

**TIPPING THE BALANCE: WHY COURTS SHOULD LOOK TO  
INTERNATIONAL AND FOREIGN LAW ON  
UNAUTHORIZED IMMIGRANT WORKER RIGHTS**

BETH LYON\*

All migrant workers, irrespective of their status, should be assured conditions of work which accord with international human rights law. States should take adequate measures to protect the rights at work of all without discrimination, including in the private sector.<sup>1</sup>

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\* Associate Professor of Law at the Villanova University School of Law and Founding Director of the VLS Farmworker Legal Aid Clinic. Any mistakes are my own, but I thank Catherine Chan, Jennifer Massey, Kristin Waller, and Arati Naik, the research assistants who helped with this article. I am also grateful to the people who offered me their invaluable comments: Sandra Babcock, Leslie Book, Michael Carroll, Connie de la Vega, Karla McKanders, Robert Miller, Penelope Pether, Michele Pistone, Dveera Segal, and Yolanda Vazquez, and the participants in the LatCrit X Works in Progress Workshop. I thank the Villanova University School of Law for its many forms of support. I also thank my family for their loving support.

<sup>1</sup> AMNESTY INT’L, WRITTEN SUBMISSION TO THE U.N. COMMITTEE ON MIGRANT WORKERS (2005), available at <http://www.ohchr.org/english/bodies/cmw/docs/ai.doc>.

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## 1. INTRODUCTION

In 2002, the U.S. Supreme Court issued a 5-4 majority opinion that substantially cut back the labor rights of unauthorized immigrant workers.<sup>2</sup> In the same year, a plurality of three out of five Pennsylvania Supreme Court justices joined in an opinion drastically reducing the workers' compensation benefits of unauthorized immigrant workers.<sup>3</sup> In 2003, two of the three judges on a Massachusetts administrative appellate panel voted to retain equal workers' compensation benefits for the unauthorized.<sup>4</sup> In 2004, the Michigan Supreme Court issued a divided opinion reversing its own earlier decision to hear an appeal, thereby upholding a lower court decision cutting the workers' compensation benefits of unau-

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<sup>2</sup> See *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002) (denying back pay to an illegal alien on the grounds that doing so would run counter to the policies of the Immigration Control and Reform Act of 1986). Following is a brief explanation of the terms used in this Article. The realm of migration law is rife with overlapping, confused, and politicized terminology. See Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM L. REV. 263 (1997) (discussing the legal, social and political significance of terms such as "alien" commonly used in describing immigrant persons). A transnational or comparative context compounds the terminology problem. For the purposes of this article, "unauthorized immigrant workers" or "unauthorized migrant workers" are people whose remunerated, otherwise lawful employment violates national immigration laws, and "undocumented immigrants" or "undocumented migrants" are people whose presence in a country violates immigration law. "Otherwise lawful" means that the immigrant's work is proscribed only by immigration laws. Thus, for the purposes of this article, the term "unauthorized immigrant workers" or "unauthorized migrant workers" does not encompass work that is illegal because of the nature of the industry, such as prostitution, or because of other worker characteristics, such as child labor. "Receiving country" refers to a country within which an unauthorized immigrant worker is working, and "sending country" indicates a country whose expatriates are laboring as unauthorized immigrant workers in another country. Finally, the Article uses the contrasting categories of "blue-collar"/"white-collar" and "labourer"/"professional" as alternatives to the "skilled"/"unskilled" distinction. For a detailed discussion of these terms, see Beth Lyon, *When More "Security" Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 573-82 (2004) [hereinafter Lyon, *Reconsidering U.S. Laws*].

<sup>3</sup> See *Reinforced Earth Co. v. Workers' Comp. Appeal Bd.*, 810 A.2d 99, 108 (Pa. 2002) (holding that "when an employer seeks to suspend the workers' compensation benefits that have been granted to an employee who is an unauthorized alien, a showing of job availability by the employer is not required.").

<sup>4</sup> See *Medellin v. Cashman KPA*, Bd. No. 03324300, (Mass. Dep't of Indus. Accidents, Dec. 23, 2003) (reviewing bd. decision), available at <http://www.mass.gov/dia/PUBS/REVIEWS/03D/GuillermoMedellin.htm>.

thorized immigrant workers.<sup>5</sup> None of these divided tribunals heard arguments about foreign or international law on the rights of unauthorized immigrant workers.<sup>6</sup> This article argues that existing international and foreign law might have tipped the balance in these closely decided cases.

Within a year of the U.S. Supreme Court decision, both the Organization of American States Inter-American Court of Human Rights and the United Nations International Labour Organization had been presented with these developments and had issued opinions affirming equal labor and employment rights for unauthorized immigrant and domestic workers. In 2003, the United Nations Special Rapporteur on the Rights of Non-Citizens issued a report reaching the same conclusion.<sup>7</sup> In 2004, the United Nations Committee on the Elimination of Racial Discrimination issued an interpretation of the International Convention on the Elimination of all Forms of Racial Discrimination (a treaty to which the United States is a party) holding that the Convention stands for the same principle: equal labor and employment rights for unauthorized immigrant workers vis-à-vis citizen workers.<sup>8</sup>

This article argues that U.S. tribunals can and should consider international and foreign law when adjudicating the rights of unauthorized immigrant workers, based on three recent developments that have profound potential consequences for civil rights and social justice in America: (1) the resurgence of judicial and scholarly interest in the application of international and comparative standards in the United States, (2) the scaling-back of rights for unauthorized immigrant workers in the United States, and (3) the corresponding rise of international human rights and foreign law standards for unauthorized immigrant workers. This article argues that these three developments are likely to intersect in the near future, as advocates for unauthorized immigrant workers be-

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<sup>5</sup> See *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510 (Mich. Ct. App. 2003) (finding that an undocumented immigrant worker commits a crime by virtue of using fake documents to obtain employment, warranting the suspension of weekly wage-loss when the worker is unable to work and suspension of benefits from the date the employer discovers the worker's employment status).

<sup>6</sup> See *infra* notes 151-56 and accompanying text.

<sup>7</sup> U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm on the Promotion and Prot. of Human Rights, *Prevention of Discrimination: The Rights of Non-Citizens*, U.N. Doc. E/CN.4/Sub.2/2003/23 (May 26, 2003).

<sup>8</sup> U.N. Comm. on the Elimination of Racial Discrimination, General Comments, <http://www.ohchr.org/english/bodies/cerd/comments.htm> (last visited Oct. 22, 2007).

gin to “import” international and foreign law arguments into their litigated cases. The article synthesizes the literature about these three phenomena to predict the likely results when they do intersect in courthouses around the country.

Section 2 argues that unauthorized immigrant workers, although they are disproportionately represented in dangerous and low-paying industries, receive fewer protections than domestic workers under federal and state labor and employment laws. Specifically, the article demonstrates three major disadvantages for unauthorized immigrant workers under U.S. law. First, unauthorized immigrants are excluded from basic employment rights protections such as workers’ compensation and unemployment compensation. Compounding this exclusion are the laws denying workers in the agricultural industry, the majority of whom are unauthorized, overtime pay and many standard occupational safety and health protections. Secondly, even when unauthorized workers are included in the coverage of a particular employment protection, U.S. law often excludes them from the relevant remedies scheme, and asserting their rights becomes nearly meaningless as they can receive no monetary damages. The article demonstrates that the exclusions from remedies schemes have come about through very divided state and federal court decisions that did not benefit from any transnational law briefing. The third way that U.S. worker protections exclude unauthorized immigrant workers is by failing to communicate to them about the rights they have or to devote meaningful government resources to enforcing those rights.

Section 2 then describes the consequences that all these exclusions carry for unauthorized workers, putting them into a legal position in which they have become some of the most vulnerable workers in our economy. It also explains the tension between regarding unauthorized workers as lawbreakers because they are working without immigration authorization, and regarding them as subjects of human rights protection, because they are unusually vulnerable. Indeed, as one author argues, “the most important place where civil rights have met with immigration law in the United States today is in the workplace.”<sup>9</sup> The section expands its description of the plight of unauthorized workers in

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<sup>9</sup> María Pabón López, *The Intersection of Immigration Law and Civil Rights Law: Noncitizen Workers and the International Human Rights Paradigm*, 44 *BRANDEIS L. J.* 611, 616 (2006).

America to a global view, to explain the reasoning behind the international community's strong commitment to a human rights view of this population.

The influence of international law norms on recent U.S. judge-made social justice paradigm changes is the focus of Section 3. These examples include not only the references to transnational law in U.S. Supreme Court capital punishment and gay rights cases, but also an earlier use of international law to expand the rights of asylum seekers. Section 3 then synthesizes new international and foreign law protections for unauthorized workers to demonstrate that in each of the three worker protection areas mentioned above—coverage of employment protections, remedies schemes, and rights enforcement—emerging international law norms and some comparative law sources present a vision of unauthorized immigrant worker rights that significantly challenges standards in U.S. law. Section 3 acknowledges that these norms are still emerging, that comparative practice is little known, and that foreign practices are likely to be contradictory. However, the article argues that looking abroad merits serious consideration by a country faced with the rule of law disaster represented by the presence of an estimated 6.2 million unauthorized immigrants in the American workplace.

Commentators note that the Supreme Court has yet to offer a coherent framework to guide lower courts as they consider international and foreign law arguments in this and other contexts. In the absence of such a framework, Section 4 identifies three factors that will likely be relevant to lower courts considering unauthorized immigrant worker plaintiffs. These factors include: (1) the type of domestic law dispute, most importantly whether the policy in dispute can be considered a matter of broad legal principle or merely an institutional arrangement; (2) the nature and presentation of the international norm invoked in a domestic law dispute; and (3) the procedural posture of the domestic dispute, namely whether the case is in a federal or state forum and whether it is at the trial or appellate level. Applying these three factors to the unauthorized immigrant worker context, Section 4 argues that international doctrine can be of service to courts and is likely in most though not all cases to be invoked by advocates for the workers, because in most though not all cases it will weigh in favor of the unauthorized. At the same time, foreign law is likely to be raised by both sides: as the comparative examples begin to come to light,

they are likely to fall all along the protection/punishment spectrum.

2. "WITH THESE HANDS":<sup>10</sup> THE CIVIL RIGHTS MOVEMENT FOR UNAUTHORIZED IMMIGRANT WORKERS

Juan C. Astudillo, a Mexican national without employment authorization, worked for the Reinforced Earth Company in Pennsylvania performing maintenance work that often involved climbing scaffolding and maneuvering steel beams. When a steel beam struck him in the head, neck and back, Mr. Astudillo was rushed to an emergency room. After a year of treatment, his physicians diagnosed Mr. Astudillo with neurological damage and other permanent injuries, and decided that he could never again climb nor lift more than twenty-five pounds. Reinforced Earth appealed Mr. Astudillo's workers' compensation coverage to the Pennsylvania Supreme Court. Neither party briefed the Pennsylvania Supreme Court on relevant international and foreign law. In 2002, the Court issued a divided opinion that granted medical services for Mr. Astudillo because the statute did not condition coverage on immigration status. However, the Court read into the statute an immigration status-based restriction that stripped Mr. Astudillo, and most other unauthorized immigrant workers in the state, of compensation for future lost wages.<sup>11</sup> No international or comparative law standards were argued to the Pennsylvania Supreme Court. However, in December 2006, Mr. Astudillo signed a statement for submission to the Organization of American States' Inter-American Commission on Human Rights alleging that the United States violated his right to equality of treatment when Pennsylvania singled out unauthorized workers in this way.<sup>12</sup>

2.1. *National-Level Decisionmaking, Global Failure to Regulate Labor Migration*

The way the United States "manages" immigration of foreign blue collar workers shares an important characteristic with most other migrant-receiving countries around the world: a large unauthorized workforce that results from lax enforcement against em-

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<sup>10</sup> DANIEL ROTHENBERG, *WITH THESE HANDS: THE HIDDEN WORLD OF MIGRANT FARMWORKERS TODAY* (1998).

<sup>11</sup> *Reinforced Earth Co. v. Workers' Comp. Appeal Bd.*, 810 A.2d 99, 111 (Pa. 2002).

<sup>12</sup> Declaration of Juan C. Astudillo (Dec. 10, 2006) (on file with author).

ployers.<sup>13</sup> Most countries, including the United States, make decisions about labor migration, including visa availability, border management, deportation priorities, and employer sanctions enforcement, at the national level.<sup>14</sup> There are a few exceptions to this general rule; for example, the European Union maintains open (intra-EU) migration through regional rules,<sup>15</sup> and two South American economic areas, the Andean Pact and Mercosur, have regional rules on migration.<sup>16</sup> However, these and the other rare examples of open migration arrangements are found between countries at similar levels of economic development,<sup>17</sup> whereas the majority of

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<sup>13</sup> See INTERNATIONAL ORGANIZATION FOR MIGRATION, *WORLD MIGRATION REPORT 2003: MANAGING MIGRATION—CHALLENGES AND RESPONSES FOR PEOPLE ON THE MOVE* 66 (2003) (“Enhancing the responsibility and culpability of employers who hire irregular migrants is . . . [the] point in the migration policy and practice chain [where] the problems are most resistant to change.”); JEFFREY S. PASSEL, PEW HISPANIC CENTER, *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.* 9 (2006), available at <http://pewhispanic.org/files/reports/61.pdf> (estimating 7.2 million unauthorized workers in the United States); PETER STALKER, *THE NO-NONSENSE GUIDE TO INTERNATIONAL MIGRATION* 11 (2001) (estimating the number of unauthorized workers in Western Europe at 3 million); Ryan Peterson, Comment, *Be Our Guest, But Please Don't Stay: A Comparison of U.S. and German Immigration Policies and Guest Worker Programs*, 14 *TULSA J. COMP. & INT'L L.* 87, 117 (2006) (stating that U.S employer sanctions are ineffective because they would require employer self-regulation).

<sup>14</sup> See Sharon Stanton Russell, *International Migration: Global Trends and National Responses*, 20 *FLETCHER F. WORLD AFF.*, Summer/Fall 1996, at 1 (1996).

<sup>15</sup> See Kevin R. Johnson, *Open Borders?*, 51 *UCLA L. Rev.* 193, 200 (2003).

<sup>16</sup> See Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, Mar. 26, 1991, 30 *I.L.M.* 1041 (1991); Agreement on Andean Subregional Integration, May 26, 1969, 8 *I.L.M.* 910.

<sup>17</sup> See U.N. Dep't of Econ. & Soc. Affairs, *Population Div., International Migration Report 2002*, at 30, U.N. Doc. ST/ESA/SER.A/220 (2002), available at <http://www.un.org/esa/population/publications/itmig2002/2002ITTMIGTEXT22-11.pdf> (calling the European Union's free movement arrangement “[t]he most extensive regional processes of cooperation and integration in the field of migration”) [hereinafter *International Migration Report 2002*]. The right of free movement is accorded to any citizen of a European Union member state. See Council Directive 2004/38/EC, *Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States*, 2004 O.S. (L 158). Currently, the European Union member states are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. See Member States of the EU, [http://europa.eu/abc/european\\_countries/eu\\_members/index\\_en.htm](http://europa.eu/abc/european_countries/eu_members/index_en.htm) (last visited Oct. 21, 2007). These countries are not at identical stages of development, but most of them are considered “high income,” and a few fall into the World Bank's “upper middle income” bracket. See The World Bank Group, *Data & Statistics, Country Groups*,



labor migration flows run between countries with significant prosperity differentials.<sup>18</sup> The size of Europe's undocumented immigrant population, estimated at between 6 and 15 million in 2006,<sup>19</sup> supports this proposition. Cooperative as Europe's internal migration processes may be, migration from Greece or Portugal to Germany is better analogized to workers moving from Mississippi to New York than those moving from Mexico to the United States. The situation of undocumented immigrants in the United States is best analogized to non-EU migrants living illegally within Europe.

Thus the legal opportunities for foreign laborers to enter and work in more prosperous economies are largely determined by the national laws of industrialized countries, rather than in the international sphere, where the concerns of migrant-sending countries have somewhat more sway. The result of national level migration management is that, historically, even while they establish intricate visa regimes for diplomats, families and white collar laborers to cross their borders, most countries' immigration laws largely ignore "blue collar" labor migration.<sup>20</sup> Thus the vast majority of

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<http://www.worldbank.org/data> (search "Data" for "Country Groups"; then follow "Data--Country Groups" hyperlink) (last visited Oct. 21, 2007) [hereinafter World Bank Country Income Statistics]. Another example of an open blue collar labor migration arrangement is the free trade pact Mercosur, which in 2002 established the intention of six South American countries to establish the free movement of persons as amongst themselves. The six countries are Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay. See *Acuerdo sobre Residencia para Nacionales de los Estados Parte del Mercosur, Bolivia y Chile, MERCOSUR/RMI/CT/ACTA No 04/02*, available at [http://www.mininterior.gov.ar/migraciones/inter\\_pdf/AcuerdoResidenciaParaNacionalesEstadosParteA\\_sociados.pdf](http://www.mininterior.gov.ar/migraciones/inter_pdf/AcuerdoResidenciaParaNacionalesEstadosParteA_sociados.pdf). Similar to the situation of the EU, these six countries fall within two close income categories. The World Bank classifies each as possessing either a lower-middle-income economy or an upper-middle-income economy (there is no category between these). See World Bank Country Income Statistics, *supra*.

<sup>18</sup> See U.N. Dep't of Econ. & Soc. Affairs, Population Div., *Fact Sheet: International Migration Facts & Figures*, available at [http://www.un.org/esa/population/migration/hld/Text/Migration\\_factsheet.pdf](http://www.un.org/esa/population/migration/hld/Text/Migration_factsheet.pdf) (finding that nearly six of every ten migrant workers live in a country designated as "high income") [hereinafter U.N. Migration Fact Sheet]. The United Nations notes that "[i]n 2005, Europe hosted 34% of all migrants; Northern America, 23%, and Asia, 28%. Only 9% were living in Africa; 3% in Latin America and the Caribbean, and another 3% in Oceania." *Id.*

<sup>19</sup> See John Slocum, Director, Initiative on Global Migration and Human Mobility, Speech at the Chicago Matters event: International Migration Trends (Nov. 29, 2006), available at <http://www.macfound.org/site/apps/nl/content2.asp?c=1kLXJ8MQKrH&b=1137397&ct=3287141>.

<sup>20</sup> See The Secretary-General, *Report of the Secretary General on International Migration and Development*, para. 83, delivered to the General Assembly, U.N. Doc. A/60/871 (May 18, 2006), available at <http://daccessdds.un.org/doc/UNDOC/>

cross-border labor migration violates domestic immigration regimes because the numbers of visas available for less-educated workers grossly under-represent the number of employers that are actually availing themselves of the services of these foreign workers.<sup>21</sup> In 2002 the International Labour Organization estimated that there were 120 million “unemployed, underemployed, or low-income” people who left their countries of origin and are working elsewhere.<sup>22</sup> A 2004 estimate places the number of trafficked people between 600,000 and 800,000, and in 2002 the United Nations Population Division noted that undocumented migration and trafficking are a “growing worldwide phenomenon.”<sup>23</sup>

The laws of the United States conform to the global pattern by

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GEN/N06/353/54/PDF/N0635354.pdf?OpenElement. In this report, the United Nations Secretary General states that:

Labour migration . . . has . . . become crucial for the global economy and is both a product and a producer of growing interdependence. Yet, migration policies at the national and international levels do not reflect this reality. There is a need for States to develop forward-looking policies that take realistic account of their long-term structural demand for both low-skilled and highly skilled workers. In advanced economies in particular, these structural needs, which derive from the rising educational level of national populations, the dynamics of population ageing and the expanding service economy, will not disappear over the medium term.

*Id.* See also U.N. Dep't of Soc. and Econ. Affairs, Population Div., *International Migration 2006*, U.N. Doc. ST/ESA/SER.A/256 (Mar. 2006), available at [http://www.un.org/esa/population/publications/2006Migration\\_Chart/Migration2006.pdf](http://www.un.org/esa/population/publications/2006Migration_Chart/Migration2006.pdf) (noting that 76 percent of the countries in the world wish to maintain or lower overall immigration, while thirty countries are promoting “skilled” migration).

<sup>21</sup> U.S. DEP'T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS), 1997-1998: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS (2000) [hereinafter NAWS FINDINGS], available at [http://www.dol.gov/asp/programs/agworker/report\\_8.pdf](http://www.dol.gov/asp/programs/agworker/report_8.pdf) (estimating that between 1997 and 1998 roughly 52 percent of hired farm workers lacked the authorization to work).

<sup>22</sup> See Kari Tapiola, Executive Director for Standards and Principles, Int'l Labour Org., Remarks at the Celebration of Entry into Force of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (July 1, 2003), available at <http://www.december18.net/UNConvention010703StatementILO.pdf> (discussing increases in migrant worker population numbers).

<sup>23</sup> See U.S. DEP'T ST., TRAFFICKING IN PERSONS REPORT (2006), available at <http://www.state.gov/g/tip/rls/tiprpt/2006/65983.htm>; *International Migration Report 2002*, *supra* note 17. Note that “undocumented” and “trafficked” immigrants are overlapping populations. Trafficking is labor migration that involves coercion at some point of the migration or work relationship. Some, but not all, undocumented immigrants are trafficking victims, and some, though not all, trafficking victims are undocumented.

sanctioning, if not criminalizing, most blue-collar labor migration. This arrangement arises from intricate politics. In the United States, positions on both the right and left *oppose* labor migration, based variously on concerns that labor migration breaks up families,<sup>24</sup> drains workers from economically depressed regions,<sup>25</sup> undermines low-income U.S. workers,<sup>26</sup> burdens social services,<sup>27</sup> di-

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<sup>24</sup> See, e.g., Stephanie Fariior, *The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to its Potential*, 10 HARV. HUM. RTS. J. 213, 243 (1997) (“[T]he government points to family migration to the city as ‘leading to the breaking up of the family unit and the moral values and self-respect that have been traditionally cultivated and nurtured at the family level.’”).

<sup>25</sup> Trebilcock and Sudak write:

There is widespread concern that emigration may be detrimental to emigration countries. The most prominent concern relates to the implications for developing countries of human capital outflows - the so-called “brain drain” - for development. The postulation is as follows: Since human capital is required for economic development, the loss of that human capital in developing countries may hamper their future growth.

Michael J. Trebilcock & Matthew Sudak, *The Political Economy of Emigration and Immigration*, 81 N.Y.U. L. REV. 234, 247 (2006); see also ORG. FOR ECON. CO-OPERATION & DEV., OECD ECONOMICS OUTLOOK NO. 68, at 199 (2000), available at <http://www.oecd.org/dataoecd/44/45/2086160.pdf> (“One of the major concerns is that the source country will lose its most qualified workers – the ‘brain drain’ – and as a result its economic development will suffer.”); Ginger Thompson, *An Exodus of Migrant Families Is Bleeding Mexico’s Heartland*, N.Y. TIMES, June 17, 2001, at A1 (profiling economic effects of Mexican migration to the United States on the town of Casa Blanca, Mexico).

<sup>26</sup> Philip Kretsedemas states:

[A] renewed emphasis on supply-side economics has been accompanied by new pressure to reduce labor costs in order to increase profit margins. This pressure has not only resulted in lower wage levels relative to the rising cost of living but also in ‘casualization’ of the labor market as employers seek a more flexible labor supply. This shift toward cultivating an “as needed” workforce not only allows employers to increase productivity by tailoring their labor expenses to the ebb and flow of market demands, but has also resulted in the under-employment of large segments of the low-income workforce and reduced access to benefits for these workers. Labor market researches have also pointed out that non-citizens are more likely to be employed in these sorts of positions than native-born workers and that the workforce attachment of low-income migrants is actually higher than comparable segments of the native-born population.

Philip Kretsedemas, *Reconsidering Immigrant Welfare Restrictions: A Critical Review of Post-Keynesian Welfare Policy*, 16 STAN. L. & POL’Y REV. 463, 467 (2005).

<sup>27</sup> See Michael J. Trebilcock, *The Law and Economics of Immigration Policy*, 5 AM. L. & ECON. REV. 271, 311 (2003) (“Impoverished immigrants may be drawn to developed countries by the amenities of the welfare state which, at the limit, may threaten the viability of the social programs that comprise the welfare state.”).

lutes Anglo-American culture,<sup>28</sup> harms the environment,<sup>29</sup> and foments exploitation of all workers.<sup>30</sup> Moreover, all sides agree that illegal migration involves great human suffering on our southern border<sup>31</sup> and presents various national security risks.<sup>32</sup> Meanwhile,

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<sup>28</sup> See Angelo N. Ancheta, Speech, *Our Immigrant Heritage: A Struggle for Justice*, 2 ASIAN PAC. AM. L.J. 101, 103 (1994) ("And just as predictable are the popular responses during economic downturns. Immigrants are inassimilable. They take away our jobs. They use up all our resources. Indeed, they threaten our very existence, our culture, our 'American' way of life.").

<sup>29</sup> Anne Minard, *U.S. Immigration Law Could Harm Desert Animals, Critics Say*, NAT'L GEOGRAPHIC NEWS, Mar. 31, 2006, available at [http://news.nationalgeographic.com/news/2006/03/0331\\_060331\\_desert\\_fence.html](http://news.nationalgeographic.com/news/2006/03/0331_060331_desert_fence.html) (noting immigration could harm environment in southwestern United States). Anne Minard writes:

As the U.S. government debates major immigration reform, environmentalists warn that the proposed laws would also prevent animal migrants from crossing the country's southern border. . . the legislation's proposal to erect 700 miles (1,125 kilometers) of immigrant-stopping fence could block key wildlife migration routes in the Sonoran Desert along the U.S.-Mexico border.

<sup>30</sup> See Shelley Case Inglis, *Expanding International and National Protections Against Trafficking for Forced Labor Using a Human Rights Framework*, 7 BUFF. HUM. RTS. L. REV. 55, 94 (2001) ("Violence against migrants and trafficking victims in forced labor stem from the same vulnerability of foreign workers to exploitation, the economic incentive for countries to allow illegal labor and the failure of governments to commit to the protection of foreign workers' human rights.").

<sup>31</sup> Sara Martinez writes:

The death rate, according to the Mexican Government, for Mexicans illegally crossing the 2,000-mile U.S.-Mexico border, is at about one death per day, with at least 371 deaths reported in 2003 and another 371 in 2002. The U.S. Border Patrol's death statistics were slightly less for 2003 and 2002, with 340 and 320, respectively. These figures should not be considered an accurate reflection of the actual amount of undocumented immigrants who have died while making their trek north; the U.S. Border Patrol only counts the deaths of along a narrow strip close to the border, and the Mexican Government only counts the deaths of Mexicans. Furthermore, the reported figures reflect urban deaths, not rural deaths. For example, the Border Patrol Sector in Laredo, Texas reported twenty deaths for the year 2003—a decrease from forty-seven in 2000.

Sara A. Martinez, Comment, *Declaring Open Season: The Outbreak of Violence Against Undocumented Immigrants by Vigilante Ranchers in South Texas*, 7 SCHOLAR 95, 99 (2004).

<sup>32</sup> See Christopher Rudolph, *International Migration and Homeland Security: Coordination and Collaboration in North America*, 11 LAW & BUS. REV. AM. 433 (2005) (discussing the threat to Homeland Security); see, e.g., Press Release, U.S. Dep't of Homeland Sec., Department of Homeland Security Unveils Comprehensive Immigration Enforcement Strategy for the Nation's Interior (Apr. 20, 2006), available at [http://www.dhs.gov/xnews/releases/press\\_release\\_0890.shtm](http://www.dhs.gov/xnews/releases/press_release_0890.shtm) (asserting that illegal immigration threatens United States' security).

positions on both the right and left *support* labor migration, because it lowers costs for labor-intensive industries such as agriculture and construction<sup>33</sup> supports U.S. families by providing affordable child- and elder-care,<sup>34</sup> sends millions of dollars in remittances to poor countries,<sup>35</sup> enhances America's diversity,<sup>36</sup> and annually adds \$7 billion in unclaimed revenues to U.S. social security reserves.<sup>37</sup>

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<sup>33</sup> Lisa Bauer states:

In the agricultural industry, U.S. employers rely heavily on migrant workers for harvesting crops. In fiscal year 1999, according to the Commission for Labor Cooperation, migrants performed sixty-one percent of the harvest tasks, and over fifty percent of all agricultural workers were unauthorized. Half of these farm worker families earn less than \$10,000 per year.

Similarly, Mexican immigrants constitute a large portion of the work force in seasonal, low-paying jobs in industries such as the garment industry, janitorial services, construction, and hospitality. The past few decades have demonstrated a shift in predominant ethnicity for jobholders in construction and hotel housekeeping; once largely African American, the jobholders are now immigrants (legal and illegal).

Lisa J. Bauer, Comment, *The Effect of Post-9/11 Border Security Provisions on Mexicans Working in the United States: An End to Free Trade?*, 18 EMORY INT'L L. REV. 725, 738-39 (2004).

<sup>34</sup> See Donna E. Young, *Working Across Borders: Global Restructuring and Women's Work*, UTAH L. REV. 1, 59-60 (2001) (noting that immigrant labor affords U.S. families access to affordable childcare and eldercare).

<sup>35</sup> See Lisa Leiman, Comment, *Should the Brain Drain be Plugged? A Behavioral Economics Approach*, 39 TEX. INT'L L.J. 675, 687 (2004) ("According to *The Economist*, migrants send home at least sixty billion dollars through official channels and even more through unreported means.").

<sup>36</sup> See Peter H. Schuck, *Immigration at the Turn of the New Century*, 33 CASE W. RES. J. INT'L L. 1, 5 (2001) (describing America's embrace of both diversity and immigration programs designed to enhance that diversity).

<sup>37</sup> Francine Lipman states:

Unauthorized workers and their employers must pay Social Security payroll taxes. The amount of Social Security taxes paid by unauthorized workers and their employers has been increasing steadily, and is now in the billions of dollars. In 2003, the government collected an estimated \$7 billion in Social Security taxes, or approximately one percent of overall revenue, from 7.5 million workers with mismatched SSNs, and their employers. This dollar amount has more than tripled in the last decade. While some of the mismatches are due to clerical errors, many can be traced to unauthorized workers. Unauthorized workers who pay Social Security taxes through withholding will not receive any Social Security retirement benefits with respect to their payments as long as they are not authorized to work in the United States.

Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal*,

Out of this welter of competing concerns about labor migration, two issues primarily preoccupy policymakers: (1) the voters' desire for strong law enforcement to prevent and punish illegal immigration, and (2) influential industries' desire to keep labor costs low through the use of subservient workers.<sup>38</sup> The result of this political reality is that the United States' labor migration policy is unpredictable and often contradictory.<sup>39</sup> For example, in 1986 the United States passed a one-time "amnesty" law that allowed millions of undocumented people to claim permanent status,<sup>40</sup> which temporarily siphoned off most of the then-existing undocumented immigrant pool.<sup>41</sup> However, the 1986 law failed to provide a legal route for the employment of future generations of labor migrants;<sup>42</sup> legal employment opportunities remained virtually unavailable,<sup>43</sup> except for a relatively low number of "guest worker" visas.<sup>44</sup>

Meanwhile, the growing network of U.S.-sponsored free trade arrangements facilitates and regulates the legal flow of goods,<sup>45</sup> but

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*and Without Representation*, 9 HARV. LATINO L. REV. 1, 24–25 (2006).

<sup>38</sup> See Sylvia R. Lazos Vargas, *Missouri, The "War on Terrorism," and Immigrants: Legal Challenges Post 9/11*, 67 MO. L. REV. 775, 780 (2002) (discussing the tension between the desire to limit migration and the middle class luxuries citizens enjoy that are made possible by migrant workers).

<sup>39</sup> See, e.g., Daniel Kurtz-Phelan, 'Give Us Your Poor' - Really?, CHRISTIAN SCI. MONITOR, Aug. 1, 2006, at 17 ("The American immigration system has taken shape through a series of 'short-term measures that may sound good to a frightened public but in fact are making things worse.' The product is a 'mishmash of contradictory and ineffective immigration policies that work against our best interests and that today threaten our social cohesion and our economic well-being.'").

<sup>40</sup> See Cecelia M. Espenosa, *The Illusory Provision of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343, 359–60 (1994) (detailing the Immigration Reform and Control Act's legalization provisions).

<sup>41</sup> *Id.* at 359 ("As applied legalization afforded protection and documentation for 2.5 million individuals but left a substantial number of people undocumented.").

<sup>42</sup> See, e.g., Sheila Jackson Lee, *Why Immigration Reform Requires a Comprehensive Approach that Includes Both Legalization Programs and Provisions to Secure the Border*, 43 HARV. J. ON LEGIS. 267, 272–3 (2006) (discussing the Immigration Reform and Control Act's limitations regarding present and future generations of immigrants).

<sup>43</sup> *Id.*

<sup>44</sup> See Alexandra Villarreal O'Rourke, *Recent Development, Embracing Reality: The Guest Worker Program Revisited*, 9 HARV. LATINO L. REV. 179, 182 (2006) ("[T]he program only admits around 100,000 temporary workers per year, which is equivalent to fourteen percent of the flow of undocumented migrants.").

<sup>45</sup> See Aaron Judson Lodge, *Globalization: Panacea for the World or Conquistador of International Law and Statehood?*, 7 OR. REV. INT'L L. 224, 272–73 (2005) (illustrat-

conspicuously omits meaningful regulation of labor migration.<sup>46</sup> As a result, at least 11.5 million undocumented people, about half of whom are working, reside in America today.<sup>47</sup> Dueling legislative proposals to address this situation remain politically mired.<sup>48</sup> Thus, most migration, like trade, is heavily regulated, but blue collar labor migration is simply relegated to the shadows.

Professors Mary Dudziak and Leti Volpp use a historical approach to assert the constructed nature of undocumented immigrant status:

The transnational labor market at the U.S.-Mexico border appears, not as a natural phenomenon, but fueled by labor needs of large-scale agriculture in the west, and by legal restrictions on Asian immigration to the United States. Once immigration was funneled into the *bracero* temporary worker program or through restrictive immigration quotas, preexisting migration outside these bounds became “illegal.” At the same time, the border itself, a fluid, transnational space, was militarized and patrolled. Through legal and policy developments, the problem of “illegal” immigration is structured and produced. In this example, law does not respond to natural forces outside the law; instead it re-

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ing how a free-trade agreement fosters the legal flow of goods into the United States).

<sup>46</sup> See Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 200 (2003) (noting that the North American Free Trade Agreement provided for the free-flow of goods but not of labor).

<sup>47</sup> See PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS & PEW HISPANIC CTR., AMERICA’S IMMIGRATION QUANDARY: NO CONSENSUS ON IMMIGRATION PROBLEM OR PROPOSED FIXES 1 (2006), available at <http://pewhispanic.org/files/reports/63.pdf> (discussing immigration statistics); Carl Hulse & Rachel L. Swarns, *G.O.P. Sets Aside Work on Immigration*, N.Y. TIMES, Sept. 5, 2006, at A18 (“Congressional Republican leaders have all but abandoned a broad overhaul of immigration laws and instead will concentrate on national security issues they believe play to their political strength.”).

<sup>48</sup> See MICHAEL HOFER ET AL., U.S. DEP’T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2005 (2006), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL\\_PE\\_2005.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL_PE_2005.pdf) (“There were an estimated 10.5 million unauthorized immigrants residing in the United States in January 2005 compared to 8.5 million in January 2000. During the 2000–2004 period, the unauthorized resident population grew at an annual average of 408,000.”).

sponds to a social context constructed, in part, through law.<sup>49</sup>

The quoted passage highlights the interplay of economics and law to simultaneously spark and sanction migration, thus creating “the problem of ‘illegal’ immigration.” This analysis extends to the phenomenon of unauthorized work. The history of the U.S. workplace is an immigrant history, through European migration, slavery, indentured servitude, trafficking, smuggling, and globalization.<sup>50</sup> As a “fluid, transnational space” in its own right, the U.S. workplace is perhaps the truest expression—for good and ill—of the American “melting pot.” Interposing immigration restrictions in this space is thus a counter-historical policy choice that has not found a solid footing in U.S. legal culture.

## 2.2. *Immigration Enforcement Against Immigrants, Not Employers*

By sanctioning the employment of people who are largely occupied in legitimate industries, policies force migration for otherwise legal work underground. Having failed to create an orderly system for large-scale labor migration, migrant-receiving countries like the United States instead concentrate on politically palatable enforcement efforts.<sup>51</sup> For example, recent administrations have

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<sup>49</sup> Mary L. Dudziak & Leti Volpp, *Legal Borderlands: Law and the Construction of American Borders*, 57 AM. Q. 593, 595 (2005).

<sup>50</sup> The following are sources documenting the many uses of new immigrants in the American workplace: DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 27 (2007) (tying “large-scale” 17th and 18th century English expulsion programs sending people to the Americas to the fact that “the New World required cultivation and labor”); *id.* at 29 (tying “the insatiable need for labor” to the American colonies’ general policy *not* to deport aliens); *id.* at 40 (discussing the history of indentured servitude in America); *id.* at 99-100 (discussing 19th century “coolie” and contract labor programs); *id.* at 219-20 (discussing the history of the Bracero Program); *id.* at 220 (discussing the effects of the Bracero Program administration in sparking flows of undocumented people for work); *id.* (discussing a legalization program “designed primarily to meet the needs of agricultural employers”); *see also* HUMAN RIGHTS WATCH, *SWEPT UNDER THE RUG: ABUSES AGAINST DOMESTIC WORKERS AROUND THE WORLD* (2006), available at <http://hrw.org/reports/2006/wrd0706/index.htm> (documenting the use of migrant domestic workers in the United States).

<sup>51</sup> *See* Beth Lyon, *Farm Workers in Illinois: Law Reforms and Opportunities for the Legal Academy to Assist Some of the State’s Most Disadvantaged Workers*, 29 S. ILL. U. L.J. 263, 276-77 (2005) (noting that U.S. immigration policies are focused on border control); *see also* David Stout, *Bush, Signing Bill for Border Fence, Urges Wider Overhaul*, N.Y. TIMES, Oct. 27, 2006, at A16 (“President Bush signed into law on Thursday a bill providing for construction of 700 miles of added fencing along the



drastically increased border enforcement, but commentary from both the left *and* right argues that these efforts have not stopped the flow, and have only made the act of entry more expensive and dangerous.<sup>52</sup> Meanwhile, the government eschews what would probably be the most effective enforcement mechanism: penalizing employers. It is illegal to hire foreigners without proper documents,<sup>53</sup> but the law contains a loophole that threatens to swallow the prohibition—employers can hire anyone whose papers “reasonably appear on their face to be genuine and to relate to the person presenting them,”<sup>54</sup> and even this weak requirement has rarely been enforced in the decades since the law passed.<sup>55</sup> In fall 2007, the Social Security Administration issued regulations that, for the first time, appeared to put some teeth into this requirement.<sup>56</sup> As this Article went to press, the regulations had not yet taken effect and were threatened with litigation.<sup>57</sup>

### 2.3. *Abridged Rights and Non-Enforcement of Remaining Rights*

The Department of Homeland Security and Department of Labor have expressed the opinion that enforcing worker protections in industries with high numbers of unauthorized workers helps to decrease illegal migration.<sup>58</sup> Employers will have less of an incen-

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Southwestern border, calling the legislation ‘an important step toward immigration reform.’”).

<sup>52</sup> See Maria L. Ontiveros, *Lessons From the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 168 (2002) (noting the danger migrant workers face when attempting to cross the border into the United States).

<sup>53</sup> Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(A) (2006).

<sup>54</sup> *Id.* See also IMMIGRATION AND NATURALIZATION SERV., U.S. DEP’T OF JUSTICE, HANDBOOK FOR EMPLOYERS: INSTRUCTIONS FOR COMPLETING FORM I-9 13 (1991), available at <http://www.uscis.gov/files/nativedocuments/m-274.pdf>.

<sup>55</sup> See Espenosa, *supra* note 40 (describing deficient INS procedures for monitoring compliance).

<sup>56</sup> See Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 8 C.F.R. § 247(a) (2007) (requiring that states obtain Social Security information for participation in several programs, including: Medicaid, unemployment compensation, and the food stamp program); see also Roger Tsai, *The IRCA – Twenty Years Later*, IMMIGRATION LAW WKLY., Apr. 12, 2007, available at <http://www.ilw.com> (enter “tsai” into “search” box on website and follow “common questions from employers” hyperlink).

<sup>57</sup> See *Am. Fed’n of Labor v. Michael Chertoff*, No. C07-04472 CRB (N.D. Cal. Oct. 10, 2007) (order granting preliminary injunction), available at <http://bibdaily.com/pdfs/nomatch%20pi%2010-10-07.pdf>.

<sup>58</sup> Reply Brief for Petitioner at 12, *Hoffman Plastic Compounds, Inc. v. NLRB*, No. 00-1595 (U.S. Jan. 7, 2002) [hereinafter *Hoffman Plastic Reply Brief*].

tive to hire the undocumented if they must obey all employment laws regardless of immigration status. Despite the enforcement branches' worker-protective position on this issue, U.S. law differentially excludes unauthorized immigrant workers from many basic labor and employment law protections. The most significant differential treatment includes the following substantive restrictions on the rights of unauthorized immigrant workers: exclusion from employment rights; and exclusion from monetary remedies schemes, such as labor rights and protection from employment discrimination. Moreover, unauthorized workers are excluded from various worker support programs. Instead, municipalities are increasingly prosecuting unauthorized workers for the document violations they committed to secure their positions.

### 2.3.1. *Employment Rights Exclusions*

In America, unauthorized immigrant workers are excluded from a variety of employment and labor rights. All unauthorized immigrant workers are excluded from receiving Social Security disability.<sup>59</sup> Additionally, unauthorized immigrant workers are excluded from unemployment insurance coverage.<sup>60</sup> Although they are required to pay taxes, unauthorized immigrant workers are not permitted to participate in Social Security<sup>61</sup> or to recover their Social Security contributions.<sup>62</sup> Nor do unauthorized immigrant workers qualify for the earned income tax credit.<sup>63</sup>

An additional issue is the specific limitation on protections for farmworkers. The laws explicitly excluding farm workers from key employment protections have a significant impact on unauthorized immigrant workers. Agriculture is an industry heavily staffed with unauthorized immigrant labor. The U.S. Department

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<sup>59</sup> Social Security Act, 42 U.S.C. §§ 401-404, 405(c)(2)(B)(i) (2006) (limiting Social Security benefits, after 1974, to elderly and disabled workers other than undocumented aliens); see also Lipman, *supra* note 37, at 5-6 (explaining undocumented immigrants are barred from almost all government benefits).

<sup>60</sup> 8 U.S.C. §§ 1611, 1641 (limiting the eligibility for federal benefits to "qualified aliens," a term which excludes undocumented immigrants, among others); see also Lipman, *supra* note 37, at 5-6 (listing several benefits to which unauthorized immigrant workers are excluded).

<sup>61</sup> Lipman, *supra* note 37, at 6.

<sup>62</sup> Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security With Billions*, N.Y. TIMES, Apr. 5, 2005, at A1 (stating that illegal immigrants contributed as much as seven billion dollars to the Social Security system but are not eligible for any of its benefits).

<sup>63</sup> Lipman, *supra* note 37, at 6.

of Agriculture reports that 52% of all farmworkers are undocumented,<sup>64</sup> and anecdotal information gathered from farming and farmworker advocacy communities indicates that this percentage is actually between 70% and 90%.<sup>65</sup> The National Labor Relations Act ("NLRA"), the New Deal statute that first established federal labor rights, exempted agricultural employers from respecting the right to collective bargaining and union formation.<sup>66</sup> Similarly, the Fair Labor Standards Act exempts agricultural employers from paying overtime wages.<sup>67</sup> Agriculture is the only industry exempted from these two cornerstones of the regulated American employment relationship.<sup>68</sup> Even by the most conservative estimate, a majority of farmworkers are unauthorized. Thus the continuing exclusion of agricultural workers from these protections has an exaggeratedly disproportionate impact on the population of unauthorized workers.

### 2.3.2. Remedies Exclusions

Exclusion from employment law monetary remedies schemes is a relatively recent judicial development that has exposed the

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<sup>64</sup> KALA MEHTA ET AL., FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 1997-1998: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS viii (2000), available at [http://www.dol.gov/asp/programs/agworker/report\\_8.pdf](http://www.dol.gov/asp/programs/agworker/report_8.pdf) (approximating that in 1997-1998, fifty-two percent of employed farm workers were unauthorized).

<sup>65</sup> The Department of Labor placed the percentage of undocumented agricultural workers in 1997-1998 at fifty-two percent. *Id.* The farmworker advocacy community considers this estimate to be a significant understatement of the true percentage. For example, in Pennsylvania, government officials who work directly with agricultural workers estimated that ninety percent of Mexican farm workers in Pennsylvania may be unauthorized. Anthony DePalma, *A Tyrannical Situation: Farmers Caught in Conflict Over Illegal Migrant Workers*, N.Y. TIMES, Oct. 3, 2000, at C1. See also Juliana Barbassa, *Farmers Fear Illegal Immigrant Crackdown*, THE ASSOCIATED PRESS, Aug. 16, 2007, available at <http://abcnews.go.com/Business/wirestory?id=3486284>.

<sup>66</sup> National Labor Relations Act, 29 U.S.C. §§ 151, 152(3) (2006).

<sup>67</sup> 29 U.S.C. § 213(b)(12); see also U.S. Dep't of Labor, Fact Sheet #12: Agricultural Employers under the Fair Labor Standards Act (FLSA), <http://www.dol.gov/esa/regs/compliance/whd/whdfs12.htm> (last visited Oct. 22, 2007).

<sup>68</sup> See 29 U.S.C. §§ 151, 152(3), 213(b)(12); see also U.S. Dep't of Labor, Fact Sheet #12: Agricultural Employers under the Fair Labor Standards Act (FLSA), <http://www.dol.gov/esa/regs/compliance/whd/whdfs12.htm> (last visited Oct. 22, 2007) (providing general information about the application of the FLSA to agricultural employment).

United States to significant international criticism.<sup>69</sup> In 2002 a U.S. Supreme Court ruling stripped unauthorized immigrant workers of back pay, the key monetary remedy afforded by the NLRA. The reasoning in the case, *Hoffman Plastic Compounds v. NLRB*,<sup>70</sup> was that back pay, which reimburses lost wages to a worker who is fired for exercising his or her right to engage in NLRA-protected activity, should not be awarded to a worker who was never legally eligible for work in the first place.<sup>71</sup> This decision created a gloss on the actual wording of the NLRA's remedies scheme, which makes no distinction on the basis of immigration status.<sup>72</sup> With no language in the NLRA justifying the outcome, the *Hoffman Plastic* five-justice majority instead relied on an attenuated immigration policy enforcement argument,<sup>73</sup> ruling that the Immigration and Nationality Act's prohibition on hiring foreigners without working papers mandated differentially less protection under the NLRA.<sup>74</sup> The majority did not credit the Bush administration's assurances to the Court that to exempt employers would actually *undermine* enforcement of the Immigration and Nationalization Act.<sup>75</sup> The notion of paying people back wages for work they would have been performing in violation of immigration laws simply seemed too

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<sup>69</sup> Rebecca Smith, *Human Rights at Home: Human Rights as an Organizing and Legal Tool in Low-Wage Worker Communities*, 3 STAN. J. C.R. & C.L. 285 (2007) (discussing how undocumented workers are treated differently in the United States).

<sup>70</sup> Lyon, *supra* note 2, at 598.

<sup>71</sup> *Hoffman Plastic Compounds Inc. v. NLRB*, 535 U.S. 137, 140, 148–49 (2002).

<sup>72</sup> See 29 U.S.C. § 152(3) (defining an "employee" as "any employee . . . not . . . limited to the employees of a particular employer, unless this subchapter explicitly states otherwise. . . includ[ing] any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but [the definition of employee] shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.") see also Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIG. L.J. 651, 653 n.4 (2004) (explaining that federal statutes do not define the term "employee" based on citizenship).

<sup>73</sup> *Hoffman Plastic Compounds*, 535 U.S. at 144.

<sup>74</sup> *Id.* at 143–44.

<sup>75</sup> See generally Petitioner's Reply Brief, *supra* note 58 (arguing that the INA should be allowed to withhold backpay for an undocumented alien not legally entitled to be present and employed in the country).

permissive, despite the important labor law enforcement implications of not paying those back wages.

The *Hoffman Plastic* decision's ripple effect continues to erode the protections afforded to immigrant workers in the United States. The Equal Employment Opportunity Commission applies the *Hoffman Plastic* reasoning to divest unauthorized immigrant workers of lost wages remedies in employment discrimination cases.<sup>76</sup> Related developments continue to occur at the state level, further worsening the legal position of unauthorized immigrant workers compared with their domestic equivalents.<sup>77</sup> In states that have adopted the High Court's reasoning, differential remedies also threaten to undercut unauthorized worker access to workers' compensation protections.<sup>78</sup>

### 2.3.3. *Instead of Protection, Criminal Prosecution*

Saúl Cortes,<sup>79</sup> a young Mexican national, lived in eastern Pennsylvania and worked for a landscaper. The landscaper stopped paying him and the other workers, and Saúl continued working, waiting for his back pay. After this situation had gone on for two weeks, Saúl's employer unexpectedly offered to give Saúl a ride to the police station for a drug possession probation check-in. However, when they arrived at the police station, Saúl's employer entered the police station with him and lodged a complaint against Saúl for having tendered false documents in order to obtain employment. Saúl was arrested and charged with identity theft and fraud. Although these charges were dropped, Saúl refused to file a

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<sup>76</sup> The U.S. Equal Opportunity Employment Commission Directives Transmittal 915.002, *Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws* (June 27, 2002), available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html> (discussing the implication of *Hoffman* on the position of the Commission on remedies for undocumented workers).

<sup>77</sup> See generally NAT'L EMPLOYMENT LAW PROJECT, USED AND ABUSED: THE TREATMENT OF UNDOCUMENTED VICTIMS OF LABOR LAW VIOLATIONS SINCE *HOFFMAN PLASTIC COMPOUNDS v. NLRB* (2003), available at [http://www.maldef.org/publications/pdf/Hoffman\\_11403.pdf](http://www.maldef.org/publications/pdf/Hoffman_11403.pdf) [hereinafter MALDEF/NELP REPORT] (describing the chilling effect of *Hoffman v. NLRB* on workers' enforcement of their remaining rights).

<sup>78</sup> See NAT'L EMPLOYMENT LAW PROJECT, LOW PAY, HIGH RISK: STATE MODELS FOR ADVANCING IMMIGRANT WORKERS' RIGHTS (2003), available at <http://www.nelp.org/docUploads/Low%20Pay%20High%20Risk%20120903.pdf> (highlighting decisions by state courts which undermine immigrant workers' access to compensation).

<sup>79</sup> Note: names have been changed to protect client confidentiality.

wage and hour complaint because he was afraid he would be arrested again if he asked a judge to help him get the money he had earned. Saúl was never paid his rightful wages, which amounted to a sum that could have supported his family in Mexico for months.

Saúl's case, which arose because of the non-payment of wages, illustrates the culture of fear and non-enforcement of those employment protections that do remain for unauthorized workers. Unauthorized workers, many of them struggling to repay smuggling debt while sending money to their families, are terrified of the possibility of deportation. In addition to cutting short an immigrant's opportunity to earn money, deportation is a time-consuming and expensive process<sup>80</sup> that frequently involves loss of liberty and yet another dangerous return across the border. American employers routinely make deportation threats to both their employees and their employees' legal representatives.<sup>81</sup> Cases like *Hoffman Plastic* induce judges to allow defendants' counsel to embark on wide-ranging discovery of matters assumed to be relevant to litigants' "unavailability for work," including number and manner of illegal entries into the country and the type of false documentation the worker presented to secure employment.<sup>82</sup> Under *Hoffman*, the actual unavailability is relevant as to remedies. However, the details about the migration are not necessary to prove simple unavailability for work, and instead are used to focus the decisionmaker's attention on illegal presence. While many courts issue protective orders to prevent this type of inquiry, many others do not.<sup>83</sup> Prejudicing the decisionmaker is only one concern

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<sup>80</sup> See Lyon, *supra* note 2, at 596 (explaining the costs associated with deportation); see United Nations Committee on Migrant Workers, *Written Contribution of the Villanova Law School Farmworker Legal Aid Clinic* (2005), available at [www.ohchr.org/english/bodies/cmw/mwdiscussion.htm](http://www.ohchr.org/english/bodies/cmw/mwdiscussion.htm) (explaining various costs of deportation to immigrants).

<sup>81</sup> Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 405 (2001) (stating that "[u]ndocumented workers remain vulnerable to threats of deportation" by employers).

<sup>82</sup> *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 153 (2002) (Breyer, J., dissenting).

<sup>83</sup> See MALDEF/NELP REPORT, *supra* note 77 (discussing numerous cases in which employers and other defendants sought to discover plaintiffs' immigration status, and the various responses of the courts); see also Rebecca Smith, *Human Rights at Home: Human Rights as an Organizing and Legal Tool in Low-Wage Worker Communities*, 3 STAN. J.C.R. & C.L. 285, 293-95 (2007) (providing an example of someone who was required to disclose her immigration status in the course of

with this practice. Answering such queries quells workers' willingness to assert their employment rights at all.<sup>84</sup>

General enforcement of workplace protections is a concern for all of American labor, and extends particularly to settings where the unauthorized are working. For example, in a recent presentation, two leading farmworker advocates agreed that monitoring of workplace violations in the agricultural sector, a leading employer of unauthorized workers, is virtually nonexistent.<sup>85</sup> Moreover, non-governmental and media human rights monitoring is also relatively less active with regard to potential violations of fundamental human rights of unauthorized workers. One example of an issue that receives scant attention is the loss of life at the border.<sup>86</sup> A study by Professor Elvia Arriola provides another example. She surveyed media reporting about immigration worksite raids, and argues that reporting focuses on the number of immigrants arrested rather than on the legal violations committed by employers involved. Professor Arriola asks "how [would] a different kind of account of an INS raid . . . change our views of this nation's compliance with basic human rights if one humanized the same stories of recent INS raids and of the design and enforcement of INS policy[?]"<sup>87</sup> Ultimately the media is a reflection of its audience, and

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civil claims related to her husband's wrongful death on an un-permitted construction worksite).

<sup>84</sup> See PETER KWONG, *FORBIDDEN WORKERS: ILLEGAL CHINESE IMMIGRANTS AND AMERICAN LABOR* (1997) (describing how American immigration policy has led to the denigration of Chinese immigrants); MALDEF/NELP REPORT, *supra* note 77 (quoting *Flores v Albertsons, Inc.*, 2002 WL 1163623 (C.D. Cal. 2002) for the proposition that discovery into immigration status chills the assertion of rights).

<sup>85</sup> Cynthia Rice & Daniel Rothenberg, *With These Hands - The Life and Law of Migrant Farmworkers*, Panel at Association of American Law Schools 2007 Annual Meeting (January 5, 2007), available at <http://www.aals.org/am2007/friday/index.html> [hereinafter Rice and Rothenberg Presentations]. See also GEN. ACCOUNTING OFFICE, *WORKER PROTECTION: LABOR'S EFFORTS TO ENFORCE PROTECTIONS FOR DAY LABORERS COULD BENEFIT FROM BETTER DATA AND GUIDANCE* 3 (2002) [hereinafter GAO REPORT] (noting that most day laborers are migrants, at least some of whom are undocumented, and that the agencies responsible for enforcing workplace protections for day laborers are "hampered" and "may [not] be reaching those industries or workplaces where day laborers work.").

<sup>86</sup> See Joseph Nevins, *Beyond the Season of Death on the US-Mexico Border*, *CHRISTIAN SCI. MONITOR* (August 8, 2005), at 9 (stating that "because the fatalities typically occur outside the public eye and the corpses are those of "illegals" fleeing poverty in Mexico and elsewhere in Latin America, they elicit little attention in the media and in public debate.").

<sup>87</sup> Elvia R. Arriola, *LatCrit Theory, International Human Rights, Popular Culture, and the Faces of Despair in INS Raids*, 28 U. MIAMI INTER-AM. L. REV. 245, 257-58 (1996).

the point here is that the deprivations of this class of people in America are invisible, further decreasing the likelihood that existing workplace rights will be protected. In this environment, government must make special exertions to overcome the obstacles to enforcing legal protections for all workers.

#### 2.4. *Consequences of the Law: Why International Human Rights for Unauthorized Immigrant Workers?*

Extreme deprivation results from the combination of the lopsided visa regime, differential rights and lack of enforcement of existing rights. From the hundreds of reported deaths and attacks on the border annually<sup>88</sup> to the drastically higher levels of mortality, injury and exploitation in the unauthorized immigrant worker-dominated industries,<sup>89</sup> the desperate plight of unauthorized workers is nearly commonplace in public policy literature.<sup>90</sup> The spillover effect of workplace exclusions undercuts wages and safety for U.S. citizen workers as well.<sup>91</sup>

In 2005, the Department of Homeland Security estimated that more than half of all undocumented people are Mexican nationals, that the other top countries of origin of the undocumented are El Salvador, Guatemala, India and China, and that the number of undocumented residents is growing rapidly.<sup>92</sup> All of these source countries are characterized by high rates of poverty.<sup>93</sup> One organi-

<sup>88</sup> Martinez, *supra* note 31.

<sup>89</sup> See Kwong, *supra* note 84 (noting the denigration of Chinese immigrants).

<sup>90</sup> See generally Connie de la Vega & Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Workers' Rights in the United States*, 3 HASTINGS RACE & POVERTY L.J. 35 (2005) [hereinafter de la Vega] (providing migrant rights advocates with international legal arguments used to address domestic human rights abuses when domestic law is inadequate); American Enterprise Institute for Public Policy, <http://www.aei.org> (last visited Oct. 22, 2007).

<sup>91</sup> Lyon, *supra* note 2, at 605 (discussing the safety implications for all workers).

<sup>92</sup> See, Hoefer *supra* note 48, at 1 (listing top source countries and noting that 2.1 million unauthorized immigrants "arrived" between 2000 and 2002).

<sup>93</sup> See Steve Schifferes, *India Pledges to Abolish Poverty*, BBC NEWS, Feb. 5, 2007, available at <http://news.bbc.co.uk/1/hi/business/6309945.stm> (describing the degree of poverty in India); U.N. Dev. Programme China, *Poverty in China*, [http://www.unchina.org/about\\_china/html/poverty.htm](http://www.unchina.org/about_china/html/poverty.htm) (last visited Oct. 22, 2007) (describing how poverty in China forces individuals to migrate to other countries); U.S. Dep't of State, Bureau of Western Hemisphere Affairs, *Background Note: Guatemala*, <http://www.state.gov/r/pa/ei/bgn/2045.htm> (last visited Oct. 22, 2007); USAID, *Budget: El Salvador*, <http://www.usaid.gov/policy/budget/cbj2005/lac/sv.html> (last visited Oct. 22, 2007).



zation that advocates for less immigration into the United States<sup>94</sup> asserts that Mexican immigrants of working age in the United States are six times less likely than Americans to have a high school education.<sup>95</sup> Since 1995, asylum seekers are not permitted to work legally,<sup>96</sup> meaning that many unauthorized workers are people who have experienced, or are fleeing, persecution and torture. Thus these are people exhibiting many indicia of vulnerability. At the same time, these workers are violating the law. In this tension lie both the urgency and the difficulty in portraying them as worthy of human rights protection.

The following discussion marshals the arguments favoring an emerging vision of unauthorized workers as rights-holders worthy of equal protection with domestic and authorized immigrant workers in the workplace. One of the elements of this vision is the often-invisible humanitarian crisis of unauthorized workers. The cross-border nature of unauthorized workers brings them particularly within the purview of international law. General Biblical passages also contribute to a protective, humanitarian approach to this community, as does Catholic Social Thought, which offers one of the oldest statements of unauthorized workers as subjects of equal protection for workplace rights. Receiving-country concerns, such as public health and protection for Americans laboring alongside unauthorized workers, call for a rights-holding approach for this population. Unauthorized worker-sending countries, concerned for citizens abroad whose remittances people who have experienced or are fueling their home economies, also advocate for unauthorized workers as rights holders.

The inequality of creating different classes of workers for the purposes of employment protection is an important factor in the development of the jurisprudence on unauthorized worker rights. In the story of Saúl discussed above, the employer used the crimi-

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<sup>94</sup> The Center for Immigration Studies website states that “[t]he Center is animated by a pro-immigrant, low-immigration vision which seeks fewer immigrants but a warmer welcome for those admitted.” About the Center for Immigration Studies, <http://www.cis.org/aboutcis.html> (last visited Oct. 22, 2007).

<sup>95</sup> Center for Immigration Studies, Labor Market Characteristics of Mexican Immigrants in the United States, <http://www.cis.org/articles/2001/mexico/labor.html>.

<sup>96</sup> 8 C.F.R. § 208.7 (2007). See M. Isabel Medina, Book Review, 46 *Loy. L. Rev.* 643, 649–50 (2000) (reviewing PHILIP G. SCHRAG, *FROM “MR. SMITH GOES TO WASHINGTON” TO A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA* (2000)) (describing the struggle to accommodate asylum seekers in the context of the immigration debate).

nal justice system to rid himself of a worker who was owed money. The police and prosecutors no doubt felt that prosecuting Saúl because of his false working papers was an appropriate response intended to punish a lawbreaker, particularly since Saúl had already served probation for drug use, and they were likely aware that their actions placed Saúl on the road to deportation.<sup>97</sup> The result is that Saúl will probably never be paid for the hard and otherwise unrewarding work that he performed. Human rights law does not question that no visa was available to Saúl, nor does it question that Saúl was prosecuted for both his drug crime and the fraudulent work papers he presented. Human rights law does not question Saúl's likely future deportation (though it might have something to say about the lack of counsel and other due process issues in the detention and deportation system). Human rights law does, however, make Saúl's loss of wages for work performed problematic.

Political theorists neatly capture Saúl's legal position in the workplace with the term *homo sacer*. Italian political theorist Giorgio Agamben drew the term from Roman law, defining a *homo sacer* as a human being who is consigned to "zones of exemption" from law.<sup>98</sup> *Homo sacer* literally means "the bare or depoliticized life that is distinguished from politicized forms of life, most clearly manifest in the citizen."<sup>99</sup> Professor Prem Kumar Rajaram and Dr. Carl Grundy-Warr apply this concept to the situation of detained undocumented immigrants, noting that the remit of "modern existence means that the family of nations, mafia-like, keeps the law within itself. That is, the remit of the law, of justice, ends at the borders of the nation-state."<sup>100</sup> Applying these concepts in the employment setting, the unauthorized worker under *Hoffman Plastic*, as *homo sacer*, through loss of remedies, is literally stripped bare of the rights clothing of the documented or citizen worker next to him or her. The remit of laws such as the National Labor Relations Act

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<sup>97</sup> See U.S. Department of Justice Corrective Action Report: Issue and Milestone Schedule: Efforts to Identify and Remove Criminal Aliens, available at [http://www.usdoj.gov/ag/annualreports/ar2002/for\\_app\\_c/remove\\_crim\\_alien.htm](http://www.usdoj.gov/ag/annualreports/ar2002/for_app_c/remove_crim_alien.htm) (describing the "Institutional Removal Program" and its focus on removing "criminal aliens").

<sup>98</sup> GEORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE*, 71-74 (1998).

<sup>99</sup> Prem Kumar Rajaram and Carl Grundy-Warr, *The Irregular Migrant as Homo Sacer: Migration and Detention in Australia, Malaysia, and Thailand*, 42 INT'L MIGRATION 33, 34 (2004).

<sup>100</sup> *Id.* at 40.

not only stops at the border, but the laws are also laced with holes in the workplace.

Falling through these holes are human beings and families whose conditions of extreme deprivation constitute an often-invisible humanitarian crisis. The deprivation results from the combination of the lopsided visa regime, differential rights, and lack of enforcement of existing rights. There are hundreds of reported deaths and attacks on the border annually.<sup>101</sup> In the workplace, there are drastically higher levels of mortality, injury and exploitation in the unauthorized immigrant worker-dominated industries. Construction, extractive operations, and agriculture are three of the most dangerous industries in this country.<sup>102</sup> According to a report by the Pew Hispanic Center, these industries are also among the heaviest employers of the unauthorized.<sup>103</sup> In 2000, the U.S. Bureau of the Census reported that between 1996 and 2000 there was a 22% increase in the number of foreign workers, while during the same period there was a 43% increase in the number of foreign workers' workplace fatalities.<sup>104</sup> By comparison, workplace fatalities among the general U.S. workforce *decreased* by 5 percent.<sup>105</sup> These numbers relate to all foreign workers, not merely to the unauthorized, but present a compelling backdrop for the likely situation of the unauthorized. Additionally, unauthorized immigrant workers commonly experience wage theft, below-minimum wages, harassment, physical abuse, wrongful termination and other forms of retaliation, and outright slavery.<sup>106</sup> In fact, the difficult plight of unauthorized workers has become commonplace in public policy literature.<sup>107</sup>

The international community has determined that this level of

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<sup>101</sup> Martinez, *supra* note 31.

<sup>102</sup> See U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, Number of Fatal Work Injuries, 1992-2006, available at <http://www.bls.gov/iif/oshwc/cfoi/cfch0005.pdf> (last visited Oct. 22, 2007) (showing statistics for fatal work injuries).

<sup>103</sup> Jeffrey S. Passel, *Size and Characteristics of the Unauthorized Migrant Population in the U.S.*, Mar. 3, 2007, <http://pewhispanic.org/reports/report.php?ReportID=61>.

<sup>104</sup> Katherine Loh & Scott Richardson, *Foreign-Born Workers: Trends in Fatal Occupational Injuries, 1996-2001*, MONTHLY LAB. REV., June 2004, at 45 (citing U.S. Bureau of the Census, March 2000, the Bureau of Labor Statistics).

<sup>105</sup> *Id.* at 42.

<sup>106</sup> See KWONG, *supra* note 84 (detailing the mistreatment of illegal Chinese workers).

<sup>107</sup> See generally de la Vega, *supra* note 90, American Enterprise Institute for Public Policy, *supra* note 90.

human suffering makes unauthorized workers an appropriate object of special protection.<sup>108</sup> This issue is of such great concern for the international community that the United Nations has elevated unauthorized immigrant worker rights to a position of relatively high legal importance and institutional action by promulgating the Migrant Worker Convention, numbered amongst the seven documents it calls the "core" international human rights treaties.<sup>109</sup> Two of these treaties are covenants that created generic, broad human rights norms.<sup>110</sup> The other five treaties focus on the following topics: the prohibition against torture,<sup>111</sup> racial discrimination,<sup>112</sup> discrimination against women,<sup>113</sup> the rights of the child,<sup>114</sup> and the rights of migrant workers.<sup>115</sup> Many other topic areas have attracted the notice of the international standard-setting bodies, in-

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<sup>108</sup> See Jorge A. Bustamante, *Immigrants' Vulnerability as Subjects of Human Rights*, 36 INT'L MIGRATION REV. 333, 337-38 (2002) (explaining the worldwide concern on the human rights of migrants).

<sup>109</sup> Office of the United Nations High Commissioner for Human Rights, *Human Rights Bodies*, <http://www.ohchr.org/english/bodies/index.htm> (last visited Oct. 22, 2007).

<sup>110</sup> International Covenant on Civil and Political Rights, *adopted by General Assembly* Dec. 19, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR]. Signed and ratified by the United States. See also International Covenant on Economic, Social and Cultural Rights, *adopted by General Assembly* Dec. 16, 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976) [hereinafter ICESCR]. Signed, but not ratified, by the United States. Status of U.S. Ratifications, <http://www.ohchr.org/english/countries/us/index.htm> (last visited Oct. 22, 2007).

<sup>111</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted by General Assembly* Dec. 10, 1984, 1465 U.N.T.S. 85 (*entered into force* June 26, 1987) [hereinafter CAT]. Signed and ratified by the United States.

<sup>112</sup> International Convention on the Elimination of All Forms of Racial Discrimination, *adopted by General Assembly* Dec. 21, 1965, 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969) [hereinafter CERD]. Signed and ratified by the United States.

<sup>113</sup> Convention on the Elimination of All Forms of Discrimination Against Women, *adopted by General Assembly* Dec. 18, 1979, 1249 U.N.T.S. 13 (*entered into force* Sept. 3, 1981) [hereinafter CEDAW]. Signed, but not ratified, by the United States.

<sup>114</sup> Convention on the Rights of the Child, *adopted by General Assembly* Nov. 20, 1989, 1577 U.N.T.S. 3. (*entered into force* Sept. 2, 1990) [hereinafter CRC]. Signed, but not ratified, by the United States.

<sup>115</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 Dec. 18, 1990 (*entered into force* July 1, 2003) [hereinafter U.N. Migrant Worker Convention].

cluding the rights of the elderly,<sup>116</sup> the rights of the mentally disabled<sup>117</sup> and the right to adequate housing,<sup>118</sup> but none of these questions has attained the institutional status of migrant worker rights. The United Nations Migrant Worker Convention states that the United Nations made migrant workers a priority because of the "importance and extent of the migration phenomenon," the lack of protection at the national level, the need for harmonization of protective laws, and the special vulnerability of the unauthorized to exploitation.<sup>119</sup> Although unauthorized worker rights have not yet achieved the level of institutional focus and support that undergird some of the earlier "core" treaties, it is clear that the United Nations has made an important acknowledgment of unauthorized workers as rights-holders.

In determining that unauthorized workers should be regarded as rights-holders, the international community was also persuaded by the transnational nature of immigrants generally and the similarity of the situation of unauthorized workers in receiving countries across the globe.<sup>120</sup> The Migrant Worker Convention asserts that the worldwide situation of unauthorized immigrant workers is relatively uniform, involving preventable suffering that governments and trading partners are politically unable to address, making this population an appropriate subject for intervention through the mechanism of human rights.<sup>121</sup>

The recency and split-nature of U.S. decisions such as *Hoffman Plastic* indicate that the singling out unauthorized workers as rights-holders is not a tradition in U.S. worker jurisprudence. The international standards described in this Article accord with a rich domestic literature asserting that far from being penalized in the workplace, unauthorized immigrant workers should receive worker rights equal to domestic and documented workers and, in-

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<sup>116</sup> United Nations Principles for Older Persons, G.A. Res. 46/49, Annex, U.N. Doc. A/Res/46/91/Annex (Dec. 16, 1991).

<sup>117</sup> Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, available at <http://www.un.org/disabilities>; G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006).

<sup>118</sup> U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context*, U.N. Doc. E/CN.4/2006/41 (Mar. 14, 2006) (prepared by Miloon Kothari).

<sup>119</sup> U.N. Migrant Worker Convention, *supra* note 115, at Preamble.

<sup>120</sup> See Bustamante, *supra* note 108, at 342-44 (explaining that the vulnerability of immigrants is an international matter).

<sup>121</sup> U.N. Migrant Worker Convention, *supra* note 115, at Preamble.

deed, that they should have special government protection to ensure that those rights are observed. The American legal literature on unauthorized immigrant labor overwhelmingly asserts that selectively denying employment protection to unauthorized workers fails scrutiny for reasons of public health,<sup>122</sup> immigration control,<sup>123</sup> managerial efficiency,<sup>124</sup> and morality,<sup>125</sup> as well as international law.<sup>126</sup>

Both the Hebrew and Christian scriptures repeatedly mandate “hospitality to the stranger,” a requirement that rarely arises in the political debates in a country that frequently politicizes the scriptures.<sup>127</sup> The Qur’an and Hindu principles also require hospitality to strangers.<sup>128</sup> A 1981 Roman Catholic Papal Encyclical, a primary source for all Roman Catholics, states that “Man has the right to

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<sup>122</sup> See Lyon, *Reconsidering U.S. Laws*, *supra* note 2, at 605 (noting the significant number of workplace injuries and fatalities suffered by unauthorized workers as recognized in case law).

<sup>123</sup> Experts argue that failing to enforce labor rights of unauthorized migrant workers increases the likelihood of illegal immigration because employers have an incentive to recruit undocumented workers. See *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 153–61 (2002) (Breyer, J., dissenting).

<sup>124</sup> Beth Lyon, *The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers’ Rights for the Hemisphere: A Comment on Advisory Opinion 18*, 28 N.Y.U. REV. L. & SOC. CHANGE 547 (2004) [hereinafter Lyon, *Comment on OC-18*]; see generally *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003) [hereinafter *OC-18*] (discussed *infra* Section 3.4.1).

<sup>125</sup> See, e.g., National Conference of Catholic Bishops, *Resolution on Immigration Reform* (Nov. 16, 2000), available at <http://www.nccbuscc.org/mrs/reform.shtml> (voicing a strong opposition to any immigration reforms proposed by the U.S. Congress without a generous legalization program).

<sup>126</sup> See, e.g., Linda S. Bosniak, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under The International Migrant Workers Convention*, 25 INT’L. MIGRATION REV. 737 (1991) (discussing how commitment to state sovereignty norms constrains the effectiveness of the International Migrant Workers Convention in terms of human rights); de la Vega, *supra* note 90 (explaining international legal arguments to remedy domestic human rights abuses); Lyon, *Comment on OC-18*, *supra* note 124 (discussing OC-18 and its effect on the rights of unauthorized workers with respect to international law); Sarah Paoletti, *Human Rights for All Workers: The Emergence of Protections for Unauthorized Workers in the Inter-American Human Rights System*, 12 HUM. RTS. BRIEF 5 (2004) (explaining that international mechanisms have responded to the need to protect the human rights of migrant workers).

<sup>127</sup> See Elizabeth McCormick & Patrick McCormick, *Hospitality: How a Biblical Virtue Could Transform United States Immigration Policy*, 83 U. DET. MERCY L. REV. 857 (2005) (discussing how the biblical command of hospitality toward the stranger should lead to a reconsideration of several current immigration policy changes).

<sup>128</sup> *Id.* at 857–58.

leave his native land for various motives—and also the right to return—in order to seek better conditions of life in another country . . . the person working away from his native land . . . should not be placed at a disadvantage in comparison with the other workers in that society in the matter of working rights.”<sup>129</sup> The way that each religious group interprets these teachings through its own social agenda is beyond the scope of this Article, but the concept of hospitality to strangers presents yet another vision that competes with a narrow view of unauthorized workers only as lawbreakers.

A final factor militating in favor of unauthorized migrant workers as rights-holders is the fact that migrant workers are of enormous economic importance to their countries of origin. In 2005, migrant-worker remittances to the developing world totalled \$166.9 billion.<sup>130</sup> In the U.S.-Mexican context, for example, remittances from expatriate nationals exceed foreign direct investment in the Mexican economy.<sup>131</sup> Remittances to Mexico in 2006 were estimated to exceed \$25 billion,<sup>132</sup> forming 2% of the Mexican gross domestic product.<sup>133</sup> This economic and political importance means that many sending countries advocate for unauthorized workers *qua* rights-holders, challenging countries like the United States to endorse a similar vision of this population.

The transnational nature of migrants, the humanitarian crisis involved, the uniformity of the problem around the industrialized world, sending-country concerns, and U.S. concerns such as public health and equal workplace rights help to explain why a vision of unauthorized workers as rights-holders persists and is growing in international law. The next Section discusses how U.S. advocates are using the new international standards.

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<sup>129</sup> POPE JOHN PAUL II, *LABOREM EXERCENS*, at para. 23 (1981).

<sup>130</sup> WORLD BANK, *GLOBAL ECONOMIC PROSPECTS: ECONOMIC IMPLICATIONS OF REMITTANCES AND MIGRATION*, at 88 (World Bank) (2006).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at Data Chart.

<sup>133</sup> Roberto Coronado, *Workers' Remittances to Mexico*, in FED. RESERVE BANK OF DALLAS, *EL PASO BUSINESS FRONTIER*, available at <http://www.dallasfed.org/research/busfront/bus0401.pdf>; CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK: MEXICO*, <https://www.cia.gov/library/publications/the-world-factbook/geos/mx.html> (last visited Oct. 22, 2007).

2.5. *The U.S. Unauthorized Immigrant Worker Rights Movement Is "Broadcasting" But Not "Importing"*

There is a vibrant reform movement concerned with the rights of unauthorized immigrant workers. This community engages seven major advocacy areas: (1) immigration, primarily the efforts to expand labor immigration opportunities, create immigration options for victims of trafficking and other crimes, advocate for regularization of status for the current undocumented population, and due process in removal proceedings;<sup>134</sup> (2) protection for human life on the border;<sup>135</sup> (3) equal employment law protections, such as workers' compensation and employment discrimination;<sup>136</sup> (4) labor rights protections such as the right to participate in union activity;<sup>137</sup> (5) access to services directly related to work, such as the right to counsel, access to drivers license regimes, and banking services;<sup>138</sup> (6) access to other services, such as emergency health care, or education for workers' children;<sup>139</sup> and (7) resisting the involvement of states and municipalities in criminal prosecution of crimes attendant upon the act of securing unauthorized work.<sup>140</sup>

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<sup>134</sup> See AMERICAN IMMIGRATION LAWYERS ASS'N, MAKING THE CASE FOR COMPREHENSIVE IMMIGRATION REFORM, <http://www.aila.org/content/fileviewer.aspx?docid=21713&linkid=157219> (last visited Oct. 22, 2007) (advocating for comprehensive immigration reform).

<sup>135</sup> See Human Rights Watch, Immigration/Treatment of Non-Citizens, [http://www.humanrightswatch.org/doc/?t=usa\\_noncitizens](http://www.humanrightswatch.org/doc/?t=usa_noncitizens) (last visited Oct. 22, 2007) (detailing the human rights violations suffered by immigrants to the United States); Immigrant Solidarity Network for Immigrant Rights, 2006 Report on Migrant Deaths at the U.S.-Mexico Border (Nov. 18, 2006), <http://www.immigrantsolidarity.org/cgi-bin/datacgi/database.cgi?file=Issues&report=SingleArticle&ArticleID=0646> (last visited Oct. 22, 2007) (criticizing the new border enforcement strategies that have lead to an increase in immigrant deaths).

<sup>136</sup> See National Employment Law Project, Immigrant-Nonstandard Project, <http://www.immigrant-nonstandard.org/index.php> (last visited Oct. 22, 2007) (describing advocacy of equal employment opportunity for unauthorized immigrants).

<sup>137</sup> See United Farm Workers, <http://www.ufw.org> (last visited Oct. 22, 2007) (advocating union participation for farm workers).

<sup>138</sup> See National Immigration Law Center, Immigrants and Public Benefits, <http://www.nilc.org/immspbs/index.htm> (last visited Oct. 22, 2007) (providing a comprehensive listing of information regarding immigration issues).

<sup>139</sup> See NAT'L IMMIGRATION LAW CENTER, DREAM ACT: BASIC INFORMATION (2007), available at [http://www.nilc.org/immlawpolicy/DREAM/dream\\_basic\\_info\\_0406.pdf](http://www.nilc.org/immlawpolicy/DREAM/dream_basic_info_0406.pdf) (describing proposed legislation that addresses the needs of undocumented immigrant children who have been raised in the United States and providing for legal residency under certain conditions).



The most widespread recent manifestation of these parallel movements was the nationwide series of demonstrations over the winter and spring of 2006 to protest proposed restrictive immigration measures.<sup>141</sup> This list of advocacy campaigns represents a swath of policy areas, and the ensuing analysis examines workplace rights.

A number of organizations loosely coordinate the immigrant worker rights movement's litigation and legislative advocacy.<sup>142</sup> These are the organizations that de la Vega, the present Author, and others are urging to expand their limited resources and utilize international law standards in their work. As the following section describes, their response to that call has been mixed. Catalyzed by the international response to *Hoffman Plastic Compounds*, the employment rights movement has made a particular effort to educate intergovernmental human rights bodies about the situation in the United States. However, to date, none of these movements has made a concerted effort to include international standards in its domestic litigation strategy.

To date, the U.S. advocates have used international standards and institutions almost exclusively for the purpose of "broadcast-

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<sup>140</sup> See American Immigration Lawyers Association, State and Local Advocacy Resources, <http://www.aila.org/content/default.aspx?docid=21577> (last visited Oct. 22, 2007) (providing tools to help advocate immigrant rights amongst communities).

<sup>141</sup> See Ines Ferre et al., *Thousands March for Immigrant Rights*, CNN, May 1, 2006, <http://www.cnn.com/2006/US/05/01/immigrant.day/index.html> (describing a series of marches that took place nationwide to protest current immigration policy); see also Sheryl Gay Stolberg, *After Immigration Protests, Goal Remains Elusive*, N.Y. TIMES, May 3, 2006, at A1 (quantifying the number of people in support of immigrant rights and protested against the current administration's immigration policy).

<sup>142</sup> See generally Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417 (2005-2006) (exploring the role of "worker centers" in the struggle of immigrant labor rights). The following groups have shown particular leadership in recent years in coordinating work in these topic areas as they relate to unauthorized immigrant workers: American Civil Liberties Union (ACLU) (resisting criminalization), Pennsylvania Immigration and Citizenship Coalition (immigration; resisting criminalization), National Employment Law Project Immigrant Worker Project (employment law); Immigrant Worker Program, American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) Immigrant Worker Program (labor, employment law and immigration); National Immigration Law Center (immigration and services); American Immigration Law Association, and American Immigration Law Foundation (immigration); Brennan Center for Justice (right to counsel); American Bar Association (immigration and right to counsel); Farmworker Justice Fund (legalization and expansion of guestworker programs; employment rights litigation); U.S. Catholic Conference of Bishops (immigration).

ing" to international actors about the situation of unauthorized workers in this country.<sup>143</sup> For example, several cases filed with the North American Agreement on Labor Cooperation (NAALC), a forum created by the North American Free Trade Agreement, dealt with the freedom of association rights of migrant workers.<sup>144</sup> More recently, U.S. advocates participated in proceedings of the Organization of American States Inter-American Court of Human Rights<sup>145</sup> and Inter-American Commission on Human Rights,<sup>146</sup> the United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of their Families,<sup>147</sup> and the United Nations General Assembly "High-level Dialogue on International Migration and Development."<sup>148</sup> Participation took the form of briefs *amicus curiae*, situation reports, and presentations. In 2003, in response to a complaint filed by the AFL-CIO and the Conference of Mexican Workers, the International Labour Organization Committee on Freedom of Association ruled that the decision in *Hoffman Plastic Compounds* violated the international right to freedom of association.<sup>149</sup> Human Rights Advocates, a California-based

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<sup>143</sup> This work also represents what some have termed "worst-practices international law formation" because the broadcasting activities described here highlighted *violative* or negative government behaviors rather than highlighting best practices as examples for potential replication through international fora or domestic movements of other countries.

<sup>144</sup> See NORTH AMERICAN AGREEMENT ON LABOR COOPERATION, SUMMARY OF PUBLIC COMMUNICATIONS (2004), [http://www.naalc.org/english/pdf/pcommtable\\_en.pdf](http://www.naalc.org/english/pdf/pcommtable_en.pdf) (listing matters brought to the forum, including many cases involving the right to organize).

<sup>145</sup> Lyon, *Comment on OC-18*, *supra* note 124, at 549.

<sup>146</sup> See Petitioner's Petition Alleging Violations of the Human Rights of Undocumented Workers by the United States of America (on file with Author); INTER-AMERICAN COMM'N ON HUMAN RIGHTS, SEVENTH PROGRESS REPORT OF THE SPECIAL RAPPORTEURSHIP ON MIGRANT WORKERS AND THEIR FAMILIES, FOR THE PERIOD BETWEEN JANUARY AND DECEMBER 2005, *available at* <http://www.cidh.org/annualrep/2005eng/chap.5.htm> (asserting support for migrant worker rights by the IACHR).

<sup>147</sup> Written submission of Rebecca Smith and Sarah Paoletti to Office of the United Nations High Comm'r for Human Rights, Committee on Migrant Workers (Oct. 30, 2005), *available at* <http://www.ohchr.org/english/bodies/cmw/docs/day.pdf> (last visited February 11, 2007).

<sup>148</sup> G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Feb. 25, 1991).

<sup>149</sup> Complaints Against the Government of the United States presented by the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM), Case No. 2227, GB.288/7 paras. 551-613 (November 2003), *available at* <http://www.ilo.org/public/english/standards/relm/gb/docs/gb291/pdf/gb-7.pdf> [hereinafter *ILO Decision on Hoff-*

group, has presented numerous reports to the United Nations on the rights of unauthorized workers.<sup>150</sup>

Interestingly, although their work has contributed to the formation of new international law, no U.S. migrant worker rights advocates appear to be utilizing international standards or internationalized strategies in their *domestic* legal advocacy.<sup>151</sup> The most telling example of this reality is the fact that no international law arguments were presented to the courts in the key recent cases discussed above, namely *Hoffman Plastic Compounds*,<sup>152</sup> *Sanchez v. Eagle Alloy*,<sup>153</sup> and *Medellín v. Cashman*.<sup>154</sup> *Lassiter v. Department of Social Services*, a 1981 U.S. Supreme Court opinion, decided an issue of similar importance to unauthorized workers by denying a right to civil counsel,<sup>155</sup> also without benefit of arguments on the considerable comparative foreign and international law on point.<sup>156</sup>

There are several reasons for the omission of international and comparative arguments in these cases. The most important is that the United States has been slow to embrace and apply international standards, making the relative investment of time and resources seem disproportional to any likely gain to advocates. One of the goals of the instant article is to challenge this perception. Another reason for the omission of international arguments from domestic advocacy for unauthorized workers is that most of the detailed international standards for the unauthorized are of relatively recent

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*man Plastics*] (expressing regret at the United States' failure to report on its implantation of the 2003 ruling).

<sup>150</sup> See Written Submission of Kristina Zinnen to Comm. on the Status of Women, 49th Session (Feb. 21, 2005), available at <http://www.humanrightsadvocates.org/UN%20interventions%20list1.htm>.

<sup>151</sup> See generally de la Vega, *supra* note 90, at 72 (stating that "it is important that attorneys understand and make use of international human rights law to avoid further deprivation of migrant worker rights.").

<sup>152</sup> See Brief for Migration Policy Institute as Amici Curiae, 535 U.S. 137, (2002) (No. 00-1595); Brief for American Civil Liberties Union Foundation as Amici Curiae, 535 U.S. 137, (2002) (No. 00-1595) (supporting the Petitioner's argument that "undocumented aliens . . . who extend their unlawful stay" should be denied backpay).

<sup>153</sup> *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510 (Mich. Ct. App. 2003).

<sup>154</sup> See *Medellín v. Cashman KPA*, Bd. No. 03324300, (Mass. Dep't of Indus. Accidents, Dec. 23, 2003), available at <http://www.mass.gov/dia/PUBS/REVIEWS/03D/GuillermoMedellin.htm> (reviewing board decision).

<sup>155</sup> *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981) (reaffirming the principle that indigent litigant only has a right to counsel if at risk of losing her physical liberty).

<sup>156</sup> Smith, *supra* note 69, at 285.

pedigree, as discussed in the next Section. Moreover, comparative standards that would reflect how foreign governments handle the rights of unauthorized workers are nearly impossible to locate and access.<sup>157</sup> They are lost in the detail of foreign administrative decisions and obscured by politics. Moreover, advocacy resources for unauthorized workers, always relatively small, contracted sharply in the wake of the Legal Service Corporation de-funding of legal work for undocumented residents.<sup>158</sup> For example, after the federal de-funding action, Friends of Farmworkers, one of Pennsylvania's two farmworker legal aid projects in operation at the time, decided to give up LSC funding so that it could continue representing the undocumented. As a result, Friends of Farmworkers closed its two rural offices and fired staff members in order to keep operating.<sup>159</sup> In this climate, when fewer clients can be served, it has been difficult to justify devoting resources to developing creative international law arguments.

### 3. HOW INTERNATIONAL LAW SUPPLEMENTS EXISTING U.S. RIGHTS FOR THE UNAUTHORIZED

The following section explains the legal stakes involved in the effort to bring the United States into conformity with international standards on the rights of migrant workers. New international standards and some known foreign laws militate against each of the three U.S. policies described above: differential substantive employment rights, lesser remedies, and lack of special protection for the unauthorized. The Section begins by describing how U.S. courts make use of international and foreign law to effect social change. The Section discusses why labor migration has become a question of human rights and then identifies three international law principles on unauthorized immigrant workers and evaluates their potential implications for U.S. law.

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<sup>157</sup> See Beth Lyon, *New International Human Rights Standards on Unauthorized Immigrant Worker Rights: Seizing an Opportunity to Pull Governments Out of the Shadows*, in Anne Bayefsky, Ed., *HUMAN RIGHTS AND REFUGEES, INTERNALLY DISPLACED PERSONS AND MIGRANT WORKERS* 551, 571-80 (2006) [hereinafter Lyon, *Pulling Governments out of the Shadows*].

<sup>158</sup> See 45 C.F.R. § 1626.3 ("Except as provided in § 1626.4, recipients may not provide legal assistance for or on behalf of an ineligible alien.").

<sup>159</sup> Presentation by Sol Maria Rivera, Paralegal, Friends of Farmworkers (September 6, 2007).

### 3.1. U.S. Courts Are Using International and Foreign Law to Effect Social Change

A dominant image in the United States' self-conception is the "moral beacon,"<sup>160</sup> or, in the words of the late President Gerald Ford, "a stronghold and a beacon-light of liberty for the whole world."<sup>161</sup> By this view, ours is a country that leads the world through the examples of its ground-breaking constitutional design, capitalist economy, and ample fundamental freedoms. This vision seems to leave little room for improvement in the United States through the interventions of international law or institutions, or foreign examples. Indeed, the United States' historic distaste for external influences manifests itself in U.S. civil rights law in many ways, including our relatively limited ratification of international human rights treaties in comparison with other industrialized countries,<sup>162</sup> its many instances of disobeying international rulings,<sup>163</sup> legal doctrines that limit the influence of international

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<sup>160</sup> See David Golove, *Human Rights Treaties and the U.S. Constitution*, 52 DEPAUL L. REV. 579, 579 (2002) (noting that the self-conception of the United States as "a moral beacon for the rest of the world has deep roots in U.S. history and seems as strong today as it has ever been").

<sup>161</sup> Gerald R. Ford, President of the United States, Address Before a Joint Session of the Congress Reporting on the State of the Union (January 15, 1975), available at <http://www.ford.utexas.edu/LIBRARY/speeches/750028.htm>.

<sup>162</sup> "Limited ratification" refers both to the low number of human rights treaties that the U.S. has ratified and to the limitations imbedded in those ratifications that the Senate has recommended, in the form of reservations, understandings and declarations limiting the impact of the treaties on U.S. domestic law. See Golove, *supra* note 160, at 580–82 (discussing the United States' hesitance to ratify human rights treaties); see also NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION 204–05 (UNIV. OF N.C. PRESS 1990) (providing a "typology of arguments against U.S. ratification of human rights treaties").

<sup>163</sup> Jenny S. Martinez, *Enforcing the Decisions of International Tribunals in the U.S. Legal System*, 45 SANTA CLARA L. REV. 877, 888 (2005) (citing examples of the United States' refusal to implement international rulings, and stating that "[t]he United States has demonstrated neither consistent obedience, nor consistent disregard for [international institutions]"); see also John Quigley, *The New World Order and the Rule of Law*, 18 SYRACUSE J. INT'L L. & COM. 75, 79–80 (noting that for the rule of law to spread in the world community, states must adhere to internationally acceptable rules for adjudicating their disputes). However, when the Regan Administration learned that Nicaragua planned to sue the U.S. for acts of aggression against Nicaragua, the Administration withdrew from the International Court of Justice's jurisdiction. The Administration cited the threat to U.S. security as a reason for the withdrawal.

standards on U.S. law,<sup>164</sup> and U.S. advocates' frequent omission of international standards from the arguments they raise on behalf of their clients.<sup>165</sup>

Thus, actors in the U.S. legal system who wish to invoke authority arising outside the domestic context face special legal and psychological barriers. However, a recent survey reports "a sharp increase . . . in citations to U.N. documents" by primarily federal and also state courts.<sup>166</sup> The study reported that there were more citations between 2001 and 2005 than *all* the references in the previous fifteen years. Moreover, international and comparative standards have a role in the history of U.S. civil rights and social reform, yielding a record that may be instructive for the future legal treatment of unauthorized immigrant workers in this country.

### 3.2. *References to International and Foreign Law in Recent Civil Rights Decisions*

In a widely discussed development,<sup>167</sup> the U.S. Supreme Court recently made reference to foreign and international law in several opinions that expanded civil rights. In *Roper v. Simmons*, Justices Kennedy, Breyer, Ginsburg, Souter, and Stevens referred to "the overwhelming weight of international opinion" in the course of banning the imposition of capital punishment for criminal acts committed by juveniles.<sup>168</sup> The *Roper* Court treated international

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<sup>164</sup> Examples of U.S. legal doctrines that limit the effect of international law in the United States include the "non-self-executing" treaty doctrine, under which a ratified treaty may be unenforceable in U.S. courts without implementing legislation, and the "last-in-time" rule, under which a ratified treaty provision can be overruled by later conflicting domestic legislation. See FRANCISCO FORREST MARTIN, CHALLENGING HUMAN RIGHTS VIOLATIONS: USING INTERNATIONAL LAW IN U.S. COURTS 9-17 (Transnational Publishers) (2001) (describing the self-executing treaty doctrine and the last-in-time rule); Michael Garcia and Arthur Traldi, CRS REPORT FOR CONGRESS, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 5-7 (2004) (exploring "the roles that international law and agreements play in the United States).

<sup>165</sup> See, e.g., MARTIN, *supra* note 164 at xv-xvi (noting that few American lawyers regard international law as relevant to U.S. law and that they often perceive it as "soft" or "not deserving serious attention by legal practitioners").

<sup>166</sup> Paul Hellyer, *U.N. Documents in U.S. Case Law*, 99 L. LIBRARY J. 73, 85 (2007).

<sup>167</sup> See Roger P. Alford, *Four Mistakes in the Debate on "Outsourcing Authority,"* 69 ALB. L. REV. 653, 656-64 (2006) (discussing scholars and other participants in the debate over whether or not references to the practices of non-U.S. jurisdictions are appropriate).

<sup>168</sup> *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

opinion, in the form of foreign law and treaties, as “respected and significant confirmation for our own conclusions.”<sup>169</sup> In *Lawrence v. Texas*, Justices Kennedy, Stevens, Souter, Ginsburg, and Breyer referred to European Court of Human Rights case law and the law of “many other countries” to rebut an assertion of a preceding Supreme Court decision that had cited a survey of constitutions and found proscriptions of sodomy to have “ancient roots.”<sup>170</sup> In *Atkins v. Virginia*, Justices Stevens, O’Connor, Kennedy, Souter, Ginsburg, and Breyer referred to the “overwhelming[] disapprov[al]” of the “world community” in the course of banning the imposition of the death penalty on mentally retarded defendants.<sup>171</sup> State courts also cite international and foreign law by treating it as persuasive authority.<sup>172</sup> Many state constitutions include social protections that have no analogue in the federal constitutions, and international law is a natural interpretive source.<sup>173</sup>

As argued in detail in Section 4 below, reference to international and foreign law as a persuasive authority is a flexible jurisprudential tool that is particularly suited to the issues raised in unauthorized immigrant worker cases. Drawing on the emerging literature about U.S. courts and international and comparative law, the article argues that particular factors will affect U.S. courts’ examination of new standards on unauthorized workers. In particular, courts have shown that they are most amenable to considering international and comparative standards in cases involving a single, broad principle of law. U.S. courts have also shown a preference for using international law as a proxy for comparative practice rather than as a body of standards binding on this country. At the same time, courts have also been willing to take this preference for interpretive flexibility to the point of acknowledging relatively

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<sup>170</sup> See *Lawrence v. Texas*, 539 U.S. 558, 560, 576–77 (2003) (characterizing *Bowers v. Hardwick*, 478 U.S. 186 (1986) as having “relied on values shared with a wider civilization”). Justice O’Connor concurred in the opinion but did not incorporate international or foreign law into her analysis. See *id.* at 579 (providing Justice O’Connor’s conclusion based on an analysis of the Fourteenth Amendment’s Equal Protection Clause).

<sup>171</sup> *Atkins v. Virginia*, 536 U.S. 304, 316, n.21 (2002).

<sup>172</sup> See Martha Davis, *The Spirit of Our Times: State Constitutions and International Human Rights* (Ne. Univ. Sch. of L. Pub. Law & Legal Theory Research Paper Series, Paper No. 02-2006, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=908283](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=908283) (citing Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT’L L. REV. 555, 556–57 (2002)).

<sup>173</sup> See *id.* at 571–74.

scant evidence of comparative practice rather than insisting on a uniform global practice, particularly if they can detect a trend.

### 3.3. *Three International Law Principles on Unauthorized Immigrant Workers and Implications for U.S. Law*

U.S. courts looking to transnational law for guidance in the treatment of unauthorized immigrant workers will find three important supplementary principles arising from a variety of sources. To facilitate the U.S. domestic-lens analysis in Section 4 below, the following Section focuses largely on the substantive and theoretical implications of these three principles rather than describing and analyzing the respective sources. The three principles are: (1) the right to equal protection and equality before the law dictates equal treatment under all employment laws regardless of immigration status; (2) remedies as well as worker rights must be equally granted regardless of immigration status; and (3) the right to equal protection and equality before the law further dictates additional, protective measures for unauthorized workers because of their vulnerability.

“International law” and “transnational law” are simple terms for a complex welter of standards, rulings, and actions taken at the international, regional, and national level,<sup>174</sup> and transnational

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<sup>174</sup> See FRANCISCO FORREST MARTIN ET AL., *INTERNATIONAL HUMAN RIGHTS & HUMANITARIAN LAW* 6–7 (Cambridge University Press 2006) (noting that these standards, rulings, and actions proclaimed a broad array of basic rights that today are monitored by two U.N. Committees: the Human Rights Committee and the Committee on Economic, Social, and Cultural Rights). In the intervening decades, each of these interrelated but distinct regimes has continued to promulgate more specialized standards focused on particular problems and populations. See CERD, *supra* note 112 (explaining the stance of the United Nations on racial discrimination); see also CEDAW, *supra* note 113 (explaining the stance of the United Nations on discrimination against women); CRC, *supra* note 114 (explaining the stance of the United Nations on children’s rights); U.N. Migrant Worker Convention, *supra* note 115 (explaining the stance of the United Nations on migrant workers’ rights); CAT, *supra* note 111 (explaining the stance of the United Nations on torture and cruel punishment). Meanwhile, the primary international protections for refugees, workers, and people in wartime remain largely in the regimes that had been established before the war, and are now in some way associated or cooperative with the United Nations. Three regional regimes arose in parallel to the Universal Declaration on Human Rights, through the American Declaration on the Rights and Duties of Man (later detailed in the American Convention on Human Rights), the African [Banjul] Charter on Human and Peoples’ Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American*



standards on unauthorized immigrant worker rights are no exception. Each of the sources for the three transnational concepts highlighted in this Article is quite institutionally distinct and claims a unique legal relationship to the United States.<sup>175</sup> It is beyond the scope of this Article to detail all of these nuances. Rather, the present Article seeks to bridge two scholarly debates: the use of international law in U.S. courts and human rights for unauthorized workers.

Most of the scholarship examining the international standards for unauthorized workers, including this Author's, focuses to a greater extent on these complexities, using traditional international legal analytical methodology and assessing each new standard's documentary and institutional source, and the level of international acceptance of each source.<sup>176</sup> The second analytical mode typical to international law scholarship, also beginning to emerge in relation to standards for the unauthorized workers, is to discern whether, and at what level, a particular country has committed itself to be bound by the international rule in question. These analyses represent an important ongoing discussion, but again, they are beyond the scope of the present Article. This Article merely references the emerging debate about the jurisdictional reach and implications of these standards, rather than engaging with it. The goal of the present Article is to provide a first assessment of the new standards for unauthorized workers through the lens of the U.S. courts' shifting bases for incorporating transnational law into domestic jurisprudence.

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System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 [hereinafter ADRDM]; African [Banjul] Charter on Human and Peoples' Rights, *adopted* 27 June 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) [hereinafter African Charter]; European Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention]. Each of these regimes also promulgates specialized standards to address regional concerns. A network of jurisprudential rivers and streams runs between all of these bodies as they interpret their founding documents. MARTIN ET AL., *supra*, at 46-70.

<sup>175</sup> See ICCPR, *supra* note 110; U.N. Migrant Worker Convention, *supra* note 115. See also the Inter-American Court of Human Rights; International Labour Organization Conventions; International Labour Organization Committee on Freedom of Association, and a broad array of domestic legal norms.

<sup>176</sup> See Bosniak, *supra* note 126; de la Vega, *supra* note 90; Lyon, *Comment on OC-18*, *supra* note 124; Brief for Ctr. For Int'l Human Rights of Northwestern Sch. Of Law as Amici Curiae Supporting Petitioner, Juridical Condition and Human Rights of the Undocumented Migrants, 2003 Inter-Am. Ct. H.R. (Ser. A) No. 18 (Feb. 21, 2003) [hereinafter Northwestern Brief].

One international law point usefully introduces the three principles: the distinction between migration policy and employment/labor policy. International law explicitly and unanimously views substantive migration policy – the body of law determining what foreign nationals may enter and remain inside a country – as a matter of strict national sovereignty, limited only by narrow requirements such as: (1) foreign nationals must not be returned to countries where they would experience persecution or torture;<sup>177</sup> (2) they must have due process when being expelled;<sup>178</sup> and (3) they must be permitted consular access when they are criminally prosecuted.<sup>179</sup> There are many well-reasoned critiques of national migration policies, among them decisions about entry opportunities based on national origin (in the United States, visas for Cubans versus Haitians is a common flashpoint),<sup>180</sup> the sharp distinction, for migration purposes, between “skilled” and “unskilled” workers,<sup>181</sup> the refusal to offer citizenship to children born and/or raised in the relevant country,<sup>182</sup> the decision not to allow family migra-

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<sup>177</sup> See Joan Fitzpatrick, *The Human Rights of Migrants*, in *MIGRATION AND INT'L LEGAL NORMS* 169, 178 (T. Alexander Aleinikoff & Vincent Chetail ed., 2003).

<sup>178</sup> See *id.* at 178–79 (noting that “[h]uman rights norms relating to the expulsion of migrants are essentially procedural. . .”).

<sup>179</sup> See Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261; see also *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27) (holding that by not informing German nationals of their rights under Article 36, paragraph 1(b) of the Vienna Convention on Consular Relations, and thereby depriving Germany of the possibility to assist the individuals concerned, the United States breached its obligations to Germany); Advisory Opinion: *The Right to Information on Consular Assistance in the Framework of the Guarantee of the Due Process of Law*, 1999 Inter-Am. Ct. H.R. (ser. A) OC No. 16 (Oct. 1, 1999) (advising on the requirement of due process when a court sentences foreign nationals to death).

<sup>180</sup> See Thomas David Jones, *A Human Rights Tragedy: The Cuban and Haitian Refugee Crises Revisited*, 9 *GEO. IMMIGR. L.J.* 479, 485–95 (1995) (describing how Haitians have historically been denied immigration to the United States (or faced significant delays), while Cubans have more easily been able to achieve entry and family reunification); see also Cheryl Little, *United States Haitian Policy: A History of Discrimination*, 10 *N.Y.L. SCH. J. HUM. RTS.* 269, 289 (1993) (describing the disparity in the United States' treatment of Haitian and Cuban refugees).

<sup>181</sup> See Section 2.1 (demonstrating the lack of available labor visas as compared with professional visas).

<sup>182</sup> A policy of refusing citizenship to the children born in the receiving country territory to foreign nationals is called *jus sanguinis*. *Jus solis* is the practice of granting citizenship based on place of birth. See e.g. Kif Augustine-Adams, *Gendered States: A Comparative Construction of Citizenship and Nation*, 41 *VA. J. INT'L L.* 93, 120 (2000) (noting that Japan establishes citizenship via *jus sanguinis*, not *jus solis*); see also Berta Hernández-Truyol & Justin Luna, *Children and Immigration: International, Local, and Social Responsibilities*, 15 *B.U. PUB. INT. L.J.* 297, 309–10 (2006) (noting that legislation has been drafted to implement a policy of *jus sanguinis* in

tion to non-traditional (extended or non-heterosexual) family units,<sup>183</sup> the problem of extended wait times for family unification,<sup>184</sup> and lengthy periods of detention coupled with detention of vulnerable immigrants.<sup>185</sup> Immigration policies like these are found in nearly every country and arguably result in human suffering disproportionate to the underlying policy goals, but they are, simply put, off the radar for international law.<sup>186</sup> So far as international human rights law is concerned, substantive migration policy, if administered in a manner that respects *nonrefoulement* and due process, is strictly the concern of national governments.<sup>187</sup>

Thus unauthorized workers can claim only very limited migration rights. For example, international law does not mandate immigration amnesties for unauthorized workers,<sup>188</sup> nor the right for their families to join them, though a moral and political case could be made for such rights. International law does, however, make a distinction between migration policy and labor/employment policies, and it is much less wary about intruding in the latter area. Labor rights are of historic concern for the international community and have evolved into a body of detailed international law standards protecting workers.<sup>189</sup> It stands to reason, then, that the

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the United States, therefore denying U.S. citizenship to children of undocumented mothers).

<sup>183</sup> Desiree Alonso, *Immigration Sponsorship Rights for Gay and Lesbian Couples: Defining Partnerships*, 8 CARDOZO WOMEN'S L.J. 207, 213-14 (2002) (providing an overview of the "mechanics of spousal sponsorship," which may be required for family reunification in the United States).

<sup>184</sup> Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701, 722-24 (2005) (noting that numerous international human rights documents acknowledge the right to maintain a regular family life, including keeping the family unit intact.)

<sup>185</sup> See, e.g., Victoria Cook Capitaine, *Life in Prison Without a Trial: The Indefinite Detention of Immigrants in the United States*, 79 TEX. L. REV. 769, 782 (2001) (citing the substantial increase in the length of confinement of alien detainees).

<sup>186</sup> See, e.g., Fitzpatrick, *supra* note 177, at 174 (stating that *jus sanguinis* is not sanctioned by the ICCPR Article 24(3) right of the child to acquire a nationality).

<sup>187</sup> See Lyon, *Comment on OC-18*, *supra* note 124. For example, a country may decide to admit a low number of foreign nationals of a particular country, but may not engage in extrajudicial killing or other abuses in preventing their entry.

<sup>188</sup> For example, Article 35 of the Migrant Workers' Convention states that: "Nothing in the present part of the Convention shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation." U.N. Migrant Worker Convention, *supra* note 115, art. 35.

<sup>189</sup> See A. LEROY BENNETT, *INTERNATIONAL ORGANIZATIONS: PRINCIPLES AND ISSUES* 335-39 (Prentice Hall, 5th ed. 1991) (noting that the ILO has its origins in

three principles highlighted here arose from the evolution of rights for unauthorized immigrant workers *qua* workers, attaching once the protected subject has already entered the receiving country and secured employment.

### 3.3.1. *Emerging International Law Prohibits Employment Law Exclusions*

An unauthorized worker's international rights to equal workplace treatment are an increasingly well established proposition, challenging governments to bring the unauthorized to the level of nationals in the workplace. Professor Joan Fitzpatrick called equal workplace protections for unauthorized workers "perhaps the least controversial [migrants' social rights] norm."<sup>190</sup> One reason for the widening acceptance of this principle is that the generic right to equal protection is a cornerstone of international human rights law.<sup>191</sup> Nowhere in international law is the right to equal protection conditioned or limited by immigration status. As one might expect, standard international law sources *do* condition selected substantive political rights on immigration status; for example, the right to vote and to run for elective office.<sup>192</sup> The vast majority of human rights norms, however, carry no such limitation.<sup>193</sup> Thus the establishment of rights for unauthorized migrant workers presents two analytical problems to the international community: should established international worker rights, such as freedom of

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the Treaty of Versailles of 1919, and, alongside the League of Nations, began a "movement to further world order through international cooperative institutions.")

<sup>190</sup> Fitzpatrick, *supra* note 177, at 180.

<sup>191</sup> Sarah H. Cleveland, *Legal Status and Rights of Undocumented Workers: Advisory Opinion OC-18/03*, 99 AM. J. INT'L L. 460, 463 (2005) (noting that the ILO, UN, and the Inter-American Court of Human Rights have each issued rulings and conventions citing the importance of rights for workers—whether documented or not); *see also* OC-18, *supra* note 124; ICCPR, *supra* note 110, arts. 2, 3 and 26.

<sup>192</sup> *See* ICCPR, *supra* note 110, art. 25. (stating that the right to vote and be elected is conferred to citizens only).

<sup>193</sup> *See, e.g.*, ICCPR, *supra* note 110, arts. 6 (right to life), 7 (prohibition on torture and cruel, inhuman or degrading treatment or punishment), 8 (prohibition on slavery), 10 (humane treatment of prisoners), 11 (imprisonment for contractual debt), 12(2) (right to leave the country), 14 (equality before the law and right to a fair trial), 15 (prohibition on retroactive criminal penalties), 16 (recognition as a person before the law), 18 (freedom of thought, conscience and religion), 19(1) (freedom of opinion), 23 (right to marry), 24 (protection for children), 27 (right to culture). *See also* Fitzpatrick, *supra* note 177, at 173 (describing the nature of rights within ICCPR).

association, be equally accorded to the unauthorized, given the lack of limiting language in the founding documents, and should workplace protections that arguably are not international rights, for example workers' compensation, be equally accorded to the unauthorized as a matter of international equal protection?

In 2003, the Inter-American Court of Human Rights issued an advisory opinion answering both questions in the affirmative. The Court held that the international right to equality before the law requires that *all* worker protections be equally granted to unauthorized as well as all other workers.<sup>194</sup> The Court held

[t]hat the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature. When assuming an employment relationship, the migrant acquires rights that must be recognized and ensured because he is an employee, irrespective of his regular or irregular status in the State where he is employed[.] These rights are a result of the employment relationship.<sup>195</sup>

In 2004, the United Nations Committee on the Elimination of Racial Discrimination interpreted the International Convention on the Elimination of all Forms of Racial Discrimination, stating that unauthorized workers "are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated."<sup>196</sup>

Additional authority underscores *OC-18* and the 2004 interpretation of the CERD by requiring equal national treatment in selected employment rights for unauthorized workers. These sources include the U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, International Labour Organization (ILO) Convention 143, recent decisions of the ILO Committee on Freedom of Association, and a growing body of recorded laws in other countries.

Some important examples of the "national treatment" em-

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<sup>194</sup> *OC-18*, *supra* note 124.

<sup>195</sup> *See OC-18*, *supra* note 124, para. 173(8).

<sup>196</sup> OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, *General Recommendation No. 30: Discrimination Against Non Citizens* (Jan. 10, 2004), available at <http://www.unhchr.ch/tbs/doc.nsf/0/e3980a673769e229c1256f8d0057cd3d?Opendocument>.

ployment rights these sources protect include: (1) the prohibition on involuntary labor<sup>197</sup> and its natural adjunct, the right to "fair wages for work performed,"<sup>198</sup> (2) freedom of association, union and negotiation rights,<sup>199</sup> (3) participation in social security schemes,<sup>200</sup> or the right to recover social security contributions<sup>201</sup>; (4) overtime and "a working day of reasonable length,"<sup>202</sup> "weekly rest [and] holidays with pay;"<sup>203</sup> (5) "adequate working conditions," including safety and health protections;<sup>204</sup> and (6) the right to enforce an employment contract, including a contractual protection against dismissal.<sup>205</sup>

This vision of equal protection offers a new direction for U.S. workplace laws that condition coverage on immigration status. A detailed substantive analysis of U.S. law in light of these standards is outside the scope of this Article. However, it seems clear that bringing U.S. law fully into compliance with these standards would result in some important changes. In particular, and with reference to the discussion above, the United States would have to reconsider its treatment of social security contributions by the unauthorized, social security disability coverage for disabled unauthorized workers, and the exclusion of immigrants from unemployment and workers' compensation coverage. Continuing

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<sup>197</sup> See *OC-18*, *supra* note 124, para. 157; see also U.N. Migrant Worker Convention, *supra* note 115, art. 11 (prohibiting the use of forced labor on migrant workers).

<sup>198</sup> See *OC-18*, *supra* note 124, para. 157; U.N. Migrant Worker Convention, *supra* note 115, art. 25; ILO Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (Convention 143), June 24, 1974, available at <http://www.ilo.org/ilolex/english/convdisp1.htm> (granting migrant workers rights to treatment equal to that of nationals) [hereinafter ILO 143].

<sup>199</sup> See *OC-18*, *supra* note 124, para. 157; Complaint Against the Government of Spain Presented by General Union Workers of Spain (UGT), Case No. 2121, GB.28318, paras. 548-62 (Int'l Lab. Org. Comm. On Freedom of Ass'n 2002) [hereinafter *Case No. 2121*]; ILO Decision on Hoffman Plastic, *supra* note 149; U.N. Migrant Worker Convention, *supra* note 115, art. 26 (granting migrant workers the right to join a trade union).

<sup>200</sup> *OC-18*, *supra* note 124, para. 157; U.N. Migrant Worker Convention, *supra* note 115, art. 27(1); ILO 143, *supra* note 198, art. 9 (granting social security rights to migrant workers).

<sup>201</sup> U.N. Migrant Worker Convention, *supra* note 115, art. 27(2).

<sup>202</sup> *OC-18*, *supra* note 124, para. 157; U.N. Migrant Worker Convention, *supra* note 115, art. 25(1)(a); ILO 143, *supra* note 198, art. 9.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

exclusion of agricultural workers from key statutes such as the National Labor Relations Act and the overtime provisions of the Fair Labor Standards Act would also merit consideration because of their *de facto* effect on the equal protection of the unauthorized.

### 3.3.2. *International Law Prohibits Remedies Exclusions*

The Mexican government had sought the advisory opinion because of the U.S. Supreme Court's decision in *Hoffman Plastic Compounds*, which involved a Mexican national.<sup>206</sup> If *OC-18* were then turned back to the United States, it would clearly dictate reconsidering not only *Hoffman Plastic Compounds* but also the many federal and state regimes that strip lost wages remedies from unauthorized immigrant workers. The result would be full remedies for unauthorized immigrant workers who suffered on the job injuries, employment discrimination, and violations of associational rights such as the right to form labor unions.<sup>207</sup>

### 3.3.3. *Emerging International Law Requires Additional Protective Measures for Unauthorized Workers*

*OC-18* contributed a second key international human rights principle to unauthorized migrant worker policy. In *OC-18*, the Inter-American Court of Human Rights held that the extreme vulnerability of unauthorized workers mandates more than merely equal protection; these workers, the Court decided, are entitled to *special* protection. The Court noted:

States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with

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<sup>206</sup> See Lyon, *Comment on OC-18*, *supra* note 124, at 548 (explaining that the U.S. Supreme Court decision in *Hoffman* contradicted recent conclusions of the Inter-American Court of Human Rights that labor rights for immigrants should not be curtailed).

<sup>207</sup> See Bosniak, *supra* note 126, at 738–42 (describing the evolution of international documents that would protect the rights of migrant workers); de la Vega, *supra* note 90, at 38–39 (noting that immigrants' illegal status excludes the workers from traditional state social and labor rights, even if the worker faces human rights violations while in the U.S.); Lyon, *Comment on OC-18*, *supra* note 124, at 557 (noting the lack of social and labor rights for immigrants while working in the U.S.).

its tolerance or acquiescence, create, maintain or promote discriminatory situations.<sup>208</sup>

The Court elaborated further:

[T]he State has the obligation to respect and guarantee the labor human rights of all workers, irrespective of their status as nationals or aliens, and not to tolerate situations of discrimination that are harmful to the latter in the employment relationships established between private individuals (employer-worker). The State must not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards.<sup>209</sup>

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[W]orkers, being possessors of labor rights, must have all the appropriate means to exercise them. Undocumented migrant workers possess the same labor rights as other workers in the State where they are employed, and the latter must take the necessary measures to ensure that this is recognized and complied with in practice.<sup>210</sup>

In the U.S. context, this mandate throws an even harsher international spotlight on the recent weakening of employment and labor rights for the unauthorized. This principle also invites closer inspection of existing outreach efforts and provision of services to this population. As noted above, existing outreach programs are restricted to serving documented workers,<sup>211</sup> and an emphasis on special protection would indicate a reevaluation of such limitations. The Government Accounting Office (GAO) report cited above urges the Department of Labor to reach out to day laborers by transcending the "limited data, traditional procedures, and difficulty in determining coverage" that hamper the agency.<sup>212</sup> Work-site inspections on farms, which employ great numbers of unauthorized workers, are extremely limited.<sup>213</sup> These recommendations encapsulate the "special obligation" imposed by

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<sup>208</sup> *OC-18*, *supra* note 124, para. 104.

<sup>209</sup> *Id.* para. 113(9).

<sup>210</sup> *Id.* para. 113(10).

<sup>211</sup> *See supra* Section 2.3.3.

<sup>212</sup> GAO REPORT, *supra* note 85, at 13.

<sup>213</sup> *See Rice and Rothenberg Presentations, supra* note 85.



international law: that far from being less zealous with regard to unauthorized workers, workplace protections enforcement agencies must affirmatively overcome the special situation of unauthorized workers.

The United States does make efforts to ensure that unauthorized immigrant workers are not exploited. Examples include the existence of visas for trafficked workers<sup>214</sup> and the victims of crimes,<sup>215</sup> government anti-trafficking programs,<sup>216</sup> and outreach efforts by the Equal Employment Opportunities Commission.<sup>217</sup> These programs are the sorts of innovations that international law is designed to highlight, communicate, and offer to other countries as possible routes toward fulfilling international obligations. To the extent that programs such as these are sufficiently funded and effective, they are also important indicators that bring the United States into better compliance with international human rights law.

#### 4. EVIDENCE ON FOREIGN AND INTERNATIONAL UNAUTHORIZED IMMIGRANT WORKER RIGHTS CAN BE HELPFUL FOR U.S. COURTS

The purpose of this Article is to link together three developments: the retrenchment of rights for unauthorized workers in the United States, the rise of international human rights standards for unauthorized immigrant workers, and the resurgence of judicial and scholarly interest in the application of foreign and international standards in the United States. The preceding sections compared the domestic retrenchment and the new international standards to demonstrate that many distinguished international jurists believe that U.S. labor and employment law violates the human rights of unauthorized immigrant workers. The preceding discussion also demonstrated that U.S. advocates for unauthorized im-

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<sup>214</sup> See 8 U.S.C. § 1101(a)(15)(U) (2000 & Supp. IV 2004); see also *Congress Creates New "T" and "U" Visas for Victims of Exploitation*, IMMIGRANTS' RIGHTS UPDATE, Oct. 19, 2000, available at <http://www.nilc.org/immlawpolicy/obtainlpr/oblpr039.htm> [hereinafter National Immigration Law Center Report].

<sup>215</sup> See 8 U.S.C. § 1101(a)(15)(T) (2000 & Supp. IV 2004); see also National Immigration Law Center Report, *supra* note 214.

<sup>216</sup> See *NAWS FINDINGS*, *supra* note 21.

<sup>217</sup> *Despite Supreme Court Ruling, EEOC Says It Will Protect Illegal Workers*, BORDER ALERT, Aug. 2002, available at [www.usbc.org/info/newslet/august2002.pdf](http://www.usbc.org/info/newslet/august2002.pdf) ("Our biggest concern is that undocumented workers not feel afraid or fearful of coming forward . . . . We have done extensive outreach in the last few years in rooting out discrimination against those individuals who are the most vulnerable." (quoting EEOC Chairwoman Cari Dominguez)).

migrant workers are becoming interested in invoking transnational standards for their clients.

However, the transnational law principles outlined above will not have an automatic impact in the United States; they will not be incorporated into U.S. law by Congress in next year's "Omnibus International Migrant Rights Domestic-International Equalization Act," and the Pennsylvania Department of Labor and Industry is not reviewing its litigation strategy in light of *OC-18*. These new standards will only come into play when they are invoked by domestic actors—communities, advocates, and government alike—who believe that the standards are either binding on the United States or persuasive in setting policy in this country. The following section analyzes the new standards in light of recent U.S. judicial decisions and the experiences of other internationalized movements, in order to predict the likely reception for these rights if presented in the domestic context.

Several factors are likely to come into play when unauthorized immigrants' rights advocates begin to invoke foreign and international law in disputes before U.S. courts. The following section uses the recent history of citation in judicial decisions to define and apply three of these factors to the unauthorized immigrant worker context: the types of legal disputes involving unauthorized immigrant workers, the nature of the extra-national norms likely to be invoked, and the procedural posture of the domestic dispute. This section argues that the rights of unauthorized immigrant workers are readily amenable to the sort of internationalized argument that won reference in the recent death penalty and gay rights cases. The section argues that international law invocations are likely to weigh in favor of the unauthorized worker, while foreign law examples on both sides will emerge as this litigation plays out.

The appropriateness of U.S. courts' use of international law is currently subject to a nascent but intense scholarly debate.<sup>218</sup> Advocates are engaged in a parallel debate about whether the gains to be made from arguing these standards in litigation merit the resources required to research and brief them.<sup>219</sup> The following analysis does not take a position in these debates, but rather treats

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<sup>218</sup> See Alford, *supra* note 167 (explaining the contours of the debate on outsourcing authority and constitutional interpretation).

<sup>219</sup> See What Every U.S. Lawyer Needs to Know About International Labor Law, Panel at The National Lawyers Guild Law for the People 2006 Conference (October 19, 2006), <http://nlginternational.org/event/past.php?id=43#43> (last visited Oct. 21, 2007).

U.S. courts' sparse but time-honored use of international and comparative standards,<sup>220</sup> as well as advocates' growing interest in invoking these standards, as established facts with concrete implications for future civil rights reform efforts. One area of agreement for international law and constitutional scholars is that the courts have offered little guidance on the appropriate use of international and foreign standards;<sup>221</sup> many additionally argue that the question of how U.S. courts express and incorporate extranational authority is undertheorized.<sup>222</sup> Although the literature is growing,<sup>223</sup> the debate is young. There is, however, as the following section demonstrates, sufficient analysis available to derive a tentative predictive framework, yielding meaningful insights for courts that are soon to be confronted with extra-national norms regarding unauthorized workers.

*4.1. Type of Substantive Domestic Law Dispute: Most Unauthorized Immigrant Worker Disputes Involve a Single, Broad Principle Involving Statutory Interpretation*

The influence that international and comparative standards might have in a legal dispute involving unauthorized immigrant worker rights will in part depend on the broadness or narrowness of the domestic law that is in dispute, and whether the domestic law involves constitutional or statutory interpretation. Courts are more likely to use transnational norms as an interpretive tool in cases presenting broad issues and questions of statutory interpreta-

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<sup>220</sup> See David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297, 301 (2006) (totaling the number of federal court citations to foreign law between 1945 and 2005).

<sup>221</sup> See Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223 (2001) (discussing the reluctance of the United States to employ comparative constitutional practices and differing objections to its use).

<sup>222</sup> See, e.g., Cindy Buys, *Burying Our Constitution in the Sand? Evaluating the Ostrich Response to the Use of International and Foreign Law in U.S. Constitutional Interpretation*, 21 BYU J. PUB. L. 1, 2-3 (2007) (noting Justice Scalia's and other criticism that the Supreme Court has failed to offer clear standards for the use of foreign and international law); see also Saby Ghoshray, *To Understand Foreign Court Citation: Dissecting Originalism, Dynamism, Romanticism, and Consequentialism*, 69 ALB. L. REV. 709, 711 (noting the author's goal of identifying an "efficient and less cumbersome framework" for foreign court citation, in the hopes that "somewhere down the road, this will help to develop a comprehensive theory on foreign court citation").

<sup>223</sup> See Zaring, *supra* note 220.

tion, characteristics that exemplify most of the disputes in which unauthorized immigrant worker rights typically arise.

The more completely a particular question appears to reflect generic public policy choices that rise above institutional frameworks, the more amenable it should be to interpretation in light of extra-legal norms.<sup>224</sup> In contrast, the more heavily a particular issue appears to involve assessment of "institutional arrangements," the more likely it is to involve comparative pitfalls.<sup>225</sup> Using this scale, the right of unauthorized immigrant workers to equal treatment under employment laws and remedies schemes appear to be quite capable of comparison. The issue is not whether these workers are entitled to a particular workplace right, but simply whether domestic statutes promulgated with general language protecting "employees" should be interpreted by the courts to exclude the unauthorized. Even the *Hoffman Plastic Compounds* decision, which was, as noted above, a five-justice majority, was framed as a simple conflict between immigration and labor rights policies, with the majority and dissents offering little more than instrumental justifications as their reasoning.<sup>226</sup> This type of stark choice is just the sort of large, general principle that the Supreme Court addressed, and used international and foreign law to analyze, in *Atkins*, *Roper*, and *Lawrence*: the appropriateness of imposing the death penalty on retarded convicts or on people convicted of juvenile crimes, and the history of sodomy criminalization.

If the question of the equal application of employment protections and remedies for unauthorized workers is a relatively broad principle, the third of the international law norms on unauthorized workers highlighted in this article is not. The third requirement of affirmative efforts is to ensure vindication of unauthorized immigrant worker rights. This is a question that could be much more mired in institutional detail. For example, questions about how much to spend on existing programs such as worksite monitoring and census outreach involve a level of executive balancing that

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<sup>224</sup> See Jackson, *supra* note 221, at 272-73 (arguing that comparative constitutional law is more helpful for understanding constitutional terms that concern individual rights than terms that allocate power to different levels of government); see also Mark Tushnet, *When Is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275, 1298-1300 (2006) (arguing that using foreign law to interpret constitutional provisions dealing with institutional arrangements is especially difficult).

<sup>225</sup> Tushnet, *supra* note 224, at 1299; see also Jackson, *supra* note 221, at 272-73.

<sup>226</sup> *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 151-52 (2002).

may seem to be much less capable of comparison across countries. An important contemporary project outside the United States is the application of international human rights principles to poverty alleviation measures through the medium of economic, social and cultural rights.<sup>227</sup> However, for a variety of historical reasons, this mode of analysis has never taken firm hold in the United States.<sup>228</sup> Until it does, using international and foreign law to analyze the government's spending on affirmative worker protection enforcement efforts to reach out to unauthorized workers is unlikely to be fruitful.

One broader issue does arise in the category of affirmative protection efforts, such that courts may find transnational norms to be instructive. When U.S. laws include *de jure*, immigration status-based restrictions on existing programs such as civil legal aid, job re-training programs and educational support programs, a general principle emerges clearly. In fact, these exclusions arguably present the same principle of non-discrimination as the substantive employment and remedies exclusions discussed above, and are also amenable to comparison with international and foreign law.

Several scholars agree that citation to transnational authority

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<sup>227</sup> Since the mid-1980s, the United Nations Committee on Economic, Social and Cultural Rights has been applying the International Covenant on Economic, Social and Cultural Rights to measure the performance of the governments that have ratified the Covenant. The Committee uses the concepts of "core obligation," "progressive realization," and popular participation to prod governments to effectively devote their resources to improve human development. See, e.g., Third United Nations Conference on the Least Developed Countries, Brussels, Belg., May 14–20, 2001, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, ¶ 15, U.N. Doc A/CONF.191/BP/7 (May 13, 2001) (discussing the integration of human rights into poverty eradication through obligation, accountability, and responsibility of States). South Africa has also been a leader in this regard. The seminal South African Constitutional Court decision in *Government of the Republic of South Africa v Grootboom & Others*, rendered in 2000, interpreted a social rights provision of the South African Constitution to require the government to "establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means. The programme must be capable of facilitating the realisation of the right." *Government of the Republic of South Africa v Grootboom & Others*, 2000 (11) BCLR 1169 (CC) at para. 41 (S. Afr.). See also FUNDAR – CENTRO DE ANÁLISIS E INVESTIGACIÓN ET AL., DIGNITY COUNTS: A GUIDE TO USING BUDGET ANALYSIS TO ADVANCE HUMAN RIGHTS (2004), available at [http://www.iie.org/IHRIP/Dignity\\_Counts.pdf](http://www.iie.org/IHRIP/Dignity_Counts.pdf) (discussing the use of budget analysis to promote economic, social, and cultural rights).

<sup>228</sup> See EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS* (2005).

for statutory interpretation is less controversial than in the context of a constitutional law dispute.<sup>229</sup> Justice Scalia, whose position is generally perceived as anti-internationalist, actually favors the use of international law for the purposes of interpreting treaties, expressing his criticism of its use for constitutional interpretation.<sup>230</sup> As noted above, disputes in which the worker's immigration status becomes an issue tend to involve the interpretation of statutory protections generically protecting the rights of "employees" or plaintiffs. In determining whether immigration status should prevent an unauthorized worker from enjoying the benefits of a statutory protection or remedies scheme, courts are more likely to feel that they may appropriately turn to transnational norms for interpretive guidance.

#### 4.2. *Nature and Presentation of the Non-U.S. Norm Invoked*

The recent history of citation to international and foreign law by U.S. courts demonstrates that evidence about the new transnational rights for unauthorized workers may be considered by U.S. courts if they are presented as persuasive authority.<sup>231</sup> The courts are willing to consider non-binding transnational law as persuasive authority for interpreting and reinterpreting U.S. law. Thus courts may choose to look to *any* of the new international norms related to unauthorized workers, as an interpretive tool. The recent decisions also reinforce the existence of a perhaps counterintuitive trend: courts are more likely to be persuaded by aggregated foreign civil rights law than by international human rights law that is arguably binding on the United States. Given that most foreign practices around unauthorized immigrant workers are invisible to U.S. advocates and courts alike, courts may have difficulty understanding the comparative context for the international norms presented to them. Evidence of dynamism in world opinion is also an impor-

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<sup>229</sup> Harold Hongju Koh, *The United States Constitution and International Law: International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 47-48 (2004) (discussing the treatment of international law in Supreme Court decisions).

<sup>230</sup> See *id.* at 47 (noting that Justice Scalia has denounced the use of international practice in Supreme Court decisions).

<sup>231</sup> See Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 Colum. L. Rev. 628, 654-56 (2007) (labeling the U.S. Supreme Court's interpretive technique the "gilding the domestic lily" approach, in which "a court points to international treaty provisions as a kind of value-added—that is, as additional support for its own interpretation (based on traditional canons of analysis)").

tant issue for the courts. Courts will likely be curious about how rapidly, if at all, the standards for unauthorized workers are gaining increased acceptance, for example in the form of new ratifications of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Finally, given that U.S. courts are relatively inexperienced with international and foreign law, presentation takes on a particularly critical role.

4.2.1. *Foreign Civil Rights Law Could Be More Persuasive than International Human Rights Norms, and Will Direct Outcomes in Both Directions*

Professor Cindy Buys points out that the recent scholarly discussions about citation to extranational norms often fail to distinguish between international law versus foreign law.<sup>232</sup> Professor Buys argues that even when U.S. judges do not determine that a particular norm of international law is actually law that binds them in making their decision, international law is the best source of authority for persuasive reference by U.S. courts.<sup>233</sup> She reasons that the United States has greater influence in the formation of international law than it does in the formation of foreign law, making it a more appropriate tool in U.S. deliberations.<sup>234</sup> She also argues that isolated foreign practices are hard to disentangle from their domestic institutional context. At the same time, foreign law appears to be particularly useful to U.S. courts, to help them predict the outcome of a particular choice based on the choices other countries have made, or to give them a sense of how widely adopted a particular choice might be, using foreign law as a persuasive barometer of world opinion.<sup>235</sup> A recent empirical survey concluded that twenty percent of the federal court citation to foreign law used the

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<sup>232</sup> See Buys, *supra* note 222, at 3–4 (noting the current failure to distinguish between international and foreign law in the debate on whether and how to use these sources of law in U.S. courts). Professor Buys also notes that the debate often fails to distinguish carefully “between various sources of international law.” *Id.* at 2.

<sup>233</sup> *Id.* at 6–7.

<sup>234</sup> *Id.*

<sup>235</sup> See Koh, *supra* note 229, at 44 (noting that the original design of the Supreme Court involved understanding and incorporating international law standards); see also *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting) (describing how foreign courts consider similar questions with similar legal standards).

foreign authority to interpret domestic law,<sup>236</sup> which is the stance that the parties to a dispute about unauthorized work would be urging in U.S. courts, as courts are asked to determine whether worker-protective legislation should apply equally to unauthorized workers.

If a court urged to exclude an unauthorized immigrant from a worker protection scheme is more interested in Spain's policies than in a ruling of the Inter-American Court of Human Rights, what is the likely result? An important consideration for the domestic incorporation of unauthorized immigrant worker rights is the paucity of comparative examples. While important international treaties and rulings now protect this population, there is extremely little evidence currently available on foreign laws relating to equal employment rights and remedies for the unauthorized. Compared with the extensive available information on other countries' death penalty policies, for example,<sup>237</sup> national unauthorized immigrant worker laws – whether rights-protective or exclusionary – are largely invisible. For example, the extensive literature on comparative labor and employment rights rarely touches on this population.<sup>238</sup> Immigration laws are also, though to a lesser extent, the subject of legal surveys and comparative work that also typically include no information that is specifically relevant to unauthorized migrant workers.<sup>239</sup> U.S. actors looking for guidance abroad can expand or supplement these existing surveys to uncover information on issues of particular importance to unauthorized workers and to the receiving and sending governments whose policies affect them.

Given the current lack of information on national practices, it is important to note that not all courts have required evidence of *widespread* national adoption of a particular policy to regard it as persuasive. For example, the *Lawrence* court found persuasive the sodomy laws of "many countries."<sup>240</sup> Other formulations demonstrate that foreign law surveys do not have to blanket the world in

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<sup>236</sup> Zaring, *supra* note 220, at 300–01 (arguing that the federal courts' most common uses of foreign court citation have been "to interpret foreign law" and to engage in "litigation coordination" between U.S. and foreign courts).

<sup>237</sup> See, e.g., Amnesty Int'l, Facts and Figures on the Death Penalty, <http://web.amnesty.org/pages/deathpenalty-facts-eng> (categorizing the world's domestic death penalty policies).

<sup>238</sup> See Lyon, *Pulling Governments Out of the Shadows*, *supra* note 157, at 571.

<sup>239</sup> See *id.*

<sup>240</sup> See *Lawrence v. Texas*, 539 U.S. 558, 598 (2003).



order to persuade U.S. courts.<sup>241</sup> Thus it may be appropriate for the parties to unauthorized immigrant worker rights disputes to argue selected foreign examples.

If courts are going to find clusters of state practice to be persuasive, what will determine the size and characteristics of those clusters? A key factor is the identity of the country whose practice or opinions the Court is considering. The more the history, culture and practices of a foreign jurisdiction appear to resemble the United States, the more likely that its policy choices will prove persuasive to a U.S. judge.<sup>242</sup> The debate over a Supreme Court dissent's reference to a Zimbabwean case<sup>243</sup> starkly demonstrates this trend. Justice Breyer, who authored the dissent, later expressed regret over citing Zimbabwean law, "presumably on the basis of finding out more about the facts of the regime . . . the vicious Mugabe dictatorship."<sup>244</sup>

This incident raised, as have some scholars, the possibility of an Anglophonic and Western bias in the Supreme Court's past references to foreign law.<sup>245</sup> One scholar urges that advocates "confine their research to foreign systems that function as constitutional democracies."<sup>246</sup> The instant article does not engage this broader debate, but the issue of comparator selection does arise in the unauthorized immigrant worker context. When adjudicating an unauthorized worker's employment dispute, a court may engage this "comparability" consideration by examining the migration situation of any country whose laws are proffered as an example for the

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<sup>241</sup> See Alford, *supra* note 167, at 675 (noting that cases such as *Eldred v. Ashcroft*, *Burson v. Freeman*, *Washington v. Glucksberg*, and *Palko v. Connecticut* relied on international and foreign law and experiences).

<sup>242</sup> See Koh, *supra* note 229, at 53 (noting the value in using foreign precedents and the emergence of universal legal principles as countries' legal systems grow to resemble each other). Rex Glensy proposes a typology of "major criteria for distinguishing" amongst potential foreign law source countries, including the perceived level of democracy and the societal character and culture. Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 411-32 (2005).

<sup>243</sup> *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J., dissenting).

<sup>244</sup> Kenneth Anderson, *Foreign Law and the U.S. Constitution*, 131 POL'Y REV. 33, 46 (2005).

<sup>245</sup> See, e.g., Glensy, *supra* note 242, at 406-07.

<sup>246</sup> Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 Am. U. L. Rev. 553, 661 (2007) (arguing that advocates "should look for systems with: (1) roughly similar constitutional structures, (2) comparable legal norms, (3) professionally trained and reasonably independent tribunals, (4) transparent and impartial adjudicative processes, and (5) some degree of final decisional authority").

United States to follow. Countries in whose economies unauthorized immigrant workers play a similar role are more likely to be considered valid comparators. In particular, countries perceived a migrant-receiving rather than -sending may be more likely to be considered persuasive in the U.S. context. However, courts should be wary about using an overly simplistic measure. The United States is the world's largest migrant-receiving country,<sup>247</sup> but this does not mean that the choices made by migrant-sending countries are not relevant examples. A U.S. court might assume that a pro-migrant worker policy adopted by a migrant-sending country is a less compelling example because it will represent less of a sacrifice. For example, the 1998 decision of the Chilean government to extend work visas to all undocumented migrants<sup>248</sup> may seem to place a relatively lower burden on Chile than a similar policy might for the United States, but the opposite may be true. Most labor migrant-sending countries have fewer resources per capita than do labor migrant-receiving countries.<sup>249</sup> In such settings, unauthorized workers can themselves have a greater impact per capita, and protective measures may impose a correspondingly heavier burden on industry and government. A less wealthy country's decisions about how to treat the unauthorized vis-à-vis the national labor force may reflect a more significant humanitarian impulse and signal a greater level of control over industry than might otherwise seem apparent.

As discussed above, it seems clear that *Lawrence* raises the possibility that a relatively small group of comparative examples might prove to be persuasive. This possibility presents both a challenge and an opportunity to courts that may be interested in placing their own policy-driven choices about unauthorized immigrant worker rights into a comparative context. Most importantly, courts and advocates focusing on the rights of unauthorized immigrant workers should not commit what Professor Alford calls "the outcome error."<sup>250</sup> The spate of cases expanding individual rights

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<sup>247</sup> ALI MANSOOR & BRYCE QUILLIN, *MIGRATION AND REMITTANCES: EASTERN EUROPE AND THE FORMER SOVIET UNION* 25 (2006).

<sup>248</sup> Cristián Doña & Amanda Levinson, *Chile: Moving Towards a Migration Policy*, in *MIGRATION INFORMATION SOURCE*, Feb. 2004, <http://www.migrationinformation.org/Feature/display.cfm?ID=199>.

<sup>249</sup> See *UN Migration Fact Sheet*, *supra* note 18 ("In 2005, Europe hosted 34% of all migrants; Northern America, 23%, and Asia, 28%. Only 9% were living in Africa; 3% in Latin America and the Caribbean, and another 3% in Oceania.").

<sup>250</sup> Alford, *supra* note 167, at 674-80.

while citing to international and foreign law is something of a historical anomaly.<sup>251</sup> Not all judges feel that international and foreign law should only be used when it acts as a “one-way ratchet” for individual rights.<sup>252</sup> Indeed, according to Professor Alford, “[t]he United States Reports are replete with instances in which the Court has relied on foreign experiences to uphold the constitutionality of government action that limits individual rights,” including limits on free speech, criminal procedural rights, and the rights of women workers, as well as denial of the right to physician-assisted suicide.<sup>253</sup> Although, as noted above, and argued in a previous piece,<sup>254</sup> little comparative information is currently accessible regarding workers, it is highly likely that countries around the world have made quite radically different choices about how to treat the unauthorized. The Spanish example offered earlier in this article was rights-protective, but exclusionary examples exist as well. For example, the Platform for International Cooperation on Undocumented Migrants, a European non-profit organization, reports that in Austria, “[t]he ÖGB, the confederation of Austrian trade unions, is not supportive of undocumented migrants. Although they advocate a crackdown on the employers rather than the employees, the effect on the undocumented migrant worker is still immediate deportation. Membership of undocumented migrant workers in trade unions in Austria is not considered.”<sup>255</sup> It is to be expected that over time U.S. courts will be asked to consider foreign examples of all kinds, as well as the new international law norms.

#### 4.2.2. *International Law as a Proxy for Foreign Practice*

The courts’ interest in foreign law sometimes finds expression through consideration of international law, when international law is pressed into service as a barometer of foreign practice. The recent Supreme Court opinions offer two examples of this analytical mode. First, the *Lawrence* opinion referred to a European Court of Human Rights decision, and noted that the decision applied in 45 countries.<sup>256</sup> The *Roper* opinion referred to the UN Convention on

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<sup>251</sup> *Id.*

<sup>253</sup> *Id.* at 675–76.

<sup>254</sup> See Lyon, *Pulling Governments out of the Shadows*, supra note 157, at 571–80.

<sup>255</sup> See Platform for International Cooperation on Undocumented Migrants, Austria, available at [http://www.picum.org/BASIC\\_SOCIAL\\_RIGHTS/Austria.htm](http://www.picum.org/BASIC_SOCIAL_RIGHTS/Austria.htm) (describing the different rights of undocumented migrants in Austria, which excludes the right to join trade associations).

<sup>256</sup> *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

the Rights of the Child, noting that every country except the United States and Somalia have ratified the Convention.<sup>257</sup> Invoked and described in this manner, "international law" becomes a proxy for world opinion and practice. A court examines the ratification of a treaty and ascribes the contents of the treaty to the domestic law of each ratifying nation.<sup>258</sup>

Viewed through this lens, the ratification pattern of the various treaties that afford rights to unauthorized immigrant workers become significant for a U.S. judge. The list of foreign governments that have ratified these treaties may tell an American court how many governments have, at least in theory, accepted the various new unauthorized worker rights. The two major treaties explicitly protecting unauthorized immigrant worker workplace rights are the United Nations Migrant Worker Convention<sup>259</sup> and the ILO Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO 143).<sup>260</sup> Between them, these treaties have been ratified by fifty governments.<sup>261</sup> Four of these fifty governments are Western European.<sup>262</sup> However, most of the ratifying governments are migrant-sending countries, likely triggering the analysis noted above about how a migrant-receiving country such as the United States should go about comparing immigrant worker policies across this particular indicia of difference.

Meanwhile, twenty-three out of the thirty-five countries in the

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<sup>257</sup> *Roper v. Simmons*, 543 U.S. 551, 576 (2005).

<sup>258</sup> This is a logical enough premise. However, it is not always accurate to equate ratification with domestic adoption. Countries can condition accession to a treaty—the United States' treaty reservations protecting its death penalty policies is one example—and some domestic systems do not provide for direct enforcement of ratified treaties.

<sup>259</sup> U.N. Migrant Worker Convention, *supra* note 115 pt. III (titled Human Rights of all Migrant Workers and Members of their Families).

<sup>260</sup> Int'l Labour Organization [ILO], *Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*, ILO C143 (June 24, 1975), available at <http://www.ilo.org/ilolex/english/convdisp1.htm>.

<sup>261</sup> *See id.* (listing the countries and the dates of ratification of the ILO Convention); U.N. Office of the High Comm'r for Human Rights [OHCHR], *Ratification List of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (Dec. 18, 1990), available at <http://www.ohchr.org/english/countries/ratification/13.htm> [hereinafter OHCHR, *Migrant Worker Convention*] (listing the countries and the dates of ratification).

<sup>262</sup> *See id.* The Western European countries are Italy, Norway, Portugal, and Sweden.

Western hemisphere have accepted the jurisdiction of the Inter-American Court of Human Rights<sup>263</sup> and thus *OC-18* directly affects their international obligations.<sup>264</sup> The United States and Canada are not numbered in that twenty-three, but the group does include Mexico,<sup>265</sup> a significant migrant-receiving country in its own right. Including the United States, 173 countries have ratified the CERD, including receiving countries such as the United Kingdom, Germany, France, Norway, and Japan.<sup>266</sup> Ultimately these factors are all worthy of careful analysis for courts faced with difficult and divisive choices about unauthorized worker rights.

#### 4.2.3. *Importance of Dynamism*

Dynamism, in the form of changes in the levels of acceptance of a particular norm, is also a factor the Supreme Court has considered in its recent assessments of world opinion. For example, in *Lawrence*, the majority noted that changes in world opinion had occurred in recent decades.<sup>267</sup> As noted above, there are no comparative surveys available to allow a court or party to characterize the number of countries ascribing to a particular practice. Thus international law ratifications are again likely to serve as a proxy for examining dynamism. Ratification rates and trends in the interest levels in documents like the Migrant Worker Convention will likely be relevant to a U.S. court's perceptions of the importance of any treaty. This should not, however, be the end of the inquiry into global patterns of protection for the unauthorized. The notion of dynamism helps to control for the fact that any treaty explicitly granting unauthorized immigrant workers rights has historically

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<sup>263</sup> See Inter-Am. C.H.R., *Signatures and Current Status of Ratifications: American Convention on Human Rights "Pact of San Jose, Costa Rica,"* O.A.S. Treaty Series 36 (Nov. 22, 1969), available at <http://www.oas.org/juridico/english/Sigs/b-32.html> (listing the countries and dates of ratification).

<sup>264</sup> See Reports of the Inter-American Commission on Human Rights (Art. 51 of the American Convention on Human Rights) 1997 Inter-Am Ct. H.R. (ser. A) No. 15 ¶¶ 25-26 (stating that "while an advisory opinion of the Court does not have the binding character of a judgment in a contentious case, it does have undeniable legal effects").

<sup>265</sup> See Inter-Am. C.H.R., *supra* note 263.

<sup>266</sup> OHCHR, *Ratification List of the International Convention on the Elimination of All Forms of Racial Discrimination* (Mar. 7 1966), available at <http://www.ohchr.ch/tbs/doc.nsf/newhvstatby treaty2openView&Start=18Count=250&Expand=9#9> (last visited Oct. 22, 2007).

<sup>267</sup> *Lawrence v. Texas*, 539 U.S. 558, 568-72 (2003).

enjoyed much lower ratification rates than other, similar treaties.<sup>268</sup> For example, the speed of ratification of the U.N. Migrant Worker Convention has increased at a much higher rate since the Convention went into force.<sup>269</sup> Many other efforts at cooperation and standard-setting evidencing international commitment to the rights of this population have taken place recently, through creation of rapporteurships, inter-governmental meetings and reports, and decisions by international human rights adjudicators interpreting generic treaty terms to provide protection to the unauthorized.

#### 4.2.4. "Binding" Does not Necessarily Equal "Persuasive"

There is an important difference between international human rights law that is *arguably binding* on the United States, and international law that concededly does not bind this country. Although several mechanisms permit the direct application of international law by U.S. courts, courts are typically wary of finding that international human rights law binds the United States. As a result, counterintuitively, courts may be more likely to refer favorably to *any* transnational norms argued as persuasive authority than to standards presented as controlling.

Reference to international and foreign law as a source of persuasive authority is the most indirect use of international human rights law and thus the most likely to feel appropriate for a U.S. court.<sup>270</sup> At the same time, U.S. courts are more actively engaging international human rights law in other types of cases arising through various statutes creating direct jurisdiction to apply general international norms. Three important examples of direct application are: (1) cases that involve direct consideration of ratified treaties; (2) cases arising under the Alien Tort Claims Act, and (3) cases that involve direct consideration of ratified treaties. For the reasons discussed below, these "entry points"<sup>271</sup> for transnational

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<sup>268</sup> See Lyon, *Comment on OC-18*, *supra* note 124, at 551-52.

<sup>269</sup> OHCHR, *Migrant Worker Convention*, *supra* note 261.

<sup>270</sup> See David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 645-53 (2006) (citing the use of international law as an aid to statutory construction).

<sup>271</sup> See William W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT'L L. 557 (2005) (using the term "entry point" in his discussion of the ways that international criminal law can filter into a domestic legal system).

standards are less likely to be relevant in the unauthorized immigrant worker context in the near future.

Ratified treaties are binding international authority through operation of Article VI of the Constitution, which states: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."<sup>272</sup> To be "made under the authority of the United States," a treaty must be approved by the president and ratified by two-thirds of the Senate.<sup>273</sup> As noted above, the United States has ratified the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), and in 2004 the United Nations Committee charged with monitoring the treaty's compliance issued an opinion that the treaty requires equal labor rights for unauthorized workers.<sup>274</sup> U.S. courts are bound to apply ratified treaties such as CERD,<sup>275</sup> but limitations placed on a treaty's effect at the time of ratification and cautious judicial implementation have weakened usage of many treaties.<sup>276</sup>

An important example that has been the subject of intense recent litigation is the Vienna Convention on Consular Relations.<sup>277</sup> The Vienna Convention, which the United States ratified in 1969,<sup>278</sup>

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<sup>272</sup> U.S. CONST. art. VI.

<sup>273</sup> U.S. CONST. art. II, §1.

<sup>274</sup> U.N. Comm. On the Elimination of Racial Discrimination, *General Recommendation No.30: Discrimination Against Non Citizens*, para. 35, U.N. Doc. HR1/GEN/1/Rev.8 (Oct. 1, 2004), available at <http://www.unhcr.ch/tbs/doc.nsf/0/e3980a673769e229c1256f8d0057cd3d?Opendocument> (stating that "while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated"). It is also arguable that Article 2, §1 of the ICCPR, to which the United States is a party, offers protection to unauthorized workers by condemning discrimination based on "other status." See ICCPR, *supra* note 110, art. 2, § 1.

<sup>275</sup> See U.S. CONST. art. VI.

<sup>276</sup> See Louis Henkin, et al., *Human Rights* 783–87, 794–807 (1999).

<sup>277</sup> Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

<sup>278</sup> In the 1960s, the United States proposed (1963) and ratified (1969) the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes ("Optional Protocol"). The Optional Protocol made the jurisdiction of the ICJ binding upon signatories for claims concerning the Vienna Convention. See Adrienne M. Tranel, *The Ruling of the International*

affords a foreign national the right to request that the authorities of the detaining State notify, without delay, his State consulate when he is arrested for criminal prosecution in a country that has ratified the treaty.<sup>279</sup> Just as in its international crusade against *Hoffman Plastic Compounds*, Mexico is vigorously pursuing domestic and international litigation about U.S. failures to implement consular notification and access for criminally accused Mexican nationals. However, the United States repeatedly refused to abide by requests and rulings of international tribunals to stay or suspend executions based on violations of the treaty.<sup>280</sup>

The international law brief that the *Lawrence* opinion cited led with the European case law on consensual adult sexual conduct and did not point out that the United States had ratified a treaty on point, the International Covenant on Civil and Political Rights (ICCPR), until page 15 of the brief. In turn, the *Lawrence* opinion's two references to "international" law rely on European national and regional authorities<sup>281</sup> and never mention a treaty or decision

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*Court of Justice in Avena and Other Mexican Nationals: Enforcing the Right to Consular Assistance in U.S. Jurisprudence*, 20 AM. U. INT'L L. REV. 403, 427 n.107 (2005) (citing an ICJ finding that the U.S. violated its Vienna Convention duty to notify Mexico "in a timely manner" that it was detaining its citizens). On March 7, 2005, however, U.S. Secretary of State Condoleezza Rice notified U.N. Secretary General Kofi Annan of U.S. withdrawal from the Optional Protocol. See generally Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A1 (discussing the Bush administration decision to withdraw from the Optional Protocol).

<sup>279</sup> See Vienna Convention, *supra* note 277, art. 36. Article 36 of the Vienna Convention is widely recognized as customary international law, and its protections are typically expected to be extended regardless of whether the detainee's home country has signed the convention. See *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128, 153-55 (Mar. 31), available at <http://www.icj-cij.org/docket/files/128/8188.pdf> [hereinafter *Avena*] (holding that the U.S. violated Article 36(1)(b) when it failed to notify, without delay, Mexican officials of the detention of Mexican nationals).

<sup>280</sup> See, e.g., *Breard v. Greene*, 523 U.S. 371 (1998) (holding that the timing of the international law claim and the low likelihood that any finding of a violation of international law would ultimately change the outcome meant that a Paraguayan national's execution should not be stayed despite pending litigation in the International Court of Justice); *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) (refusing to act to prevent the imminent execution of a German citizen "given the tardiness of the pleas and the threshold barriers they implicate"); *Avena*, *supra* note 279, at 127-28 (noting Mexico's allegation of U.S. and state government refusal to stay execution despite the pending proceedings in the ICJ).

<sup>281</sup> See *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003) (referring to the British Parliament's recommended repeal of laws punishing homosexual conduct and a



that might arguably be binding on the United States.<sup>282</sup> Most notably, the Court did not mention *Toonen v. Australia*, a directly relevant UN Human Rights Committee decision interpreting the ICCPR.<sup>283</sup>

The Court's reluctance to bind itself by a ratified international human rights treaty does not prevent it from citing the same treaty using the modality of persuasive authority. The *Roper* decision exemplifies the Court's preference for citing ratified treaties as persuasive sources. Before *Roper* came before the Supreme Court, numerous lower courts had held that the ICCPR's prohibition of the juvenile death penalty was *not* binding on the United States, because the United States took a reservation to that provision of the ICCPR when it ratified the treaty in 1992.<sup>284</sup> Notwithstanding this explicit rejection, transnational law came into play in the majority opinion in the form of a lengthy reference to the global rejection of the death penalty for juvenile offenders.<sup>285</sup> In fact, the Court held the reservation "provides minimal evidence that there is not now a national consensus against juvenile executions."<sup>286</sup> Similarly, Justices Ginsburg and Kennedy registered a brief concurrence in the 2003 ruling in *Grutter v. Bollinger*, to assert:

The Court's observation that race-conscious programs "must have a logical end point," accords with the international understanding of the office of affirmative action. The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994 . . . endorses "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of

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decision of the European Court of Human Rights that held Northern Irish laws proscribing homosexual activities to be invalid).

<sup>282</sup> See *id.* (omitting reference to any treaties binding on the United States).

<sup>283</sup> See *Toonen v. Australia*, 1 I.H.H.R. 97, 104-06, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994) (finding Australia violated the ICCPR by criminalizing homosexual conduct).

<sup>284</sup> See Mark Wendell DeLaquil, *Foreign Law and Opinion in State Courts*, 69 ALB. L. REV. 697, 704 (2006) (noting that the United States signed the ICCPR with reservations).

<sup>285</sup> *Roper*, 543 U.S. at 568 ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under [the age of] 18, and we now hold this is required by the Eighth Amendment.")

<sup>286</sup> *Id.* at 567.

guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms."<sup>287</sup>

What is a U.S. court to make of the fact that no U.S.-ratified treaty explicitly addresses the rights of unauthorized workers, and only one (the CERD) has been interpreted to provide these rights? With no ratified treaties on point, there are nonetheless some treaty-based arguments in favor of maintaining worker protections for the unauthorized. First, the Committee interpretation of the CERD is authoritative, as the treaty creates the Committee to monitor treaty compliance and to provide general recommendations interpreting the treaty.<sup>288</sup> However, the United States included two limitations that hamper direct implementation: an "understanding" that the "[t]o the extent . . . that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under [the relevant paragraphs] with respect to private conduct except as mandated by the Constitution and laws of the United States."<sup>289</sup> The United States also made ratification contingent on its understanding that the terms of the CERD would be non-self-executing, or, in other words, that the treaty could not be enforced in court in the absence of implementing legislation.<sup>290</sup> However, this restriction does not mean that the United States is not bound by the CERD, and leaves open the possibility of invoking it with the executive branch and administrative agencies.<sup>291</sup>

With regard to *OC-18*, the Inter-American Court of Human Rights advisory opinion, the primary obstacle to direct implementation is that the United States has signed but not ratified the American Convention on Human Rights, which establishes the Inter-American Court of Human Rights. However, U.S. ratification of the Organization of American States Charter arguably made the advisory opinion rulings of the Inter-American Court of Human

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<sup>287</sup> *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (citations omitted).

<sup>288</sup> See CERD, *supra* note 112 arts. 8-16.

<sup>289</sup> United States Reservation I(2) to CERD, *supra* note 112, available at <http://www.ohchr.org/english/bodies/ratification/2.htm#reservations> (last visited Oct. 22, 2007).

<sup>290</sup> *Id.* at III.

<sup>291</sup> Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423, n.206 (1997).

Rights binding on the United States.<sup>292</sup> A similar argument for the binding nature of the International Labour Organization Freedom of Association Committee rulings arise from the fact of the United States' membership in the ILO.<sup>293</sup>

Given U.S. courts' demonstrated reluctance, in the civil rights context, to apply ratified treaties directly, at this juncture courts are unlikely to declare themselves bound by the CERD interpretation, by *OC-18*, or by the recent ILO decisions. Far more likely is the consideration of such opinions as persuasive examples of the direc-

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<sup>292</sup> See, e.g., *Ramón Martínez Villareal*, Report N° 52/02, Merits Case 11.753 para. 60 (Inter-American Commission on Human Rights Oct. 10, 2002), available at <http://www.cidh.org/annualrep/2002eng/USA.11753.htm> (noting that "in interpreting and applying the American Declaration, it is necessary to consider its provisions in the context of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged. Developments in the corpus of international human rights law relevant in interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments.") (citation omitted); *id.* paras. 65–70 (citing *OC-16*, an Inter-American Court of Human Rights advisory opinion); *id.* para. 80 (applying the analysis laid out in *OC-16* to the U.S. death penalty case before it, and finding a violation of the American Declaration of the Rights and Duties of Man); see also de la Vega, *supra* note 90, at 61–62 (arguing that *Hoffman Plastic Compounds* violates Article 45(c) of the OAS charter, which establishes the right to collective bargaining and the right to strike.) The United States ratified the OAS charter in 1951. See Office of International Law, Organization of American States, Charter of the Organization of American States, <http://www.oas.org/juridico/english/Sigs/a-41.html> (last visited Oct. 22, 2007).

<sup>293</sup> The Committee's position is that the United States' obligations arise from the ILO Constitution. See *ILO Decision on Hoffman Plastic*, *supra* note 149 at para. 600 (stating that the Committee's mandate to decide a petition regarding the United States "stems directly from the fundamental aims and purposes set out in the ILO Constitution"). The United States has been a member of the ILO since 1934, with a three-year hiatus from 1977 to 1980. See WALTER GALENSON, *THE INTERNATIONAL LABOR ORGANIZATION: AN AMERICAN VIEW* 3–4 (1981). Moreover, the ILO is a specialized agency of the United Nations, see International Labour Organization, About the ILO, available at [http://www.ilo.org/global/About\\_the\\_ILO/lang-en/index.htm](http://www.ilo.org/global/About_the_ILO/lang-en/index.htm) (stating that "[t]he ILO became the first specialized agency of the UN in 1946"). The United States is a member state of the United Nations, having ratified the United Nations Charter on July 28, 1945. See U.S. Department of State, *The United States and the Founding of the United Nations, August 1941–October 1945*, available at <http://www.state.gov/r/pa/ho/pubs/fs/55407.htm>; see also de la Vega, *supra* note 90, at 61–62 (citing ILO Declaration on Fundamental Principles and Rights at Work, 37 I.L.M. 1233, art. 2 ("[A]ll Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions . . .")).

tion the United States should be steering in order to best animate domestic constitutional principles that stand at the heart of the U.S. vision of individual equality.

The second example of direct application of international standards is the Alien Tort Claims Act (ATCA). The ATCA is a jurisdictional statute, originally passed in 1789,<sup>294</sup> which permits foreign nationals to sue in tort in U.S. courts for "a tort . . . committed in violation of the law of nations."<sup>295</sup> The landmark case of *Filartiga v. Peña-Irala*, in which the Second Circuit made a tort award, calling torture a violation of the law of nations,<sup>296</sup> began a flow of creative Alien Tort Claims Act litigation.<sup>297</sup> The U.S. Supreme Court recently reaffirmed a circumscribed vision of the Alien Tort Claims Act in *Sosa v. Alvarez-Machain*, holding that courts can only find that a particular norm has achieved the status of "law of nations" and apply that law in tort if the norm demonstrates the same "definite content and acceptance among civilized nations" as "the 18th-century paradigms familiar when [the ATS] was enacted."<sup>298</sup> According to the Supreme Court, those eighteenth century torts included "offenses against ambassadors, violation of safe conducts, and piracy."<sup>299</sup>

Customary international law and *jus cogens* principles are additional entry points into U.S. law allowing direct application of international human rights norms. Courts can discern customary international law and *jus cogens*, a particular form of customary law, declaring them part of the federal common law, if there is not already a contradictory statute or executive act on the books.<sup>300</sup> Ac-

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<sup>294</sup> Marcia Coyle, *Justices Weigh Alien Tort Act*, NAT'L L.J., Mar. 29, 2004, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1080334938936> (noting that the ATS first appeared in the Judiciary Act of 1789, which gave rise to the U.S. court system).

<sup>295</sup> Alien's Action for Tort, 28 U.S.C. § 1350 (2006).

<sup>296</sup> *Filartiga v. Peña-Irala*, 630 F.2d 876, 885-88 (1980).

<sup>297</sup> Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 4 (2002) (explaining that after *Filartiga*, a "broad approach" is required to attain just outcomes for human rights abuse victims).

<sup>298</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 694 (2004); Ralph Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in the U.S. Courts*, 57 VANDERBILT L. REV. 2241, 2257-60 (2004).

<sup>299</sup> *Sosa*, 542 U.S. at 720.

<sup>300</sup> See *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are

ording to the standard definition, “[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>301</sup> *Jus cogens* is a form of customary law that is so widely accepted that it has risen to the level of a peremptory norm of international law that must be obeyed whether or not domestic law is in accord.<sup>302</sup> Scholars are now debating the effect of the *Sosa* holding in the Alien Tort Claims Act context on analyses of customary international law raised in other contexts.<sup>303</sup>

Alien Tort Claims Act, customary international law and *jus cogens* claims are possible bases of consideration by future courts, as more information is revealed about immigrant worker protections that may be widespread enough to represent the “law of nations” or a “general and consistent practice of states.”<sup>304</sup> However, as discussed below, that information is not currently available to U.S. courts. The most compelling immediate argument is that the long-standing norm of equal protection (also phrased in international documents as “non-discrimination,” “equal protection of the law” and “equality before the law”) has risen to the level of *jus cogens*, and requires that unauthorized workers be treated equally under

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duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . .”).

<sup>301</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 102(2) (1986).

<sup>302</sup> *Id.*

<sup>303</sup> Compare T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 Tex. L. Rev. 1989, 2003-04 (2004), and Harold Hongju Koh, Dean, Yale Law School, and Former Assistant Sec’y of State for Democracy, Human Rights, and Labor, Keynote Address at the University of Tulsa College of Law’s 2004 John W. Hager Lecture (Oct. 28, 2004), in 12 TULSA J. COMP. & INT’L L. 1, 12 (2004) and Steinhardt, *supra* note 291, at 2259; and Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 L. & CONTEMP. PROBS. 169, 173 (2004) (arguing that, after *Sosa*, customary international law is directly applicable in U.S. courts, even in the absence of explicit legislative or constitutional incorporation) with Curtis A. Bradley, Jack L. Goldsmith, and David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 902-919 (2007) (arguing that, after *Sosa*, customary international law is directly applicable in U.S. law only when explicitly referenced in domestic legislation or the Constitution).

<sup>304</sup> See also Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 521-23 (2004) (noting that ATCA suits could be a suitable recourse for undocumented immigrant workers, and also noting that undocumented workers “may turn increasingly to international labor law in their efforts to redress workplace abuses committed in the United States”).

the statutes of general application from which they are currently being excluded.<sup>305</sup>

According to this argument, extending this protection to unauthorized workers is appropriate owing to the fundamental nature of worker protections, the traditional concern of equal protection law for guarding against discrimination on the basis of national origin, and the humanitarian plight of unauthorized workers. This was the precise reasoning of the Inter-American Court of Human Rights in *OC-18*.<sup>306</sup> The counter-arguments are as follows. First, the list of norms considered to be *jus cogens* has remained relatively fixed over the decades, and it is premature to add equal protection to the list.<sup>307</sup> Second, even if equal protection is properly considered *jus cogens*, immigration status is not an appropriate category of protection, as compared with traditional categories such as race, gender, religious belief and nationality.<sup>308</sup> To the best of the Author's knowledge, U.S. courts have never ruled on this question.

#### 4.2.5. Presentation of the Transnational Norm

There is broad acknowledgement that international law is incompletely and sometimes incorrectly identified, briefed to courts, and discussed in judicial opinions.<sup>309</sup> Professor Mark Tushnet

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<sup>305</sup> See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A, art. 7, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) (stating that "All are equal before the law and are entitled without any discrimination to equal protection of the law"); ICCPR, *supra* note 110, at art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."); CERD, *supra* note 112, art. 5(a) (requiring equality of treatment by courts); see also *OC-18*, *supra* note 124, para. 101 (finding "equality before the law," "equal protection of the law," and "non-discrimination" to be *jus cogens* norms); see also CURTIS DOEBBLER, THE PRINCIPLE OF NON-DISCRIMINATION IN INTERNATIONAL LAW 3 (2007) (noting different terminology and sources for this concept).

<sup>306</sup> Compare *OC-18*, *supra* note 124, para. 101 (finding equality before the law, equal protection of the law and non-discrimination to be *jus cogens* norms) with *id.* paras. 111–60 (applying equality norms to the situation of migrant workers and unauthorized workers).

<sup>307</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (1986) ("Not all human rights norms are peremptory norms (*jus cogens*), but those in clauses (a) to (f) of this section [genocide; slavery or slave trade; the murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; and systematic racial discrimination] are.").

<sup>308</sup> See Northwestern Brief, *supra* note 176, at 39–40.

<sup>309</sup> See Tushnet, *supra* note 217, at 1294 ("The most cogent criticism of references to non-U.S. law in constitutional interpretation is surely that such references are likely to be wrong"); Jordan J. Paust, *International Law Before the Supreme Court: A Mixed Record of Recognition*, SANTA CLARA L.R., 829, 855 (2005) (discussing the

compares the Supreme Court's attempts to demonstrate "a decent respect to the opinions of mankind"<sup>310</sup> with past attempts to incorporate microeconomics into antitrust decisions and to predict the likely effects of particular legal rules: an imperfect enrichment, but an enrichment nonetheless. This observation demonstrates the key importance of the presentation by advocates to the education of the judiciary on these sources.<sup>311</sup> For example, in 2003, a group of retired diplomats submitted an *amicus* brief assuring the Court that the death penalty was hampering the United States' image abroad.<sup>312</sup> In the consular access death penalty cases, the European Union and the Mexican government have made arguments to the courts. In one Texas death penalty case, the Inter-American Commission on Human Rights sent a letter to the judge requesting a delay in setting the execution date; the court responded and many months later the date had not been set.<sup>313</sup> The advocates involved believed that the Inter-American Commission's letter was the reason for the otherwise unexpected delay, although the court never provided a reason.<sup>314</sup>

The unauthorized immigrant worker issue will likely also attract opinions from the international community. In addition to migrant-sending U.S. allies such as Mexico and Turkey, other countries that have contributed undocumented populations to the United States, such as Ireland, might decide to offer statements in U.S. controversies as well. Both the United Nations and the Organization of American States now have Special Rapporteurs focused on the human rights of migrants; these are natural contribu-

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Supreme Court's failure to address international law in case decisions); Anderson, *supra* note 244, at 46.

<sup>310</sup> Tushnet, *supra* note 217, at 1291, 1297-98.

<sup>311</sup> Sandra Babcock, Panel Presentation at Association of American Law Schools 2007 Annual Meeting (Jan. 4, 2007), *audio recording available at* <http://www.aals.org/am2007/thursday/index.html> [hereinafter Babcock Presentation]. See Rahdert, *supra* note 246, at 661-62 (arguing that, once his proposed baseline test for compatibility between the comparator country and the United States is satisfied, "the rest of the process for determining which foreign decisions are most relevant and how they ought to be used should be left to the adversarial process");

<sup>312</sup> Brief for former U.S. Diplomats Morton Abramowitz, Stephen W. Bosworth, Stuart E. Eizenstat, John C. Kornblum, Phyllis E. Oakley, Thomas R. Pickering, Felix G. Rohatyn, J. Stapleton Roy, and Frank G. Wisner as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633).

<sup>313</sup> Babcock Presentation, *supra* note 311.

<sup>314</sup> *Id.*

tors as U.S. courts begin the process of assessing the new international rights for unauthorized immigrant workers.

4.3. *Procedural Posture of the Domestic Dispute: Courts at All Levels Make Reference to International and Foreign Law*

Unauthorized immigrant workers' rights sound in numerous fields of law and arise in every sort of forum, any of which may appropriately look to international and foreign law. They are legal areas in which international law has had relatively little play to date: workers' compensation and employment-related torts, sounding in state law; and employment discrimination, wage and hour, and labor/freedom of association, involving dual federal and state law. The cases arise at all levels, including state and federal, administrative and judicial, trial and appellate.

Most discussion about the use of international and foreign law in U.S. courts centers on federal appellate courts rather than state, trial, or administrative fora,<sup>315</sup> and there appears to be no scholarly examination of whether or how state administrative agency decisions refer to international and foreign law. Although the phenomenon has attracted less attention, state courts do refer to international and foreign law,<sup>316</sup> including international human rights law, primarily when interpreting statutes that directly implicate it.<sup>317</sup> They have also been relatively active in referring to international and foreign law to create common law interpreting state (as opposed to federal) statutes and constitutions.<sup>318</sup> Trial courts are also an under-examined arena for international and foreign law. The paradigm that may come to mind is of internationally recognized figures urging exotic international law principles through *amicus* briefs, because trial courts can also consider persuasive evidence and any other arguments about the controlling law in a case. Professor Sandra Babcock, a criminal defense attorney with extensive experience using international fora and law to defend capital

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<sup>315</sup> See DeLaquil, *supra* note 284, at 698 (stating that "the way state courts have used foreign law and international opinions in their recent jurisprudence" is "often not mentioned")

<sup>316</sup> See *id.* (noting cases in which state courts have referred to international and foreign law).

<sup>317</sup> See *id.* at 698 ("Foreign law is not often used by contemporary state courts, except . . . where the substance of foreign law is necessary to deciding domestic law questions.").

<sup>318</sup> See *id.* at 699-701 ("Many state courts have used foreign laws and views to interpret and make common law . . .").



cases, recounts the story of a trial court judge who dismissed a charge against her client when she argued that his right to consular access had been denied in violation of the Vienna Convention on Consular Relations.<sup>319</sup> The prosecutor had never heard of the Vienna Convention on Consular Relations, gave no response to the motion, and the defendant prevailed.<sup>320</sup>

## 5. CONCLUSION

International and some reported foreign laws establish standards that challenge the recent downturn in workplace rights for the unauthorized in the United States. This Article used these sources as a departure point in its discussion of employment rights for the unauthorized, working from the assumption that the United States will probably never stop demanding foreign manual labor, that our present system for managing it is woefully inadequate, and that unauthorized migrant workers are properly the subject of international human rights protection. The U.S. courts' demonstrated past interest in international and foreign law in other contexts has important implications for all actors across this broken system. A recent article by Professor Connie de la Vega and Conchita Lozano-Batista urged advocates to begin invoking international standards.<sup>321</sup> The present article drew from the recent use of international law by U.S. courts to provide guidance to the courts for the day that advocates respond to this challenge.

Professor Babcock likens the use of foreign and international law in death penalty cases to the "Hail Mary" pass in football.<sup>322</sup> The Hail Mary pass is defined as "a long pass thrown high into the air in a last-ditch attempt to score a touchdown with time running out; aptly named because so few are completed, it does not amount to much more than a prayer."<sup>323</sup> The Hail Mary analogy illustrates a few important points about the use of international and foreign law in the adjudication of unauthorized immigrant worker rights.

First, adjudicators need to see that unauthorized workers in America are indeed in a situation that calls for a Hail Mary pass. Isolated without a vote amidst an electorate that feels besieged by

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<sup>319</sup> Babcock Presentation, *supra* note 311.

<sup>320</sup> *Id.*

<sup>321</sup> De la Vega, *supra* note 90.

<sup>322</sup> Babcock Presentation, *supra* note 311.

<sup>323</sup> DAVE OMINSKY & P.J. HARARI, FOOTBALL MADE SIMPLE: A SPECTATOR'S GUIDE 116 (4th ed. 2002) (emphasis omitted).

the possibility of global competition, terrorism, and loss of ethnic and cultural supremacy, unauthorized workers have witnessed a radical slippage in their rights. Unauthorized workers may not be on death row, but many of their workplace protections are. International and foreign law provides a fresh perspective on unauthorized workers as rights-holders. At the same time, adjudicators should not see reference to international and foreign law as a Hail Mary pass by the parties, but instead as the strategic placement of a larger and stronger fullback defending their decisions. Fullbacks help advance the ball in the small burst;<sup>324</sup> that may be all that is needed in cases that nearly always divide the courts that hear them.

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<sup>324</sup> See OMINSKY AND HARARI, *supra* note 323, at 42 (noting that in addition to “provid[ing] the quarterback with *pass protection*, . . . he also runs with the ball in *short yardage* situations . . . and catches short forward passes.”).