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MIGRANT WORKERS IN THE UNITED STATES: CONNECTING DOMESTIC LAW WITH INTERNATIONAL LABOR STANDARDS

LANCE COMPA

Note: This article is based on the author's Kenneth M. Piper Lecture at the IIT Chicago-Kent College of Law, March 22, 2016

I. INTRODUCTION

U.S. immigration policy is a matter of domestic law (distinct from refugee policy, which is grounded in international treaties). This paper asks whether and how immigration policy makers and advocacy groups in the United States might take into account international standards on migrant labor. These standards appear in United Nations, International Labor Organization, and international trade agreement provisions on rights and protections for migrant workers. I do not argue that international standards should override or substitute for U.S. law. Rather, they should inform policy makers and advocacy groups' work in crafting immigration law and policy changes.

Following this introduction, Part II summarizes current debates and policy divides on migrant labor in the United States regarding both documented and undocumented workers from abroad. It also notes the absence of international labor and human rights considerations in most U.S. policy discourse, reflecting a broader "American exceptionalism" strain.

Part III examines three principal international instruments on migrant labor: the United Nations' *International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families*,¹ the International Labour Organization's ("ILO") *Convention No. 97 concerning Migration for Employment (Revised 1949)*,² and *ILO Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equali-*

1. U.N. GAOR, 45th Sess., 69th plen. mtg. at 261, U.N. Doc. A/45/49 (Dec. 18, 1990), G.A. Res. 45/158.

2. Convention Concerning Migration for Employment (ILO No. 97), July 1, 1949, 120 U.N.T.S. 71 [hereinafter ILO No. 97].

ty of Opportunity and Treatment of Migrant Workers (1975).³ In 2006, the ILO consolidated key provisions of these instruments in a *Multilateral Framework on Labour Migration*,⁴ subtitled “[n]on-binding principles and guidelines for a rights-based approach to labor migration” (emphasis on “non-binding”).

Rather than a lengthy parsing of these texts, this article will explore their common features and their relevance to current migrant labor debates and policy discourse. This part continues with a review of migrant labor treatment in the United States that arguably runs afoul of international standards.

Part IV moves to a review of experience with migrant labor provisions of trade agreements—mainly the North American Free Trade Agreement (NAFTA),⁵ the only one that specifically addresses migrant workers’ rights. As binding international documents, these trade agreements affect U.S. law and policy. Sometimes, the effect is direct, as when NAFTA created new visa categories allowing more cross-border movement.⁶ But effects can also be indirect, as when NAFTA’s supplemental labor agreement included protection of migrant workers as one of its “labor principles.”⁷ This gave rise to several complaints and cases under the NAFTA labor agreement, demonstrating both its potential and its limitations.

Part V reviews arguments for taking into account international standards and applying a human rights framework in our domestic legal discourse, and concludes with a set of policy recommendations.

II. OVERVIEW OF MIGRANT LABOR POLICIES AND DEBATES

A. Moving “Talent”

Governments around the world have expanded commercial relations through trade agreements, bilateral investment treaties, and other moves to attract investment and to promote exports of goods and trade in services. However, the expansion of movement of goods, services, and money does

3. Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO No. 143), June 24, 1975, 1120 U.N.T.S. 323 [hereinafter ILO No. 143].

4. See Int’l Labour Org. [ILO], *Multilateral Framework on Labour Migration*, at 33 (2006), http://www.ilo.org/global/topics/labour-migration/publications/WCMS_178672/lang-en/index.htm.

5. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

6. See *id.* at 664-70.

7. North American Agreement on Labor Cooperation, Annex 1, ¶11, *opened for signature* Sept. 8, 1993, 32 I.L.M. 1499 [hereinafter NAALC].

not extend to people. As Richard Freeman notes, “[t]rade and international capital flows are a larger proportion of activity in goods and capital markets than immigration is in labor markets, presumably because governments have reduced trade barriers and liberalized capital markets, but have not lowered barriers to immigration.”⁸

Defining and controlling borders are seen as essential to sovereignty. Governments are less willing to cede decision-making on immigration policy to international bodies. In the great exception to this trend, the European Union has made free movement of people among member countries a fourth pillar of economic integration alongside goods, services and capital. But the EU’s “free movement” pillar faces enormous pressure in the wake of the United Kingdom’s June 2016 “Brexit” vote.⁹

Freed-up movement of capital, goods, and services carries with it a demand for freed-up movement of “talent”—people applying their skills to generate more wealth in a globalized economy. How wealth is distributed and shared is a question beyond the scope of this paper. But the movement of talent across borders is a key factor in producing the wealth.

The term “talent” should not be limited to executives, professionals, “outstanding ability” O-visa holders, and those in the vaunted STEM fields (science, technology, engineering, mathematics). The word properly attaches to all workers who bring skill, care, and responsibility to their tasks. And that means all workers.

In upstate New York, mostly undocumented migrant workers apply their talent to the year-round care of dairy herds and milk production. Their work has proven to be a boon to the state’s economy, especially with the rise of Greek-style yogurt. The same holds true for those caring for upstate apple orchards, Finger Lakes vineyards, and other agricultural production, both year-round and at harvest time.

In other parts of the country, millions of immigrant workers—again, many of them undocumented—apply skill, care, and responsibility in a broad range of industries. These sectors include meatpacking and poultry (starting with care not to cut themselves and others wielding sharp knives in close quarters at rapid line speeds); construction, forestry and landscaping; hotels and restaurants and amusement parks; and other sectors where

8. Richard B. Freeman, *People Flows in Globalization* 9, (Nat’l Bureau of Econ. Research, Working Paper No. 12315, 2006), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.464.5626&rep=rep1&type=pdf>.

9. See Alan Travis, *Fear of Immigration Drove The Leave Victory – Not Immigration Itself*, THE GUARDIAN (June 24, 2016), <http://www.theguardian.com/politics/2016/jun/24/voting-details-show-immigration-fears-were-paradoxical-but-decisive>.

immigrant workers' labor powers economic activity. Migrant workers, documented and undocumented, play a key role in important economic sectors in the Chicago regional economy.¹⁰

What Maria Lorena Cook describes as “the conflict and tensions between sovereignty of the nation-state and the cross-border flows characteristic of a global economy”¹¹ generate currents that politicians, policy makers, and interest groups around the globe are trying to navigate. Not least here in the United States, where on one side candidates for office set a harsh anti-immigrant tone, while others support comprehensive immigration reform and decry deportations breaking up families and sending women and children back to violence-ridden countries.¹²

B. Competing Realities

Contradictory approaches also mark views of employer and employee advocates, who appear to inhabit separate universes. For many employers, the United States suffers a dearth of talent. The U.S. Chamber of Commerce, the Essential Worker Immigration Coalition, ImmigrationWorks USA, CompeteAmerica and other industry and trade associations insist that we are in desperate need of more immigrant workers to meet labor shortages and keep the economy growing.¹³ The American Immigration Council asserts that immigrant employees with H-1B visas do not pull down wages of American high-tech workers; they make higher salaries than American counterparts.¹⁴

10. See, e.g., AM. IMMIGRATION COUNCIL, IMMIGRANTS HELP SUSTAIN CHICAGO'S ECONOMY 2 (2002), <http://216.92.33.26/special-reports/immigrants-help-sustain-chicagos-economy>.

11. Maria Lorena Cook, *The Advocate's Dilemma: Framing Migrant Rights in National Settings*, 4 STUD. SOC. JUST. 145, 145 (2010).

12. See, e.g., Miriam Valverde, *Compare the Candidates: Clinton vs. Trump on Immigration*, POLITIFACT (July 15, 2016, 2:46 PM), <http://www.politifact.com/truth-o-meter/article/2016/jul/15/compare-candidates-clinton-vs-trump-immigration/>.

13. See, e.g., CompeteAmerica, et. al., *Debunking the Myth that Immigration Harms America*, <http://www.semiconductors.org/clientuploads/directory/DocumentSIA/Workforce/19%20Associations%20Immigration%20Myth%20Facts%203-2015.pdf> (last visited January 27, 2016); MICROSOFT CORP., A NAT'L TALENT STRATEGY: IDEAS FOR SECURING U.S. COMPETITIVENESS AND ECON. GROWTH 1, <https://news.microsoft.com/download/presskits/citizenship/MSNTS.pdf> (last visited January 27, 2016); STUART ANDERSON, NATIONAL FOUNDATION FOR AMERICAN POLICY., SETTING THE RECORD STRAIGHT ON HIGH-SKILLED IMMIGRATION 1–2, 5, 9, 26 (2016), <http://nfap.com/wp-content/uploads/2016/08/Setting-the-Record-Straight-on-High-Skilled-Immigration.NFAP-Policy-Brief.August-20162.pdf>.

14. See AMERICAN IMMIGRATION COUNCIL, THE H-1B VISA PROGRAM: A PRIMER ON THE PROGRAM AND ITS IMPACT ON JOBS, WAGES, AND THE ECONOMY 4 (2016), <http://www.immigrationpolicy.org/just-facts/h-1b-visa-program-primer-program-and-its-impact-jobs-wages-and-economy>.

In their various publications just noted, these pro-immigration advocates call for lifting the cap on H-1B “specialty occupation” visas and expanding use of L “intracompany transfer” visas for high-tech and other high-skilled employees. They want to make H-2A and H-2B visas for “low-tech” temporary agricultural and non-agricultural jobs available for year-round work, not just seasonal labor. They want to ease what they see as overly burdensome prevailing wage and adverse effect wage requirements, job posting requirements, travel cost payments, work guarantees and other conditions employers must meet to engage H-1B, L, H-2A and H-2B workers. In March 2016, their views were reflected by the government of India, which filed a complaint with the World Trade Organization charging that U.S. visa requirements for H-1B employees violated WTO trade rules.¹⁵

A recent *Financial Times* article suggested that there is such a labor shortage in the construction industry that employers now sponsor migrant workers for U.S. citizenship to retain them.¹⁶ But the same article reported (apparently oblivious to connecting the dots) that employers complaining about labor shortage are resolutely non-union and pay workers as little as \$10 an hour for dangerous, demanding physical labor.¹⁷

Trade unions, employee associations, and other worker advocates take a polar opposite view. They argue that what employers see as burdensome requirements, such as demonstrating unsuccessful attempts to recruit American workers as a condition of approval for using guest worker visas, are easily evaded by employers and weakly enforced by government regulators.¹⁸ Research by Ben A. Rissing shows that Department of Labor officials over-rely on employers’ “attestations” of labor shortages (taking their word for it, without back-up evidence) and end up granting more temporary visas at times of high unemployment.¹⁹

15. See Matthew Dalton, *India Challenges U.S. Worker Visa Fees at WTO: Complaint Addresses Increase in Fees for Temporary Visas Available for Highly Skilled Workers*, WALL ST. J. (March 4, 2016), <http://www.wsj.com/articles/india-challenges-u-s-temporary-visa-scheme-at-wto-1457091168>.

16. See Gary Silverman, *Workers Wanted: Construction Sector Fights to Retain Foreign-Born Employees With Citizenship Schemes and Other Incentives*, FIN. TIMES (February 8, 2016), <https://www.ft.com/content/46f78afc-ce4d-11e5-831d-09f7778e7377>.

17. *Id.*

18. See, e.g., Ken Bensinger et. al., *The Pushovers: Bar None: Abusing Foreign “Guest Workers,” Stealing Their Wages, Even Threatening Their Lives: There Is Almost No Workplace Offense so Extreme that the U.S. Government Will Not Reward Employers with the Chance to Do It Again*, BUZZFEED (May 12, 2016), https://www.buzzfeed.com/kenbensinger/the-pushovers?utm_term=.gy0Vad90Z#.ojwaNJQ26.

19. See Ben A. Rissing & Emilio J. Castilla, *Testing Attestations: U.S. Unemployment and Immigrant Work Authorizations*, 69 INDUS. & LAB. REL. REV. 1081, 1102, 1106 (2016).

Labor advocates insist that the alleged labor shortage is itself a myth.²⁰ They say that employers claim a lack of home-grown talent to justify bringing large numbers of immigrant employees into the workforce to replace American workers, save on labor costs, and maintain a docile workforce fearful of jeopardizing their visa status. Moreover, use of temporary visas puts downward pressure on the wages of U.S. workers who manage to hold onto their jobs.²¹

Each side in this debate musters myriad studies and reports to support its view and to influence public opinion and the policy debate in Congress.²² As Kati Griffith summarizes:

At the heart of much of the current debate surrounding both skilled and unskilled migrant workers in the United States is whether, and to what extent, these workers have an effect on the wages and working conditions of domestic workers. Studies on the effect of immigrant workers on labor standards for domestic workers arrive at “contradictory conclusions.” Some find that migrant workers have increasingly “caused a major competitive problem” for U.S. workers and may have reduced wage rates of some domestic workers. Others point out that, at the aggregate level, migrant workers do not negatively affect labor conditions for domestic workers. Much of this debate centers on “whether low-income [domestic] workers are hurt a lot or just a little.” While the direct causal relationship between the presence of migrants and declining labor standards in the U.S. remains hotly contested, there is no doubt that many migrant workers, especially undocumented migrant workers, are concentrated in low-wage workplaces where workplace rights are poorly followed and poorly enforced.²³

The H-2B visa program apparently fails to protect hundreds of traveling carnival workers whose jobs are controlled by a spurious “union” run

20. See, e.g., MICHAEL S. TEITELBAUM, *FALLING BEHIND? BOOM, BUST, AND THE GLOBAL RACE FOR SCIENTIFIC TALENT* (Princeton Univ. Press 2014).

21. See Hal Salzman et. al., *The Bogus High-Tech Worker Shortage: How Guest Workers Lower U.S. Wages*, PBS NEWSHOUR: MAKING SENSE (July 24, 2013, 1:05PM), <http://www.pbs.org/newshour/making-sense/the-bogus-high-tech-worker-sho/>.

22. On the labor shortage side, see, e.g., ADAMS B. NAGER & ROBERT D. ATKINSON, *DEBUNKING THE TOP TEN ARGUMENTS AGAINST HIGH-SKILLED IMMIGRATION* (2015), <http://www2.itif.org/2015-debunking-myths-high-skilled.pdf> (accessed January 27, 2016); U.S. CHAMBER OF COMMERCE & IMMIGRATIONWORKS USA, *THE ECONOMIC IMPACT OF H-2B WORKERS* (2010), at https://www.uschamber.com/sites/default/files/legacy/reports/16102_LABR%20H2BReport_LR.pdf (accessed January 27, 2016). *But see* RON HIRA, ECON. POLICY INST., *THE H-1B AND L-1 VISA PROGRAMS: OUT OF CONTROL*, EPI BRIEFING PAPER #280 (Oct. 14, 2010) at <http://www.epi.org/publication/bp280/>; DANIEL COSTA, ECON. POLICY INST., *THE H-2B TEMPORARY FOREIGN WORKER PROGRAM: FOR LABOR SHORTAGES OR CHEAP, TEMPORARY LABOR?*, EPI BRIEFING PAPER #416, (Jan. 19, 2016), <http://www.epi.org/publication/h2b-temporary-foreign-worker-program-for-labor-shortages-or-cheap-temporary-labor/> (accessed January 27, 2016).

23. Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL'Y. J. 125, 127–28 (2009).

by businessmen from Mexico and Texas.²⁴ Working conditions of Mexican and Central American migrants with temporary work visas in Chesapeake Bay crab-processing plants are sharply criticized by labor advocates, yet defended by an otherwise staunch labor ally.²⁵

C. Litigating Migrant Protections

Problems of migrant worker abuse do not arise only in the policy and publicity arena. They come to our courts, too. In one widely publicized lawsuit, Indian welders brought in on H-2B visas by Signal International corp. to repair oil facilities after Hurricane Katrina won a multi-million-dollar judgment against the company for holding them in conditions akin to slavery.²⁶ In another, former Disney Corp. computer systems employees in Orlando have filed a lawsuit against the company for replacing them with immigrant H-1B visa holders (and adding insult to injury, making them train their replacements before losing their jobs).²⁷

A federal judge in Virginia awarded \$781,916 in unpaid wages and damages to 200 Guatemalan guest workers whose employers failed to pay the minimum wage or overtime.²⁸ The largest sauerkraut producer in the United States was found to have failed to provide H-2B workers with written terms of employment, terminated them early without good cause, took unlawful food and housing deductions from their paychecks, failed to reimburse their inbound expenses and failed to pay for return transportation to their homes in Mexico.²⁹ Prosecutors around the country have brought several cases against wealthy householders who kept domestic servants in indenture-like conditions.³⁰

24. See Barry Meier, *Union Accused of Betraying Migrant Carnival Workers*, N.Y. TIMES (Sept. 1, 2015), <http://www.nytimes.com/2015/09/02/business/union-accused-of-betraying-migrant-carnival-workers.html>.

25. See Rachel Weiner, *A Progressive Champion in Maryland Sides with Seafood Companies over Visa Regulations*, WASH. POST (Nov. 26, 2015), https://www.washingtonpost.com/local/md-politics/why-a-liberal-senator-is-siding-with-employers-in-a-bitter-labor-dispute/2015/11/26/03a1a63c-8962-11e5-be8b-1ae2e4f50f76_story.html.

26. See Liam Stack, *Indian Guest Workers Awarded \$14 Million*, N.Y. TIMES (Feb. 18, 2015), http://www.nytimes.com/2015/02/19/us/indian-guest-workers-awarded-14-million.html?_r=0.

27. See Julia Preston, *Lawsuits Claim Disney Colluded to Replace U.S. Workers with Immigrants*, N.Y. TIMES (Jan. 25, 2016), <http://www.nytimes.com/2016/01/26/us/lawsuit-claims-disney-colluded-to-replace-us-workers-with-immigrants.html>.

28. *Siquic v. Star Forestry, LLC*, No. 3:13-cv-00043, 2016 WL 1650800, at *7–9 11 (W.D. Va. Mar. 17, 2016).

29. *Jimenez v. GLK Foods, LLC*, No. 12-CV-0209, 2013 WL 3936928, at *6, *16, *32, *34, *36–39 (E.D. Wisc. May 23, 2016).

30. See, e.g., Ashley Southall, *Diplomat From India Is Indicted Again over Housekeeper*, N.Y. TIMES (Mar. 14, 2014), <http://www.nytimes.com/2014/03/15/world/asia/diplomat-from-india-is-indicted-again-over-housekeeper.html>; Michael E. Miller, *Chinese Nanny Beaten, Starved, Treated*

A 2011 front-page story in the New York Times about J-1 visa holders working long hours in abusive conditions packaging products for Hershey Chocolate Corp exposed the program as a cheap labor scheme, not the cultural exchange experience for young foreigners it was meant to be.³¹ The State Department reformed the program, but the Government Accountability Office found in 2015 that the program continues to lack the safeguards necessary to ensure that participants are offered cultural activities and not charged exorbitant fees.³²

In February 2016, a class action suit on behalf of foreign au pair employees holding J-1 visas went forward to trial.³³ Plaintiffs argued that fifteen J-1 visa sponsoring companies colluded to suppress wages in violation of the Sherman Antitrust Act, the Fair Labor Standards Act and state wage and hour laws. The court also held that the au pairs can maintain claims for fraud, breach of fiduciary duty, unjust enrichment and promissory estoppel.³⁴

Employers of H-1B visa holders are now concerned about a legislative proposal that would make it easier for American workers to file lawsuits against companies who hire foreign employees. They say, “The goal appears to be to produce enough legal peril for employers that they will avoid hiring high-skilled foreign nationals in the United States.”³⁵ They further argue that such measure would “have the effect of . . . encouraging many companies to expand resources abroad and place more people in other countries.”³⁶

‘Like a Dog’ in Wealthy Minnesota Suburb, Authorities Say, WASH. POST (July 18, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/07/18/chinese-nanny-beaten-starved-treated-like-a-dog-in-wealthy-minn-suburb-authorities-say/>.

31. See Julia Preston, *Foreign Students in Work Visa Program Stage Walkout at Plant*, N.Y. TIMES (Aug. 17, 2011), <http://www.nytimes.com/2011/08/18/us/18immig.html>; Julia Preston, *State Department Revises Foreign Student Job Program after Abuse Complaints*, N.Y. TIMES (May 4, 2012), <http://www.nytimes.com/2012/05/05/us/politics/us-revises-foreign-student-job-program.html>.

32. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-265, SUMMER WORK TRAVEL PROGRAM: STATE DEPARTMENT HAS TAKEN STEPS TO STRENGTHEN PROGRAM REQUIREMENTS, BUT ADDITIONAL ACTIONS COULD FURTHER ENHANCE OVERSIGHT, at 24–26 (2015), <http://www.gao.gov/assets/670/668453.pdf>.

33. See *Beltran v. InterExchange, Inc.*, No. 1:14-cv-03074-CMA-KMT, 2015 WL 7253286, at *5–6, *43 (D. Colo. Feb. 22, 2016).

34. *Id.* See also Laura D. Francis, *J-1 Au Pairs Maintain Claims Sponsors Colluded to Fix Wages*, DAILY LAB. REP. (BNA) Feb. 23, 2016 at A-2.

35. See NAT’L FOUND. FOR AM. POLICY, THE REAL WORLD IMPACT OF PROPOSED HIGH-SKILLED IMMIGRATION RESTRICTIONS 3 (2016), <http://nfap.com/wp-content/uploads/2016/08/Real-World-Impact-of-Proposed-High-Skilled-Immigration-Restrictions.NFAP-Policy-Brief.August-20161.pdf>.

36. *Id.*

D. International Standards and American Exceptionalism

Both sides in the labor-shortage vs. labor-exploitation debate make compelling arguments. Ultimately, the arguments depend on underlying political inclinations and angle of approach. Labor advocates criticize what they see as the misuse of immigration programs. But this doesn't mean (nor do they argue) that immigration should be halted. It means that the United States a new immigration policy that balances the needs of companies and the overall economy with needs for high labor standards and protection of workers' rights. This is where international human rights norms concerning migrant labor can inform analysis and discourse.

In its 2006 *Multilateral Framework*, the International Labor Organization (ILO) recognized the reality that member states are not willing to cede sovereignty on basic immigration policy, while recommending that they take international standards into consideration:

States have the sovereign right to develop their own policies to manage labor migration. International labor standards and other international instruments, as well as guidelines, as appropriate, should play an important role to make these policies coherent, effective and fair.³⁷

But we in the United States have yet to seriously engage international labor standards in developing migrant labor policies. For example, a 2013 critical analysis of U.S. immigration by a coalition of unions and immigrant worker advocacy groups concludes that regardless of visa category, immigrant workers in the United States face “disturbingly common” patterns of abuse including “fraud, discrimination, coercion, retaliation, blacklisting and, in some cases, forced labor, indentured servitude, debt bondage and human trafficking.”³⁸ However, this impressive 50-page report, backed up by more than 300 source citations, offering eight “core principles” and detailed policy recommendations, does not discuss the United Nations' *International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families* and mentions only in passing related ILO conventions.

This is not surprising, nor is it a cause for criticism. It simply reflects the reality that international law and international labor and human rights standards have limited purchase in American policy discourse, even among advocates whose newly-proposed core principles have long been contained in these international instruments. With the world's longest-standing con-

37. *Multilateral Framework on Labour Migration*, *supra* note 4, at 11.

38. INT'L LAB. RECRUITMENT WORKING GRP., THE AMERICAN DREAM UP FOR SALE: A BLUEPRINT FOR ENDING INTERNATIONAL LABOR RECRUITMENT ABUSE, at 5 (2013), <https://fairlaborrecruitment.wordpress.com/>.

stitution, our Bill of Rights, and a rich rule-of-law tradition, Americans tend to think we don't need the rest of the world to tell us how to order our affairs.³⁹ Practically alone in the world, for example, the United States has refused to ratify the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁴⁰ and the Convention on the Rights of the Child (CRC).⁴¹

The "American exceptionalism" strain in our law and policy mix is especially marked in the labor-related field. Outside a small cadre of comparative and international specialists, most actors in the U.S. labor law system have little familiarity with ILO conventions and labor provisions in other international instruments. As one scholar noted:

The official American view is that international human rights are endangered elsewhere, and that American labor law is a model for the rest of the world. The rest of the world may not be convinced that American labor law, old and flawed as it is, is a model for the modern world. But more to the present point, American legal institutions and decision makers have thus far been deaf to the claim that international labor law provides a potential model for American labor law, or even a critical vantage point from which to view American labor law (footnote omitted).⁴²

The United States has ratified just 14 of the ILO's 189 conventions, and among the 14 are just two of the organization's eight "core conventions" on forced labor and child labor.⁴³ It has not ratified either of the ILO's migrant labor conventions, nor the UN migrant convention.⁴⁴

39. See Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, at 1567-75 (2006).

40. United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 20378.

41. United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 27531.

42. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1589 (2002).

43. See *ILO Conventions: Ratifications for United States*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871 (last visited September 8, 2016) (The United States has ratified Convention No. 105 on forced labor and Convention No. 182 on worst forms of child labor. The United States has not ratified Convention No. 29 on forced labor, No. 87 on freedom of association, No. 98 on the right to organize, No. 100 on equal pay, No. 111 on nondiscrimination, and No. 138 on child labor.).

44. See *Ratifications of C097 - Migration for Employment Convention (Revised), 1949 (No. 97)*, INT'L LABOUR ORG.,

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242:NO (last visited September 8, 2016); *Ratifications of C143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288:NO (last visited September 8, 2016); on ratification of the Migrant Workers convention, see United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, December 18, 1990, 2220 U.N.T.S. 39481.

In the face of American exceptionalism, are we in the United States ready to examine and learn from international standards and international discourse on migrant workers' rights? Here is how Maria Lorena Cook characterizes the problem:

There are political, legal, and discursive limits on the use of human rights frames, particularly in the United States. Moreover, much of the contemporary debate on immigration in the US and other advanced industrial democracies revolves around arguments about security, economics, and law—arguments that are rooted in the nation-state. This gives rise to the advocate's dilemma: on the one hand, universal norms such as human rights, which are theoretically well suited to advancing immigrants' claims, may have little resonance within national settings; on the other hand, the debates around which immigration arguments typically turn, and the terrain on which advocates must fight, derive their values and assumptions from a nation-state framework that is self-limiting.⁴⁵

III. INTERNATIONAL STANDARDS AND U.S. LAW AND PRACTICE

A. International Norms

A brief summary of the three major international instruments on migrant labor standards introduces this section and the discussion that follows.

ILO Convention No. 97 on migration for employment dates to 1949 and aims mainly at fraudulent recruiting and misleading information about migrant work opportunities. It calls for governments to themselves administer migrant labor recruiting services, or to carefully regulate such services by private actors.⁴⁶

Adopted in 1975, Convention No. 143 on migration “in abusive conditions” aims at traffickers and their victims. It calls on countries to “suppress clandestine movements of migrants for employment and illegal employment” of migrants and to criminally prosecute traffickers.⁴⁷ It goes on to promote equality of opportunity and treatment for migrant workers.⁴⁸

The UN adopted its migrant worker convention in 1990, but it took more than a decade for it to enter into force.⁴⁹ The terms of the convention

45. Maria Lorena Cook, *The Advocate's Dilemma: Framing Migrant Rights in National Settings*, 4 STUDIES IN SOCIAL JUSTICE 145, 146 (2010).

46. See ILO No. 97, *supra* note 2 at annex I–II.

47. ILO No. 143, *supra* note 3 at art. 3.

48. *Id.* art. 8–10.

49. For an overview of adoption, entry into force, and ratification of the Migrant Workers Convention, see *International Migration Convention*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG. [UNESCO], <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/international-migration-convention/> (last visited November 7, 2016).

required at least twenty ratifications before going into force, so that a first mover is not alone assuming obligations. Mostly migrant-sending countries made up the first twenty ratifiers, a threshold achieved in 2003. This pattern has held in years since, when another twenty countries ratified the convention, most of them likewise primarily sending countries.⁵⁰

Among Organization for Economic Cooperation and Development (OECD) member states, only Chile, Mexico and Turkey have ratified the migrant labor convention. The total of forty is still far below the UN's nearly 200-country membership, compared with CEDAW and the CRC, which have almost universal ratification (but not by the United States). Ratification of the ILO migrant labor conventions is also characterized by mostly sending-country approval: 49 countries have ratified Convention No. 97, and 23 have ratified convention 143 (again, not including the United States).⁵¹

Notwithstanding relatively low ratification levels, these instruments reflect common international expectations as to how migrant workers should be treated. The UN migrant worker convention and the two ILO migrant labor conventions are long, dense, complex documents. This article is not going to delve into their fine details. Rather, it synthesizes central precepts and lay them alongside U.S. law, policy, and on-the-ground reality to examine how treatment of migrant workers in the United States comports with global standards.

The international instruments on rights and protections of migrant workers share these principles:

- Non-discrimination (i.e. on traditional grounds such as race, sex, national origin, religion etc., separate from migration status);⁵²
- Humane treatment that respects the essential dignity of the person;⁵³

50. *Id.*

51. *See Ratifications of C097 - Migration for Employment Convention (Revised), 1949 (No. 97)*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242:NO (last visited September 8, 2016); *Ratifications of C143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)*, INT'L LABOUR ORGANIZATION, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288:NO (last visited September 8, 2016).

52. *See United Nations Migrant Worker Convention art. 7, Dec. 18, 1990, 2220 U.N.T.S. 39481* [hereinafter *Migrant Worker Convention*]; ILO No. 97, *supra* note 2 art. 6; ILO No. 143, *supra* note 3 art. 10.

53. *See Migrant Worker Convention, supra* note 52 art. 17; ILO No. 143, *supra* note 3 art. 1.

- Document integrity ensuring that migrants maintain possession of or have immediate, unfettered access to their passports, work permits, visas, birth certificates or any other vital personal document;⁵⁴
- Regulated recruitment systems ensuring that workers are apprised of terms and conditions of employment under temporary work visas and that promised terms and conditions become a reality, without workers having to pay excessive fees, transportation costs, or bribes to get their visas and their jobs;⁵⁵
- Wages, conditions, and other terms of employment “not less favorable” than those of co-workers who are “nationals”;⁵⁶
- Freedom of association, the right to organize, and the right to bargain collectively;⁵⁷
- Access to justice and remedy for injustice—migrant workers should have legal recourse available to them for violations of minimum labor standards under national law, violations of contracted conditions of employment, or violations of terms guaranteed by their work visas.⁵⁸

B. U.S. Law and Practice

Addressing each of these in turn, the following examples of ways in which conditions for immigrant workers in the United States fail to live up to international norms suggest that reform efforts might benefit from taking into account and responding to these baseline standards.

1. Discrimination

Many immigrant workers face discrimination because of sex, race, national origin, religion and other grounds. For starters, foreign recruiters can openly discriminate against workers seeking temporary visas for employment in the United States, based on the principle of non-extraterritorial application of U.S. anti-discrimination statutes.⁵⁹

54. See Migrant Worker Convention, *supra* note 52 art. 21.

55. See *Id.* art. 66; ILO No. 97, *supra* note 2 at annex I-II.

56. See Migrant Worker Convention, *supra* note 52 art. 27.

57. See *Id.* art. 7; ILO No. 97, *supra* note 2 at art. 6; ILO No. 143, *supra* note 3 at art. 10.

58. See Migrant Worker Convention, *supra* note 52 art. 83.

59. See, e.g., *Reyes-Gaona v. NCGA*, 250 F.3d 861 (4th Cir. 2001).

Once here, many immigrant workers endure discrimination both blatant and disguised.⁶⁰ They and members of their families suffer economic, social and health effects of discrimination in many areas.⁶¹ Sexual harassment is an especially widespread abuse.⁶² But discrimination can be subtler, too, as when resort operators employ young white East European and Russian (mostly women) workers holding H-2 visas for “front-of-the-house” contact with customers, while Mexican and Central Americans with the same visas work in “back-of-the house” cooking and cleaning. In one notable example, Donald Trump’s Mar-a-Lago resort hotel in Florida spurned citizen job applicants in favor of H-2B visa holders from Eastern Europe.⁶³

2. Humane treatment

Conditions for immigrant workers such as the welders from India in the *Signal International* litigation and many household domestic employees in anti-slavery prosecutions clearly run afoul of humane treatment requirements. One shocking example of non-conformance with the humane treatment standard is found in accounts of immigrant women in detention being shackled to hospital beds while giving birth.⁶⁴ Beyond that, Amnesty International has documented pervasive problems with conditions of detention, such as comingling of immigration detainees with individuals convicted of criminal offenses; inappropriate and excessive use of restraints; inadequate access to healthcare, including mental health services; inadequate access to

60. See Griffith, *supra* note 23, at 126, 129, 134, 150-51, 161.

61. See Cecilia Ayón, *Economic, Social, and Health Effects of Discrimination on Latino Immigrant Families*, MIGRATION POL’Y. INST. (September 2015), <http://www.migrationpolicy.org/research/economic-social-and-health-effects-discrimination-latino-immigrant-families> (accessed February 19, 2016).

62. See, e.g., Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 VIOLENCE AGAINST WOMEN 237, at 245–54 (2010); Grace Meng, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment*, HUMAN RIGHTS WATCH (May 15 2012), <https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and-sexual>; Sara Kominers, *Working in Fear: Sexual Violence against Women Farmworkers in the United States: A Literature Review*, OXFAM AM. (Apr. 16 2015), <https://www.northeastern.edu/law/pdfs/academics/phrge/kominers-report.pdf>.

63. See Charles V. Bagli & Meghan Twohey, *Foreign Labor Fills Vacancies at Trump Club*, N. Y. TIMES (February 25, 2016), <http://www.nytimes.com/2016/02/26/us/politics/donald-trump-taps-foreign-work-force-for-his-florida-club.html>.

64. See, e.g., Julia Preston, *Settlement for a Shackled Pregnant Woman*, N. Y. TIMES (October 17, 2013), <http://www.nytimes.com/2013/10/18/us/settlement-for-a-shackled-pregnant-woman.html>; Laura Mills, *Poor Housing, Wage Cheats still Plague Midwest Migrant Farm Workers*, IOWAWATCH (December 30, 2013), <http://investigatamidwest.org/2013/12/30/poor-housing-wage-cheats-still-plague-midwest-migrant-farm-workers/> (accessed January 31, 2016).

exercise; and denial of telephone access and other means of communication with family members or advocates.⁶⁵

Other detention abuses include denial of family visitation, denial of physical recreation, denial of telephone access, denial of access to legal material and presentations by attorneys, denial of correspondence and other mail, improper storage (and resulting loss) of funds and personal property, abusive conditions in transfer from one facility to another, denial of toilet facilities in hold rooms, and other egregious cases of inhumane treatment.⁶⁶ And remember, these are not criminal detainees.

3. Document integrity

Document integrity is a recurring problem for immigrant workers in the United States. Crew leaders and employers often seize passports, birth certificates and visas from H-2A and H-2B workers.⁶⁷ Diplomats, officials of international organizations, international businessmen and other wealthy employers of household domestic workers do likewise with workers holding with B-1, G-5 and A-3 “personal servant” visas.⁶⁸

Document confiscation puts employees in effective captivity. They are already isolated in temporary employee housing quarters, usually with no means of independent transportation. But without personal documents they fear even to flee an abusive employer.⁶⁹

4. Regulated recruitment systems

Recruitment abuses are common in U.S. temporary work visa programs. A 2015 report by the U.S. General Accounting Office found evidence of “third-party recruiters charging workers prohibited fees; not

65. See AMNESTY INT’L USA, *JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA*, 7 (March 25, 2009) at <http://www.amnestyusa.org/research/reports/usa-jailed-without-justice?page=show> (accessed January 31, 2016).

66. See KAREN TUMLIN ET. AL., *A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS* 73 (2009), <http://www.nilc.org/wp-content/uploads/2016/02/A-Broken-System-2009-07.pdf> (accessed February 19, 2016).

67. See ETAN NEWMAN, *NO WAY TO TREAT A GUEST: WHY THE H-2A AGRICULTURAL VISA PROGRAM FAILS U.S. AND FOREIGN WORKERS* 33 (2011), <https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20No%20Way%20To%20Treat%20A%20Guest%20H-2A%20Report.pdf> (accessed January 31, 2016); U.S. GOV’T ACCOUNTABILITY OFFICE, *GAO-15-154, H-2A AND H-2B VISA PROGRAMS: INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS*, at 31, 36, 72 (2015).

68. See CAROL PIER, *HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES* 5 (June 2001), <https://www.hrw.org/reports/2001/usadom>, (accessed January 31, 2016).

69. See Petula Dvorak, *Woman escapes modern-day slavery in a home near the nation’s capital*, WASH. POST, April 15, 2013.

providing information about a job, when required, such as wage level; or providing false information about job conditions.”⁷⁰

Many workers take on high levels of debt to secure visas. For example, Filipino teachers recruited to work in Louisiana with H-1B visas were charged \$15,000 in recruitment fees and had to sign contracts forking over 10 percent of their salaries to the recruiting agency.⁷¹ Nurses recruited to work under H-1C “nursing shortage” visas often must sign contracts with “breakage fees” in the tens of thousands of dollars if they leave before the full contract period ends.⁷² In many cases, they are hired and placed by staffing agencies that contract their labor to hospitals at salaries far below that of non-immigrant nurses.⁷³

A prominent U.S. recruiter was found to have manipulated the H-2B visa program by bringing in thousands more workers than clients properly sought.⁷⁴ Then he offered the surplus labor force to other employers (growers, landscapers, ski resort owners and more) and coached them on how to discourage American workers from accepting job offers, thus circumventing the requirement to show a U.S. employee shortage. The recruiter instructed employers to hire a handful of token U.S. workers to game the system. Then, they treated immigrant workers in vulnerable, abusive conditions as a surplus labor force that employers traded among themselves on an as-needed basis. But the immigrant employees were always tied to the H-2B visa and powerless to protest conditions or freely to seek other employment.⁷⁵

5. Equal treatment at work

The international norm requires equal (i.e. “not less favorable”) treatment of migrant workers.⁷⁶ But less favorable wages and working conditions for immigrant workers, compared with non-immigrants, permeate the

70. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 67 at [CITE].

71. See JENNIFER DORNING ET AL., AFL-CIO DEPT. PROF'L EMP., GAMING THE SYSTEM: GUEST WORKER VISA PROGRAMS AND PROFESSIONAL AND TECHNICAL WORKERS IN THE UNITED STATES, at 49 (2012), <http://dpeaflcio.org/wp-content/uploads/Gaming-the-System-2012-Revised.pdf>; CENTRO DE LOS DERECHOS DEL MIGRANTE RECRUITMENT REVEALED: FUNDAMENTAL FLAWS IN THE H-2 TEMPORARY WORKER PROGRAM 49 (2013), <http://www.cdmigrante.org/recruitment-revealed-fundamental-flaws-in-the-h-2-temporary-worker-program-and-recommendations-for-change/>.

72. See PATRICIA PITTMAN ET. AL., U.S.-BASED INTERNATIONAL NURSE RECRUITMENT: STRUCTURE AND PRACTICES OF A BURGEONING INDUSTRY 22 (2007), https://www.macfound.org/media/article_pdfs/NURSING_CODE_RESEARCHREPORTYR1.PDF.

73. *Id.*

74. See Ken Bensinger et al., *The Coyote*, BUZZFEED NEWS, December 29, 2015, <http://www.buzzfeed.com/kenbensinger/the-coyote#.xa6OdoEBV>.

75. *Id.*

76. See Migrant Worker Convention, *supra* note 52 art. 26.

U.S. labor market. For example, some employers discriminate against foreign-born Latino workers holding valid work permits or green cards by demanding additional, unnecessary documentation, compared with U.S.-born Latino employees.⁷⁷

Immigrant workers are disproportionately victimized by “wage theft”—failure to pay minimum wage and overtime pay as required by law.⁷⁸ A Labor-Department-commissioned study found that non-citizens are 50% more likely in California and three times more likely in New York to suffer minimum wage violations.⁷⁹ The problem is acute in Chicago and other major metropolitan areas.⁸⁰ An account of wage theft in New Orleans reports:

During a decade of fast-paced and rough-and-tumble post-Katrina reconstruction, contractors have stolen an estimated aggregate fortune worth millions of dollars from migrant workers. . . [E]mployment lawyers, workers’ advocates, and others paint a picture of systematic and multifaceted exploitation. Wages go unpaid or underpaid. Police are unresponsive or aggressive . . . Law and policy in Louisiana tilt heavily to employers over workers: The state does not have a department of labor, the agency that in many states acts as a watchdog against wage theft and enforces the laws meant to inoculate against it; the responsibility for recovering wages lies entirely with the worker. Legal experts’ efforts to engage the state’s attorney general in addressing the problem have not been fruitful⁸¹

The meatpacking industry is another prime example. As the center of the American meatpacking industry, the city of Chicago lived its history. Wages and working conditions of meatpacking employees in Chicago and around the country were once on a par with those of auto workers and machinists. For about forty years in the middle of the twentieth century, from the 1930s to the 1970s, meatpacking workers’ pay and conditions improved. Master contracts covering the industry raised wages and safety

77. See Life Generations Healthcare, 11 OCAHO 1227, 2014 WL 4955643 at *20 (Sept. 11, 2014).

78. See ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES 49 (2009), <http://nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf>.

79. See EASTERN RESEARCH GROUP, INC., THE SOCIAL AND ECONOMIC EFFECTS OF WAGE VIOLATIONS: ESTIMATES FOR CALIFORNIA AND NEW YORK 39 (2014), <http://www.dol.gov/asp/evaluation/completed-studies/WageViolationsReportDecember2014.pdf>.

80. See NIK THEODORE ET AL., UNREGULATED WORK IN CHICAGO: THE BREAKDOWN OF WORKPLACE PROTECTIONS IN THE LOW-WAGE LABOR MARKET, at 9 (2009) http://www.urbanecconomy.org/sites/default/files/Unregulated%20Work%20in%20Chicago%204_7_2010%20FINAL%20REPORT_0.pdf.

81. See Alexander Zaitchik, *The People who Rebuilt New Orleans Are Still Waiting to Get Paid: Estimates of the Wages Pilfered from Construction Workers after Hurricane Katrina Run to the Tens of Millions of Dollars*, TAKEPART, August 17, 2015, <http://www.takepart.com/feature/2015/08/17/new-orleans-wage-theft-katrina-reconstruction> (last visited February 19, 2016).

standards. Meatpackers' wages remained substantially higher than the average manufacturing sector wage into the early 1980s. But then, they reversed course and entered into a long decline.⁸²

Meatpacking workers' wages and conditions declined in tandem with the industry's move away from urban factory settings to the countryside, accompanied by stepped-up recruiting of immigrant workers and treating them contrary to the "not less favorable" international standard.⁸³ Unlike workers in many U.S. manufacturing sectors, most meat and poultry workers do not face employers' threats to move their plants to other countries where wages and workers are suppressed.⁸⁴ Large quantities of meat are heavy and bulky to ship long distances by air or sea, and the perishable nature of these products usually requires that high volume, mass-market production take place within quick reach of retail outlets.

But this did not block a "Third World" strategy by the U.S. meat and poultry industry. Instead of exporting production to developing countries for low labor costs, lax health, safety and environmental enforcement, and vulnerable, exploited workers, U.S. meat and poultry companies essentially are reproducing developing country employment conditions with immigrant workers here.⁸⁵

Downward pressure on wages and conditions is not limited to low-wage sectors. One exposé notes:

Under federal rules, employers like TCS, Infosys and Wipro that have large numbers of H-1B workers in the United States are required to declare that they will not displace American workers. But the companies are exempt from that requirement if the H-1B workers are paid at least \$60,000 a year. H-1B workers at outsourcing firms often receive wages at or slightly above \$60,000, below what skilled American technology

82. For an overall historical review and discussion, see generally essays in SHELTON STROMQUIST AND MARVIN BERGMAN, *UNIONIZING THE JUNGLES: LABOR AND COMMUNITY IN THE TWENTIETH CENTURY MEATPACKING INDUSTRY* (University of Iowa Press 1997).

83. See DONALD D. STULL, *ON THE CUTTING EDGE: CHANGES IN MIDWESTERN MEATPACKING COMMUNITIES* 13 (1st ed. 1997); Michael J. Broadway, *From City to Countryside: Recent Changes in the Structure and Location of the Meat- and Fish-Processing Industries*, in *ANY WAY YOU CUT IT: MEAT PROCESSING AND SMALL-TOWN AMERICA* 17, 37 (Donald D. Stull, Michael J. Broadway & David Griffith eds., 1995); Alexander Stuart, *Meatpackers in Stampede*, *FORTUNE*, June 29, 1981, at 67.

84. See Kate L. Bronfenbrenner, *We'll Close! Plant Closings, Plant-closing Threats, Union Organizing and NAFTA*, 18 *MULTINATIONAL MONITOR*, no. 3, 1997, at 8, <http://digitalcommons.ilr.cornell.edu/cbpubs/17/>.

85. See, e.g., OXFAM AMERICA, *LIVES ON THE LINE: THE HUMAN COST OF CHEAP CHICKEN* 7–8 (2015), https://www.oxfamamerica.org/static/media/files/Lives_on_the_Line_Full_Report_Final.pdf; TED GENOWAYS, *THE CHAIN: FARM FACTORY & THE FATE OF OUR FOOD* 34 (2014); Ted Genoways, *The Spam Factory's Dirty Secret: First, Hormel Gutted the Union. Then it Sped Up the Line. And When the Pig-Brain Machine Made Workers Sick, they Got Canned*, *MOTHER JONES*, July 2011, <http://www.motherjones.com/print/115121> (last visited February 5, 2016).

professionals tend to earn, so those firms can offer services to American companies at a lower cost, undercutting American workers.⁸⁶

6. Freedom of association, the right to organize, and the right to bargain collectively

With an important exception, immigrant workers—even undocumented—are covered by most labor and employment laws to the same extent as American workers,⁸⁷ including coverage under the National Labor Relations Act (“NLRA”).⁸⁸ It should be noted, though, that the exclusion of agricultural employees from coverage of the NLRA has a disproportionate effect on immigrant workers, who comprise an estimated three-fourths of the farm labor force.⁸⁹ This means that, except in a handful of states with agricultural labor relations acts (notably California), farm workers can suffer discrimination for union activity without recourse—a clear violation of international standards.

It should be unremarkable that immigrants lawfully working thanks to visas, green cards or other work permits are covered by the NLRA. But coverage also extends to undocumented immigrant workers. They have the same rights as documented immigrants and U.S. workers to join unions, vote in NLRB elections, and benefit from collective bargaining agreements.⁹⁰ This is as it should be: if they were not, employers’ “divide and conquer” policies would undermine organizing and collective bargaining rights of all workers.

The significant legal exception arises in connection with remedies. In *Hoffman Plastic Compounds*, the Supreme Court held five-to-four that an undocumented worker, because of his immigration status, was not entitled to back pay for lost wages after he was illegally fired for union organizing.⁹¹ The five-justice majority said that enforcing immigration law takes

86. See Haeyoun Park, *How Outsourcing Companies Are Gaming the Visa System*, N.Y. TIMES, (Nov. 10, 2015), <http://www.nytimes.com/interactive/2015/11/06/us/outsourcing-companies-dominate-h1b-visas.html>.

87. See *Patel v. Quality Inn South*, 846 F.2d 700, 701 (11th Cir. 1988).

88. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 890 (1984); *NLRB v. Kolkka*, 170 F.3d 937, 941 (9th Cir. 1999); *Concrete Form Walls, Inc.*, 346 N.L.R.B. 831, 833 (2006); *Agri-Processor Co., Inc. v. NLRB*, 514 F.3d 1, 3–4 (D.C. Cir. 2008).

89. See Michael H. LeRoy & Wallace Hendricks, *Should “Agricultural Laborers” Continue to be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489, 500 (1997); U.S. DEP’T. OF LABOR, NATIONAL AGRICULTURAL WORKERS SURVEY (UNDATED), DATA TABLES, “NATIONAL DEMOGRAPHIC CHARACTERISTICS,” table 1, at <https://www.doleta.gov/agworker/naws.cfm> (SEE EXCEL FILE “HIRED CROP WORKER DEMOGRAPHICS, NATIONAL ESTIMATES, FIVE TIME PERIODS”).

90. See *Sure-Tan, Inc.*, 467 U.S. at 890; *Kolkka*, 170 F.3d at 941; *Concrete Form Walls, Inc.*, 346 N.L.R.B. at 833 (Apr. 13, 2006); *Agri-Processor Co., Inc.*, 514 F.3d at 3–4.

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

precedence over enforcing labor law. A powerful dissent argued that there was not such a conflict and that a “backpay order will *not* interfere with the implementation of immigration policy. Rather, it reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent.”⁹² The dissenters went on to say:

Without the possibility of the deterrence that backpay provides, the Board can impose only future-oriented obligations upon law-violating employers—for it has no other weapons in its remedial arsenal. And in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity. Hence the backpay remedy is necessary; it helps make labor law enforcement credible; it makes clear that violating the labor laws will not pay . . . To deny the Board the power to award backpay. . . lowers the cost to the employer of an initial labor law violation (provided, of course, that the only victims are illegal aliens). It thereby increases the employer’s incentive to find and to hire illegal-alien employees. Were the Board forbidden to assess backpay against a knowing employer—a circumstance not before us today—this perverse economic incentive, which runs directly contrary to the immigration statute’s basic objective, would be obvious and serious.⁹³

The “obvious and serious” shoe dropped in *Mezonos Maven Bakery*, when the NLRB ruled that *Hoffman* further required a denial of backpay to workers fired for union activity even where their undocumented status was known to the employer at the time of hiring.⁹⁴ Two Board members felt bound by *Hoffman*, but noted that “in addition to the obvious failure to make employee-victims whole—the Act’s enforcement is undermined, employees are chilled in the exercise of their Section 7 rights, the workforce is fragmented, and a vital check on workplace abuses is removed.”⁹⁵ As a result, unscrupulous employers can hire undocumented workers and discriminate against them for exercising the right to freedom of association with total impunity.

The *Hoffman* decision sparked immediate worry that undocumented workers might be denied all forms of backpay for any labor or employment law violation.⁹⁶ It appears that backpay awards for work actually performed (as with minimum wage or overtime pay violations) remain available to undocumented workers. But other forms of compensation—such as workers’ compensation or damage awards for sexual harassment and other dis-

92. *Id.* at 153.

93. *Id.* at 154–57.

94. *Mezonos Maven Bakery, Inc.* 357 N.L.R.B. 377, 377 (2011).

95. *Id.* at 380.

96. See Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 511 (2004).

crimination abuses, anti-retaliation remedies, and others—are subject to a patchwork of court decisions in different jurisdictions, some favorable and some unfavorable to immigrant workers.⁹⁷

The American labor movement tested the *Hoffman* decision in an international forum. In November 2003, the International Labour Organization Committee on Freedom of Association declared that the *Hoffman* doctrine violates international legal obligations to protect workers' organizing rights. The Committee concluded that "the remedial measures left to the NLRB in cases of illegal dismissals of undocumented workers are inadequate to ensure effective protection against acts of anti-union discrimination."⁹⁸

The ILO Committee recommended congressional action to bring U.S. law "into conformity with freedom of association principles, in full consultation with the social partners concerned, with the aim of ensuring effective protection for all workers against acts of anti-union discrimination in the wake of the Hoffman decision."⁹⁹ Of course, the ILO has no enforcement authority and the United States has no legal obligation to implement ILO recommendations.

Besides the ILO, another international human rights tribunal took up the *Hoffman* issue. Joined by immigrant worker advocates in the United States, Mexico petitioned the Inter-American Court of Human Rights for an advisory opinion on U.S. treatment of immigrant workers.¹⁰⁰

In its opinion, the Inter-American Court said that undocumented workers are entitled to the same labor rights, including wages owed, protection from discrimination, protection for health and safety on the job, and back pay, as are citizens and those working lawfully in a country. The Court said that despite their irregular status "[I]f undocumented migrants are engaged, they immediately become possessors of the labor rights corresponding to workers . . . This is very important, because one of the principal problems that occurs in the context of immigration is that migrant workers who lack permission to work are engaged in unfavorable conditions compared to other workers."¹⁰¹

97. See Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1370 (2009).

98. See Int'l Labour Org. Comm. On Freedom of Ass'n, Rep. in which the Com. Requests to be Kept Informed on Dev., ¶ 610 Rep. No. 332 (2003).

99. *Id.* at ¶ 613.

100. See Juridical Condition and Rights of Undocumented Migrant Workers, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (Ser. A) No. 18, ¶ 1 (September 17, 2003).

101. *Id.* at ¶ 136. For a summary discussion, see NATIONAL EMPLOYMENT LAW PROJECT, FACTS ABOUT THE HOFFMAN CASE AND INTERNATIONAL LAW INTER-AMERICAN COMMISSION ON HUMAN

7. Recourse and remedy

Under principles common to the UN migrant worker convention and the two ILO instruments, workers should be able to turn to labor and employment law enforcement agencies and to the judicial system for violations of their rights and protections under national law.¹⁰² As a threshold problem, most immigrant workers holding visas are ineligible for federal or state-funded legal services for help with workplace violations.¹⁰³ They are on their own to find a lawyer for assistance, and are likely to be turned down unless a large class of employees can be created to pursue large-scale financial remedies. The potential recovery for any single worker makes taking a case financially unfeasible for most practicing attorneys, and individual employees cannot afford the attorney's going rate.

Undocumented workers with potential claims face the same barriers and more. Not making legal recourse and remedy available to immigrants invites the emergence of an underclass of exploited and frightened workers, putting enormous downward pressure on labor standards generally.

Keeping millions of undocumented workers "in the shadows" has exactly this effect. They might be covered by labor and employment laws, but coverage by itself is useless if workers are afraid to even voice concerns about working conditions or to file complaints with government agencies because they are afraid that employers' challenges to their immigration status will expose them to deportation.¹⁰⁴

The "fear factor" is not limited to undocumented workers. Employees with visas that tie them to a particular employer are also afraid to protest conditions or assert their rights. The employer-specificity of temporary work visas are the main reason that employment under such visas is often described as a form of indentured servitude.¹⁰⁵ Employers can create a pretext to summarily fire visa-holding workers who protest conditions, which

RIGHTS HEARING (Mar. 3, 2005), <http://www.nelp.org/content/uploads/2015/03/facts-about-the-hoffman-case-and-international-law.pdf>.

102. See Migrant Worker Convention, *supra* note 52 art. 83.

103. See 45 C.F.R. § 1626.1 (2016); for discussion, see generally ALAN W. HOUSEMAN, CIVIL LEGAL AID IN THE UNITED STATES AN UPDATE FOR 2013 6 (2013), <http://www.clasp.org/resources-and-publications/publication-1/CIVIL-LEGAL-AID-IN-THE-UNITED-STATES-3.pdf>; LEGAL SERVICES CORPORATION, ABOUT STATUTORY RESTRICTIONS ON LSC-FUNDED PROGRAMS, (noting "with limited exceptions such as lawful permanent residents, H2A agricultural workers, H2B forestry workers, and victims of battering, extreme cruelty, sexual assault or trafficking"), <http://www.lsc.gov/about-statutory-restrictions-lsc-funded-programs> (last visited Sep. 26, 2016).

104. For discussion, see Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961 (2006).

105. See MARY BAUER, CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 2 (2013), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf.

puts them immediately “out of status” and subject to deportation.¹⁰⁶ The result is that many suffer in silence, with no place else to go.¹⁰⁷ Workers who manage to bring wage and hour complaints often have to return home before their cases are decided, creating a huge communication and logistics problem for advocates handling their cases in U.S. proceedings.¹⁰⁸

IV. MIGRANT LABOR AND TRADE AGREEMENTS

A. NAFTA and Migrant Workers

Another international angle of approach to migrant labor law and policy arises in trade agreements negotiated by the United States with commercial partners and related labor provisions in such agreements. The chief example is the North American Free Trade Agreement (NAFTA) and its supplemental North American Agreement on Labor Cooperation (NAALC).

Negotiated in the early 1990s, NAFTA created a new visa category called the TN visa for business and professional employees entering the United States for temporary work.¹⁰⁹ However, NAFTA stopped there. Rebuffing Mexico’s request, the United States ruled out any farther-reaching immigration provisions in NAFTA (just as Mexico refused to negotiate over its energy reserves and Canada refused to negotiate over its protected cultural sector; for each of the three countries, its jealously guarded issue was “off-the-table” in NAFTA negotiations).¹¹⁰

To obtain a TN visa, an applicant has to hold a university degree and demonstrate “business activity at a professional level” in one of sixty business, medical, scientific and educational professions listed in a NAFTA

106. *Id.* at 1.

107. *Id.* at 16. Note some research suggests that the “indenture” case might be overstated for skilled H-1B high-tech employees who manage to move from firm-to-firm, especially when overall unemployment is low. See Briggs Depew et al., *Inter-firm Mobility and Return Migration Patterns of Skilled Guest Workers*, J. POPUL ECON. 1 (August 2016), <http://link.springer.com/article/10.1007/s00148-016-0607-y/fulltext.html?view=classic>.

108. See NAN SCHIVONE, GLOBAL WORKERS JUSTICE ALLIANCE, CHALLENGES IN TRANSNATIONAL LITIGATION: REPRESENTING ABSENTEE MIGRANT WORKERS IN U.S. COURTS (4th Ed. 2014) at http://www.globalworkers.org/sites/default/files/4th%20Ed_Challenges%20in%20Transnational%20Litigation_2014%28WEB%29_0.pdf (table of contents accessed February 9, 2016; full text available as hard copy upon request to Global Workers Justice Alliance).

109. See NAFTA, *supra* note 5, at 664–67; *TN Visa — North American Free Trade Agreement for Canadian and Mexican Citizens*, UNIV. OF MICH. INT’L CTR., <http://internationalcenter.umich.edu/immig/tvisa/>.

110. See MAXWELL A. CAMERON & BRIAN W. TOMLIN, THE MAKING OF NAFTA: HOW THE DEAL WAS DONE 110 (2002).

annex, starting with A for accountant and ending with Z for zoologist.¹¹¹ The TN visa program has been relatively uncontroversial, compared with the H-1B and L visa programs for professionals and highly-skilled employees and recurring exposés about their misuse by employers.¹¹² The TN program is sufficiently narrow, and the volume of trade among the three NAFTA countries is sufficiently large, that TN visa holders mostly fly under the radar of immigrations concerns. They mostly come for short stays, not for long-term employment in the United States.¹¹³

B. The NAALC, Labor Principle 11, and Complaints and Cases

NAFTA went no farther on immigration, but the three countries took up migrant labor concerns in the supplemental North American Agreement on Labor Cooperation (NAALC), one of two “side agreements” negotiated in 1993 after Bill Clinton took office.¹¹⁴

The NAALC defined eleven “labor principles” that the United States, Mexico and Canada parties pledged to promote. In Labor Principle 11 on protection of migrant workers, they agreed to promote the principle of “[p]roviding migrant workers in a Party’s territory with the same legal protection as the Party’s nationals in respect of working conditions.”¹¹⁵

Trade unions, human rights groups, and other labor advocates in North America have made extensive use of the NAALC’s complaint mechanism to target exploitative treatment of Mexican migrant workers in the United States. In examining these cases, one must keep in mind that the NAALC did not create an adjudicatory system. It is rather a “soft law” procedure making use of reviews, investigations, research, public hearings, reports, recommendations, consultations, action plans, and the like. Still, advocates’ creative use of the mechanism can bring concrete positive results.¹¹⁶

111. 8 C.F.R. § 214.6 (2016).

112. See, e.g., Jacob T. Muklewicz, *The TN visa category: An oasis in the Desert of Dried up International talent pools*, INSIDE COUNSEL, May 15, 2015, <http://www.insidecounsel.com/2015/05/15/the-tn-visa-category-an-oasis-in-the-desert-of-dri>.

113. See Elizabeth M. Grieco, *Length of Visit of Nonimmigrants Departing the United States in 2003* 6, tbl. 6, (Dep’t of Homeland Security, Off. of Immigr. Stat. Working Paper, Mar. 2005), <https://www.dhs.gov/xlibrary/assets/statistics/publications/LengthVstNonim2003.pdf> (87 percent of TN visa holders stayed less than one year).

114. See NAALC, *supra* note 7, art. 52. Another side agreement took shape in the North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480 (1993); for a discussion of the side agreements, see Cameron and Tomlin, *supra* note 110.

115. NAALC, *supra* note 7 annex I, princ. 11,

116. National Union of Workers (“UNT”) et al., *Mexico NAO Submission 9802 (Apple Growers)*, U.S. DEP’T OF LABOR - BUREAU OF INT’L LABOR AFFAIRS (May 27, 1998), at https://www.dol.gov/ilab/submissions/pdf/mx_9802_apple_growers_submission.pdf. For official documentation in all cases, see *Submissions under the North American Agreement on Labor Coopera-*

1. Washington State Apple Case

A coalition of Mexican trade unions and farmworker organizations filed a wide-ranging NAALC complaint in May 1998 alleging failure of U.S. labor law to protect migrant workers' rights in the Washington State apple industry.¹¹⁷ Virtually all of the 50,000 workers who harvest apples are immigrants from Mexico and Central America.¹¹⁸

The submission cited the lack of legal protection for farmworker union organizing, widespread health and safety violations, discrimination against immigrant workers, and employers' use of threats and intimidation in recent union representation elections in apple packing and shipping facilities. The complaint called on the Mexican government to invoke review and consultation mechanisms under the NAALC.¹¹⁹

A public hearing in Mexico City garnered widespread publicity in the news media of both the United States and Mexico; Mexico's secretary of labor formally requested ministerial consultations with the U.S. secretary of labor. This development sparked a new round of publicity and related attention to the conditions of immigrant workers in the industry.¹²⁰

In May 2000, the governments announced a program of events resulting from the consultations, including a public forum for workers, unions, employers and government officials and an "outreach" effort by labor law enforcement personnel.¹²¹ On the ground, it led to improvements in housing conditions, piecework rate calculations, and health and safety enforcement.¹²²

tion (NAALC), U.S. DEPARTMENT OF LABOR - BUREAU OF INT'L LABOR AFFAIRS at <http://www.dol.gov/ilab/trade/agreements/naalc.htm> (filter list by "Mexico") (last visited Sept. 21, 2016). See also Tamara Kay, *NAFTA and the Politics of Labor Transnationalism* (2004) (unpublished Ph.D. dissertation, U.C., Berkeley).

117. See Steven Greenhouse, *Mexicans Were Denied U.S. Rights, Suit Says*, N.Y. TIMES May 28, 1998, <http://www.nytimes.com/1998/05/28/us/mexicans-were-denied-us-rights-suit-says.html>.

118. See Lynda V. Mapes, *Needed but Often Illegal, they Pick our Crops, Pine for Home*, SEATTLE TIMES, June 18, 2000, <http://old.seattletimes.com/special/mexico/stories/mex1a.html>; Matthew Geyman et al., *Indigenous Guatemalan and Mexican Workers in Washington State: Living Conditions and Legal Issues*, 5 MEX. LAW REV. 1 (2012), http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1870-05782012000200002.

119. See UNT et al., *supra* note 116.

120. See, e.g., Molly Moore, *Mexican Farmhands Accuse U.S. Firms: Panel Hears Washington Apple Pickers*, WASH. POST, Dec. 3, 1998, at A36.

121. See Alexis M. Herman & Mariano Palacios Alcocer, U.S. DEP'T. OF LABOR - BUREAU OF INT'L LABOR AFFAIRS, *Ministerial Consultations - Mexico Submissions 9801, 9802 and 9803* (May 18, 2000), at http://www.naalc.org/english/pdf/pubcomm/minagr_mex1998_01_02_03_en.pdf.

122. Interviews with United Farm Workers union representatives (2001–2002).

2. North Carolina H-2A Case

In February 2003, advocates filed a complaint alleging that the United States failed to protect the rights of Mexican migrant agricultural workers recruited to work in the state of North Carolina through the H-2A visa program.¹²³ North Carolina was (and still is) the biggest single state with H-2A visa workers, with some 10,000 migrants coming under the program.¹²⁴

Complainants argued that employers restricted H-2A workers' access to union organizers, service providers, and legal aid attorneys; denied H-2A workers medical care and access to compensation for on-the-job injuries; blacklisted workers from participating in the program if they file complaints about on-the-job injuries or unpaid wages; refused to hire women or workers over a certain age; and manipulated the growing season and forced workers to sign voluntary resignations in order to avoid paying required travel and other expenses.¹²⁵

Thanks in part to the international spotlight of the NAALC complaint process, the Farm Labor Organizing Committee (FLOC) gained union recognition from the North Carolina Growers Association and has successfully negotiated a series of contracts.¹²⁶

3. Carnival Workers H-2B Case

In September 2011, migrant worker advocacy groups filed a complaint arguing that the U.S. government had failed to comply with its obligations under the NAALC to effectively enforce labor laws with respect to migrants working in the carnival and fair industry under H-2B visas.¹²⁷ The individual migrant workers were originally from the Mexican states of Zacatecas and Veracruz and worked for J&J Amusements, Inc. and Reithoffer Shows, Inc. in the U.S. from 2007 to 2009.

123. See Central Independiente de Obreros Agricolas y Campesinos & Farmworker Justice Fund, Inc., *Mexico NAO Submission 2003-1 (North Carolina)*, U.S. DEP'T. OF LABOR - BUREAU OF INT'L LABOR AFFAIRS (Feb. 11, 2003), at https://www.dol.gov/ilab/submissions/pdf/mx_2003-01_carolina_submission.pdf [hereinafter *Mexico NAO Submission 2003-1*].

124. See *H-2A Temporary Agricultural Visa Program*, U.S. DEP'T. OF LABOR - OFF. OF FOREIGN LABOR CERTIFICATION (2012), https://www.foreignlaborcert.doleta.gov/pdf/h_2a_selected_statistics.pdf; *H-2A Workers in the United States – Data: Top Ten States of Employment 2012*, GLOB. WORKERS JUSTICE ALL., <http://globalworkers.org/iii-h-2a-workers-us-%E2%80%93-figures> (last visited Sept. 21, 2016).

125. *Mexico NAO Submission 2003-1*, *supra* note 123. See also Meier, *supra* note 24.

126. See *Organizing the South*, FARM LABOR ORGANIZING COMMITTEE (“FLOC”), <http://www.floc.com/wordpress/cross-border-organizing/north-carolina-organizing/> (last visited Sept. 21, 2016).

127. See Centro de los Derechos del Migrante, Inc. et al., *Mexico Submission 2011-1 (H-2B Visa Workers)*, U.S. DEP'T. OF LABOR - BUREAU OF INT'L LABOR AFFAIRS (Sept. 19, 2011), https://www.dol.gov/ilab/submissions/pdf/mx_2011-01_h2b_submission.pdf.

The complainants alleged that 1) the U.S. government allowed carnival and fair industry employers of workers with H-2B visas to deny their employees minimum wage and overtime payments; 2) the U.S. government failed to conduct inspections of traveling carnivals and fairs that employed H-2B workers; 3) the U.S. government failed to enforce requirements that H-2B workers be reimbursed for pre-employment visa-related and travel expenses; 4) the U.S. government failed to prevent employers' illegally withholding a portion of the workers' pay to ensure they stay for the entire period of temporary employment and requiring workers to purchase \$100 uniforms; and finally 5)

H-2B visa workers and other migrant workers have a difficult time accessing administrative and judicial resources because they work in industries that require them to work seven days a week and travel from place to place.¹²⁸

In November 2012, Mexico issued a bold critique of U.S. labor laws and policies governing migrant workers.¹²⁹ In April 2014, Secretary of Labor Thomas E. Perez and his Mexican counterpart issued a detailed Ministerial Declaration to address the issues raised in all the NAALC complaints on migrant workers. Their plan for extensive outreach, education, and enforcement is now underway.¹³⁰

This review of migrant labor complaints under the NAFTA labor agreement suggests that the international "not less favorable" norm embodied in a trade agreement can influence policy steps within the United States. It did not have the effect of changing immigration law, but it spurred a response by the government in several areas that led to improved conditions for migrants.¹³¹ As Xóchitl Bada and Shannon Gleeson note:

This new form of immigrant worker advocacy emerged in 2008 through the creation of the annual Labor Rights Week (LRW), which is a collaborative effort between the U.S. Department of Labor (DOL) and Mexico's Ministry of Foreign Affairs. The LRW is executed through dozens of individual regional agreements between local regulatory agencies and Mexican consulate offices at the state level. Made possible in large part

128. *Id.*

129. See MEXICAN SECRETARIAT OF LABOR AND SOCIAL WELFARE, REPORT ON THE REVIEW BY THE NATIONAL ADMINISTRATIVE OFFICE OF MEXICO OF PUBLIC COMMUNICATIONS MEX 2003-1 AND MEX 2011-1 PURSUANT TO THE NAALC (UNOFFICIAL DOL TRANSLATION) 75 (2012), https://www.dol.gov/ilab/reports/pdf/mx_report_eng.pdf.

130. See *U.S. Response to Mexico's Request for Migrant Worker Outreach*, U.S. DEP'T OF LABOR - BUREAU OF INT'L LABOR AFFAIRS (April 3, 2014), <https://www.dol.gov/ilab/trade/preference-programs/US-Mexico.htm>.

131. For discussion, see *Top 10 CDM Victories*, CENTRO DE LOS DERECHOS DEL MIGRANTE (Sept. 2015), <http://www.cdmigrante.org/wp-content/uploads/2015/09/Top-10-CDM-Victories.pdf> (#9: Urging government accountability through binational advocacy).

by a 2004 federal memorandum of understanding between the Mexican Secretary of Foreign Affairs and the U.S. Secretary of Labor, as well as several subsequent accords with other agencies, the annual LRW represents the institutionalization of a binational partnership that may be characterized as what Amengual and Fine (2013) refer to as a “model of transnationally coproduced regulatory enforcement of labor standards.”¹³²

C. Post-NAFTA Migrant Labor Omissions

Unfortunately, in post-NAFTA trade agreements’ labor chapters, the United States has moved away from addressing migrant labor concerns. Starting with the U.S.-Jordan agreement of 2002 and continuing through trade agreements with Central American countries, Peru, Korea, Colombia and others, and now in the much-debated Trans-Pacific Partnership (TPP) trade agreement, the United States dropped the NAALC labor principle on protection of migrant workers’ rights. Instead, U.S. focus turned to ILO core labor standards (on freedom of association, forced labor, child labor and discrimination) and what the agreements call “acceptable conditions” on wages, hours, and health and safety at work.¹³³ These clauses should apply equally to migrant workers, but the post-NAFTA accords are silent on this point.

Labor migration is a global phenomenon, but the NAALC remains the only labor-trade agreement that includes protection for migrant workers. TPP negotiators have not said whether NAFTA and the NAALC will survive and remain in effect alongside the TPP, or whether they will be completely supplanted by the Trans-Pacific pact.¹³⁴ If the NAALC survives, it

132. See Xóchitl Bada & Shannon Gleeson, *A New Approach to Migrant Labor Rights Enforcement: The Crisis of Undocumented Worker Abuse and Mexican Consular Advocacy in the United States*, 40 LAB. STUD. J. 32, 34 (2015), citing Matthew Amengual and Janice Fine, *Co-enforcing Labor Standards: The Unique Contributions of State and Worker Organizations in Argentina and the United States*, in REGULATION & GOVERNANCE (June 24, 2106), at <http://onlinelibrary.wiley.com/doi/10.1111/rego.12122/abstract>.

133. See, e.g., U.S.-Dominican Republic-Central America Free Trade Agreement art. 16, Aug. 5, 2004, 43 I.L.M. 514,

https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file320_3936.pdf (noting in Article 16.1, “The Parties reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)* (ILO Declaration)” and Article 16.8, “acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health,” and similar language in labor chapters of other U.S. trade agreements. Post-NAFTA/NAALC trade agreements are silent on rights of immigrant workers. See all at <https://ustr.gov/trade-agreements/free-trade-agreements>.)

134. The U.S. Trade Representative says only it will “upgrade” NAFTA; see *TPP: Upgrading the North American Free Trade Agreement (NAFTA)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/sites/default/files/TPP-Upgrading-the-North-American-Free-Trade-Agreement-NAFTA-Fact-Sheet.pdf> (last visited Sept. 22, 2016).

is unclear whether advocates will still be able to invoke its labor principle on protection of migrant workers, which in any case would only involve the three original NAFTA parties.¹³⁵

Preserving this feature of the NAALC for only three countries is not enough. While it now appears to be a moot point in light of the incoming administration's stated intention to "tear up" the TPP and renegotiate other trade agreements such as NAFTA,¹³⁶ labor advocates should continue to insist that the NAALC's signature feature on protection of migrant workers' rights be included in any newly-negotiated trade agreements and strengthened in any re-drawn agreements.

V. TURNING TO A HUMAN RIGHTS APPROACH

A. *Diffusing Frames*

Discussion and advocacy of international standards on migrant workers does not mean to suggest that UN and ILO conventions have all the answers and are free of shortcomings. For one thing, they offer most of their protections to workers who obtain visas or work permits.¹³⁷ They assume that workers who migrate without documents are all trafficking victims who should be liberated and returned home, while those who employ them should be criminally prosecuted and punished.¹³⁸

Reality of course is different. "Push" effects in sending countries and "pull effects" in receiving countries make most undocumented migration voluntary, with millions of workers seeking opportunities for better lives than they contemplate at home.¹³⁹ The challenge in the United States is to recognize reality and recognize the many positive contributions of immi-

135. The author asked a U.S. Department of Labor official about this in a May 2016 exchange that the official requested be off-the-record; the response was "we don't know."

136. See David Nakamura and Ylan Q. Mui, "Donald Trump promised to rip up trade deals. TPP is the first casualty." WASH. POST (Nov. 11, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/11/11/donald-trump-promised-to-rip-up-trade-deals-tpp-is-the-first-casualty/>.

137. See, e.g., ILO No. 97, *supra* note 2 art. 6; ILO No. 143, *supra* note 3 art. 10 (committing state to protect migrant workers "lawfully within its territory").

138. See, e.g., ILO No. 143, *supra* note 3 art. 6 (committing states to "the application of administrative, civil and penal sanctions, which include imprisonment in their range, in respect of the illegal employment of migrant workers.").

139. See Rachel Cassidy, *Involuntary and Voluntary Migrant Estimates (2005)* (unpublished manuscript), http://www.copafs.org/UserFiles/file/seminars/methodology_and_data_quality/Involuntary%20and%20Voluntary%20Migrant%20Estimates.pdf (noting "there were 3,523,262 involuntary migrants and 27,210,764 voluntary migrants identified in Census 2000").

grant workers to our economy and society, and to forge a means of regularizing their situation within a context of respect for human rights.

Can using a human rights frame advance this process? Extensive literature describes how diffusion of international human rights norms slowly permeates and changes domestic legal regimes in countries transitioning from dictatorship to democracy.¹⁴⁰ Less common is analysis and advocacy on incorporating international standards into U.S. law and practice. But several knowledgeable immigration specialists have confronted this question and offered compelling arguments for undertaking such an effort.

Kati Griffith says:

[M]igrant workers may also have some recourse in international arenas such as the International Labor Organization, Inter-American Court of Human Rights, and the National Office of Administration of the North American Agreement on Free Trade. These avenues are sometimes limited because of the failure of the United States to sign treaties that may be helpful to migrant workers and because the domestic enforcement of international standards is often difficult . . . [I]nternational bodies largely do not have an ability to reach specific employers in the United States. Even when international law cannot directly reach employers in the United States, however, international legal challenges often provide political pressure that may help migrant workers more broadly and international laws can serve as a source of “aspirational law” for the future.¹⁴¹

Canadian colleague Judy Fudge argues:

On their face, international human rights norms offer a more promising avenue for protecting migrant workers from precarious employment than do claims based upon citizenship, a formal legal status that migrant workers do not enjoy in the state in which they are working. Human rights, by contrast, are invoked and apply on the basis of humanity and personhood, a much broader status that does not depend upon political membership in the host state.¹⁴²

Leslie Wexler of Illinois Law School suggests that viewing migrant labor policy through a human rights lens can overcome “moral disengagement” by people who fail to recognize the human condition of migrants. It can also contribute to formation and dissemination of best practices among receiving countries and ultimately lead to legislative change.¹⁴³

140. See, e.g., *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse et al. eds., 1999).

141. Griffith, *supra* note 23, at 154.

142. See Judy Fudge, *Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers*, 34 *COMP. LAB. L. & POL'Y J.* 95, 96 (2012) (footnote omitted).

143. See Lesley Wexler, *The Non-Legal Role of International Human Rights Law in Addressing Immigration*, *U. CHI. LEGAL F.* 359, 391 (2007).

Beth Lyon argues that “the U.N. Migrant Worker Convention, dismissed by this [the United States] and other migrant-receiving countries for nearly two decades as a political non-starter, provides a rational approach to labor migration that deserves meaningful examination by the United States . . . because it would inject into domestic debates the notion that immigrant workers, including unauthorized workers, are subjects of human rights protection.”¹⁴⁴

Prof. Lyon goes on to suggest areas in which international standards embodied in the U.N. Convention could affect U.S. law, policy, and discourse:

- Engaging with the Convention would shift the political climate toward policy reform by keeping human rights concerns front and center in discourse and debates;
- Ratification of the Convention would advance foreign policy goals of strengthening relations with Mexico and with developing countries generally, enabling the United States to shape the development of emerging international law standards on immigrant workers;
- Engaging with the Convention would educate U.S. officials on best practices in labor migration and promote policy coherence among the many federal agencies that deal with migrant labor issues;
- A campaign to ratify the Convention would signal a meaningful shift in modality for U.S. migrant workers and their advo-

144. See Beth Lyon, *The Unsigned United Nations Migrant Worker Rights Convention: An Overlooked Opportunity to Change the “Brown Collar” Migration Paradigm*, 42 N.Y.U. J. INT’L L. & POL. 389, 393 (2010) [hereinafter Lyon, *Brown Collar*]; see also Beth Lyon, *Changing Tactics: Globalization and the U.S. Immigrant Worker Rights Movement*, 13 UCLA J. INT’L L. & FOR. AFF. 161 (2008) [hereinafter Lyon, *Changing Tactics*]; Beth Lyon, *Tipping the Balance: Why Courts Should Look to International and Foreign Law on Unauthorized Immigrant Worker Rights*, 29 U. PA. J. INT’L L. 169 (2007) [hereinafter Lyon, *Tipping the Balance*]; David Weissbrodt, *Remedies for Undocumented Noncitizens in the Workplace: Using International Law to Narrow the Holding of Hoffman Plastic Compounds, Inc. v. NLRB*, 92 MINN. L. REV. 1424 (2008); Ryszard Cholewinski, *The Human and Labor Rights of Migrants: Visions of Equality*, 22 GEO. IMMIGR. L.J. 177 (Winter 2008); 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); T. Alexander Aleinikoff, *International Legal Norms on Migration: Substance without Architecture*, in INT’L MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES 467 (Ryszard Cholewinski et al. eds., 2007); Connie de la Vega & Conchita Lozano, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Migrant Workers’ Rights in the United States*, 3 HASTINGS RACE & POVERTY L.J. 35 (Fall 2005).

cates, requiring that they articulate and justify a broad range of international standards for domestic audiences.¹⁴⁵

Change will be incremental. Migrant labor and human rights advocates still confront general unawareness in the United States of international human rights standards and of the ILO's work in giving precise meaning to those standards.¹⁴⁶ Advocates still have an enormous educational challenge of making them more widely known and respected.

But the fact that international human rights arguments strain for a place in American political discourse is not a reason to shy away from their use. It is a reason to bring human rights into the discourse to connect with a natural sense of "rights" that all people share.

The human rights argument pries open more space for advocacy on behalf of migrant workers and for rights-based reforms. It frames advocacy as a human rights mission, not defending "illegal aliens" or, more mundanely, seeking to raise or lower the numerical cap on H-1B visas or the Adverse Effect Wage Rate.

D. Informing the Judiciary

One possible approach pertinent for practitioners to consider is including international human rights arguments in complaints, trial briefs and appeal briefs in litigating immigrant worker cases. Consider too having expert witnesses testify about international standards on migrant workers.

Granted it is difficult, especially at the district court level. Applying U.S. law is complicated enough; introducing international law puts front-line judges into mostly unfamiliar and uncomfortable territory. But this is why human rights should be raised at the trial level: so that on appeal circuit courts, and ultimately the Supreme Court, can begin to fashion analytical approaches that guide lower judges and courts.

This is not so far-fetched. In *Roper v. Simmons*, in which the Court ruled unconstitutional the death penalty for juvenile offenders, Justice Scalia railed against consideration of international norms, saying "the views of other countries and the so-called international community . . . [and the] argument[] that American law should conform to the laws of the rest of the world[] ought to be rejected out of hand."¹⁴⁷

145. See generally Lyon, *Brown Collar*, *supra* note 144, at 495; Lyon, *Changing Tactics*, *supra* note 144; Lyon, *Tipping the Balance*, *supra* note 144; Weissbrodt, *supra* note 144; Cholewinski, *supra* note 144; Smith, *supra* note 144; Aleinikoff, *supra* note 144; de la Vega & Lozano, *supra* note 144.

146. Estlund, *supra* note 42 at 1589–90; see also AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., Princeton Univ. Press 2005).

147. *Roper v. Simmons*, 543 U.S. 551, 622 (2005) (Scalia, J., dissenting).

But Scalia was dissenting. Justice Kennedy's majority opinion noted:

[T]he Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." . . . It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.¹⁴⁸

Justice Breyer has elaborated on this view in a recent book, saying:

[C]ritics worry that . . . our judiciary will come to substitute foreign legal concepts and values for those upon which Americans have long built their lives . . . [T]he demands of the Court's work make impossible the sort of hermetically sealed legal system some might imagine America able to sustain . . . [I]f potential for influence exists in our engagement with the legal world beyond our shores, it is far likelier to be our influence on international law . . . than foreign influence on American law . . . By engaging the world and the borderless challenges it presents, we can promote adherence to and the adoption of those basic constitutional and legal values for which the Court and the Constitution stand . . .¹⁴⁹

Anti-immigrant sentiment and attacks are increasing around the world.¹⁵⁰ Instead, the United States should seek to promote values suggested by Justice Breyer by applying human rights standards and principles to treatment of migrant workers in U.S. law and policy. Perhaps, for example, in a case reprising the question of remedies for migrant workers unlawfully fired for exercising rights of association, the Supreme Court might reconsider its decision in *Hoffman Plastic* and take into account recommendations of the ILO Committee on Freedom of Association and the Inter-American Court of Human Rights.¹⁵¹

E. Reform Proposals

In the policy arena, the United States should consider reform measures that will reflect international human rights standards alongside homegrown

148. *Id.* at 574, 577 (majority opinion).

149. STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 246, 248 (2015).

150. See, e.g., Steven Erlanger, *String of Attacks in Europe Fuels a Summer of Anxiety*, N.Y. TIMES, July 25, 2016, http://www.nytimes.com/2016/07/26/world/europe/string-of-attacks-in-europe-fuels-a-summer-of-anxiety.html?_r=0; Dan Bilefsky, *Fatal Beating of Polish Man Fuels Debate Over Xenophobia in Britain*, N.Y. TIMES, Sept. 1, 2016, <http://www.nytimes.com/2016/09/02/world/europe/britain-polish-man-killed-brexite.html>.

151. See *Houseman*, *supra* note 103; Juridical Condition and Rights of Undocumented Migrant Workers, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (Ser. A) No. 18, ¶ 1 (September 17, 2003); 45 C.F.R. § 1626.1 (2016).

values that do *not* brand migrants as criminals and rapists,¹⁵² apply a religious test to reject migrants and refugees,¹⁵³ purport to round up and deport eleven million people,¹⁵⁴ or build a wall on the border with a friend and neighbor.¹⁵⁵

In this light, international human rights principles compel an immigration reform plan that provides:

- the application of international human rights standards to migrant workers' living and working conditions;
- regularization of status and a path to citizenship for undocumented migrant workers and members of their families;
- safeguards against migrant labor being used to undermine terms and conditions of employment for all workers;
- tighter control of temporary visa programs based on real needs, coupled with an opportunity for temporary migrants to obtain green cards, permanent residency, and a path toward citizenship;
- where a genuine labor shortage exists (i.e. not one driven by failure to offer good pay and benefits), salary guarantees for migrant workers at prevailing wage levels, not artificially suppressed pay;
- strong anti-blacklisting and anti-retaliation measures to protect migrant workers' rights, including special visas and work permits to remain in the country to pursue legal recourse;
- a temporary visa system that allows for free movement among employers, thus ending the "virtual servitude" that marks current temporary visa programs tying the worker to one employer;

152. See Alexander Burns, *Choice Words from Donald Trump*, N.Y. TIMES: FIRST DRAFT, June 16, 2015, <http://www.nytimes.com/politics/first-draft/2015/06/16/choice-words-from-donald-trump-presidential-candidate/>; S.A. Miller, *Ivanka Trump Wanted to Walk back Donald Trump's Mexican 'Rapists' Comments: Deposition*, WASH. TIMES, Aug. 13, 2016, <http://www.washingtontimes.com/news/2016/aug/13/ivanka-trump-wanted-walk-back-donald-trumps-mexica/>.

153. John Nichols, *Bush and Cruz Want to Use Religious Tests to Bar Refugees From the US*, THE NATION Nov. 17, 2015, <https://www.thenation.com/article/republicans-want-to-use-religious-tests-to-bar-refugees-from-the-us/>.

154. Brian Bennett, *Can Donald Trump really round up and deport 11 million people?*, L.A. TIMES, Aug. 23, 2016, <http://www.latimes.com/politics/la-na-pol-trump-deport-20160822-snap-story.html>.

155. Nick Gass, *Conway: Trump focuses on wall because it's 'easy for people to understand'*, POLITICO, Aug. 30, 2016, <http://www.politico.com/story/2016/08/trump-wall-kellyanne-conway-227546#ixzz4J2GZoyT8..>

- a regulated temporary worker recruitment system ensuring reasonable fees, registration and vetting of recruiters, full disclosure and transparency, enforceable individual contracts of employment, document integrity, employer-paid travel expenses, and making employers where migrant workers actually apply their labor legally responsible for adherence to international standards and legally liable for violations by recruiters and their agents;¹⁵⁶
- migrant workers' access to legal services on the same basis as other low-income workers;
- protection of migrant workers' full freedom of association and related rights to organize and to bargain collectively, including access to the full range of remedies when they are victimized by unlawful conduct.

This is an ambitious set of proposals. Achieving even a portion of such reforms is a huge challenge not easily met. But at a time when noisy political voices propose policies incorporating anti-immigrant racism, xenophobia, and intolerance, advocates should “go big” in defense of human rights and migrant workers' rights.

156. For details on these proposals, see Jennifer Gordon, *Global Labor Recruitment in a Supply Chain Context* (ILO Working Paper 2015), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_377805.pdf.