

Fear of Discovery: Immigrant Workers and the Fifth Amendment

Keith Cunningham-Parmeter

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Fear of Discovery: Immigrant Workers and the Fifth Amendment

Keith Cunningham-Parmeter†

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Introduction

The threat of deportation looms large in the lives of unauthorized immigrants. Faced with sexual harassment, unpaid wages, or a host of other workplace violations, immigrant workers have long been forced to choose between remaining silent or risking removal from the United States by complaining. Throughout the latter half of the twentieth century, courts mitigated the risk of deportation associated with workplace complaints by broadly applying employment protections to all workers, irrespective of immigration status. By clearly and consistently making status-based issues irrelevant to employment protections, courts signaled to prospective immigrant plaintiffs that questions about their “papers” would fall outside the normal course of civil discovery. The extension of workplace protection to all employees regardless of immigration status avoided the perverse economic incentive inevitably caused by such differentiation. Namely, a system that absolves employers from illegal conduct taken against unauthorized immigrants lowers the cost of hiring that class of workers, thereby incentivizing the practice.

The longstanding judicial effort to discourage illegal immigration by harmonizing labor and immigration laws ended discordantly at the beginning of this century with the Supreme Court’s decision in *Hoffman Plastic Compounds, Inc. v. NLRB*.¹ Finding a conflict between the federal prohibition on hiring unauthorized immigrants, as reflected in the Immigration Reform Control Act (IRCA),² and awarding backpay to such workers for violations of the National Labor Relations Act (NLRA),³ the Court held that the latter practice must yield.⁴ According to the Court, work-authorized employees fired as victims of an employer’s unfair labor practices are entitled to all available remedies; unauthorized immigrants are not entitled to monetary compensation.⁵ In so deciding, the Supreme Court laid the doctrinal foundation for a two-tiered legal system to match the two-tiered workforce already in place⁶—one tier encompassing citizens, legal

1. 535 U.S. 137 (2002).

2. 8 U.S.C. § 1324a(a)(1)(A) (2000).

3. 29 U.S.C. §§ 151-169 (2000).

4. See *Hoffman*, 535 U.S. at 145-46, 151-52.

5. *Id.* at 151.

6. See Maria L. Ontiveros, *Immigrant Workers’ Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651, 658 (2004) (criticizing *Hoffman* for creating a “class of workers without equal recourse or remedies”);

residents, and work-authorized nonimmigrants entitled to the full range of remedies for workplace violations, and another tier encompassing unauthorized immigrants,⁷ a group already in the shadow of the American workforce, now in the shadow of the American legal system as well.

In *Hoffman's* wake, academics, lawyers, and judges have attempted to predict whether the decision will extend beyond the NLRA, diminishing other employment protections in the process. Was the holding limited to administrative actions before the National Labor Relations Board (NLRB) or would unauthorized immigrants eventually be barred from bringing discrimination and wage claims as well? The ambiguities created by *Hoffman* provided employers with a sword to wield against an already submissive workforce and a shield to defend against charges of illegality in the workplace brought by immigrant employees.

Employers quickly embraced the decision in attempts to defeat a wide range of claims brought by "suspected" immigrants.⁸ A fashion designer cited *Hoffman* to defend against wage claims brought by Chinese garment workers.⁹ A construction company argued that *Hoffman* foreclosed a work-

see also NAT'L EMPLOYMENT LAW PROJECT, USED AND ABUSED: THE TREATMENT OF UNDOCUMENTED VICTIMS OF LABOR LAW VIOLATIONS SINCE *Hoffman Plastic Compounds v. NLRB* 2 (2003), available at <http://www.nelp.org/docUploads/Used%20and%20Abused%20101003.pdf>.

7. I use the term "unauthorized immigrant" to refer to foreign nationals who immigrate to the United States without authorization as well as those who immigrate legally but later violate the terms of entry. Labels such as "undocumented worker" and "illegal alien," both of which have been used to describe this group, present semantic difficulties. See Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1597 (2005). Popular discourse commonly conflates the term "illegal alien" with Mexican identity, providing an unnecessary political charge and underinclusiveness to the discussion. See *id.*; see also Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: *The Social Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 279-81 (1997) (discussing the use of the term "illegal alien" in legal discourse). Likewise, those who immigrate to the country without work authorization rarely lack "documents" but instead provide fraudulent paperwork to their employer at the time of hire in order to comply with the verification system established by the IRCA. 8 U.S.C. § 1324a(b) (2000). These workers are "documented" in the most literal sense. See JEFFREY S. PASSEL, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 2 (2005), available at <http://pewhispanic.org/files/reports/46.pdf> (using the term "unauthorized migrant"). The non-citizens referred to here reside in the United States without authorization from the United States Citizenship and Immigration Services and, therefore, are described most accurately as "unauthorized immigrants." See OFFICE OF POLICY & PLANNING, U.S. IMMIGRATION & NATURALIZATION SERV., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990-2000 3 (2003), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_Report_1211.pdf (defining "unauthorized immigrants").

8. See Mariel Martinez, *The Hoffman Aftermath: Analyzing the Plight of the Undocumented Worker Through a "Wider Lens,"* 7 U. PA. J. LAB. & EMP. L. 661, 682 (2005) (summarizing the contention of some employers that "undocumented workers were thus completely precluded from employment rights and all corresponding remedies"); see also Anne Marie O'Donovan, *Immigrant Workers and Worker's Compensation After Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 30 N.Y.U. REV. L. & SOC. CHANGE 299, 300 (2006) (contending that *Hoffman* provided employers with a "green light" to argue that undocumented workers are no longer covered by workplace protections).

9. *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 192-93 (S.D.N.Y. 2002).

ers' compensation award to an immigrant who sustained head injuries at the worksite.¹⁰ Although most attempts to extend *Hoffman* beyond the NLRA have failed,¹¹ some defendants have experienced limited success,¹² thus emboldening other employers to continue to argue that a plaintiff's unauthorized immigration status limits recovery or eliminates liability altogether. If *Hoffman* restricts workplace protections other than the NLRA, the argument goes, then the plaintiff's immigration status matters; and if status matters, then employers may ask the crucial question: Do you have papers?

This article focuses on that question and the role the Fifth Amendment's privilege against self-incrimination plays in its answer. Although most scholarly attention has focused on *Hoffman*'s substantive limitations,¹³ the decision is far more significant for the revolution in discovery that it has produced.¹⁴ With employers now posing immigration-related questions with impunity, immigrant plaintiffs who were already uneasy with asserting workplace claims have ceased suing employers to avoid answering questions about their immigration status. Without an effective methodology for addressing status-based discovery, immigrant workers, both legal and unauthorized, will continue to opt out of employment litigation.

This article tracks the *Hoffman*-created transformation in civil discovery while proposing a role for the Fifth Amendment in immigrant-initiated employment litigation. I begin by providing a brief overview of *Hoffman*, the lower courts' reactions, and the ensuing shift toward invasive status-based discovery. In the second section, I explain how status-based discovery not only dissuades immigrant employees from vindicating their workplace rights but also weakens the employment protections at issue. As the frequency and predictability of status-based questions increase, more unauthorized immigrants will refrain from suing, thereby excluding an entire class of workers from asserting claims under federal employment statutes that by design rely on private attorneys general for their enforcement. In addition to unauthorized immigrants, any plaintiff employee who appears "illegal" to the defendant will experience the repercussions.

10. Reinforced Earth Co. v. Workers' Comp. Appeal Bd., 810 A.2d 99, 101 (Pa. 2002).

11. See, e.g., *De La Rosa v. N. Harvest Furniture*, 210 F.R.D. 237, 238-39 (C.D. Ill. 2002) (noting that *Hoffman* is "not dispositive" on Title VII and FLSA claims); *Flores v. Albertsons, Inc.*, No. 01 Civ. 00515, 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002) (holding that *Hoffman* does not prevent recovery of unpaid wages under the FLSA).

12. See *Veliz v. Rental Serv. Corp. USA, Inc.*, 313 F. Supp. 2d 1317, 1335 (M.D. Fla. 2003) (personal injury); *Escobar v. Spartan Sec. Serv.*, 281 F. Supp. 2d 895, 896-98 (S.D. Tex. 2003) (Title VII sexual harassment); *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510, 512 (Mich. Ct. App. 2003) (workers' compensation).

13. See, e.g., *Developments in the Law—Jobs and Borders*, 118 HARV. L. REV. 2171, 2241-44 (2005) (arguing against IRCA preemption under *Hoffman*); O'Donovan, *supra* note 8, at 304-07; Rebecca Smith et al., *Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 602-07 (2004) (arguing against *Hoffman*'s extension to Title VII and other federal employment statutes).

14. See *Developments in the Law—Jobs and Borders*, *supra* note 13, at 2244.

In the third section, I propose a role for the Fifth Amendment in immigrant-initiated employment litigation. I begin by reviewing, evaluating, and ultimately dismissing as inadequate the responses offered by academics and practitioners to the problems posed by discovery in the post-*Hoffman* era. The conventional wisdom recommends obtaining a protective order pursuant to Federal Rule of Civil Procedure 26(c). Examining the purpose and structure of Rule 26, I argue that protective orders fail to satisfy immigrants' interests in anonymity, consistency, and certainty. Beyond that incongruity, I outline the protective order's practical limitations, including third-party access and malleability.

After rejecting the current strategies for addressing questions about status, I explain why the privilege against self-incrimination is a highly effective—although presently ignored—strategy for serving immigrants' litigation needs. I contend that the policies in support of extending the privilege to the civil context play a prominent role in immigrant-initiated litigation. Civil libertarian values traditionally associated with the privilege, such as privacy and the prevention of cruelty,¹⁵ are threatened when courts grant defendants unfettered access to status-based discovery. The privilege is said to prevent the witness from facing the "cruel trilemma" of perjury, self-incrimination, and contempt.¹⁶ The choice is uniquely cruel for the unauthorized immigrant who risks criminal prosecution and deportation with a truthful answer to a question about status.

After evaluating the policies and principles of the privilege in the context of status-based discovery, I discuss the consequences of invocation. For example, courts in civil cases can draw an adverse inference from a plaintiff's assertion of the Fifth Amendment. I outline factors counseling against such inferences, including the unreliability of silence, the prejudicial effect of adverse inferences, and the irrelevance of status to most employment claims. I contend that even if courts infer that silent plaintiffs are unauthorized immigrants, the outcome would be preferable to the current amorphous state of affairs in which unauthorized immigrants occupy a legally untenable space where employment rights and remedies remain obscured by *Hoffman*. The privilege provides a vehicle for courts to clarify these issues. In order to draw an adverse inference from a plaintiff's silence, a court must first determine whether a plaintiff's unauthorized immigration status is relevant to the claims at issue. If *Hoffman* did not limit the workplace rights of unauthorized immigrants beyond the NLRA, then status is irrelevant and the inference will not be drawn. Either way, the inference analysis forces courts to declare whether status matters. Thus, the privilege serves both protective and explanatory functions by

15. See Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 434-36 (2000) (criticizing the traditional rationales associated with the privilege); William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1232-42 (1988) (analyzing the cruel choice theory and other rationales for the privilege).

16. See Robert Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 YALE L.J. 1062, 1086 (1982).

guarding the witness's status-based information, while demanding a determination of immigrant-based employment rights after *Hoffman*.

I. Redefining Immigrant-Initiated Employment Litigation

In May 1988, Jose Castro applied for work at a plastics factory in Panorama, California.¹⁷ Castro submitted a Texas birth certificate, a California driver's license, and a Social Security card with his application.¹⁸ Approximately seven months after being hired, Castro joined several other employees to support a union-organizing campaign and distribute union authorization cards to coworkers.¹⁹ His employer, Hoffman Plastic Compounds, laid off Castro and several other organizers the next month.²⁰ After an investigation and hearing, the NLRB determined that Hoffman had unlawfully discharged Castro and three other employees in retaliation for their union activities in violation of § 8(a)(3) of the NLRA. The NLRB ordered Hoffman to reinstate the employees with backpay and to cease and desist from further violations.²¹

At a compliance hearing to determine the amount of backpay owed to the workers, Hoffman's lawyer posed the following question to Castro: "What kind of documents do you have that authorize you to work in the United States?"²² Although the administrative law judge (ALJ) presiding over the hearing sustained the General Counsel's objection to the question, the ALJ allowed Castro to answer through an offer of proof. Castro admitted to being a Mexican national and conceded that he submitted a fraudulent birth certificate, driver's license, and Social Security card to Hoffman at the time of hire.²³ The ALJ denied Castro reinstatement and backpay, holding that such remedies would conflict with the IRCA's prohibition²⁴ on providing false documentation to prove employment eligibility.²⁵ The NLRB reversed with respect to backpay, finding that awarding Castro wages for lost work would effectuate the policies of the NLRA and the IRCA.²⁶

After the D.C. Circuit enforced the Board's order,²⁷ the Supreme Court reversed, holding that the NLRB was powerless to award backpay to employees who, although victims of unfair labor practices, "themselves had committed serious criminal acts."²⁸ The Court held that unauthorized immigrants are not entitled to backpay under the NLRA because they are

17. Catherine L. Fisk & Michael J. Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights Without Remedies for Undocumented Immigrants*, in *LABOR LAW STORIES* 399, 408 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

18. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140-41 (2002).

19. *See Hoffman*, 535 U.S. at 140.

20. *See id.*

21. *Hoffman Plastic Compounds, Inc.*, 306 N.L.R.B. 100, 100-01 (1992).

22. *Hoffman Plastic Compounds, Inc.*, 326 N.L.R.B. 1060, 1060 (1998).

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

24. 8 U.S.C. § 1324c (2000).

25. *Hoffman Plastic Compounds, Inc.*, 314 N.L.R.B. 683, 685 (1994).

26. *Hoffman Plastic Compounds, Inc.*, 326 N.L.R.B. 1060, 1061-62 (1998).

27. *Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639, 650 (D.C. Cir. 2001).

28. *Hoffman*, 535 U.S. at 148-49.

not “lawfully entitled to be present and employed in the United States,” as required by the IRCA.²⁹ In addition, unauthorized immigrants would be unable to fulfill their statutory duty to mitigate damages for lost work without further violating the IRCA by obtaining additional employment through unlawful means. As Justice Scalia stated during oral argument, because the unauthorized immigrant cannot lawfully mitigate his damages, a backpay award would create an incentive for the immigrant to “just sit home and eat chocolates”³⁰

Hoffman rests on a strained statutory analysis of the NLRA and the IRCA, as well as flawed assumptions about the incentives that drive illegal immigration. Based on a broad definition of “employee”³¹ and a remedial scheme designed to combat unfair labor practices as is necessary to “effectuate the policies” of the Act,³² the NLRA appears to express a congressional intent to extend workplace protections and remedies to all employees, regardless of immigration status. Although the Court concluded that such a reading of the NLRA would conflict with the IRCA, the IRCA’s legislative history addresses the issue explicitly, stating that the Act was *not* intended to “limit the powers of federal or state labor relations boards . . . to remedy unfair practices committed against undocumented employees”³³ Congressional intent notwithstanding, the Court inferred from the IRCA a need to ban backpay awards to unauthorized immigrants in NLRA proceedings. According to the decision, awarding damages to unauthorized immigrants in labor disputes would encourage illegal immigration, thereby undermining the IRCA. Although studies conclude that a desire to obtain employment, not a speculative hope of labor law remedies, drives illegal immigration,³⁴ the Court nonetheless presumed that precluding NLRA backpay awards would enhance IRCA compliance.

29. *Id.* at 146 (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984)).

30. Transcript of Oral Argument at 32–33, *Hoffman*, 535 U.S. 137 (No. 00-1595).

31. See 29 U.S.C. § 152(3) (2000) (“The term ‘employee’ shall include *any* employee”) (emphasis added).

32. 29 U.S.C. § 160(c) (2000).

33. H.R. REP. NO. 99-682(I), at 58 (1986), *reprinted* in 1986 U.S.C.C.A.N. 5649, 5662 (emphasis added). The House Education and Labor Committee created a similar record: “[T]he committee does not intend that any provision of [the IRCA] would limit the powers of State or Federal labor standards agencies such as the . . . Equal Employment Opportunity Commission . . . to remedy unfair practices committed against undocumented employees.” H.R. REP. NO. 99-682(II), at 8-9 (1986), *reprinted* in 1986 U.S.C.C.A.N. 5757, 5757-58; see also Marianne Staniunas, *All Employees Are Equal, but Some Employees Are More Equal Than Others*, 6 U. PA. J. LAB. & EMP. L. 393, 401 (2004) (discussing congressional intent, as reflected in the IRCA).

34. See PASSEL, *supra* note 7, at 41 (2005) (citing job availability in the United States and conditions in countries of origin as reasons for increased illegal immigration); see also *Patel v. Quality Inn S.*, 846 F.2d 700, 704–05 (11th Cir. 1988) (“By reducing the incentive to hire such workers the FLSA’s coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA.”).

A. *Hoffman's* Expansion to Other Statutory Protections

Concerns about mass firings and deportations spread throughout immigrant communities soon after *Hoffman*.³⁵ Unscrupulous employers used the decision to “straighten out” troublesome immigrant workers.³⁶ A population already reluctant to complain about workplace wrongs became more fearful of initiating litigation.³⁷ Critics charged that the decision encouraged employers to hire unauthorized immigrants.³⁸ Transnational human rights bodies such as the Inter-American Court of Human Rights and the International Labor Organization held that *Hoffman* violated international migrants’ right of association.³⁹ Employers attempted to expand *Hoffman* beyond the NLRA to laws governing wages, discrimination, and workplace safety,⁴⁰ fueling a frenzy of test cases across the country.⁴¹

The post-*Hoffman* expansion movement has been wide-ranging. At its most basic level, the argument proceeds as follows: If the Supreme Court believes that monetary payments to unauthorized immigrants constitute a “reward” for illegal behavior, then all employment claims brought by unauthorized immigrants are barred. Thus, employers have argued that *Hoffman* limits their obligation to pay for work already performed,⁴² eliminates sexual harassment protections for unauthorized immigrants,⁴³ and reduces

35. See generally Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465, 500 (2006) (describing how some employers intimidate workers by citing *Hoffman*).

36. See NAT’L EMPLOYMENT LAW PROJECT, *supra* note 6, at 6.

37. 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 n.19 (2003) (referring to the “mischief” created by the *Hoffman* decision but predicting limited impact).

38. See, e.g., Sarah Cleveland et al., *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law when Labor Law Remedies Are Restricted Based on Workers’ Migrant Status*, 1 SEATTLE J. FOR SOC. JUST. 795, 802 (2003) (“Since these employers suffer no penalty for violating the law, they are encouraged to hire the undocumented, and the goals of U.S. immigration laws are thus thwarted.”); Martinez, *supra* note 8, at 661.

39. See Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC 18/03, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003); Int’l Labour Office, *332nd Report of the Committee on Freedom of Association*, at 142, ILO Doc. No. GB.288/7 (Pt. 1) (Nov. 2003), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb288/pdf/gb-7.pdf>; see also LANCE COMPA, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS xxi (2004).

40. See Smith et al., *supra* note 13, at 605.

41. Martinez, *supra* note 8, at 664–66 (observing that “the rights of undocumented immigrants have seemingly become more and more obscure” following *Hoffman*).

42. See, e.g., Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 321 (D.N.J. 2005) (“[Wal-Mart] contends that . . . *Hoffman* casts doubt on the notion that undocumented workers are entitled to seek back pay for minimum wage and overtime under FLSA.”); Bob Egelko, *Immigration: The Legal Whorl*, S.F. CHRON., May 26, 2002, at A7 (discussing the possible extension of *Hoffman* to all work-related claims).

43. Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 896–98 (S.D. Tex. 2003); NAT’L EMPLOYMENT LAW PROJECT, *supra* note 6, at 6 (discussing sexual harassment); Donna Y. Porter, *Undocumented Workers Have NLRA Rights, but Not Monetary Remedies*, EMP. L. STRATEGIST, Apr. 2002 (arguing that *Hoffman* may limit Title VII remedies).

recoveries for on-the-job injuries sustained by unauthorized immigrants.⁴⁴ Taken to its extreme, the *Hoffman* expansion movement argues that unauthorized immigrants have no employment rights at all.⁴⁵

Attempts to broaden *Hoffman* notwithstanding, most courts have limited *Hoffman* to the NLRA. Nevertheless, a few judicial opinions have relied on *Hoffman* to strike down employment claims brought by unauthorized immigrants, encouraging employers to argue that the scope of *Hoffman*'s expansion remains undetermined. For employers, this substantive ambiguity justifies questions about immigration status.

1. *Wage and Hour Law: Hoffman Inapplicable*

Nearly every court to reach the issue of *Hoffman*'s relevance to wage and hour law has ruled that unauthorized immigrants may still assert claims for unpaid wages.⁴⁶ Allowing unauthorized immigrants to assert claims for unpaid wages does not offend *Hoffman* because of different meanings given to the term "backpay" by courts interpreting the NLRA and the Fair Labor Standards Act (FLSA), the federal law guaranteeing minimum wage and overtime payments to most employees.⁴⁷

The type of "backpay" involved in *Hoffman* concerned unpaid wages for "lost work."⁴⁸ Jose Castro sought damages for wages that he never

44. See, e.g., *Xinic v. Quick*, 69 Va. Cir. 295 (Va. Cir. Ct. 2005).

45. REBECCA SMITH ET AL., UNDOCUMENTED WORKERS: PRESERVING RIGHTS AND REMEDIES AFTER *Hoffman Plastic Compounds v. NLRB* 1 (2003), available at <http://www.nelp.org/docUploads/wlghoff040303%2Epdf>; Martinez, *supra* note 8, at 681-82 (summarizing the post-*Hoffman* expansion argument that "undocumented workers were thus completely precluded from employment rights and all corresponding remedies"); O'Donovan, *supra* note 8, at 300; see also *Majlinger v. Cassino Contracting Corp.*, 802 N.Y.S.2d 56, 63 (N.Y. App. Div. 2005) (stating that the broadest reading of *Hoffman* would bar all employment claims brought by unauthorized immigrants).

46. *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1277 (N.D. Okla. 2006); *Zavala*, 393 F. Supp. 2d at 323 ("[T]his Court only joins the growing chorus acknowledging the right of undocumented workers to seek relief for work already performed under the FLSA."); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 501-03 (W.D. Mich. 2005); *Hernandez-Cortez v. Hernandez*, No. 01 Civ. 1241, 2003 WL 22519678, at *6 (D. Kan. Nov. 4, 2003); *Cortez v. Medina's Landscaping*, No. 00 Civ. 6320, 2002 WL 31175471, at *1 (N.D. Ill. Sept. 30, 2002); *Flores v. Amigon*, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002); *Rodriguez v. Texan, Inc.*, No. 01 Civ. 1478, 2002 WL 31061237, at *2 (N.D. Ill. Sept. 16, 2002); *Singh v. Jutla*, 214 F. Supp. 2d 1056, 1062 (N.D. Cal. 2002); *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 192-93 (S.D.N.Y. 2002); *Flores v. Albertsons, Inc.*, No. 01 Civ. 00515, 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002); *Reyes v. Van Elk, Ltd.*, 56 Cal. Rptr. 3d 68, 75 (Cal. Ct. App. 2007); *Coma Corp. v. Kansas Dept. of Labor*, 154 P.3d 1080, 1087 (Kan. 2007); *City Plan Dev., Inc. v. Office of Labor Comm'r*, 117 P.3d 182, 189-90 (Nev. 2005); *Pineda v. Kel-Tech Const., Inc.*, 832 N.Y.S.2d 386, 394 (N.Y. App. Div. 2007); *Garcia v. Pasquareto*, 812 N.Y.S.2d 216, 217 (N.Y. App. Div. 2004); *Gomez v. Falco*, 792 N.Y.S.2d 769 (N.Y. App. Term 2004).

47. 29 U.S.C. §§ 201-219 (2000).

48. See *Flores*, 233 F. Supp. 2d at 463 (distinguishing between "undocumented workers seeking backpay for wages actually earned and those seeking backpay for work not performed"); *Zeng Liu*, 207 F. Supp. 2d at 192; *Pineda*, 832 N.Y.S.2d at 395; *Garcia*, 812 N.Y.S.2d at 216 (allowing recovery of "unpaid wages for work that undocumented aliens have performed when the undocumented aliens have also tendered false documents").

earned because he was discharged illegally for union organizing.⁴⁹ The Supreme Court held that awarding Castro backpay would offend the IRCA because it would “trivialize[] the immigration laws” and “encourage[] future violations.”⁵⁰ On the latter point, the Court noted that in order to comply with his required duty to mitigate, Castro would have to obtain replacement work, thereby engaging in additional document fraud in violation of the IRCA.⁵¹

“Backpay” under the FLSA does not require the employee to find replacement work because the term refers to payment for “work already performed.”⁵² Thus, the FLSA allows an employee to recover unpaid minimum wages already earned from past work completed. Such a backpay award does not encourage a violation of the IRCA because there is no duty to mitigate through reemployment. Backpay awards under the FLSA remain available to unauthorized immigrants in nearly every jurisdiction because, other than sharing the label “backpay,” FLSA claims are wholly distinct from the monetary award involved in *Hoffman*.

The few courts to extend *Hoffman* to claims for unpaid wages have ignored the distinction between “past work” and “lost work.” In New York, a landscaper sued his employer for unpaid wages.⁵³ Finding that the employment relationship was “tainted with illegality” because the employee was an unauthorized immigrant, the court barred the plaintiff from recovering overtime.⁵⁴ In Los Angeles, four Latino immigrants sued their employer for failing to comply with the state’s prevailing wage statute in compensating them for their services on a public works project.⁵⁵ The plaintiffs refused to answer discovery questions about their immigration status. Citing *Hoffman*, the trial court declared that the unauthorized immigrants had no standing to sue under California’s labor laws.⁵⁶ The court also struck down as preempted by the IRCA the California legislature’s post-*Hoffman* attempt to extend the state’s labor, employment, civil rights, and employee housing laws to unauthorized immigrants.⁵⁷

49. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 141-42 (2002).

50. *Id.* at 150.

51. *Id.* (“Similarly, Castro cannot mitigate damages, a duty our cases require without triggering new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore IRCA and hire illegal workers.”) (citations omitted).

52. *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 322 (D.N.J. 2005) (“In *Hoffman*, the plaintiffs sought recovery for the hours that they would have, but had not, worked, had they not been terminated for engaging in protected, union-related activities. Here, Plaintiffs hope to recover under the FLSA for work that they already have performed.”).

53. *Ulloa v. Al’s All Tree Serv., Inc.*, 768 N.Y.S.2d 556, 556 (N.Y. Dist. Ct. 2003) (allowing unauthorized immigrant to recover no more than the minimum wage).

54. *Id.* at 558 (noting that if an employee produced false documents when hired, “*Hoffman* would require that the wage claim be disallowed in its entirety”).

55. *Reyes v. Van Elk, Ltd.*, 56 Cal. Rptr. 3d 68, 70 (Cal. Ct. App. 2007) (discussing procedural history).

56. *Id.* at 71.

57. CAL. CIV. CODE § 3339(a), (c) (West 2007); CAL. GOV’T CODE § 7285(a) (West 2007); CAL. HEALTH & SAFETY CODE § 24000 (West 2007); CAL. LAB. CODE § 1171.5(a) (West 2007).

Although the California Court of Appeal reversed,⁵⁸ the lower court's willingness to use the plaintiff's silence to determine their status and then to extend *Hoffman* to defeat their wage claims exemplifies the willingness of a minority of courts to broaden *Hoffman* to employment claims far removed from the NLRA.⁵⁹

2. *Anti-discrimination Law and Damages for Lost Work*

Hoffman cast doubt on the remedies available to unauthorized immigrants under federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964,⁶⁰ the Age Discrimination in Employment Act (ADEA),⁶¹ the Equal Pay Act,⁶² and the Americans with Disabilities Act (ADA),⁶³ all of which are enforced by the Equal Employment Opportunity Commission (EEOC). Although the Supreme Court considered the issue during oral argument⁶⁴ and was urged by some employer groups to institute a wide ban on backpay under all anti-discrimination statutes,⁶⁵ the Court did not address Title VII in its opinion. Nevertheless, actions taken by the EEOC and a few courts following *Hoffman* cast doubt on the contin-

58. *Reyes*, 56 Cal. Rptr. 3d at 78-79.

59. See *Renteria v. Italia Foods, Inc.*, No. 02 Civ. 495, 2003 WL 21995190, at *6 (N.D. Ill. Aug. 21, 2003) (allowing recovery for FLSA retaliation, except for backpay). But see *Singh v. Jutla*, 214 F. Supp. 2d 1056, 1061 (N.D. Cal. 2002) (allowing recovery for FLSA retaliation, including backpay).

60. 42 U.S.C. §§ 2000e-2000e-17 (2000).

61. 29 U.S.C. §§ 621-634 (2000).

62. 29 U.S.C. § 206(d) (2000).

63. 42 U.S.C. § 12101 (2000).

64. Transcript of Oral Argument at 19-20, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (No. 00-1595). The discussion of the issue at oral argument proceeded as follows:

QUESTION: So in Title VII, if she were laid off, say, because they laid off all the women before they laid off any men, so she would also have a duty to mitigate in those circumstances, would the result be different?

MR. McCORTNEY: No. When there's a duty to mitigate which requires them to seek interim employment, that is where the rub is, but under Title VII, under, like, the NLRA, there's a whole array of other remedies available to enforce compliance. Punitive damages, you can—compensatory damages, emotional distress, that is not dependent on the victim's authorization to work in this country.

QUESTION: Of course, her complaint, if it were complaint, should read something like, you know, I shouldn't have been working at all, and it was illegal for me to be working at all, and I'm complaining because I only got \$12,000 in illegal wages. I should have gotten \$14,000 in illegal wages. I don't find that a very appealing case anyway. Do you find that an appealing case?

MR. McCORTNEY: No, Your Honor, I don't. I don't find that an appealing case.

Id.

65. See Brief Amici Curiae of the Equal Employment Advisory Council and LPA, Inc. in Support of Petitioner at 18, *Hoffman*, 535 U.S. 137 (No. 00-1595), 2001 WL 1480578. ("The Court should clarify that under IRCA, undocumented aliens are not entitled to backpay under the NLRA—or any of the other federal anti-discrimination laws, such as Title VII, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA) . . .") (citations omitted); see also Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 497-98 (2005) (discussing the *Hoffman* oral argument).

uing availability of backpay for unauthorized immigrants under federal anti-discrimination statutes.

Soon after *Hoffman*, the EEOC rescinded its prior enforcement guidance,⁶⁶ which had stated that unauthorized immigrants were entitled to all forms of monetary relief under federal anti-discrimination laws.⁶⁷ The EEOC stated that its former guidance was based on federal court decisions extending backpay to unauthorized immigrants under the NLRA.⁶⁸ Because of *Hoffman*, the EEOC could no longer declare affirmatively that unauthorized immigrants were entitled to recover backpay for Title VII violations.

Most courts have not treated the rescission as an explicit signal to limit the range of Title VII remedies available to unauthorized immigrants. These courts have noted—usually in response to discovery requests seeking information regarding the plaintiff's immigration status—that Title VII relies on enforcement and remedial schemes distinct from the NLRA, making *Hoffman* inapplicable.⁶⁹ Although *Hoffman* has not affected Title VII in most instances, a few courts have relied on the decision to dismiss discrimination claims brought by unauthorized immigrants. In *Escobar v. Spartan Security Service*, a security officer claimed that his supervisor sexually harassed him and retaliated against him after rebuffing the advances.⁷⁰ Noting that the plaintiff was an unauthorized immigrant at the time of hire, the court dismissed his claim for lost wages under Title VII.⁷¹ Although the court did not state its reasoning, implicit in the decision was the past work/lost work distinction discussed above.⁷² Although backpay awards under most wage statutes involve payment for work already performed, lost wages under the NLRA and Title VII typically involve payment for work lost due to the defendant's unlawful acts.⁷³ Thus, the same problems of mitigation and future IRCA violations present in *Hoffman* arguably exist in these

66. See U.S. Equal Emp. Opportunity Comm'n, *Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws*, EEOC Notice No. 915.002, Oct. 26, 1999, rescinded June 27, 2002, available at <http://www.eeoc.gov/policy/docs/undoc.html>.

67. U.S. Equal Emp. Opportunity Comm'n, *Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws*, EEOC Directives Transmittal No. 915.002, June 27, 2002, available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html>.

68. *Id.*

69. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1067-69 (9th Cir. 2004); *EEOC v. First Wireless Group, Inc.*, 225 F.R.D. 404, 406-07 (E.D.N.Y. 2004) (following *Rivera* and denying discovery of charging parties' immigration status); see *De La Rosa v. N. Harvest Furniture*, 210 F.R.D. 237 (C.D. Ill. 2002).

70. *Escobar v. Spartan Sec. Serv.*, 281 F. Supp. 2d 895, 896 (S.D. Tex. 2003).

71. *Id.* at 897 ("*Hoffman* only compels the conclusion that *Escobar* is not entitled to backpay on his claims under Title VII, such a remedy being foreclosed by the fact that he was an undocumented worker at the time he was employed by *Spartan*.").

72. See *supra* Part I.A.1 and accompanying discussion on backpay awards under the FLSA.

73. See *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1277 (N.D. Okla. 2006) (suggesting that *Hoffman* "may preclude an award of backpay" for lost work under Title VII); *Smith et al.*, *supra* note 13, at 606 (noting the difference between "backpay" under the FLSA and other employment statutes).

situations.⁷⁴

In New Jersey, Rosa Crespo alleged that her employer violated the state's anti-discrimination law by firing her because she was pregnant.⁷⁵ The state appellate court held that as an unauthorized immigrant, Crespo was completely barred from asserting a claim for pregnancy discrimination.⁷⁶ Feeling bound by "*Hoffman's* strong enforcement of the policies served by IRCA," the court held that Crespo's "statutory bar from employment" precluded recovery under New Jersey's Law Against Discrimination.⁷⁷ This is a remarkable outcome given that the Supreme Court in *Hoffman* reaffirmed its prior holding that unauthorized immigrants are "employees" under the NLRA and are therefore covered by the Act.⁷⁸ Following *Hoffman*, the Department of Labor, the NLRB, and the EEOC stated unequivocally that federal employment laws still cover unauthorized immigrants.⁷⁹ Although the availability of backpay under these statutes remains debatable, coverage has never been at issue. There is no coherent reading of *Hoffman* that would restrict federal or state anti-discrimination statutes to citizens.

3. State Law: Torts and Workers' Compensation

Although most scholars have focused on *Hoffman's* impact on federal wage and anti-discrimination laws, state courts have cited *Hoffman* in personal injury, wrongful death, wrongful discharge, and workers' compensation cases. Although still in the minority,⁸⁰ some state courts have relied

74. FLSA retaliation claims can involve backpay for lost work. Although few courts have addressed the availability of this type of backpay to unauthorized immigrants after *Hoffman*, at least one court has allowed backpay for past work but denied an award of backpay for lost work. See *Renteria v. Italia Foods, Inc.*, No. 02 Civ. 495, 2003 WL 21995190, at *6 (N.D. Ill. Aug. 21, 2003). But see *Singh v. Jutla*, 214 F. Supp. 2d 1056, 1062 (N.D. Cal. 2002).

75. *Crespo v. Evergro Corp.*, 841 A.2d 471, 473 (N.J. Super. Ct. App. Div. 2004).

76. *Id.* at 476-77.

77. *Id.* at 477 (leaving open the possibility that an unauthorized immigrant could recover for "aggravated sexual harassment" or "other egregious circumstances").

78. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144-45 (2002) (citing *Sure-Tan v. NLRB*, 467 U.S. 883, 892 (1984)).

79. See U.S. Equal Emp. Opportunity Comm'n, *supra* note 67 ("The Supreme Court's decision in *Hoffman* in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes."); Memorandum GC 02-06 from Arthur F. Rosenfeld, Gen. Counsel, NLRB, to All Regional Dirs., Officers-in-Charge and Resident Officers, Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens After *Hoffman Plastic Compounds, Inc.* (July 19, 2002), available at http://www.nlr.gov/shared_files/GC%20Memos/2002/gc02-06.html ("[I]t is unassailable that all statutory employees, including undocumented workers, enjoy protections from unfair labor practices . . ."); *Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division*, FACT SHEET (U.S. Wage & Hour Div., U.S. Dep't of Labor, Wash., D.C.), Nov. 2007, available at <http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm> ("The Department's Wage and Hour Division will continue to enforce the FLSA and MSPA [Migrant and Seasonal Agricultural Worker Protection Act] without regard to whether an employee is documented or undocumented.").

80. For cases refusing to extend *Hoffman* to tort claims involving lost earnings, see *Madeira v. Affordable Hous. Found., Inc.*, 315 F. Supp. 2d 504, 507-08 (S.D.N.Y. 2004);

on *Hoffman* to bar unauthorized immigrants from recovering damages for lost wages.⁸¹ For example, in *Hernandez-Cortez v. Hernandez*, an unauthorized immigrant was en route to North Carolina from Mexico when his van was involved in a three-car accident in Kansas, causing the plaintiff severe back injuries and limiting his ability to work.⁸² Describing the plaintiff as “engage[d] in a conspiracy to transport illegal aliens,” the court, applying Kansas tort law, cited *Hoffman* and dismissed the plaintiff’s claim for lost future earnings.⁸³

In *Veliz v. Rental Service Corp.*, Felipe Valdivia Ignacio was killed in a forklift accident at a construction site in Florida.⁸⁴ Ignacio’s estate asserted a products liability action against the leasing company and manufacturer of the forklift and sought, *inter alia*, damages for the decedent’s lost future wages.⁸⁵ Citing *Hoffman* and finding that “Mr. Ignacio unlawfully subverted the IRCA’s enforcement mechanisms by tendering fraudulent identification to obtain employment,” a Florida state court dismissed the estate’s claim for lost support.⁸⁶ The court noted that in addition to offending national immigration policy and condoning past immigration violations, an award of lost wages “would be tantamount to violating the IRCA.”⁸⁷

As with tort law, most state courts addressing the issue of workers’ compensation have extended coverage to unauthorized immigrants following *Hoffman*.⁸⁸ Nevertheless, several courts have relied on *Hoffman* to limit

Hernandez v. Paicuis, 134 Cal. Rptr. 2d 756, 760-762 (Cal. Ct. App. 2003) (medical malpractice); *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1260 (N.Y. 2006) (negligence); *Majlinger v. Cassino Contracting Corp.*, 802 N.Y.S.2d 56, 66 (N.Y. App. Div. 2005) (negligence); *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233, 247 (Tex. App. 2003); see also Ho & Chang, *supra* note 65, at 497-98 (summarizing the development of tort law following *Hoffman*).

81. For cases extending *Hoffman* to tort claims involving lost wages, see *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1001-02 (N.H. 2005) (finding *Hoffman* “instructive” and holding that “generally an illegal alien may not recover lost United States earnings, because such earnings may be realized only if that illegal alien engages in unlawful employment”); *Cano v. Mallory Mgmt.*, 760 N.Y.S.2d 816, 818 (N.Y. Sup. Ct. 2003) (allowing jury to consider plaintiff’s unauthorized status); see also Megan A. Reynolds, *Immigration-Related Discovery After Hoffman Plastic Compounds, Inc. v. NLRB: Examining Defending Employers’ Knowledge of Plaintiffs’ Immigration Status*, 2005 MICH. ST. L. REV. 1261, 1279 (2005) (summarizing unsuccessful common law claims brought by unauthorized immigrants following *Hoffman*).

82. *Hernandez-Cortez v. Hernandez*, No. 01 Civ. 1241, 2003 WL 22519678, at *2-4 (D. Kan. Nov. 4, 2003).

83. *Id.* at *4.

84. *Veliz v. Rental Serv. Corp. USA, Inc.*, 313 F. Supp. 2d 1317, 1321 (M.D. Fla. 2003).

85. *Id.* at 1334-35.

86. *Id.* at 1335-37.

87. *Id.* at 1336.

88. *Farmers Bros. Coffee v. Workers’ Comp. App. Bd.*, 35 Cal. Rptr. 3d 23, 29-30 (Cal. Ct. App. 2005); *Safeharbor Employer Servs. I, Inc. v. Cinto Velazquez*, 860 So. 2d 984, 986 (Fla. Ct. App. 2003); *Earth First Grading & Builders Ins. Group/Ass’n Serv., Inc. v. Gutierrez*, 606 S.E.2d 332, 334 (Ga. Ct. App. 2004) (extending workers’ compensation benefits to unauthorized immigrants and noting that a “contrary holding would reward employers for hiring illegal aliens”); *Design Kitchen & Baths v. Lagos*, 882 A.2d

the ability of unauthorized immigrants to recover workers' compensation benefits.⁸⁹ These decisions reflect a muddled understanding of federalism and a confused application of federal preemption rules.⁹⁰ Nevertheless, they define a new legal landscape in which the employment rights and remedies available to plaintiffs depend on immigration status.

B. The Unauthorized Immigrant's Ambiguous Place in Employment Law

It will likely take decades to determine the impact of the post-*Hoffman* expansion movement on employment laws.⁹¹ Although some commentators contend that courts have largely "tempered" *Hoffman's* ripple effect,⁹² others argue that, absent congressional intervention, *Hoffman* will likely eliminate unauthorized immigrants' ability to receive reinstatement or backpay under most federal employment statutes.⁹³ Given that *Hoffman* was only the second Supreme Court decision to address the employment rights of unauthorized immigrants,⁹⁴ the lower courts are unlikely to clarify these issues in the foreseeable future.⁹⁵

The inhibiting effect resulting from the expansion movement will arise not from the movement's limited substantive success but from the status-

817, 830 (Md. 2005); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 329-30 (Minn. 2003); *Ruiz v. Belk Masonry*, 559 S.E.2d 249, 252 (N.C. Ct. App. 2002); *Rajeh v. Steel City Corp.*, 813 N.E.2d 697, 702 (Ohio Ct. App. 2004); *Cherokee Indus., Inc. v. Alvarez*, 84 P.3d 798, 801 (Okla. Civ. App. 2003); *see also O'Donovan, supra* note 8, at 304-07.

89. *Sanchez v. Eagle Alloy*, 658 N.W.2d 510 (Mich. Ct. App. 2003) (claimant is no longer eligible for workers' compensation wage loss benefits upon discovery of claimant's unauthorized immigration status); *Reinforced Earth Co. v. Workers' Comp.* Appeal Bd., 810 A.2d 99 (Pa. 2002) (claimant's unauthorized immigration status makes him "unavailable" for work and justifies suspension of benefits); *Xinic v. Quick*, 69 Va. Cir. 295 (Va. Cir. Ct. 2005) (citing the IRCA and holding that "[p]laintiff's current legal status is potentially dispositive as to whether he may recover under the Virginia Workers' Compensation Law").

90. *See infra* Part III.E.3 and accompanying discussion on federal preemption and adverse inferences.

91. *See* Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 516 (2004).

92. *See* Beth L. Throne, *Hoffman Plastic Compounds, Inc. v. NLRB: Empowering the Unscrupulous Employer and Stigmatizing the Undocumented Worker*, 17 TEMP. INT'L & COMP. L.J. 595, 606 (2003).

93. *See* Wishnie, *supra* note 91, at 508. *But see infra* Part III.E and accompanying discussion on *Hoffman's* limited relevance to other employment statutes.

94. Wishnie, *supra* note 91, at 498-99 (referring to *Hoffman* as possibly "the most important recent development in the lives of immigrant workers"). The first decision was *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), in which the Supreme Court held that unauthorized immigrants who are no longer present in the United States are not "available for work" and therefore ineligible for an award of backpay under the NLRA. *Id.* at 884.

95. *See* Martinez, *supra* note 8, at 692 ("[U]ntil the Supreme Court or Congress revisits the logic behind this decision, it will continue to be conveniently stretched and analogized by employers."); Reynolds, *supra* note 81, at 1280 (noting that "defendants have seized upon the language in *Hoffman* to support arguments that make immigration status relevant to every imaginable claim and, therefore, demanded discovery on this matter").

based inquiries made possible by lawyers arguing for *Hoffman's* application to other employment claims. In a world where *Hoffman* arguably limits the recovery of unauthorized immigrants, status matters. Without an effective strategy for answering the status-based questions born of *Hoffman*, immigrants will continue to opt out of civil litigation,⁹⁶ unwilling to assert even the strongest claims for workplace violations.⁹⁷

II. Discovery and Immigrant Opt-Out

Before becoming a member of the Supreme Court and joining the *Hoffman* majority, then-Judge Anthony Kennedy wrote that courts must extend labor protections to unauthorized immigrants, lest they “leave helpless the very persons who most need protection from exploitative employer practices.”⁹⁸ Most scholarly attention paid to *Hoffman* has misconstrued the decision’s significance by focusing on *Hoffman's* impact on the rights and remedies available to unauthorized immigrants. In fact, the decision will be remembered most for legalizing exploitative discovery practices that undermine workplace rights.⁹⁹ *Hoffman* and its progeny provided employers with a “prying device”¹⁰⁰ that allows employers to achieve ends in litigation that remain illegal in the workplace. For example, it remains unlawful for an employer to report a plaintiff to immigration officials¹⁰¹ in retaliation for workplace complaints. Because of the status-based discovery made possible by *Hoffman*, employers can implicitly threaten deportation in depositions and document requests without violating anti-retaliation employment protections. The same is true for discrimination based on race and national origin. Defendants can now use race-based and accent-based factors in selectively posing immigration-related discovery questions to certain plaintiffs. The distinctions that the employer is prohibited from drawing in the terms and conditions of employment become operative in the terms and conditions of litigation.

In the following section, I summarize employers’ widespread use of status-based discovery following *Hoffman*. These new methods of immi-

96. See Cleveland et al., *supra* note 38, at 796; Connie de la Vega & Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Migrant Workers’ Rights in the United States*, 3 HASTINGS RACE & POVERTY L.J. 35, 49 (2005).

97. See Cleveland et al., *supra* note 38, at 801–02; Throne, *supra* note 92, at 605 (noting that *Hoffman* has “made immigration status relevant to an immigrant worker’s standing to even bring a well-substantiated claim against his or her former employer”).

98. *NLRB v. Apollo Tire Co., Inc.*, 604 F.2d 1180, 1184 (9th Cir. 1979) (Kennedy, J., concurring).

99. See *Developments in the Law—Jobs and Borders*, *supra* note 13, at 2234 (noting that “the crucial point of leverage” created by *Hoffman* “lies not in removing one category of damages, but in adding a new category of discovery”).

100. See Robert I. Corrales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers*, 14 BERKELEY LA RAZA L.J. 103, 146 (2003) (describing discovery following *Hoffman*).

101. On March 1, 2003, the Department of Homeland Security (DHS) assumed the functions of the former Immigration and Naturalization Service (INS). See 6 U.S.C. § 542 (2000); see also *Yerkovich v. Ashcroft*, 381 F.3d 990, 991 (10th Cir. 2004).

grant exploitation are perfectly legal and highly effective at maintaining a submissive workforce. This outcome not only dissuades immigrants, both legal and unauthorized, from righting workplace wrongs, it diminishes employment protections that depend on enforcement from a broad section of the workforce.

A. Losing Immigrants, Harming Citizens

In conjunction with their arguments that *Hoffman* applies to all types of employment claims, employers have adopted aggressive discovery practices designed to uncover plaintiffs' immigration status. In California, Juan Flores represented a class of janitors who alleged that Albertsons, Safeway, and other supermarkets failed to pay workers overtime and other wages.¹⁰² The supermarkets served Flores with the following document request: "Each and every [document] describing, reflecting, referring to or relating to the immigration status of [Flores], including but not limited to I-9 forms."¹⁰³ In a class action that immigrant garment workers in New York brought for unpaid minimum wages, Donna Karan International sought discovery of the plaintiffs' immigration status.¹⁰⁴ Hilton Hotels demanded to know the immigration status of a steamfitter who sued to recover lost earnings after sustaining an injury at the New York Hilton.¹⁰⁵

Defendants now pose status-based questions to immigrant employees as a matter of course.¹⁰⁶ The stated purpose of these requests is to pursue the defendant's argument that *Hoffman* imposes new remedial limitations on unauthorized immigrants. More important, however, the questions send an ominous signal to the plaintiff immigrant: If you continue to assert your workplace rights, you will reveal your illegal presence in the United States and risk deportation.¹⁰⁷ Faced with this choice, the unauthorized immigrant will often choose to walk away.¹⁰⁸

102. *Flores v. Albertsons, Inc.*, No. 01 Civ. 00515, 2002 WL 1163623, at *1 (C.D. Cal. Apr. 9, 2002).

103. *Id.* at *6 (denying the discovery request).

104. *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 192-93 (S.D.N.Y. 2002).

105. *Asgar-Ali v. Hilton Hotels Corp.*, No. 114451/02, 2004 WL 2127230, at *3 (N.Y. Sup. Ct. Aug. 6, 2004) ("[U]ntil plaintiff filed suit, there is no indication in the record that Hilton expressed an interest in determining employment authorizations.").

106. See *Ho & Chang*, *supra* note 65, at 475 (describing the requests as "nearly routine"); *Martinez*, *supra* note 8, at 692 (noting that *Hoffman* has "given employers an unjustified conviction that they have a right to use the discovery process to disclose a worker's immigration status"); see also NAT'L EMPLOYMENT LAW PROJECT, *supra* note 6 (referring to a "sharp rise" in status-based requests).

107. *Zeng Liu*, 207 F. Supp. 2d at 193 (referring to "the danger of intimidation, the danger of destroying the cause of action" posed by status-based discovery); *EEOC v. Wireless Group, Inc.*, 225 F.R.D. 404, 406-07 (E.D.N.Y. 2004); *Flores*, 2002 WL 1163623, at *6 ("It is entirely likely that any undocumented class member forced to produce documents related to his or her immigration status will withdraw from the suit rather than produce such documents and face termination and/or potential deportation.").

108. See *Ho & Chang*, *supra* note 65, at 475; Kiren Dosanjh Zucker, *From Hoffman Plastic to the After-Acquired Evidence Doctrine: Protecting Undocumented Workers' Rights Under Federal Anti-Discrimination Statutes*, 26 WHITTIER L. REV. 601, 604 (2004).

Unauthorized immigrants are acutely aware of their tenuous presence in the United States.¹⁰⁹ Long before *Hoffman*, the greatest force preventing immigrants from asserting employment claims was the unavoidable association of complaining with removal—a consequence far more life-altering than mere discharge. Even without the prospect of status-based questions clouding litigation, unauthorized immigrants often chose to remain silent in the face of egregious workplace violations.¹¹⁰ The fear is justified; studies suggest that immigration raids are more likely to occur at workplaces where immigrants have lodged complaints.¹¹¹

In addition to causing unauthorized immigrants to abandon litigation, questions about status dissuade lawful permanent residents from going to court. These legal immigrants often live in “mixed families” in which some family members are U.S. citizens and others are unauthorized immigrants.¹¹² If litigating workplace claims entails extensive discovery about status, many of these legal immigrants will decline to sue in order to avoid answering invasive questions about their families and themselves.¹¹³

The opt-out phenomena caused by status-based discovery reaches a sizable percentage of the workforce. Immigrants represent roughly 15% of the civilian labor force,¹¹⁴ accounting for nearly one-half of the growth of the workforce between 1990 and 2001.¹¹⁵ With more than 400,000 unauthorized immigrants coming to the country annually,¹¹⁶ they now eclipse

109. See generally DANIEL ROTHENBERG, *WITH THESE HANDS: THE HIDDEN WORLD OF MIGRANT FARMWORKERS TODAY* xiv (1998) (referring to “an entire class of unprotected and unrecognized laborers deeply aware of their powerlessness and vulnerability”); see also Hiroshi Motomura, *Choosing Immigrants, Making Citizens*, 59 *STAN. L. REV.* 857, 865 (2007) (referring to the “inherently precarious” existence of undocumented immigrants).

110. See NAT’L EMPLOYMENT LAW PROJECT, *supra* note 6 at 2; de la Vega & Lozano-Batista, *supra* note 96, at 40–44 (describing working conditions of migrant workers in the United States).

111. See Michael J. Wishnie, *Introduction: The Border Crossed US: Current Issues in Immigrant Labor*, 28 *N.Y.U. REV. L. & SOC. CHANGE* 389, 390–92 (2004) (summarizing data showing a correlation between INS raids in New York and state labor complaints); see also COMPA, *supra* note 39, at 30 (reporting on employers’ threats to call the INS in retaliation for unionization drives by immigrant workers).

112. See PASSEL, *supra* note 7, at 17–18 (estimating 13.9 million persons living in unauthorized migrant families).

113. Ho & Chang, *supra* note 65, at 525 (noting that status-based discovery would “undeniably weaken [immigrants’] resolve to see their cases through to their end”).

114. STEPHEN A. CAMAROTA, *CTR. FOR IMMIGRATION STUDIES, IMMIGRANTS IN THE UNITED STATES—2002: A SNAPSHOT OF AMERICA’S FOREIGN-BORN POPULATION* 11 (2002), available at <http://www.cis.org/articles/2002/back1302.pdf>; see also Michael R. Brown, *Hoffman Plastic Compounds v. NLRB: The First Step?*, 19 *LAB. LAW.* 169, 171 (2003) (describing *Hoffman*’s impact on the growing immigrant labor market).

115. *CTR. FOR LABOR MKT. STUDIES, NORTHEASTERN UNIV., IMMIGRANT WORKERS AND THE GREAT AMERICAN JOB MACHINE: THE CONTRIBUTIONS OF NEW FOREIGN IMMIGRATION TO NATIONAL AND REGIONAL LABOR FORCE GROWTH IN THE 1990s* 27 (2002).

116. OFFICE OF IMMIGRATION STATISTICS, *DEP’T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2005 I* (2006), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL_PE_2005.pdf.

the number of new legal immigrants.¹¹⁷

Beyond unauthorized immigrants, status-based discovery also harms citizens by diminishing litigation market conditions. The Supreme Court has stated that unauthorized immigrants' willingness to accept lower wages depresses market pay rates and harms working conditions for citizens.¹¹⁸ Although economists and policymakers debate this conclusion, there is no doubt that an immigrant applicant holds some competitive advantage in the labor market over a similarly situated citizen if the only difference between the two is their willingness to someday assert workplace claims. As a growing segment of the workforce refuses to sue for employment law violations, citizens who complain become more costly relative to their silent immigrant coworkers. In addition, immigrants' unwillingness to sue weakens the enforcement scheme of many employment statutes.¹¹⁹ From combating sweatshop conditions¹²⁰ to investigating labor law violations¹²¹ and enforcing wage laws,¹²² many federal agencies rely almost entirely on employee complaints. For example, federal anti-discrimination statutes depend on private attorneys general to assert claims in court to promote nondiscrimination in the workforce, "a policy of the highest priority."¹²³ Continued unabated, the current rate of *Hoffman*-caused immigrant opt-out will eventually clear the courts of most immigrants, leaving unreported "countless acts of illegal and reprehensible conduct."¹²⁴

B. Effective Race and National Origin Discrimination

In addition to harming immigrants and disincentivizing citizen-initiated employment litigation, status-based discovery enables employers to discriminate and retaliate against immigrants in the courtroom in ways strictly forbidden in the workplace. Title VII protects immigrants from workplace discrimination based on, among other factors, language and race.¹²⁵ Likewise, the IRCA contains its own anti-discrimination provi-

117. PASSEL, *supra* note 7, at 6 (stating that beginning in 1995 the annual number of new unauthorized immigrants exceeded the annual number of new legal immigrants).

118. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) (discussing the effects of illegal immigration on wages, working conditions, and labor unions).

119. See Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protections and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 347 (2001) (explaining how the exclusion of undocumented workers from employment protections harms all employees).

120. See U.S. GEN. ACCOUNTING OFFICE, GARMENT INDUSTRY: EFFORTS TO ADDRESS THE PREVALENCE AND CONDITIONS OF SWEATSHOPS 3 (1994), available at <http://www.gao.gov/archive/1995/he95029.pdf>.

121. See *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972); see also Wishnie, *supra* note 91, at 518 (discussing the crucial role of worker complaints in agency enforcement).

122. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("Plainly, effective enforcement [of the FLSA] could thus only be expected if employees felt free to approach officials with their grievances.").

123. *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358-59 (1995); *N.Y. Gaslight Club v. Carey*, 447 U.S. 54, 63 (1980) (discussing private enforcement of Title VII).

124. See *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004).

125. 42 U.S.C. § 2000e-2(a) (2000).

sion, the goal of which is to prevent employers from differentiating among foreign-looking and foreign-sounding applicants.¹²⁶ By allowing employers to randomly subject certain plaintiff immigrants to status-based inquiries during litigation, *Hoffman* enables employers to lawfully achieve ends in discovery that Title VII prohibits in employment.

Because discovery is party-driven and molded by the contours of each case, there is no uniform set of interrogatories, document requests, or deposition questions posed to all plaintiff employees. The defending employer maintains almost complete discretion over the questions he asks during litigation. Given this freedom, the employer will not pose status-based questions to all plaintiffs, but only to those who the employer believes are foreign-born.¹²⁷ What criteria do employers use to determine when immigration-related questions are warranted and when they are not? Although an employee's job application or interview responses might furnish information about foreign nationality, more times than not, the employer will simply rely on her intuition in deciding whether to propound status-based discovery. That "hunch" will almost invariably be informed by the employee's language, accent, or skin color. The same pernicious cues the employer is prohibited from considering in employment become the basis of the employer's *Hoffman*-inspired discovery. Thus, in addition to eliminating immigrants as a class of potential Title VII enforcers, status-based discovery facilitates an end-run around the core protections of the statute.¹²⁸ The immigrant employee is told that she is protected from race discrimination in the workplace, but upon filing a complaint alleging such discrimination, she is subjected to intimidating discovery based on racial cues, thereby undermining the very statute that she attempts to enforce.

C. Implied Retaliation

Nearly all federal employment statutes contain parallel anti-retaliation provisions.¹²⁹ These laws would collapse in the absence of protections for complaining employees. Courts have long held that employers who call immigration officials to quell workplace complaints violate anti-retaliation protections.¹³⁰ Merely threatening deportation without actually contact-

126. See Juan P. Osuna, *Breaking New Ground: The 1996 Immigration Act's Provisions on Work Verification and Employer Sanctions*, 11 GEO. IMMIGR. L.J. 329, 333 (1997) (summarizing the IRCA's anti-discrimination provisions).

127. See David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45, 55 (2005).

128. See Ho & Chang, *supra* note 65, at 525 (arguing that status-based discovery strongly deters immigrants from asserting national origin discrimination claims).

129. See, e.g., 29 U.S.C. § 215(a)(3) (2000) (FLSA anti-retaliation provision); 42 U.S.C. § 2000e-3(a) (2000) (Title VII anti-retaliation provision); *NLRB v. Del Rey Tortilleria, Inc.*, 787 F.2d 1118, 1123 (7th Cir. 1986) (finding unlawful retaliation under the NLRA).

130. See, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898 (1984) (holding that an employer committed an unfair labor practice by reporting five union supporters to the INS).

ing immigration officials may constitute prohibited retaliation as well.¹³¹ For example, in *Singh v. Jutla*,¹³² Macan Singh, an unauthorized immigrant, sued his employer for unpaid wages. Singh alleged that his uncle recruited him from India to work at a gas station in California. After working twelve-hour shifts, seven days per week for three years without pay, Singh sued his uncle. The day after the parties settled Singh's wage claims for \$69,000, the uncle reported Singh to the INS, which arrested and detained Singh for fifteen months.¹³³ In a subsequent action alleging FLSA retaliation, Singh recovered \$40,000 in damages for pain and suffering and \$160,000 in punitive damages after the trial court ruled that *Hoffman* did not preclude unauthorized immigrants from asserting FLSA retaliation claims.¹³⁴

Although anti-retaliation provisions still prevent employers from contacting immigration officials in reprisal for workplace complaints, an employer can now accurately remind a prospective plaintiff of the employer's ability to inquire into the employee's immigration status should she decide to commence litigation.¹³⁵ The threat to call immigration officials is illegal, but the threat to depose a worker about her status is permissible. In effect, *Hoffman* enables employers to raise the specter of deportation without breaking the law.¹³⁶

From a narrow decision involving one type of remedy available in an administrative labor proceeding, *Hoffman* has morphed into a blunt discovery weapon that weakens our nation's entire system of employment protections for immigrant workers.¹³⁷ The loss of immigrants and the harm to employment laws will continue until immigrants adopt an effective strategy for responding to post-*Hoffman* discovery.

III. Status, Silence, and the Fifth Amendment

Unauthorized immigrants rarely invoke the Fifth Amendment to defend against status-based discovery. Their unwillingness to claim the privilege against self-incrimination is driven by the misperception that invocation "criminalizes" the civil process. As a result, immigrant-rights advocates scrambling to respond to the challenges posed by status-based discovery have largely failed to formulate an internally coherent strategy

131. See Orrin Baird, *Undocumented Workers and the NLRA: Hoffman Plastic Compounds and Beyond*, 19 LAB. LAW. 153, 161 (2003) (noting that reporting or threatening to report workers to immigration officials violates the NLRA).

132. *Singh v. Jutla*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002).

133. Bob Egelko, *Jury Awards \$200,000 to Illegal Immigrant*, S.F. CHRON., Dec. 20, 2003, at A3.

134. *Id.*; see also *Singh*, 214 F. Supp. 2d at 1061.

135. See Annie Decker, Comment, *Suspending Employers' Immigration-Related Duties During Labor Disputes: A Statutory Proposal*, 115 YALE L.J. 2193, 2199 (2006) (describing the chilling effect of status-based document requests).

136. See Martinez, *supra* note 8, at 673 (discussing the implied retaliation of status-based discovery).

137. See *id.* at 665; see also *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004) (arguing that status-based questions contain the implicit threat of deportation).

for addressing their clients' competing needs: protection from intimidation and vindication of substantive employment rights. I contend that the Fifth Amendment provides a method for achieving both ends.

My argument in favor of the privilege begins by explaining the limitations of the protective order—the most common strategy employed by lawyers responding to status-based discovery. Protective orders do not effectively curb the broad inhibiting effects of status-based discovery. In addition, the orders fail to serve immigrants' litigation interests in anonymity, consistency, and certainty. This outcome not only diminishes the plaintiff's confidence in the process, as well as her sense of security, but also discourages potential immigrant litigants from coming to court knowing that they will quite likely confront invasive status-based discovery.

I argue that the privilege against self-incrimination is a far more effective—though almost completely unutilized—method for addressing questions about status. I begin by considering the language, history, and purpose of the Fifth Amendment as applied to civil litigation brought by unauthorized immigrants. The privilege is said to prevent a witness from facing the "cruel trilemma" of perjury, self-incrimination, and contempt.¹³⁸ Thus, absent the privilege, witnesses would be forced to choose between deceit, penalized admission, and penalized silence. The privilege eliminates the "cruel choice," thus facilitating a more humane criminal prosecution. While responding to critics who question whether this and other policies underlying the Fifth Amendment carry much weight in the civil context, I argue that the cruel choice theory plays a prominent role in immigrant-initiated civil litigation. In addition to facing the possibility of criminal prosecution, unauthorized immigrants risk removal from the United States should they testify about their status. Thus, the unauthorized immigrant faces a cruel trilemma with a twist. Truth carries the primary consequence of criminal prosecution and the collateral consequence of deportation. The latter penalty, which is unique to this class of witnesses, increases the harshness of a forced choice, thus strengthening the case for extending the privilege to unauthorized immigrants asserting workplace claims. As explained below, the privilege's other underlying policies, including privacy, individualism, and fair criminal process, also counsel in favor of allowing unauthorized immigrants to invoke the privilege.

After outlining the policy reasons for extending the privilege to unauthorized immigrants in civil cases, I explain the procedures for invoking the privilege and the potential costs of invocation. Chief among the potential costs is the adverse inference that a court may draw from a witness's silence. Although the adverse inference is an intuitively attractive measure for counter-balancing the apparent advantage the immigrant gains from invocation, I argue that upon closer examination, courts should not draw

138. See Heidt, *supra* note 16, at 1084-87. But see Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 694-95 (1968) (criticizing the rationale).

the inference in most instances because a plaintiff's unauthorized status is irrelevant to the majority of employment claims.

Even if a court draws a negative inference from the plaintiff's silence, I assert that the result is more consistent with plaintiff immigrants' litigation interests than the current state of affairs. By forcing the court to rule on the issue of adverse inferences, the invocation allows for a clear enunciation of *Hoffman's* relevance to the claims at issue. As immigrant-initiated employment litigation stands today, employers pose status-based questions, immigrants hide behind protective orders, and courts write cryptic decisions alluding to *Hoffman's* "possible" relevance. In contrast, the model proposed here clarifies immigrants' legal rights by requiring inference decisions that cannot occur until courts first make a clear pronouncement on *Hoffman's* effect, if any, on the claims at issue.¹³⁹

A. Inadequate Alternatives

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

In cases involving plaintiff immigrants who seek protection from status-based questions, courts have balanced the public and private interests in the enforcement of employment protections against the employer's need to know the plaintiff's status.¹⁴¹ The more evidentiary value the court places on status, the more reticent the court will be to issue the protective order. Courts tend to prohibit status-based inquiries during the liability phase of discrimination cases¹⁴² and throughout wage cases.¹⁴³ Neverthe-

139. See, e.g., *Lopez v. Superflex, Ltd.*, No. 01 Civ. 10010, 2002 WL 1941484, at *2 (S.D.N.Y. Aug. 21, 2002) ("[I]f plaintiff were to admit to being in the United States illegally, or were to refuse to answer questions regarding his status on the grounds that it is not relevant, then the issue of his standing would properly be before us, and we would address the issue of whether *Hoffman Plastics* applies to ADA claims for compensatory and punitive damages brought by undocumented aliens.").

140. See, e.g., *SMITH ET AL.*, *supra* note 45, at 19 (recommending protective orders); *Ho & Chang*, *supra* note 65, at 519 (same); *Martinez*, *supra* note 8, at 688-89 (same); see also Peter J. Donnici, *The Privilege Against Self-Incrimination in Civil Pre-Trial Discovery: The Use of Protective Orders to Avoid Constitutional Issues*, 3 U.S.F. L. REV. 12, 21 (1968) (arguing that protective orders prevent the public disclosure of incriminating information while supporting policies of liberal discovery).

141. See *Rivera*, 364 F.3d at 1063-64, 1069 ("[T]he overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases."); see also *Flores v. Albertsons, Inc.*, No. 01 Civ. 00515, 2002 WL 1163623, at *6 (C.D. Cal. Apr. 9, 2002).

142. See *Rivera*, 364 F.3d at 1064; *EEOC v. Kovacevich "5" Farms*, No. 06 Civ. 0165, 2007 WL 1599772, at *3-5 (E.D. Cal. June 4, 2007); *Perez-Farias v. Global Horizons, Inc.*, No. 05 Civ. 3061, 2007 WL 1412796, at *3 (E.D. Wash. May 10, 2007); *EEOC v. First Wireless Group, Inc.*, No. 03 Civ. 4990, 2007 WL 586720, at *3 (E.D.N.Y. Feb. 20, 2007); *EEOC v. Rest. Co.*, 448 F. Supp. 2d 1085, 1088 (D. Minn. 2006); *Avila-Blum v. Casa de Cambio Delgado, Inc.*, 236 F.R.D. 190, 192 (S.D.N.Y. 2006); *EEOC v. Bice of Chicago*, 229 F.R.D. 581, 582-83 (N.D. Ill. 2005); *EEOC v. First Wireless Group, Inc.*,

less, as in cases attempting to expand *Hoffman* beyond the NLRA, courts have not ruled uniformly in favor of plaintiff immigrants.

In Colorado, six Chilean cattle herders asserted wage and other claims against their employer and sought a protective order prohibiting document requests or deposition questions related to their immigration status.¹⁴⁴ The trial court determined that as temporary guest workers, the plaintiffs had placed their immigration status at issue and that status-based discovery was relevant to the employer's mitigation-related defenses.¹⁴⁵ The court ordered the plaintiffs to state whether or not they were legal immigrants, holding that their privacy interests could be protected by limiting dissemination of their answers to the parties and court.¹⁴⁶ Other courts have found immigration status relevant to workers' compensation and workplace discrimination claims.¹⁴⁷ The cases thus present mixed results in which most courts forbid status-based discovery, while others refuse to bar immigration-related questions.

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

Protective order litigation cannot be harmonized with the unauthorized immigrant's central concern for anonymity. In fact, the order fails to

225 F.R.D. 404, 406-07 (E.D.N.Y. 2004); *De La Rosa v. N. Harvest Furniture*, 210 F.R.D. 237, 237-39 (C.D. Ill. 2002).

143. *Rengifo v. Erevos Enter., Inc.*, No. 06 Civ. 4266, 2007 WL 894376, at *2 (S.D.N.Y. March 20, 2007); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 501 (W.D. Mich. 2005); *Centeno-Bernuy v. Becker Farms*, 219 F.R.D. 59, 61 (W.D.N.Y. 2003); *Cortez v. Medina's Landscaping*, No. 00 Civ. 6320, 2002 WL 31175471, at *1 (N.D. Ill. Sept. 30, 2002); *Flores v. Amigon*, 233 F. Supp. 2d 462, 463-64 (E.D.N.Y. 2002); *Rodriguez v. Texan, Inc.*, No. 01 Civ. 1478, 2002 WL 31061237, at *2 (N.D. Ill. Sept. 16, 2002); *Topo v. Dhir*, 210 F.R.D. 76, 78-79 (S.D.N.Y. 2002) (describing plaintiff's immigration status as a "non-relevant matter"); *N. Harvest Furniture*, 210 F.R.D. at 239; *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 192-93 (S.D.N.Y. 2002); *Flores*, 2002 WL 1163623, at *5-6; *Cabrera v. Ekema*, 695 N.W.2d 78, 81 (Mich. Ct. App. 2005); NAT'L EMPLOYMENT LAW PROJECT, *supra* note 6, at 2-4 (summarizing discovery requests following *Hoffman*). *But see Flores v. Limehouse*, No. 04 Civ. 1294, 2006 WL 1328762, at *2 (D.S.C. May 11, 2006) (requiring plaintiffs in wage case to disclose their status).

144. *Catalan v. Vermillion Ranch Ltd. P'ship*, No. 06 Civ. 01043, 2007 WL 951781, at *1 (D. Colo. Mar. 28, 2007).

145. *Id.* at *1-2.

146. *Id.* at *2.

147. *Lopez v. Superflex, Ltd.*, No. 01 Civ. 10010, 2002 WL 1941484, at *2 (S.D.N.Y. Aug. 21, 2002) (noting that if plaintiff were to refuse to answer status-based questions then the court could address his standing to assert an ADA claim as an unauthorized immigrant); *Xinic v. Quick*, 69 Va. Cir. 295 (Va. Cir. Ct. 2005) (describing plaintiff's immigration status as "highly relevant" to workers' compensation claim but refusing to compel answer due to Fifth Amendment privilege); *see also* NAT'L EMPLOYMENT LAW PROJECT, *supra* note 6, at 2 (noting that some courts "have ordered immigrant victims of labor law violations to disclose their status").

serve the immigrant's key litigation interests, including a desire for speedy, consistent, and complete protection from status-based inquiries. An analysis of *Rivera v. NIBCO, Inc.*¹⁴⁸—the gold standard in protective order litigation for unauthorized immigrants—demonstrates the weak nexus between the order and the immigrant's litigation interests. *Rivera* involved twenty-three female production line workers with limited English proficiency who alleged that their employer engaged in national origin discrimination by requiring them to take a basic job skills examination in English—a requirement allegedly unrelated to actual job performance.¹⁴⁹ On May 14, 2001, the employer deposed plaintiff Martha Rivera, who refused to answer questions related to her immigration status.¹⁵⁰ Rivera's position triggered a series of briefs, arguments, and written opinions, eventually resulting in a strong protective order for the plaintiffs. The Ninth Circuit affirmed the protective order in 2004,¹⁵¹ and the Supreme Court denied review in 2005.¹⁵² In sum, after four years, a dozen briefs, several hearings, and five orders, the courts finally assured Martha Rivera that she would be "protected" from answering questions about her immigration status. The protection was undercut shortly thereafter, however, when the trial court ruled on remand that Rivera would have to disclose her status to facilitate the court's in camera damages calculation.¹⁵³

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

Even if a plaintiff immigrant obtains a protective order quickly, information protected at the early stages of discovery becomes vulnerable to disclosure as the trial nears.¹⁵⁵ For example, in *Flores v. Albertsons*, the trial court denied the defendant grocery stores' efforts to discover the class representatives' immigration status but made the ruling "without prejudice" in order to allow the court to "revisit" the issue later in the litigation.¹⁵⁶ Likewise, although Donna Karan International lost its initial attempt to discover the immigration status of the plaintiff immigrant gar-

148. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004).

149. *Id.* at 1061.

150. *Rivera v. NIBCO, Inc.*, 204 F.R.D. 647, 648 (E.D. Cal. 2001).

151. *Rivera*, 364 F.3d at 1062.

152. *NIBCO, Inc. v. Rivera*, 544 U.S. 905 (2005).

153. *Rivera v. NIBCO, Inc.*, No. Civ.-F-99-6443, 2006 WL 845925, at *8 (E.D. Cal. Mar. 31, 2006).

154. See Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 23 (1983) (noting that absent party consent, protective order litigation "is often an extremely time-consuming process for the parties and the court").

155. See *In re Grand Jury Subpoena*, 836 F.2d 1468, 1476 (4th Cir. 1988) (noting that protected discovery usually surfaces at trial).

156. *Flores v. Albertsons, Inc.*, No. 01 Civ. 00515, 2002 WL 1163623, at *3 (C.D. Cal. Apr. 9, 2002).

ment workers, the court permitted the clothing designer to seek leave to renew the discovery request at a later juncture.¹⁵⁷

Protective orders cannot meet the immigrant's interest in anonymity, speed, or consistency when courts wait until late stages of the litigation to determine whether status is relevant. The cases most likely to yield early protection from status-based questions involve lost wages for past work.¹⁵⁸ Given the long line of decisions holding that status is irrelevant to these claims,¹⁵⁹ courts are likely to issue broadly worded protective orders that maintain their vigor throughout the case. The outcome is far less clear in Title VII and other cases involving wages for lost work. The trend is to prohibit disclosure early, while leaving open the possibility that status will become relevant later in the litigation.¹⁶⁰

Courts are empowered to bar discovery of even relevant matters.¹⁶¹ Thus, if an employer attempts to enter the "shadow zones of relevancy" regarding an immigrant's status, the court is well within its authority to limit discovery,¹⁶² because such disclosure would have a chilling effect on immigrant plaintiffs. Nonetheless, given the policy of liberal discovery underlying the Federal Rules of Civil Procedure,¹⁶³ courts tend to require parties to disclose information that is even tenuously relevant.¹⁶⁴ If the court ultimately determines that a plaintiff's unauthorized status eliminates or significantly reduces an employer's exposure, the court is much

157. *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) ("If it appears at some later juncture that such discovery would be relevant, and more relevant than harmful, Donna Karan may seek leave to renew this request.").

158. *Id.* at 192-93; *Flores*, 2002 WL 1163623, at *6.

159. See *supra* Part I.A.1 and accompanying discussion on the past work/lost work distinction; see also SMITH ET AL., *supra* note 45, at 19 (referring to the growing authority for protective orders in wage cases).

160. *EEOC v. Rest. Co.*, 490 F. Supp. 2d 1039, 1047 (D. Minn. 2007) (noting that *Hoffman* might preclude certain remedies but declining to rule on the issue during the liability phase of litigation); *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1277 (D. Okla. 2006) (noting that *Hoffman* does not preclude the recovery of lost wages for work performed but "may preclude an award of backpay" for lost work); *EEOC v. Rest. Co.*, 448 F. Supp. 2d 1085, 1087 (D. Minn. 2006) ("[S]uch information may become relevant later, depending on the nature of the remedies sought."); *Avila-Blum v. Casa de Cambio Delgado, Inc.*, 236 F.R.D. 190, 191 (S.D.N.Y. 2006) (granting protective order but "leaving open the prospect that the issue could be reopened at a later stage of the proceeding as appropriate in relation to damages"); see also *Rivera v. NIBCO, Inc.*, No. Civ.-F-99-6443, 2006 WL 845925, at *8 (E.D. Cal. Mar. 31, 2006) (authorizing in camera review of plaintiffs' documents following liability phase of Title VII case).

161. See *Topo v. Dhir*, 210 F.R.D. 76, 79 (S.D.N.Y. 2002) (citing *Crawford-El v. Britton*, 523 U.S. 574, 599 (1998)); see also *Ho & Chang*, *supra* note 65, at 519 ("[E]ven if *Hoffman* made a worker's status potentially relevant to the measure of backpay, it does not thereby confer license upon any and all efforts to discover that status.").

162. *In re Surety Ass'n of Am.*, 388 F.2d 412, 414 (2d Cir. 1967).

163. See FED. R. CIV. P. 26(b)(1) ("Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.").

164. See Charles H. Rabon, Jr., *Evening the Odds in Civil Litigation: A Proposed Methodology for Using Adverse Inferences when Nonparty Witnesses Invoke the Fifth Amendment*, 42 VAND. L. REV. 507, 514 (1989) (arguing that the Fifth Amendment prevents disclosure far more effectively than protective orders).

more likely to limit the scope of dissemination, rather than ban discovery altogether.¹⁶⁵

The immigrant's interest in certainty is disserved not only by courts that initially protect information about status and then order disclosure but also by those that first require disclosure only to be reversed. This "reveal, protect" chronology has occurred in cases involving sexual harassment, unpaid wages, and medical malpractice, with immigrants receiving "protection" on appeal many months or years after being ordered to disclose their status.¹⁶⁶ In *Flores v. Limehouse*, for instance, immigrant plaintiffs alleged that their employer failed to pay wages and retaliated against them by threatening deportation. The plaintiffs obeyed a court order and admitted that they were unauthorized immigrants who submitted false employment documents to the Social Security Administration.¹⁶⁷ After forcing the plaintiffs to run this disclosure gauntlet, the court ruled that the plaintiffs' immigration status was irrelevant to their claims.¹⁶⁸

Beyond failing to satisfy the immigrant's interests in speed, consistency, and certainty, protective orders typically fail for lack of completeness. Rule 26(c) grants courts wide discretion in determining the nature of the protection afforded to plaintiffs.¹⁶⁹ Of the eight courses of action listed in the Rule, only one mandates that "discovery not be had."¹⁷⁰ Most of the other options allow the discovering party to obtain the information sought but limit the scope of the inquiry or the breadth of disclosure. The court will often seek to strike a balance by limiting the number of questions or the size of the audience privy to the answers. Under these scenarios, however, the plaintiff still must answer *some* status-based questions.¹⁷¹ Thus, even when motions for protective orders succeed, the end result often fails to broadly prohibit questions related to status, both directly and indi-

165. See Smith et al., *supra* note 13, at 607 (arguing that courts will not issue protective orders if they deem status-based information relevant to remedies); Throne, *supra* note 92, at 605.

166. See, e.g., *EEOC v. Rest. Co.*, 448 F. Supp. 2d 1085, 1088 (D. Minn. 2006) (reversing magistrate's order compelling plaintiff in sexual harassment case to admit or deny her status as an unauthorized immigrant); *Hernandez v. Paicius*, 134 Cal. Rptr. 2d 756, 757-64 (Cal. Ct. App. 2003) (reversing trial court's order allowing disclosure of plaintiff's status in a medical malpractice action); *Cabrera v. Ekema*, 695 N.W.2d 78, 79-83 (Mich. Ct. App. 2005) (reversing lower court's order requiring plaintiffs to reveal their Social Security numbers).

167. *Flores v. Limehouse*, No. 04 Civ. 1294, 2006 WL 1328762, at *2 (D.S.C. May 11, 2006).

168. *Id.*

169. See Marcus, *supra* note 154, at 25 (describing the protective order's "inherent flexibility").

170. FED. R. CIV. P. 26(c) (authorizing courts to formulate orders as "justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense").

171. Courts have recognized that protective orders will not serve immigrants' privacy needs unless they ban status-based discovery completely. See, e.g., *Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 192-93 (S.D.N.Y. 2002) (noting that even with a confidentiality agreement in place the dangers of inhibition and intimidation remain).

rectly.¹⁷² Other courts, although refusing to consider a plaintiff's status for liability purposes, allow juries to consider immigration status when calculating damages for lost earnings.¹⁷³ Still others require immigrants to reveal their status to employers under a protective order that confines disclosure to the parties and the court.¹⁷⁴

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

172. For example, in *EEOC v. First Wireless*, a group of Hispanic employees alleged that their employer engaged in racially discriminatory payment practices in violation of Title VII. *EEOC v. First Wireless Group, Inc.*, No. 03 Civ. 4990, 2007 WL 586720, at *1 (E.D.N.Y. Feb. 20, 2007). After first issuing a protective order prohibiting discovery of the plaintiffs' immigration status, *EEOC v. First Wireless Group, Inc.*, 225 F.R.D. 404, 406-07 (E.D.N.Y. 2004), the magistrate eventually allowed discovery of the plaintiffs' places of birth and employment application information. *First Wireless Group, Inc.*, 2007 WL 586720, at *3; see also *EEOC v. Bice of Chicago*, 229 F.R.D. 581, 583 (N.D. Ill. 2005) (ordering immigrants to disclose their aliases, notwithstanding protective order).

173. See, e.g., *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 230 (2d Cir. 2006); *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1259 (N.Y. 2006) (allowing the "jury to consider immigration status as one factor in its determination of the damages, if any, warranted under the Labor Law"); *Majlinger v. Cassino Contracting Corp.*, 802 N.Y.S.2d 56, 69 (N.Y. App. Div. 2005); *Cano v. Mallory Mgmt.*, 760 N.Y.S.2d 816, 818 (N.Y. Sup. Ct. 2003).

174. See, e.g., *Catalan v. Vermillion Ranch Ltd. P'ship*, No. 06 Civ. 01043, 2007 WL 951781, at *1 (D. Colo. Mar. 28, 2007) ("[T]he privacy interests that Plaintiffs have in the requested discovery can be protected and limited in use through a protective order."); see also *EEOC v. Kovacevich "5" Farms*, No. 06 Civ. 0165, 2007 WL 1599772, at *4 (E.D. Cal. June 4, 2007) (entering protective order for damages phase of trial allowing disclosure of plaintiffs' Social Security numbers).

175. See, e.g., *In re Grand Jury Subpoena*, 62 F.3d 1222, 1224 (9th Cir. 1995) (discussing effects of allowing government access to testimony produced under civil protective order); *Marcus*, *supra* note 154, at 41-46 (discussing non-party access to protected discovery materials).

176. In addition to obtaining protective orders, immigrants have sought to bifurcate trials between liability and damages phases, as well as to limit the disclosure of status-based information to in camera review. See *Developments in the Law—Jobs and Borders*, *supra* note 13, at 2244; *Martinez*, *supra* note 8, at 691 (proposing bifurcation); *Zucker*, *supra* note 108, at 617 (proposing in camera review). These strategies may effectively delay the disclosure of status-based information, thus encouraging settlement prior to an unauthorized immigrant's admission regarding his or her status. See *Developments in the Law—Jobs and Borders*, *supra* note 13, at 2245. Bifurcation and in camera review, however, both ensure that an immigrant will eventually disclose his or her immigration status if the case proceeds to trial. Thus, the strategies fail to provide the immigrant with complete protection throughout all phases of litigation. In addition, these approaches supply employers with ever-increasing settlement leverage as the trial nears.

B. Principles of the Privilege

The Self-Incrimination Clause of the Fifth Amendment states, "No person . . . shall be compelled in any criminal case to be a witness against himself."¹⁷⁷ The Fifth Amendment's explicit restriction to "any criminal case" would seem to preclude its application in the civil context. Nevertheless, courts have interpreted the term to refer to the type of punishment that would flow from an inculpatory statement, rather than the specific context of the procured testimony.¹⁷⁸ The witness who testifies to wrongdoing in a civil case increases the chance of criminal prosecution and can therefore claim the privilege.

This interpretation has been challenged on both textual and historical grounds. James Madison's proposed language to the Clause originally stated, "[N]o person . . . shall be compelled to be a witness against himself."¹⁷⁹ With the addition of "in any criminal case" to the final version of the Fifth Amendment, some commentators have inferred an intent to limit the privilege to criminal trials.¹⁸⁰ Others, however, have argued that by inserting "criminal case," the Framers sought merely to clarify that the privilege applied to matters involving criminal, and not civil, liability.¹⁸¹ The latter reading has carried the day,¹⁸² and it remains well-settled that witnesses can claim the privilege in civil and criminal litigation,¹⁸³ as well as in administrative and legislative proceedings.¹⁸⁴

Unauthorized immigrants can claim the privilege to the same extent as citizens.¹⁸⁵ Most unauthorized immigrants have committed at least one of

177. U.S. CONST. amend. V.

178. See Stuntz, *supra* note 15, at 1274 (noting that a witness in a civil case can invoke the privilege if his or her testimony could aid a subsequent criminal prosecution).

179. LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 423 (2d ed. 1986).

180. See, e.g., Martin I. Kaminsky, *Preventing Unfair Use of the Privilege Against Self-Incrimination in Private Civil Litigation: A Critical Analysis*, 39 BROOK. L. REV. 121, 125 (1972) (summarizing the addition of "criminal case" to the Fifth Amendment and noting that the phrase was added without recorded debate); Michael J. Zydney Mannheimer, *Ripeness of Self-Incrimination Clause Disputes*, 95 J. CRIM. L. & CRIMINOLOGY 1261, 1323 (2005) (arguing that the scope of the Self-Incrimination Clause has been widely misread for over a century).

181. See Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in Chavez v. Martinez*, 70 TENN. L. REV. 987, 1009-12 (2003) (distinguishing between the terms "criminal case" and "criminal trial").

182. The result did not change in *Chavez v. Martinez*, 538 U.S. 760 (2003). Although the Supreme Court held that civil rights plaintiffs do not suffer Fifth Amendment deprivations until their testimony is used against them, the Court reaffirmed prior authority allowing witnesses to assert the privilege in civil cases. *Id.* at 770-71.

183. *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924); see *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

184. *United States v. Balsys*, 524 U.S. 666, 671-72 (1998); *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972); *McCarthy*, 266 U.S. at 40 (1924); *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1263 (9th Cir. 2000); see also Kaminsky, *supra* note 180, at 122.

185. See *Alcaraz v. Block*, 746 F.2d 593, 603-04 (9th Cir. 1994) (acknowledging unauthorized immigrant's self-incrimination privilege but finding no violation); *Wall v.*

the following crimes: entering the country without inspection, providing false immigration-related documents to obtain employment, or failing to register with immigration officials.¹⁸⁶ Because status-based questions posed during civil discovery implicate these crimes, the immigrant has the ability to assert the privilege and refuse to answer the questions.

Before evaluating the power of invocation, however, the principles and policies underlying that power should be considered. A policy analysis informs the many issues that immigrant invocation forces tribunals to address. To what extent does the status-based question tend to incriminate? If a court draws an adverse inference from an immigrant's silence does it exact too costly a price for invocation? Courts that are informed by the privilege's underlying policies are more equipped to answer these and other questions raised by an immigrant's silence.

Beginning with Jeremy Bentham, academics have long struggled to ascertain the rationales underlying the privilege.¹⁸⁷ The Supreme Court has said that the privilege "registers an important advance in the development of our liberty— 'one of the great landmarks in man's struggle to make himself civilized.'"¹⁸⁸ Consistent with these broad pronouncements, advocates have cited a long list of libertarian principles that they claim support and underlie the privilege. Critics contend that this "market basket"¹⁸⁹ approach evinces the privilege's lack of governing principles,¹⁹⁰ especially in the civil context.¹⁹¹

Of the most commonly cited principles, three are viewed as fundamental justifications for the modern day privilege.¹⁹² The privilege is said to

INS, 722 F.2d 1442, 1443 (9th Cir. 1984); *Tashnizi v. INS*, 585 F.2d 781, 782 (5th Cir. 1978); *Cabral-Avila v. INS*, 589 F.2d 957, 959 (9th Cir. 1978) (referring to unauthorized immigrants' silence during deportation proceeding as "an appropriate exercise of their Fifth Amendment privilege"); see also Mark A. Godsey, *The New Frontier of Constitutional Confession Law— The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 GEO. L.J. 851, 881 n.172 (2003) (discussing unauthorized immigrants' trial rights).

186. See *infra* Part III.C and accompanying discussion on immigration-related crimes.

187. See generally 5 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 207-83 (Fred B. Rothman & Co. 1995) (1827).

188. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (quoting ERWIN N. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 7 (1955)).

189. Friendly, *supra* note 138, at 686.

190. See Stuntz, *supra* note 15, at 1232 (arguing that rationales for the privilege rely erroneously on moral philosophy rather than modern legal doctrine). For a thorough critique of the privilege's traditional justifications, see Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 889-98 (1995); David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986); Michael S. Green, *The Privilege's Last Stand: The Privilege Against Self-Incrimination and the Right to Rebel Against the State*, 65 BROOK. L. REV. 627, 628-29 (1999) (noting that the many justifications for the privilege reinforce the notion that it has no governing policies).

191. See Heidt, *supra* note 16, at 1083-85 (arguing that the rationales apply with less force in civil cases); see generally Friendly, *supra* note 138, at 672-98 (calling for a retraction of the privilege).

192. David M. O'Brien, *Fox Hunters, Old Woman, Hermits, and the Burger Court*, 54 NOTRE DAME L. REV. 26, 27 (1978); Rabon, *supra* note 164, at 517 ("[T]hree rationales

preserve individual privacy and fair prosecution while preventing cruelty. Commentators have been particularly skeptical of the relevance of these rationales in civil settings. Too often, however, civil extension critiques rely on a civil-criminal distinction that becomes blurred when immigrants face status-based questions in employment litigation.¹⁹³ Because of the quasi-criminal nature of deportation and the immigrant's unique interests in preserving private matters and preventing removal, the privilege's libertarian rationales are particularly compelling in the context of immigrant-initiated civil litigation.

1. *Civil-Criminal Dichotomy*

Removal proceedings, although considered civil in nature,¹⁹⁴ involve quasi-criminal¹⁹⁵ sanctions that directly implicate the immigrant's liberty interests.¹⁹⁶ The Supreme Court's characterization of removal hearings as "civil" proceedings has been described as a legal fiction by scholars and judges.¹⁹⁷ The Court has stated that although civil confinement serves the goals of incapacitation and rehabilitation, criminal incarceration is a punitive measure designed to achieve retributive and deterrent aims.¹⁹⁸ Upon close examination, however, deportation more often serves the latter goals.

Once detained, deportees face a period of long-term confinement that mirrors criminal punishment.¹⁹⁹ They are held in large, overcrowded dormitories that resemble state penitentiaries.²⁰⁰ Reports from detentions centers indicate that some detainees are shackled, denied access to the outdoors, and physically harmed through corporal punishment.²⁰¹ Even after

largely explain the privilege as it exists today."); Stuntz, *supra* note 15, at 1232 (examining the three most common explanations for the privilege against self-incrimination).

193. See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1363 (1991) (referring to deportation as "a kind of banishment that represents the ultimate separation from society").

194. *United States v. Balsys*, 524 U.S. 666, 671 (1998); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

195. See Nessel, *supra* note 119, at 374-75 (discussing the criminal aspects of removal proceedings); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 333-34 (2000) (arguing that removal proceedings give rise to punitive consequences).

196. See *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted.").

197. See *Scheidemann v. INS*, 83 F.3d 1517, 1531 (3d Cir. 1996) (Sarokin, J., concurring) ("[N]ow is the time to wipe the slate clean and admit to the long evident reality that deportation is punishment."); Nessel, *supra* note 119, at 373-74; Pauw, *supra* note 195, at 305-06.

198. See *Kansas v. Hendricks*, 521 U.S. 346, 361-66 (1997).

199. See AM. CIVIL LIBERTIES UNION, *JUSTICE DETAINED: CONDITIONS AT THE VARICK STREET IMMIGRATION DETENTION CENTER 1-3* (1993); Barbara MacGrady, Note, *Resort to International Human Rights Law in Challenging Conditions in U.S. Immigration Detention Centers*, 23 BROOK. J. INT'L L. 271, 280-82 (1997).

200. See AM. CIVIL LIBERTIES UNION, *supra* note 199, at 1-3.

201. See *id.*; see also MacGrady, *supra* note 199, at 280-82.

the respondent is deemed removable through formal or informal proceedings, a noncitizen may be detained for six months or longer before actually being deported.²⁰² For the unauthorized immigrant, removal may result in a far harsher punishment than incarceration.²⁰³ Upon returning to her country of origin—typically a place from which she spent a great deal of time and effort to flee—the immigrant may face unemployment, extreme poverty, inhumane living conditions, or war.²⁰⁴

Although I leave a more detailed criticism of the civil-criminal distinction to others,²⁰⁵ my point is to contextualize the consequences that unauthorized immigrants who invoke the privilege face. These outcomes inform the policy debate. For example, the government's ability to prosecute and deport immigrants with evidence obtained by private employers in civil litigation raises serious questions of autonomy and fairness. Absent the privilege, this scenario is not entirely unlikely. In addition, the unique threat of removal raises the price of truth for the unauthorized immigrant, as compared to citizen witnesses. Thus, the privilege's rationales carry greater force for the unauthorized immigrant whose truthful answer in the civil case implicates distinct collateral consequences.

2. Fairness

The fairness rationale argues that the criminal defendant must maintain a certain level of autonomy from the state in order to produce a fair and just criminal prosecution. Bentham described this as “the fox hunter’s reason,” stating that just as specific rules control the fox hunt, fair criminal procedure requires the government to prosecute its case with evidence derived independently from the defendant.²⁰⁶ To do otherwise would allow the prosecution to rely habitually on confessions as a primary form of proof.²⁰⁷ Under the fairness rationale, the privilege forces the government to prosecute crimes with evidence deemed to be more reliable than compelled confessions. This outcome not only promotes balance between the individual and the state, it also preserves the defendant’s moral

202. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) (authorizing detention beyond six months if there is a “significant likelihood of removal in the reasonably foreseeable future”).

203. See Nessel, *supra* note 119, at 373 n.120 (arguing that deportation is “the harshest punishment of all”).

204. See Michelle Rae Pinzon, *Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century*, 16 N.Y. INT’L L. REV. 29, 59-60 (2003).

205. See Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 66 (1984); see also Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 105-06 (1998); Nessel *supra* note 119, at 373-76; Pauw, *supra* note 195, at 337-44; Pinzon, *supra* note 204, at 29-32.

206. BENTHAM, *supra* note 187, at 238-39; see also *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964) (citing the “preference for an accusatorial rather than an inquisitorial system of criminal justice” as a reason for the privilege); O’Brien, *supra* note 192, at 36; Rabon, *supra* note 164, at 517-18 (discussing Bentham’s critique).

207. See 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2251, at 295-96 n.1 (John T. McNaughton ed., rev. ed. 1961).

dignity.²⁰⁸

Critics charge that whatever merit the fairness rationale may have in the criminal context, it has no place in civil cases.²⁰⁹ After all, the problem of governmental encroachment is not at play in civil proceedings between private parties.²¹⁰ Far from browbeating a criminal defendant, the government is not obtaining any evidence from the witness in civil cases. The critique of the fairness rationale in civil cases, however, ignores the not-so-attenuated link between civil discovery and subsequent criminal prosecutions of immigrants. If immigrants were denied the privilege in civil litigation, the government could too easily sidestep fairness concerns by prosecuting crimes with evidence discovered by private actors in immigrant-initiated civil litigation.²¹¹

The fairness rationale carries particular weight in light of deportation hearings. Currently, immigrants can claim the privilege in these civil proceedings. Although the immigration court can draw an adverse inference from the respondent's silence, the situation would be far worse for the immigrant were she forced to answer questions about alienage.²¹² Presumably these compelled admissions could be used as a basis not only for removal but for criminal prosecution as well. These circumstances diminish the government's incentive to investigate and present outside evidence, creating a process in which immigrants are questioned, detained, imprisoned, and finally deported by their own admission. The privilege breaks this chain of events, thereby encouraging a fairer prosecution.²¹³

3. *Privacy*

The privacy justification states simply that the privilege protects the defendant's overriding privacy interest in keeping information related to past criminal activity confidential.²¹⁴ Proponents of the privacy rationale argue that the government should not be allowed to compel a witness to reveal her most personal thoughts in order to gather incriminating testi-

208. See Stuntz, *supra* note 15, at 1234 (arguing that the immunity problem is "devastating" to the privacy rationale).

209. See, e.g., Kaminsky, *supra* note 180, at 127 (noting that "the government is in no way involved" in civil cases between private parties).

210. See *Garner v. United States*, 424 U.S. 648, 655-56 (1976) ("In areas where a government cannot be said to be compelling such information, however, there is no such circumvention of the constitutionally mandated policy of adversary criminal proceedings."); Heidt, *supra* note 16, at 1084-85, 1111-12.

211. See Heidt, *supra* note 16, at 1084 n.92 (noting that the government might pressure private parties to gather information in civil discovery); Dennis J. Bartlett, Note, *Adverse Inferences Based on Non-party Invocations: The Real Magic Trick in Fifth Amendment Civil Cases*, 60 NOTRE DAME L. REV. 370, 374 (1985) (discussing the fairness rationale).

212. See *infra* Parts III.C-D and accompanying discussion on the role of the Fifth Amendment in removal proceedings.

213. See Green, *supra* note 190, at 634 (citing DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 194 (1988)) (noting that the privilege prevents criminal prosecutions from morphing into an inquisitional system of justice).

214. See O'Brien, *supra* note 192, at 28 (summarizing the privacy rationale).

mony.²¹⁵ Critics assert that the privacy rationale is inconsistent with the realities of criminal prosecutions. Because the privilege protects only testimonial evidence, the government may still offer evidence gathered from sources as personal as the defendant's body.²¹⁶ If the state can prosecute the defendant with her own blood and handwriting, why not elicit the defendant's words as well?²¹⁷ Even if the privilege is limited to the idea of "mental privacy,"²¹⁸ critics correctly note that the state can still compel disclosure of those thoughts by granting the witness immunity from criminal prosecution.²¹⁹

Of the three putative rationales for the privilege, the privacy interest is the weakest as applied to unauthorized immigrants. Just as with any criminal defendant, the unauthorized immigrant can be immunized from prosecution and forced to testify. If the privilege were really designed to protect the immigrant's private thoughts, it would presumably prevent disclosure under all circumstances. The privacy rationale, however, carries somewhat more weight when considering the actual mechanics of immigration prosecutions. Immigrants rarely receive immunity from prosecution of immigration-related crimes because the government seldom has an interest in granting immunity.²²⁰ In nearly every circumstance involving possible prosecution for illegal entry or document fraud, the government foregoes prosecution altogether, initiating immediate removal proceedings instead. Thus, although cogent, the critique of the privacy interests secured by the privilege ignores the real-world prosecutions of immigration-related crimes, which rarely involve immunity.

The physical intrusion privacy critique also seems inapposite to the actual experience of immigrants in the criminal justice system. The evidence used to prosecute immigrants most commonly involves the defen-

215. See Vincent Martin Bonventre, *An Alternative to the Constitutional Privilege Against Self-Incrimination*, 49 BROOK. L. REV. 31, 56-59 (1982); Robert S. Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 UCLA L. REV. 343, 345-47 (1979); Erwin N. Griswold, *The Right to Be Let Alone*, 55 NW. U. L. REV. 216 (1961). But see Amar & Lettow, *supra* note 190, at 890-91 (arguing that witnesses possess equally strong privacy interests in civil proceedings, thus undermining the argument that privacy justifies the privilege in the criminal setting); Seidmann & Stein, *supra* note 15, at 433 (summarizing and criticizing traditional justifications for the right to silence as relying "on a conspicuously nonfactualist analysis").

216. See, e.g., *Holt v. United States*, 218 U.S. 245, 252-53 (1910) ("[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.").

217. See *Gilbert v. California*, 388 U.S. 263, 266 (1967); *United States v. Wade*, 388 U.S. 218, 222-24 (1967); *Schmerber v. California*, 384 U.S. 757, 761 (1966).

218. Peter Arenella, *Schmerber and the Privilege Against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31, 36 (1982).

219. See Robert B. McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 230 (1967); Stuntz, *supra* note 15, at 1234 (explaining the role of immunity in privilege cases); see also O'Brien, *supra* note 192, at 48 (evaluating McKay's analysis of the relationship between the privacy interest and the Fifth Amendment).

220. See generally Daniel Kanstroom, *Hello Darkness: Involuntary Testimony and Silence as Evidence in Deportation Proceedings*, 4 GEO. IMMIGR. L.J. 599, 599-600 (1990) (discussing the role of the privilege in removal hearings).

dant's identity, outside witnesses, birth certificates, and other proof of alienage.²²¹ The gathering of such evidence does not implicate privacy concerns in the same way that intrusion of the defendant's body does in other criminal settings. If the privilege is viewed as protecting only mental privacy,²²² immigrants maintain a strong interest in preventing the forced disclosure of their most personal thoughts regarding alienage. Absent the privilege, courts could require unauthorized immigrants to reveal the details of their immigration, document fraud, and aliases—embarrassing subjects that often have little relation to the employment violations at issue.

4. *Preventing Cruelty*

Of the privilege's three main descriptive justifications, proponents most often cite the goal of preventing "cruelty."²²³ The cruelty rationale²²⁴ asserts that self-incrimination does harm to the human conscience by forcing a person to choose between perjury, contempt, and self-incrimination.²²⁵ Thus, while the fairness rationale focuses on preserving a fair system of criminal prosecution that yields convictions based on reliable, non-self-confessional evidence, the cruelty rationale focuses on the privilege's role in preserving human dignity and preventing the "unnatural act" of self-condemnation.²²⁶ Critics charge that there really is no cruelty in forcing a witness to testify against herself. Although choosing between self-incrimination and perjury may be unpleasant, the choice is no crueler than other aspects of prosecution, such as the threat of incarceration or forced testimony against friends or family members.²²⁷ Further, the risks of perjury and contempt sanctions are not unique to criminal defendants but are hazards faced by all witnesses.²²⁸ The rationale carries even less force, critics charge, in civil cases in which the witness may face only a remote chance of criminal prosecution.²²⁹

For unauthorized immigrants, the risk of removal from the country is far from hypothetical. In addition to direct criminal liability, unauthorized immigrants face a severe collateral consequence not faced by citizens in civil cases. The cruel choice theory applies with particular force to the

221. *See id.* at 602.

222. *See* Robert B. McKay, Book Review, 35 N.Y.U. L. REV. 1097, 1100 (1960) (reviewing LEWIS MAYERS, *SHALL WE AMEND THE FIFTH AMENDMENT?* (1959)).

223. Stuntz, *supra* note 15, at 1237 (describing the cruelty explanation as "[p]erhaps the most common").

224. Many commentators refer to the cruelty rationale using Bentham's misogynistic label, "the old woman's policy." BENTHAM, *supra* note 187, at 230; *see* O'Brien, *supra* note 192, at 41-45.

225. O'Brien, *supra* note 192, at 27 (summarizing the principles and policies justifying the privilege); *see generally* Dolinko, *supra* note 190, at 1090-107 (outlining the cruelty rationale).

226. John T. McNaughton, *The Privilege Against Self-Incrimination: Its Constitutional Affection, Raison d'Étre and Miscellaneous Implications*, 51 J. CRIM. L. CRIMINOLOGY, & POLICE SCI. 138, 147-48 (1960); O'Brien, *supra* note 192, at 43.

227. *See* BENTHAM, *supra* note 187, at 230-31; Heidt, *supra* note 16, at 1086; Rabon, *supra* note 164, at 518; Stuntz, *supra* note 15, at 1238.

228. Bonventre, *supra* note 215, at 54-56; Green, *supra* note 190, at 631.

229. Heidt, *supra* note 16, at 1086-87.

trilemma facing unauthorized immigrants who, absent the privilege, must choose between perjury, contempt, and self-incrimination, knowing that the latter option could lead to both prosecution and removal. Certainly there is nothing cruel about the threats of perjury and contempt in forcing witnesses to testify truthfully, but in deciding how to testify, the rational witness weighs the moral and practical consequences of lying versus telling the truth. The possibility of deportation alters the calculus in a way unique to immigrants. In essence, the price of truth doubles. The collateral consequence of removal incentivizes perjury and contempt—the remaining options of the cruel choice. Thus, absent the privilege, immigrants would feel a forceful pull away from truth-telling in a manner not felt by citizens. The cruel choice theory argues that in order to blunt the force of these collateral consequences courts should construe the privilege broadly for immigrants who refuse to answer status-based questions.

C. Applying the Privilege to Immigrant-Initiated Civil Litigation

Assuming that the principles and policies of the Fifth Amendment support extending the privilege to immigrants in civil litigation, what are the practices of invocation? In order to claim the privilege, the question posed must force the plaintiff immigrant to stand as a “witness against himself.” The information sought must be testimonial in nature and not merely exhibitiv²³⁰. The plaintiff can assert the privilege during discovery²³¹ or as a witness at trial.²³² Civil litigants have claimed the privilege in response to interrogatories,²³³ requests for admission,²³⁴ and depositions.²³⁵

The information sought must “tend to incriminate” the speaker,²³⁶ or, as the common legal parlance puts it, the adverse answer would furnish a

230. See *Holt v. United States*, 218 U.S. 245, 252-53 (1910).

231. *Garner v. United States*, 424 U.S. 648, 656 (1976); *United States v. Kordel*, 397 U.S. 1, 7-8 (1970); *United States v. White*, 322 U.S. 694, 699 (1944).

232. *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972).

233. *United States v. Kordel*, 397 U.S. 1, 7 (1970); *Gordon v. Fed. Deposit Ins. Corp.*, 427 F.2d 578, 580 (D.C. Cir. 1970); *De Vita v. Sills*, 422 F.2d 1172, 1178 (3rd Cir. 1970); *Duffy v. Currier*, 291 F. Supp. 810, 815 (D. Minn. 1968); *United States v. Forty-Seven Bottles, More or Less, Each Containing Thirty Capsules of Jenasol*, 26 F.R.D. 4, 6 (D.N.J. 1960); *Paul Harrigan & Sons, Inc. v. Enter. Animal Oil Co.*, 14 F.R.D. 333, 334 (E.D. Pa. 1953).

234. *Gordon*, 427 F.2d at 581.

235. *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1086-89 (5th Cir. 1979); *In re Folding Carton Antitrust Litig.*, 609 F.2d 867, 870 (7th Cir. 1979); *In re Master Key Litig.*, 507 F.2d 292, 293 (9th Cir. 1974); *De Vita*, 422 F.2d at 1178 (3rd Cir. 1970). Although document production by itself is not considered “testimonial” and therefore not covered by the privilege, if producing the documents authenticates them or concedes the existence, control, or possession of the documents, then the plaintiff may claim the privilege and refuse to produce them, assuming the other requirements of the privilege are satisfied. *United States v. Doe*, 465 U.S. 605, 608 (1984); *Fisher v. United States*, 425 U.S. 391, 410 (1976); see generally Robert P. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1, 5 (1987) (discussing the *Fisher* doctrine).

236. *Hoffman v. United States*, 341 U.S. 479, 486-88 (1951); see also *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924).

“link in the chain” required for criminal prosecution.²³⁷ The “tend to incriminate” standard represents a broadening of the privilege over earlier verbal formulations that allowed witnesses to invoke only when their responses constituted a direct admission of a crime or an element of a crime.²³⁸ Some courts require a “real” possibility of prosecution,²³⁹ while others state that a witness may invoke the privilege with a “remote” possibility of prosecution.²⁴⁰ The “real” versus “remote” terminology is unfortunate. Judges and commentators frequently misread this language as requiring a determination of the likelihood of prosecution based on prosecutorial resources and charging decisions. The “real possibility” requirement, however, speaks to the incriminating nature of the response, rather than an assessment of the chances of an actual government prosecution.²⁴¹ “Real” possibility of prosecution thus refers to legal possibility.²⁴² If the information sought might provide a clue of criminal wrongdoing to a “hypothetical government investigator”²⁴³ and the criminal charge is still legally viable, the witness can assert her Fifth Amendment privilege. If the relevant criminal statute of limitations has passed or the witness has received immunity, however, prosecution is legally impossible and the witness cannot claim the privilege.²⁴⁴

In order for the response to provide a “link in the chain” of prosecution, the question put to the immigrant must implicate a particular crime.²⁴⁵ In nearly every employment case, a plaintiff can easily prove that questions about her Social Security number or alienage implicate possible crimes.²⁴⁶ Although unauthorized presence in the United States standing alone is not a criminal offense, admitting this fact or other facts related to alienage may prove elements of other crimes.²⁴⁷ Entering the United States

237. *Hoffman*, 341 U.S. at 488; see also *Malloy v. Hogan*, 378 U.S. 1, 11-12 (1964); *Hashagen v. United States*, 283 F.2d 345, 348 (9th Cir. 1960).

238. See *Heidt*, *supra* note 16, at 1093-94.

239. *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980) (requiring a “substantial and ‘real,’ and not merely trifling or imaginary, hazard[] of incrimination”) (citations omitted); *Zicarelli v. New Jersey State Comm’n of Investigation*, 406 U.S. 472, 478 (1972); *Marchetti v. United States*, 390 U.S. 39, 53 (1968); *Rogers v. United States*, 340 U.S. 367, 374-75 (1951); *In re Master Key Litig.*, 507 F.2d at 293.

240. *United States v. Cuthel*, 903 F.2d 1381, 1384 (11th Cir. 1990); *Wehling*, 608 F.2d at 1087 n.5; *United States v. Johnson*, 488 F.2d 1206, 1209 n.2 (1st Cir. 1973); *United States v. Miranti*, 253 F.2d 135, 139 (2d Cir. 1958).

241. *In re Morganroth*, 718 F.2d 161, 167 (11th Cir. 1983).

242. See Marjorie S. White, Comment, *Plaintiff as Deponent: Invoking the Fifth Amendment*, 48 U. CHI. L. REV. 158, 160 n.19 (1981) (noting that the witness must establish only the possibility of prosecution, rather than its likelihood).

243. *Heidt*, *supra* note 16, at 1065 (discussing the “great range of civil cases” in which a witness can invoke the privilege).

244. See *Brown v. Walker*, 161 U.S. 591, 599-600 (1896); see also *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 79-80 (1964).

245. *Cheh*, *supra* note 193, at 1385.

246. *United States v. Balsys*, 524 U.S. 666, 671-72 (1998); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *Kanström*, *supra* note 220, at 603 (discussing criminal charges collateral to civil deportation proceedings).

247. *Kanström*, *supra* note 220, at 603-04 (noting that alienage and undocumented residence, though not crimes, may implicate elements of crimes); Henry G. Watkins,

without inspection and reentering the country following deportation are crimes.²⁴⁸ Any person who fraudulently presents documents such as a Social Security card to satisfy employment-related immigration verification requirements commits a felony.²⁴⁹ As discussed above,²⁵⁰ immigrants seeking to vindicate their employment rights face a barrage of questions related to their immigration status in civil discovery. Defendants pose questions about the immigrants' residency, paperwork, and prior aliases. Because answers to such questions involve criminal offenses, the immigrant witness can claim the privilege.²⁵¹

The privilege is virtually self-policing because courts are nearly powerless to overrule the invoker.²⁵² They must afford the privilege broad, liberal construction²⁵³ and can overrule an immigrant's decision to invoke the privilege only if it is "perfectly clear" that the answer "cannot possibly have such tendency to incriminate."²⁵⁴ In the unusual situation in which a court makes such a finding, the witness must respond or face contempt charges.²⁵⁵ Given the deference that the "perfectly clear" standard affords the invoker, employers will have great difficulty challenging the plaintiff immigrant's ability to claim the privilege.²⁵⁶ For this reason, the few courts that have addressed the issue of immigrant invocation in civil cases have found plaintiffs "entirely justified" in refusing to answer questions about their status.²⁵⁷

D. Adverse Inferences: The Consequences of Silence

The Supreme Court has forcefully protected the criminal defendant's Fifth Amendment privilege. No adverse inference may be drawn from

Streamlining Deportation Proceedings: Self-Incrimination, Immunity from Prosecution, and the Duty to Testify in a Deportation Context, 22 SAN DIEGO L. REV. 1075, 1081 (1985) (discussing illegal entry and reentry as crimes).

248. 8 U.S.C. §§ 1325(a), 1326 (2000); see also Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 499 (2007) (discussing immigration-related crimes).

249. 18 U.S.C. § 1546(b) (2000) (false statements on employment verification form); 42 U.S.C. § 408(a)(7)(B) (2000) (fraudulent use of Social Security number).

250. See *supra* Part II and accompanying discussion on the proliferation of status-based discovery following *Hoffman*.

251. Unauthorized immigrants who entered the country legally but overstayed their visas may still face criminal punishment. See 8 U.S.C. § 1306(b) (2006). They can be charged with providing fraudulent employment documents or willfully failing to notify the government of a change of address. *Id.*; see *Kanstroom*, *supra* note 220, at 603 n.19.

252. Heidt, *supra* note 16, at 1065-71.

253. *Bouschor v. United States*, 316 F.2d 451, 458 n.9 (8th Cir. 1963); *Hashagen v. United States*, 283 F.2d 345, 348 (9th Cir. 1960).

254. *Hoffman v. United States*, 341 U.S. 479, 488 (1951) (quoting *Temple v. Commonwealth*, 75 Va. 892, 898 (1881)).

255. See *Kaminsky*, *supra* note 180, at 122, 137 (noting that courts retain the power to overrule a witness's invocation of the privilege, but the chances of a court actually doing so are "remote").

256. *Mannheimer*, *supra* note 180, at 1299 (arguing that courts err on the side of upholding claims of privilege).

257. See *Pontes v. New England Power Co.*, No. 03-00160A, 2004 WL 2075458 (Mass. Super. Ct. 2004); *Xinic v. Quick*, 69 Va. Cir. 295 (Va. Cir. Ct. 2005).

silence, and the prosecutor is forbidden from commenting on the defendant's invocation.²⁵⁸ A strict prohibition against inferring guilt from silence is necessary to prevent the Fifth Amendment from becoming a cruel joke that guarantees silence in name but penalizes it in practice.²⁵⁹ Thus, in *Griffin v. California*, the "high-water mark"²⁶⁰ of Fifth Amendment jurisprudence, the Supreme Court barred all penalties that make invocation "costly."²⁶¹ Though *Griffin* was a criminal case, the Court initially applied a similar rationale in civil cases, holding that the government may not "exact[] . . . a price" from a civil witness who chooses to exercise this "right[] of constitutional stature . . ."²⁶² Following these bold pronouncements, the Supreme Court struck down several state and local laws that attempted to penalize parties for remaining silent in civil actions.²⁶³ The line of cases extending strong protections to civil witnesses who invoke the privilege took an abrupt turn in *Baxter v. Palmigiano* when the Burger Court authorized courts to draw "adverse inferences against parties [who] refuse to testify in response to probative evidence offered against them . . ."²⁶⁴ Palmigiano was an inmate at a Rhode Island prison charged with inciting a disturbance of prison operations. During the non-criminal hearing before the prison disciplinary board, Palmigiano asserted his Fifth Amendment privilege and refused to discuss his role in the prison uprising. After advising Palmigiano that his silence could be used against him, the board ordered the prisoner placed in segregation for thirty days.²⁶⁵ Reviewing Palmigiano's case, the Supreme Court found no constitutional infirmity in the board's decision to penalize Palmigiano's silence. The Court reasoned that the adverse inference was permissible because the board did not impose the sanction automatically but only in conjunction with other evidence incriminating Palmigiano.²⁶⁶ Although *Baxter* empowers courts to draw negative inferences from silence in civil cases, several procedural requirements significantly reduce the likelihood that courts will actually penalize immigrants for invoking the privilege.

258. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976); *Griffin v. California*, 380 U.S. 609, 614-15 (1965); *Grunewald v. United States*, 353 U.S. 391 (1957).

259. See *Slochower v. Bd. of Higher Educ. of N.Y.*, 350 U.S. 551, 557 (1956) ("The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury.").

260. 8 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2018 (3d ed. 2007).

261. *Griffin*, 380 U.S. at 614-15.

262. See *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

263. *Lefkowitz v. Turley*, 414 U.S. 70, 85 (1973) (striking down New York statute prohibiting the issuance of government contracts to persons who refuse to waive their Fifth Amendment privilege); *Gardner v. Broderick*, 392 U.S. 273, 279 (1968) (barring discharge of city employees for refusal to waive privilege before grand jury); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of New York*, 392 U.S. 280, 284-85 (1968) (same); *Spevack v. Klein*, 385 U.S. 511, 516 (1967) (forbidding the disbarment of an attorney solely on the basis of the attorney's invocation of the privilege).

264. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

265. *Id.* at 312-13.

266. *Id.* at 317-18.

E. Limitations on Status-Based Inferences

Several factors counsel against drawing an adverse inference from an immigrant's silence in civil litigation. First, the privilege law of the forum jurisdiction may bar the inference altogether. Twenty-two states disallow factfinders from drawing adverse inferences from the testimony of witnesses who assert valid testimonial privileges.²⁶⁷ For example, the California Evidence Code prohibits the trier of fact from drawing adverse inferences "as to any matter at issue in the proceeding."²⁶⁸ No negative inference will attach to silent immigrant plaintiffs filing actions in these state courts regardless of whether state or federal law governs their claims.²⁶⁹ In addition, the state privilege law will apply to state claims filed in federal court.²⁷⁰

Second, even if drawn, the adverse inference alone cannot prove that the silent plaintiff is in fact an unauthorized immigrant.²⁷¹ A court that penalizes an invoker based on her silence alone exacts too high a price on her Fifth Amendment rights.²⁷² In the case of immigrant-initiated civil litigation, a factfinder may not conclude that a plaintiff is an unauthorized immigrant from the mere fact that she refuses to answer questions about her status. This is because the inference is considered corroborative, rather than independent evidence.²⁷³ If the defendant has any hope of convincing the court to grant a *Hoffman*-based defense, he must present evidence beyond the plaintiff's silence and any consequent inference flowing from it to prove unauthorized status.²⁷⁴

Third, and most important, courts should be wary of attaching evidentiary value to a plaintiff immigrant's silence because silence itself is ambiguous and noncommunicative.²⁷⁵ Although silence is commonly perceived as a tacit admission of guilt,²⁷⁶ witnesses who are factually innocent may

267. Deborah Stavile Bartel, *Drawing Negative Inferences Upon a Claim of the Attorney-Client Privilege*, 60 BROOK. L. REV. 1355, 1394 (1995) (discussing states that prohibit drawing adverse inferences from the assertion of testimonial privileges).

268. CAL. EVID. CODE § 913 (West 2006).

269. Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 GEO. L.J. 1781, 1811-12 (1994).

270. *Id.* at 1812.

271. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("It is thus undisputed that an inmate's silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board."); *SEC v. Colello*, 139 F.3d 674, 678 (9th Cir. 1998) ("*Lefkowitz* and *Baxter* require that there be evidence in addition to the adverse inference to support a court's ruling.") (citing *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 n.5 (1977); *Baxter*, 425 U.S. at 318); see also *Seidmann & Stein, supra* note 15, at 487-88 (noting that civil liability cannot arise from an adverse inference alone).

272. *Lefkowitz*, 431 U.S. at 808 n.5 (noting that a witness's silence is "only one of a number of factors to be considered by the finder of fact in assessing a penalty").

273. See *Baxter*, 425 U.S. at 317-18; *Seidmann & Stein, supra* note 15, at 487-88.

274. See *Baxter*, 425 U.S. at 318.

275. *Rabon, supra* note 164, at 532 (discussing the relevance of silence and the prejudicial effect of inferring guilt from silence).

276. See, e.g., John T. Noonan, Jr., *Inferences from the Invocation of the Privilege Against Self-Incrimination*, 41 VA. L. REV. 311, 322-23 (1955) (arguing that a witness who invokes the privilege would likely provide an incriminatory response if she answered the question).

claim the privilege as well as the guilty.²⁷⁷ Courts that allow jurors to infer guilt from a plaintiff immigrant's silence assume that faced with an accusatory question, an innocent witness would deny the charges.²⁷⁸ The theory is defective on several fronts. Innocent witnesses may fear an erroneous criminal prosecution and thus choose to remain silent even though they have nothing to hide. In addition, the question posed may not be accusatory, thereby amplifying the ambiguity of silence. For example, during a deposition the defendant may ask, "Where did you reside five years ago?" or "What documents did you provide to your employer to obtain employment?" There are no obvious inferences to draw from a witness's refusal to answer these questions. The jury is left to speculate as to how a witness might incriminate herself by responding to such apparently innocuous questions.²⁷⁹ The deponent's silence is evidentially suspect because of the innumerable possible answers to such questions, none of which becomes any more probable from the non-answer.

Consider a far more pointed line of questioning in which defense counsel asks, "You are an illegal alien from Mexico, aren't you?" A juror allowed to draw an adverse inference in this case would certainly conclude that the plaintiff is an unauthorized immigrant. Because the innocent can claim the privilege as well as the guilty, however, the deponent's truthful response might be: "Absolutely not, I was born in the United States and am an American citizen." Thus, by inferring guilt from silence, the factfinder erroneously gives evidentiary weight to the question posed.²⁸⁰

Assuming, however, the court finds that the immigrant's silence is competent evidence of unauthorized status, the inference is still inadmissible if its probative value is substantially outweighed by the risk of unfair prejudice to the plaintiff immigrant.²⁸¹ The inference implicates at least two separate prejudices, one related to those who invoke the privilege and another related to unauthorized immigrants. The first prejudice derives from the lay misconception that only the guilty "plead the Fifth."²⁸² The

277. *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) ("[T]ruthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth."); *Grunewald v. United States*, 353 U.S. 391 (1957) ("[O]ne of the basic functions of the privilege is to protect innocent men."); see also *Seidmann & Stein*, *supra* note 15, at 433 (arguing that the privilege enhances the credibility of innocent suspects by creating an anti-pooling effect that distinguishes the guilty from the innocent).

278. See *Heidt*, *supra* note 16, at 1116 (discussing the common belief that "the natural reaction of an innocent man to an untrue accusation is a prompt denial").

279. John C. O'Brien, *Judicial Responses When A Civil Litigant Exercises a Privilege: Seeking the Least Costly Remedy*, 31 ST. LOUIS U. L.J. 323, 334 (1987) (questioning the probative value of silence).

280. See, e.g., *Brink's Inc. v. City of New York*, 717 F.2d 700, 715-17 (2d Cir. 1983) (Winter, J., dissenting) (discussing the dangers of drawing adverse inferences from a witness's refusal to answer leading questions).

281. *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1266 (9th Cir. 2000); see also *FED. R. EVID.* 403; *Rabon*, *supra* note 164, at 549-50 (stating that the Rule 403 methodology controls the entire adverse inference analysis).

282. See *Heidt*, *supra* note 16, at 1123-24 (arguing that jurors view a silent witness "as a criminal who has probably eluded justice").

second prejudice derives from the American public's hostility toward illegal immigration.²⁸³ Given the current antipathy toward unauthorized immigrants, some jurors are quite likely to reject legal claims brought by plaintiffs who they view as "lawbreakers."

Prior to balancing prejudice and relevance, the court must determine whether the inference (i.e. the assumption that the plaintiff is an unauthorized immigrant) has any probative value.²⁸⁴ Thus, even if the court determines that the witness's silence is competent evidence of status, and even if this fact is not unduly prejudicial, the court still should not draw the inference unless the issue of immigration status limits the rights and remedies available to the plaintiff. The application of the inference depends on the threshold question of whether *Hoffman* in fact places unauthorized immigrants in a separate remedial universe, as claimed by some employers. If the law is as it was prior to *Hoffman* and unauthorized immigrants still enjoy the same employment rights and remedies as their status-holding coworkers,²⁸⁵ the inference is irrelevant. In order to answer this threshold question, the court should consider the relevance of status to each employment claim at issue.

1. Wage and Hour Law

An immigrant's silence in wage cases should not trigger an adverse inference because by barring unauthorized immigrants from recovering unpaid minimum wages, lower courts would undermine the very immigration policies that the Supreme Court sought to bolster in *Hoffman*.²⁸⁶ In order to discourage employers from exploiting immigrants' willingness to work for sub-minimum wages, unauthorized immigrants must be empowered to recover unpaid wages like all other employees.²⁸⁷ Otherwise, unau-

283. See, e.g., DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP 42-72 (1996) (discussing American attitudes toward illegal immigration and the recasting of nationality); David W. Haines & Karen E. Rosenblum, *Preface to ILLEGAL IMMIGRATION IN AMERICA: A REFERENCE HANDBOOK* 1, 4-7 (David W. Haines & Karen E. Rosenblum eds., 1999) (discussing the social and political aspects of illegal immigration); Legomsky, *supra* note 248, at 499-500 (discussing the public perception of immigrants as criminals).

284. FED. R. EVID. 402 ("Evidence which is not relevant is not admissible.").

285. See Reynolds, *supra* note 81, at 1269 (noting that prior to *Hoffman*, unauthorized immigrants enjoyed "protection without regard to immigration status"); Wishnie, *supra* note 91, at 502 (summarizing federal courts' near-universal conclusion prior to *Hoffman* that unauthorized immigrants were covered by federal employment protections). *But see* Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 186-88 (4th Cir. 1998) (holding that unauthorized immigrants are not "qualified" for employment and therefore not covered by Title VII).

286. Singh v. Jutla, 214 F. Supp. 2d 1056, 1058 (N.D. Cal. 2002) ("If the FLSA did not cover undocumented aliens, employers would have an incentive to hire them By reducing the incentive to hire such workers the FLSA's coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA.") (citing Patel v. Quality Inn S., 846 F.2d 700, 704 (11th Cir. 1988)).

287. See Reyes v. Van Elk, Ltd., 56 Cal. Rptr. 3d 68, 77 (Cal. Ct. App. 2007) ("Allowing employers to hire undocumented workers and pay them less than the wage mandated by statute is a strong incentive for the employers to do so, which in turn encourages illegal immigration.").

thorized immigrants will become an even more exploitable workforce, thus encouraging employers to knowingly hire this group of workers in violation of the IRCA.

Hoffman is irrelevant to wage claims because of the past work/lost work distinction.²⁸⁸ Unlike Jose Castro in *Hoffman*, who sought backpay for the time that he was unemployed because of his employer's illegal conduct, plaintiffs attempting to recover the minimum wage under the FLSA simply seek payment for hours previously worked.²⁸⁹ Because FLSA claims involve past work, rather than lost work, the mitigation concern expressed in *Hoffman* is irrelevant.²⁹⁰

A court faced with an immigrant refusing to answer status-based questions in a FLSA action can draw an adverse inference only if the right to recover unpaid wages is now restricted to work-authorized employees. Because such a finding would constitute a flawed interpretation of federal immigration policy and *Hoffman*, the negative inference is irrelevant to the underlying wage claim.

2. *Anti-discrimination Law*

A plaintiff's refusal to discuss her status in Title VII litigation is irrelevant unless *Hoffman*'s discussion of labor law remedies can somehow be read as a signal to limit backpay under other federal employment statutes. The courts rejecting *Hoffman*'s extension to anti-discrimination laws have noted several distinctions between Title VII and the NLRA.²⁹¹ For example, the Supreme Court stated in *Hoffman* that the NLRB lacks authority to balance competing federal objectives; in contrast, federal courts possess the power and expertise to evaluate Title VII in light of the IRCA.²⁹²

In addition to the difference in interpretive bodies, Title VII and the NLRA have very different remedial schemes. The Supreme Court has referred to Title VII as a national "policy of the highest priority," which depends on enforcement by private attorneys general.²⁹³ The plaintiff

288. See *supra* Part I.A.1 and accompanying discussion on decisions declining to extend *Hoffman* to FLSA claims.

289. *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 501 (W.D. Mich. 2005) (citing *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002)) (noting that the Supreme Court focused on the fact that "Castro was not entitled to receive backpay for work he never performed").

290. After *Hoffman*, the Department of Labor reaffirmed the right of unauthorized immigrants to recover wages under the FLSA. See *Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division*, *supra* note 79.

291. For a comprehensive argument against extending *Hoffman* to Title VII, see Ho & Chang, *supra* note 65, at 503-17.

292. See *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 237 (2d Cir. 2006) ("In *Hoffman Plastic*, the Supreme Court sought to reconcile two federal statutes to ensure that one did not trench on the other, a task routinely performed by federal courts."); see also *Hoffman*, 535 U.S. at 149 (2002) (noting that the NLRB "has no authority to enforce or administer" the IRCA); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1068 (9th Cir. 2004) ("A district court has the very authority to interpret both Title VII and IRCA that the NLRB lacks.").

293. *N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980).

enforces not only her own rights but also “the important congressional policy against discriminatory employment practices.”²⁹⁴ The importance of this policy is reflected in the wide range of remedies available to victims of discrimination, in comparison to the NLRA, which provides backpay and reinstatement as the only meaningful remedies for wrongfully discharged employees.²⁹⁵ The Ninth Circuit has recognized the distinction between the NLRA and Title VII, noting that eliminating backpay under the NLRA still preserves the Act’s “traditional remedies” but doing so under federal anti-discrimination laws seriously weakens Title VII’s private enforcement scheme.²⁹⁶

Put simply, *Hoffman* involved the Supreme Court’s balancing of two unique federal statutes, the IRCA and the NLRA;²⁹⁷ the decision did not address Title VII. Because denying backpay to unauthorized workers in Title VII cases would severely undermine federal anti-discrimination policies, courts should refrain from drawing adverse inferences from an immigrant’s silence in these cases.

3. State Law, Preemption, and Adverse Inferences

With stated deference to the federal immigration concerns expressed in *Hoffman*, certain courts have struck down tort and workers’ compensation claims brought by unauthorized immigrants. Although most judges considering these state claims have rejected preemption arguments,²⁹⁸ some courts have cited *Hoffman* as either persuasive authority²⁹⁹ or as a binding indication of the IRCA’s preemptive force.³⁰⁰

294. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974).

295. *Rivera*, 364 F.3d at 1067 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)); see also *De La Rosa v. N. Harvest Furniture*, 210 F.R.D. 237, 239 (C.D. Ill. 2002) (arguing that eliminating backpay under Title VII would “frustrate the central statutory purposes of eradicating discrimination . . . and making persons whole”).

296. *Rivera*, 364 F.3d at 1067.

297. *Developments in the Law—Jobs and Borders*, *supra* note 13, at 2229 (“*Hoffman* could—and should—be understood as a narrow decision balancing two federal statutes . . .”).

298. *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 237–38 (2d Cir. 2006); see *Flores v. Limehouse*, No. 04 Civ. 1294, 2006 WL 1328762, at * 2 (D.S.C. May 11, 2006) (arguing that the IRCA does not preempt unauthorized immigrants’ wage claims); *Reyes v. Van Elk, Ltd.*, 56 Cal. Rptr. 3d 68, 77–78 (Cal. Ct. App. 2007); *Safeharbor Employer Servs. I, Inc. v. Velazquez*, 860 So.2d 984, 986 (Fla. Dist. Ct. App. 2003) (“IRCA does not . . . so thoroughly occupy the field as to require a reasonable inference that Congress left no room for states to act.”); *Cont’l Pet Techs., Inc. v. Palacias*, 604 S.E.2d 627, 629 (Ga. Ct. App. 2004); *Coma Corp. v. Kan. Dep’t. of Labor*, 154 P.3d 1080, 1084 (Kan. 2007); *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1256–60 (N.Y. 2006).

299. See, e.g., *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510, 519–20 (Mich. Ct. App. 2003) (finding *Hoffman* “highly instructive” and noting that “the highest court in the land speaks with authority when it comes to determining what is a federal crime”).

300. See, e.g., *Veliz v. Rental Serv. Corp. USA, Inc.*, 313 F. Supp. 2d 1317, 1336 (M.D. Fla. 2003) (striking down unauthorized immigrant’s common law claims for lost wages because to do otherwise would “trench[] upon the immigration policy of the United States”); *Hernandez-Cortez v. Hernandez*, No. 01 Civ. 1241, 2003 WL 22519678, at *6 (D. Kan. Nov. 4, 2003) (relying on the IRCA to strike down unauthorized immigrant’s tort claim for lost future earnings).

Although a full analysis of federal preemption and the IRCA is beyond the scope of this article, a brief discussion is necessary in order to understand why *Hoffman* does not limit a state's power to extend workplace protections to unauthorized immigrants. For a state court faced with the decision of whether to penalize a plaintiff who invokes the privilege, the IRCA's lack of preemptive force counsels against drawing adverse inferences.³⁰¹

Hoffman does not raise federalism issues; the Supreme Court addressed only a potential conflict between two federal statutes.³⁰² Thus, any state court decision based on IRCA preemption explores a subject that the Supreme Court never addressed in *Hoffman*. As with any preemption analysis, the inquiry begins with determining congressional intent.³⁰³ Was the IRCA intended to bar states from awarding backpay to unauthorized immigrants injured on the job, killed in automobile accidents, or victimized by other types of tortious conduct? In areas where the state possesses broad regulatory authority, such as occupational safety and workplace rights,³⁰⁴ courts are extremely hesitant to give a federal act preemptive force absent a "clear and manifest" expression by Congress to do so.³⁰⁵

It would be an incredible stretch to argue that the IRCA expressly preempts the state's ability to award lost earnings to unauthorized immigrants.³⁰⁶ The IRCA contains only one express preemption clause, which prohibits states from "imposing civil or criminal sanctions" on employers who hire unauthorized immigrants.³⁰⁷ A personal injury award is not a state-imposed "sanction."³⁰⁸ The conduct governed by tort and workers' compensation claims does not involve "employ[ing], or recruit[ing] . . . unauthorized aliens"³⁰⁹ but involves workplace injuries or breaches of duties owed to plaintiffs. If anything, the fact that the IRCA contains a clause explicitly preempting certain state conduct while omitting any refer-

301. See generally *Developments in the Law—Jobs and Borders*, *supra* note 13, at 2242 ("The most important doctrinal issue in question is whether the IRCA will be interpreted to preempt state protections for illegal workers . . .").

302. *Madeira*, 469 F.3d at 237-38.

303. *Retail Clerks Int'l Assoc. v. Schermerhorn*, 375 U.S. 96, 103 (1963).

304. *DeCanas v. Bica*, 424 U.S. 351, 356 (1976) ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State."); see also *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (requiring that Congress express a "clear and manifest purpose" to preempt areas of state police powers).

305. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

306. See *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002) (noting that the best evidence of congressional preemptive intent is the language of the statute).

307. 8 U.S.C. § 1324a(h)(2) (2000).

308. See *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1256 (2006) ("The legislative history of IRCA confirms this interpretation, as the preemption language in section 1324a(h)(2) was intended to apply only to civil fines and criminal sanctions imposed by state or local law.")

309. 8 U.S.C. § 1324a(h)(2).

ence to tort claims implies an absence of preemptive intent.³¹⁰

Field preemption analysis produces the same result.³¹¹ Although Congress enacted the IRCA pursuant to its exclusive power to regulate immigration and naturalization,³¹² the congressional record lacks any reference to an attempt to affect state tort and employment laws.³¹³ In fact, the IRCA's legislative history indicates that Congress did not intend "to undermine or diminish in any way labor protections in existing law."³¹⁴

Even absent express and field preemption, a state judge could still draw an adverse inference if she determines that the plaintiff's unauthorized immigration status is relevant to a conflict preemption analysis.³¹⁵ The court must determine whether a defendant ordered to pay lost wages to an unauthorized immigrant is physically unable to comply with both the state court judgment and the IRCA or whether compliance with the judgment poses a "direct and positive obstacle" to the "accomplishment and execution of the full purposes and objectives of Congress."³¹⁶ The "physical inability" analysis is easily dismissed. Awarding an unauthorized immigrant lost wages does not require an employer to violate the IRCA by "hir[ing] . . . an alien knowing the alien is an unauthorized alien."³¹⁷ Compared to a reinstatement order, which would require an employer to knowingly employ an unauthorized immigrant, a backpay award does not violate the IRCA because it does not foist an unlawful employment relationship on the employer.

Although the "physical inability" argument is unlikely to yield fruit, an employer may argue that awarding lost earnings to an unauthorized immigrant constitutes a direct and positive obstacle to the accomplishment of the IRCA's objectives. Any potential conflict between a backpay award and the IRCA's policies, however, is not "direct and positive" but rather circuitous and hypothetical. In fact, a state's decision to eliminate the ability of unauthorized immigrants to recover lost earnings is far more likely to create a direct conflict with the IRCA's objectives. In essence, a state that restricts tort recovery to citizens encourages employers to "first hire, then

310. See Wishnie, *supra* note 91, at 513 (arguing that the IRCA's express preemption of certain state acts strongly implies a lack of intent to preempt state employment laws and torts).

311. See *id.*

312. See *Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977).

313. *Balbuena*, 845 N.E.2d at 1256 ("[N]othing in [the IRCA] indicat[es] that Congress meant to affect state regulation of occupational health and safety, or the types of damages that may be recovered in a civil action arising from those laws.")

314. H.R. REP. NO. 99-682(II), at 8-9 (1986), reprinted in 1986 U.S.C.C.A.N. 5757, 5757-58 (emphasis added).

315. See *Majlinger v. Cassino Contracting Corp.*, 802 N.Y.S.2d 56, 62 (N.Y. App. Div. 2005) (rejecting arguments related to express and field preemption and defining the "principal question" as "whether an award of lost wages to an undocumented alien presents an obstacle to the [c]ongressional objectives underlying the IRCA").

316. *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 238, 241 (2d Cir. 2006) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); see also *Kelly v. Washington*, 302 U.S. 1, 10 (1937).

317. 8 U.S.C. § 1324a(a)(1)(A) (2000).

abuse, and finally retaliate” against unauthorized immigrants.³¹⁸ Such a result would frustrate Congress’s primary purpose in enacting the IRCA: decreasing employers’ incentives to hire unauthorized immigrants.³¹⁹ Likewise, the denial of certain state remedies would act as an additional penalty on unauthorized immigrants for their IRCA-related violations thus disrupting the careful immigration enforcement scheme that Congress crafted.³²⁰

The adverse inference conceivably could affect a state court’s ability to award damages to an unauthorized immigrant only if the court finds a clear and manifest congressional intent to prevent states from awarding lost earnings to this class of workers. A close reading of the text and policies of the IRCA, however, leads to the opposite conclusion, thus making any status-based inference irrelevant to tort and workers’ compensation claims.

F. Swords, Shields, and Status: Dismissing the Silent Plaintiff’s Claims

Beyond the risk of adverse inferences, silent immigrant plaintiffs confront the far greater penalty of dismissal should they refuse to answer status-based questions. Nearly all of the academic commentary on the use of the privilege in civil litigation characterizes the invoker as a defendant.³²¹ Courts are reluctant to penalize civil defendants who are viewed as involuntary participants in the civil action. On the other hand, there is an intuitive sense of injustice in allowing plaintiffs to file suit and then refuse to answer questions about their claims.³²² The perception is that the plaintiff who sues and then remains silent uses the Fifth Amendment as a shield to protect against incrimination and a sword to gain an upperhand in

318. NAT’L EMPLOYMENT LAW PROJECT, *supra* note 6, at 7 (arguing that an expansion of *Hoffman* would create a perverse incentive for employers to recruit unauthorized immigrants and violate workplace protections); *see also* *Majlinger*, 802 N.Y.S.2d at 66 (“[O]ur own analysis of the preemption issue leaves us firmly convinced that requiring defendants to pay the same damages to all plaintiffs regardless of their immigration status not only does not interfere with, but actually advances, the immigration policy of the United States . . .”).

319. *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988) (“Congress enacted the IRCA to reduce illegal immigration by eliminating employers’ economic incentive to hire undocumented aliens.”); *Reyes v. Van Elk, Ltd.*, 56 Cal. Rptr. 3d 68, 78 (Cal. Ct. App. 2007) (“Allowing employers to hire undocumented workers and pay them less than the wage mandated by statute is a strong incentive for the employers to do so, which in turn encourages illegal immigration.”); *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1257 (N.Y. 2006).

320. *Majlinger*, 802 N.Y.S.2d at 65 (citing *Martinez v. Fox Valley Bus Lines*, 17 F. Supp. 576, 577 (N.D. Ill. 1936)) (rejecting conflict preemption and noting that a state’s attempt to withhold certain remedies “impos[es] upon undocumented aliens an additional penalty not authorized by federal law”).

321. *See, e.g.,* *Heidt*, *supra* note 16, at 1081 (referring to the privilege as a potent “weapon in the hands of civil defendants”); *Kaminsky*, *supra* note 180, at 121 (same); *Rabon*, *supra* note 164, at 526.

322. *See, e.g.,* *Kaminsky*, *supra* note 180, at 143 (arguing that it would be “exceedingly unfair” to allow a plaintiff who actively seeks the court’s aid to obstruct discovery by “keeping essential aspects of his case secret”).

discovery.³²³

The “sword and shield” doctrine authorizes courts to dismiss silent plaintiffs’ claims, while allowing defendants to invoke the privilege without consequence. In reality, however, the doctrine fosters a false distinction among those who assert constitutional privileges. When an unauthorized immigrant files a civil action related to alleged workplace violations, her act is “voluntary” only in the sense that she seeks relief from the only tribunal that can vindicate her employment rights.³²⁴ The semantics of the debate could easily be reordered to state that by failing to pay employees their wages or by engaging in sexual harassment, the employer has “voluntarily” committed workplace violations.³²⁵ Because unauthorized immigrants are often the involuntary victims of such unlawful employment practices, the sword and shield doctrine “has not carried the day,” and modern courts are unlikely to dismiss an action solely because the invoker happens to be the plaintiff.³²⁶

Dismissal is proper only when “other, less drastic, remedies are not available.”³²⁷ Courts have imposed the ultimate sanction of dismissal³²⁸ when plaintiffs have refused to provide any discovery³²⁹ or refused to answer questions central to the issue of liability.³³⁰ If the questions that the plaintiff refuses to answer involve secondary matters, dismissal is inappropriate. For example, in *Campbell v. Gerrans*, a husband and wife alleged that San Francisco police officers had violated their civil rights during a search of their home. The plaintiffs answered thirty of thirty-four interrogatories but asserted their privilege against self-incrimination in response to four interrogatories related to the couple’s alleged drug trafficking.³³¹ Following the trial court’s dismissal of the action based on the couple’s silence, the Ninth Circuit reversed, holding that the interrogatories “were of a highly questionable nature” and that dismissal under these facts

323. See, e.g., *Penn Comm. Specialties, Inc. v. Hess*, 65 F.R.D. 510, 512 (E.D. Pa. 1975) (comparing parties “involuntarily thrust into such quandary” to situations in which “the invoking party is voluntarily the moving party affirmatively seeking equity”); *Indep. Prod. Corp v. Loew’s, Inc*, 22 F.R.D. 266, 276 (S.D.N.Y. 1958) (describing the “uneven justice” of allowing plaintiffs to invoke the privilege).

324. *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1089 n.10 (5th Cir. 1979).

325. See *White*, *supra* note 242, at 163 (criticizing the description of plaintiffs as voluntary litigants).

326. *McMullen v. Bay Ship Mgmt.*, 335 F.3d 215, 218 (3d Cir. 2003); see also *White*, *supra* note 242, at 173 (summarizing the modern trend of rejecting automatic dismissal as a penalty for invocation).

327. *Black Panther Party v. Smith*, 661 F.2d 1243, 1272 (D.C. Cir. 1981), *vacated on other grounds*, 458 U.S. 1118 (1982); see also *McMullen*, 335 F.3d at 218.

328. See *Wehling*, 608 F.2d at 1089 (describing dismissal as a “drastic remedy”).

329. See, e.g., *Lyons v. Johnson*, 415 F.2d 540 (9th Cir. 1969) (dismissing complaint due to plaintiff’s refusal to provide any discovery).

330. See, e.g., *Brown v. Ames*, 346 F. Supp. 1176, 1178 (D. Minn. 1972) (refusal to answer questions directly related to defendant’s liability); see also *Serafino v. Hasbro, Inc.*, 82 F.3d 515, 518–19 (1st Cir. 1996); *Pervis v. State Farm Fire & Cas. Co.*, 901 F.2d 944 (11th Cir. 1990); *Nat’l Life Ins. Co. v. Hartford Accident & Indemn. Co.*, 615 F.2d 595, 599 (3d Cir. 1980); *Hudson Tire Mart, Inc. v. Aetna Cas. & Sur. Co.*, 518 F.2d 671, 674 (2d Cir. 1975).

331. *Campbell v. Gerrans*, 592 F.2d 1054, 1056 (9th Cir. 1979).

made the plaintiff's assertion of the privilege too costly.³³² Contrast *Campbell* with *Lyons v. Johnson*, in which a plaintiff in another civil rights action refused to sit for a deposition or provide any discovery related to her claims.³³³ The Ninth Circuit held that the plaintiff's "unyielding refusal" to answer questions justified dismissal due to the prejudice that her silence caused the defendants.³³⁴

In the case of unauthorized immigrants who refuse to answer status-based questions, courts have at least three options, all of which are less burdensome than dismissal. Accordingly, silent plaintiff immigrants should not be penalized with dismissal—a "sanction of last resort"³³⁵—given that several "viable alternative[s] exist . . ."³³⁶ In response to a plaintiff who refuses to answer questions about her status, the court could determine that *Hoffman* does not control the employment claim at issue, in which case the plaintiff's invocation would not prejudice the employer. Even if the court determines that the plaintiff's silence directly implicates a valid *Hoffman*-based defense, the court can draw an adverse inference from the plaintiff's silence or strike the plaintiff's claim for backpay.³³⁷ Even under the broadest reading, *Hoffman* affects only those claims involving lost earnings; the decision does not limit an employer's liability or a plaintiff's ability to recover other remedies. In light of the options available to the court, dismissal would constitute an erroneously imposed, "costly"³³⁸ penalty on the plaintiff who asserts the privilege.

G. Fear and Removal: The Risks of Invocation

To this point, I have argued that the Fifth Amendment serves the unauthorized immigrant's litigation interests, both as a matter of policy and practice. The promising scenario pictured here is not without secondary effects. Immigrants may fear that silence, or an adverse inference drawn from silence, will increase their risk of removal. Extensive litigation over invocations and inferences could undercut the privilege's claimed efficiency and protective benefits.

The model here should be evaluated in the context of its alternatives. Other possible methods for responding to status-based questions include:

332. *Id.* at 1057-58.

333. *Lyons v. Johnson*, 415 F.2d 540 (9th Cir. 1969).

334. *Id.* at 541-42.

335. *Thomas v. United States*, 531 F.2d 746, 749 (5th Cir. 1976).

336. *Serafino v. Hasbro, Inc.*, 82 F.3d 515, 518 (1st Cir. 1996); *see also McMullen v. Bay Ship Mgmt.*, 335 F.3d 215, 218 (3d Cir. 2003) (citing *SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 192 (3d Cir. 1994)) ("[T]he detriment to the party asserting [the privilege] should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side."); *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1088 (5th Cir. 1979).

337. *See, e.g., Johnson v. United Parcel Serv., Inc.*, 127 F.R.D. 464, 465-66 (D. Md. 1989) (refusing to dismiss plaintiff's action but striking plaintiff's claim for punitive damages); *Bootz v. Childs*, 627 F. Supp. 94, 102 (N.D. Ill. 1985) (rejecting dismissal in favor of adverse inference).

338. *Spevack v. Klein*, 385 U.S. 511 (1967).

convincing the defendant to refrain from posing such questions,³³⁹ admitting unauthorized status, obtaining a protective order, and refraining from filing suit. Although pre-discovery conciliation is certainly desirable, the intimidation gained from status-based questioning represents an irresistible discovery tactic for many employers. By forcing the court to make a determination on *Hoffman's* relevance, the admission route carries the same elucidative benefits as the privilege. Moreover, an immigrant's decision to admit unauthorized status would eliminate most of the motion practice that either a protective order or invocation might trigger. These benefits notwithstanding, admission is not a viable option for most unauthorized immigrants who would absorb the full brunt of the questions' intimidating force by disclosing their status in open court. Further, unlike invocation, an admission constitutes direct evidence of criminal liability and deportability that theoretically could be used against the immigrant in subsequent proceedings. Finally, although the immigrant's decision to simply stay out of court would "solve" the problems posed by status-based questions, the result would weaken the already fragile system of employment protections for immigrants and harm statutory rights designed to benefit all workers.

1. Intimidation

The privilege does not fully eliminate the intimidating effect of the employer's status-based questioning. Unlike a criminal defendant who can refuse to take the witness stand altogether, the civil litigant must ordinarily face her adversary and assert the privilege in response to each incriminating question at trial.³⁴⁰ In fact, even if the parties are aware that the witness will assert the privilege, defense counsel can request that the plaintiff take the stand and claim the privilege in front of the jury.³⁴¹ The same rule applies during discovery: The plaintiff must wait for an incriminating interrogatory, request for production, or deposition question before claiming the privilege.³⁴²

The immigrant's lawyer can counter some of the intimidation by preparing the witness and instructing her on the meaning and purpose of the privilege. The question is asked, the privilege is asserted, and the parties move to the substance of the case. Compare this rather efficient scenario to the process of obtaining a protective order, which frequently halts discovery and requires briefs and hearings. The delay undermines the immigrant's confidence in the process and her lawyer. After all, the lawyer cannot guarantee how the court will rule after weeks or months of argu-

339. See, e.g., SMITH ET AL., *supra* note 45, at 17-18 (recommending informal resolution of disputes over status-based discovery).

340. *Anglada v. Sprague*, 822 F.2d 1035, 1037 (11th Cir. 1987); *United States v. Melchor Moreno*, 536 F.2d 1042, 1049 (5th Cir. 1976).

341. *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 522 (8th Cir. 1984); *Brinks, Inc. v. City of New York*, 717 F.2d 700, 708-10 (2d Cir. 1983).

342. *N. River Ins. Co. v. Stefano*, 831 F.2d 484, 487 (4th Cir. 1987); *Hudson Tire Mart v. Aetna Cas. & Sur. Co.*, 518 F.2d 671, 674 (2d Cir. 1975) (noting that the deponent may claim the privilege "[o]nly after the incriminating question is asked").

ment on the motion. In the meantime, the immigrant waits and wonders whether she will have to reveal her secret to the defendant and the court. In contrast, a lawyer who instructs her client to assert the privilege can almost unreservedly assure the client that she will be protected from forced disclosure throughout the litigation. Finally, the court maintains the discretion to allow plaintiff's counsel to assert the privilege on the client's behalf.³⁴³ If permitted, this tactic further diminishes the intimidating effect of the questions.

2. *Efficiency*

Another possible objection to the privilege involves the immigrant's interests in speedy resolution of claims.³⁴⁴ Invocation triggers two litigable issues: (1) whether the question at issue tends to incriminate and (2) whether the court's adverse inference constitutes an automatic penalty that makes invocation too costly.³⁴⁵ If fully litigated, these issues would eliminate the likelihood of an efficient resolution of the dispute—a goal held by immigrants and promoted by federal discovery rules. The first issue will rarely give rise to extensive debate. Questions about Social Security numbers or alienage implicate the witness in document fraud and illegal entry and thus tend to incriminate. Even if the employer were to challenge the immigrant's ability to claim the privilege, the court would allow invocation unless it were "perfectly clear" that the answer "cannot possibly have such tendency to incriminate."³⁴⁶

The issue of adverse inferences could involve extensive briefing and argument, but only if the plaintiff immigrant chooses to contest the inference. Plaintiff's counsel may opt to record a brief objection in order to preserve the issue for appeal, without stopping litigation. Any delay beyond this would be a tactical decision strictly controlled by the plaintiff's specific litigation interests.

3. *Flagging Issues*

Immigrants may believe that invocation heightens the risk of removal. As a natural consequence of their uncertain presence in the United States, unauthorized immigrants fear deportation more than workplace exploitation or criminal prosecution.³⁴⁷ Any proposal that fails to account for the coercive nature of implied deportation will be useless to most unautho-

343. *United States v. Mayes*, 512 F.2d 637, 649 (6th Cir. 1975). Plaintiff's counsel can always attempt to assert the privilege on her client's behalf. *Bigby v. United States*, 21 F.3d 1059, 1062 (11th Cir. 1994). Absent a timely objection from the defendant, the invocation will be deemed effective. *Id.*

344. See *supra* Part III.A and accompanying discussion on protective orders and immigrants' litigation interests.

345. See Marc Youngelson, *The Use of 26(c) Protective Orders: "Pleading the Fifth" Without Suffering "Adverse" Consequences*, 1994 ANN. SURV. AM. L. 245, 265 (1994) (noting that debates over inferences can slow litigation).

346. *Hoffman v. United States*, 341 U.S. 479, 488 (1951) (quoting *Temple v. Commonwealth*, 75 Va. 892, 898 (1881)).

347. See Smith et al., *supra* note 13, at 607.

rized immigrants. Regarding removal, the privilege raises what I call flagging and transfer problems. The immigrant's refusal to discuss her status brands her as suspect in the eyes of the court and opposing counsel. Simply by declining to answer status-based questions, the immigrant flags herself as unauthorized. Rationally or not, she may fear that this flagging effect will draw the attention of immigration officials or cause her employer to report her to the government.

The flagging problem is to some extent an unavoidable consequence of immigrant-initiated civil litigation. Whether the immigrant seeks a protective order or asserts the privilege, nothing can fully prevent an employer from alerting immigration officials to the immigrant's actions.³⁴⁸ If sufficiently motivated, extremely defiant parties will release information from the proceedings in violation of a court order.³⁴⁹ Invocation will create a far smaller flagging effect than the alternative strategy of obtaining a protective order. This result is largely a function of the time and effort associated with invocation, as compared to the protective order. Because the unauthorized immigrant will expend considerably more time obtaining the protective order than claiming the privilege, she increases the risk of drawing attention to her unwillingness to discuss her status under the former approach.

Even assuming that invocation creates some flagging effect, it seems unlikely, though not impossible, that immigration officials would interpret a report of a plaintiff who refuses to answer status-based questions as the kind of reliable information warranting an investigation of a suspected unauthorized immigrant. Nonetheless, assuming that the government decided to investigate a plaintiff who claims the privilege in civil proceedings, any subsequent removal action would violate the Department of Homeland Security's internal guidelines that caution against the agency's involvement in labor disputes.³⁵⁰ Although these guidelines are largely discretionary, at least one immigration court has terminated removal proceedings based on violations of the guidelines.³⁵¹

348. *But see supra* Part II.C and accompanying discussion on the anti-retaliation provisions of employment laws.

349. *See In re Grand Jury Subpoena*, 836 F.2d 1468, 1476 (4th Cir. 1988); Heidt, *supra* note 16, at 1096-97 (acknowledging and ultimately rejecting the common belief that prosecutors cannot obtain testimony produced under a civil protective order).

350. *See Memorandum from Office of Field Operations & Office of Programs, U.S. Immigration & Customs Enforcement, to Mgmt. Team et al., Questioning Persons During Labor Disputes, Revised Operations Instruction 287.3a* (Dec. 20, 1996), available at http://www.nilc.org/immsemplymnt/emprights/Revised_Op_Inst.pdf; *see also* Ho & Chang, *supra* note 65, at 522 n.216 (discussing internal guidelines).

351. *In re Herrera-Priego*, U.S. D.O.J. EOIR, at 23, 25 (July 10, 2003), available at http://www.nilc.org/immsemplymnt/IWR_Material/Advocate/Herrera-Priego.pdf. *But see Velasquez-Tabir v. INS*, 127 F.3d 456 (5th Cir. 1997) (allowing removal despite employer retaliation); *Montero v. INS*, 124 F.3d 381, 385 n.4 (2d Cir. 1997) (same); Nessel, *supra* note 119, at 385 (criticizing the lack of any enforcement mechanism in the internal guidelines).

4. *Transfer Problems*

In addition to flagging issues, it might appear that invocation creates a transfer problem in which the immigrant leaves an evidentiary trail that the government can use to initiate removal proceedings. Upon closer analysis, however, the privilege in fact creates little or no transfer risk. Because removal proceedings are deemed civil in nature,³⁵² the respondent may claim the privilege to the same extent as in immigrant-initiated civil litigation. Thus, the immigrant can claim the privilege in response to incriminating questions asked during removal proceedings.³⁵³ Likewise, the immigration judge can draw adverse inferences from a respondent's silence.³⁵⁴

If an immigrant asserts the privilege as a plaintiff in an employment case, the question becomes whether any inference flowing from the assertion could be admitted as evidence in a subsequent removal proceeding. There are several reasons why that scenario is highly unlikely. First, there would be no point in transferring an adverse inference from the civil case to the removal proceeding. The immigration judge can question the respondent and draw adverse inferences from his silence without relying on the record from the preceding litigation. Second, the inference from the employment case would not inform the removal proceeding. The trial judge in the civil case would have drawn the inference based on the unique characteristics of the action such as the relevance of *Hoffman* to the employment claims at issue. Because the removal proceeding would involve completely different issues, any prior inference would not assist the immigration judge in determining removability.

In contrast to invocation, both protective orders and outright admissions create enormous transfer problems. As explained above, if the immigrant seeks damages for lost work and the court holds that *Hoffman* eliminates certain remedies, the court may issue a protective order that limits dissemination of status-based information. If the plaintiff admits that she is an unauthorized immigrant under the protective order, her disclosure is potentially transferable to later criminal proceedings. Protective orders have been misconstrued as "comparable to immunity" in preventing the government from obtaining and using civil discovery in subsequent criminal proceedings.³⁵⁵ Judges who issue protective orders, however, can-

352. *United States v. Balsys*, 524 U.S. 666, 671 (1998); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

353. *Wall v. INS*, 722 F.2d 1442, 1443 (9th Cir. 1984); *Cabral-Avila v. INS*, 589 F.2d 957, 959 (9th Cir. 1968).

354. *Lopez-Mendoza*, 468 U.S. at 1043; *Chavez-Raya v. INS*, 519 F.2d 397, 401 (7th Cir. 1975); see *Kanstroom*, *supra* note 220, at 605-06 (discussing Fifth Amendment invocations and adverse inferences in removal proceedings).

355. See *Donnici*, *supra* note 140, at 25-31; Osum R. LaTrobe, Note, *Constitutional Law: Self-Incrimination and Court Granted Immunity in Civil Litigation*, 27 OKLA. L. REV. 243, 248 (1974) (equating protective orders with use immunity).

not grant immunity, as such power is reserved to the executive branch.³⁵⁶ In order to avoid the separation of powers problem presented by equating protective orders with immunity, courts have almost uniformly allowed prosecutors to obtain "protected" civil discovery.³⁵⁷ Therefore, an immigrant who reveals information about her unauthorized status under the supposed shelter of a protective order does so at her own peril.³⁵⁸

Conclusion

Hoffman altered the landscape of civil discovery for immigrants and those who appear to be immigrants. This new era of status-based discovery will continue as long as *Hoffman's* substantive reach remains an open question. As it stands now, plaintiffs assert all available claims, defendants argue that the plaintiff's status matters, and an entire class of immigrant workers withdraws from the process. The inhibitive reach of these questions extends beyond current immigrant litigants to prospective plaintiffs who survey the tactical battlefield of civil discovery and decline to enter.

The privilege against self-incrimination is the most effective method for breaking the stalemate. The libertarian rationales underlying the privilege carry particular force in civil cases brought by immigrants. The privilege prevents immigrant-initiated litigation from becoming a quasi-criminal discovery process through which private employers gather incriminating evidence that can lead to the immigrant's removal or prosecution. In addition, the privilege eliminates the cruel choice of deceit, penalized silence, and self-incrimination that the immigrant would otherwise face. Absent the privilege, immigrants would avoid making these choices by simply ignoring workplace violations and staying out of court.

In addition to supporting the Fifth Amendment's underlying rationales and the immigrant's litigation interests, invocation encourages substantial progress during the litigation by bringing focus to the relevance, if any, of the negative inference that may be drawn from the witness's silence. Thus, the privilege advances the central legal issue following *Hoffman*: whether unauthorized immigrants enjoy equal rights and remedies in the workplace. The explanatory effect of invocation benefits both current plaintiffs and other immigrants who understandably remain averse to asserting workplace claims in this hazy legal reality.

356. 18 U.S.C. §§ 6002-6003 (2000); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 261 (1983); *United States v. D'Apice*, 664 F.2d 75, 77-78 (5th Cir. 1981); *In re Daley*, 549 F.2d 469, 478-79 (7th Cir. 1977).

357. See *Andover Data Serv. v. Statistical Tabulating Corp.*, 876 F.2d 1080, 1083 (2d Cir. 1989) ("[A] court in a civil action is simply without the means to fashion a sufficiently durable safeguard for the full protection of the Fifth Amendment rights . . ."); see also *In re Grand Jury Subpoena*, 62 F.3d 1222, 1224 (9th Cir. 1995); *In re Grand Jury Proceedings*, 995 F.2d 1013, 1020 (11th Cir. 1993). But see *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979) (requiring the government to demonstrate a compelling need or extraordinary circumstances in order to obtain information sealed by a protective order).

358. See *Rabon*, *supra* note 164, at 529-30; *Youngelson*, *supra* note 345, at 276 (stating that a protective order is not comparable to a grant of immunity).

Hoffman was intended to limit remedies available to unauthorized immigrants in labor disputes; it was not intended to deputize employers with discovery weapons to brandish before plaintiff immigrants. Do you have papers? Until workers develop an effective response, employers will continue to pose such questions, workplace violations will go unremedied, and unauthorized immigrants will remain shrouded in *Hoffman's* fog.

