

Can Undocumented Immigrants Still Have U.S. Work Rights? The Hoffman Decision and New Forms of Labor Power

By Samuel A. Butler

The contemporary United States is usually classified as a state of rights. The history of the ratification of the Constitution is inextricably bound up with that of the ratification of the Bill of Rights. So, the story goes, one ought not to define the prerogatives of government without simultaneously guaranteeing to the individual certain rights against the government.

The notion of work rights took longer to develop. Predictably, the way in which work rights are interpreted is subject to immense variation—so much so that the ‘right to work’ signifies ‘freedom’ from closed shops, whereas the ‘droit au travail’ and ‘diritto al lavoro’ signify the right to dignified work. What neither of these addresses, however, is the right to have rights, a right that has been questioned with increasing force by an age of increased labor mobility. Few people would suggest that undocumented immigrants have no rights—most would agree that they do deserve, for example, protection from criminal violence—but it is not uncommon to attempt to draw a distinction between rights of protection and more positive rights such as the right to material sustenance or workplace rights. Unlike, for example, the Italian constitution, the U.S. Constitution includes no rights specific to workers. Rather, work rights have been pieced together over generations of struggles in factories and on picket lines, in the streets and in the courts. Since these rights are not enshrined in constitutional law in this country, they are subject to revision.

In 2002, the U.S. Supreme Court issued a decision which appears to exclude a large class of workers from the business of holding rights at all. *Hoffman Plastics, Inc. v. National Labor Relations Board* makes a more fundamental claim than the denial of this or that right to workers; it threatens to deny all work rights to undocumented workers.¹ There is a thick trail of fact sheets, legal briefs and academic studies outlining the traces of the tails of *Hoffman*, attempting to work within the framework of the legal system to limit its reach. In this article I attempt to make sense of the connection between this activity within the courts and the resistance in the world around them. The labor movement has never restricted itself to judicial appeals and, indeed, understanding the *Hoffman* decision and resistance to it requires taking account of its effects inside and outside of the courts. I argue that there is a sort of non-judicial power that underlies the legal structure. It can be seen in its exercise by a group of day laborers using a new style of organization to mobilize a sort of

resistance that goes beyond that of legal briefs and appeals to the NLRB. I approach their example both through concrete accounts and theoretical analysis, one that draws upon the work of Italian philosopher Giorgio Agamben.² I argue that new forms of labor organizing present the possibility of working beyond the reach of the tails of *Hoffman*, and that Agamben's analysis of power is a useful one for helping us understand the structure of political power in which this is possible.

The Hoffman Ruling

The *Hoffman* decision concerns a worker, José Castro, who was hired by Hoffman Plastics in May 1988 to a job in California. A recent immigrant, he used a friend's birth certificate to establish his eligibility for employment. In December 1988, the United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, began an organizing drive at the plant where Castro worked. In January 1989, Castro was amongst four workers fired for participating in the organizing effort.

In January 1992 the NLRB ordered Hoffman to cease and desist, to post a notice to employees regarding the order and to offer reinstatement and backpay to the four workers it illegally fired.³ This is where things get complicated. The provisions of the order that do not concern the fired workers are straightforward. What is less clear is whether the board can order reinstatement and backpay for undocumented workers.

Reinstatement, as ordered by the labor board, is contingent upon the workers becoming documented. The backpay issue is the one taken up by then-Chief Justice William Rehnquist in the *Hoffman* majority opinion. It is important here to distinguish between: (a) backpay as wages workers *would have* earned had they not been dismissed, and (b) backpay as wages workers had in fact *earned, but were never paid*. The Fair Labor Standards Act, for example, has provisions for backpay for earned wages. *Patel v. Quality Inn South* appears to preserve the right of undocumented workers to sue under the FLSA for payment of wages earned.^{4,5} The *Patel* precedent, however, does not cover the case of Castro, in which the NLRB ordered the payment of restitutive backpay of the wages (plus interest) that Castro would have earned had he not been illegally fired. Rehnquist asked, therefore, whether a worker who obtained employment by fraudulently presenting documents has a right to this sort of restitutive backpay, given that this backpay would tend to restore to him wages he would have earned illegally.

The majority opinion couched the issue largely in terms of three precedents and one law. The Immigration Reform and Control Act of 1986 (IRCA) made it illegal for employers to 'knowingly' hire undocumented workers and for workers to present fraudulent documents to establish eligibility to work.⁶ IRCA was intended to make the employment of undocumented workers less attractive to employers by criminalizing the practice.⁷ At the same time, IRCA preserves the protection of labor law for undocumented workers. This, so the argument goes, makes undocumented labor less attractive by protecting it from exploitation over and above that to which documented labor is subject.

This is the sort of the argument that the NLRB made in one of the case precedents considered in the majority opinion: *NLRB v. APRA Fuel Buyers Group, Inc.*⁸ If the protections of labor law are not available to undocumented workers, then undocumented labor is exploitable to a greater degree than documented labor. This greater level of exploitability constitutes an incentive to employers to pursue and hire undocumented labor.

The majority opinion acknowledged that the 1984 *Sure-Tan, Inc. v. NLRB* decision would appear to have been relevant to *Hoffman* prior to the passage of the IRCA.⁹ After its passage, however, Rehnquist concluded otherwise, insofar as the workers in *Sure-Tan* were not in the country at the time of the decision and were not authorized for the re-entry necessary to collect backpay.

Most relevant to my exposition here is Rehnquist's consideration of the 1992 case *Del Ray Tortilleria, Inc. v. NLRB*, which held that (1) the remedies available to the NLRB under the National Labor Relations Act are remedial, rather than punitive, and that (2) an undocumented worker who is fired in violation of the NLRA has not been 'harmed in a legal sense', insofar as s/he had no legal right to seek employment in the first place. I want to briefly consider each of these claims in turn.^{10,11}

As for (1), what it seems to suggest is that the issue, insofar as it concerns the NLRA, must be considered first on the side of the worker. If, then, the worker violates the IRCA by fraudulently presenting documents to establish eligibility to work, then the worker loses at least the availability of backpay under the provisions of the NLRA. This is to say that the worker's responsibilities under the IRCA are taken in some sense to be legally prior to the employer's obligations under the NLRA.

As for (2), I simply want to underline the distinction Rehnquist drew between legal and non-legal harm. *Del Ray* does not hold that the worker has not been harmed, only that the worker has not been harmed in a legal sense. Taking this step seems to indicate that at least some portion of the employer-worker relationship rests in a realm of extrajudiciality when the worker is undocumented.

Justice Stephen Breyer's dissenting opinion in *Hoffman* addresses primarily (1). Breyer claims that the remedies imposed by the NLRB properly have the ends of both compensation of the worker and deterrence of the employer, and that backpay is an important component of each. Where Rehnquist found that the remedies of posting cease and desist orders constitute 'significant sanctions' against an employer violating the NLRA, Breyer argued that backpay must be available for the NLRA to be effectively enforced.

I want to flesh out Breyer's argument by attempting to address (2). In some sense, (2) represents a judicial precedent attempting to establish the limits of judicial precedents. Ever since Immanuel Kant's attempts to establish the limits of pure reason, practical reason and the faculty of aesthetic judgment, philosophers have tried in various ways to establish the limits of the proper application of various faculties and frameworks of inquiry. I would like to suggest that the limits of juridical reason are circumscribed by the realm of political power, particularly that of "biopower" as the concept is appropriated by the Italian philosopher Giorgio Agamben.

Tails of Hoffman

Now that I've sketched a brief outline of the *Hoffman* decision, the next question to ask is whether it matters and how. *Hoffman*, I will argue, threatens to sweep away important gains of the labor movement in the U.S. The ruling's most obvious and direct impacts have to do with the NLRA. These consequences can be divided along two axes: the first is the axis of documentation; the second is the axis of individuality and collectivity. With respect to the issue of documentation, *Hoffman* withholds the remedy of backpay from the NLRB when it is considering the cases of undocumented workers. Backpay is, of course, still a possible remedy for cases in which documented workers are illegally fired. Along the axis of documentation, then, the consequences of *Hoffman* appear to fall entirely on undocumented labor.

Undocumented workers tend to work with others, some of whom are documented, some of whom aren't. Moving to the axis of collectivity, then, means that the burdens imposed on undocumented workers can have significant effects on documented workers, as well. Undocumented workers still have the right to organize, and employers are still forbidden by the NLRA from firing them for organizing. When they organize, however, they are likely to organize alongside documented workers. When they are fired for organizing, the only remedies that can be imposed by the NLRB are cease and desist orders and requiring that the employer post a notice concerning the case at the worksite. Neither of these remedies aids the fired worker, and it is questionable whether they constitute any sort of a deterrent.¹² If employers are not deterred from illegal union-busting activities, the practice of organizing is significantly undermined. Without organization, the quality of jobs available to undocumented and documented workers declines. Thus the consequences of *Hoffman*, *prima facie* imposed on undocumented workers, in fact tend to inflict penalties on documented workers as well. While I take these claims to be relatively uncontroversial, it is nevertheless worth noting that their basic thrust is contained already in the intent and motivation of the IRCA, as noted above.

Union organizing is straightforwardly dependent on collective action, and the fact that the enforcement of so much of labor law in the U.S. is dependent upon worker complaints means that the prevailing conditions of labor are a result of whatever complaints are brought and whatever decisions are handed down in response to worker complaints.¹³ The more complaints successfully brought against employers for a given infraction, the less likely it is that individual employers will risk the adventure of committing that infraction.

After *Hoffman*, the only economic sanctions available to the NLRB are penalties associated with contempt. If an employer dismisses workers a second time for organizing, in violation of the cease and desist order, it will potentially face contempt charges, yet it is unclear why a dismissed undocumented worker would file a complaint that doesn't seem to have any hope of resulting in restitution for the worker. In the shadow of

the *Hoffman* decision, it would literally take an act of Congress—passing a law to invalidate *Hoffman*—for the worker to benefit from filing a claim.

Without such an act, employers are free in their attempts to extend *Hoffman* as much as possible. As accumulating case histories discourage employers from committing a particular infraction, so decisions like *Hoffman* tend to invite arguments by employers to universalize the restrictions on remedies far beyond the case and the law immediately concerned.¹⁴ It is in this way that *Hoffman* represents the danger of excluding not only the backpay and reinstatement remedies of the NLRB, but remedies imposed by a host of other agencies charged with enforcing the protections afforded to workers by U.S. labor law. In some cases, these extensions are proposed by employers in court eager to expand their ability to exploit undocumented workers, while in other instances it is the enforcing agencies themselves which voluntarily circumscribe their sphere of action in response to a decision like *Hoffman*.¹⁵

Juridical and Extrajudicial Struggle

Some Labor Department officials in charge of enforcing national wage and hours laws have tried to assure the public that the principle expressed in *Hoffman* of finding workers' migration status to be relevant to their protections under U.S. labor law won't be extended to the Labor Department's enforcement policies.¹⁶ However, it seems to me that *Hoffman* is important, and potentially quite relevant to a variety of contexts beyond questions of securing backpay under the aegis of the NLRA. It seems worthwhile and important for labor lawyers to continue to fight the extension of the *Hoffman* decision to other areas of labor law, but I want to suggest that the juridical front is simply one front in a much larger struggle. Fighting in the courts is important, but it is also important to remember that the very possibility of fighting in the courts was won by a lot of fighting outside of the courts. The current protections of U.S. labor law are what they are because of the history of the U.S. labor movement. Preserving and extending those protections involves carrying that struggle further.

That struggle can only be carried forward, I am convinced, by coming to terms with the changing face of labor in the U.S. The 1950's were the high water mark of union membership in the U.S., when 35% of the workforce belonged to a union. Today 12% belongs to a union.¹⁷ Jennifer Gordon claims that 'the level of union organization among private-sector workers has now fallen below eight percent, and the rate of union representation among the bottom ten percent of wage earners is less than one percent.'¹⁸ This deorganization of labor was effected in part by the shifting patterns of employment, from permanent, full-time and industrial employment to seasonal, temporary and part-time employment, often in the service sector.¹⁹ As jobs have changed, workers have changed as well. The workforce participation of women has steadily increased, and issues of language, culture and migration status have steadily gained in importance.²⁰ At its worst, these circumstances have rendered many unions depleted and ineffective, unable to address the sexism and racism within their ranks and their leadership. At their best, these circumstances have provided the opportunity for new

forms of organization by groups whose concerns go beyond the provisions of the next contract to issues of community solidarity and social justice.²¹

Many of these issues are present in the struggles of the day laborers in Farmingville, New York. The history of the struggles of the day laborers in this suburban Long Island town is, I think, one that can be instructively applied to many other situations. It is, in this sense, an example of a local struggle which can be usefully generalized for application to many similar situations around the country. Towards the end of the 1990's, the day laborer population in Farmingville looked like that of many places in the U.S.—a group of mostly male, mostly Latino, sometimes undocumented workers had been drawn to the area by the relatively high prevailing wages in work in construction and landscaping.²² Workers gathered in the mornings at particular intersections in the town for the sort of informal shape-up conducted by contractors driving up in pickups to hire a few workers for the day. As time went by, the practice began to catch the attention of some other residents of the town, who began to entreat the police to enforce anti-loitering and housing ordinances in an attempt to break up the informal shape-ups and drive the workers out of town.

Sides were chosen and allies rushed to the scene. A community group, Sachem Quality of Life, was formed to advance the anti-worker position. SQL gained some notoriety as a vocal opponent of immigrant rights, particularly in the region. It wasn't long before SQL was joined by various racist groups and infiltrated by neo-Nazis. In the fall of 2001, two neo-Nazis abducted and attempted to kill two day laborers, Israel Perez and Magdaleno Estrada Escamilla.²³ On July 5, 2003, a house inhabited by Mexican immigrant workers was firebombed.²⁴ Four men were convicted for these two crimes. At least in this instance, criminal law enforcement proved to be distinct from immigration law enforcement, and indeed law enforcement spokespeople reliably express the desire that such a separation ought to remain in force.²⁵

At one level, the fact that people were convicted for crimes against working people is surprising. At another level, it is understandable—the workers in Farmingville had consistently fought to make their struggle a public one, to insist on their position as part of the community with a right to participate in its public discourse. Sometimes this meant coming to town council meetings or publicizing their struggles in the local media; sometimes this meant simply preserving public space by cleaning up a local park and starting a soccer league.

The relationship between the sort of organizing carried out by worker centers and more traditional forms of union organizing would be a fruitful direction in which to extend the research here, particularly in light of the Summer 2006 partnership between the AFL-CIO and the National Day Laborer Organizing Network (NDLON). As Karin Brulliard puts it, the alliance “could provide day laborers with a potent ally’ in their efforts.”²⁶ The way in which *Hoffman* attempts to place undocumented workers outside of the reach of juridicality, to construct them as non-rights-bearing entities, suggests that the form of organizing employed in these struggles must be imagined along different lines—as I have suggested. Insofar as the alliance between the NDLON and the AFL-CIO represents an expansion of the resources available for organizing day laborers or an enlargement of their

access to public discourse, it would seem to be a useful step in the organization of day laborers. What is clear, however, is that the inclusion of the AFL-CIO in the struggle will do little to establish the legal standing of undocumented workers. For this, it is necessary to reconceptualize the relations of power in which undocumented workers work and struggle to improve their working conditions.

Juridical Power and Political Power

I would argue that it is clear that the immigrant day laborers in Farmingville were able to exercise some sort of political agency, and that they were able to do so in spite of their tenuous grasp on the levers of juridical power. In order to make such an argument, one needs the fuller conception of power to which I alluded above. A useful starting point is to first separate liberal political philosophy over the last century or so from radical political philosophy of the same period. On the liberal side of this division, Max Weber stresses the notion of the state as holding a monopoly on the legitimate use of force.²⁷ From this perspective, a project like John Rawls' widely influential book *A Theory of Justice* attempts to construct a normative framework describing the space in which the state is morally permitted to juridically authorize the use of force.²⁸ Others have conceptualized the conditions in which inequalities of force are neutralized so that a group of people can come to an agreement about the proper use of force, for example within the state. A prominent example of the latter is Jürgen Habermas' "ideal speech situation."²⁹

From a more radical perspective, a writer like Michel Foucault can be read as attempting to uncover the ways in which force -- or power, more broadly -- acts upon, within and through a socio-political system. Rather than constructing a space like Rawls' "original position" or Habermas' "ideal speech situation," in which interaction amongst individuals is free of coercion and autonomous action is possible, Foucault attempts to show how we act in and through various relations and fields of power even when our experience of our actions might suggest that they are at their most autonomous and free. In the contemporary era, Foucault focuses on the political technology of "biopower:" whereas older forms of sovereignty operated through the threat of death in execution, Foucault argues that contemporary power is marked by 'making live and letting die', by the action of power through desire and living.³⁰ Whereas feudal power was exercised by the sovereign against subjects, biopower is creative, playing a role in the very formation of subjectivity. Biopower is not concentrated in a sovereign or a government, but is diffused throughout a population. It is the "disciplinary" power of schools, prisons and worksites; it operates through the shaping of customs, habits and desires. Where autonomy is a paradigm of freedom for the liberal understanding of power, the paradigm of biopower suggests that we are operating in and sustaining networks of power even as we desire, even if we are successful in getting what we want. Whereas sovereign power stymied the will of those under its control, biopower shapes and influences our will.

For Foucault, biopower is a relatively recent historical phenomenon, linked to the rise of the nation-state and capitalism. But, Giorgio Agamben has recently argued that it has been an integral part of political functioning since at least classical times.³¹ Agamben attempts to formulate a notion of sovereign power that will make possible what he terms ‘the possibility of politics beyond the state.’³² Agamben attributes to the sovereign the ability to dictate who is included and who is excluded under the law. The punishment of ostracism was, after all, one of the most serious that could be imposed by a classical Greek city-state, representing the removal from an individual of home, culture, family and property—those things which separated a meaningful human life (*bios*) from the meaningless ‘bare life’ (*zoé*) led by plants and animals.³³

Banishment is not limited to classical Greece. Drawing on Hannah Arendt’s work in *The Origins of Totalitarianism*, Agamben notes that the concentration camp is a sphere beyond the possibility of meaning.^{34,35} One cannot be murdered or executed—killed with juridical significance—in a concentration camp, one can only perish. It seems appropriate to immediately bring under this description the disappeared of so many Latin American military dictatorships in the 70s and 80s, as well as so-called “enemy combatant” detainees in contemporary U.S. military installations. These are what Agamben describes, using the classical Roman legal term, as *homines sacri*—individuals who are put outside of the protection of the law. In the Roman context, these individuals could not be sacrificed to the gods, something which would imbue their death with meaning. By the same token, if they were killed it would not constitute murder.³⁶ The killing of a *homo sacer* is legally irrelevant.

The fact that this sort of banishment is possible allows Agamben to draw a distinction between two sorts of sovereign power, constituting power (*auctoritas*) and constituted power (*potestas*).³⁷ Agamben identifies the power of juridical structures with *potestas*, while the power that makes it possible to have juridical structures is *auctoritas*. In their functioning, the interaction of *auctoritas* and *potestas* form the potential for what Agamben, again borrowing from Schmitt, calls the ‘state of exception.’³⁸ In the state of exception, *potestas* is suspended in whole or in part, leaving only the activity of *auctoritas*. In the state of exception it is impossible to make appeals to the suspended laws, which remain in force but not in effect. Agamben refers to the Third Reich as a twelve-year long state of exception.³⁹ The selective suppression of *habeas corpus* during the U.S. Civil War or under the Bush regime can be read analogously. In my view, the *Hoffman* decision excises undocumented workers from the realm of juridical significance in the same way.

Conclusion

The most fundamental change made by the Supreme Court’s *Hoffman* decision is its exclusion of a class of workers from the protections of the NLRA. *Hoffman* does not repeal the NLRA, it simply leaves it in force while removing the possibility of appeal to it on the part of undocumented workers. It creates therefore a zone

of exception in U.S. labor law. The reference to *Del Ray* in the majority opinion says so much as: ‘within the context of employment, this is a class of workers who can be harmed without juridical significance.’

What does it take for an action to be juridically significant? A few broad, uncontroversial aspects of a theory of juridical meaning may help establish my larger claims: Agamben uses the opposition of murder and killing outside of the protection of law as paradigmatic. Murder is juridically significant, it would seem, insofar as it is defined and forbidden in legal code and its commission leads to certain juridical consequences. By definition, killing outside the protection of the law cannot be addressed in a legal code. The analogy, then, would be to termination of employment. For a documented worker, there are many juridically defined legitimate and illegitimate grounds for termination. In the case of termination on illegitimate grounds, there are a variety of remedies to be applied. Thus termination in the case of a documented worker is juridically significant.

The case of the undocumented worker is similar, with the removal of the remedy of restitutive backpay. Breyer’s dissent in *Hoffman* argued that removing this remedy amounts to the creation of an unenforced law. I tend to agree, but want to suggest that it is helpful to see the law not as ‘unenforced’, but rather as ‘in force but not in effect’. This description leaves open the possibility of carrying struggle forward along many fronts; this analysis seems to permit the conclusion that *Hoffman* is a step towards rendering the termination of undocumented workers juridically meaningless.

It would be hyperbole to suggest straightforwardly that undocumented workers are thereby rendered *homines sacri*, but they can be fired for organizing a union without that firing having full legal significance. Perhaps they are *obreros sagrados*.

Looking at Farmingville alongside the *Hoffman* decision, however, casts the case in a much different light. It reminds us that the withdrawal of the protection of the NLRA is but the withdrawal of one sort of juridical protection, and that withdrawal can be combated by the deployment of other forms of juridical and meta-judicial power. There are other forms of juridical power in labor law and in criminal law. Supplementing these with the protections of community and solidarity makes those exercises of power more effective and more likely to succeed.

Undertaking the analysis through the work of Agamben permits the demonstration of the way in which different forms of power are interlaced and intermixed. All of this seems to point in support of the new form of labor organizing that goes beyond the worksite and beyond the contract, beyond the protections of the NLRA and beyond union bureaucracies. It is a form of organizing that is both new and older than the NLRA, reaching back to the beginnings of the labor movement. It is a form of organizing that well understands that every tool is a weapon if you hold it right.

NOTES

¹ 535 U.S. 137 (2002).

² To my knowledge, the nearest study to mine is Rajaram, Prem Kumar and Carl Grundy-Warr. "The Irregular Migrant as *Homo Sacer*." *International Migration*, vol. 42, no. 1 (March 2004): 33-64, which addresses issues of undocumented migration in Australia.

³ For a discussion of the rights of undocumented workers under the FLSA, see Sugimori, Amy, et al., National Employment Law Project and National Immigration Law Center. "Assessing the Impact of the Supreme Court's Decision in *Hoffman Plastic Compounds v. NLRB* on Immigrant Workers and Recent Developments." October 2002. Retrieved 21 May 2007. <http://www.nelp.org/document.cfm?documentID=129>.

⁴ 29 U.S.C. 201.

⁵ 846 F.2d 700 (11th Cir. 1988).

⁶ 8 U.S.C. 1101 note.

⁷ See "Courts Continue Rejecting Defendants' Post-Hoffman Inquiries into Plaintiffs' Immigration Status." *Immigrants' Rights Update*, vol. 16, no. 6 (October 21, 2002).

⁸ 320 N.L.R.B. 408 (1995).

⁹ 467 U.S. 883 (1984).

¹⁰ 976 F. 2d 1115 (CA7 1992).

¹¹ 29 U.S.C. §§151-169.

¹² I'm reminded of an old joke about a man who gets pulled over in Montana for speeding, in the days of the federal 55 MPH speed limit. The fine for speeding in rural areas in Montana at the time was \$5. When issued the fine, the man pulls a \$20 bill from his pocket, hands it to the police officer and says, "Here—you just tell the next three officers that I've already paid." The \$5 fine constituted no deterrent; *Hoffman* excuses the employer from even paying \$5 of backpay.

¹³ For the effects of *Hoffman* on traditional union organizing efforts, see Ruiz, Antonio and Lisa Pau. "The Effect of the U.S. Supreme Court's Decision in *Hoffman Plastics v. NLRB* on Union Organizing". California Labor Federation, AFL-CIO Conference (January 2003). Retrieved May 21, 2007. http://www.calaborfed.org/pdfs/Effect_of_Hoffman_Decision.pdf.

¹⁴ The 2002 ruling in a federal court in New York in *Lopez v. Superflex, Ltd.* (2002 U.S. DIST. LEXIS 15538 (S.D.N.Y. 2002)) cites *Hoffman* in denying standing to a worker 'refusing to answer questions regarding his [immigration] status' suing for relief under antidiscrimination laws. The Nassau County District Court ruled in 2003 that an undocumented worker attempting to recover wages earned could only recover the minimum wage for the time worked, rather than the wage promised, in *Ulloa v. Al's All Tree Service, Inc.*, 2003 WL 22762710 (N.Y. Dist Ct. 2003). In 2003 the New York Supreme Court denied lost wages to an undocumented worker injured through employer negligence on the basis of *Hoffman* in *Stanislaw Majlinger v. Cassino Contracting Corp., et al.*, 2003 N.Y. Misc. LEXIS 1248. In 2004 the New Jersey Superior Court cited *Hoffman* barring undocumented workers from pursuing economic or non-economic damages *in general* in *Crespo v. Evergo Corp.*, N.J. Super. Ct. App. Div., No A-3687-02T5.

¹⁵ Jill Borak, claims that the Department of Labor and the Equal Employment Opportunity Commission have asserted that the *Hoffman* decision does not affect their enforcement of labor law (Borak, Jill. "A Wink and a Nod: The *Hoffman* Case and Its Effects on Freedom of Association for Undocumented Workers." *Human Rights Brief*, vol. 10, no. 3 (Spring 2003): 20-23.), yet in Equal Employment Opportunities Commission. "Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws." EEOC Directive Number 915.002 (June 27 2002), the EEOC acknowledges its reliance on NLRB cases for its conclusion that undocumented workers are entitled to all forms of monetary relief.

¹⁶ See, for example, comments by Irv Miljoner, director of the US Labor Dept.'s Wages and Hours office on Long Island, at an immigration policy panel in Easthampton, as reported in *Latino Weekly Review* (August 2004), where Miljoner stresses the separation between DOL enforcement and the NLRB issues taken up in *Hoffman*, or the Wage and Hour Division's actions in pursuing backpay for teachers working on H1-B visas in Newark, as described in the press release U.S. Dept. of Labor. "U.S. Labor Department Fines Plainview, N.Y. Placement Firm \$120,000 for Illegal Treatment of Foreign Teachers; *Teachers Placement Group also owes over \$187,000 in back wages.*" Release Number BOS 2003-018 (February 5, 2003). The relevant argument of the DOL, expressed in U.S. Dept. of Labor. "Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman Plastics* decision on laws enforced by the Wage and Hour Division" seems to be simply that *Hoffman* addresses only the NLRA, which is not enforced by the DOL.

¹⁷ These statistics are reported in Steven Greenhouse, "Sharp Decline in Union Members in '06," *New York Times* (January 26, 2007): A17.

¹⁸ Gordon, Jennifer. "American Sweatshops." *Boston Review*, vol. 30 (Summer 2005).

¹⁹ On this shift, see Dickinson, Torry D. and Robert K. Schaeffer. *Fast Forward: Work, Gender and Protest in a Changing World*. (New York: Rowman & Littlefield, 2001), particularly chapter four, "The Redistribution of Work in the Core": 49-81.

²⁰ See Milkman, Ruth. "Union Responses to Workforce Feminization in the United States." In Jane Jenson and Rianne Mahon, eds., *The Challenge of Restructuring: North American Labor Movements Respond* (Philadelphia: Temple UP, 1993) and Catanzarite, Lisa. "Brown Collar Jobs." *Sociological Perspectives* vol. 43, no. 1 (Spring 2000): 45-75.

²¹ A particularly well-informed account of the work being done by worker centers, particularly in the New York metropolitan area, can be found in Jennifer Gordon's "American Sweatshops," *cit. supra*.

²² For general information regarding the situation in Farmingville, see Tambini, Catherine and Carlos Sandoval. *Farmingville* (New York: Camino Bluff Productions, 2003), as well as the transcript of the June 9, 2004 Brookings Institution Panel "Learning from Farmingville: Promising Practices for Immigrant Workers." Retrieved May 21, 2007. http://www.brookings.edu/metro/events/20040609_Farmingville.pdf.

²³ Ostendorf, David L. "Workers, go home!" *Christian Century* (Dec. 19, 2001).

²⁴ Patrick Healy and Ian Urbina, "Two Plead Guilty in Firebombing," *New York Times* (Mar. 19, 2004).

²⁵ Patrick Healy reports on Steve Levy's proposal to deputize Suffolk County police as immigration officials and the opposition of the Suffolk County Benevolent Police Association in "Long Island Clash on Immigrants is Gaining Political Force," *New York Times* (Nov. 29, 2004): A1. A nation-wide campaign of *soi-disant* gang-related arrests in the spring of 2005 stressed the claim that "federal and local law enforcement officials are

cooperating without blurring their missions or job descriptions” (“A Gang Crackdown,” *New York Times* [Mar. 20, 2005]). The Fall of 2007, however, another round of joint operations characterized as ‘anti-gang’ stings carried out by Suffolk and Nassau County police in conjunction with Immigration and Customs Enforcement, organized under the Department of Homeland Security. 186 people were arrested on Long Island. Of these, 28 were identified as gang members, while 129 others were claimed to be their ‘associates’, guilty of misdeeds as diverse as ‘hanging out’ with gang members or ‘providing transportation, food and lodging’ (Susana Enriquez, “Nearly 200 arrests in LI anti-gang raids,” *Newsday* [Oct. 9, 2007]). In the aftermath of the raids, Thomas Suozzi, Nassau County Executive, demanded investigation into widespread misconduct by ICE agents, including the indiscriminate targeting of immigrant communities. Peter J. Smith, in charge of raids for ICE, responded to the charges by saying, “We didn’t have warrants. [...] We don’t need warrants to make the arrests. These are illegal immigrants” (Nina Bernstein, “Raids Were a Shambles, Nassau Complains to U.S.,” *New York Times* [Oct. 3, 2007]). It goes without saying that the desire by some law enforcement officials to be able to maintain cooperation and communication with communities of workers is in direct conflict with the desire by others to be able to target communities with raids.

²⁶ Karin Brulliard, “AFL-CIO Aligns with Day-Laborer Advocates,” *Washington Post* (Aug. 10, 2006): A5. I am indebted to the Gregory DeFreitas for suggesting I consider the consequences of this alliance.

²⁷ Weber, Max. *Politik als Beruf*. (München: Duncker & Humboldt, 1926), 5.

²⁸ Rawls, John. *A Theory of Justice*, rev. ed. (Cambridge: Belknap, 1999).

²⁹ Habermas, Jürgen. “Diskursethik.” In *Moralbewußtsein und kommunikatives Handeln*. (Frankfurt a.M.: Suhrkamp, 1983): 52-125, 86.

³⁰ The *locus classicus* for Foucault’s conception of biopower is part five of Foucault, Michel. *Volonté de Savoir*. (Paris: Gallimard, 1994). This section is taken almost verbatim from his 17 March 1976 lecture at the Collège de France in *Il Faut Défendre la Société*. (Paris: Seuil, 1997), with ‘sex’ substituted for ‘race’.

³¹ Agamben, Giorgio. *Homo Sacer*. Daniel Heller Roazen, tr. (Stanford: Stanford UP, 1998), 6.

³² *Ibid.* 109, but see also Agamben, Giorgio. “Form-of-Life.” In Michael Hardt and Paolo Virno, eds., *Radical Thought in Italy* (Minneapolis: Minnesota UP, 1996):151-158, 153.

³³ *Homo Sacer* 88.

³⁴ Arendt, Hannah. *The Origins of Totalitarianism*. (New York: Harvest, 1973).

³⁵ *Homo Sacer* 181; cf. *Origins of Totalitarianism* 452.

³⁶ *Homo Sacer* 100-1.

³⁷ Agamben, Giorgio. *State of Exception*. Kevin Attell, tr. (Chicago: Chicago UP, 2005), 74ff.

³⁸ The classical source for Schmitt’s discussion of the *Ausnahmezustand* is his Schmitt, Carl. *Politische Theologie*. (München: Duncker & Humboldt, 1922).

³⁹ *State of Exception*, p. 2.