized and segmented, similar to that of developing countries. There are areas, for example, strawberry or kiwi harvesting, where employers are specifically looking for female workers [25,29]. Women are concentrated in socially less valued physical jobs which are characterized by temporary, unstable, very flexible contractual relationships, worse working conditions and lower wages [30,68], and often feel that they are demeaned, dismissed or excluded because of gender [92]. Female workers tolerate repetitive tasks, painful postures and long working hours, and their ability to handle more loads should be emphasized which can be considered a guarantee of good performance. Business strategies and the devaluation of various agricultural jobs directly contribute to developing an unequal and vulnerable social structure [29].

As farm income increases, farmers invest some of the extra income in their children's education, and educated children are less likely to become farmers (see more in subchapter 3.5). Women who have more children, and thus more potential agricultural offspring, are more likely to leave the agricultural sector. Parents who earn a larger share of their income from agricultural activities and social transfers are less likely to send their children to school (e.g., university), especially not girls. Children of women earning low wages also stay in agriculture, with a few exceptions [8,29,129].

The relationship between migration and gender roles is also worth exploring [106]. A significant part of the labor force entering Canadian agriculture is male due to the nature of agricultural work, and in the interest of minimizing gender tensions, employers are looking for men. In Europe, the most sought-after workforce is men between the ages of 20 and 40 [25]. Furthermore, women working outside of agriculture can help avoid potential “cooperative conflicts” with their husbands [49]. The political and corporate attitude, which allows employers to choose the nationality and gender of their migrant workers, results in various forms of racial and gender segmentation. Women also face a challenge when it comes to succession in family-owned wineries in the Cognac region of France [11].

3.4. Wage

Darpeix et al. [26] distinguish three types of employee wages: wages paid to family members, permanently employed workers, and seasonal workers. Using seasonal workers increases flexibility and reduces costs, but this type of labor is not available in all geographic regions. Family labor can replace both types of labor but is typically used to replace the latter. However, there are cases where hiring a permanent employee is cheaper, for example, when the cost of training, turnover, or work supervision is very high. Agricultural employment is characterized by highly discriminatory wages. There is a significant difference between the wages paid to family members, permanent employees, or migrant workers. Furthermore, migrant workers work for hourly and performance wages and generally do not have the same social rights as citizens, which further increases their vulnerability [5,15,[25], [26], [27],29,33,36,38,46,66,90,105,109,113,[120], [121], [122], [123]].

When investigating the illegal employment of Romanian migrant workers in Italy, Domșodi [33] draws attention to the fact that the pressure on efficiency on both the upstream and downstream sides of the agricultural supply chain is so great that the cost of labor matters a lot. Shreck et al. [123] also report that the income of migrant workers working in California decreases in real terms; they are not paid overtime, and they are underemployed in the off-season. In Denmark, it is a regular solution that domestic workers are paid more for the same work than seasonal workers, who also lose out on social services (pension, health insurance) [109].

Migrant workers in the UK routinely receive their wages late [27]. From 2021, Germany fixed the minimum hourly wage for seasonal immigrant workers [105]. However, the wage depends only partly on the hours worked, workers earn the other part based on performance, and the performance measurement that results in unfair situations is based on unrealistic expectations [121,122]. In Northern European welfare states, trade unions specifically feared that EU enlargements would depress the wages of seasonal agricultural work. The wage gap between agriculture (and other sectors based on immigrant labor) and other industries strongly supported by trade unions has opened [38,91,109,129]. Mishra and Chang [85] found that income uncertainty in American farm households promotes precautionary savings and household wealth. Jiang and Miller [54] analyzed the wage impact of cannabis legalization in the USA without finding any significant differences in the average wage of the agricultural sector. Furthermore, according to Richards and Rutledge [112], with the increase in bargaining power of workers during COVID-19, agricultural (minimal) wages started to rise, and the higher unemployment benefits increased the equilibrium wages as fewer workers remained in the (agricultural) labor force.

3.5. Education

The rapid development of technology, smart agriculture, and the recording, collection, processing, and proper use of an unimaginable amount of data require different knowledge and skills from agricultural workers than ever before. One of the most essential tools for this is education and training so that professionals with adequate knowledge and experience are present in the sector. With the progressive professionalization of the food industry workforce, next to the demand for manual or low-skilled workers in this sector [68], there is also a need for specialists who can handle and service machines, which requires the development of other skills in education and technology-oriented training [18]. Agricultural consulting and education are the key to improving labor productivity [104,116]. Internship programs can play an important role in this process, as collaborative courses strengthen academia-industry bonds; however, the USDA example shows that only a small percentage of the interns will be long-term employees [32]. Nevertheless, the University Extension Diploma in Food Technology (DEUTA) program is a good example of collaboration between academia and industry [19].

It can be considered a serious challenge that the qualifications of the agricultural workforce are generally lower compared to other sectors [36,46,141], and that the highly qualified workforce does not stay in the agricultural sector for long, mainly due to financial reasons [15,129,132]. One of the critical effects of the increase in farmer's income is that the child(ren) of the producers can receive a higher level of education, because of which they can find a better paid job outside the sector and are less likely to take over their parents’ farm [8,59].

Education makes it easier for immigrants and less educated people to find work in agriculture [7,15,27,59]. Special attention must be paid to the safety training of migrant workers, for whom injury rates are generally higher than for the non-migrant workforce [16]. As family labor is found to be less efficient than hired labor, investing in education and training programs for family members is justified [64,65]. A relationship can be demonstrated between farmer education and the ability of the farm to generate income [8,43]. An educated farmer collects and uses more information, has better access to resources, and is more likely to invest in technology and operate a more modern and efficient farm. Succession is usually not a problem on such farms: the next generation is more willing to take over a well-functioning, modern, and profitable farm. The higher the level of farmer education and the higher the percentage of permanent employees, the smaller the proportion of families involved in the work [26]. Policymakers in the EU should focus on rural development payments for education, as it is found to facilitate the increase in human capital and efficiency [75].

3.6. Productivity

As in other sectors, one of the essential means of increasing profits in the agricultural sector is increasing productivity. Production increases through the optimal use of machines and labor, while costs do not change substantially, resulting in higher profits overall. The labor shortage in developed countries further reinforces the need to increase productivity. The decrease in labor use labor through technological developments requires an increase in workers’ education level [5]. The productivity of agricultural land grows slower than its labor force, and the growth of agricultural productivity lags that of the sectors that produce inputs [62]. Zhengfei and Lansink [142] show that long-term debt has a positive effect on productivity growth in the farming context. In general, agricultural wages show an increasing trend and its main reason is higher labor productivity [6].

The role of agriculture and the food industry is more significant in the new member states of the EU, compared to the old ones, but the productivity in the old member states can be considered higher. In the case of both groups of countries, the opportunities for employment growth are limited [5,58]. Taking into account CAP subsidies, the smallest farms have the best indicators, as the use of labor per unit of area is inversely proportional to the size of the farm. In the case of smaller farms, this means overemployment, which negatively affects workforce’s productivity [13,102]. On the contrary, in the case of American agriculture, the allocation of labor from less efficient to more efficient (typically larger) producers would increase the output and productivity. Agricultural subsidies and programs play a key role in this continent and Europe [43,51,62,69].

In developed countries, family farms do not hinder the increase in productivity, which significantly contributed to the optimization of work organization and the continuous reduction of the workforce due to technological development. Increasing labor productivity increases the return of capital investors (and not wages) [50]. Environmental policy-measures also have an impact on farm labor use. Unay-Gailhard and Bojnec [132] showed that agri-environment measures increase the hired labor on crop farms and the family labor on dairy farms. Increasing the productivity of the farm can be achieved in many ways, for example by increasing the level of education of employees, increasing economies of scale, mechanization and technological development, export orientation, specialization, or supporting young farmers [2,18,40,72,89,93,104,118,131].

Groborz and Juliszewski [47] show that tasks performed by women are in greater need of mechanization due to the effort requirement than tasks performed by men. Since labor availability is a critical factor, production contracts also typically increase productivity [118]. Increasing workforce productivity requires an integrated approach and targeted programs [5,34]. Maietta et al. [75] suggest that rural development payments play the most significant role in improving human capital productivity. Sabasi and Shumway [116] also emphasize the human aspect of agricultural productivity, mainly through education and access to health care, as the main drivers of human capital. Yagi and Hayashi [139] found that overwork is unavoidable on both family and non-family rice farms in Japan due to the extra time requirement of coordinating with part-time workers. Konstantinidis [63] shows that even organic farms in the EU are highly mechanized and productivity-oriented, despite the policymakers' rhetoric of organic farming promoting small-scale agriculture. Raimondo et al. [107] also highlight how organic farming increases the efficiency of Italian olive farms. Reissig et al. [111] found that farm couples work longer hours on organic farms than on conventional farms, which might also be motivated by work enjoyment. Overall, the agricultural model in developed countries focuses on productivity, the main feature of which is the reduction of labor use to the greatest extent possible [72].

4. Summary and conclusions

4.1. Summary and synthesis of the findings

The challenges experienced in recent years and decades, including factors such as an aging population, changing consumption patterns and a growing demand for organic foods, have significantly burdened the agricultural sector. Furthermore, the recent, suddenly occurring new challenges (e.g., COVID-19 pandemic, the Ukrainian-Russian conflict) have also heavily affected and tested the agri-food sector. Regrettably, agriculture's importance, for example, in the ratio of total GDP and employment, has declined in developed countries. Based on the two-stage, comprehensive systematic literature review presented in this paper, employment in developed countries’ agriculture is characterized by specific areas of focus: (1) family farming; (2) unique employment characteristics related to migration and mobility; (3) gender issues; (4) wage disparities; (5) educational considerations; and (6) productivity enhancements. The review included the summarization and synthesis of 128 articles. Most of the articles dealt with the United States, followed by the EU (mainly Italy and Poland) in Fig. 5.

According to the results, family farms remain crucial in developed nations’ agriculture despite their decreasing number [60]. The decline comes from the increase in the size of farms driven by efficiency pressures, mainly in developed Europe. In least developed countries such as Romania or Bulgaria, family farming is still prevalent, managed mainly by older, low-educated farmers with family help [81,129]. The drop in family farming is driven by socio-economic factors such as smaller families, educated children leaving agriculture, and an aging farmer population. This complex problem is the crux of agriculture in developed countries. For survival, family farms must improve efficiency, specifically in labor costs. Furthermore, the modernization and high degree of mechanization of family farms have an attractive effect on descendants in terms of staying in agriculture [5]. Agricultural policy should encourage the size of holdings that can support a family by consolidating agricultural land and reducing fragmentation.

However, global capitalist agriculture seeks to increase profits by cutting labor costs, leading to reliance on exploiting migrant workers for economic gain. This not only subjects migrant workers to inhumane and illegal working conditions [106,114], but also jeopardizes the stability of the global agricultural workforce due to mobility restrictions during epidemics. Governments must find a solution to ensure a predictable food supply through the management of human labor in the future. Seasonal work can benefit farmers and workers in specific structures [43,67,95]. For example, in Great Britain or Canada, a special type of work allows contractors to bring their tools and offer a stronger bargaining position for better wages and conditions, contributing to work sustainability and stability [1,94]. In countries with high wages, strong mechanization and automation are being implemented to replace repetitive, low-value-added work. However, with mechanization, the digital surveillance of workers is also spreading, which could lead to even greater exploitation of migrant workers Fig. 3,Table 10,Table 5,Table 6,Table 7,Table 8,Table 9.

The least amount of research has been done on the topic of gender (in)equality in developed countries. Women's jobs in agriculture are increasingly devalued (e.g., monotonous jobs) and require less and less high-level education. As a result of migration, a significant number of men appear in developed countries’ agriculture, and the increase in the number of women can only be observed recently [25,106]. It is not surprising since, due to the typical physical load of most agricultural work, most employers are specifically looking for male workers. In the case of women, a clear turning point can be the acquisition of higher education, which allows them to occupy higher positions.

Based on the results, agricultural wages show severe discrimination, with significant disparities between wages paid to family members, permanent employees and migrant workers. Low-skilled labor leaves agriculture when wages increase in the industrial sector. Migrant workers often earn lower hourly and performance-based wages and lack the same social rights as citizens, exacerbating their vulnerability [15,25,36,66]. Seasonal labor offers flexibility and cost savings but may not be accessible everywhere. Family labor can replace both but typically replaces the latter. In some cases [33], hiring a permanent employee may be cheaper, for example, when training, turnover, or supervision costs are high.

As a result of technological development (e.g., mechanization, automation, robotization), different kinds of knowledge and skills are needed [18,68] and professional education is generally valued. The problem is that the educational level of the workers in agriculture is typically lower than in other sectors [36,46]. Higher education helps attract agricultural labor but typically results in higher income within the sector. For family farms, encouraging generational change can concentrate the proper education, skills and capital in the hands of a single family in the long term. EU policymakers should prioritize rural development subsidies for education, as this has been shown to foster human capital growth and improve efficiency [75]. Moreover, attracting young people to work in agriculture is key to the development of the sector [[14], [76]]. Technological progress means that short-term, highly practice-oriented training is needed to meet rapidly changing needs. Innovation and know-how are the basis of modern agriculture and the food industry and should be the foundation for future training programs. Secondary and higher education in agriculture should be effectively involved in various R&D activities in which theoretical and practical knowledge can be successfully combined.

Indicators used to measure productivity (value produced by the workforce, gross added value, and agricultural income) are projected onto the labor unit (annual labor unit). Consequently, productivity increases when the value of production increases and/or the use of labor decreases. The tools to increase productivity are production concentration, optimization of the production structure, development of technology (technical innovations that save labor), and support of young people/farmers to start or continue agricultural activities. The family farming model does not prevent the increase in productivity at all. Processing raw materials is essential to increase added value. One of the main outcomes of this research is the close link between the identified themes. Having skilled workers requires education and training. This is important for family farms and even for seasonal workers. Skilled workers should be paid better regardless of their gender. Higher productivity is based on advanced methods including precision agriculture and precision technologies cannot be applied without skilled workers. However, the time aspect of the different policy measures should be highlighted. Even a single support program, such as investments in physical assets, can enhance productivity in the short term. While different types of training are short- or medium-term measures, changing the education system according to the specific need of the sector requires more time. Although fairer wages can be introduced instantly, they are closely linked to higher productivity. Table 11 provides an overview of the identified themes, and the main findings related to them.

#### Food shortages cause extinction.

Julian Cribb 23, Ph.D., Principal of Julian Cribb and Associates, Fellow at the Australian Academy of Technology and Sciences and Engineering, former Director of National Awareness at the Commonwealth of Scientific and Industrial Research Organization, "Chapter 4: Nuclear Awakening," in How to Fix a Broken Planet: Advice for Surviving the 21st Century, Cambridge University Press, University of Kansas Libraries, Pro Quest, 2023

The greatest single risk of human extinction among the 10 catastrophic threats that comprise our existential emergency is still nuclear war. However, the core issue is that conflict can originate with almost any one of them – with food shortages leading to international disputes over food, land, and water; in quarrels over dwindling fish, forest, energy, or mineral resources; in the unleashing of uncontrolled technologies such as cyber raids on national IT networks, banks, and even nuclear command-and-control centres; the release of novel man-made plague organisms; the almost universal brain damage and loss of IQ now being caused by the chemical flood; the tension and anxiety driven by worsening climate conditions; and in the manic tide of false information propagated by fools and malignant actors via the internet. The existential threat to humanity thus spirals out of the coming together of several of these mega-risks, culminating in nuclear conflict.

An instance of how mega-risks may compound into nuclear war is the long-standing animosity between India and Pakistan, chiefly over Kashmir, terrorism, and the waters of the Indus River which feed both countries at a time of growing climate stress. Even a relatively limited nuclear conflict between the two – 100–150 warheads of Hiroshima scale – is projected to kill 100 million people directly and 1–2 billion people worldwide as the resulting ‘nuclear winter’ would cause harvests to fail and food supplies to collapse all around the planet.9 Such a disaster would almost certainly trigger further wars, some of them nuclear, as governments fail and atomic weaponry falls into the hands of political radicals, warlords, criminals, or religious extremists.

A second example is acute water scarcity leading to a food crisis in northern China, spilling the local population in all directions, including Siberian Russia: strategic think tanks fear such a development could precipitate a nuclear response. Another case is the Middle East, already the most water-starved and volatile region on Earth, where the acquisition of nuclear weapons by Iran could spark a regional arms race involving Israel and, potentially, Saudi Arabia.10 In all these cases, the nine catastrophic threats pave the road that leads to nuclear holocaust – and all must now be regarded as primers in the explosive chain leading to civilisational collapse and human extinction.

#### Compliance with employment law is key. It stabilizes food supply against antibiotic resistance and foodborne diseases.

Megan Linnea Clayton 14 - PhD candidate for social and behavioral science from The Johns Hopkins Bloomberg School of Public Health. “A Qualitative Investigation of the Role of Food Workers in U.S. Food Safety,” November 2014, The Johns Hopkins University, http://jhir.library.jhu.edu/handle/1774.2/40662

2.1 The Global Food System and Infectious Disease

Protecting the U.S. food supply requires understanding the pathways by which contaminants enter the food system, or the organizational structures, processes, resources, and people involved in the growing, harvesting, processing, packaging, distribution, marketing, consumption, and disposal of food (Behravesh, Williams, & Tauxe, 2012; Tansey & Worsley, 1995). This system is shaped both by the natural environment, such as soil and water, and by social, political, and economic pressures. Since the late 20th century, increased migration, international travel, and trade in food and other commodities have created greater social, political, and economic interdependence at a global level (Kaferstein, Motarjemi, & Bettcher, 1997; Krause & Hendrick, 2011). As a result, the industrial food system has become global in nature, and increased consolidation has resulted in large processing facilities that efficiently produce and distribute products across the world (Tansey & Worsley, 1995; Woteki & Kineman, 2003). Representing 13% of the U.S. Gross Domestic Product, the food sector sells $1.8 trillion dollars in goods and services each year. Thus, this food system contributes significantly to the U.S. economy and provides consumers with a wide array of fresh foods year-round and at relatively low cost (Taylor, 2011).

In addition to benefits in terms of costs and availability of foods, industrial food production and greater interconnectedness allow for the rapid spread of infectious disease and food contamination (Cork & Checkley, 2011). Greater access to foreign foods has changed U.S. food preparation techniques and regional preferences, increasing the chance that new and infrequent pathogens enter the system. Under the industrial food model, the overuse of pesticides and antibiotics has led to multi-drug resistant organisms that infect food, increased pathogen virulence, and reduced antibiotic effectiveness (Travers & Barza, 2002; Woteki & Kineman, 2003). Though the number of foodborne outbreaks has remained steady for decades, pathogens have become increasingly lethal and old pathogens have adapted to new food territories, such as salmonella in nuts (Centers for Disease Control and Prevention, 2011d; Taylor, 2011). When food safety problems do occur, complex production technology and supply chains make it difficult to identify and stop the contamination source. As the U.S. population continues to grow, age, urbanize, and increasingly rely on commercially-prepared foods, the ability of the U.S. food safety system to develop practices that ensure safe food is vital for protecting public health (Cork & Checkley, 2011).

2.2 Foodborne Disease in the United States

2.2.1 The Public Health Burden

As a result of food safety challenges, foodborne disease represents a significant public health problem in the United States. Every year, approximately 48 million Americans become sick, 128,000 are hospitalized, and 3,000 die from contaminated foods (Centers for Disease Control and Prevention, 2011d). Foodborne diseases result from the consumption of foods and beverages contaminated with viruses, bacteria, parasites, toxins, metals, and prions (McCabe-Sellers & Beattie, 2004). While the majority of foodborne diseases result in acute, self-limiting episodes of gastrointestinal problems and vomiting, 2-3% of cases become severe with long-term health consequences, including hemorrhagic colitis, bloodstream infection, meningitis, joint infection, kidney failure, paralysis, and miscarriage (Centers for Disease Control and Prevention, 2011d). While rare, death from foodborne disease is more likely to occur in infants and children, pregnant women, the elderly, and patients with compromised immune systems (McCabe-Sellers & Beattie, 2004).

The costs associated with foodborne disease are significant. For the individual and household, these may include medical costs, income or productivity loss, and pain and suffering. Contaminated food affects the food industry through product recalls, plant closings, and reduced product demand. To both address and prevent foodborne illness, the public health sector incurs costs from implementing and running disease surveillance systems, education, and outbreak investigation (Woteki & Kineman, 2003). Recent studies estimate that health costs from foodborne illness total U.S. $77.8 billion per year, or average to approximately $1,626 per illness episode (Scharff, 2012)

2.2.2 Foodborne Outbreaks, Trends, and Risk Factors

Cases of foodborne disease are classified as outbreaks when two or more persons experience a similar illness after consuming a similar food or beverage (Centers for Disease Control and Prevention, 2013). Currently, the Centers for Disease Control and Prevention (CDC) collects information on foodborne outbreaks from all states, the District of Columbia, and Puerto Rico. These data include information on the number of sick persons, hospitalizations, deaths, the agent or pathogen, implicated food, and other factors related to food preparation and consumption (Centers for Disease Control and Prevention, 2013). Each year, approximately 1,000 outbreaks are reported to the CDC, though the true occurrence is unknown and likely higher. This reporting gap results from challenges in outbreak identification, which relies on sick individuals to seek treatment, medical testing and determination of the food and agent, and health department investigation and reporting (Painter et al., 2013; Scallan et al., 2011; Woteki & Kineman, 2003).

Over the last 15 years, progress in addressing foodborne illness and outbreaks has remained relatively stagnant (Centers for Disease Control and Prevention, 2011d). An inherent challenge of controlling contamination is the fact that food-contaminating microorganisms are everywhere – in the air, soil, and water, as well as on the surface of plants and animals, and in the mouth, nose, and intestines of animals and humans (Adams & Motarjemi, 1999). As such, common sources of foodborne pathogens include flies, polluted water, domestic and wild animals, human and animal waste, food workers, and dirty equipment, which may then infect food through failure to detect and remove diseased materials, inadequate food storage, handling, and/or processing, poor health and hygiene, and intentional introduction into the food supply (Adams & Motarjemi, 1999; Merrill & Francer, 2011). These factors are further complicated by industrial food animal production systems, where public health threats such as antibiotic-resistant pathogens and contaminated animal waste in groundwater are found to originate and to create opportunities for food contamination (Solomon, Yaron, & Matthews, 2002) .

Across the variety of sources of foodborne outbreaks and disease, one of the most common is identified as food workers through poor health, hygiene, and improper food handling practices (Centers for Disease Control and Prevention, 2011d; Gould et al., 2013; Todd, Greig, Bartleson, & Michaels, 2008). Further, norovirus, the pathogenic cause of most foodborne illness in the U.S., has been most commonly linked to foods prepared by workers in commercial settings, such as delis and restaurants (Hall et al., 2012; Hall et al., 2013) . According to Greig et al. (2007), food workers across food work settings have, for decades, been identified as the source of many foodborne outbreaks, with few indications that this trend is on the decline. In this way, a key factor for improving food safety resides in the extent to which our food safety system understands and manages the relationship between food work and food risk.

2.3 Food Work, Working Conditions, and the Impacts on Health in the United States

2.3.1 Jobs in the Food Chain

Approximately 20 million people (1/6th of the U.S. workforce) work in five key sectors of the food system, which include food production, processing, distribution, retail, and service (Food Chain Workers Alliance, 2012). In order to appreciate the connection between workers and food safety, it is important to understand the types of jobs and populations that make up our food system.

Since food service represents over half of food workers, the average food worker is a non-Hispanic white, U.S.-born person whose primary language is English and who holds a high school degree or less. Approximately half of food workers are female and two-thirds are 44-years-old or younger. Food system jobs may include positions as management, supervisor, professional, and/or office worker, though 86% of all workers are categorized as front-line staff, or hold jobs with repetitive work and little decisionmaking capacity. While most workers have lived in the U.S. for their entire lives, approximately 23% were born elsewhere (Food Chain Workers Alliance, 2012). Finally, since most food jobs do not require formal credentials, the food system provides work opportunities to undocumented workers and government labor data likely underestimate the prevalence of this population. Food sector size, tasks, and jobs are summarized in Figure 1 [located on the next page].

[FIGURE 1 OMITTED]

Food Production

There are 3 million people who work in food production, which represents 15% of the food system workforce (Food Chain Workers Alliance, 2012). Food production workers include farmworkers who raise livestock and plant, manage, gather, pick, and collect raw foods, and fisherman, who raise, catch, sort, and pack fish and other aquatic animals (Food Chain Workers Alliance, 2012; U.S. Department of Labor, 2014b).

For a variety of reasons, it is difficult to determine the size of the farmworker population; however, estimates range from 1 to 3 million workers (Economic Research Service, 2012; National Center for Farmworker Health, 2012). Farmworkers mostly work outdoors as field crop workers, nursery workers, and livestock workers; approximately half are employed in California, Florida, Texas, Washington, Oregon, and North Carolina. Compared to other U.S. workers, farmworkers are younger, less educated, more likely to be foreign-born and male, and less likely to speak English, be a U.S. citizen, or hold a legal work permit (Economic Research Service, 2012). An estimated 82% selfidentify as Hispanic, with the majority born in Mexico. There are no formal requirements to become a farmworker, and between 53% and 60% are estimated to be undocumented immigrants (Carroll, Samardick R., Bernard S., Gabbard S., & Hernandez T., 2005; The Southern Poverty Law Center, 2010). There are approximately 36,000 fisherman or fish farmers in the United States, and this industry experiences high turnover due to the seasonal nature of the job and lack of a steady income. Fishing is characterized as strenuous and hazardous, depending on the body of water and type of fish sought (U.S. Department of Labor, 2014b). No formal education is required to become a fisherman and workers usually learn on the job (U.S. Department of Labor, 2014b).

Food Processing

There are 1.3 million people who work in food processing, which represents 7% of the food system workforce (Food Chain Workers Alliance, 2012). Processors include bakers and food processing operators who measure, cook, mix, bake, and assemble raw ingredients into finished products and monitor food temperatures. They also include slaughterhouse workers (packers and eviscerators) who slaughter, clean, and divide animal carcasses, as well as butchers, boners, and trimmers who often repeat the same cut to one type of meat product for the duration of their shift. Some production workers act as operators and tenders of baking, roasting, and drying machinery, and process meat as well as foods like tortillas, fruits (e.g., raisins), and vegetables (U.S. Department of Labor, 2014c). Many of the food products created in the processing sector are shipped in bulk to food warehouses, retail outlets like grocery stores, and service outlets like restaurants. Food processing workers often inspect and pack final products and sterilize and clean the processing area (The Johns Hopkins Center for a Livable Future, 2012).

An estimated 500,000 people work in U.S. slaughterhouses and meat processing facilities (Kandel, 2009). These workers are predominantly African American and Latino, 38% are foreign-born, and many live in low-income communities (U.S. Government Accountability Office, 2005). These facilities experience high turnover, and it is believed that many employers knowingly hire undocumented workers, estimated to represent 25% of the workforce (Human Rights Watch, 2005; Passel & Cohn, 2009; U.S. Government Accountability Office, 2005). Many slaughterhouse positions are at-will, which means jobs may be terminated at any time without advance warning.

Bakers most often work in commercial settings, such as large factories (18%), or retail environments, such as bakeries and tortilla factories (31%), grocery stores (27%), limited-service eating places (12%), and restaurants (4%) (U.S. Department of Labor, 2014c). While some bakers attend culinary school or an apprenticeship program, most receive long-term on-the-job training.

Next, approximately 131,000 individuals work as food processing operators (U.S. Department of Labor, 2014c). These workers use a large assortment of equipment to create highly processed foods like breakfast cereals, frozen pizza, candy, and chips, medium-processed foods like flour, and minimally processed foods like milk. These jobs generally require a high-school diploma or equivalent, and have on-the-job training. Finally, meat, poultry, and fish cutters and drying equipment operators work in food manufacturing plants (U.S. Department of Labor, 2014c). These jobs often require workers to operate dangerous equipment in loud and wet environments that are very hot or cold (The Southern Poverty Law Center, 2010). Across processing jobs, workers perform most or all tasks while standing (U.S. Department of Labor, 2014c).

Food Distribution

Approximately 1.6 million people work in food distribution, which represents 8% of the food system workforce. Distribution workers include warehouse workers who load and unload trucks and move products using equipment and physical labor, sometimes in cold storage environments (Food Chain Workers Alliance, 2012). Limited data are available regarding work and workers in this sector. However, a few reports, including one focused on the greater Chicago area and Southern California, find that workers in these major distribution centers are generally employed through staffing or temp agencies, such that workers are expected to leave the employer within a certain period of time. These positions often pay at or below minimum wage (Food Chain Workers Alliance, 2012; Smith & McKenna, 2014; Warehouse Workers for Justice, 2010).

Food Retail

There are 2.5 million people who work in food retail, representing 13% of the food system workforce. Food retail workers include grocery store workers such as cashiers, clerks, deli workers, and those who stock shelves and clean facilities (Food Chain Workers Alliance, 2012). Approximately one half of all food retail workers are women, 85% are non-Hispanic white, 10% African American, and 4% Asian. One third of the industry is between the ages of 35 and 54, while teenagers (16-17) represent 11% and workers 65 and over 3% (Lovell, Song, & Shaw, 2002). This sector does not require formal credentials, and approximately 29% of workers did not finish high school. Almost half of all retail positions are part-time (46%) and 52% of the part-time workforce is female (including 7% single mothers), which means that women are most greatly affected by the limited hours and pay in this sector (Lovell et al., 2002).

Food Service

With 11.4 million workers representing 54% of the food system workforce, service is by far the largest food sector (Food Chain Workers Alliance, 2012). Food service workers include bartenders who mix and serve drinks, chefs and head cooks who oversee staff and food preparation, cooks who prepare, season, and cook foods, food preparation workers who work under cooks to slice, peel, chop, cut, mix, and prepare cold foods, food and beverage serving and related workers (who conduct food preparation and cleaning duties in places like cafeterias and hotels), bussers, dishwashers, and waiters and waitresses who take orders and serve food and beverages to customers (U.S. Department of Labor, 2014d).

The food service sector is mostly comprised of restaurant workers (88%), the vast majority of whom work in non-supervisory positions (90%) (Restaurant Opportunities Centers United, 2010). Across restaurant jobs, half of the workers are women, 22% Latino or Hispanic, 11% African American, and 6% Asian (U.S. Department of Labor, 2014d). In general, the restaurant industry does not require formal training; however, many workers have higher levels of education than workers in other sectors, with 38% of workers over 25 years of age holding a high school degree, 27% with some college, and 15% with a bachelor’s degree or higher (Restaurant Opportunities Centers United, 2010). According to the Pew Hispanic Center (2009), undocumented workers comprise 12% of the restaurant workforce.

2.3.2 Food Working Conditions

Although some food sector jobs provide a livable wage and opportunities for upward mobility, the majority offer low wages with little access to benefits, few opportunities for advancement and training, and significant risks to worker health and safety (Food Chain Workers Alliance, 2012). Overall, the 86% of food workers who work in front-line positions also report earning low or poverty wages. This pay includes a median salary of $18,880 per year and represents the least across all jobs in the food sector as well as across U.S. industries, including healthcare, manufacturing, government, retail trade, construction, education, and transportation. In fact, six of the ten lowest paying jobs in the U.S. are in the food industry, including the bottom three as (3) dishwasher, (2) food prep cook, and (1) fast food cook (U.S. Department of Labor, 2014e).

Beyond low pay, many food workers cite that the inconsistent provision of wages and work hours challenges their ability to plan and achieve economic stability. For approximately 40% of food workers, making ends meet requires working for two or more employers for 40 hours a week and with little access to breaks (Food Chain Workers Alliance, 2012). For some production workers, wages are earned according to a piecerate, a payment structure that connects earnings to stamina and output and negatively impacts worker health and safety (Johansson, Rask, & Stenberg, 2010).

Agricultural work is considered one of the most hazardous jobs in the U.S., putting workers at regular risk for heat exhaustion and stroke (Carroll, Samardick R., et al., 2005). Compared to the general public, production workers suffer higher rates of toxic chemical injury and pesticide exposure (Economic Research Service, 2012). Many hired farmworkers live in employer-provided housing, which has been found to be low quality, with crowding and poor sanitation (Economic Research Service, 2012). In a study of cooking facilities within farmworker housing in North Carolina, Quandt and colleagues (2013) identified cockroach infested food preparation areas and contaminated water sources, signaling a lack of employer compliance with housing regulations and risks to worker health. These risks extend to significant sexual harassment problems, where reports from females in food production and service suggest female food workers experience higher rates of sexual harassment than women in the general workforce (Jayaraman, 2012; The Southern Poverty Law Center, 2010; Waugh, 2010).

These conditions are exacerbated by the fact that 79% of workers report that they lack, or do not know if they have access to paid sick days, 83% report a lack of health insurance from employers, and 58% lack any coverage whatsoever. These conditions make it difficult for workers to care for themselves or their families and many report that they rely on the emergency room for primary care. Further, more than half report working while sick (Food Chain Workers Alliance, 2012). To complicate the issue, some workers note that the nature of work environments prolongs illnesses, sometimes for months (Food Chain Workers Alliance, 2012). For example, most production jobs require working outdoors, meat processors work on slaughtering floors that lack climate control and trap heat in summer and cold in the winter, and food processing, distribution, retail and service workers operate in extreme temperatures to help preserve foods (U.S. Department of Labor, 2014b, 2014c, 2014d). Finally, more than half of workers report that they handle food without health and safety training and a third report a lack of access to proper equipment to do their job (Food Chain Workers Alliance, 2012).

Some poor working conditions are, in part, related to food worker exemptions under U.S. Department of Labor laws such the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA) (Farmworker Justice and Oxfam America, 2010; Liu, 2012). The FLSA entitles some workers to the minimum wage for each hour worked ($7.25), overtime pay of one and one-half times the regular rate for each hour worked over forty-hours per week, and that employers maintain payroll records. Under the NLRA, workers earn protection for union organizing and collective bargaining (U.S. Department of Labor, 2004b, 2013). Currently, farmworkers are exempt from the NLRA and the FLSA overtime pay requirements, and workers on small farms (fewer than 7 workers employed in a calendar quarter) are excluded from all protections (Farmworker Justice and Oxfam America, 2010). Further, employers of workers classified as tipped employees (those who customarily and regularly receive more than $30 a month in tips) are only required to pay $2.13 per hour, as long as that amount combined with worker earned tips equals the federal minimum wage (U.S. Department of Labor, n.d.)

In an effort to make up for lack of farmworker protection under the FLSA, Congress passed the 1982 Migrant and Seasonal Agricultural Worker Protection Act. This Act regulates farm contracts such that employers must disclose wage rates and job terms to workers, keep detailed records of wages and hours worked, meet local and federal housing and safety health standards, and register with the Department of Labor (Farmworker Justice and Oxfam America, 2010). Despite these added protections, employment law violations, such as not being paid for full hours worked and poor work and housing conditions persist among workers in the food chain (Food Chain Workers Alliance, 2012).

2.3.3 The Impacts of Food Work on Family Health

Beyond the workplace, poor food working conditions impact workers’ families. It is sadly ironic that food workers and their families experience high rates of food insecurity, or the lack of access to enough food for an active and healthy life (Economic Research Service, 2013; Restaurant Opportunities Center of New York, 2014). To support themselves, food workers often participate in public assistance programs, such as the Supplemental Nutrition Assistance Program (formerly known as Food Stamps), at twice the rate of all other workers in the U.S. (Food Chain Workers Alliance, 2012).

Further, the conditions faced by the majority of U.S. food workers exact a price on their children. The lack of access to health benefits and an inability to stay home with sick children has been associated with children experiencing worse health and slower recovery times (Heymann, 2003). Poor working conditions also impact children’s educational attainment and risk for injury, as children spend more time alone, lack stimulation necessary for physical and cognitive growth, and regulate themselves or are regulated by other children (Heymann, 2003). While these scenarios impact many working families, they particularly disadvantage the poor, who often lack access to support that may help with inflexible schedules, such as affordable and quality child care (Heymann, 2003). These conditions also impact elderly and disabled family members who often have caregiving needs that require attention from working adults. As the U.S. elderly population grows to 379 million by 2050, the inability of food workers to effectively care for this population represents a serious public health problem (Heymann, 2003).

2.4 Implications of Working Conditions for Food Risk

The negative health impacts of poor working conditions and the states of deprivation that they create—inadequate food, housing, and sanitation—have been recognized for centuries (Braveman, Egerter, & Williams, 2011). A smaller body of research, however, has extended this knowledge base to consider which poor food working conditions may impact worker health in ways that directly impact food safety, such as working while ill (Braveman et al., 2011; Johns, 2010).

2.4.1 Presenteeism

Presenteeism is a term that describes working when ill (Johns, 2010) . Since the 1980s, this workplace problem has been studied in business and social science literatures, and examined mostly for impacts of chronic conditions, like arthritis, on worker productivity, measured as economic costs (Johns, 2010; Schultz & Edington, 2007). The existing research that applies this problem to public health has focused mostly on health care settings, or risk of workers spreading infectious disease to vulnerable patient populations (Rodriguez, Parrott, Rolka, Monroe, & Dwyer, 1996; Widera, Chang, & Chen, 2010). This body of research is valuable for understanding the impact of food working conditions on presenteeism in food jobs, particularly as food, like patients in health care settings, extends the risk of presenteeism beyond productivity to issues of food safety and public health (Widera et al., 2010).

Factors Driving Presenteeism

Research suggests that presenteeism is related to both personal and work factors, including work discipline, employee status in the work hierarchy, and human resource policies such as pay, paid sick days, attendance control, downsizing, and permanency of employment (Johns, 2010, 2011). For example, in a systematic review of presenteeism research, Johns (2011) found that employees who perceived themselves as replaceable, held temporary status, and lacked a sense of job security exhibited more presenteeism days. In a study of infectious disease outbreaks in New York State nursing homes, Li and colleagues (1996) found that homes with paid sick leave policies were less likely to have infectious disease outbreaks, attributing the relationship to reduced presenteeism. To the author’s knowledge, no similar studies have been conducted for the food worker population. However, these data corroborate findings from surveys conducted with food workers who often reported working while sick (53%) and attributed their behavior to a lack of paid sick days, a belief that one would otherwise lose her job, and threats made by an employer (Food Chain Workers Alliance, 2012).

Consequences of Presenteeism

Presenteeism is associated with lost productivity as workers are paid a salary but cannot perform at optimal levels, increased chance for worker injury or mistakes, and a further drop in productivity and increased risk for injury and mistakes as the sickness of one worker spreads to others (Collins et al., 2005; Widera et al., 2010). For food workers, presenteeism likely holds implications for disease transmission (to other workers and food) as well as for the successful performance of measured tasks such as the ability to control food temperatures and operate machinery properly, watch the flow of products, and check products to ensure accuracy and absence of adulteration or health problems (Nestle, 2010). Ultimately, though research examining drivers of presenteeism is limited, existing data suggest the importance of considering food working conditions in efforts to control and prevent worker-related food safety risks (Johns, 2011).

Considering previous descriptions of food workers, however, it is clear that the food industry runs on work characterized by factors that may increase presenteeism as well as other risks for food. This state of affairs suggests working conditions may not be considered in food safety strategies, which is problematic for reducing the burden of foodborne disease as well as for workers who are expected to keep food safe despite conditions that impact their own well-being and make them a risk for food. In order to understand how to address this problem, it is essential to identify where we now stand, or how the role of food workers is accounted for in food safety. In the next section, the historical origins and current structure of the U.S. food safety system is presented to provide context and to help define the key stakeholders and policies that may be most appropriate for answering this question.

### Plan – 1AC

#### The United States federal government should clarify that the Immigration Reform and Control Act does not precede or repeal collective bargaining rights for workers in the United States.

### Worker Organizing – 1AC

#### Trump’s immigration crackdown against workers creates a climate of fear via workplace raids and arrests. Employers take advantage by retaliating against immigrant workers who try to organize.

Sarah Lazare 25 – contributing editor. “How ICE Terror Campaigns Are Used to Discipline Labor,” 10/01/2025, The American Prospect, https://prospect.org/2025/10/01/2025-10-01-how-ice-terror-campaigns-are-used-to-discipline-labor/

CHICAGO – The last time Regina heard from her mother, Laura Murillo, she was calling from inside the ICE detention center in Broadview, Illinois, last Friday. “She just told us that she loved us. She seemed shocked, and she said she’s wanting to fight the case,” Regina says.

Regina, 19, is standing at the street vendor booth in the Back of the Yards neighborhood of Chicago, where Murillo was detained. She’s now missing college to work at the booth, selling tamales and champurrado, a Mexican hot chocolate drink, to make sure the business doesn’t go under. Video footage shows Murillo, 54, being arrested by at least three masked federal agents at this site last week, while onlookers shouted at them to let her go.

Regina, who requested I use a pseudonym to protect her privacy, wipes away tears as she explains that she believes her mom was racially profiled and swept up in a broader attack on workers in the area.

“My sister needs her,” says Regina, pointing to her 16-year-old sister standing next to her. “We need her.”

Since the Trump administration unleashed “Operation Midway Blitz” on September 8, workers across the Chicago area have been targeted at hiring sites, on the way to work, and as in the case of Murillo, while on the job. While the Department of Homeland Security says it has made 500 detentions in Chicagoland, Brandon Lee, communications director for the Illinois Coalition for Immigrant and Refugee Rights, cautioned against citing the agency’s numbers as fact, because “ICE lies.” While rapid response organizers told me they don’t have their own independent tally, they are certain that detentions are escalating.

Organizers say that the crackdown has created a climate of fear and intimidation that is not only directly harming workers and their families, but is also stifling ongoing worker efforts to improve conditions on the job, and organize to protect themselves from raids. There are documented cases of employers seemingly taking advantage of this climate to clamp down on organizing efforts among their workforce. “The atmosphere that the Department of Homeland Security is trying to create is one where they’re chilling speech and chilling organizing among immigrants, among immigrant workers, and among advocates,” Lee says.

THERE IS A CLASS COMPONENT to this crackdown. Unlike the immigrants now being abducted off the streets, employers rarely find themselves the target of immigration enforcement, beyond fines that are already factored into their cost of doing business. As Jean Reisz, co-director of the USC Gould School of Law Immigration Clinic, told the Los Angeles Times in June, Donald Trump—who himself has a long record of employing undocumented people—has no interest in criminalizing those in his class orbit. “It doesn’t fit the narrative to penalize employers,” Reisz said.

The same can’t be said for the day laborers, textile workers, street vendors, and domestic workers being rounded up en masse in the United States.

Miguel Alvelo Rivera, executive director of the Latino Union of Chicago, a worker center, is standing around the corner from Regina’s street vendor booth, in front of a Home Depot on 47th and S. Western Avenue that has become a target of ICE crackdowns on day laborers, who often gather at hardware stores to get hired for work. Numerous day laborers have been detained at this location and nearby, though organizers don’t have an exact number.

“When I speak with my neighbors, the people that have crossed rivers, deserts, and oceans, have risked their lives, have lost their loved ones, to make it to this city, this country, the hope for peace, in the hope for a better life, and then they encounter violence against them, they encounter pain, they encounter being disappeared, they encounter death in the place that’s supposed to be their sanctuary, I’m mad. I’m angry. Because that’s not right,” he tells a crowd of around 75 people.

Amanda, who requested I use only her first name to protect her privacy, is one of the leaders for the Southwest Rapid Response Team that responds to ICE presence in this neighborhood. “There’s been so much ICE activity that it’s hard to keep it all straight,” she says. “We’ve responded to over 100 sightings in this neighborhood in the past ten days.”

Immigration enforcers in and around Chicago have targeted a homeless shelter and school drop-off, and included a militarized clampdown on protests at the Broadview ICE detention center. On Sunday, more than 50 armed, masked federal agents marched through downtown Chicago detaining people, with Gregory Bovino, commander at large of the border force, telling one reporter that the agents were detaining people based on “how they look.” Bovino, who also led ICE efforts in Los Angeles, represents an apparatus that is better funded than most of the armies in the world, after the Trump administration’s budget bill, signed on July 4, allocated $170 billion to immigration enforcement.

Months before the latest “blitz” began, Chicago communities were escalating their own organizing to defend immigrants. Across the city and surrounding suburbs, communities have been organizing know-your-rights trainings and rapid response networks, and workers have organized with unions and worker centers, to help keep immigrants—or those simply perceived as immigrants—safe.

This includes demands by the Latino Union of Chicago and the Raise the Floor Alliance that the city of Chicago urgently establish safe hiring sites so that day laborers are protected while they’re looking for work, including by making funding available for the required infrastructure. The groups have also highlighted community efforts to adopt street corners where day laborers are known to work. “We are working closely with existing rapid response networks across Cook County to push community members to adopt their local hiring corners,” Geovanni Celaya, a migrant worker organizer for the Latino Union of Chicago, said at the rally in front of Home Depot. “However, we know that isn’t enough.”

Organizing to defend immigrants spans across sectors. The Chicago Teachers Union has been organizing safe transport for immigrant families, and reactivating its safety committee that met during the height of the COVID pandemic. Sylvelia Pittman, who works at Nash School of Fine and Performing Arts, where around one-quarter of the students are from immigrant families, told me two weeks ago, “We’ve been making sure that our parents and students know their rights, defend their rights, letting them know that they do not have to talk to anybody. Now we are in the process of setting protocols for our schools, making sure that everybody in our buildings knows what the proper protocols are.”

Yet the current climate is also making organizing more difficult. On September 25, the same day Murillo was detained, members of the Southwest Rapid Response Team went to the parking lot of a Dollar Store around the block. “Our folks responded to that sighting and were confronted with 20 armed agents, head-to-toe tactical gear, helmet, bulletproof vest, rifles in hand,” Amanda says. The federal agents surrounded the rapid responders, Amanda says, “and they grabbed one of our members, pulled her and physically assaulted her.” When rapid responders are physically stopped from doing their jobs, she says, it puts immigrant workers at greater risk.

AND THEN THERE IS THE TREND, which is difficult to quantify, where employers are taking advantage of the climate to repress worker organizing. I’m in touch with immigrant workers at a warehouse not far from Chicago, where two men were fired, allegedly in retaliation for participating in a July 25 march on the employer and its temp agency, demanding that the company honor their earned vacation time and give them raises. The workers are what are known as “perma-temps”: They work for temp agencies, even though they’ve been employed long-term at the same warehouse, some of them for over ten years. (In a sign of the times, organizers asked that I not share the name of the company or the temp agency, worried that ICE would carry out a raid.)

The workers say they have faced direct discrimination as immigrants. At one point during the delegation, in response to a request for a raise, a manager said that he doesn’t give raises to undocumented immigrants, according to a worker, whose account was corroborated by an organizer at Warehouse Workers for Justice. While the workers did eventually get a modest raise, their vacation demands were denied, and they say they face a workplace plagued by disrespect and mistreatment. “Everybody should demand their rights, because we are not animals to be treated like they’re treating us,” said one worker, who requested anonymity to protect him from retaliation.

The Latino Union of Chicago believes that one of its own members, Willian Giménez González, was targeted by ICE in retaliation for being one of five day laborers launching a federal lawsuit. The lawsuit was filed in August 2024 against the city, Home Depot, and off-duty police officers who do security for Home Depot. It alleges that security beat and harassed the workers, then brought spurious trespassing charges against them, part of “a conspiracy to criminalize day laborers’ attempts to find work in Chicago.”

But then, in the midst of the lawsuit, Giménez González was abducted outside a barbershop on September 11. Community groups immediately sounded the alarm that this was retaliation for his efforts to advocate for his rights, as Ari Bloomekatz and I reported for In These Times and Workday Magazine. “Willian was double-profiled, and now he’s suffering consequences within the ICE detention system,” said Kevin Herrera, legal director of Raise the Floor Alliance, and attorney for Giménez González.

At the September 29 rally, we are standing outside the Home Depot where Giménez González once worked, and suffered the alleged beatings. â‹â‹“As we continue to fight for Willian, he has also continued to fight and endure the precarious conditions of detention. We ask for your unconditional support as we fight to get him out,” Celaya says to the crowd.

Marisa Díaz, director of the Immigrant Worker Justice Program at the National Employment Law Project, tells me, “All employees, regardless of their immigration status, have almost all of the same workplace rights. That includes the right to organize collectively with their co-workers to improve their workplace conditions. Also, it is illegal for employers to retaliate against workers when they exercise their rights. That protection applies to all workers, regardless of immigration status.”

Whatever laws exist on paper, however, in the current climate, there is much that employers are able to get away with, a reality that extends well beyond Illinois. An attorney for a building trades union told me that a witness in a wage theft case in another state was recently targeted and deported by ICE. The union believes the employer encouraged ICE to target the worker, in a bid to undercut the wage theft case. Because the family is concerned about their own safety, the attorney asked me not to share specifics about the case, the individuals or union involved, or even the state where it happened.

Some employers rely on the ever-present fear of immigration enforcement to chill workers from speaking out about wage theft or other abuses on the job (though, in reality, immigrant workers have also been critical to fighting bosses’ abuse, and building unions and worker centers in the United States). That threat is only heightened in the Trump era, and if employers are not held accountable for these abuses, some will continue to exploit the situation.

In fact, the exception to the rule of accountability for employers is particularly revealing. Rafie Shoued, a 79-year-old Muslim American and U.S. citizen who owns a car wash in Van Nuys, California, was body-slammed while trying to show ICE agents legal authorization for his workers during a raid on his business earlier this month. The agents then detained Shoued for 12 hours and denied him medical treatment, questioning his immigration status. He has sued the Department of Homeland Security for $50 million.

REGINA IS IN HER OWN PITCHED BATTLE to get her mother out of detention. She seems like she is still stunned that her mother was detained. Murillo has been a street vendor for 20 years, working seven days a week, all day long, in this neighborhood, says Regina. Murillo saved money all year so that the family could go on a four-day trip to Wisconsin; they took the trip in late June.

Murillo is generally an optimistic and happy person, but recent events have been testing her resilience. “When I talked to her, she told me that they were quite aggressive with her,” says Regina. “That’s all she told me.” Murillo’s fiancé, Jaime Perez, says he was on the phone with her while she was detained. “She was shouting, ‘You’re hurting me!’” he says.

The local community did a fundraiser for Murillo, and Regina says she finds the support comforting. “A lot of people knew my mother. A lot of people are trying to help her. A lot of people are sending their love. And I wish she was here to see it.”

#### Hoffman undermines immigrant participation in unions by threatening employer backlash.

Rita Trivedi 18 – attorney at the NLRB, LLM from Columbia Law School, JD from Duke University School of Law. “Restoring a Willingness to Act: Identifying and Remedying the Harm to Authorized Employees Ignored under Hoffman Plastics,” Winter 2018, University of Michigan Journal of Law Reform 51(2), pp. 357-408.

II. SKEWED EMPLOYER INCENTIVES

The history of the NLRA shows the importance of maintaining industrial peace and ensuring that all workers are free to exercise their fundamental rights in the workplace.90 At the same time, the legislative history of the IRCA shows it was intended to complement, not run counter to, federal labor and employment lawsincluding the NLRA.91 House committee reports emphasize that, although it sought to prevent the employment of unauthorized workers, the IRCA would not limit the power of the Board to remedy violations against undocumented employees9 2 because doing so would be counter-productive to congressional intent.93 Indeed, the reports reflect an overall belief that immigration and labor law could work together to create a disincentive for employer violations in both hiring of unauthorized workers and the commission of unfair labor practices. 94 Yet despite this potential cohesion, the current remedial structure incentivizes violations of both types of unlawful activity. As a result, authorized employees are more likely than ever to find themselves personally impacted by the harm caused by insufficient remedies for employers' violations in cases involving their unauthorized coworkers. The need to address the remedial hole for authorized employees is even more critical in a world where the proclivity for violations is high. Before suggesting how to fill that hole and remedy the harm to authorized workers, the next section of this Article surveys how and why the current structure incentivizes employers to act unlawfully under both statutes. Because violations are felt by authorized employees as much as unauthorized workers, understanding the impetus to commit unfair labor practices in workplaces that include unauthorized workers helps identify the nature of the harm that must be remedied.

This section will first discuss the minimal cost of the NLRA violations for certain employers who employ unauthorized workers. Next, it will discuss the vulnerability of unauthorized employees, which contributes to the temptation to violate the Act in ways that affect all employees. This section goes on to consider the financial savings and other costs associated with a potential violation. Finally, it will touch on the use of immigration status to thwart the purposes of NLRA, leading to adverse workplace consequences for all.

A. Violations of the NLRA in Cases Involving Unauthorized Workers Presently Carry Little Meaningful Cost

Successfully balancing remedial incentives means inducing two parties-employers and undocumented workers-to each adhere to two statutes in two different ways.95 But Hoffman and its progeny mean the employer is incentivized to violate the NLRA rather than follow it, because the cost of violation is relatively low. Without backpay or reinstatement remedies made available to the employees, the employer faces little direct financial harm because of its unfair labor practices. If an employer violates the remaining terms of a settlement or Board order (such as notice posting, access, etc.) or engages in similar unfair labor practices, it may be subject to contempt proceedings before a court. 96 Some say these proceedings are sufficient not only to deter an employer from subsequent unlawful conduct but also to reassure employees of the sanctity of their rights. For example, the Supreme Court majority in Sure-Tan maintained that "were petitioners [i.e. the employers] to engage in similar illegal conduct, they would be subject to contempt proceedings and penalties. This threat of contempt sanctions thereby provides a significant deterrent against future violations of the Act." 97 Yet the impact of the loss of employees' mental confidence in their ability to safely exercise their legal rights under the NLRA means that once may be enough if there is no counterbalance specifically restoring the authorized employees."

The employer may also be incentivized to violate the IRCA by hiring unauthorized workers in the first instance. "Employers would weigh the reduction in employment liability gained by hiring unauthorized workers against the risk of [the IRCA's] fines. Given the improbability of actual prosecution by immigration authorities, many employers might seek to hire unauthorized workers as an explicit management strategy."" The General Counsel of the AFLCIO offered examples of ways employers capitalize on the skewed incentive structure in his 2007 testimony before the House of Representatives. He explained that employers often call for immigration raids on their own facilities when they suspect there is union organizing activity, reasoning that the price of immigration fines is relatively low, the labor law backpay is virtually non-existent, and the cost of unionization is enormous over the long term.10o With the chance of fewer consequences for violations of the NLRA and a relatively low bar to prove the requisite status investigation under the IRCA, it becomes tempting indeed for employers to break the law.

B. Vulnerability of Employees

The number of unauthorized residents willing to enter the workforce means that it is not difficult for an unscrupulous employer to act on that temptation, undercutting the goals of both IRCA and the NLRA. The Pew Research Center reports that out of approximately 11.2 million unauthorized immigrants in the United States, 8.1 million were members of the nation's civilian labor force in 2012, making up fully 5.1% of the workforce. 01 Nevada has the largest number of unauthorized laborers, followed by California and Texas.10 2 A Pew analysis also shows that in most states, the largest number of unauthorized immigrant workers are concentrated in service occupations, which include maids, cooks, and groundskeepers; unauthorized workers make up the highest share of the overall workforce in farming occupations in most states.103

Lora Jo Foo notes that the underground economy means that employers can fairly readily evade taxes, minimum wage and hour statutes, and other worker protections. 0 4 IRCA plays no small part in these violations: the Commission on Agricultural Workers, a Congressionally created panel, concluded that rather than stopping unauthorized work, IRCA created a market for false documentation.'0 5 Because IRCA provides an affirmative defense to liability for employers that in good faith verify an applicant's eligibility to work, 0 6 businesses are incentivized to accept even questionable documents and forgers have a ready market in unauthorized workers who may have come to the United States specifically to find work.' 0 7 Once in the system, the employer may be more confident in its ability to skirt liability given (1) the threat of exposure it holds over employees; (2) limited remedies under labor law; and (3) the employer's knowledge that it has a defense under immigration law. Although documented workers risk retaliation if they assert their statutory rights, "undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution."' 0

The effect from unregulated labor is equally poignant for other workplace laws, including widespread minimum wage and overtime violations. Kati Griffith observes that according to 2008 surveys, "low-wage undocumented workers are more than twice as likely to suffer minimum wage violations" as compared to authorized workers, with 37.1 percent of undocumented workers experiencing a violation in the week before the survey was conducted; 85% experienced an overtime violation during that period. 09 Reports suggest that Hoffman further exacerbated employers' leverage in skirting workplace laws such as the NLRA by strengthening the threat of deportation even though backpay denials would have no direct bearing on that possibility. 10

Due to these skewed incentives, the original goals prompting Congress to enact the NLRA in 1935-to promote industrial peace, remove barriers to the free flow of commerce caused by industrial strife between workers and corporations, protect the right of employees and employers, and address the inequality between the parties"'-are now undermined. Particularly in an economy in which employers already have an overwhelming degree of leverage and unionization rates are down, the weakened NLRA remedies could give rise to greater risk of work disruptions, low wage rates, and the erosion of fundamental rights for authorized employees." 2

C. Financial Costs and Savings

As noted above, the nature of unauthorized work and fear of exposure makes it easier for employers seeking a business advantage to violate wage and hour laws. The same may be said for the cost savings in violating the NLRA by interfering with attempts to unionize-violations that ultimately harm authorized workers as well. In a sense, therefore, these employers may be receiving a windfall under the current remedial structure akin to that which the system tries to avoid by denying backpay to unauthorized workers." 3 Calculated across industries, full-time wage and salary union members in the United States earned a median weekly pay of $1,004 per week in 2016, while their non-unionized counterparts had median weekly earnings of $802.11 Backpay after an unfair labor practice represents an entirely separate cost; the Board ordered approximately $94.3 million in total backpay relief in 2015.15

In a facility in which authorized and unauthorized workers work together (as may easily be the case in many facilities), the incentive structure created by the current remedial doctrine may allow the employer to reap a compounded windfall. First is the opportunity to start at a lower wage rate with the threat of exposure for unauthorized employees. Second is the knowledge that there is no risk of backpay or reinstatement costs should a violation be found. Coupled with the realization that one violation can be enough to dampen collective activity even among authorized employees who observe the employer's violations pass with less-than-full consequences, the employer may have created a perfect storm for a longterm success story.

D. Use of Immigration Status to Thwart the Purposes of the NLRA

An employer aware of the limited remedies available to unauthorized employees may also take advantage of an employee's immigration status to thwart the effective enforcement of the NLRA with respect to the rest of its workforce. For example, an employer may terminate an employee based on his or her immigration status as a pretext for retaliation after protected concerted activities that affect the workforce overall, knowing that the employer has the defense of attempting to comply with the IRCA and is relatively secure against remedies under the NLRA due to the employee's immigration status. Alternatively, an employer may respond to general protected concerted activity by unlawfully terminating an employee with a non-immigrant work authorization conditioned on employment, causing that employee to lose status along with the opportunity for backpay under the NLRA.

The Board has attempted to limit the possibility of such abuses. After Hoffman Plastic, employers began asserting that alleged discriminatees were undocumented and therefore ineligible for backpay or reinstatement under Hoffman Plastics. To support their positions, employers served subpoenas on discriminatees, demanding proof of work authorization and putting them at risk of intimidation. In Flaum Appetizing Corp,1 " 6 the Board responded, holding that the "IRCA does not require that the Board permit baseless inquiry into immigration status in every case in which reinstatement or backpay is granted."11 7 Instead, an employer was barred from asserting an affirmative defense based on Hoffman Plastics absent a factual foundation for doing So. 1 1 8 Yet it is unclear whether the Flaum standard is sufficient to overcome the incentives towards the violation described above, particularly as violations may go underreported.

III. RESULTANT HARM FOR AUTHORIZED EMPLOYEES

Current interpretations and incentives in cases involving unauthorized employees mean that when an employer violates the NLRA, authorized employees are also discouraged from exercising their fundamental rights after seeing little has been done to repair the harm done.' This harm makes it that much more important to rebalance employers' cost/benefit analyses to uphold the core purpose of the NLRA: giving employees the freedom to choose to join together in a concerted manner for mutual aid and protection in the workplace, or refrain from doing so as they choose. It is this point that easily gets lost in the scholarly discussion of incentives and compliance.

This section will first discuss how the unlawful labor practices for unauthorized workers erode the NLRA's collective goals for all employees. After then addressing the ramifications of violations on the terms and conditions of employment for authorized workers, it will identify and examine the decrease in mental confidence among those authorized workers that results from the inadequately remedied violations.

A. Erosion of the NLRA's Collective Goals

From the beginning, the NLRA has maintained a group orientation.1 20 Congress enacted the statute to ensure employees' freedom "to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ... .".21 In this context, "concerted" generally includes situations when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment, but it may also include a single employee acting for the group, trying to induce group action, or preparing for group action. 122 The overriding commonality of their action is the center of the concerted element of the NLRA.123 "Mutual aid and protection" is also infused with the collective: the employee must be acting for a collective goal, not a personal gripe. 124

Hoffman and its progeny, however, have turned away from the collective nature of the statute. As a result, authorized employees may be losing the full value of their fundamental rights under the NLRA, at least when working with unauthorized workers, as existing incentives tempt employers towards non-compliance. Ellen Dannin's analysis of the oral arguments in Hoffman touches on part of the problem.125 Dannin points to Justice Scalia's questioning regarding the impossibility of the unauthorized worker to mitigate any alleged losses, given that working would further violate the IRCA.1 2 6 For Justice Scalia, a "wily discriminatee" could take advantage of a "hapless employer" by making this argument, an action just as bad as the employer's violation.12 7 Scalia's approach, Dannin argues, turns the intent and analysis of the NLRA on its head: "Under the NLRA, only the discriminator's intent matters. But the analysis advocated by justices who joined the Hoffman Plastics' majority 'rewrote' the NLRA to shift that inquiry to reverse the roles of victim and victimizer.""1 2 Rather than focusing on whether the employer's objective actions and intent violated the law, the majority's focus fell on the individual employee's background, intent, and actions-an odd approach for analyzing a statute rooted in the rights of employees to band together collectively to address the common terms and conditions of their employment.

Kati Griffith makes similar observations regarding the divisions between authorized and unauthorized employees created under Hoffman. Under current law, even if an employee is unauthorized to work, he may still share a community of interest in the workplace with authorized employees sufficient to be included in the same union. 129 But if, as Hoffman requires, unauthorized workers have different remedial rights under the NLRA, divisions are likely to form that can ultimately harm the ability of authorized workers to act regarding their conditions of employment. In contrast, focusing on the collective nature of the statute can foster a sense of common cause, becoming a "legitimacy-builder that unifies documented and undocumented workers around their mutual interests as workers."130 Griffith focuses on the possibilities of unity in support of broad advocacy,13' but the point is equally applicable on the micro level of the workplace. Without attention to the effects of focusing on the unauthorized worker's possible IRCA violation and the relative minimization of the employer's NLRA violations, the shared identity and willingness to join together for the collective bargaining so central to the labor statute is at risk for authorized workers.1 32

I join Dannin and Griffith in affirming the focus on the collective. The NLRA was enacted to protect workers as a group, not as isolated individuals.133 A collective focus creates a stable long term relationship between workers and management developed through bargaining that goes beyond a one-on-one affinity/dislike.13 4 Existing law already recognizes that authorized and unauthorized workers can share a community of interest sufficient to place them in the same bargaining unit under the NLRA; erosion of the group based on Hoffman outcomes threatens that community and effectiveness of concerted action.135 But the current remedial structure not only creates a subclass of employees that lack a stake in the goals of their authorized co-workers, but also erodes the willingness and ability of authorized employees to exercise their rights and impedes effective collective bargaining for the entire facility.136

Recognizing the importance of a shared employee identity to the operation of the NLRA, some unions have begun organizing attempts involving unauthorized workers. 37 This Article takes no position on whether such attempts to secure additional rights or remedies for this group are desirable, either as a social or political matter. Yet should a union begin an organizing campaign and meet with a positive employee reaction, it may press further-and learn that some employees are unauthorized to work. It is conceivable that, at least in some cases, the union will then back away from organizing to avoid unwanted publicity. Outside organizers can quickly realize that the employer may be immunized against consequences for unfair labor practices against those unauthorized employees and that union pressure might result in heightened scrutiny for the authorized employees with whom they work. The possibility for unionization is further weakened when one realizes that unauthorized employees without protection from unlawful discharge on the basis of their union activity are less likely to vote for union representation because they do not have a comparable stake in the collective goals of their authorized co-workers or share their confidence in the union's ability to support their goals. As a result, the opportunity for authorized employees to exercise their right under the NLRA to choose union representation is undermined.

Should a facility with both unauthorized and authorized workers manage to organize a union, 38 an unscrupulous employer may be motivated to use the strained relationship between the NLRA and the IRCA to oust the chosen representatives of its lawful, authorized employees. Under the NLRA, if an employer commits an egregious violation and refuses to bargain with a union, it may face an unfair labor practice charge ultimately resulting in an order to bargaineven if there are unauthorized employees in the unit.' 39 But in this context, it is highly probable that the status of its unauthorized employees will already have been exposed, and those employees may now face immigration violations or deportation.1401 Without the full unit, the employer might try to claim that the union lacks majority support from the remaining authorized employees. Whether or not this argument is successful, 4 1 it is unlikely that those authorized employees will try to exercise their rights again, knowing that they risk another backlash from their employer.

B. Terms and Conditions of Employment

Wages and other terms and conditions of employment for authorized employees are also at risk when employers face fewer consequences for violations of the NLRA. When "unscrupulous employers can exploit some low-wage workers with impunity, all lowwage workers suffer compromised employment protections and economic security." 42 The NLRA's collective nature contemplates that workers gain in strength when they join in mutual aid withrespect to the terms and conditions of their employment. But when authorized employees are constrained in their ability to effectively act because violations against part of the workforce carry a different risk than against another, they are unable to work together towards change in their mutual terms and conditions of employment.

This inability may result in wages and working conditions below the industry standard. When an employer is incentivized to hire unauthorized workers (in violation of the IRCA) and can create a sufficient business rationalization for committing unfair labor practices against them (in violation of the NLRA), lawful employees face a race-to-the-bottom to remain competitive.143 The Board itself has recognized this danger, as expressed in then-Chairman Liebman and Member Pearce's concurrence in Mezonos Maven Bakery:

[Although] Congress sought through IRCA to protect the interests of U.S. citizens and authorized-alien workers . . undocumented immigrants, fearing detection and deportation, will work long hours, accept low wages, and tolerate substandard conditions. Thus, they possess a competitive edge in the labor market[,] particularly in the market for unskilled labor [,] over U.S. citizens and other authorized workers unwilling to submit to such exploitation. Also, undocumented immigrants' availability in a labor market tends to depress wages and working conditions for others in the same market. By deterring employers from hiring undocumented immigrants, IRCA seeks to counteract these forces. To the extent that precluding backpay awards encourages employers to hire undocumented immigrants, it is at cross-purposes with IRCA and injures the welfare of citizen and authorized-alien workers.1 44

Yet, as will be discussed below, there is an even greater danger to the working conditions of authorized workers: the impact on their willingness to freely exercise their rights under the NLRA as a result of the current inadequacy of remedies. This chill makes employees reluctant to freely share views on wages, hours, and other terms and conditions of employment. It also keeps them from acquiring the information they need to join together for mutual aid and protection regarding those terms, which depresses working conditions and suppresses rights of even authorized employees.

C. Decreased Mental Confidence Due to Inadequately Remedied Violations

The same reverse incentive structure that fails to effectively deter employers from violating the NLRA also diminishes the fundamental rights of authorized employees when they self-censor.1 45 Authorized workers may limit communications in front of unauthorized coworkers, thereby also limiting opportunities to talk to each other.'4 6 They may under-report other violations, lose some of their collective power, or even choose not to report at all, deeming it a futile exercise without more support.1 47 When, as with the NLRA, a law depends so heavily on employees acting as "private attorneys general who will pull the workplace law fire alarm when necessary," this kind of intimidation undermines the entire system of operations.1 48

The Office of the General Counsel has recognized that "no worker in his right mind would participate in a union campaign in [a] plant after having observed that other workers had previously attempted to exercise rights protected by the Act have been discharged and must wait for three years to have their rights vindicated."1 4 9 This observation is equally applicable to other forms of collective action when, under Hoffman, the employer escapes two of the most common remedies (backpay and reinstatement) for violations of the NLRA if the targeted employee is unauthorized. Just one violation can thwart an entire union movement when workers are vulnerable and create a "legacy of coercion" for the remaining authorized workers.15 0 Authorized employees will not always know whether a coworker is unauthorized or not. Once they become aware of the termination of the unauthorized employee, they may think twice before engaging in protected activity with their co-workers out of fear the employer will then target them. 151 Because of the paucity of demonstrable remedies for their colleagues, they may conclude that they too are unprotected.' 5 2 As the employer's unlawful actions become part of the lore of the shop, employees' mental confidence in the legal system as well as in the meaning of their rights under the Act is shaken; traditional remedies under the NLRA often do little to address this erosion of the so-called status quo. "Indeed, rather than removing harm to employee collective action and union support caused by employer illegal action, coworkers may become afraid of the consequences of asserting their legal rights to organize, support one another, or bargain collectively."15 3

The available data bears out the danger. Although admittedly limited, a survey of low-wage workers in three cities found that employers do, in fact, threaten to call immigration authorities.154 Nearly half of all employees who were retaliated against for filing workplace complaints or considering unionization were threatened with termination or exposure to immigration officials.' 55 Additional empirical research is necessary to provide a deeper view into the mechanics and extent of the chill on authorized employees after seeing these types of NLRA violations. Nevertheless, at least some statistically-significant harm seems to flow to those authorized employees from the remedial structure governing violations involving unauthorized employees. This harm, though an unintended consequence, underlines the need for reform-regardless of what protections and rights unauthorized workers should enjoy.

As a hypothetical, imagine that an employer terminates Sam's employment (an unauthorized employee) after he discussed the employer's overtime and leave policies with John (an authorized employee). Imagine further that this discussion was overheard by two other authorized employees, Jane and Joe. Because the discussion constitutes protected activity, Sam's termination would normally constitute an unlawful unfair labor practice warranting Sam's reinstatement and an award of backpay. But because he was working without authorization, current law bars those remedies. And what then of Jane and Joe, authorized employees who observed or heard of-but were not a part of-Sam and John's discussion? They became aware of both the discussion and the employer's unlawful actions, including the termination, and they would likely think twice before engaging in additional protected activity with their other colleagues out of fear that the employer will repeat the violations with them as the targets. Addressing this chilling effect has been cited as grounds for reinstatement and other remedies. In this example, however, Jane and Joe have not seen such mitigation: the two primary tools in the remedial toolbox for such situations have been eliminated because of Sam's unauthorized status. If Jane and Joe are unaware of the legal nuances that make Sam's unauthorized status the reason for the limited remedy, or are simply unaware of his status altogether, they may assume that subsequent violations against even authorized workers such as themselves will result in the same limited relief.

Despite the majority view in Hoffman, an argument can be made that remedies such as notice readings and the possibility of compliance hearings serve little use to remedy the chill on the remaining employees or prevent subsequent violations. Here again is an example of the "once-is-enough" argument: even if an employer does not commit a subsequent violation, the harm to Jane, Joe, and other employees who hear of the incident may already have been done. Because Sam was the original target, authorized, protected workers are left with no readily available remedy against their employer's misconduct toward them unless the employer terminates their employment or engages in other forms of retaliation. Yet they too experience direct harm from the violation. This lies largely unaddressed under the current schema of analysis for unfair labor practices against unauthorized workers.

Chills and loss of confidence result in self-censoring even before the unauthorized employee is called to account. Authorized employees such as Jane, Joe, and John may limit their protected concerted activities in front of a coworker, such as Sam, whom they know to be unauthorized-thereby also limiting opportunities for communications with each other. And effectively, Jane, Joe, and John cede the right to exercise their Section 7 rights out of fear that there will be no clear right to a strong remedy for any of them if an unauthorized worker is involved. For Sam, the risk of speaking with fellow employees and consequently exposing his own immigration violations should the employer's attention be focused on their concerted activity may well be too high. The risk is higher when the employer's own risk-reduction calculus leads it to naturally single out Sam should any activity take place among the group, given the limited remedies in play. Self-censoring can also take the form of lower reporting of unfair labor practices by authorized employees. If unauthorized employees abandon or choose not to participate in claims, the remaining authorized employees will lose some of the collective power of their arguments and struggle to show the extent of the employer's violations. In turn, they may then choose not to report at all, deeming it to be a futile exercise without broad support. Because the NLRA is structured as a collective statute, a significant unintended consequence comes from under-enforcement and under-reporting-more so than in statutes permitting a private right of action. Likewise, when employees hesitate to share views on wages, hours, and other terms and conditions of employment, even authorized employees are kept from acquiring the information they need to join together for mutual aid and protection regarding those terms.

#### Unions have unique power to protect workers against raids, arrests, and deportations. Hoffman is the key deterrent.

Mimi Goldberg 24 – JD from Cornell Law School. “Quizás Se Puede: Evaluating Union Success in Incorporating Immigrant Workers,” 2024, Harvard Civil Rights-Civil Liberties Law Review, vol. 59, pg. 303-324.

The statute that governs unionization is the National Labor Relations Act (NLRA), which has been regarded by some scholars as outdated and poorly adjusted to the modern labor economy . 37 This is due to congressional failure to amend the statute and a series of hostile judicial decisions that have removed much of the NLRA’s enforcement power . 38 One such example is Hoffman Plastic Compounds v. NLRB, a Supreme Court decision which ruled that those without work authorization, while still included under the NLRA’s protection, are unable to monetarily recover from any workplace violations from their employers . 39

In general, unionism has been steadily declining and suffers from a lack of public support . 40 Decisions like Hoffman Plastics and unions’ historical hostility towards immigrant workers have contributed to keeping immigrant workers on the political margins of society . 41 However, immigrant workers now constitute a significant percentage of the low-wage industries that were once historically targeted by unions . 42 One of the many issues that the labor movement has had to confront is reversing their historical trends by becoming inclusive of immigrant workers.

New models of organizing, such as the worker center, have emerged to serve these populations, and in doing so have raised questions as to unions’ continued relevancy . 43 Worker centers differ from unions in that they are primarily community-based nonprofit organizations, rather than outgrowths of large national organizations funded by member dues . 44 Many worker centers retain close ties to the communities they serve, allowing them to meet the needs of those communities more effectively . 45 Furthermore, worker centers are often able to reach across language and cultural barriers, as well as overcome workers’ unease about disclosing immigration status and political organizing . 46 Many worker centers engage in political advocacy, particularly at local levels, to gain favorable policies for their community base . 47 These organizations deliver services, such as language classes and legal representation, and they focus heavily on internal democracy and leadership development within their membership base . 48 However, while worker centers have magnified access to workplace laws and their enforcement mechanisms, they do not negotiate directly with employers . 49

Other potential models for securing workers’ rights include independent unions and government-enforced codes of conduct . Despite their potential for success, these models have seen limited use . 50 Forming transnational partnerships, particularly in areas surrounding the border, may provide for more complete organizing of a migratory workforce . 51 Still, cross-border labor organizing remains relatively underdeveloped . 52 Additionally, another promising organizing model is the union co-operative, in which companies are both unionized and communally-owned by workers . 53

Worker centers and similar variations on the traditional union model have succeeded in organizing low-wage immigrant workplaces and are continuing to grow across the country . 54 Together, these models fill a gap that unions have left behind and challenge long-held notions about activism and labor organizing . Organizers have been able to successfully show that immigrant workers are an important group that is capable of rallying around causes that directly affect their rights, even if they may face heightened vulnerability for speaking out

Review of Union Contracts

A. Methodology

To capture trends among unions, I reviewed all collective bargaining agreements published between January 1, 2020 and December 1, 2022 on Bloomberg Law’s databases . CBAs were selected as a proxy for union organizing success because these contracts ultimately determine what gains unions can make for their workers . Furthermore, these contracts are effective ways to signal to immigrant workers their relevance and rights, allowing unions to overcome information barriers that prevent union organizing . 55 2020 was selected as the starting point because it marked a transformative year in the labor movement, as the contributions of “essential” workers during the COVID-19 pandemic sparked conversations across the country on the importance of low-wage work to our economy and everyday life . 56 Over 100 union contracts were reviewed carefully for any immigration-related provisions . Once these CBAs were selected, the sixty-six resulting contracts were coded according to what types of protections they contained.

B. Results

This review of union contracts reveals that a small but sizable minority of unions are successful in advocating for immigrant worker protections . During the period examined, 1,016 CBAs were available through Bloomberg Law’s database . However, only 113 of these contracts contained any mention of immigration or work authorization (11%) . An even smaller percentage of CBAs (6 .4%) contained substantive provisions related to immigration status . While these numbers leave room for improvement, they indicate that some unions are taking immigration issues seriously

The most common provision within union contracts was an antidiscrimination provision (present in 56%), which forbade discrimination on account of immigration status . 57 However, since discrimination on account of immigration status is already unlawful,58 these provisions tended to be mere virtue signaling rather than a substantive gain for immigrant workers . In over one third of the union contracts containing immigration provisions (38%), these provisions were the only type of protection specifically offered to immigrant workers . 59

Many unions provided minor but thoughtful protections for immigrant workers who might encounter issues related to their status . For example, over one third of union contracts (35%)60 guaranteed time off so that members may attend immigration proceedings, and a significant percentage of unions (17%)61 ensured that documents provided for employment verification would be either returned to the worker or given heightened protection from third party release . Some CBAs (9%) went even further to ensure that employers could not ask workers to reverify their immigration status after successfully completing their I-9 . 62 Though these provisions may not seem significant at first glance, these labor protections ensure that a worker will not be fired or penalized for having to comply with necessary immigration regulations and prevent employers from re-investigating the workers’ status for bad-faith reasons

Other common protections for immigrant workers provided job security and preserved their seniority within the union . Almost a quarter of the union contracts (23%) prohibited employers from taking adverse action against workers who lawfully amended their immigration status, and thereafter provided new information, such as a social security number, to their employer . 63 A smaller number of CBAs (18%) contained detailed reinstatement provisions, allowing union members who lost work authorization or were terminated because their employer discovered they lacked authorization to return to their previous position if they could amend their status within a certain time window . 64 Although the short window of these reinstatement provisions may not reflect the actual time it takes to navigate immigration proceedings,65 this type of provision provides increased job security and allows the union to preserve seniority, an incentive for members to join and remain within the union.

The most inclusive union provisions provided protections for immigrant workers in the case of interactions with immigration enforcement agencies . Around one third of the CBAs (30%) required employers to involve the union in discussions about immigration status, whether they were geared towards a particular employee, related to changes in company policy or law, or spurred by contact from immigration enforcement agencies . 66 Many contracts (24%) outlined procedures for the employer, union, and workers to follow when the employer receives a No-Match letter, which informs employers that a worker’s social security number does not match their name, or any similar contact from immigration enforcement agencies . 67 A small minority of contracts forbade the employer from requiring an employee to meet with U .S . Immigration and Customs Enforcement (ICE) . 68 This category of contracts allows unions to insert themselves as an intermediate actor between workers and employers, or workers and immigration enforcement agencies, which can help ensure that a worker’s rights are protected and prevent immigration arrests at work

The CBA review indicates that immigration-specific protections for workers can ensure that their rights are respected in the workplace and materially increase their ability to navigate the challenges that accompany noncitizen status . For some, a union contract even provided a pathway to citizenship . 69 However, only 6% of the total contracts provided substantive immigration-related protections, illustrating that there is still vast room for improvement within the labor movement . This number perhaps overstates the impact of the CBAs studied, as only 4% of total contracts issued contained provisions beyond what was already mandated by law . 70

These contracts illustrate that some unions are observing changes in the labor movement that are taking place outside the context of CBAs . The substantive protections offered in the CBAs studied illustrate that unions have potential to materially advance the conditions of immigrant workers and address the unique needs that they face . Furthermore, unions are beginning to understand the necessity of meeting the current needs of the working class for their continued survival . Despite these underwhelming statistics, hope remains . Worker centers and alternative organizing models have illustrated how new creative strategies can overcome organizing barriers in the immigrant workforce71 The success of these models has assured unions that it is worth investing resources to run organizing campaigns in immigrant communities . Additionally, these models have highlighted the specific needs of this community that unions have previously ignored . To continue this success, more unions can build on their importance to this segment of the workforce by providing direct benefits to immigrant workers

Unions as Immigration Intermediaries

While unions must continue to make progress on incorporating immigrant workers into the rank-and-file, the CBA review did reveal an important offering that unions can provide their immigrant members. Many unions are inserting protections that allow the union to serve as an intermediate party in the workplace between the employee and the employer or an immigration enforcement official . 72 Significantly, these protections could perhaps only exist in a unionized workplace because a union, unlike an alternative organizing model, has physical presence in the workplace . Similarly, these union provisions give workers protections beyond what is required by law, which is only possible through contract negotiations . The following section details and suggests proposals for the various ways that unions can uniquely position themselves as immigration intermediaries.

A. Procedures for Contact with Immigration Enforcement Agencies

Immigration enforcement often takes place in the workplace . 73 Much attention has been given to the ways in which No-Match letters, issued by the Department of Labor (DOL) when auditing employer I-9 records, have been used to intimidate undocumented workers . 74 Although there are many potentially innocuous reasons as to why the DOL may issue a No-Match letter, employers will commonly use these letters as implicit threats of deportation to workers to stifle organizing campaigns . 75 For example, during a larger battle with the Korean Immigrant Workers Advocates, who sought to unionize grocery stores in LA’s Koreatown, employers used No-Match letters as a basis for firing a large majority of workers who were active in organizing a union . 76 Furthermore, workplace raids, wherein ICE unexpectedly arrives to interrogate workers on their status, have been on the rise as the federal government revived a focus on arresting and detaining people while at work . 77

As a result, procedures relating to possible immigration enforcement in the workplace were among the most popular immigration-related provisions in CBAs studied . These procedures detail how employers can react to receiving a No-Match letter or contact from immigration authorities, with some provisions even going so far as to prohibit employer collaboration with ICE . 78 These provisions ensure that union leaders are able to either instruct workers on how to avoid being apprehended or talk on behalf of vulnerable workers to immigration enforcement. Organizers are critical advocates for workers following workplace raids because they apply public pressure on elected officials to intervene on behalf of workers, support affected families, and connect those detained to legal representation . 79 Thus, provisions that enable unions to step in during immigration enforcement events may prevent apprehension and enable quick mobilization in support of detained union members.

Additionally, these provisions often limit the steps an employer can take during these immigration enforcement procedures . For example, some contracts required employers to notify the union so that union leadership may represent the employee upon receipt of a No-Match letter or similar contact by the Department of Homeland Security (DHS) . 80 Under some of these provisions, employers can only allow inspection of I-9 forms by DHS or DOL if a request is made in writing at least three days beforehand or if a legal order specifically names employees or requires production of their I-9s . 81 Furthermore, the employer must attempt to offer a private setting for any questioning by DHS . 82

Other contracts prohibited employers from requiring that an employee meet with ICE or prevented employers from handing over information about their workers unless required by law . 83 Many of the analyzed contracts required that the employer give an employee reasonable time to correct a discrepancy highlighted in a No-Match letter . 84 Similarly, many contracts required that the employer meet with the union to resolve questions surrounding a worker’s immigration status or inquiries from immigration enforcement agencies . 85

These procedures represent a unique opportunity for unions to position themselves as protectors within the workplace . Contact with immigration enforcement agencies presents a grave threat to non-citizen workers, who many employers can exploit . 86 Inserting the union as a third party to these discussions can mitigate a power imbalance between immigration enforcement agencies and employees, as well as provide peace of mind to both workers and employers . Unions can instantly react to these kinds of events in a way that worker centers can only do after the fact.

B. Procedures for Immigration-Related Discussions with Employers

Unions can also serve as intermediaries when workers discuss their status with employers . Several CBAs required that union members be notified, if not involved, whenever an employer approaches an employee about their immigration status . 87 Furthermore, some CBAs required employers to meet with the union when changes to immigration law affect workplace policies . While a union cannot ask an employer to violate the law by knowingly hiring unauthorized workers,88 the union’s presence can ensure workers’ rights are respected and employers do not intimidate workers due to their immigration status . Furthermore, the union may voice the workforce’s collective concerns without singling out individual employees who may be directly affected by changes in immigration laws

This study revealed many instances where union involvement in immigration-related discussions has yielded some positive changes for their workers . For example, union contracts protected workers against retaliation for legally amending their immigration status, and thus receiving new social security numbers . 89 Unions also ensured that accommodations were made for workers who were terminated upon expiration of their immigration status . These accommodations included allowing employees to work remotely or obtain reinstatement once they regain authorization . 90 Through CBAs, unions also gained authority to initiate conversations about employer-sponsored visas on behalf of employees, thereby ensuring that employers were promptly communicating with workers . 91

The reverse is also true . As intermediaries, unions have asked employers not to discuss a worker’s immigration status after an I-9 is completed and to prohibit discussion of a worker’s status with outside parties . With the added authority of a union, workers can ensure that their employers respect their rights to privacy and mitigate the risk of having their immigration status weaponized against them

These provisions have the potential to transform the workplace for immigrants with temporary status, such as Temporary Protected Status (TPS) . Although work authorization provides such immigrants greater stability, extensive research has shown that they face unique vulnerabilities, namely navigating the unpredictable and onerous bureaucracy involved in renewing their status . These vulnerabilities contribute to heightened worker precarity . 92 Many employers prefer not to hire workers with temporary status because it is difficult to verify the authenticity of their papers or follow the rapid changes in an already complex immigration law system, instead working with authorized or unauthorized workers . 93 The disfavor towards workers with temporary status often leads these workers to work in unfavorable conditions out of necessity, despite their authorization to work in the United States . 94

However, union involvement in discussions with employers has the potential to bridge this gap of semi-legality . Collective bargaining agreements could enable workers to stay in their jobs by requiring employers to comply with a temporary worker’s status renewal . Union leaders could keep pace with policy changes in immigration law, keep employers informed about policies like TPS, and instruct them on how to read the often confusing and misleading paperwork accompanying temporary statuses . Grievance procedures might provide for stronger remedies if an employee is dismissed or retaliated against based on their complex immigration status . Unions can thereby strengthen protections and reduce employment insecurity for this class of workers.

#### Trump’s deportation campaign collapses the economy and threatens the fabric of society. It spikes food and housing costs, collapses small businesses, overburdens the healthcare system, and erodes communities.

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The second Trump administration has – in less than a year – established a whole-of-government campaign against immigrants. Their mass deportation agenda is being carried out through indiscriminate and often violent raids and arrests. These arrests have drawn significant attention for the resulting family separations and disappearances of community members to inhumane prisons here and abroad. In addition to this immediate pain to those whose families are being torn apart, the Trump administration’s immigration agenda directly harms our collective economy, health, and safety as a nation. This commentary reviews the harm thus far to our country, as the administration pursues its mindless ambitions.

The only coherent policy goal of this administration when it comes to immigration is its relentless pursuit of cruelty—no matter what the cost and no matter what else is impacted. The strategy is clear: to cultivate so much suffering and fear, through real and threatened violence, that immigrants choose to abandon their communities and lives in the United States. As a nation, we are witnessing the profound cost—in both tangible and intangible ways—of a government deliberately targeting a community for misery, making life so unbearable that they consider exiling themselves to survive.

Our Economy

The human costs of mass deportation are clear, but sometimes less visible are the financial costs to American communities. The harm is immediate and expansive, affecting our nation’s GDP, the job market, the cost of goods, and lost tax revenue.

Mass deportations are forecast to reduce our nation’s Gross Domestic Product (GDP, a measure of the overall economy) by more than 7 percent in the next three years—greater than the damage to the U.S. economy during the Great Recession from 2007 to 2009, when the country’s GDP fell by more than 4 percent. In addition, despite the administration’s claims, the actual consensus of researchers is clear: mass deportations cause U.S. citizens to lose jobs. According to one estimate, if the administration succeeds in its staggering and inhumane goal of removing 4 million people over the next 4 years, there would be 2.6 million fewer jobs for U.S.-born workers.

Communities are also seeing the ramifications of this cruelty in the prices they pay for food and housing. Economists have estimated that deporting 1.3 million immigrants would increase prices 1.5 percent in the next three years. Deporting 8.3 million immigrants in that time would increase prices by more than 9 percent. This is greater than the inflation the United States saw from 2019 to 2021, during the COVID-19 pandemic, when prices went up by less than 8 percent over three years.

Immigrants are essential to the U.S. economy, paying almost $580 billion in taxes annually, including massive contributions to federal, state, and Social Security taxes. Contrary to this administration’s claims, undocumented immigrants contribute far more to Social Security than they receive; in 2022, for example, they contributed $26 billion in Social Security taxes, despite being ineligible to receive the benefits they pay for. The Social Security program is already facing a funding shortfall; lower immigration (not even mass deportation) would create an increased shortfall by more than 11 percent. The administration’s efforts to allow the Internal Revenue Service to share private taxpayer information with Immigration and Customs Enforcement (ICE) will likely result in less tax revenue from immigrants due to a chilling effect.

Small businesses and farmers are already enduring very real harms less than one year into the administration’s campaign of cruelty. Since January, the labor force has already shrunk by more than 1.2 million immigrant workers. Restaurant owners, already facing economic hardships, are struggling to keep their businesses staffed and afloat. Other small business owners across the country have experienced sharp decreases in customer traffic due to fears of immigration enforcement. Some business owners report losing up to 50 percent of their customers, and up to two-thirds of their workforce. Farmers are especially hard hit. Over the last three decades, approximately 40 percent of the farm labor force has been made up of undocumented immigrants. In addition to mass deportation, the reduction in the numbers of immigrants arriving to the United States is also “really hurting” farmers.

Despite all the economic benefits immigrants contribute, this administration has chosen to spend astonishing sums on harming them – approximately $170 billion over the next four years – that could be far better used to strengthen and support our communities, not break them apart. $170 billion would fund a paid family and medical leave program or a universal preschool program for almost a decade. Or it could clear the backlog of all needed infrastructure improvements to our country’s public transit systems, twice.

Health

In addition to devastating our economy, mass deportations are harming our nation’s health. The administration’s brutal immigration agenda will make it more expensive for everyone to get medical care, reduce our health care workforce, increase the burden on hospitals and health care providers, create a chilling effect on patients, and cause significant harm to people’s mental and physical health.

More than one million immigrants work in essential health care jobs in the United States, and one-third of them are undocumented. In some states, immigrants comprise one-third of all health care sector workers. The Trump administration is stripping more than one million TPS holders of their immigration status this year, 50,000 of whom work in health care. Half a million immigrants with humanitarian parole have also had their status terminated. The administration’s actions to strip people of lawful status will shrink the health care workforce, causing additional strain to an already overburdened system. Our population is aging at an unprecedent rate, and within the next five years, 20 percent of the country’s residents will be of retirement age. Studies show that our health care system is not prepared for the demands of caring for this population.

We are already seeing the harm unfolding across our health care sector. Long-term care providers have indicated they will need to increase costs for residents due to labor shortages, given that immigrants comprise 28 percent of the direct care workforce for long-term care. Fifty percent of nursing homes in the United States have reported that they have had to stop accepting residents because they lack the staff to care for them. Families are finding that long-time caretakers, who previously were authorized to work, can long longer provide care to their loved ones. Given the numbers of immigrants that contribute to our health care system, we are losing an essential part of the vital labor force that cares for the people we love.

The mass deportation regime also fails doctors, nurses, and health care workers across the board because of a change to long-standing policy that now allows immigration enforcement in hospitals and other health care facilities. Instead of being able to focus all their attention on improving the health of their patients, these essential workers must now prepare for and respond to ICE presence in their facilities. The public strongly opposes ICE in hospitals, yet the administration continues to defend the practice.

Mass deportations also have an impact on patients, who avoid medical care out of fear, resulting in worse health outcomes. Their failure to seek timely care also increases the burden on hospitals, which were stretched thin before the health care cuts in the 2025 budget bill that are expected to lead to closures of rural hospitals. When people delay or avoid seeking timely medical care, their conditions worsen and ultimately lead to higher costs and poorer outcomes for everyone.

Widespread immigration enforcement also causes dramatic mental and physical health impacts on families and communities experiencing the detention or deportation of a loved one. The results of having a friend, family member, coworker, or other community member detained results in U.S. citizens, particularly children, having greater anxiety, depression, and psychological distress. U.S.-citizen children who are separated from their parents due to detention or deportation often experience adverse behavioral changes; have higher rates of suicidal ideations, alcohol use, and aggression; and exhibit signs of post-traumatic stress disorder. Doctors have expressed significant concerns about the long-term physical and mental health consequences on children who experience such fear and uncertainty.

These disruptions don’t just happen to individuals or isolated groups of people; the effects of mass deportation undermine and harm the overall health of entire communities. Republicans and this administration have chosen to allocate more than $170 billion to this violent anti-immigrant apparatus. That money could easily be used to uplift the health of our residents, by covering health care for millions of veterans, hiring one million elementary school teachers, or hiring almost 900,000 nurses.

Society and Safety

The damage this agenda inflicts doesn’t end with jobs, or dollars, or even our collective physical or mental health. Mass deportations erode our civil society, our communities, and our connections to each other. Immigrants make up significant and vital portions of our communities, and ICE raids are quickly becoming the gateway to the entry of destabilizing forces that leave people less safe and erode the social bonds and connections that make our communities vibrant. The Supreme Court’s recent ruling in Vasquez-Perdomo v. Noem also paves the way for racial profiling during immigration enforcement, which will further erode trust and safety.

In pursuing their anti-immigrant goals, this administration has gone to unprecedented lengths—including occupying two of its largest cities, Los Angeles and D.C. These likely unconstitutional shows of force erode trust in the government, increase fear, and disproportionately target immigrant communities and people of color. In D.C., 61 percent of residents who noticed the presence of additional law enforcement felt less safe with them present. This makes sense, given the large numbers of arrests, increase in racial profiling, and indiscriminate targeting and detention of immigrants. The residents of Los Angeles also learned that the risks and damage to a community after being occupied don’t end if the occupiers leave. The climate of fear and continued ICE raids persist.

Mass deportations undermine our safety and topple the building blocks that create community. Indeed, in places that prioritize welcoming, rather than demonizing, immigrants, studies show a documented decrease in crime. Policies that do not embrace newcomers only erode the safety of our communities. A climate of fear and enforcement can also cause individuals to withdraw from public life more broadly, which harms social growth and communities.

The social connections that are created through participation in community life, including religious institutions, affinity groups, or other clubs, are pivotal to individual and community. In a climate of fear and justified paranoia, trust is eroded—not only in our government, but also among neighbors. Instead of spending billions on tearing our communities apart, the federal government can better fund many of their programs that increase social capital, like partnering with faith-based, local, state and nonprofit organizations to improve community wellbeing.

Investing in People, Not Fear

The Trump administration acts as if it has a blank check to cause any amount of cost, chaos, and harm in the name of its mass deportations agenda. It wants people to believe that mass deportations only hurt undocumented immigrants. But we are all part of the same fabric: family, neighbors, churchgoers, nurses, patients, teachers, and students. The ripple effects of these deportations will be felt for generations, by all of us.

Mass deportations are not just a policy choice. They are an economic mistake, a public health risk, and a threat to the social fabric of our communities. When families are separated and community members are forcibly removed, our economy, health, and communities suffer. The ties that bind us unravel when our government causes untold destruction in its relentless targeting of one group for harm.

This administration has only just begun spending billions of dollars to unleash a violent and hate-filled agenda—money that should be used to build our communities up, not tear them down. Without greater outcry by elected officials, businesses, civic leaders, and the public leading to a change in direction, we may be in for much darker days. Instead of our tax dollars paying for mass deportations, we could be investing in health care, education, housing, and infrastructure that benefit everyone. We must reject fear and division and choose policies that promote dignity, safety, and health for all. Our communities and our country deserve better.

#### That triggers global nuclear war.

Dambisa Moyo 24, PhD, Contributor, Project Syndicate. Member, House of Lords, United Kingdom. Principal, Versaca Investments, "The Eight Headwinds Threatening Global Growth In 2025," Project Syndicate, 12/06/2024, https://www.project-syndicate.org/onpoint/powerful-headwinds-herald-decade-of-paltry-growth-by-dambisa-moyo-2024-12

NEW YORK – As we enter the second quarter of the twenty-first century, slow economic growth will remain the world’s most persistent challenge, transcending national borders and affecting developed and developing countries alike.

The economies of the United States, the European Union, and Japan are all projected to grow by less than 3% per year for the foreseeable future – the threshold needed to double per capita income within a generation (25 years). At the same time, large emerging economies like Brazil, Argentina, and South Africa are also expected to experience sluggish growth over the next decade.

While total global GDP has increased to $110 trillion, progress remains unevenly distributed, threatening to erode living standards. Worse, the world economy faces powerful headwinds that could stifle growth, innovation, and investment, triggering political and social instability.

Governments and business leaders must adjust their models and assumptions accordingly. In the face of significant policy shifts, investors will need to rethink their investment and allocation strategies to navigate an era defined by uncertainty and uneven growth.

Looking ahead, eight risks to global GDP growth stand out: geopolitical fissures; divisive domestic politics; technological disruption and the rise of artificial intelligence; demographic trends; rising inequality between and within countries; natural-resource scarcities; government debt and loose fiscal policies; and deglobalization. Taken together, these headwinds will be a persistent impediment to economic growth in the coming years.

*No World Order*

The first drag on global growth is the escalation in geopolitical tensions – particularly among the US, China, and Russia – compounded by additional threats from Iran and North Korea. As the rift between developed and developing economies widens, developing countries are increasingly joining economic alliances like the BRICS bloc, which expanded from five members at the start of 2024 to nine by the end of the year. In the near term, there is a growing risk that this geopolitical tug-of-war could escalate into an all-out military conflict.

Over the past 50 years, the world economy has gone from being a positive-sum game to a negative-sum game. The positive-sum era, driven by economic and global cooperation, reached its zenith during the Washington Consensus period, which was highlighted by the fall of the Berlin Wall in 1989 and China’s accession to the World Trade Organization in 2001. But following the 2008 financial crisis, the world entered a negative-sum period, marked by declining growth, intensifying competition, and rising international tensions, further heightened by the COVID-19 pandemic, Russia’s invasion of Ukraine, and the Gaza War.

Widening geopolitical fissures have laid bare deep vulnerabilities. China, for example, is one of America’s largest foreign creditors, holding more than $770 billion in US Treasuries. This gives it significant leverage over the US, whose policymakers increasingly regard it as a political and ideological rival. Against this backdrop, the intensifying race between China and the West for technological dominance in AI, quantum computing, and semiconductors has fractured the digital economy, giving rise to a balkanized “splinternet.”

As decades of multilateral cooperation give way to economic fragmentation, new cross-country alliances have weakened the US-led international order and the Bretton Woods institutions, such as the World Bank and the International Monetary Fund. The expanded BRICS bloc – led by Brazil, Russia, India, China, and South Africa – is the most significant of these alliances, representing more than 40% of the world’s population and 36% of global GDP.

Meanwhile, so-called “swing states” like Turkey, Saudi Arabia, and other Gulf Cooperation Council countries are reshaping global trade routes, reconfiguring supply chains, and redirecting investment flows, altering the distribution and pricing of key commodities such as foodstuffs and critical minerals.

Beyond stifling global GDP growth, these geopolitical rifts are hindering collective efforts to tackle climate risks, as developed and developing economies remain deeply divided over the urgency, scope, and aggressiveness of the regulatory and policy reforms required to combat climate change and advance the clean-energy transition.

*Populism and Domestic Politics*

Many advanced economies are also grappling with deepening political polarization at home. US President-elect Donald Trump’s return to the White House – much like Brexit and Trump’s first election victory in 2016 – heralds a period of widespread uncertainty and major political transformations.

Amid these populist gales, developed economies’ budgets are increasingly strained by expanded welfare programs. In 2022, for example, the EU spent €3.1 trillion ($3.3 trillion) – 19.5% of its GDP and nearly 40% of its total expenditures – on social protection.

As demands on government budgets grow, worsening fiscal positions will make it increasingly difficult for many countries to provide essential public goods like health care, education, and infrastructure. The resulting fiscal pressures will likely deepen polarization and lead to more policy volatility.

### Solvency

#### Courts cannot escape Hoffman’s shadow while its rationale is ambiguous. The Supreme Court arbitrarily inserted its policy preference by obscuring its implied repeal of the NLRA with vague rhetoric.

Nhan T. Vu & Jeff Schwartz 08 – Associate Professor at Chapman University School of Law & J.D. from University of California at Berkeley Law School, Aspiring Legal Scholars Fellow at California Western School of Law. “Workplace Rights and Illegal Immigration: How Implied Repeal Analysis Cuts through the Haze of Hoffman Plastic, Its Predecessors and Its Progeny,” 2008, Immigration and Nationality Law Review 29(1), pp. 813-872.

One could argue that implied repeal analysis should not be applied in Hoffman because the case did not involve a conflict between two federal statutes. Instead, one could cast the case as concerning the bounds of agency discretion or, at best, a conflict between agency action (the Board’s order awarding back pay) and a federal statute (the IRCA). The Hoffman majority itself stated that the case centered on “the Board's discretion to select and fashion remedies for violations of the NLRA." Certainly, the holding in Hoffman focused on the Board's powers: the Court specified that “the award [of back pay to an undocumented worker] lies beyond the bounds of the Board’s remedial discretion." Even the dissent and critics of the Hoffman opinion have chosen to focus their argumens on the role of the agency rather than on the issue of statutory conflict. For this common reading of the case to be correct, it means that Hoffman must have either been about (1) whether a federal agency (the NLRB) acted within the bounds of the authority granted to it by the federal statute that the agency administers (in this case, the NLRA), or (2) whether the NLRB had taken action contrary to the dictates of a statute over which it had no administrative authority, namely the IRCA.

But neither of these interpretations stands up to scrutiny. First, despite the majority's suggestion that the case revolved around the Board's discretion under the NLRA, that could not have been the basis of its opinion. Sure-Tan's holding that the NLRA applied to unauthorized aliens, and the analysis underlying that holding, strongly suggested that the NLRA by itself posed no obstacles to the award of remedies to unauthorized aliens for unfair labor practices. This aspect of Sure-Tan was left untouched in Hoffman. Nor was there anything in the NLRA itself that limited the Board's ability to grant back pay awards to undocumented workers when the Board found that employers had violated the statute. The provision of the NLRA that granted authority to the Board to to order reinstatement and award back pay merely required that the Board take into consideration the policies of the statute: “[T]he Board shall… cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]…” Thus, the issue in Hoffman would have been an easy one if the Court had merely been asked to review whether the Board's order was in compliance with the NLRA; clearly, it was.

Therefore, the basis for the majority’s reasoning in Hoffman must have been that the NLRB's award of back pay to an undocumented worker was inconsistent with a statute that the Board did not administer, namely the IRCA. From this, one could argue that the Hoffman case did not implicate two conflicting statutes, but merely the conflict bctween an agency action on the one hand and a federal statute on the other.

Though this may be a factually correct statement of what happened in Hoffman - it was, after all, the Board that ordered the problematic back pay remedy - this interpretation fails to address the heart of the issue. As discussed above, the Boad acted perfectly in line with the statue that governs its activities, the NLRA. Therefore, the conflict was not really between the agency and the IRCA, but rather between the NLRA's grant of such authority to the Board and the IRCA.

A closer look at the Court’s holding best illustrates how the case was truly about this statutory conflict. Even though the reasoning of Hoffman was vague, the result was unambiguous – the majority removed the Board’s power to order back pay to undocumented workers under any circumstances. The Hoffman majority placed no qualifiers when it stated that “allowing the Board to award backpay to illgal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA,” and that the Board “[lacks] authority to award backpay.”

This holding essentially adds a clause to the National Labor Relations Act. There is no dispute that the NLRA grants the Board broad, general powers to award back pay and itself poses no specific impediment to the award of back pay to unauthorized immigrants. At the same time, the IRCA does not specifically prohibit granting such awards. Therefore, the only way for the Supreme Court to have reached the result it did in Hoffman was to look past the plain language of the IRCA, and intepret the statute to add the words “except in the case of undocumented workers, who may never be awarded back pay” at the end of the provision of the NLRA that grants authority to the Board. Inferring that a previous statute should be amended based on a subsequent statute is exactly the result of the doctrine of implied repeal.

Consider, for example, if Congress were to pass a powerful “at-will employment” law that unconditionally guaranteed an employee’s right to quit his or her job, and concomitantly, an employer’s right to discharge an employee, at any time for any reason. In a specific case, the Board finds that an employer has discharged an employee in order to thwart unionization of the workplace in violation of the NLRA, and orders the employer to reinstate the employee with back pay. The Supreme Court now takes up the case and holds that the Board’s order trenches upon the new federal law and that the Board’s order and award must be vacated. The Supreme Court makes clear that any order of reinstatement or award of back pay by the Board would be inconsistent with the new at-will employment law, but that the objectives of the NLRA can still be met through the use of cease and desist orders and a requirement that employers post notices setting forth employees’ rights under the NLRA and detailing the employer’s past unfair practices.

The underlying issue here is the tension between the NLRA and the hypothetical at-will employment law. On the basis of the at-will employment law, the Supreme Court has ordered the complete removal of the authority and discretion granted to the Board by the NLRA to order reinstatement and award back pay. To allow the Court to hide behind the argument that it was merely adjudicating the propriety of the Board’s order would make no sense and only obscure the arguments, for the case is not really about the Board’s exercise of its authority and discretion. Rather, it is about whether one federal statute may be amended on the basis of another federal statute. There is simply no principled way to distinguish this case from ours.

Moreover, failure to acknowledge the statutory conflict and to focus instead on agency action opens the door to arbitrary and incoherent case law. Because most statutes today involve implementation by a governmental entity, it would be all too easy to turn any conflict between two statutes into a conflict between agency action and a statute. Suppose, for example, that after Castro is fired but before he could file a complaint with the Board, the INS orders that he be deported to Mexico under the IRCA. In his defense, Castro argues that his rights under the labor laws have been violated, and that under such circumstances, he is entitled under the NLRA to seek remedies. Deporting him would destroy the value of certain remedies, such as reinstatement, and therefore interfere with the NLRA’s protection of collective bargaining rights.

In such a case, the INS’s actions would trench upon the goals and policies of the NLRA, a statute which it has no authority to administer. In Hoffman, the NLRB’s order was purportedly struck down for exactly this reason, implying that the INS order should likewise be overridden. But this result would not align with Hoffman itself: in this hypothetical, the goals and policies of the NLRA would be favored over those of the IRCA, instead of vice versa, even though only the procedural posture-and not any substantive aspect of the dispute-has been changed. By wording its decision as a limitation on agency discretion in the face of competing statutes, the Court invites such inconsistency.

Alternatively, suppose that Congress had not entrusted administration of the NLRA to the Board, but instead, as it does with many statutes, left it to private parties to enforce the statute and to the courts to adjudicate disputes. Assume Castro files suit in federal district court on the basis of Hoffman Plastic’s NLRA violations. Finding that the NLRA has been violated, the federal district court orders that Castro be paid back pay. The Supreme Court could hardly argue that the case was one about whether the federal court’s actions trenched upon the IRCA. If it could do so, no implied repeal cases would ever reach the Supreme Court, since almost every Supreme Court case concerning potentially conflicting statutes involves lower court activity no different than what th Board did in Hoffman. Thus, for the purposes of determining whether a case implicates implied repeal analysis, to make a distinction between agency action taken pursuant to a statute and the requirements of that statute itself invites only confusion and inconsistency. Making this distinction also runs counter to a line of Supreme Court cases that has discerned a conflict between two statutes even where agency action is involved.

B. Supreme Court Precedent Regarding Potential Statutory Conflict Manifested Through Agency Action

In situations similar to that found in Hoffman, the Supreme Court has seen fit to focus on potential statutory inconsistency rather than agency discretion. For example, in NLRB v. Bildisco & Bildisco, a distributor of building supplies voluntarily declared bankruptcy under Chapter 11 of the Bankruptcy Code.78 Applicable provisions of the federal bankruptcy code allowed the debtor-distributor to reject executory contracts if the rejection would help the company reorganize.79 A collective bargaining agreement covered part of the debtor's work force, and there was no dispute that this agreement constituted an executory contract.50 The debtor failed to meet several obligations under the collective bargaining agreement and ultimately requested permission from the bankruptcy court to reject it.R! Meanwhile, the company's resistance to the contract caused the union representing the covered employees to bring charges under the NLRA.82 The Board found that the debtor had violated the NLRA by unilaterally changing the terms of the collective bargaining agreement and by refusing to negotiate modifications of the agreement with the union.83

Despite the fact that the case could have been viewed as one involving the conflict between the Board's findings and the Bankruptcy Code, the majority, dissent, and subsequent commentators all understood the case to be about a potential conflict between the NLRA and the Bankruptcy Code.R In fact, without explicitly referring to implied repeal analysis, the majority spent almost the entire opinion attempting to reconcile the two statutes,$5 and held that the newly enacted provisions of the Bankruptcy Code trumped the NLRA only when the two statutes were irreconcilable.6 The procedural posture of Bildisco was similar to Hoffman, and it would have been easy for the Court and commentators to focus on the Board's actions in the case. The fact that no one did so is telling.

Nor is Bildisco an isolated case. In Silver v. New York Stock Exchange, plaintiff Silver owned two securities brokerages, neither of which were members of the New York Stock Exchange (the "NYSE"), but which traded with NYSE members through direct wire connections.97 Pursuant to rules promulgated by the NYSE, the members sought the NYSE's approval of the wire connections.88 The regulatory body disapproved the wire connections, and pursuant to its rules, all of the members were required to disconnect the wires from Silver's brokerages.89 Silver then brought suit, alleging violation of Sections 1 and 2 of the Sherman Act.90 The NYSE argued that the alleged antitrust violations had been dictated by its rules, which had been properly registered and approved by the Securities Exchange Commission pursuant to the Securities Exchange Act of 1934.91

The Supreme Court was then faced with the issue of whether an individual, specific action, taken pursuant to a rule, which was promulgated pursuant to a federal statute, was in conflict with another federal statute. The Court, however, did not view the case as involving a clash between the NYSE's action and the federal statute. Rather, it viewed the issue through the lens of implied repeal: "The fundamental issue confronting us is whether the Securities Exchange Act has created a duty of exchange self- regulation so pervasive as to constitute an implied repealer of our antitrust laws, thereby exempting the Exchange from liability in this and similar cases."92 In fact, the Silver Court specifically relied upon canons of implied repeal:

The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute, This means that any repealer of the antitrust laws must be discemed as a matter of implication, and "it is a cardinal principle of construction that repeals by implication are not favored." Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.93

It is hard to imagine a situation in which the action of which the plaintiff complained-the disconnection of the wires --- was farther removed from a federal statute. The action in question was taken pursuant to an NYSE rule promulgated pursuant to a federal statute. Nonetheless, the Supreme Court applied implied repeal analysis, properly viewing the case as one involving inconsistency between two federal regimes.

The Supreme Court applied this same framework in United States v. Philadelphia National Bank. In that case, two large banks in the Philadelphia area agreed to merge.95 Federal banking law required that the Comptroller of the Currency approve the merger.9 In analyzing such transactions, the Bank Merger Act stated that the Comptroller of the Currency must "take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest."97 Despite receiving reports from the Federal Deposit Insurance Company, the Federal Reserve Board, and the Attorney General that came to the contrary conclusion, the Comptroller approved the merger, finding that the transaction would not have an unfavorable effect on competition and would be in the public interest.98 The United States then brought suit to enjoin the proposed merger of the two banks, arguing that the transaction violated antitrust laws, specifically Section 1 of the Sherman Act and Section 7 of the Clayton Act.99

The first issue that the Supreme Court discussed was whether "the Bank Merger Act, by directing the banking agencies to consider competitive factors before approving mergers, immunizes approved mergers from challenge under the federal antitrust laws."100 Despite the fact that the lawsuit was instituted to enjoin a specific merger and that the action being attacked was the Comptroller's approval only of this specific merger, the Court did not treat the issue as being one about the clash of federal law and agency decision-making.101 Rather, the Court based its analysis on the doctrine of implied repeal. In finding that the antitrust laws were left unscathed by the Bank Merger Act, the Court noted that "(r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."102

From the foregoing, we can see that the Supreme Court has seen fit to focus on the potential clash of two statutes even when one of those statutes is manifested in the case in the form of agency action.103 Looking past agency involvement, and instead focusing on the true issue- the conflicting statutes that led to the agency's controversial decision in the first place -- therefore is not only the cleanest way to adjudicate such disputes, but is also an approach grounded on Supreme Court precedent.

IV.

APPLICATION OF IMPLIED REPEAL ANALYSIS IN HOFFMAN

A. The Canons of Implied Repeal

Having shown that Hoffman was really a case about two potentially conflicting federal statutes, we may now apply implied repeal analysis. As we will argue below, application of the rules of implied repeal points us toward the correct resolution of the case, helps analyze the arguments of both the majority and the dissent, and provides better guidance to the lower courts. However, before delving into all of this, it is first necessary to set out the tenets of implied repeal analysis and discuss briefly whether they make sense.

We begin with the often-quoted maxim that implied repeals are disfavored.10f Perhaps the most trenchant criticism of this rule is that it is the most quoted and least used. Because it is rarely applied, at least in an explicit manner, it could be argued that it has no meaning. This, however, overstates the matter because, even if this canon is not explicitly relied upon, it does have an effect on implied repeal analysis. First, it requires that all arguments in favor of implied repeal be viewed with a skeptical eye.105 Second, it stands for the proposition that in cases where a judge is of the opinion that the arguments for and against implied repeal are equally or almost equally strong, the judge should err on the side of not finding implied repeal. To this end, the Supreme Court in Posadas v. National City Bank of New York noted that "the intention of the legislature to repeal must be clear and manifest .\* 106

A second tenet of implied repeal is that it may only be found when (1) two statutes are irreconcilable, or (2) when the later act was clearly intended to cover "the whole subject of the earlier one" and "is clearly intended as a substitute."" The first condition is an extension of the "reconciliation principle," a general rule of statutory construction that requires that two potentially conflicting statutes, to the extent possible, be interpreted so that they can coexist.106 In the implied repeal context, this principle requires that before one statute is held to repeal another, a court must find more than a possible conflict between the two statutes at issue and more than a conflict merely between their purposes. Instead, the two statutes must be logically and physically impossible to apply at the same time. The Supreme Court has stated it thusly:

Irreconcilable conflict" [means] that there is a positive repugnancy between them or that they cannot mutually coexist. It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem. Rather, "when two statutes are capable of co-existence, it is the duty of the courts ... to regard each as effective. 109

In another case, the Court explained that "[r]epeal is to be regarded as implied only if necessary to make the (later enacted law) work, and even then only to the minimum extent necessary."!10

Finally, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." The courts should only find implied repeal of federal laws in such instances when it is clear that Congress intended for the broader statute to overrule the more specific.12 The reasoning behind this rule is that Congress, in drafting the more general statute, will almost never be considering how that statute is to apply in specific contexts.13 The courts are thus safe in assuming that Congress, not having thought about how a general statute applies to a narrow situation, could not have meant for the more general statute to impliedly repeal the more specific one.114

Of course, these rules are not positive law, but merely canons of statutory construction meant to provide assistance to courts in their attempts to ascertain legislative intent in the face of silence or ambiguous statutory language. Although these rules are now decply entrenched in common law, it is nevertheless prudent to determine whether they still have a sound basis. Some commentators have argued that these canons are unrealistic because they posit an omniscient legislature, or at least one fully familiar with all fcderal statutes.115 According to this explanation, implied repeal is based on the presumption that the legislature, being completely aware of all previous statutes as it drafts new ones, explicitly repeals any old statutes of which it no longer approves.116 This assumption that the legislature is entirely cognizant of the implications of its every action explains why implied repeal doctrine calls on courts to interfere with legislation only in exceptional circumstances.117

The above criticism is a valid attack on one potential underpinning of implied repeal. This does not mean, however, that the doctrine lacks foundation, for it finds support in other more defensible theories as well. For example, some of the theoretical foundations that underpin the textualist approach to statutory interpretation could also explain implied repeal doctrine. One idea behind the textualist approach is that it is impossible to determine what the legislature, as a whole, intended aside from the words of the statute.118 Therefore, courts should avoid modifying statutes in the absence of clear indication that the legislature in question intended to do so."19 This concept readily translates to implied repeal: it can be argued that it is because courts lack insight into legislative motivations that implied repcal analysis calls on courts to avoid repeal unless it is physically or logically impossible to apply both statutes at the same time.120 Moreover, the framework of implied repeal, by providing specific guideposts for the interpretation of potentially conflicting statutes, makes it harder for courts to inject their own policy preferences into such difficult cases - a result very much in line with textualist thought.121

Alternatively, one could posit that a legislature is not aware of all of its laws when it is drafting a new statute, but that it values the work of its predecessors and recognizes the benefits of continuity in the law. Admitting that it is nearly impossible for a legislative body to recognize and deal with all potential conflicts between a new law and all those that preceded it, the doctrine of implied repeal does nothing more than require the courts to do what the legislature in question would have done had it been omniscient - to reconcile a new law with all previous laws to the greatest extent possible and to only repeal a conflicting statute where this is an absolute impossibility.122 This is nothing more than a legislative version of the common law system's reverence for precedent and adherence to the doctrine of stare decisis.123

A fuller discussion of the philosophy of statutory construction doctrine is beyond the scope of this Article. Whatever the merits of the various positions supported by knowledgeable commentators, however, it is sufficient to note for our purposes that the rules of implied repeal listed above have been widely adopted by the federal courts, including the Supreme Court, and are supported by reasonable arguments.

B. Implied Repeal and the Right Result in Hoffman

When Hoffman is viewed through the lens of implied repeal, the analysis becomes significantly easier and clearer. With some guiding principles set out by long-standing precedent, we can avoid the largely untethered analysis indulged in by both the majority and dissent. First, because implied repeals are disfavored, we start our analysis with a skeptical eye to the Court's holding - that the IRCA repeals that provision of the NLRA granting the Board authority to award back pay to unauthorized aliens.124 In case the arguments are equally strong, we will err on the side of not finding implied repeal. However, as we shall see below, the arguments are not equally strong, and in fact, point towards not finding implied repeal.

Next, an implied repeal may only be found where there is either an irreconcilable conflict or the subject matter of one statute completely encompasses the subject matter of the other.125 The IRCA and NLRA deal with very different topics, and there is no serious argument that they overlap in any substantial manner.125 One can confidently say, therefore, that the latter prong of the test does not allow for a finding of implied repeal.

The question then becomes whether the statutes are "irreconcilable." As discussed above, a finding of irreconcilability requires that both laws under consideration be given effect to the extent possible; implied repeal may be found only where the two statutes cannot logically or physically be applied at the same time.127 This somewhat abstract framework can be further refined through an analysis of the Supreme Court's jurisprudence with respect to reconciliation. This case law shows that courts will go to great lengths to harmonize two statutes despite significant tension between them.

Allen v. McCurry, for example, involved the question of whether 42 U.S.C. § 1983, which allows plaintiffs to bring federal civil rights claims for violations of their Constitutional and federal statutory rights, repealed by implication 28 U.S.C. § 1738, which requires federal courts to give state court judgments the same preclusive effect that the state court judgment would have in the state courts from which the judgment issued. 128 In Allen, the plaintiff had been previously charged with possession of heroin and assault with intent to kill and tried in state court.129 Before the criminal trial, the plaintiff moved to suppress certain evidence as having been gathered in violation of the Fourth Amendment; the state court judge excluded some of the evidence but allowed other evidence to be admitted,130 and the plaintiff was eventually convicted.131

After this trial, the plaintiff brought a civil rights lawsuit in federal court pursuant to 42 U.S.C. § 1983, in which the plaintiff renewed allegations that the police officers had violated the Fourth Amendment when they gathered evidence in connection with the original case.132 The federal trial judge held that 28 U.S.C. § 1738 required that the court apply collateral estoppel with respect to those issues actually litigated in the prior state court suppression hearing, including the legality of the challenged search, but the Court of Appeals for the Eighth Circuit reversed.133 The Supreme Court agreed with the district court judge, holding that § 1983 had not impliedly repcaled § 1738.134

Allen has been criticized by commentators because the Court gave short shrift to the commonly-held understanding that § 1983 was enacted to allow plaintiffs to sue for wrongs committed by state and local officials,135 To give meaning to this right, the federal courts must always be open to such plaintiffs, for it would be pointless to create a right to protect citizens from the wrongdoings of state and local governments, and at the same time require that those rights be vindicated in state or local courts.136 However, by applying § 1738 to § 1983 cases, the federal courts were doing exactly that - the plaintiff in Allen had no choice but to have his allegations that the Fourth Amendment had been violated adjudicated in the first instance by a state court and, on that basis, had been denied a federal court adjudication of those same allegations.

Despite this criticism, Allen is not an extraordinary case when viewed through the lens of implied repeal. The Court's holding that § 1983 did not repeal § 1738 is consistent with the reconciliation principle. It is not logically impossible to apply these statutes at the same time - plaintiffs can raise federal civil rights claims under § 1983, but if the issue has already been adjudicated by a state court, the preclusive rules of § 1738 will come into play. The fact that § 1738 might conflict with § 1983's purpose of protecting individuals from overreaching by state court officials is irrelevant under this framework.

Another case that provides guidance on the issue of reconciliation is Morton v. Mancari."37 In that case, employees of the Bureau of Indian Affairs (the "BIA") who were not Native Americans challenged a provision of the Indian Reorganization Act of 1934 (the "IRA") that gave a preference to Native Americans with respect to hiring at the BIA." It was alleged that the preference conflicted with, among other laws, the anti-discrimination provisions of the Equal Employment Opportunity Act of 1972 (the "EEOA"). 139 The district court held that the latter statute, having been issued later in time, repealed the former statute.140 The Supreme Court reversed, but at the same time recognized the tension between the preference provided by the IRA, which "would result in employment disadvantages within the BIA for non-Indians,"141 on the one hand, and the EEOA's prohibition of discrimination on the basis of race in federal employment, on the other.142

In order to defend its holding in the face of this potential conflict, the Court relied on the reconciliation principle. First, the Court interpreted the underlying policy goal of the EEOA as "alleviating minority discrimination in employment."143 "irreconcilable" with the IRA, which is "aimed at furthering Indian self- government by according an employment preference within the BIA for qualified members of the governed group."4 The Court reasoned that "[a]ny other conclusion can be reached only by formalistic reasoning that ignores both the history and purposes of the preference and the unique legal relationship between the Federal Government and tribal Indians."145

What the Court, in essence, is saying is that even if there seems to be both a physical and logical impossibility in applying two statutes simultaneously, they are not necessarily irreconcilable if the goals of the two can be reconciled. In Mancari, it would have been impossible for the BIA to grant Native Americans a preference in hiring while at the same time avoiding discrimination on the basis of race. Nonetheless, the Supreme Court chose to interpret the goal of the EEOA as the prevention of racial minority discrimination, rather than any discrimination, in employment. Once the goal of the EEOA was viewed in that light, it was not in conflict with the preference of the IRA. Since the goals of the statutes could coexist, the statutes themselves were no longer incapable of reconciliation.

Finally, in a recent case, the Supreme Court showed the lengths to which it would go to reconcile statutes. Branch v. Smith involved representation of the state of Mississippi in the House of Representatives, 146 Pursuant to the 2000 Census, Mississippi lost one seat in the House, dropping from five to four representatives.147 But the state legislature failed to adopt a plan to redistrict the state to take into account the reduced number of scats.148 One set of plaintiffs (the Branch plaintiffs) brought suit requesting that a state court issue a redistricting plan.H49 Another set of plaintiffs (the Smith plaintiffs) brought a separate action asking a federal court to issue a redistricting plan.18) The two sets of plaintiffs differed on whether the elections should be held by district or should be at-large.15! At issue was the interpretation of two federal statutes. The first federal statute, 2 U.S.C. § 2a(c), enacted in 1941, stated:

Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportiontent shall be elected in the following manner: .. , if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.152

However, in 1967, Congress enacted 2 U.S.C. § 2c, which required:

In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment ... , there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative.153

A majority of the Supreme Court admitted that there was "tension" between the two statutes - the 1941 statute seemed to require at-large elections in Mississippi's case and the 1967 statute seemed to forbid such elections, requiring instead that all elections be by district, 154 But rather than find implied repeal, as three justices in concurrence did and as several lower courts had done, the majority rejected the argument that the 1967 statute was meant to replace the 1941 statute.155 A plurality of four justices argued that the first statute was a stopgap measure only to be applied when the state legislature and the state and federal courts had failed to redistrict pursuant to the 1967 statute, and "the election is so imminent that no entity competent to complete redistricting ... is able to do so without disrupting the election process."150 Two other justices interpreted the first statute as applying prior to the state being redistricted as provided by the law of the state and the second statute as applying after the state had been redistricted as provided by such laws.157 While both interpretations can be applied as a matter of logic, both suffer from substantial flaws: the plurality's argument is weakened because it required the determination of an unspecified time period at which point the election was "imminent," while the case made by the other two justices suffers because their interpretation of the 1967 statute had almost no textual support. Meanwhile, finding that the 1967 statute had repealed the earlier statute, as three justices had done,158 required no mental gymnastics. The implication of this case is that reconciliation should be attempted, even if it is difficult and even if a finding of implied repeal would do away with such difficulty.

These cases are all relevant to determining whether the statutes implicated in Hoffman were in irreconcilable conflict. First, the majority's focus is on the tension between the NLRB's order and the IRCA's purpose.19 We have already discussed that the Board's involvement should have been ignored, and that this should have been viewed as a conflict between the NLRA's grant of authority to the Board to award back pay in such circumstances and the purpose of the IRCA. Allen makes clear, however, that a conflict of purpose does not lead to the conclusion that two statutes are irreconcilable so long as the statutes at issue can be applied simultaneously.

To determine whether the latter condition is met, we can turn to Branch for guidance. This decision tells us that two statutes may be applied simultaneously, and in this way reconciled, even though doing so may require difficult and complex rationalizations. Reconciling the statutes at issue in Hoffman does not require us to make questionable analytical steps as in Branch, but does require close attention to the operation of the statutes at issue. Where the employer takes measures against its employees that are motivated by a desire to thwart collective action, both the text and the spirit of the NLRA require that such employees be given remedies. The focus of the NLRA is not only to make employees whole, and thus ensure that they face no obstacies to discourage them from organizing, but also to guarantee that the employer does not benefit by its unscrupulous actions.100 All of this can be accomplished without irreconcilable conflict with the IRCA because it is physically and logically possible to apply both statutes. The undocumented worker may be awarded back pay in order to further NLRA goals as this would require nothing more than the mailing of a check. At the same time, the undocumented worker may be made subject to the appropriate IRCA sanctions for running afoul of that statute.16!

Finally, even if we had not been able to reconcile the application of the statutes, implied repeal would still be unwarranted under Mancari. Because the policies of the two conflicting statutes at issue in Mancari could be aligned, the Court found them capable of reconciliation. A good argument can be made that the policies at issue in Hoffman are likewise capable of coexistence. As Justice Breyer argued in dissent, failure to enforce the NLRA would inevitably make undocumented immigrant workers more powerless to take action to raise their wages and improve their working conditions, thus making them more attractive to employers.162 This would lcad not only to an increase in the hiring of undocumented workers, but presumably, as the demand for undocumented workers rose, it would also increase the volume of illegal immigration.163 By the same token, enforcing the NLRA would discourage employers from hiring unauthorized workers and perhaps even reduce the incentives for undocumented workers to illegally enter the United States. In this way, the goal of the NLRA (protecting the labor rights of all employees) and the goal of the IRCA (discouraging the employment and entry of unauthorized workers) are in line. Under Mancari, this would seem to be enough to avoid a finding that the two statutes arc irreconcilable.

The last canon of statutory construction with respect to implied repeal is that a more general statute cannot repeal a more specific one. Here, it would seem that the two statutes are of equal specificity -- in fact, both deal with vastly different subject matter-and so this canon may not apply. To the extent that it has any application, however, it points against implied repeal. In Hoffinan, the majority did not refer to the IRCA for its specific requirements (e.g., that employer and employee must verify work eligibility), but for the more general concept that the government should discourage unauthorized aliens from obtaining employment. This general concept was then relied upon to overturn a specific remedy granted in accordance with the NLRA.164 Thus, the underlying spirit behind this canon applies here - Congress focused its attention on the more specific task of empowering the Board to grant remedies to all employees in the United States who have been mistreated in violation of the NLRA, and should not be seen to have undone this work when it took on the more general task of deterring the employment of undocumented workers.165

In the end, each canon of implied repeal favors judicial restraint. Accordingly, the Board should have been permitted to award back pay to Castro notwithstanding the potential tension between the remedy and IRCA policy.

C. Implied Repeal and the Conflicting Arguments Raised in Hoffman

Not only does the implied repeal framework lcad us to a more supportable result, but it also provides the basis for a meaningful analysis of the majority and dissenting opinions. The biggest difficulty with the conflicting opinions is that they fail to engage each other in a way that allows the reader to evaluate both sides and choose a winner. For example, the two opinions in Hoffinan argue whether the availability of back pay awards for undocumented workers "runs counter to" or "trenches upon" the IRCA.165 undocumented immigrants is troubling because it condones and encourages violation of the immigration laws certainly makes sense. At the same time, however, it is difficult to dismiss the dissent's counterpoint that failing to award back pay actually undermines the IRCA because it only makes unauthorized immigrant employees more attractive to employers, and thus encourages more illegal immigration. Without empirical data on the impact back pay has on illegal immigration, which neither side presents, the reader is at a loss to decide whether and to what extent such awards are truly problematic,167

Application of implied repeal analysis to the debate in Hoffman provides a measuring stick against which the reasoning of the majority and the dissent can be judged. Instead of trying to grapple with their policy arguments and competing interpretations of precedent in the abstract, we can evaluate their points in terms of their persuasiveness in connection with the elements of implied repeal. Going through this exercise shows how the application of the canons of implied repeal effectively rebut the majority's arguments, clarifies what the majority and dissent were likely getting at with their sometimes vague rhetoric, and provides a forum to reevaluate the precedent at issue and the nuances of the Board's back pay order.

The tenet of implied repeal that is particularly relevant to Hoffman is the principle that the statutes under consideration should be reconciled if at all possible. This principle immediately calls the majority's central logic into doubt because, instead of letting both the IRCA and the NLRA stand, it effectively repealed the NLRA to address its concern about the NLRA's conflict with IRCA policy. The dissent countered that there was really no such conflict, but there is no way to judge which side is right from a policy perspective. From the perspective of implied repeal, however, this entire debate is irrelevant. Even if the majority was correct that the policies do conflict, since the NLRA and the IRCA are not in physical and logical opposition, this tension does not constitute grounds for repealing the NLRA.

The two sides also clash with respect to the "tension" created by the fact that Castro could not mitigate damages, something legally required in connection with the award he sought, without "triggering new IRCA violations."1 The majority contended that this demonstrates one way in which the back pay award encourages future IRCA violations." But the dissent countered that this was not a legitimate concern because "the Board is able to tailor an alien's backpay award to avoid rewarding that alien for his legal inability to mitigate damages by obtaining lawful employment elsewhere."170 At first glance, it appears that the majority gets the better of this exchange - the dissent's response is merely an acknowledgement of the inconsistency between the two statutes.

The flaw in the majority's argument only becomes clear when it is looked at through the prism of implied repeal. Because the mitigation requirement is based on common law and not the NLRA itself,1T the two statutes can readily coexist. Therefore, there is no need to strike down back pay awards as a result of this concern. Moreover, the tension the court identifies can be addressed by the NLRB on a case by case basis. As the dissent suggested, in fashioning a remedy the Board can take into account an undocumented worker's inability to legally mitigate.

Another problematic debate berween the majority and dissent centered around precedent, and in particular, the impact of four cases: Sure-Tan, ABF Freight System, Fansteel, and Southern S.S. Co. In Sure-Tan, the Supreme Court held that the NRLA applied to undocumented workers, despite immigration policy embodied in the Immigration and Nationality Act (the "INA").172 The Court held, however, that "employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) language to count against Castro's case."" The dissent responded that the statement did not impact Castro because it had to be read in the factual context of Sure-Tan. In Sure-Tan, the undocumented immigrant employees had returned to Mexico and, therefore, "[i]n order to collect the backpay to which the order entitled them, the aliens would have had to reenter the country illegally. Consequently, the order itself could not have been enforced without leading to a violation of the criminal law."7 This stands in contrast to the situation in Hoffman where the order could be enforced without requiring further illicit behavior.176

The trouble with the dissent's argument is that it oversimplifies matters, and therefore misses the crux of the distinction between Sure-Tan and Hoffman. The problem in Sure-Tan was not that, as Breyer suggests, "the aliens would have had to reenter the country illegally" in order to collect their back pay awards. Rather, it was that the back pay awards were for a time period during which reinstatement was impossible without illegal entry into the United States.177 Implied repeal analysis elucidates the importance of this aspect of the back pay issuc as a basis for distinguishing the two cases.

Though the Court in Sure-Tan did not explicitly apply an implied repeal framework, the issues in the case called for the doctrine just as they do in Hoffman.178 Moreover, the two potentially contrary holdings in the case make sense when viewed through this paradigm. Sure-Tan's first holding, that the NLRA applies to undocumented workers, is all but dictated by the principle requiring an irreconcilable conflict between the two statutes at issue in order to find repeal. The Court in Sure-Tan all but admitted that no such irreconcilable conflict existed:

[W]e do not find any conflict between application of the NLRA to undocumented aliens and the mandate of the Immigration and Nationality Act (INA) .... (T]here is no reason to conciude that application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA.179

Sure-Tan's second holding, that the Board could not grant reinstatement with back pay, can likewise be explained by implied repeal. Because the employees in Sure-Tan had returned to Mexico and would have had to re-enter the United States in violation of the INA, the reinstatement remedy authorized by the NLRA would have been in direct and irreconcilable conflict with the INA. The NLRA would have tequired the employees to illegally re-enter the United States, while the INA would have expressly forbidden it. By the same token, it would be illogical to award back pay for a period when the employees could not have been reinstated without violating the INA. The back pay award in Hoffman, however, raises no such concerns; it is in no way tied to further criminal conduct.

Breyer's truncated discussion fails to fully capture these substantive grounds for distinction. When both cases are viewed on the foundation of implied repeal, however, the difference between the two rises to the surface - the award of back pay in Sure-Tan would have created an irreconcilable conflict, whereas in Hoffman it would not.

Similar arguments can be made with respect to the other precedents relied upon by the majority and dissent. In ABF Freight System, Inc. v. NLRB, the Supreme Court had upheld an award of reinstatement with back pay to an unlawfully discharged employee guilty of committing perjury during the Board's enforcement proceedings.1$0 The majority in Hoffinan attempted to distinguish ABF by noting that (1) "[ABF] did not address whether the Board could award backpay to an employee who engaged in 'serious misconduct' unrelated to internal Board proceedings," (2) "the challenged order [in ABF] did not implicate federal statutes or policies administered by other federal agencies," and (3) "the employee misconduct [in ABF] ... was not at all analogous to misconduct that renders an underlying employment relationship illegal under explicit provisions of federal law."18!

The Hoffman dissent ably noted that the majority failed to explain why the first distinction was relevant.182 However, the dissent's responses to the second and third points are substantially weaker. The dissent argued that the second point was irrelevant because the "Attomey General, whose Department-through the Immigration and Naturalization Service -- administers the immigration statutes, supports the Board's order" and that "the perjury statute at issue in ABF Freight was a statute ... administered by another agency," namely the Justice Department."3 No explanation is given for why the Attorney Geteral's support for the Board's award of back pay makes Hoffman analogous to ABF and therefore makes the reasoning of ABF applicable to Hoffman. Furthermore, the fact that the Department of Justice administered the perjury laws was irrelevant. Even if the dissent was correct that the Department of Justice administered the perjury laws,181 it is unclear how that would lead to the conclusion that ABF mandates that the Board's award of back pay in Hoffman should stand.

Most difficult to understand, however, is the dissent's counter to the third argument. Its only response to the contention that the employee's action in Hoffman "renders an underlying employment relationship illegal," whereas the action in ABF did not, does not even engage the majority in debate. Justice Breyer instead noted that the majority's "conclusion rests upon an implicit assumption - the assumption that the immigration laws' ban on employment is not compatible with a backpay award. And that assumption, as I have tried to explain, is not justified."15 However, the dissent fails to explain how this is a response to the majority's argument.

Viewing the ABF case through the prism of implied repeal allows us to grapple with the majority's arguments head on and makes the dissent's statements more explicable. The majority's strongest points, the second and third arguments, relate to the reconciliation principle. When the majority argues that ABF did not "implicate federal statutes or policies administered by other federal agencies," it is essentially saying that that ABF did not involve a potential conflict between two statutes. Similarly, when it argues that "the employee misconduct [in ABF did not] render an underlying employment relationship illegal under explicit provisions of the law," the majority is arguing that the violation of the IRCA in Hoffman ("explicit provisions of the law") made the employment relationship illegal, thereby putting the IRCA in conflict with the NLRA, which governs said employment relationship,1%

Once the majority's arguments are viewed in this light, it is easy to see why they are insufficient to support an implied repeal. The majority's remark that ABF invoived no other statute administered by another agency turns out to be a red herring, because what the majority meant to argue was that ABF did not involve a conflict between the NLRA and a statute other than the NLRA. If ABF involved only one statute, the NLRA, then there could be no implied repeal in that case, and ABF would indeed be inapplicable to Hoffman. But instead of referring to "a federal statute other than the NLRA," the majority referred to "federal statutes ... administered by other federal agencies." This led the dissent to posit a pointless argument concerning whether the Department of Justice administers the perjury statute, when all that was required was for the dissent to note that ABF involved this second federal statute. Implied repeal analysis would then lead to the conclusion that the two statutes at issue in ABF were not in irrcconcilable conflict. The employce in ABF could be prosecuted for perjury and the Board could award reinstatement and back pay to that same employee without inconsistency. Application of this framework would reveal, therefore, that Hoffman is indistinguishable from ABF in the way that matters - it too involved no irreconcilable conflict between the two statutes under consideration.

The majority's third point can be responded to in the same way. It is not important whether the employee misconduct "renders an underlying employment relationship illegal under explicit provisions of the law," but whether such illegality creates an irreconcilable conflict with another statute, Here, the response must be that while the employee misconduct in Hoffman did make the employment relationship illegal, it caused no irreconcilable conflict with the NLRA's grant of authority to the Board to award back pay. Viewed through this lens, Justice Breyer's cryptic response to the majority's third point now makes sense: "But this conclusion rests upon an implicit assumption - the assumption that the immigration laws' ban on employment is not compatible with a backpay award. And that assumption, as I have tried to explain, is not justified."187 Presumably, the dissent means that the distinction made by the majority between Hoffman and ABF is only relevant if the illegal employment relationship in Hoffman is inconsistent with the IRCA, which the dissent argues it is not. However, implied repeal analysis makes the connection between the majority's argument and the dissent's response clearer and provides justification for favoring the latter.

The Hoffman majority also relied on two cases-Fansteel and Southern S.S. Co .- that it claimed stood for the proposition that courts have restricted the Board's authority to award back pay "to employees found guilty of serious illegal conduct in connection with their employment."18\* In Fansteel, the Court set aside an award of back pay to employees who had engaged in a sit-in strike that led to a "confrontation with local law enforcement."189 In Southern S.S. Co., the Court overruled an award of back pay to employees whose strike while onboard their ship had amounted to a mutiny in violation of federal law.190 The dissent responded to the majority's argument that Castro's illicit conduct caused the case to fall in line with this precedent by noting the following distinction: in Fansteel and Southern S.S. Co., "the employees' own unlawful conduct provided the employer with 'good cause' for discharge, severing any connection to the earlier unfair labor practice that might otherwise have justified reinstatement and backpay. By way of contrast, the [Hoffman] case concerns a discharge that was not for 'good cause."191 This response is unpersuasive, however, because it fails to explain how Castro's entry into the United States and his subsequent production of false work papers to the employer, both in violation of the IRCA, did not similarly "sever" his right to employment and render his employer's labor law violation irrelevant.

Similarly, when the majority suggested that it would be problematic for the Court to "allow [the Board] to award backpay to an illegal alien ... for wages that could not lawfully have been eared, and for a job obtained in the first instance by a criminal fraud,"192 the dissent's only response was that:

[T]he award simply requires that [sic] employer to pay an employee whom the employer believed could lawfully have worked in the United States, (1) for years of work that he would have performed, (2) for a portion of wages that he would have earned, and (3) for a job that the employee would have held - had that employer not unlawfully dismissed the employee for union organizing. 193

This counterargument hardly seems satisfying for it merely takes the methods of the majority and applies them to the Board's and employee's position - making arguments only from the viewpoint of the NLRA, while completely ignoring the policies underlying the IRCA.

Implied repeal analysis provides a more satisfying answer to the majority's argument: that it is irrelevant to the question at hand, which is whether back pay remedies may be awarded to unauthorized immigrant employees. The NLRA allows the award of back pay remedies, and makes no mention of prohibiting such remedies when wages could not have been lawfully earned or when the job in question was obtained by criminal fraud. The only way in which to add such prohibitions to the NLRA is by means of an implied repeal, and an implied repeal may only be found where the two statutes are in irreconcilable conflict. It is not enough, despite the majority's suggestion to the contrary, that the IRCA makes illegal the method by which the employee obtained the job and makes it impossible for any such employment relationship to exist without some illicit behavior. The two statutes can be applied simultaneously without physical or logical impossibility nonetheless.

But this conclusion-that Castro's illegal conduct in Hoffman is irrelevant for purposes of implied repeal-creates a further complication. It arguably runs counter to the holdings of Fansieel and Southern S.S. Co., which specifically pointed to illicit activities by employees as a reason for denying them relief. Just because our analysis conflicts with the findings of Fansteel and Southern S.S. Co., however, does not mean it is wrong. Like Hoffman, those cases were really about the potential conflict between the NLRB awards given in connection with conduct that violates the possibly contradictory statute without utilizing the canons of implied repeal. If these opinions had looked at the facts at issue from an implied repeal perspective, they would have come to the opposite conclusions, and would have cleanly aligned with our analysis of Hoffman.

The first step in implied repeal analysis is to see whether the doctrine is implicated at all -- that is, whether two statutes enacted by the same legislature are in potential conflict. This is actually not the case in Fansteel, because the trespass and violence committed by Fansteel's employees were violations of state law.

This distinction, however, does not support the Court's holding nor does it put our approach into doubt. Because the result in Fansteel was the curtailment of federal law through the operation of state law - reverse preemption, so to speak, there is serious question about whether the decision is correct. While reverse preemption is theoretically possible, such as where Congress explicitly states that federal powers may be limited by state law, nothing in the NLRA, either now or at the time Fansteel was decided, explicitly signaled Congressional intent that the NLRA be limited in this way. Lacking express guidance in the statute itself, the Supreme Court implied legislative intent to limit the NLRA and the Board's powers under the NLRA pursuant to the following logic:

We are unable to conclude that Congress [in drafting the NLRA] intended to compel employers to retain persons in their employ regardless of their unlawful conduct, - to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work.i94

Given the text and spirit of the Supremacy Clause, it seems unlikely that that the courts should ever allow implied reverse preemption. But even assuming implied reverse preemption is possible, it surely stands to reason that the standards to find it would be just as high if not higher than the standards required to find implied repeal.

If we apply the standards for implied repeal to this case, we see that the Fansteel Court reached the wrong result. The Court first stated that it was "unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct."195 This misconstrues the issue. The real question is whether the two laws are in irreconcilable conflict. There is no such incompatibility here because, while state law might dictate that the employees be tried criminally for trespass, burglary, assault, battery or similar crimes, and may also allow the employer to bring civil actions for trespass or assault and battery in order to collect damages, there is nothing inconsistent about applying both sets of laws. Employees may be reinstated to further the goals of the labor laws, while being punished both criminally and civilly to deter them from committing similar unlawful acts in the future. Of course, the situation might be different where, for example, the state law requires the employees to be discharged or where the operation of state law makes it impossible for the employees to be reinstated, as would be the case if they were imprisoned. There was nothing in Fansteel, however, to indicate that to be the case.

But what about the Fansteel Court's concern that through application of the NRLA, the employees would receive "immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work"?" This tension is also irrelevant because it does not put the statutes at issue in irreconcilable conflict. The fact that these employees could have been fired for their illicit activities had they not been anion-related does not suggest that the NLRA should be repealed; instead, it is merely a reflection of what the NLRA does. The statute abrogates the employer's right to discharge, granting the employee reinstatement and recompense where he or she has been discharged for conducting union-related activities, even if such discharge would have been defensible had the NLRA not been implicated. Since the NLRA, by definition, grants employees immunity from discharge for engaging in union activities, this concern is insufficient to justify repeal. Thus, under implied repeal or whatever narrower approach may be appropriate, we can see that the Court in Fansteel erred.

The Supreme Court faced a similar situation and made a similar mistake three years later in Southern S.S. Co., when it held that the Board could not order the reinstatement of five sailors who had gone on strike in violation of federal criminal law, because "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."197 This case involved the conflict of two federal statutes, and application of implied repeal analysis-specifically, the reconciliation principle-shows that the Supreme Court reached the incorrect outcome. As in Hoffman and Fansteel, there was no logical reason that the two statutes could not have been applied simultaneously. Having determined that the seamen had been discharged for their union- organizing activities, the Board could require, pursuant to the NLRA, that they be reinstated to effectuate Congress's intent to protect employees' rights to collective bargaining.198 At the same time, the criminal laws against mutiny would require that the seamen be tried, and if convicted, face possible fines and imprisonment.199 There was no showing that Congress's intent was that those charged with mutiny must lose their jobs, and certainly there was nothing in the criminal statute that required the seamen be fired.

The final point with respect to which the dissent and majority clash involves the issue of deference. In a parting shot in the dissent, Justice Breyer notes that "the law requires the Court to respect the Board's conclusion, rather than to substitute its own independent view of the matter for that of the Board."200 The majority then rejoined with the argument that the Supreme Court had not granted such deference in Southern S.S. Co., Bildisco and Sure-Tan, and that there was even less reason to do so in Hoffman, where the IRCA "not only speaks directly to matters of employment but expressly criminalizes the only employment relationship at issue."201

We need not concem ourselves with which side has the better case because this crossfire is irrelevant for implied repeal. Where the question is whether one federal statute trumps another, even if the Supreme Court were to completely disregard the Board's decision, it should nonetheless have applied implied repeal analysis to answer the question. And, even if the Court were to apply the implied repeal standard de novo or grant some sort of deferential standard of review to the Board's decision, the NLRA would have been permitted to stand.

Finally, the reconciliation principle explains a portion of the Board's holding that makes sense as an intuitive matter, but which neither the majority nor the dissent adequately addresses. In most labor law cases where the Board orders back pay, it orders it for the time period beginning when the employee was discharged and ending when the employee is reinstated.202 In Hoffman, however, the Board ordered that Castro only be allowed back pay until the date on which he testified that he had obtained employment illegally.203 But assuming Castro was entitled to back pay at all, there is no explanation why Castro's truthful testimony at the hearing before the NLRB could terminate his right to the remedy. If it was the substance of Castro's testimony that cut off his right to benefits (i.e., his explanation that he was not entitled to be employed), then surely that preclusion would relate back to the dale on which he was hired - that was the date on which he first violated the IRCA, On the other hand, it is difficult to see how the act of testifying could terminate his back pay rights when his testimony was required by, and consistent with, the law. If anything, Castro's act of testifying truthfully under those circumstances was laudable.

The result makes sense, however, when viewed through the lens of implied repeal. As we have argued, the IRCA did not repeal by implication the NLRA, and so Castro should have been entitled to back pay. But on the date on which Castro testified that he had obtained employment illegally, he placed the NLRA and the IRCA in direct and irreconcilable conflict with one another. While the IRCA says nothing about back pay, it does make clear that an employer who discovers that an employee is unable to work must terminate that employee.204 The NLRA's requirement that Castro be given back pay under such circumstances is in logical conflict with this IRCA mandate. Hoffman Plastic could not simultaneously pay back pay to Castro and at the same time refuse to employ him; the two results are incompatible. Because the two statutes are in conflict, the more recent, the IRCA, must prevail. As far as the record shows, the date of Castro's testimony was when Hoffman Plastic first discovered that Castro was not entitled to work and therefore the first date on which the NLRA and IRCA were in direct conflict.205 The Board's decision to cut off back pay on that date, therefore, is consistent with implied repeal.

Use of the implied repeal framework allows us to better understand and evaluate the debate in Hoffman. On the surface, each side ignores the doctrine of implied repeal, and the majority and dissent engage in what appears to be an abstract policy debate mixed in with conflicting interpretations of relevant precedent. To attempt to indulge the Court in this debate is to enter a fog. Once the arguments are viewed in terms of implied repeal, however, the opinions and the precedent on which they rely become much more manageable. This framework bolsters the dissent's arguments, and exposes why those of the majority fail to compel. At the same time, we can see that although the majority opinion may fit in with past precedent, it is only because those cases are similarly flawed. In fact, by continuing to ignore implied repeal in this context, the Court in Hoffman failed to clean up this area of the law, and instead laid the groundwork for yet more confusion.

V.

IMPLIED REPEAL AND HOFFMAN'S AFTERMATH

A further benefit of using implied repeal analysis to decide Hoffman is that lower courts would readily be able to judge the implications of the case in analogous contexts. The majority's analysis lacks this quality. Because the Supreme Court supported its ruling with broad rhetoric and loosely connected supporting arguments, federal and state courts have been unable to convincingly define the extent of the decision's reach. The Supreme Court's failure to provide adequate guidance to lower courts has led to troubled legal doctrine - an outcome that would not have followed from implied repealed analysis.

Hoffman's precise holding applies to a fairly narrow issue - whether back pay is available to undocumented workers as a remedy for employer violations of the NLRA.2 In this case, the Court does not deduce a powerful common-law rule with clearly wide-sweeping ramifications. On its surface, the ruling's only impact is to narrow the remedial rights of undocumented workers in connection with a single statute.

But the holding does not exist in a vacuum. Because the NLRA is part of an overlapping state and federal employee-protection regime, when the Supreme Court eliminated back pay from the remedies potentially available to undocumented workers under this statute, it called into question whether this award, or even awards that are closely related, should be available under the multitude of other statutes enacted to shelter employees from abuse.

To determine whether the result in Hoffman calls for a similar outcome in analogous contexts, lower courts must analyze the rationale underlying the majority's decision. Looking at the result alone provides little guidance. Theoretically, a court should be able to decide whether its case is governed by Hoffman or distinguishable from it based on whether the case it is adjudicating contains the legal and factual elements determinative of the outcome in Hoffman. For example, the decision in Hoffinan would weigh strongly against recovery in an action considering workers' compensation awards, if the Supreme Court's logie with respect to the NLRA applied with equal force to that employee-protection regime.

In fact, a look at the Supreme Court's conclusion suggests that the case may indeed be widely applicable outside of the NLRA. The Court's overarching rationale is quite broad - the back pay remedy is foreclosed because providing the award undermines IRCA policy by, in essence, sanctioning the very employment relationship the IRCA was enacted to prevent.207 If blindly followed, this logic could serve to significantly scale back the labor law remedies available to unauthorized aliens. This is because awarding any remedy to undocumented workers as recompense for violation of their rights as employees can be conceptualized as implicitly condoning the illicit employment relationship, and therefore contrary to IRCA goals. It would be a leap of faith, however, for courts to apply this reasoning in each potentially analogous context. Though this language can be logically applied to almost any labor law remedy, there is nothing in the opinion to suggest that this was the intended result, nor is this called for as a matter of stare decisis. It would be inadvisable to rely on Hoffman to launch a revolution in employment law without a more solid foundation.

Lower courts, for the most part, have agreed. Despite the absence of self-limiting language in the Supreme Court's holding itself, state and federal courts have been mostly, though not wholly, unsympathetic when asked to expand Hoffman based upon the universality of its reasoning. Lower courts have repeatedly found that Hoffman's ruling does not impact immigrant rights under anti-discrimination statutes,208 wage and hour laws,209 state workers' compensation schemes,210 or state tort law.211 At the same time, however, a small group of cases have followed the expansive language of Hoffman and applied it with respect to analogous employee- protection statutes.212

This movement away from Hoffman is contrary to the wide-sweeping implications of the majority's rhetoric. What is troubling is that although radical change to immigrant worker rights is not justified based solely on the Court's broad language, for there to be a coherent body of law in the wake of such a decision, courts must justify their failure to adhere to the case through reference to valid points of distinction. In other words, to convincingly get out from under Hoffman's shadow, courts must show why the majority's concern about trenching upon IRCA policy is not implicated with respect to the remedy under consideration. Courts have repeatedly tried to do this, but have ultimately failed because the majority opinion did not clearly outline the factors in the case that led to its broad conclusion.

A. Distinguishing Hoffman

In order to differentiate Hoffman, lower courts have turned to policy arguments, as well as potential points of distinction arising from factual and procedural aspects of the Hoffman case. These cases, however, have not succeeded in deciphering true confines on the majority’s rationale.

1. Policy Distinctions

Various courts have voiced disagreement with the majority’s chief concern that providing back pay under the NLRA undermines IRCA policy, and have cited this point of contention as a reason to find Hoffman inapplicable. One case to voice this sentiment was Majlinger v. Cassino Contracting Corp. Here, the court considdered whether under New York law undocumented workers were eligible to recover lost wages resulting from a workplace injury. En route to upholding the compensation rights at issue, the court dismissed Hoffman’s concerns about IRCA policy as follows:

In our judgment – and in the judgment of many other courts…whitholding otherwise available remedies from undocumented aliens would create an incentive for unscrupulous employers to hire them, secure in the knowledge that such employees would have no recourse in pursuing proper wages and benefits or damages for workplace injuries. Such a result would thwart the Congressional objective of preventing American employers from hiring undocumented aliens.

This is the very logic relied upon by the Board in rendering the decision that the Supreme Court overturned in Hoffman. The court, in fact, quoted the Board’s proposition that “the most effective way to accommodate and further the immigration policies embodied in [the IRCA] is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees. The majority implicitly rejected that rationale when it concluded the opposite – that providing back pay actually undermines the IRCA. Seeings as this logic has been considered and rejected by the Court, restating it cannot serve as a valid way to distinguish Hoffman.

A more compelling, though ultimately still unsatisfying, means of distinguishing Hoffman is to counter its policy-based holding with offsetting and fresh policy concerns. This was one argument in the Ninth Circuit used to distinguish the case in Rivera v. NIBCO, Inc. In this case, twenty-three immigrant women brought suit claiming that a job skills test administered only in English was, among other things, a violation of Title VII. The court was called upon to decide whether immigration status was discoverable in acase such as this, and if so, under what restrictions. The employer’s argument was that Hoffman rendered this information discoverable because it made the issue relevant to available remedies. But the court reasoned that any potential harm of the discovery – the chilling effct that the disclosure of plaintiffs’ immigration status could have upon their ability to effectuate their rights.” In addition, the court went out of its way to express its opinion that Hoffman was most likely inapplicable to Title VII.

To distinguish Hoffman, the court relied heavily on the gravity of the policy considerations expressed in Title VII. According to the Rivera court, the anti-discrimination policies reflected in the statute are of the “highest priority,” and because of this, “the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrations in Title VII cases.” This argument, that more important competing policy concerns justify a different result, strikes a chord because it is possible to cast the Supreme Court’s holding as a resolution of rival policies: the Board was prevented from awarding back pay to undocumented workers, a remedy designed to effectuate the NLRA’s goal of protecting union activities, because the award ran counter to federal immigraiton policy. Meanwhile, according to the Court, NLRA policies would still be vindicated because the employer would be saddled with other sanctions.

This reasoning is problematic, however, because the Rivera court is making a value judgment about the relative import of different federal statutes, which is inherently subjective terrain. It also lacks foundation in Hoffman itself – there is nothing in the case that suggests the majority would have been swayed had more central policies been the ones that conflicted with the IRCA.

Finally, the problem with this line of thought is that it fails to unwind the majority’s cenral rationale. The Ninth Circuit’s argument points to nothing particular about back pay under Title VII that makes the award of this remedy to undocumented workers in this context any less threatening to IRCA policy. In fact, it is even arguable that the Supreme Court’s rationale is stronger in Title VII cases. If the Ninth Circuit is right that protection from discrimination is more important than an employee’s right to unionize, then it arguably follows that enforcement of anti-discrimination laws with respect to undocumented workers creates more of an incentive to seek employment in this country than union-related safeguards. This greater incentive would run contrary to the IRCA’s goals of preventing such employment relationships. Thus, alhough Rivera’s reasoning is attractive at first blush, it ultimately fails to engage and counter Hoffman’s logic, and perhaps even renders it more forceful.

2. Factual Distinctions

Courts have also scrutinized the facts giving rise to the dispute in Hoffman in order to uncover meaningful ways to distinguish the case. Under New York law, several courts have attempted to differentiate personal injury awards stemming from an employer's failure to install proper safety devices from the award in Hoffman, which these cases point out was merely recompense for discharge. One line of thought is that the NLRA and the IRCA were more clearly at odds in Hoffman because termination was at issue. The thinking goes that even though termination may be forbidden under the NLRA if done in violation of labor laws, the IRCA requires that this very action be taken with respect to employees who are known undocumented immigrants. In contrast, there is no such direct conflict with respect to the employer's action in the personal injury context. The employer's breach of New York law by providing inadequate equipment is in no way condoned by the IRCA.

But this logic, that there is somehow less tension between the statutes in cases of physical injury, does not stand up to scrutiny under the circumstances of Hoffman. As previously discussed, Hoffman Plastic did not discover Castro's immigration status until long after he was fired for union activity. Thus, at that time, the employer could not have relied on the IRCA to justify its actions. The fact that the IRCA and the NLRA could potentially call for different results is, therefore, irrelevant; in Hoffman they did not. The underlying tension at issue was that the employer violated a labor law in connection with an employment relationship criminalized by the IRCA. This is the exact same tension that exists in personal injury cases.

The distinction between actions for personal injury verses those for illicit termination, however, does seem to carry weight at least on an intuitive level – it just seems more unjust to deny recovery when an individual has actually been physically injured. But even assuming this is true, relative injustice is far from a compelling ground on which to distinguish Hoffman; in the end, it does nothing to show that lost wages in a tort action are any less troubling to IRCA policy than NRLA back pay awards.

Courts have launched more direct attacks by slicing into the definition of "back pay." The back pay that Mr. Castro sought in Hoffman was compensation for time he could have worked had he not been fired in violation of the NLRA; during the time period at issue, he performed no actual labor for Hoffman Plastic that would have entitled him to compensation. The majority makes a point of this when it chides the NLRB for asking that it award back pay for work that, among other things, was “not performed.” The remedy Castro sought can be contrasted with the type of back pay that is commonly awarded as a means of recompense for employer violation of wage and hour laws. In the latter situation, the employee is seeking compensation for work that has already been done. Lower courts have seized on this distinction to justify ignoring Hoffman.

Two arguments have arisen to justify distinguishing Hoffman on this basis. In Flores v. Amigon, a New York district court considered whether immigration status was relevant for recovery under federal and state wage and hour laws. The plaintiff in the case, Maria Flores, sought back pay for her employer’s failure to pay proper overtime wages. The court found that Hoffman was inapposite because it did not address recompense for earned wages, “and that the policy issues addressed and implicated by the decision in Hoffman do not apply with the same force as in a case such as this.” The court, however, did a poor job of explaining why policy considerations would be different under state wage and hour laws. Instead, it fell back on the argument that “enforcing the FLSA’s provisions requiring employers to pay proper wages to undocumented aliens when the work has been performed actually furthers the goal of the IRCA” in that it eliminates the employer’s incentive “to hire an undocumented alien in the first instance.” Though this may be true, the majority in Hoffman already spurned this rationale when used to defend back pay under the NLRA, and the Flores court gave no indication as to why this policy position is any more poignant in the FLSA context.

The court in Flores did, however, have another more persuasive argument in its arsenal. As discussed earlier, the majority reinforced its position that back pay awards are contrary to IRCA policy by noting the distinction between plaintiff’s mitigation duties when seeking recompense for work not performed, on the one hand, and the impossibility of legally doing so in the U.S. when such plaintiffs are undocumnted workers, on the other.“\* As the Court explained, the plaintiff in such a case “cannot mitigate damages... without triggering new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore [the] IRCA and hire illegal aliens.”

If the back pay award at issue, however, is for work already performed, then this conflict disappears — the damages for failure to pay proper wages are what they are, and they cannot be mitigated by seeking alternate employment.\*° In these cases, therefore, the tension between back pay and mitigation is relieved, and the Supreme Court’s broad pronouncement that back pay trenches upon immigration policy no longer carries quite the same gravity. But is this distinction enough to justify parting ways with Hoffman?

A rather strong case can be made that the answer is “no.” The mitigation-related argument is one of several threads that the majority loosely tics together on the way to its holding. Only countering this particular argument, therefore, leaves much of Hoffman's logic intact. Most importantly, the Court's central argument—that providing a back pay remedy to an undocumented worker condones an employment relationship ilegal under the IRCA-—remains relevant irrespective of whether the worker is required to mitigate damages. That being the case, a lower court would likely have to find further distinctions before it could reasonably contend that Hoffman has been sufficiently weakened so as to be inapt. This quandary illustrates how the nature of the Court’s analysis makes it quite difficult to escape: because it is not based on clear elements, ach essential to its ruling, the nearly ubiquitous holding can stand even if particular supporting arguments are defeated.

Nevertheless, lower courts have done their best to pinpoint and pick apart the foundational elements of the opinion. Probably the most thought provoking factual distinction that courts have identificd has to do with whether the employer or the employee was responsible for violating the IRCA. Because the employee was the one who breached the IRCA in Hoffman, when the employer violates the IRCA (by, for instance, not conducting the proper diligence with respect to immigration status at the time of hiring), courts have argued that Hoffman does not apply.

At first glance, this appears to be a valid point. The Supreme Court is focused on protecting immigration policy. It is a compelling intuitive argument to say that compensating an undocumented immigrant who intentionally contravened IRCA rules undermines this policy; to do so, would in essence reward violative conduct. The argument that providing relief is inappropriate is more difficult if it is the employer that commits the violation. If back pay is denied in the latter scenario, then the employer is rewarded for violating the IRCA. Therefore, IRCA policy would arguably be undermined if back pay were not awarded.

This point of distinction also finds support in the opinion itself. The Court makes note af Castro's illicit conduct several times, and at one point specifically points out that it “subverts” IRCA policy to reward Castro’s "criminally punishable conduct.” Moreover, if Castro was not in breach, the Court would no longer be able to argue that its decision fits nearly in with the Southern S.S. Co. line of cases, which it claimed stood for the proposition that NLRB awards could be set aside when employees are guilty of illicit conduct. This all suggests that Castro's breach may have been an important piece of the majority's reasoning. If so, a fairly strong argument could be made that cases where the employer was the breaching party are distinguishable.

But it is difficult to discern exactly what role Castro’s illicit conduct played in the Court’s, decision. Although the majority does rely on Southern S.S. Co. and similar cases for the proposition that illicit conduct severs an employee’s right to NLRB remedies, it also uses these cases for the more general proposition that Board remedies may be overruled when they contravene other statutes. While the former proposition may no longer be applicable in cases where the employee did not tender false documents, the Court’s opinion remains somewhat bolstered by the latter. Therefore, precedent, albeit in a more diluted state, supports the Court’s opinion irrespective of which party breaches.

In addition, the Suprem Court’s other shots at Castro may just have been dicta. What points to this conclusion is language in the opinon that suggests the Court was not focused on assigning blame, but on the illicit nature of the entire employment relationship. It is careful to note the following:

[I]t 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 [the] IRCA's enforcement mechanism. or the employer knowlingly hires the undocumented alien in direct contradiction of its IRCA obligations.

Since the Court points out that IRCA policy is violated any time an undocumented worker is hired, it seems reasonable to conclude that the Court viewed its overarching concern about subverting IRCA policy by providing back pay as implicated in either situation. This reading of the opinion is bolstered by the strong language used in the Court's holding - it purports to preclude the award of back pay generally, not only in cases where the employee tendered false documents. Moreover, viewing the issue more broadly still fits with the majority’s argument in that a back pay award nevertheless legitimizes an employment relationship born illegally. Similarly, at least in cases where undocumented workers know they lack authorisation to work, even if the employer technically commits the violation, back pay can still be perceived as a regard to undocumented workers for flaunting the IRCA regime by seeking employment in the first place.

In the end, it is difficult to determine to what extent the majority relied on Castro’s illegal behavior in reaching its conclusion. Without clear guidance in this respct, we cannot tell whether employer rather than employee misconduct is a valid point of distinction.

3. Procedural Distinctions

Finally, cases have distinguished Hoffman in settings where workers’ rights are raised in private causes of action that are adjudicated in court proceedings. This paradigm is contrasted with the procdural framework underlying the NLRA, where the Board is charged with both enforcing employee rights and adjudicating disputes.

These procedural distinctions, however, are shaky grounds on which to base a departure from Hoffman. The first prong of this argument-distinguishing based on the litigant-is unimpressive because, whether the Board or the employes themselves initiate proceedings, the Court’s theory that recompense to undocumented immigrants trenches upon immigration policy is equally valid. The second prong, meanwhile, which draws a distinction based on the type of decision-making body that adjudicates such disputes, is also unfounded, though it is at least grounded in the rhetoric of the majority opinion. As discussed in Part III, the Supreme Court framed the issue in Hoffman as one of agency discretion, emphasizing that the Board had “no authority to enforce or adminster” IRCA policies. In pointing to the Board’s limited discretion, the case opened itself up to distinction on the basis that, as the Rivera court noted in the context of Title VII, “a district court has the very authority to interpret both Title VII and [the] IRCA that the NLRB lacks.” The Rivera court, in fact, relied on this difference to conclude that “to the extent that Hoffman stands for a limitation on the NLRB’s remedial discretion to interpret statutes other than the NlRA, the decision appears not to be relevant to a Title VII action.

The trouble with this reasoning is that even though the Court’s specific ruling was that the Board had exceeded its remedial authority, there is no reason to think that the policy concerns on which this conclusion was based are not applicable in the Title VII context. The tension between IRCA policy and labor-law remedies still exists irrespective of whether a federal agency or a courthouse grants the award. For a lower court to limit Hoffman to the NLRB on this basis is to essentially ignore the underpinnings of the Supreme Court’s decision rather than distinguish them.

In the end, despite the efforts of numerous state and federal courts, judges have been unable to convincingly discern the scope of Hoffman. This serves as compelling evidence of one essential shortcoming of the majority's reasoning - that it fails to provide clear limits on the far-reaching potential of its holding. Moreover, as courts have struggled through this ambiguity, they have created an ungainly group of cases marked by sometimes questionable logic. Hoffman's chief legacy consists of fomenting a body of law that contorts itself like a bonsai tree to avoid the potential implications of the case itself. This was the predictable result of the poorly articulated analysis in the Court's decision. Subsequent courts could either let Hoffman revolutionize immigrant rights, which is not necessarily what the Hoffman court intended, or they could stretch to find ways to limit its holding. The problematic doctrine that has evolved was written by lower court judges, but they were painted into a corner by the Hoffman majority.

#### Overturning Hoffman solves legal ambiguity that lets courts arbitrarily restrict rights under employment law that are unrelated to collective bargaining. That’s necessary to end the chilling effect.

Michelle Goldberg 21 – Columbia University. “Re-Examining Hoffman Plastic Compounds v NLRB under the Trump Administration,” Fall 2021, Columbia Undergraduate Law Review 18(1), pp. 84-126.

The precedent from Hoffman has yielded many decisions from courts that have challenged the rights of undocumented immigrants. Although courts have established clear guidelines for some legal issues, such as FLSA wage claims, other issues led to completely incongruous results between cases. 38 While many courts chose to limit Hoffman to NLRA cases, some courts interpreted the reasoning in Hoffman so broadly to suggest that granting any sort of monetary compensation to undocumented immigrants will incentivize migration.39 Cases following Hoffman have been inconsistent at best while providing ammunition for those seeking to restrict the rights of immigrant workers.

While the courts were mostly consistent on issues such as disclosure of immigration status and whether the law protects undocumented workers, there was a clear division between different jurisdictions on the topic of what damages workers can recover post-Hoffman. On some topics, such as FLSA wage theft, the courts agreed on an established distinction with Hoffman, arguing that wages for hours already worked need to be honored.40 However, as courts began to deal with other forms of remedies for workers, this distinction began to fall apart. When discussing issues other than FLSA, there was a lack of clear standards to apply to the case of undocumented immigrants. In these opinions, courts were unsure which damages would disincentivize future migration, the aim of IRCA and the Hoffman decision.4'

As a result, cases unrelated to FLSA-type wages were highly inconsistent with one another, even within the same legal issue. For example, in cases of loss of future earnings potential due to workplace injuries, one court chose to grant full damages without regard to status,42 while another created a new test to determine employer and employee culpability under IRCA to decide whether damages can be awarded.41 Meanwhile, another court granted damages calculated based on the plaintiff's home country, El Salvador, in order to account for the worker's ineligibility to work in the United States.44 Here, there is an unclear brightline rule because these damages represent hypothetical work, similar to backpay, but in the future rather than the past. The potential for a worker to amend their work authorization status complicates the issue presented in Hoffman and makes the distinction less clear. These inconsistencies affect workplace conditions for unauthorized workers and the decision calculus to go forward with claims for violation of workplace protections.

Another trend within the case law was the use of Hoffman's logic to argue that any right or remedy can incentivize further unauthorized migration and IRCA violations. Employers generally attempted to argue this in court, with mixed success. While courts generally rejected these arguments, there were several instances where courts categorically denied remedies to undocumented immigrants, regardless of the degree of similarity between the case and Hoffman. For example, in Phase II Investments Inc., the court utilized the broad reasoning in Hoffman to deny backpay under Title VII, notwithstanding that the employer, in this case, was complicit in the violation of IRCA by providing with and instructing their employees to use false identification documents after a Department of Homeland Security (DHS) investigation.41 Similar arguments also became the basis for these courts to deny rights unrelated to the NLRA to undocumented immigrants, such as state disability benefits.46

Ultimately, the Hoffman opinion failed to specify clearly what characteristic of backpay made it unique from other types of remedies and to what extent it would apply to other areas of the law. Without this clarification, courts lacked a clear direction, leading to inconsistency in how damages are calculated or awarded. In the worst scenarios, it allowed for any court to use Hoffman's logic broadly to unilaterally forbid any type of monetary compensation to victims of workplace law violations. While many courts have drawn clear boundaries to the Hoffman decision and upheld the rights of immigrant workers, several courts have chosen to deny workers damages due to their immigration status. The discrepancy between courts' interpretations illustrates the ongoing need for Hoffman to be clarified or overturned.

#### The court must unambiguously interpret congressional intent about the labor-immigration conflict. Unnatural rulings delegitimize the entire labor law regime by making the court look like a policymaker.

Michael C. Duff 13 - Professor of Law at University of Wyoming College of Law. “EMPLOYMENT AND LABOR LAW IN THE 21ST CENTURY: CHANGES IN THE ARENAS OF CONFLICT: ARTICLE & ESSAY: What Brady v. N.F.L. Teaches About the Devolution of Labor Law,” Sumer 2013, Washburn Law Journal, vol. 52, pg. 429.

In 1947, Jerome Frank explored an interesting analogy between musical and statutory interpretation. 103 There was always more going on in labor law than was immediately revealed by the text of the statute - a kind of music or inner coherence. 104 As Professor Atleson has shown, there were many instances during labor law's evolution, from its inception really, in which common law notions of property and management rights reemerged periodically to defeat statutory rights; wherever possible, judges read common law "management rights" into the NLRA. 105 Despite this dissipation, for a long period of time one could continue to hear the statutory music within doubtful interpretations of the NLRA rendered by federal courts and often by the NLRB itself. One could say with more or less a straight face during the "mature" period of labor law that any tearing of the statutory fabric was leading to some greater statutory purpose; the rending was on some level an unfolding of the inner statutory logic advancing to meet novel contemporaneous challenges. 106 One could even argue that such doubtful interpretation was necessary to advance the deep policy of the law.

The wise composer expects the performer to read his score "with an insight which transcends" its "literal meaning." He does not deplore the performer's creative activity, does not denounce it as "caprice" or "subjective tricks." … Sometimes a literal interpretation of a piece of legislation is indubitably correct. Often, however, so to construe a statute will yield a grotesque caricature of the legislature's purpose. 107

Looking at the situation in hindsight, one might now be justified in seeing such textual departures as a conscious but non-malicious disregard of the statute - as a form of incremental soft sabotage meant to diminish, but not to extinguish, the potential for real working class power embedded within the [\*449] statute. The soft sabotage might be analogized to a broader anti-democratic spirit manifested by judges during the 20th century. As Jerome Frank explained, "When, not so long ago, some judges were anti-democratic, they often obstructed the democratic will voiced by the legislature. This they sometimes did by obstinately construing a statute narrowly, without real regard to its intention." 108 However, the incrementally congealed judicial departures from the NLRA - the narrow constructions of the type Judge Frank was describing - eventually became widely understood if not accepted. 109 Whether the deviations were "minor key" frolics or "major key" detours, one could still make out the musical theme in the whole while the composer remained discernible.

For decades, interpretations of labor law resulted in a fine work of doctrinal local coherence - a concert overture - if not always in a product reflecting correspondence of rules to the reality of labor management relations and conflict. 110 One could read many cases over the last half-century that did not seem quite right but which connected to each other neatly. The unifying themes of the cases created music of managed chaos, a chaos accepted because of the presumed existence and permanence of labor-management conflict and the corresponding need for negotiation writ large. Perpetual conflict suggested the need for at least some level of cooperation. There was no question of anyone winning the struggle. 111 To allow the battle to be fought without restraint was considered society's loss, culminating in grievous injury to industry and commerce. 112 Over time, the courts began to [\*450] forget the sound and coherence of the music in minor and major ways, yielding to the reality that the deregulatory experience playing out was not quite corresponding to the received tale. When the statute was disregarded, the promised horribles failed to materialize. Unions were more or less quiet. Workers were more or less quiet. 113 History seemed to unfold without significant economic dislocation. 114

I now briefly discuss a few specific examples of creeping judicial incoherence and the loss of the musical theme. Significantly, the reaction to the "creep" by unions and workers was at best muted, a reality that judges who were already unconvinced by the NLRA's industrial strife policy have noticed, even if unconsciously. Minor ways of disregarding labor law statutory music are heard most discordantly by everyday practitioners working in the field, but often not by laypersons, or even by legally trained non-specialists. When courts interpret the NLRA in silly, unnatural ways, they communicate to "repeat players" that the statute is not taken seriously. Those repeat players are then quite likely to pass on the ethos to laypersons, even if they do not mean to do so. I know I did as an NLRB agent. In these circumstances, courts damage the statutory regime slowly and incrementally rather than traumatically and immediately. After recounting some of these minor instances of field incoherence, I will move on to a major one, and then reconnect the discussion to Brady.

A. Minor Key I: Inconsistent Deference to the NLRB

In theory, courts are required to defer to the NLRA's permissible constructions of ambiguous statutory provisions within the purview of the agency's statutory mandate. 115 No one would now argue that Chevron deference - named after the case that most famously announced that courts should not second-guess agencies' interpretations of vague statutes within the agencies' jurisdiction - is as simple as it once seemed. 116 In certain instances [\*451] it is hard to argue that the U.S. Supreme Court has even attempted to apply Chevron, or any other authentic deference canon 117 to the decisions of the NLRB. This non-deference has been particularly noticeable to labor relations specialists through the courts' unpersuasive second guessing of the NLRB's attempts to unravel convoluted employee and supervisory definitions under the NLRA.

1. Who Is an Employee?

In Lechmere v. NLRB, 118 the U.S. Supreme Court held that "non-employee" union organizers were barred from an employer's property in nearly absolute terms. The general rule had been laid down, but arguably qualified, in the 1950s-era Babcock and Wilcox case. 119 Following that decision, the NLRB continued to administratively balance employer property rights with the right of nonemployee union organizers to access employer property as reflected in cases like Jean Country, 120 and eventually the Court took notice. For all practical purposes, the Court in Lechmere closed the door to union access of employer property.

Lechmere had a profound impact on day-to-day union organizing. As a practical matter, it had long been recognized that a union's only real access to employees was face-to-face in the workplace. 121 By cutting off such direct access, the U.S. Supreme Court in nearly absolute terms denied unions the use of their primary organizational tactic: interacting with employees at work. 122 The end of this kind of union-employee contact would severely circumscribe organizing. Every practitioner of labor relations of every stripe knew it. 123 I spoke and dealt with union organizers, for example, who were acutely aware not only of the decision but of its symbolic power. What was more, the position of the NLRB - the agency with alleged labor relations expertise - that such drastic banishment of union organizers would diminish employee rights was rejected almost out of hand. Union organizers and labor attorneys [\*452] confided in me their surprise at the curt dismissiveness with which the Court in Lechmere assessed the NLRB's position in the case. There was obvious symbolic power in such a summary rebuff.

Chevron loomed large in the Lechmere opinion by virtue of the dismissive treatment visited on the NLRB by the Court. 124 As the dissent argued, the question of access to employees by "third party" unions under the NLRA is not addressed in the statute, and access issues therefore necessarily present ambiguities. 125 The Babcock and Wilcox case had been decided prior to Chevron. The NLRB's interpretation of the NLRA as permitting union access to employees in non-working areas of an employer's property accordingly seemed permissible under deference principles, especially under the kind of cautious balancing scheme the agency had been utilizing. 126 As a practical matter, the NLRB sometimes permitted organizational activity in locations of a facility formally owned or leased by employers, but not part of working areas, and otherwise frequented by the public without challenge or the need to obtain advance permission. 127

The most jarring aspect of Lechmere for many labor relations specialists was the failure of the Court to acknowledge that "non-employee" union organizers might arguably be considered statutory employees presumptively afforded access to an employer's facility in order to engage in protected labor activity. 128 The NLRA does not limit employee status to employees of any particular employer, and there is no legitimate conceptual reason why union agents employed by the union would not fit into the statutory definition. 129 Non-exclusion of union agents from the statutory definition of the NLRA makes sense. Under Section 2(9) of the NLRA, the term "labor dispute" is defined to include "any controversy concerning terms, tenure or conditions of [\*453] employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." 130 The definition mirrors statutory language in the NLGA and is transparently directed at the tendency of the judiciary to see all labor activity undertaken by employees not proximately employed by an employer as illegitimate. 131 Solidarity is trouble. Through application of "absolute" state property rights, the Court needlessly constitutionalized union access. Moreover, and more importantly for my present purposes, the Court sent an unmistakable message to those involved in organized labor relations of its hostility and of its intention to continue to interpret the NLRA in the narrowest possible fashion. Non-employee union organizers were necessarily "strangers" to the workplace, and employers need take no notice of them unless employees managed to designate a union to represent them under the difficult new regime. 132

More cramped interpretations resulting in statutory employee exclusions from the NLRA exist; I will discuss one of them momentarily. In my labor law practice experience, however, the professional union organizer exclusion was most notable. The determination had a palpable and immediate impact on traditional union organizing. Still, I do not characterize court-authorized banishment of non-employee union organizers from employers' property as more than a minor disregard of the NLRA statutory music; the judgment was a plausible, if doubtful, accommodation of federal-state "access" tensions that have existed for decades. 133 It is possible to conceive of Lechmere as one end point of a continuum of constantly and necessarily shifting conceptions of property. Ultimately, the decision may have as much to do with generally cramped conceptions of property as with anti-union animus. 134 At bottom, the disingenuous interpretation of the employee definition was not an open assault on the "core legitimacy" of union organizing or collective bargaining but rather a narrowing of the field of conflict prompted by judicial hostility. [\*454] In the subsequent unorthodox salting campaigns, which developed in reaction to Lechmere 135 and its rule of restricted access for unions, 136 the courts substantially upheld the protected status of "salts." This outcome seems unlikely if the intent of the courts at the time had been to baldly prevent all union contact with employees, a development that would have represented a "major key" departure from the statute.

2. Who Is a Supervisor (and Therefore Not an Employee) - The Case of Nurses

The courts have continually second guessed and refused to defer to the NLRB on the question of whether workers, especially nurses, are supervisors within the meaning of the NLRA. The question is important because supervisors have almost no rights under the NLRA and can play no part in encouraging unionization of health care facilities. Deference is admittedly an imprecise enterprise, and courts may occasionally, or even more than occasionally, disturb agency interpretive decisions. 137 However, the U.S. Supreme Court, twice in a mere seven-year period, disturbed highly fact-sensitive NLRB decisions on supervisory status under the NLRA. 138 This failure to defer to the NLRB is noteworthy given the infamously muddled statutory definition of "supervisor." 139 If ever a court were to defer to an agency, one would think it would do so in connection with cases interpreting such a definition. 140 A nurse who is a supervisor is not an employee within the meaning of the NLRA. 141 Each decision to classify a nursing job as supervisory has the effect of deregulating the workplace with respect to nurses falling within the classification. 142 Although decisions overturning NLRB [\*455] findings of supervisory status have always seemed to represent a broader, calculated, deregulatory agenda, in no area has this agenda been as strong as in the healthcare industry. 143

Frankly speaking, as an administrative law professor, I think the Court's decisions reviewing the NLRB's factual assessments of the supervisory authority of nurses defy principles of "substantial evidence" 144 applicable generally to administrative adjudications. 145 The decisions considered together represent theoretical embarrassment for administrative law and practical confusion for the NLRB and for the repeat players appearing before the agency. I focus on the area of supervisory findings because it was so striking to me in practice that individuals found to be supervisors were not "truly supervisory" and that everybody involved in day-to-day labor relations matters knew it. 146 Thus, I am not as interested in doctrinal parsing as I am in the pervasive sense among workers and labor lawyers that the courts have completely lost the thread of workplace reality.

Charge nurses, for example, "are nurses who have some oversight responsibilities in addition to performing patient care." 147 The basic problem has been that such nurses historically possessed the scantest "supervisory" duties, especially in nursing homes or in the case of "Licensed Practical Nurses" ("LPN"). 148 I personally took affidavits from nurse-witnesses in several health care supervisor issue cases and developed a clear impression of their perceptions of the cases. In short, they told me that "charge" nurses were often "in charge" because no one else wanted to be in charge or because some nurses simply knew more about nursing than others. In many workplaces, charge-nurse duties are rotated, so that a relatively large percentage of nurses in a facility have at one time or another been "in charge." [\*456] If a charge nurse is a supervisor, a facility could end up with a large number of supervisors. 149

Findings of nurse supervisory status hamper union-organizing efforts in at least two ways. First, supervisors are by definition not "employees" under the NLRA, so a potential bargaining unit is stripped of eligible members. Second, it is not permissible for supervisors to become involved in organizing activity on behalf of unions. 150 If it is found that they have become involved in such activity, any election in which a union has prevailed might be set aside and rerun. 151 Because a union cannot know in advance if the NLRB or the courts will ultimately find putative supervisors to be supervisors, it conducts at its peril an organizing campaign in which there are disputed supervisory classifications. 152 The resulting chilling impact on organizing activity is entirely foreseeable and tactically intended.

When courts refused to defer to the NLRB on nurse supervisory determinations, practitioners understood immediately that mere employer assertions that apparent employees are supervisors could paralyze NLRB proceedings. I was at the NLRB when some of the supervisory cases were being decided and witnessed some of the chaos first-hand. Pre-election hearings assessing the status of purported supervisors were among the most tedious over which I had the occasion to preside. It was widely perceived, for example, that changed definitions and agency delay carried the potential for reversing increased union density in the nursing profession, intensifying hearings on the issue. 153 The impetus for the chaos was the courts' de facto insistence on ignoring administrative law deference canons. 154

Nevertheless, I regard all of this confusion as only minor key disregard of statutory music because the statutory definition of "supervisor" was already explicitly muddled in a way that invited judicial mischief. The courts' narrowing impulses are in significant measure a function of the statute itself. The development would probably not have been possible if there were a [\*457] clearer statutory definition of "employee," despite the impression among many health care workers that a health care employer could simply hand a nurse a clipboard one night a month and convert him to a "supervisor," when everyone knew he was not. From the perspective of nurses sympathetic to unions, the game may feel rigged. But the supervisory definition is the responsibility of the divided Congresses of 1935 and 1947 and their failure to provide clarity. The courts did not break the definition; it was already broken by the manifest legislative gridlock of the era.

B. Minor Key II: Preemption and Implied Repeal

Also evincing judicial disregard for labor law "statutory music" has been, speaking broadly, the tendency of courts to allow narrower policies embedded in sundry federal laws to "trump" the much broader policies of federal labor law. The resulting evil is that in the eyes of the broader society, NLRA policy is denigrated. The NLRA can be seen "competing" with statutory regimes of much more recent vintage and of far more limited impact and "losing" in the competition. The development has been effectuated in part through the thrusting aside of Garmon preemption 155 principles in favor of what is a dramatic over-reading of "the independent federal remedy" exception, as articulated in cases like Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100. 156 "As a general rule," San Diego Building Trades Council v. Garmon establishes that "federal courts do not have jurisdiction over activity which "is arguably subject to § 7 or § 8 of the [NLRA],' and [in such cases] they "must defer to the exclusive competence of the National Labor Relations Board.' " 157 The purpose of the rule is to discourage development of inconsistent labor policy arising from a welter of tribunals. 158 Garmon itself did not concern a clash between federal policies but involved a conflict between state and federal policies. But Garmon's primary jurisdiction language was sweeping and seems generally applicable to federal courts entertaining suits in which there is conflict between federal statutory policies and the NLRA.

As I will discuss momentarily, this matter has not been resolved. Garmon broadly instructed that, where conduct was arguably protected or prohibited by the NLRA, the NLRB, and not the states, should serve as the forum for disputes arising out of the conduct:

When it is clear or may fairly be assumed that the activities which a State [\*458] purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. 159

This begs the question of when conduct is arguably protected or prohibited by the NLRA. As to that question, the Court in Garmon held that the determination was for the NLRB to make.

At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 [of the NLRA] or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board. 160

Under cases following Connell Construction, however, a competing principle 161 applicable to conflicts between federal statutes has arisen that "federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies." 162 It is far from clear, however, when a labor law question is a "collateral issue" in a suit brought under an "independent federal remedy." More precisely, it is not clear what the court in Connell Construction meant by the term "collateral" issue. Considered in its broadest sense, "collateral" might mean simply an accompanying issue. That is, any time cases are brought under non-NLRA federal statutes possessing non-NLRA remedies, federal courts - rather than the NLRB - may take or retain jurisdiction of the cases, presumably even if conduct implicating Sections 7 or 8 of the NLRA predominates. If that is all collateral means, then the rule of Garmon will necessarily be defeated. The only reason underlying conduct is ever arguably protected or prohibited by Sections 7 or 8 of the NLRA is that it emerges in the context of some other law that might also apply. The independent remedy rule seems to stand Garmon on its head by establishing a per se rule working in the opposite direction: If other federal statutes arguably apply to cases also involving labor issues, federal courts have virtually unfettered license to assume or retain jurisdiction and decide those issues. The presumption made in Garmon, however, was that courts would be far less likely to produce uniform labor policy than the NLRB.

[\*459] I suppose that makes sense if one assumes, as many do, that the Court in Garmon was only addressing conflicts between state and federal law. That is a difficult notion to accept because the Court specifically referenced federal courts, and not just state courts, deferring to the exclusive competence of the NLRB. 163 In Vaca v. Sipes, 164 for example, Justice White, while acknowledging that Congress had carved out various exceptions to strict application of the Garmon primary jurisdiction rule in both federal and state court contexts, presumed that the rule applied to federal courts, that it continued to be vital, and that exceptions to the rule must take into account "the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." 165 Similarly, in Communication Workers of America v. Beck, 166 Justice Brennan cited Garmon reflexively in considering whether a claim that a union had violated its federal common law "duty of fair representation" was required to be heard preliminarily by the NLRB. He appeared to assume without analysis that the NLRB would have exclusive jurisdiction of the claim in the absence of a qualifying independent federal remedy. 167 At a minimum, Garmon, Vaca, and Beck stand for the proposition that the Garmon rule is presumptively applicable to federal courts. In deciding whether the Garmon presumption is rebutted by the independent federal remedy rule, it appears that courts must consider labor policy explicitly and balance it with facially-conflicting federal statutes when deciding cases under those statutes. Of course, courts would have had no reason to develop an independent federal remedy exception in the first place if no good argument existed that Garmon did not apply to federal courts and to conflicts between the NLRA and other federal statutes.

Assessing the independent federal remedy exception on its own terms produces instant difficulty once the term "collateral" is subjected to adequate scrutiny. Black's Law Dictionary, for example, defines "collateral" as "supplementary; accompanying, but secondary and subordinate to[; e.g.,] whether the accident victim was wearing a seat belt is a collateral issue." 168 If the independent federal remedy exception to Garmon were interpreted according to this definition of "collateral," courts would be limited to deciding labor issues that were "secondary" or "subordinate" to a given case. The purpose of such a rule might be to prevent avoidance of NLRB jurisdiction and forum shopping through artful pleading, a possibility hinted at by Justice Brennan in Beck. 169 Presumably, courts would defer to the NLRB [\*460] for resolution of those cases in which labor issues were not merely secondary or subordinate to the case.

A superlative example of how failure to apply careful preemption analysis to cases containing obvious labor issues can produce suspect results is the Third Circuit's decision in Pichler v. UNITE. 170 In Pichler, eight employees of Cintas Corporation, and five of their relatives, alleged that the Union of Needletrades, Industrial & Textile Employees AFL-CIO ("UNITE") recorded license plate numbers from vehicles parked outside of Cintas's Allentown, Pennsylvania, facility while engaging in a protected union organizing drive of Cintas employees during the winters of 2003 and 2004. The plaintiffs alleged that the union used the license plate numbers to retrieve the addresses of the vehicles' owners from Pennsylvania motor vehicle records and then contacted the owners at their homes to try to persuade them to join the union. The plaintiffs alleged that the conduct violated the Drivers' Protection Privacy Act ("DPPA"), a statute meant to stem the increase in opponents of abortion rights using public driving license databases to track down and harass abortion providers and patients.

License number collection has been thought of as garden-variety labor activity. 171 It became more important after the U.S. Supreme Court barred non-employee union organizers from employers' property in the Lechmere case. 172 The Court in Lechmere explicitly mentioned license number collection as one of the methods the union used to gain access to employees. The Court was satisfied that the union in Lechmere had reasonable access to employees in part because of its ability to collect license plate information, notwithstanding the barring of non-employee union organizers.

The court in Pichler not only failed to balance what appeared to be competing federal policies, but it also explicitly refused to accord NLRA policy any weight at all. In this regard, the court failed to devote any discussion to the NLRB's historical treatment of the organizing conduct that the court acknowledged was at issue. 173 If one did not know better, one might assume that no "legitimate" countervailing labor law considerations existed. 174 The court never cited to Garmon and never made reference to the independent federal remedy exception. 175 As the dissent observed,

[\*461]

It is important to note that there is nothing illegal about efforts to organize a union. It is one of the activities protected by our labor laws. There is no indication that the need to obtain names and addresses of employees for the purpose of unionization was ever brought to Congress' attention when it drafted the DPPA. 176

In light of the court's failure in Pichler to even consider balancing statutory policies, one is driven to the realization that the court may have concluded, sub silentio, that the DPPA had implicitly repealed sections of the NLRA affording protection to activities arguably protected or prohibited by the DPPA. 177 To be sure, courts sometimes find under an implied repeal theory that specific provisions of later statutes must prevail over general provisions of earlier statutes. In contrast, as the Third Circuit itself has recognized, courts should, in the absence of clear congressional intent to the contrary, make every attempt to reconcile competing federal statutory policies. 178 As the U.S. Supreme Court stated decades ago,

The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication: (1) Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment. 179

Only the first category could apply under the facts in Pichler. The Third Circuit might have attempted to show that the NLRA and the DPPA were in irreconcilable conflict on the question of driver license plate information [\*462] collection. It might also have attempted to show that Congress had a clear and manifest intention to repeal the portion of the NLRA authorizing union organizers to collect driver information. It did neither. It made no attempt to reconcile NLRA and DPPA policies. Moreover, the court below admitted that it could discover no congressional intent with respect to the interplay between the NLRA and the DPPA. 180 It merely argued that because union organizational activity was not explicitly exempted from the general prohibition on collecting driver information under the DPPA, the union activity was flatly prohibited, just like any other activity not arguably protected by a federal statute. 181 The point of Garmon, however, is effectively to provide the NLRB a role in developing federal labor policy precisely because courts are often unwilling or unable to do so. Pichler demonstrates the wisdom of the rule - without it, NLRA reconciliation would probably never occur.

While I have been focusing on Pichler, a particular federal appellate court case, Professor Cameron has made similar points quite effectively in the course of critiquing the U.S. Supreme Court's infamous opinion in Hoffman Plastic Compounds, Inc. v. NLRB. 182 According to Professor Cameron,

Except for some narrow but significant changes made in 1984, Congress has enacted no substantive reforms of federal labor policy since 1959. But the Supreme Court has. Seizing on purported conflicts between the NLRA and other federal legislation, the Court periodically has taken advantage of this repose to "enact" its own substantive policy choices. In selected cases, the Court has set up an apparent conflict between the NLRA and some other federal legislative scheme, then resolved that conflict by effectively abrogating federal labor policy in favor of federal "other" policy. Typically, the majority dresses its rationale in the clothing of true congressional intent, and dismisses as the ravings of an incompetent bureaucracy any views to the contrary expressed by the National Labor Relations Board. 183

Professor Cameron points to Connell Construction as one example of this abrogation, 184 and, as should be clear at this juncture, I agree. Despite Pichler not relying on, or even citing, Connell Construction, the spirit of Connell is manifest. The independent federal remedy exception to Garmon creates a slippery slope. Once it is vaguely permissible for labor cases to escape the labor paradigm, anomalies like Pichler are sure to follow. 185

[\*463] I raise the statutory conflict issue, and focus particularly on Pichler, because of the impact such cases can have on the general public and in the world of practice. I cannot explain Pichler in a doctrinally credible manner to supporters of the labor movement. How can a drivers' privacy statute, not aimed at labor organizing and of very recent vintage, be applied to stifle the longstanding statutory right of employees to engage in accepted labor organizing activities like collecting drivers' license information? It was obvious that the purpose of the activity was to contact employees to solicit them for union membership and support. I am also unable to teach law students about cases like Pichler without transmitting to them the reality of a legal hierarchy in which labor law is simply unimportant. I nevertheless conclude that these developments, while important, are properly assigned to the minor disregard category. While incrementally devolutionary, the erosion occasioned by assigning the NLRA a status of relative unimportance in instances of statutory conflict does not rise to the level of major key like Brady does.

#### Hoffman made immigration status legally relevant to workplace rights litigation. The plan allows workers to assert their rights without risking deportation.

Keith Cunningham-Parmeter 08 - Assistant Professor of Law at Willamette University. “Fear of Discovery: Immigrant Workers and the Fifth Amendment,” Winter 2008, Cornell International Law Journal 41(1), pp. 27-82.

In conjunction with their arguments that Hoffman applies to all types of employment claims, employers have adopted aggressive discovery practices designed to uncover plaintiffs' immigration status. In California, Juan Flores represented a class of janitors who alleged that Albertsons, Safeway, and other supermarkets failed to pay workers overtime and other wages. 10 2 The supermarkets served Flores with the following document request: "Each and every [document] describing, reflecting, referring to or relating to the immigration status of [Flores], including but not limited to 1-9 forms."'1 3 In a class action that immigrant garment workers in New York brought for unpaid minimum wages, Donna Karan International sought discovery of the plaintiffs' immigration status. 10 4 Hilton Hotels demanded to know the immigration status of a steamfitter who sued to recover lost earnings after sustaining an injury at the New York Hilton. 0 5

Defendants now pose status-based questions to immigrant employees as a matter of course.' 0 6 The stated purpose of these requests is to pursue the defendant's argument that Hoffman imposes new remedial limitations on unauthorized immigrants. More important, however, the questions send an ominous signal to the plaintiff immigrant: If you continue to assert your workplace rights, you will reveal your illegal presence in the United States and risk deportation. 10 7 Faced with this choice, the unauthorized immigrant will often choose to walk away. 10 8 102. Flores v. Albertsons, Inc., No. 01 Civ. 00515, 200

Unauthorized immigrants are acutely aware of their tenuous presence in the United States. 10 9 Long before Hoffman, the greatest force preventing immigrants from asserting employment claims was the unavoidable association of complaining with removal-a consequence far more life-altering than mere discharge. Even without the prospect of status-based questions clouding litigation, unauthorized immigrants often chose to remain silent in the face of egregious workplace violations.' 10 The fear is justified; studies suggest that immigration raids are more likely to occur at workplaces where immigrants have lodged complaints. 1'

In addition to causing unauthorized immigrants to abandon litigation, questions about status dissuade lawful permanent residents from going to court. These legal immigrants often live in "mixed families" in which some family members are U.S. citizens and others are unauthorized immigrants. 1 2 If litigating workplace claims entails extensive discovery about status, many of these legal immigrants will decline to sue in order to avoid answering invasive questions about their families and themselves. 1 13

The opt-out phenomena caused by status-based discovery reaches a sizable percentage of the workforce. Immigrants represent roughly 15% of the civilian labor force, 114 accounting for nearly one-half of the growth of the workforce between 1990 and 2001.115 With more than 400,000 unauthorized immigrants coming to the country annually,1 16 they now eclipse the number of new legal immigrants. 1t 7

Beyond unauthorized immigrants, status-based discovery also harms citizens by diminishing litigation market conditions. The Supreme Court has stated that unauthorized immigrants' willingness to accept lower wages depresses market pay rates and harms working conditions for citizens.' 18 Although economists and policymakers debate this conclusion, there is no doubt that an immigrant applicant holds some competitive advantage in the labor market over a similarly situated citizen if the only difference between the two is their willingness to someday assert workplace claims. As a growing segment of the workforce refuses to sue for employment law violations, citizens who complain become more costly relative to their silent immigrant coworkers. In addition, immigrants' unwillingness to sue weakens the enforcement scheme of many employment statutes. 11 9 From combating sweatshop conditions' 20 to investigating labor law violations 121 and enforcing wage laws, ' 22 many federal agencies rely almost entirely on employee complaints. For example, federal anti-discrimination statutes depend on private attorneys general to assert claims in court to promote nondiscrimination in the workforce, "a policy of the highest priority."'123 Continued unabated, the current rate of Hoffman-caused immigrant opt-out will eventually clear the courts of most immigrants, leaving unreported "countless acts of illegal and reprehensible conduct." 124

#### That’s true regardless of other protections. Status discovery is a worthwhile litigation practice for employers, which alone chills worker claims.

Keith Cunningham-Parmeter 08 - Assistant Professor of Law at Willamette University. “Fear of Discovery: Immigrant Workers and the Fifth Amendment,” Winter 2008, Cornell International Law Journal 41(1), pp. 27-82.

Faced with Hoffman-inspired questions about status, immigrants most commonly seek protective orders under Federal Rule of Civil Procedure 26(c). In its broadest form, the protective order bars defense counsel from making any discovery request related to the plaintiffs immigration status.140

In cases involving plaintiff immigrants who seek protection from status-based questions, courts have balanced the public and private interests in the enforcement of employment protections against the employer's need to know the plaintiffs status. 141 The more evidentiary value the court places on status, the more reticent the court will be to issue the protective order. Courts tend to prohibit status-based inquiries during the liability phase of discrimination cases 142 and throughout wage cases. 143 Nevertheless, as in cases attempting to expand Hoffman beyond the NLRA, courts have not ruled uniformly in favor of plaintiff immigrants.

In Colorado, six Chilean cattle herders asserted wage and other claims against their employer and sought a protective order prohibiting document requests or deposition questions related to their immigration status. 14 4 The trial court determined that as temporary guest workers, the plaintiffs had placed their immigration status at issue and that status-based discovery was relevant to the employer's mitigation-related defenses. 145 The court ordered the plaintiffs to state whether or not they were legal immigrants, holding that their privacy interests could be protected by limiting dissemination of their answers to the parties and court.146 Other courts have found immigration status relevant to workers' compensation and workplace discrimination claims. 1 47 The cases thus present mixed results in which most courts forbid status-based discovery, while others refuse to bar immigration-related questions.

Given their tenuous status in the United States, unauthorized immigrants place a premium on maintaining an inconspicuous presence. Because the public nature of litigation runs counter to this interest, the unauthorized immigrant is naturally averse to vindicating her workplace rights in court. Any litigation tactic that increases public attention decreases the likelihood that the unauthorized immigrant will come to court or remain in a lawsuit already filed.

Protective order litigation cannot be harmonized with the unauthorized immigrant's central concern for anonymity. In fact, the order fails to serve the immigrant's key litigation interests, including a desire for speedy, consistent, and complete protection from status-based inquiries. An analysis of Rivera v. NIBCO, Inc. 148 -the gold standard in protective order litigation for unauthorized immigrants-demonstrates the weak nexus between the order and the immigrant's litigation interests. Rivera involved twenty-three female production line workers with limited English proficiency who alleged that their employer engaged in national origin discrimination by requiring them to take a basic job skills examination in English-a requirement allegedly unrelated to actual job performance. 149 On May 14, 2001, the employer deposed plaintiff Martha Rivera, who refused to answer questions related to her immigration status. 150 Rivera's position triggered a series of briefs, arguments, and written opinions, eventually resulting in a strong protective order for the plaintiffs. The Ninth Circuit affirmed the protective order in 2004,151 and the Supreme Court denied review in 2005.152 In sum, after four years, a dozen briefs, several hearings, and five orders, the courts finally assured Martha Rivera that she would be "protected" from answering questions about her immigration status. The protection was undercut shortly thereafter, however, when the trial court ruled on remand that Rivera would have to disclose her status to facilitate the court's in camera damages calculation. 153

Unlike Rivera, most protective orders do not take years to obtain; in jurisdictions where parties have frequently litigated post-Hoffman discovery issues, courts may issue protective orders relatively quickly. Nevertheless, an employer who so chooses can often turn protective order litigation into a protracted and costly legal battle.154 The extended timeline fails to serve the plaintiff's interest in swift adjudication, further discouraging immigrants from enforcing their workplace rights in court.

Even if a plaintiff immigrant obtains a protective order quickly, information protected at the early stages of discovery becomes vulnerable to disclosure as the trial nears. 15 5 For example, in Flores v. Albertsons, the trial court denied the defendant grocery stores' efforts to discover the class representatives' immigration status but made the ruling "without prejudice" in order to allow the court to "revisit" the issue later in the litigation. 156 Likewise, although Donna Karan International lost its initial attempt to discover the immigration status of the plaintiff immigrant gar ment workers, the court permitted the clothing designer to seek leave to renew the discovery request at a later juncture. 15 7

Protective orders cannot meet the immigrant's interest in anonymity, speed, or consistency when courts wait until late stages of the litigation to determine whether status is relevant. The cases most likely to yield early protection from status-based questions involve lost wages for past work. 158 Given the long line of decisions holding that status is irrelevant to these claims, 15 9 courts are likely to issue broadly worded protective orders that maintain their vigor throughout the case. The outcome is far less clear in Title VII and other cases involving wages for lost work. The trend is to prohibit disclosure early, while leaving open the possibility that status will become relevant later in the litigation. 160

Courts are empowered to bar discovery of even relevant matters.161 Thus, if an employer attempts to enter the "shadow zones of relevancy" regarding an immigrant's status, the court is well within its authority to limit discovery, 16 2 because such disclosure would have a chilling effect on immigrant plaintiffs. Nonetheless, given the policy of liberal discovery underlying the Federal Rules of Civil Procedure, 163 courts tend to require parties to disclose information that is even tenuously relevant. 164 If the court ultimately determines that a plaintiff’s unauthorized status eliminates or significantly reduces an employer's exposure, the court is much more likely to limit the scope of dissemination, rather than ban discovery altogether. 16 5

The immigrant's interest in certainty is disserved not only by courts that initially protect information about status and then order disclosure but also by those that first require disclosure only to be reversed. This "reveal, protect" chronology has occurred in cases involving sexual harassment, unpaid wages, and medical malpractice, with immigrants receiving "protection" on appeal many months or years after being ordered to disclose their status.166 In Flores v. Limehouse, for instance, immigrant plaintiffs alleged that their employer failed to pay wages and retaliated against them by threatening deportation. The plaintiffs obeyed a court order and admitted that they were unauthorized immigrants who submitted false employment documents to the Social Security Administration. 16 7 After forcing the plaintiffs to run this disclosure gauntlet, the court ruled that the plaintiffs' immigration status was irrelevant to their claims. 168

Beyond failing to satisfy the immigrant's interests in speed, consistency, and certainty, protective orders typically fail for lack of completeness. Rule 26(c) grants courts wide discretion in determining the nature of the protection afforded to plaintiffs. 169 Of the eight courses of action listed in the Rule, only one mandates that "discovery not be had.' 170 Most of the other options allow the discovering party to obtain the information sought but limit the scope of the inquiry or the breadth of disclosure. The court will often seek to strike a balance by limiting the number of questions or the size of the audience privy to the answers. Under these scenarios, however, the plaintiff still must answer some status-based questions. 17 1 Thus, even when motions for protective orders succeed, the end result often fails to broadly prohibit questions related to status, both directly and indirectly. t 7 2 Other courts, although refusing to consider a plaintiffs status for liability purposes, allow juries to consider immigration status when calculating damages for lost earnings.' 73 Still others require immigrants to reveal their status to employers under a protective order that confines disclosure to the parties and the court. 174

Telling unauthorized immigrants that their employer cannot ask questions about their immigration status but can ask questions about where they were born or what paperwork they used to obtain employment, recognizes the intimidating potential of status-based inquiries but does not diminish their effect. Likewise, limiting dissemination of status-based information to the parties does not negate the chilling effect of the disclosure or prevent the government or third-parties from accessing the information.175 With their interests in anonymity, consistency, and completeness rarely served by protective orders or other strategies pursued by advocates, 176 immigrant plaintiffs currently lack an effective approach for responding to post-Hoffman discovery.

#### Trump’s deportations are a feature of a broken system. Hoffman solves the root cause.

Risa L. Lieberwitz 19 - Professor of Labor and Employment Law in the Cornell University School of Industrial and Labor Relations. “Work-Related Immigration Policy in the United States: Past and Present Problems,” 2019, Revue de droit comparé du travail et de la sécurité sociale, vol. 4, pg. 114-125.

The 2016 election of Donald Trump as president of the United States has placed increased focus on US immigration policies, largely due to Trump’s anti-immigrant rhetoric initiating his political campaign and continuing into his presidency. The Trump administration’s strategy is built on a foundation of racism, xenophobia, and islamophobia that scapegoats immigrants of color, and in particular, immigrants from Latin America and Muslim-majority countries. The administration has carried out its strategy by escalating US Immigrations and Customs Enforcement (ICE) raids and deportations of unauthorized immigrants residing in the US, adopting broad bans on entry into the United States from certain Muslim-majority countries, and intensifying an obsession with «security» along the US-Mexico border. The Trump administration’s anti-immigrant rhetoric includes racist statements used to assert that immigrants of color pose a national security threat. Trump’s ability to achieve such success through these attacks, however, should also be analyzed in relation to the existing problems in US immigration policies, which have created overly stringent restrictions on immigration into the US and have failed to protect the rights of immigrants working in the US.

This article examines current US work-related immigration policy, which was in effect prior to the Trump’s election and which is deeply flawed. Such long-term policies have resulted in an immigration system that places unfair restrictions on authorized temporary guest workers while in the US, creates incentives for employers to exploit workers, and creates conditions in which authorized and unauthorized immigrant workers experience violations of their employment rights but are afraid to file legal complaints. This article discusses the long-term immigration policies that have resulted in these problems and the need for legal reform of the US immigration system (I). The article also critiques the Trump administration’s anti-immigrant policies and programs, which have exacerbated pre-existing problems and created a new level of hostility toward immigrants (II).

I - Work-related immigration policy in the United States

A - Categories of visas

As of 2012, immigrants residing in the US made up about 13 percent of the US population. Slightly less than half of these 40 million immigrants are naturalized US citizens1. US immigration law creates categories of visas, including those that authorize employment in the US. «Employment-based» immigrant visas, also known as «preferences», grant legal permanent resident status and create an eligibility for citizenship after five years in that status2. In most cases, a US employer files a petition for the visa on behalf of the worker, based on the individual’s abilities in high-skilled areas such as science and research3.

In contrast, temporary or «nonimmigrant» visas include the «H» category that authorize the individual to work for a set period of time, usually for approximately ten months for a specific employer and renewable in one-year increments for up to three years4. These include H-2 «guest worker» programs, generally in low-wage, lower skilled jobs, for temporary agricultural work (H-2A visas) and for temporary non-agricultural work in seasonal industries, including seafood processing, construction, hotels, and national disaster recovery work (H-2B visas)5. There is no regulatory limit on the annual number of H-2A visas, but there is a cap on H-2B visas. Approximately 100,000 H-2A and 66,000 H-2B temporary work visas are issued per year6, although in 2019, the Department of Homeland Security increased the H-2B annual limit by an additional 30,000 visas7. Workers on temporary H-2 visas lose their authorized visa status if they change employers8.

Another temporary work visa, the H-1B visa, is designed for higher skilled workers in specialty occupations requiring a college degree or equivalent, particularly in the information technology industry9. There is a statutory cap of 65,000 H-1B visas per year, although more are often issued under exceptions to the cap10. The H-1B visa has advantages over the H-2A and H-2B visas, as H-1B visa holders may change employers while in the US and are provided with opportunities to apply for resident status and eventual citizenship in the US11. Although J-1 visas, which are temporary visas, are part of a federal cultural exchange program, they also include low-wage work in occupations such as au pairs, maids and housekeepers12.

Some visa categories are not considered «employment-based» but permit the individual to be employed in the US. These include visas based on refugee status, diversity (lottery) visas, or visas granted because of a family relationship with a US citizen or legal permanent resident13.

B - Systemic flaws in the temporary visa programs

The system of guest worker programs in the US has long been criticized as deeply flawed, plagued by some of the same problems of exploitation and abuse as the US «Bracero» agricultural guest worker program that existed from 1942 to 196414. The current H-2A and H2-B guest worker program was created by the 1986 federal Immigration Reform and Control Act (IRCA)15, which amended the H2 program in the 1952 Immigration and Nationality Act16. The central problem is the control of employers over the H-2 guest workers, which creates what critics refer to as a system of «indentured servitude»17. This control is built into the structure of the H-2 program, which prohibits H-2 guest workers from changing employers in the US. Employers reportedly routinely abuse this control through actions such as confiscating workers’ identity documents and threatening workers with deportation18.

Another flaw of the H-2 guest worker program are the low-wages. Although federal regulations require employers to pay H2 workers either a «prevailing» or «adverse effect» wage rate, in practice many employers pay lower rates, even less than the federal minimum hourly wage of $7.2519. Moreover, guest workers are victims of other forms of «wage theft» by employers who underreport the hours worked, fail to pay for overtime, make deductions from workers’ pay, or fail to reimburse workers for their travel and visa expenses20. Similarly, the «indentured» nature guest workers’ employment make them vulnerable to other violations of US labour law, including unsafe working conditions, and discrimination based on race, national origin, and union activities21. Further, many guest workers’ economic conditions are worsened by having gone into debt to pay high fees to labour recruiters who act as middlemen for US employers22. Given these conditions and their complete dependence on their employer, guest workers fear retaliation from their employer, including discharge or being blacklisted from future employment, if they file complaints about violations of their labour rights.

These structural flaws of H-2 guest worker programs are intertwined with class, race, and gender-based systemic inequalities. In the US workforce, women and people of color are significantly more likely to earn poverty-level wages than are white men23. Women, minorities, and immigrants are overrepresented among low-wage workers24. The H-2 guest worker programs reveal the same impact of race, gender and class-based inequalities. About 80 percent of H-2 workers come from Mexico25. Race and gender inequalities also affect migrant workers through the exclusions of certain categories of workers from basic labour rights in the US. The Fair Labor Standards Act of 1938 (FLSA)26 excludes agricultural workers and domestic workers from overtime pay provisions27. The exclusion of agricultural workers and domestic employees from coverage under the National Labor Relations Act28 leaves these low-wage employees without federal statutory rights to unionize, collectively bargain, or engage in other protected concerted activity. These statutory exclusions were made as concessions to southern congressmen in exchange for their support of New Deal legislation29. The exclusions have a disproportionately negative impact on women and people of color, including guest workers, who are heavily concentrated in agricultural and domestic labour.30 Both the FLSA and NLRA exclude «independent contractors» from protection31. This may have a negative impact on workers in the H-2B non-agricultural jobs program, particularly where employers seek to avoid legal obligations by misclassification of employees32.

Although the J-1 visa cultural exchange program has received broad positive support, there have also been problems with exploitation, subjecting J-1 visa holders to labour abuses similar to H-2 workers33. Some employers have used J-1 visa holders as substitutes for low-wage labour that would have been held by H-2B workers34. In other cases, J-1 visa holders have experienced extremely poor working conditions in J-1 positions, such as au pair jobs35.

While H-1B visas have significant advantages over H-2A and H-2B visas, including higher wages in skilled jobs, the ability to change employers in the US, and the opportunity to apply for permanent resident status, there have also been problems with enforcement of labour rights in the H1-B program36. This is, in part, due to the dependency of H1-B visa holders on their US employers to sponsor them for permanent resident status37.

C - Labor conditions and violations of rights of undocumented workers

Individuals with temporary work visas account for only a small percentage of migrant workers in the US. It is estimated that there are about 11 million unauthorized immigrant workers - that is, without required work visas - in the US38. Most of these are low-wage and low-skilled workers39 who have lived in the US for many years40. They work throughout the US across a broad range of industries, including agriculture, meatpacking and poultry, construction, forestry and landscaping, domestic service, hotels, and restaurants41.

Without a work visa, undocumented workers are even more vulnerable to employer exploitation and abuse than are guest workers in the H-2 programs. Additionally, a Supreme Court decision in 2002 makes it more unlikely that undocumented workers will engage in union activities under the NLRA. Although undocumented workers are employees covered by the NLRA42, in Hoffman Plastic Compounds v. NLRB43, the Court severely restricted the NLRB’s power to award remedies to undocumented workers. In its 5-4 decision, the Court held that the NLRB was barred from awarding reinstatement or backpay to undocumented workers as a remedy for violations of the NLRA. The Court viewed such remedial awards as undermining the policies of IRCA, which «makes it unlawful for employers knowingly to hire undocumented workers or for employees to use fraudulent documents to establish employment eligibility»44.

As the four dissenting justices in Hoffman Plastic noted, the Court’s holding, in effect, immunizes employers from paying NLRA remedies where the employer commits unfair labour practices such as discharging undocumented workers for attempting to form a union45. As the dissent stated, a «backpay order [under the NLRA] will not interfere with the implementation of immigration policy. Rather, it reasonably helps to deter unlawful activity that both labour laws and immigration laws seek to prevent»46. In 2011, the NLRB applied Hoffman Plastic to hold that employers are not required to pay remedies even where they knowingly hire an undocumented worker and then commit an unfair labour practice against that worker47. The combined effect of these two decisions encourages employers to risk violating IRCA in exchange for the «benefit» of union avoidance48. Given the concentration of immigrant workers in low-wage jobs with poor working conditions, this will make unionization even more difficult in industries where there is the greatest need for unions and collective bargaining49. Undocumented migrant workers, fearing employer retaliation that may include ICE raids during union organizing campaigns, will be unlikely to assert their collective and individual rights under the NLRA, Title VII and other employment legislation50. Authorized workers, including H-2 guest workers, will also likely be afraid of being targeted for additional scrutiny51.