

The Borders of Collective Representation: Comparing the Rights of Undocumented Workers to Organize Under United States and International Labor Standards

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Introduction

IN THE UNITED STATES, THE BORDERS limiting a broad spectrum of workers' rights are established by the answer to a deceptively simple question: who counts as an "employee"?¹ An "employee" has recourse to the machinery of the legal system if she is denied the minimum wage;² equal treatment based on age,³ race, color, religion, or sex;⁴ and the right to organize a union.⁵ A non-"employee" has no

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1. See KENNETH G. DAU-SCHMIDT, MARTIN H. MALIN, ROBERTO L. CORRADA, CHRISTOPHER DAVID RUIZ CAMERON & CATHERINE L. FISK, *LABOR LAW IN THE CONTEMPORARY WORKPLACE* (2009).

2. See Fair Labor Standards Act of 1938, 29 U.S.C. § 203(e) (2006).

3. See Age Discrimination in Employment Act of 1967, § 11(f), 29 U.S.C. §§ 621, 630(f) (2006).

4. See Civil Rights Act of 1964, tit. VII, § 701(f), 42 U.S.C. §§ 2000e-3, 2000e(f) (2006).

5. See National Labor Relations Act, § 2(3), 29 U.S.C. §§ 151, 152(3) (2006) [hereinafter NLRA].

legal recourse. Whereas the former is recognized as a person with standing to invoke the protection of the law, the latter is not recognized at all. She is a nobody. And like all nobodies, she is left to fend for herself.

The National Labor Relations Act (“NLRA”) is the basic law in the United States guaranteeing the right of working people to organize unions. Under the NLRA, there are at least two methods by which a worker can be excluded from the definition of “employee.” The first is by statute; for sound or unsound policy reasons, the legislature may allow some workers to play the game while requiring others to sit on the bench. The second is by interpretation; either the administrative agency, or the courts charged with applying the statute in question, can choose to include certain workers within the definition of “employee” but exclude others.

An important example of the interpretation method of exclusion is found in *Hoffman Plastic Compounds, Inc. v. NLRB* (“*Hoffman Plastics*”),⁶ decided by the U.S. Supreme Court in 2002. In *Hoffman Plastics*, an undocumented worker named Jose Castro was fired in retaliation for distributing union authorization cards. Although this act of retaliation was an undisputed violation of section 8(a)(3) of the NLRA,⁷ the Court found Castro was not entitled to collect back pay. Back pay is a standard item on the menu of make-whole remedies typically served up by the National Labor Relations Board (“NLRB”) in retaliation cases. According to the majority,⁸ however, awarding back pay would subvert or trivialize federal immigration policy by rewarding an undocumented laborer for violating the extensive “employment verification system” codified by the Immigration Reform and Control Act (“IRCA”).⁹

As a result, *Hoffman Plastics* effectively, if not in so many words, excluded the undocumented worker from the statutory definition of “employee” under the NLRA.

The purpose of this Article is not to beat the *Hoffman Plastics* decision like some piñata; the overwhelming weight of scholarly commentary has already done that job.¹⁰ Besides, in 2003, the International

6. 535 U.S. 137 (2002).

7. NLRA, § 8(a)(3), 29 U.S.C. § 158(a)(3) (2006).

8. *Hoffman Plastics Compounds, Inc.*, 535 U.S. at 150.

9. Immigration Reform and Control Act of 1986, § 101(a)(1), 8 U.S.C. § 1324a(1) (1994).

10. *Hoffman Plastics* has generated substantial commentary. Disagreeing with me, most commentators worry that the decision will preclude workers from vindicating their rights under other employment law regimes. See Robert I. Corrales, *Did Hoffman Plastic Com-*

Labour Organization's Committee on Freedom of Association seemed to settle the matter under international law by finding that the *Hoffman Plastics* decision left the United States with insufficient remedies to ensure that undocumented workers are protected against anti-union discrimination.¹¹

Instead, the purpose of this Article is to explore whether the *Hoffman Plastics* way is the only way. The question is this: do international legal regimes approach the collective bargaining rights of transborder workers, like Jose Castro, in the same way as the U.S. Supreme Court?¹² Put another way, in any other context, are the labor rights of documented or "regular" workers treated differently in the United

pounds, Inc. *Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103 (2003); Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Law*, 36 U. MICH. J.L. REFORM. 737 (2003); María Pabón López, *The Place of the Undocumented Worker in the United States Legal System After Hoffman Plastics: An Assessment and Comparison with Argentina's Legal System*, 15 IND. INT'L & COMP. L. REV. 301 (2005); Maria L. Ontiveros, *Immigrant Workers Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651 (2005). One scholar raised fears about the effects a *Hoffman Plastics*-type decision would have even before *Hoffman Plastics* was decided. See Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 369 n.98 (2001). But I predicted—so far accurately—that the decision's legal impact on undocumented workers would "be confined mostly to the ever shrinking world of the National Labor Relations Act." Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 5 (2003).

The legal status of undocumented workers in the United States continues to generate substantial scholarly interest. See, e.g., Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U.L. REV. 1361 (2009) (constructing a framework for evaluating the spectrum of undocumented workers' rights, from rights that are acknowledged to those that are disputed); Kari L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL'Y J. 125 (2009) (providing an overview of the intersection between the federal immigration laws and various employment regimes, including the Fair Labor Standards Act and the Migrant Seasonal Agricultural Worker Protection Act).

11. Complaints Against the Government of the United States Presented by the American Federation of Labor and the Congress of Industrial Organizations ("AFL-CIO") and the Confederation of Mexican Workers ("CTM"), Report No. 332, Case No. 2227 (Oct. 18, 2002), available at <http://www.ilo.org/ilolex/english/casframeE.htm> (follow "by case" hyperlink; then follow "2200" hyperlink; then follow "2227 United States" hyperlink) [hereinafter Complaints Against the Government].

12. The argument that our courts should use international labor standards to interpret domestic statutes—a position that can be controversial in this country unless the United States has agreed to be bound by such standards—is beyond the scope of this Article. Instead, the focus here is on America's exceptionalism as demonstrated by the use of the term "employee" to set limits on the protections granted by national labor policy. The United States is not the only nation ambivalent about extending basic labor rights to undocumented workers. See, e.g., Graeme Orr, *Unauthorised Workers: Labouring Beneath the Law?*, in *LABOUR LAW AND LABOUR MARKET REGULATION* (Christopher Arup, Peter Gahan,

States from the labor rights of undocumented or “irregular” workers? The answer, as we shall see, is no.¹³

I. Who Counts as an “Employee” Under the NLRA?

Section 2(3) of the NLRA defines “employee” as follows:

The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or

John Howe, Richard Johnstone, Richard Mitchell & Anthony O’Donnell eds., 2006) (examining ambivalence in Australia).

13. Even in the United States, the logic of *Hoffman Plastics* has its limits. In at least five cases decided under the NLRA, *Hoffman Plastics* has been all but limited to its facts.

In one NLRB decision, the administrative law judge found that seven undocumented Latino bakery workers were entitled to back pay because there was no evidence they had engaged in fraud or criminal activity when their *employer* knowingly and illegally hired them. *Mezonos Maven Bakery, Inc.*, Case No. 29-CA-25476, 2006 WL 3196754 (N.L.R.B. Div. of Judges 2005). In reviewing another NLRB decision, the District of Columbia Circuit set forth that a kosher meat wholesaler had a duty to bargain with a union elected by a bargaining unit in which half the workers either lacked social security numbers or had numbers that did not match government records, which suggested the workers were undocumented. *Agri Processor Co.*, 347 N.L.R.B. 1200 (2006), *enforced*, 514 F.3d 1 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 594 (2008). In an Alabama case, the NLRB held that sections 8(a)(3) and (4) of the NLRA were violated when four undocumented Latino workers were discharged for voting in a representation election, and rejected the employer’s contention that the workers were ineligible to vote in the first place. *Concrete Form Walls, Inc.*, 346 N.L.R.B. 831 (2006), *enforced*, 225 F. App’x. 837 (11th Cir. 2007).

In one California case, a majority of the NLRB left these precedents undisturbed, but refused to find on the facts that the suspension and later discharge of a Latina worker due to an expired work permit was in retaliation for her service as a union observer during a representation election. *Int’l Baking Co. & Earthgrains*, 348 N.L.R.B. 76 (2006).

In another California case, the Ninth Circuit held that the NLRB was authorized to enforce a consent decree calling for a roofing company to reinstate and pay back wages to twenty workers fired in violation of the NLRA, even though many of them were undocumented. *NLRB v. C & C Roofing Supply, Inc.*, 569 F.3d 1096 (9th Cir. 2009).

Beyond the NLRA, virtually every decision reported by a court confronted with the possibility of using *Hoffman Plastics* to restrict the remedies or rights of undocumented workers under other employment regimes has refused to do so. In at least forty-four decisions reported after *Hoffman Plastics*, courts either refused to follow, declined to extend, distinguished, or recognized the limits of the holding in *Hoffman Plastics*. The reported decisions include state and federal claims for employment discrimination, minimum wages, prevailing wages, unemployment compensation, workers’ compensation, and workplace safety. In some cases, they also include employer demands for discovery of the plaintiffs’ immigration status, which were generally denied. For some examples of the forty-four cases, *see infra* note 90.

any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act¹⁴

By its express terms, section 2(3) is broad. It defines “employee” as “any” employee, and indicates the definition “shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise.”¹⁵ The statute does go on to exclude from the definition of “employee” a short but substantial list of various categories of worker. Though undocumented employees are not on this list, the listed exclusions have the effect of removing huge segments of the U.S. workforce from the protections offered under the NLRA.¹⁶ Indicative of their continuing importance, many of these exclusions continue to be the subject of much-noticed litigation.

For example, the exclusion of supervisors was arguably expanded by *Oakwood Healthcare, Inc.*,¹⁷ a 2006 decision by the NLRB. Interpreting sections 2(2) and 2(11) of the NLRA, the NLRB held that permanent charge nurses who direct the work of other nurses as a regular and substantial part of their duties are supervisors who are excluded from the protections of the NLRA.¹⁸ Advocates for organized labor complained the decision would transform potentially millions of rank-and-file employees into statutory supervisors. Of course, the question of who must be excluded as a supervisor remains of continuing importance due to the inevitable conflicts arising between a statute drafted to address the hierarchical industrial workplace of the mid-twentieth century and the demands of the flatter management hierarchies now so common in the twenty-first century workplace. The division between labor and management is no longer so clear.

Two other exclusions are of particular significance due to their disproportionate effects on an undocumented worker’s right to free association: agricultural laborers and domestic servants.

As to agricultural laborers,¹⁹ labor-management relations affecting millions of farm workers are carved out of the NLRA; they remain

14. NLRA, § 2(3), 29 U.S.C. § 152(3) (2006).

15. *Id.*

16. These exclusions have been extensively catalogued—and criticized. *See, e.g.,* Lance Compa, *Workers’ Freedom of Association in the United States: The Gap Between Ideals and Practice*, in *WORKERS RIGHTS AS HUMAN RIGHTS* 23–41 (James A. Gross ed., 2003).

17. 348 N.L.R.B. 686 (2006). *Oakwood Healthcare* was one of three important cases interpreting the supervisor exclusion. *See also* *Croft Metals, Inc.*, 348 N.L.R.B. 717 (2006); *Golden Crest Healthcare*, 348 N.L.R.B. 727 (2006).

18. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 699–700.

19. To be considered agricultural, an employee’s duties must form an integral part of ordinary farming operations, and such duties must be performed before the product can be marketed through normal channels. Employees engaged primarily in duties that serve

the exclusive province of the individual states in which they work.²⁰ Yet only four states—Arizona, California, Idaho, and Kansas—have passed agricultural labor relations statutes. These statutes are patterned somewhat after the NLRA, in that they provide for employee elections and unfair labor practice proceedings.²¹

As to domestic servants,²² a veritable army of babysitters, cooks, home healthcare providers, maids, nannies, and others who work primarily in the home are excluded from the NLRA. A substantial percentage of this group is undocumented. Perhaps this is why a growing number of home health care workers in selected states are gaining collective bargaining rights with “employers of record” established by legislation.²³

Since the 1980s, the Supreme Court has added a previously unlisted exclusion: undocumented workers. This development cannot be explained by the plain meaning of the NLRA. Section 2(3) defines “employee” as “any” employee, and “shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise.”²⁴ But nowhere does the subchapter containing section 2(3) “explicitly state[] otherwise” as to undocumented workers.²⁵ In fact, the NLRA makes no reference at all to the status of foreign nationals in the U.S. workforce.

Eleven million or more undocumented people are estimated to currently live in the United States;²⁶ the precise number is notoriously difficult to calculate. From 2000 to 2008, undocumented workers in this country have grown by thirty-seven percent.²⁷ Whether everyone

to increase the value of already-marketable products do not fall within the exclusion. Under this interpretation, workers engaged in packing, processing, refining, and slaughtering have found to be protected by the Act. *See Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996); *Bayside Enter., Inc. v. NLRB*, 429 U.S. 298 (1977).

20. Most of these states refer to common law principles, “little” Wagner or Norris-LaGuardia Acts, or both. *See, e.g., Bravo v. Dolsen Cos.*, 888 P.2d 147 (Wash. 1995).

21. *See, e.g., Babbitt v. United Farm Workers*, 442 U.S. 289 (1979). California’s Agricultural Labor Relations Act is one of the more comprehensive statutes. *See Agric. Labor Relations Bd. v. Super. Ct.*, 546 P.2d 687 (Cal. 1976).

22. A substantial amount of literature analyzes some of the gaps left by the statutory exclusion of domestic workers from labor and other protective legislation. *See generally* MARY ROMERO, *MAID IN THE U.S.A.* (2d ed. 2002).

23. *See* Stu Schneider, *Victories for Home Health Care Workers: Home Health Care Workers Get Organized*, *DOLLARS & SENSE*, Sep./Oct. 2003, at 25–27 (2003).

24. NLRA, § 2(3), 29 U.S.C. § 152(3) (2006).

25. *See id.*

26. MICHAEL HOEFER, NANCY RYTINA & BRYAN C. BAKER, DEP’T OF HOMELAND SECURITY, *ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2008*, at 1 (2009).

27. *Id.*

welcomes them or not, undocumented immigrants play an indispensable role in the American workforce.²⁸ Workers lacking papers constitute a huge fraction, if not a majority, of the labor found in many low-wage industries. Latinos, for example, increasingly dominate agriculture, culinary service, domestic employment, health care, janitorial service, and poultry processing.²⁹ Although most Latinos are legal residents, a substantial portion is undocumented and concentrated in low-wage work.

In theory, an undocumented worker should enjoy the same rights in the workplace that other workers do. The Supreme Court has held that such workers are indeed “employees” under the NLRA.³⁰ To this end, the District of Columbia Circuit Court has held that undocumented workers are entitled to have their votes counted in a representation election.³¹ The NLRB’s general counsel has taken a similar position.³²

In practice, however, the undocumented worker is treated differently. For example, it is hornbook labor law that workers discharged for engaging in union organizing, or other activities protected by the NLRA, are entitled to reinstatement and back pay to make them whole for their injuries.³³ Yet in 1984, the Supreme Court, interpreting the old Immigration and Nationalization Act,³⁴ held that undocumented workers must be denied the reinstatement remedy.³⁵ In 2002, the Court, attempting to reconcile the NLRA with the newer Immigration Reform and Control Act, added that undocumented workers must be denied back pay for the same reason.³⁶

As Part II demonstrates, the *Hoffman Plastics* way is not the only way. In fact, *Hoffman Plastics* is based on a distinction that is either

28. See Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089, 1091–93 (1999).

29. *Id.*

30. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892–94 (1984).

31. *Agri Processor Co.*, 514 F.3d 1, 2 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 594 (2008).

32. See Memorandum from Arthur F. Rosenfeld, General Counsel, NLRB, to All Regional Directors, Officers-in-Charge and Resident Officers, on Procedures and Remedies for Discriminates Who May Be Undocumented Aliens After *Hoffman Plastic Compounds, Inc.*, NLRB GC 02-06, B-3 (July 19, 2002) (declaring employee’s immigration status to be “irrelevant” in representation proceedings).

33. See, e.g., DOUGLAS L. LESLIE, *LABOR LAW IN A NUTSHELL* 95–96 (5th ed. 2008).

34. 8 U.S.C. § 1101, *amended by* Immigration Reform and Control Act of 1986 [hereinafter IRCA].

35. *Sure-Tan, Inc.*, 467 U.S. at 899.

36. *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 150 (2002).

unknown to, or explicitly rejected by, the framers of international labor standards codified in at least eighteen instruments, containing as many as thirty-one separate provisions, arguably protective of undocumented workers.³⁷

II. Who Counts as an “Employee” Under International Labor Standards?

The nomenclature attached to the world’s basic international labor standard is “freedom of association.” It includes, among other things, the rights to organize, bargain collectively, and strike. Freedom of association has long been acknowledged as a universal or fundamental right.³⁸

The specific labor standards associated with freedom of association are established in a widely accepted body of international norms. They flow from five sources of international law codified in at least eighteen separate instruments: (1) human rights instruments developed by the United Nations and related organizations; (2) conventions and other documents elaborated through worker, employer, and government representatives at the International Labour Organisation (“ILO”); (3) human rights instruments created by regional governmental bodies; (4) labor rights clauses in international trade agreements; and (5) the governing documents of the European Union. The United States has accepted obligations under some, but not all, of these instruments.³⁹

For the purposes of this Article, the key common feature of these eighteen instruments is that the term “employee” is not found in any

37. For a table listing each of these eighteen instruments, together with the thirty-one relevant provisions, see *infra* Appendix A.

38. I am indebted to Professor Lance Compa—whose influence is felt throughout this paper—for his comprehensive work summarizing the key international labor standards. See Compa, *supra* note 16, at 23–41. I am also grateful to the team of co-authors whose textbook enriched my knowledge of the field. See JAMES ATLESON, LANCE COMPA, KERRY RITICH, CALVIN SHARPE & MARLEY WEISS, *INTERNATIONAL LABOR LAW: CASES AND MATERIALS ON WORKERS’ RIGHTS IN THE GLOBAL ECONOMY* (2008); see also, ROGER BLANPLAIN, SUSAN BISOMRAPP, WILLIAM R. CORBETT, HILARY K. JOSEPHS & MICHAEL J. ZIMMER, *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW CASES AND MATERIALS LAW 288* (2007) [hereinafter *THE GLOBAL WORKPLACE*].

39. There have been prior published efforts to address the application of the international labor standards codified in many of these eighteen instruments in a systemic, albeit somewhat less comprehensive, way. See Sarah Cleveland, Beth Lyon & Rebecca Smith, *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Remedies Are Restricted Based on Workers’ Migrant Status*, 1 SEATTLE J. FOR SOC. JUST. 795 (2003); see also Jill Borak, *A Wink and a Nod: The Hoffman Case and Its Effects on Freedom of Association for Undocumented Workers*, 10 HUM. RTS. BRIEF 20 (2003).

of them.⁴⁰ Instead, the broader terms “everyone,” “[e]very person,” or “worker[]” are used.⁴¹ Except for United Nations Resolution 40/144, the eighteen instruments make no explicit attempt to differentiate between employees based on documented versus undocumented or regular versus irregular status.

A. International Human Rights Instruments

At least five instruments containing thirteen separate provisions establish international labor standards for undocumented workers by framing such standards in terms of human rights.

Article 20(1) of the Universal Declaration of Human Rights (“UDHR”) states: “Everyone has the right to freedom of peaceful assembly and association.”⁴² Moreover, Article 23(4) states: “Everyone has the right to form and to join trade unions for the protection of his interests.”⁴³ As noted above, freedom of association has long been considered a basic human right that includes the right to form, join, and seek the assistance of trade unions. One of the three founding documents of the United Nations, the UDHR was adopted by the United Nations General Assembly. Like all United Nations member nations, the United States is bound to the obligations created by the UDHR. (In fact, one of its co-authors was Eleanor Roosevelt.)

Article 22(1) of the International Covenant on Civil and Political Rights (“ICCPR”) declares: “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”⁴⁴ The United States ratified the ICCPR in 1992. In doing so, it took several reservations, understandings, and declarations limiting or avoiding various obligations in the covenant. Notably, it took no reservations, understandings, or declarations with respect to Article 22(1) on the right to form and join trade unions, or to Article 2(3) requiring an “effective remedy” for rights violations.⁴⁵

Article 8(1) of the International Covenant on Economic, Social, and Cultural Rights obligates governments to “ensure . . . the right of

40. Occasionally, however, the term “employment” is used to indicate a working relationship for remuneration. See *infra* Appendix A.

41. *Id.*

42. Universal Declaration of Human Rights, G.A. Res. 217A, art. 20(1), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

43. *Id.* art. 23(4).

44. International Covenant on Civil and Political Rights art. 22(1), Mar. 23, 1967, 999 U.N.T.S. 171 [hereinafter ICCPR].

45. *Id.* art. 2(3)(a).

everyone to form trade unions and join the trade union of his choice,” “the right of trade unions to function freely . . . [and] . . . the right to strike”⁴⁶ This instrument has not been ratified by the United States, but under principles of international law more generally accepted outside the United States, the country is considered bound to its standards anyway.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (“Migrant Workers Convention”) is one of the few instruments to deal specifically with the problems faced by persons working in “irregular” employment—that is, workers who do not have legal status in the countries in which they are living and working, including the undocumented.

Procedurally, Article 2(1) of the Migrant Workers Convention defines a “migrant worker” as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”⁴⁷ Article 25(1) states: “Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration”⁴⁸ Related to this, Article 25(3) states:

[Bound countries] shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.⁴⁹

Substantively, Article 26(1) of the Migrant Workers Convention guarantees “the right of migrant workers and members of their families . . . [t]o take part in meetings and activities of trade unions . . . [t]o join freely any trade union . . . [and] [t]o seek the aid and assistance of any trade union.”⁵⁰ Like the labor standards codified in other human rights conventions, the labor standards set forth in the Migrant Workers Convention are not absolute. Language found in Article 26(2) is typical: “No restrictions may be placed on the exercise of these rights other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security,

46. International Covenant on Economic, Social and Cultural Rights art. 8(1)(a), (c)–(d), Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR].

47. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 2(1), July 1, 2003, 2220 U.N.T.S. 3 [hereinafter Migrant Workers Convention].

48. *Id.* art. 25(1).

49. *Id.* art. 25(3).

50. *Id.* art. 26(1).

public order (ordre public) or the protection of the rights and freedoms of others.”⁵¹

The Migrant Workers Convention is especially notable for broadly protecting families as well as workers. Families’ rights include freedom of religion and expression, privacy, property, urgent medical care, access to education, and in some circumstances, other state-supported benefits.

Perhaps because the protections offered by the Migrant Workers Convention are so broad, its reach remains quite narrow. As of October 2009, only forty-two countries—none of them developed nations such as the United States or Canada—had become parties to it.⁵²

Finally, there is United Nations Resolution 40/144, otherwise known as the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live. This document is unique for using the term “aliens” to refer to non-citizen workers. Drawing on provisions in the United Nations Charter encouraging universal respect for and observance of fundamental human rights, Article 8(1) of United Nations Resolution 40/144 states: “Aliens lawfully residing in the territory of a State shall also enjoy” certain rights,⁵³ including “[t]he right to join trade unions and other organizations or associations of their choice”⁵⁴ But Article 8 says the enjoyment of such rights is qualified by Article 4,⁵⁵ which provides: “Aliens shall observe the laws of the State in which they reside or are present and regard with respect the customs and traditions of the people of that State.”⁵⁶ It may well be that modifying “aliens” with the term “lawfully” in Article 8, taken together with the qualifier in Article 4, effectively guarantees only to documented or regular workers the right to enjoy freedom of association. In any event, under Article 8(1)(b), aliens remain subject to having such restrictions placed on

51. *Id.* art. 26(2); *see also*, ICCPR, *supra* note 44, arts. 22(1) and 22(2) (limiting rights to associate freely and to join trade unions); ICESCR, *supra* note 46, arts. 8(1)(c), 8(2) (limiting rights of trade unions, military personnel, and police personnel); UDHR, *supra* note 42, art. 29(2) (limiting human rights).

52. United Nations Treaty Collection, <http://treaties.un.org> (follow “Status of Treaties” hyperlink; then “Chapter IV” hyperlink; and follow hyperlink 13 “International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. New York, Dec. 18, 1990) (last visited Oct. 19, 2009).

53. Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, G.A. Res. 40/144, art. 8(1), U.N. GAOR, 40th Sess., 116th plen. mtg., U.N. Doc. A/RES/40/144 (Dec. 13, 1985).

54. *Id.* art. 8(1)(b).

55. *Id.* art. 8(1).

56. *Id.* art. 4.

their right to freedom of association “which are necessary, in a democratic society, in the interests of national security or public order or for the protection of the rights and freedoms of others.”⁵⁷

B. ILO Conventions

At least three ILO instruments containing four separate provisions establish international labor standards for undocumented workers. These standards have been elaborated by the ILO’s Committee on Freedom of Association (“CFA”) after decades of careful consideration of worldwide allegations concerning violations of workers’ rights to form or join labor organizations, to engage in collective bargaining, and to go on strike.

Article 2 of ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise provides: “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”⁵⁸ The words “without distinction whatsoever” make clear that the rights of undocumented workers are not to be treated less favorably than those of documented workers.

Article 1(1) of ILO Convention No. 98 on the Right to Organise and Collective Bargaining declares: “Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.”⁵⁹ The words “adequate protection” suggest that the remedies available to undocumented workers are not to be less favorable than those afforded to documented workers. Article 1(2) adds:

Such protection shall apply more particularly in respect of acts calculated to [] (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities⁶⁰

57. *Id.* art. 8(1)(b).

58. International Labour Organisation, Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise art. 2, July 9, 1948, 68 U.N.T.S. 17, *reprinted in* ILO, CONVENTIONS AND RECOMMENDATIONS 527 (1996) [hereinafter ILO C. 87].

59. International Labour Organisation, Convention (No. 98) Concerning the Application of the Principles of the Right to Organise and Bargain Collectively art. 1(1), July 1, 1949, 96 U.N.T.S. 257, *reprinted in* ILO, CONVENTIONS AND RECOMMENDATIONS 639 (1996) [hereinafter ILO C. 98].

60. *Id.* art. 1(2)(a)–(b).

The United States has ratified neither ILO Convention No. 87 nor ILO Convention No. 98. But it has accepted obligations relating to freedom of association under these conventions by virtue of its membership in the International Labour Organisation.⁶¹ This is due to a third ILO instrument: the Declaration on Fundamental Principles and Rights at Work (“DFPRW”). Article 2 of the DFPRW states:

[A]ll members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the [ILO] Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining⁶²

Citing the DFPRW,⁶³ the American Federation of Labor and Congress of Industrial Organizations, together with the Confederación de Trabajadores de Mexico, filed a complaint with the ILO’s CFA. The complaint alleged that the *Hoffman Plastics* decision violated the United States’ obligations under the DFPRW. In 2003, the CFA issued a report finding that eliminating the back pay remedy left the U.S. government with insufficient means for ensuring that undocumented workers are protected from anti-union discrimination.⁶⁴ This decision is binding on the United States by virtue of its having accepted obligations under the DFPRW.

61. International Labour Organization, Report of the Fact-Finding and Conciliation Commission on Freedom of Association Concerning the Trade Union Situation in Chile, para. 466 (1975).

62. International Labour Organisation, Declaration on Fundamental Principles and Rights at Work art. 2(a), June 18, 1998, 37 I.L.M. 1233 [hereinafter DFPRW].

63. To those unfamiliar with the nuances of international law, there might seem to be a contradiction between recognizing a nation’s sovereign power to refrain from signing or ratifying an instrument codifying international labor standards, and holding that nation to the obligations under some of those standards anyway. This apparent contradiction was addressed in commentary to the DFPRW. The commentary, which was written by the chief of the Equality and Human Rights Coordination Branch of the ILO, explains the basis of every nation’s obligations under the DFPRW arises from its membership in the ILO. Therefore, declarations on behalf of the entire organization—such as the DFPRW—are binding even though the precise labor standards set forth in conventions like ILO C. 87 and ILO C. 98 may not be. As the commentator put it:

This does not mean that the Conventions the ILO has adopted to develop these [international labor] principles will be extended to member States which have not ratified them. It means rather that States have an obligation to pursue the realization of the principles in ways appropriate to their own situation, and to report regularly on how they do so.

Lee Swepston, *Introductory Note, International Labour Conference: ILO Declaration on Fundamental Principles and Rights at Work and Annex*, 37 I.L.M. 1233, 1234 (1998).

64. See Complaints Against the Government, *supra* note 11.

C. Regional Human Rights Instruments

At least four regional human rights instruments containing as many as five separate provisions establish international labor standards for undocumented workers in the Americas.

Article XXII of the American Declaration of the Rights and Duties of Man states: "Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature."⁶⁵ The reference to "[e]very person" does not admit distinctions due to immigration status. The instrument was the world's first human rights instrument of a general nature, predating the UDHR by about six months. It was adopted in Bogotá, Colombia, at the same meeting that created the thirty-five member Organization of American States ("OAS"). The United States is a member of the OAS, which is headquartered in Washington, D.C.

Relevant to this point, Article 29(a) of the Charter of the OAS provides: "All human beings, without distinction as to . . . social condition, have the right to attain material well-being and spiritual growth under circumstances of liberty, dignity, equality of opportunity, and economic security."⁶⁶ Article 29(b) adds: "Work is a right and a social duty . . . it demands respect for freedom of association and for the dignity of the worker"⁶⁷

Section 16(1) of the American Convention on Human Rights declares: "Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes."⁶⁸ Moreover, section 8(1) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Culture Rights ("Protocol of San Salvador") states that parties to the Protocol of San Salvador "shall ensure: [t]he right of workers to organize under trade unions and to join the union of their choice for the purpose of protecting and promoting their interests."⁶⁹

65. American Declaration of the Rights and Duties of Man art. XXII, May 2, 1948, OAS Res. XXX, adopted by the Ninth Int'l Conf. of Amer. States, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc. 6 rev. 1 at 17 (1992).

66. Charter of the Organization of American States art. 29(a), Dec. 13, 1951, 2 U.S.T. 2394, 119 U.N.T.S. 3.

67. *Id.* art. 29(b).

68. Organization of American States, American Convention on Human Rights art. 16(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

69. Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Culture Rights art. 8(1)(a),

Concerned that the *Hoffman Plastics* decision violated the principles codified by these instruments, the Republic of Mexico, following a path similar to that taken by American and Mexican trade unionists before the ILO's Committee on Freedom of Association, filed a case with the Inter-American Court of Human Rights ("IACHR"). In 2003, the IACHR issued an opinion advising that, despite their irregular status, undocumented workers in the United States are frequently treated unfavorably compared to other workers.⁷⁰ The decision, however, is not binding on the United States.

D. Labor Rights Clauses in Free Trade Agreements

At least four free trade agreements containing as many as five separate provisions establish international labor standards for bilateral or multilateral trade relations between the United States and other countries.

The North American Free Trade Agreement ("NAFTA")⁷¹—to which Canada, Mexico, and the United States are parties—includes a labor side agreement, the North American Agreement on Labor Cooperation ("NAALC"). The first three "labor principles" codified in the NAALC are (1) freedom of association and protection of the right to organize, (2) the right to bargain collectively, and (3) protection of the right to strike.⁷² To the point, Article 4(1) of NAALC provides: "Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law."⁷³ Moreover, Article 4(2) states: "Each party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under: [] its labor law, including in respect of . . . employment standards, industrial relations and migrant workers . . ." can be enforced.⁷⁴ At first glance, the guarantees of "appropriate access" and "recourse" to "appropriate" procedures

Nov. 16, 1999, O.A.S.T.S. No. 69, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, at 67 (1992) [hereinafter Protocol of San Salvador].

70. Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion, Inter-Am. Ct. H.R. (ser. A) No. 18, at 106, 136 (Sept. 17, 2003).

71. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993).

72. North American Agreement on Labor Cooperation, U.S.-Can.-Mex., art. 49(1)(a)–(c), Sept. 14, 1993, 32 I.L.M. 1499 (1993).

73. *Id.* art. 4(1).

74. *Id.* art. 4(2).

for “migrant workers” would not seem to make any distinctions as to undocumented migrant workers. But Article 4(1) clearly does; it obligates the signatory nation to ensure rights as to “persons with a legally recognized interest under its law in a particular matter”⁷⁵—thereby leaving room for domestic immigration laws restricting the rights of undocumented and other persons without “legally” recognized interests.

Article 16(1) of the Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA”) “reaffirm[s]” the parties’ “obligations as members of the [ILO] and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up*”⁷⁶ Thus CAFTA incorporates by reference Article 2 of the DFPRW, which requires the United States to honor the principles set forth in ILO Conventions No. 87 and No. 98 and their implications for undocumented workers. Moreover, Article 16(2) of CAFTA states that “[a] party shall not fail to effectively enforce its labor laws”⁷⁷

Similarly, Article 6(1) of the Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area (“Jordan Free Trade Agreement”) “reaffirm[s]” the parties’ “obligations as members of the [ILO] and their commitments under” the DFPRW to “strive to ensure that such labor principles and the internationally recognized labor rights . . . are recognized and protected by domestic law.”⁷⁸

To the same effect, Article 17(1) of the United States-Columbia Trade Promotion Agreement (“Columbia TPA”) “reaffirm[s]” the parties’ obligations as members of the ILO.⁷⁹ Article 17(2) also requires each party to “adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in” the DFPRW.⁸⁰

75. *Id.* art. 4(1).

76. Dominican Republic-Central America-United States Free Trade Agreement art. 16(1)(1), Aug. 5, 2004, 119 Stat. 462, 43 I.L.M. 514 (2004) (draft text) [hereinafter CAFTA].

77. *Id.* art. 16(2)(1)(a).

78. Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan art. 6(1), Oct. 24, 2000, 41 I.L.M. 63.

79. United States-Colombia Trade Promotion Agreement art. 17(1)(1), Nov. 22, 2006, (not in force) [hereinafter Colombia TPA], *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta> (last visited Oct. 12, 2009)

80. *Id.* art. 17(2)(1).

E. European Union Governing Documents

Even though the United States is obviously not a member of the European Union (“EU”), the EU is often held up as a successful model of social, cultural, and economic—if not political—integration. The free movement of persons in general, and workers in particular, is one of the cornerstones of EU governance.⁸¹ No distinction is made between “worker” and “employee.” Indeed, in proclaiming this right, the EU’s governing documents go much further than the NAALC does—or even international labor standards do—by abolishing distinctions between workers based on citizenship.

At least two EU instruments containing some four relevant provisions are illustrative: the Treaty Establishing the European Community (“EC Treaty”) and the Charter of Fundamental Rights of the European Union (“EU Charter”). Under these instruments, a single internal market is established in accordance with four fundamental freedoms: “the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital.”⁸² Although the EU Charter declares freedom of movement to be a fundamental right of workers, it is limited to the purpose of performing economic activity: “Mobility of labour . . . is looked upon as one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement, while helping to satisfy the requirements of the economies of the Member States.”⁸³

To these ends, Article 39 of the EC Treaty provides: “Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.”⁸⁴

Further, Article 12 of the EU Charter states: “Everyone has the right to . . . freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone

81. See *THE GLOBAL WORKPLACE*, *supra* 38.

82. Treaty Establishing the European Community (Consolidated Version) art. 3(1)(c), Apr. 16, 2003, 2006 O.J. (C 321) 44 [hereinafter EC Treaty].

83. Council Reg. No. 1612/68, Oct. 15, 1968, 1968 O.J. SPEC. ED. 475, *amended by* Reg. 312/76, Feb. 9, 1976, 1976 O.J. (L 3/2) and Council Reg. No. 2434/92, 1992 O.J. (L 25).

84. EC Treaty art. 39(2); *see, e.g.*, Case C-415/93, *URBSFA v. Bosman*, 995 E.C.R. 4921 (1995) (declaring transfer fee—mandated by rules of FIFA and other sporting associations—to be paid by acquiring professional soccer club to player’s former club to violate Article 39).

to form and join trade unions for the protection of his or her interests.”⁸⁵

III. *Hoffman Plastics* Revisited: Some Thoughts About Who Counts

For at least three reasons, courts in the United States should consider limiting *Hoffman Plastics* to its narrow facts and reinterpret the NLRA to conform to international labor principles by including undocumented workers as “employees” who are entitled to the full rights and remedies guaranteed by the law.⁸⁶

First, as demonstrated by Part II, the plain meaning of section 2(3) of the NLRA does not support carving out undocumented workers from the definition of “employee.” If anything, the otherwise broad language of that provision, coupled with its short but certain list of exceptions, demonstrates that Congress knew precisely how to carve out categories of non-employees. To argue otherwise is to conclude, by inference or implication, that Congress intended to omit millions of working people who were contributing to the lifeblood of our economy, for no reason other than the accident of their citizenship. There is no evidence of this intent in the language or legislative history of either NLRA or IRCA.

Second, as demonstrated by this Part III, the pull of international labor standards away from *Hoffman Plastics* is strong. Table 1 summarizes the information from the eighteen instruments discussed in this section.

85. Charter of Fundamental Rights of the European Union art. 12(1), Dec. 7, 2000, 2000 O.J. (C 364) 11.

86. Pointing to recent decisions from the courts in the European Union, Professor Judy Fudge has sounded a cautionary note about the project of “constitutionalizing” human rights—including international labor standards—by incorporating them into regional or national legal regimes. Of particular concern is the paradox by which courts recognize such rights broadly but apply them narrowly. See Judy Fudge, *Constitutionalizing Labour Rights in Europe*, in *RESCUING HUMAN RIGHTS* (Tim Campbell & Keith Ewing eds., forthcoming 2010); see also Judy Fudge, *The New Discourse of Labour Rights: From Social to Fundamental Rights?*, 29 *COMP. LAB. L. & POL’Y J.* 29 (2007).

TABLE 1

Terminology Used in International Labor Rights Instruments

Term Used	Number
Everyone, every person, all human beings	7
Workers or migrant workers	6
Aliens or similar term ⁸⁷	2
Employees	0

Of the eighteen instruments examined here, none use the term “employee”; instead, thirteen use the terms “everyone,” “every person,” or “all human beings” (seven instruments) and “worker” or “migrant worker” (six other instruments).⁸⁸ Even the few documents using more restrictive language—either “alien” or “persons with a legally recognized interest” (two instruments)—do not use the term “employee.”⁸⁹ Of course, in this country, international labor standards are rarely, if ever, relied upon to rewrite the terms adopted by Congress in the labor and immigration statutes. But they can be looked to for guidance in resolving doubts and ambiguities. By virtue of the United States having accepted obligations under such standards, it would seem imperative to take this approach; otherwise, the acceptance of such obligations would mean little. Any doubts or ambiguities about whether “employees” are entitled to remedies for violations of their rights in the workplace can be readily resolved by reference to international labor standards applicable to “everyone,” “every person,” or “workers.” In short, as this discussion demonstrates, the *Hoffman Plastics* way is not the only way.

Finally, as a practical matter, the lower state and federal courts are already doing what this Article suggests. With few exceptions, they are following the spirit, if not the letter, of international labor standards applicable to irregular workers. By my count, there are at least forty-four reported decisions in which the court addressed the argument that *Hoffman Plastics* should limit the remedies or rights of undocumented workers for violations of state or federal employment laws, including employment discrimination, minimum wage, prevailing wage, unemployment compensation, workers’ compensation, and workplace safety laws. (In some of these decisions, employers sought to discover the immigration status of plaintiffs who were probably undocumented.) None of these decisions expressly relied on the instru-

87. See NAALC, *supra* note 72 (“persons with a legally recognized interest under [the country’s] law in a particular matter”).

88. See *infra* Appendix A.

89. *Id.*

ments codifying international labor standards discussed in this Article. Yet, in all forty-four reported decisions, the court refused to follow, declined to extend, distinguished, or recognized the limits of, the holding in *Hoffman Plastics*.⁹⁰

Why are post-*Hoffman Plastics* courts doing this? A review of the opinions accompanying these decisions suggests at least two reasons: first, as with the NLRA and IRCA, nothing in the plain language of the applicable state or federal employment statute suggests that withholding remedies or rights from undocumented workers would comport with sound public policy; and second, ruling otherwise would simply give offending employers an undeserved windfall for breaking the law. The latter is especially true as to back pay for workers who have already performed the work. As the Kansas Supreme Court put it in a prevailing wage case: “[W]e conclude that to deny or to dilute an action for wages earned but not paid on the ground that such employment contracts are ‘illegal,’ would thus directly contravene the public policy of the State of Kansas.”⁹¹

The implications of reconsidering who counts as an “employee,” and what remedies they are entitled to, are enormous. About eleven million undocumented persons reside within the borders of the United States.⁹² Most of these people are engaged in some type of work; one source estimates the number of unauthorized workers at 8.3 million, or about 5.4% of the nation’s workforce.⁹³ Undocumented workers are concentrated in low-wage industries, such as agriculture, construction, food processing, garment manufacturing, the hospitality industry, and landscaping. Indeed, undocumented workers may represent about ten percent of all low-wage workers in the United States, and as much as fifty to sixty percent of the agricultural workforce.⁹⁴ If U.S. employers—and by extension, consumers—are

90. For a sample of these forty-four decisions, see, e.g., *Coma Corp. v. Kansas Dep’t of Labor*, 154 P.3d 1080, 1092 (Kan. 2007); *Reyes v. Van Elk, Ltd.*, 56 Cal. Rptr. 3d 68, 78 (2007); *Madeira v. Affordable Housing Found, Inc.*, 315 F. Supp. 2d 504 (S.D.N.Y. 2004), *aff’d*, 469 F.3d 219 (2d Cir. 2006) (not followed on state law grounds). A complete list is on file with author.

91. *Coma Corp.*, 154 P.3d at 1092; see, e.g., *Reyes*, 56 Cal. Rptr. 3d at 78 (“[S]uch awards do not condone future unauthorized work; rather they make it clear that employers should not be allowed to profit from employing undocumented workers and then exploiting them.”).

92. HOEFER, RYTINA & BAKER, *supra* note 26, at 1.

93. JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CENTER, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES i (2009).

94. Wayne A. Cornelius & Takeyuki Tsuda, *Controlling Immigration: The Limits of Government Intervention*, in CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE I, 20 (Wayne A. Cornelius et al. eds., 2004).

willing to accept the benefits of undocumented work, then they should also accept its costs, in the form of respecting work-related rights.

As of 2005, one United Nations report estimated that around the world some 191 million people were living outside the country in which they were born.⁹⁵ The World Commission on the Social Dimensions of Globalization more conservatively estimated that there were fifteen to thirty million irregular migrants.⁹⁶ But if the estimate of eleven million undocumented persons by the United States is accurate, then both estimates are probably too low.

In any event, eleven million is an awfully lot of people from whom to take away fundamental human rights with a whisper, rather than a shout, as *Hoffman Plastics* did. Many of them are marginal workers and people of color. To some Americans, the terms “undocumented worker” and “Hispanic” are synonyms. Of course, not all undocumented workers are Hispanic, but there is little doubt that workers of Latino origins are disproportionately affected. So, too, have many Chinese, Thai, and Filipino workers been the subject of sensational reports about their mistreatment.

We sometimes forget that the primary means of enforcing most labor standards—from minimum wages to safe working conditions—is voluntary compliance. To back up voluntary compliance, most U.S. employment law regimes rely on supervision by government agencies, the availability of workers’ private rights of action, or some combination of the two. But these mechanisms have their limits; government officials may lack the resources or political will, and private rights of action may be too expensive for low- or middle-income workers. Without the availability of one, the other, or both, voluntary compliance by employers may be minimal. Trade unions can fill the gap by providing, outside the vagaries of state bureaucracies, an inexpensive means of enforcing not only collectively bargained rights, but also minimum labor standards. To deny undocumented workers access to trade unionism is to effectively deny them access to viable means of enforcing a wide variety of other substantive rights.

95. U.N. Dep’t Econ. & Soc. Affairs, Population Division, International Migration Report 2006: A Global Assessment xiv, U.N. Doc. ESA/P/WP.209 (2009), available at http://www.un.org/esa/population/publications/2006_MigrationRep/exec_sum.pdf (indicating the United States hosted the largest number of migrants—thirty-eight million—in 2005, followed by the Russian Federation with twelve million and Germany with ten million).

96. World Comm’n on the Soc. Dimensions of Globalization, June 1–17, 2004, *A Fair Globalization: Creating Opportunities for All* 96, available at <http://www.ilo.org/public/english/wcsdg/docs/report.pdf>.

Today it is often argued that labor rights are human rights. If so, then international labor laws—including those guaranteeing access to the institutions of collective bargaining—should be respected more across national borders.⁹⁷ And, why not? After all, the laws of labor economics operate without reference to national borders. In so many industries, jobs are established where labor costs are the most attractive, and people, irrespective of their nationality, will be attracted to go wherever those jobs are located. As a result, “[t]he reasons for concluding international treaties on labour rights may thus be seen as primarily protective of employees, redressing the imbalance of their otherwise enfeebled status[]”⁹⁸—without regard to the citizenship of these employees.

97. See, e.g., Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT’L ECON. L. 61, 63–68 (2001).

98. Janet Dine, *Human Rights and Company Law*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 209, 210 (Michael K. Addo ed., 1999).

APPENDIX A

Instruments Codifying International Labor Standards on Freedom of Association for Undocumented Workers (Highlighting Terms Used Instead of “Employee”)

(* indicates obligations accepted by the U.S.)

International Human Rights Instruments	
1.*	<p>Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).</p> <p>20(1) <i>Everyone</i> has the right to freedom of peaceful assembly and association.</p> <p>23(4) <i>Everyone</i> has the right to form and to join trade unions for the protection of his interests.</p>
2.*	<p>International Covenant on Civil and Political Rights, Mar. 23, 1967, 999 U.N.T.S. 171.</p> <p>22(1) <i>Everyone</i> shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.</p> <p>22(2) No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.</p> <p>22(3) Nothing in this article shall authorize States Parties to the International Labour Convention of 1948 on Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.</p>
3.	<p>International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3.</p> <p>8(1) The States Parties to the present Covenant undertake to ensure:</p> <p>(a) the right of <i>everyone</i> to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic social interest. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interest of national security or public order or for the protection of the rights and freedoms of others;</p> <p>(b) the right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;</p> <p>(c) the right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;</p> <p>(d) the right to strike, provided that it is exercised in conformity with the laws of the particular country.</p> <p>8(3) Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.</p>

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|-----|---|
| 4. | <p>International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, July 1, 2003, 2220 U.N.T.S. 3.</p> <p>2(1) The term "<i>migrant worker</i>" refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.</p> <p>26(1) States Parties recognize the right of <i>migrant workers and members of their families</i></p> <p>(a) to take part in meeting and activities of trade unions and of any other associations established in accordance with the law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned;</p> <p>(b) to join freely any trade union and any such associations as aforesaid, subject only to the rules of the organization concerned;</p> <p>(c) to seek the aid and assistance of any trade union and of any such association as aforesaid;</p> <p>26(2) No restrictions may be placed on the exercise of these rights other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security, public order (<i>ordre public</i>) or the protection of the rights and freedoms of others.</p> |
| 5.* | <p>Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, G.A. Res. 40/144, U.N. GAOR, 40th Sess., 116th plen. mtg., U.N. Doc. A/RES/40/144 (Dec. 13, 1985).</p> <p>1. For the purposes of this Declaration, the term "<i>alien</i>" shall apply, with due regard to qualifications made in subsequent articles, to any individual who is not a national of the State in which he or she is present.</p> <p>4. <i>Aliens</i> shall observe the laws of the State in which they reside or are present and regard with respect to the customs and traditions of the people of that State.</p> <p>8(1) <i>Aliens</i> lawfully residing in the territory of a State shall also enjoy, in accordance with the national laws, the following rights, subject to their obligations under article 4:</p> <p>...</p> <p>(b) The right to join trade unions and other organizations or associations of their choice and to participate in their activities. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary, in a democratic society, in the interests of national security or public order or for the protection of the rights and freedoms of others[.]</p> |
| 6. | <p>International Labour Organisation, Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise, July 9, 1948, 68 U.N.T.S. 17, <i>reprinted in</i> ILO, CONVENTIONS AND RECOMMENDATIONS 527 (1996).</p> <p>2. <i>Workers</i> and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.</p> |
| 7. | <p>International Labour Organisation, Convention (No. 98) Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257, <i>reprinted in</i> ILO, CONVENTIONS AND RECOMMENDATIONS 639 (1996).</p> <p>1(1) <i>Workers</i> shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.</p> <p>1(2) Such protection shall apply more particular in respect of acts calculated to—</p> <p>(a) make the employment of a <i>worker</i> subject to the condition that he shall not join a union or shall relinquish trade membership;</p> <p>(b) cause the dismissal of or otherwise prejudice a <i>worker</i> by reason of union membership or because of participation in union activities outside working hour or, with the consent of the employer, within working hours.</p> |

<p>8.* International Labour Organisation, Declaration on Fundamental Principles and Rights at Work, June 18, 1998, 37 I.L.M. 1233. 2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote, and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining</p>
<p>Regional Human Rights Instruments</p>
<p>9.* American Declaration of the Rights and Duties of Man, May 2, 1948, OAS Res. No. XXX, adopted by the Ninth Int'l Conf. of Amer. States, <i>reprinted in</i> BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc. 6 rev. 1 at 17 (1992). XXII Right of Association. <i>Every person</i> has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.</p>
<p>10.* Charter of the Organization of American States, Dec. 13, 1951, 2 U.S.T. 2394, 119 U.N.T.S. 3. 29. The Member States agree upon the desirability of developing their social legislation the following bases: (a) <i>All human beings</i>, without distinction as to . . . social condition, have the right to attain material well-being and spiritual growth under circumstances of liberty, dignity, equality of opportunity, and economic security; (b) Work is a right and a social duty; it shall not be considered as an article of commerce; it demands respect for freedom of association and for the dignity of the <i>worker</i></p>
<p>11. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. 16(1) <i>Everyone</i> has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.</p>
<p>12. Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Culture Rights, Nov. 16, 1999, O.A.S.T.S. No. 69, <i>reprinted in</i> BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc. 6 rev. 1 at 67 (1992). 8(1) The States Parties shall ensure: (a) The right of <i>workers</i> to organize under trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the State Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The State Parties shall also permit trade unions, federations and confederations to function freely; (b) The right to strike.</p>

FREE TRADE AGREEMENTS

- 13.* **North American Agreement on Labor Cooperation**, Can.-Mex.-U.S., Sept. 14, 1993, 32 I.L.M. 1499 (1993).
 4(1) Each Party shall ensure that *persons with a legally recognized interest under its law in a particular matter* have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law.
 4(2) Each Party's law shall ensure that *such persons* may have recourse to, as appropriate, procedures by which rights arising under:
 (a) its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and
 (b) collective agreements
 49. Definitions- "labor law" means laws and regulations, or provisions thereof, that are directly related to:
 (a) freedom of association and protection of the right to organize;
 (b) the right to bargain collectively;
 (c) the right to strike
- 14.* **Dominican Republic-Central America-United States Free Trade Agreement**, Aug. 5, 2004, 119 Stat. 462, 43 I.L.M. 514 (2004) (draft text).
 16(1) The Parties reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)* (ILO Declaration)
 16(2)(1)(a) A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.
 16(8) Definitions- For the purposes of this Chapter:
 [L]abor laws means a Party's statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights:
 (a) The right of association;
 (b) the right to organize and bargain collectively;
 [S]tatutes or regulations means:
 (b) for the United States, acts of Congress or regulations promulgated pursuant to an act of Congress that are enforceable by action of the federal government.
- 15.* **Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area**, U.S.-Jordan, Oct. 24, 2000, 41 I.L.M. 63.
 6(1) The Parties reaffirm their obligations as members of the International Labor Organization ("ILO") and their commitments under the ILO Declaration of Fundamental Principles and Rights at Work and its Follow-up. The Parties shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in paragraph 6 are protected by domestic law.
 6(6) For purposes of this Article, "labor laws" means statutes and regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights:
 (a) the right of association;
 (b) the right to organize and bargain collectively[.]
- 16.* **United States-Colombia Trade Promotion Agreement**, Nov. 22, 2006 (not in force).
 17(1) The Parties reaffirm their obligations as members of the International Labor Organization (ILO).
 17(2) Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)* (ILO Declaration):
 (a) freedom of association;
 (b) the effective recognition of the right to collective bargaining[.]

European Union Instruments

17. **Treaty Establishing the European Community** (Consolidated Version), Apr. 16, 2003, 2006 O.J. (C 321) 44.
Art. 39 (formerly Art. 48):
1. Freedom of movement for workers shall be secured within the Community.
 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
18. **Charter of Fundamental Rights of the European Union**, Dec. 7, 2000, 2000 O.J. (C 364) 11.
12(1) *Everyone* has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of *EVERYONE* to form and to join trade unions for the protection of his or her interests.

