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THE INTERNATIONALIZATION OF PUBLIC INTEREST LAW

SCOTT L. CUMMINGS†

ABSTRACT

This Article describes and explains the influence of global change on American public interest law over the past quarter-century. It suggests that contemporary public interest lawyers, unlike their civil rights-era predecessors, operate in a professional environment integrated into the global political economy in ways that have profound implications for whom they represent, where they advocate, and what sources of law they invoke. The Article provides a preliminary map of this professional environment by tracing the impact of three defining transnational processes on the development of the modern public interest law system: the increasing magnitude

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and changing composition of immigration, the development and expansion of free market policies and institutions, and the rise of the international human rights movement. It then suggests how each of these processes has contributed to institutional revisions within the U.S. public interest system: the rise of immigrant rights as a distinctive category of public interest practice, the emergence of transnational advocacy as a response to the impact of free market policies abroad, and the movement to promote domestic human rights both as a way to resist free market policies at home and to defend civil rights and civil liberties in the face of domestic conservatism and antiterrorism. After mapping the institutional scope and texture of these trends, the Article appraises their influence on the goals public interest lawyers pursue, the tactics they deploy, and the professional roles they assume in the modern era.

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INTRODUCTION

When the *Yale Law Journal* heralded the arrival of the “new” public interest lawyers in 1970, it presented a distinctively American profile of legal practice.¹ The new activist lawyers were notable not simply for their commitment to social change, but also for the parochial nature of their project, which was defined by the use of domestic legal institutions to advance domestic causes.² The unique terrain of the civil rights political landscape shaped this insularity, as liberal public interest lawyers, buoyed by their litigation success in federal court,³ sought to claim the power of American law as a force for vindicating the rights of politically marginalized domestic groups.⁴

1. Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

2. *Id.* at 1072–1105. Even when profiled lawyers took cases with international dimensions—like California Rural Legal Assistance lawyers who served migrant farm workers, *id.* at 1088, or Law Commune lawyers who represented clients resisting the Vietnam War draft, *id.* at 1095—their work was presented in domestic terms: serving the “poor” or supporting “political dissidents.” *Id.* at 1072, 1091.

3. See, e.g., JOEL F. HANDLER, ELLEN JANE HOLLINGSWORTH & HOWARD S. ERLANGER, *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* 24–44 (1978); SUSAN E. LAWRENCE, *THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING* 99–101 (1990).

4. See Burton A. Weisbrod, *Conceptual Perspective on the Public Interest: An Economic Analysis*, in *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 4, 22 (Burton A. Weisbrod et al. eds., 1978). Although the test-case approach was the dominant motif of the early public interest law period, it had many critics inside the movement; indeed, well-known public interest lawyers of the time expressed dissatisfaction with the limits of test-case reform

The isolationist impulse of the early public interest movement stands in contrast to the increasingly cosmopolitan scope of contemporary practice. This shift is symbolized by the most prominent test-case litigation of the post-9/11 era: the contest over the detention of so-called “enemy combatants” at Guantánamo Bay, which has seen high-profile U.S. public interest law organizations representing detained foreign nationals,⁵ advocating both in U.S. courts and international venues like the Inter-American Commission on Human Rights and the United Nations,⁶ and asserting claims that detention violates both U.S. and international human rights law.⁷

Yet, as this Article suggests, the Guantánamo litigation is but the most dramatic expression of a broader pattern of internationalization that has disrupted the insularity of the American public interest law project.⁸ Unlike their civil rights-era predecessors, contemporary public interest lawyers operate in a professional environment integrated into the global political economy in ways that have

and argued instead for a model of social change that combined law and organizing. *See* Comment, *supra* note 1, at 1077–78 (quoting Gary Bellow’s critique of test-case litigation).

5. The Center for Constitutional Rights represented petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Al Odah v. United States*. *See* Brief for Petitioners El-Banna et al., *Al Odah v. United States*, No. 06-1196 (U.S. filed Aug. 24, 2007).

6. In 2002, the Center for Constitutional Rights “filed a petition with the Inter-American Commission for Human Rights seeking the Commission’s intervention and requesting the issuance of Precautionary Measures to protect the rights of persons detained at Guantanamo.” CTR. FOR CONSTITUTIONAL RIGHTS, *THE STATE OF CIVIL LIBERTIES: ONE YEAR LATER: EROSION OF CIVIL LIBERTIES IN THE POST 9/11 ERA* 16, *available at* http://www.cala-online.org/Civil_Lib/Civil_Liberties.pdf. In 2005, the American Civil Liberties Union submitted a Written Statement to the UN Commission on Human Rights condemning the torture of Guantánamo detainees. *See* ACLU, *Written Statement on Torture and Detention to UN Comm’n on Human Rights* (2005), *available at* http://www.aclu.org/images/asset_upload_file810_24799.pdf.

7. *See* Complaint at ¶ 164, *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002) (alleging that “acts described herein constitute prolonged arbitrary detention in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violated customary international law prohibiting prolonged arbitrary detention as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities”).

8. For the seminal research on the internationalization of domestic legal fields, see YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002), and David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 *CASE W. RES. L. REV.* 407 (1994); *see also* Howard Erlanger et al., *Is It Time for a New Legal Realism?*, 2005 *WIS. L. REV.* 335, 343–44 (calling for law and social science researchers “to develop a ‘bottom-up’ approach appropriate to the era of globalization and to explore the institutions and decision-makers who are calling the shots”).

profound implications for whom they represent, where they advocate, and what sources of law they invoke. Although global interdependence has by no means spelled the demise of the classic public interest law model of domestic rights enforcement,⁹ it has generated new stories of innovation that foreground international themes.¹⁰ Thus, the literature on public interest practice has drawn attention to lawyers who mobilize law to protect the workplace rights of undocumented immigrants,¹¹ challenge U.S. actions in front of human rights and free trade bodies,¹² sue transnational corporations in U.S. courts for abuses committed in developing countries,¹³ and promote human rights as a strategy to advance domestic social justice.¹⁴ These stories, though only partial accounts of public interest practice, point to new directions of global engagement by lawyers on the ground and suggest the rough outlines of an evolving frontier of transnational justice.

This Article describes and explains the influence of global change on American public interest law over the past quarter century. It does not offer a systematic measurement of the degree to which U.S. public interest practice has been transformed by globalization, but rather a preliminary map of the public interest field that overlays

9. See Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law,"* 2005 WIS. L. REV. 455, 457–60 (discussing the history of the "classic" public interest law model). In fact, a 2006 empirical study of the public interest field suggests that traditional domestic legal advocacy remains a core element of what U.S. public interest law organizations do. See Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591, 1611 (2006).

10. See Austin Sarat & Stuart A. Scheingold, *State Transformation, Globalization, and the Possibilities of Cause Lawyering: An Introduction*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 3 (Austin Sarat & Stuart Scheingold eds., 2001); see also Timothy K. Kuhner, *International Poverty Law: A Response to Economic Globalization*, 22 BUFF. PUB. INT. L.J. 75 (2003–2004).

11. See JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (2005).

12. See FORD FOUND., CLOSE TO HOME: CASE STUDIES OF HUMAN RIGHTS WORK IN THE UNITED STATES (2004) (describing a petition filed with the Inter-American Commission on Human Rights to challenge U.S. welfare reform); Michael J. Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Rights*, 4 U. PA. J. LAB. & EMP. L. 529, 547–53 (2001–2002) (discussing the use of the side labor agreement of the North American Free Trade Agreement to enforce international labor norms).

13. See Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation As a Tool for Social Change*, 57 VAND. L. REV. 2305, 2328 (2004).

14. See Catherine Albisa & Sharda Sekaran, *Foreword to Symposium, Realizing Domestic Social Justice Through International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 351 (2006).

currents of global change onto the terrain of domestic institutions, revealing the texture of U.S. lawyering in the international arena. Its goals are threefold.

First, it provides a historical framework for understanding what is distinctive about the interaction between global change and domestic public interest practice since the 1980s. Part I thus suggests that, although transnational processes influenced the development of legal aid in the first half of the twentieth century and the public interest law movement of the 1960s and 1970s, the Reagan years constituted a political disjuncture associated with two fundamental policy shifts: from global anticommunism to free markets and from domestic political liberalism to conservatism. Although these shifts impacted domestic practice in complex ways, one may view them schematically as operating to both push and pull public interest lawyers into the international arena: shrinking the sphere of market regulation at home while expanding the scope of market integration abroad; narrowing the opportunities for liberal advocacy at home, while fueling the movement for international human rights abroad. From this vantage point, U.S. policy can be viewed as constricting the avenues of domestic legal redress forged by liberal public interest lawyers, while simultaneously igniting transnational processes that opened new pathways of global legal engagement.

The goal of Part II is to identify and chart the impact of these processes on the development of contemporary public interest law. Toward this end, it identifies three defining transnational processes of the modern public interest era: (1) the increasing magnitude and changing composition of immigration (bringing in new *clients*), (2) the development and expansion of free market policies and institutions (extending transnational economic *arenas* within which advocacy takes place), and (3) the rise of the international human rights movement (stimulating the importation of new *norms*). It then suggests how each of these processes has contributed to institutional revisions within the U.S. public interest system: the rise of *immigrant rights* as a distinctive category of public interest practice, the emergence of *transnational advocacy* as a response to the impact of free market policies abroad, and the movement to promote *domestic human rights* both as a way to resist free market policies at home and to defend civil rights and civil liberties in the face of domestic conservatism and antiterrorism. In this way, the Article provides an initial account of how global change has influenced what public interest lawyers do *inside* the U.S. legal system (which clients they

represent and which causes they pursue) as well as what types of activities they undertake *outside* of American borders (which international venues they enter and which networks they support).

The final goal of the Article is to move beyond a description of institutional change toward an evaluation of what this change means for conceptions of U.S. public interest law, its relevance as a tool for social change, and its role in the legal profession. Does the international turn in public interest law represent the extension of familiar American legal objectives and methods into the international sphere or has global engagement altered public interest law's basic terms and fundamental values?

This Article can only offer tentative answers to this question, which it does in Part III by shifting the lens from discrete practices to synthetic themes. Looking across the range of lawyering activity described in the Article, it examines how global engagement has influenced the *goals* U.S. public interest lawyers pursue, the *tactics* they deploy, and the professional *roles* they assume. With respect to the definition of goals, the evidence from practice suggests that internationalization has refocused the traditional public interest objectives of market regulation, public participation, and political resistance. The project of market regulation in the global era encompasses efforts by American lawyers to hold transnational corporations outside the United States accountable to international standards, while also enforcing the labor rights of undocumented immigrants within U.S. borders. Efforts to promote public participation are channeled into attempts to correct the "democracy deficit" in international institutions. And, in perhaps the most striking turn, some public interest lawyers are moving away from the old civil rights model of enlisting federal power to protect minority rights toward a new human rights model of resisting federal power—particularly after 9/11—through the domestic application of international standards. Tactically, these shifts have been associated with an approach that both encompasses and moves beyond court-centered litigation strategies. Lawyering within the international arena is thus notable for its tactical pluralism, embracing a broad range of nontraditional techniques such as lobbying, reporting, and organizing; its polycentrism, evident in the movement by lawyers into advocacy venues outside of the U.S.; and its connection to transnational alliances that operate to mobilize law across borders. Finally, internationalization has reframed issues of professional accountability, as public interest lawyers increasingly operate in

international venues where the rules of lawyer-client relations are not well defined and the geographic scope of legal advocacy strains even the best attempts by lawyers to remain responsive to their clients' interests.

I. AMERICAN LEGAL ACTIVISM IN TRANSNATIONAL PERSPECTIVE: A BRIEF HISTORY OF THE FIELD

Although this Article focuses on what has happened within American public interest law since the early 1980s—a period roughly identified with the rise of globalization¹⁵—the penetration of global influences into the domestic field has a longer history. To understand what is distinctive about the contemporary period, it is therefore instructive to compare the influence of international forces across three phases of public interest law's development.

A. *Legal Aid*

The first phase, from roughly 1900 to 1950, was dominated by the rise of legal aid: a system of local direct services offices defined by a commitment to equal access to justice for the poor.¹⁶ The project of legal aid was heavily influenced by the racial exclusivity of U.S. immigration policy, which meant that legal aid services were directed to “white” southern and eastern European immigrants living in major urban “ghettos.”¹⁷ Rather than emphasizing the distinctiveness of immigrant grievances, the early legal aid project was defined by the

15. Researchers have used the concept of globalization as a way of framing changes in the form and tempo of global interdependence across dimensions of economic exchange, political governance, and social exchange. See ARJUN APPADURAI, MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION (1996); ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY (1990); SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS (1998); JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002); TOWARD A GLOBAL CIVIL SOCIETY (Michael Walzer ed., 1995); Jane Jenson & Boaventura de Sousa Santos, *Introduction: Case Studies and Common Trends in Globalizations*, in GLOBALIZING INSTITUTIONS: CASE STUDIES IN REGULATION AND INNOVATION 9, 11 (Jane Jenson & Boaventura de Sousa Santos eds., 2000); Francis Snyder, *Economic Globalization and the Law in the Twenty-First Century*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 624, 625–26 (Austin Sarat ed., 2004).

16. See HANDLER, HOLLINGSWORTH & ERLANGER, *supra* note 3, at 19 (1978); EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM 14 (1974); JACK KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION 40 (1982); Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 487 (1985).

17. See JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 58–60 (1976).

goal of promoting individual assimilation: immigrant clients received free services as a means of counteracting notions of class-divided justice and facilitating the process of Americanization.¹⁸

This project of Americanization had little room for Asian immigrants, however, who were targeted for exclusion.¹⁹ Immigrant groups who had already established themselves in urban areas, such as the Chinese, gained limited access to legal aid, while private attorneys stepped in to provide additional services, notably helping Chinese clients to challenge racial exclusion.²⁰ For Mexican Americans, in contrast, advocacy efforts reflected their distinctive status: legally resident and legally white.²¹ Living largely outside the urban legal aid hubs, Mexican Americans looked to mutual aid groups for representation on issues of systemic abuse,²² such as the educational segregation of Mexican-American children,²³ with early challenges premised on the theory that segregation violated their right to be treated the same as other whites.²⁴

B. *Public Interest Law*

The efforts of Mexican-American groups to attack systemic segregation reflected the emerging model of public interest law reform that would come to be identified with the civil rights period. This law reform strain, in addition to responding to the dynamics of U.S. immigration, was also notably influenced by U.S. foreign relations. In particular, the American Civil Liberties Union (ACLU),

18. *See id.* at 60–61.

19. Asian immigrants were barred under the National Origins Act of 1924, which prohibited entrants ineligible for citizenship, thereby excluding all “non-white” Asians. *See* James F. Smith, *A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT’L L. & POL’Y 227, 232 (1995). The 1924 act effectively targeted Japanese immigrants, *see* RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* 209 (1989), because Chinese and other Asians had already been excluded, *see* KEVIN R. JOHNSON, *THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS* 18 (2004).

20. *See* LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 70 (1995).

21. *See* Steven H. Wilson, *Brown over “Other White”: Mexican Americans’ Legal Arguments and Litigation Strategy in School Desegregation Lawsuits*, 21 LAW & HIST. REV. 145, 152 (2003). *See generally* IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

22. *See* Wilson, *supra* note 21, at 154.

23. *See id.* at 155–56.

24. *See id.* at 155–60.

which was formed in 1920, took on early cases defending radical labor leaders against the charge of Communism.²⁵ During World War II, the ACLU gained notoriety for its effort to challenge Japanese-American internment;²⁶ and after the war, the organization became heavily involved in the McCarthy-era fight against Communism, filing a number of lawsuits challenging governmental efforts to investigate political dissidents.²⁷

The pivotal moment for the law reform movement, however, came in *Brown v. Board of Education*,²⁸ which validated the test-case strategy of the NAACP Legal Defense and Educational Fund (NAACP LDF) with the Supreme Court's sweeping repudiation of school segregation. The LDF model of law reform defined the second phase of legal activism, which lasted through the 1970s and—because of its association with efforts to promote the interests of politically vulnerable social groups—came to be identified with the concept of “public interest law.” The success of liberal lawyers in using the courts as a fulcrum to leverage political change brought resources and status to a new sector of legal organizations promising to use federal court litigation to promote progressive reform.²⁹ Yet, while the public interest law movement developed as a distinctively American project, its evolution was framed by the emergence of a human rights system outside U.S. borders and the changing stream of immigrants within.

The United States was a primary architect of human rights in the postwar era, contributing to the formation of the United Nations (UN),³⁰ whose Charter proclaimed “respect for human rights,”³¹ and

25. See HANDLER, HOLLINGSWORTH & ERLANGER, *supra* note 3, at 23–24.

26. See *Korematsu v. United States*, 323 U.S. 214 (1944).

27. For example, the ACLU represented Communist party leaders charged with sedition, *Yates v. United States*, 354 U.S. 298 (1956), and challenged the power of the House Un-American Activities Committee, *Watkins v. United States*, 354 U.S. 178 (1957). See generally Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 211 (1976).

28. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

29. See JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 1 (1978); Trubek, *supra* note 9, at 457–60; Weisbrod, *supra* note 4, at 22.

30. See Lisa Hajjar, *Human Rights*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY*, *supra* note 15, at 589, 592; see also Martha Minow, *Instituting Universal Human Rights Law: The Invention of Tradition in the Twentieth Century*, in *LOOKING BACK AT LAW'S CENTURY* 58, 62–63 (Austin Sarat et al. eds., 2002).

31. See MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 85–86 (1998).

helping to draft the Universal Declaration of Human Rights.³² While the United States sought to use human rights to cultivate anticommunist allies abroad, the creation of the human rights system emboldened activist groups at home, who saw it as a way to force the U.S. government to put its principles into practice. The NAACP, sensitive to the dynamics of Cold War politics, brought its civil rights agenda to the UN in the late 1940s and early 1950s in an effort to internationalize the civil rights struggle,³³ submitting a petition to the newly formed UN Commission on Human Rights challenging the “barbaric” practice of U.S. discrimination against blacks.³⁴ Additional human rights efforts ensued, as lawyers from the NAACP LDF, the ACLU, and other groups attempted to draw international attention to racial discrimination through the inclusion of human rights claims in civil rights cases during the 1940s and 1950s.³⁵ But this human rights approach was de-emphasized in the 1950s in part to avoid the red-baiting that destroyed other civil rights groups, but also because of the building momentum for domestic legalism, dramatized by *Brown*, and cultivated by U.S. policymakers eager to avoid international embarrassment.³⁶ Successive legal victories and the passage of the civil rights laws bolstered the domestic trend, which—though never exclusive—became the defining mode of legal engagement during the public interest period.

Yet as the civil rights ethos reinforced parochialism in public interest practice, it also stimulated revisions in immigration policy that had the opposite effect: opening the domestic public interest system to a more cosmopolitan client base. From a policy perspective, the watershed was the 1965 passage of the Immigration and

32. See Minow, *supra* note 30, at 63.

33. See CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955, at 93–112 (2003).

34. Petition, reprinted in W.E.B. DuBois, *Three Centuries of Discrimination*, 54 THE CRISIS 362, 380 (1947) (containing a “condensed version” of DuBois’s introduction to “A Statement on the Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America and an Appeal to the United Nations for Redress”); see also MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 44–45 (2000); Dorothy Q. Thomas, *Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy*, 9 HARV. HUM. RTS. J. 15, 17 (1996).

35. See Bert B. Lockwood, Jr., *The United Nations Charter and United Nations Civil Rights Litigation: 1946–1955*, 69 IOWA L. REV. 901, 931–48 (1984); see also MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); Paul Sayre, *Shelley v. Kraemer and United Nations Law*, 34 IOWA L. REV. 1 (1948).

36. See DUDZIAK, *supra* note 34, at 11–12.

Nationality Act amendments, which eliminated the racially discriminatory national origin quota system that had operated to block immigration from Asia, while imposing new limits on Latin American entry.³⁷ This produced two major effects: igniting the transformation of Mexican immigration from a legal to a predominately illegal stream, while dramatically expanding legal Asian immigration. In responding to the legal needs of the new immigrants, lawyers fashioned advocacy tools out of the resources provided by the public interest law movement, developing a law reform agenda to address systemic grievances, while also extending individual legal services to immigrant clients. In both cases, however, advocacy in the public interest period was driven not by a commitment to “immigrant rights” as a distinct mode of practice; rather, immigrant representation was viewed in terms of traditional concepts of civil rights and access to justice.

On the law reform side, the emphasis on civil rights over immigrant rights reflected demographic realities and political priorities. For Mexican Americans, the rubric of civil rights gave voice to their struggle for political and social integration, and reflected the fact that undocumented immigration, though growing,³⁸ still did not occupy a central place on the political agenda. The Mexican-American community, defined by its predominately legal status,³⁹ sought to emphasize its entitlement to legal equality as part of the broader polity, rather than assert the rights of immigrants as a special class.⁴⁰ Accordingly, the litigation agenda of the Mexican American Legal Defense and Educational Fund (MALDEF) followed the

37. See Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (1965). Also, 1965 marked the first year that Mexican immigration was not governed by the massive Bracero program, which permitted the legal entry of nearly five million migrant farmworkers from 1942 to 1964. See DOUGLAS S. MASSEY, JORGE DURAND & NOLAN J. MALONE, *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* 39–40 (2002).

38. Although the 1965 amendments to the Immigration and Nationality Act imposed a quota on immigration from México, see THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 162 (5th ed. 2003), it did not take effect until 1968, and its full impact on undocumented immigration was not felt until the 1970s, see MASSEY, DURAND & MALONE, *supra* note 37, at 43–44.

39. In the late 1960s, most Mexican Americans were born in the United States. See Antonia Hernandez, *American Citizenship Post 9-11*, 1 STAN. J. C.R. & C.L. 289, 294 (2005).

40. See Telephone Interview with Antonia Hernandez, Former President, Mexican-American Legal Def. Fund (MALDEF), President, Cal. Cmty. Found. (June 30, 2006).

NAACP LDF's lead,⁴¹ departing from earlier efforts emphasizing Mexican-American "whiteness," and instead challenging the disparate treatment of Mexican Americans on the ground of racial discrimination.⁴² Yet as the imbalance between the demand for entry and the availability of visas for Mexicans immigrants grew worse in the 1970s, undocumented immigration surged,⁴³ elevating the importance of immigrant issues on MALDEF's docket—and prompting its high-profile challenge of a Texas law denying public school admission to the children of undocumented immigrants in *Plyler v. Doe*.⁴⁴ Even though it struck at a critical issue for the undocumented community, MALDEF, however, defined *Plyler* as an *education* case, not an *immigration* case⁴⁵—reflecting the continuing political sensitivity of the undocumented issue throughout the 1970s. Indeed, it was not until the early 1980s—when MALDEF's board approved a controversial proposal to establish an Immigrant and Alien Rights project—that the organization began to invest substantial resources to explicitly support the struggle of Mexican immigrants.⁴⁶

For Asian-American legal groups during this period, undocumented immigration was not a major concern; instead, as the 1965 immigration reforms repealed a virtual bar to Asian immigration and thus dramatically increased *legal* entry,⁴⁷ the main question became how to provide basic services to the diverse newcomers. For the lawyers who founded the first Asian-American organizations,

41. See Karen O'Connor & Lee Epstein, *A Legal Voice for the Chicano Community: The Activities of the Mexican American Legal Defense and Educational Fund, 1968–82*, in *THE MEXICAN AMERICAN EXPERIENCE: AN INTERDISCIPLINARY ANTHOLOGY* 281, 284 (Rodolfo O. de la Garza et al. eds., 1985); Joe Ortega, *The Privately Funded Legal Aid Office: The MALDEF Experience*, 1 *CHICANO L. REV.* 80, 82 (1972).

42. See Wilson, *supra* note 21, at 181–92.

43. See MASSEY, DURAND & MALONE, *supra* note 37, at 43–44. Between 1970 and 1980, the Mexican population in the United States almost tripled, growing by over 1.4 million (from 760,000 to nearly 2,200,000). JEFFREY S. PASSEL, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 37 (2005), available at <http://pewhispanic.org/files/reports/46.pdf> [hereinafter PASSEL, UNAUTHORIZED MIGRANTS]. Of the Mexican immigrants who entered during the 1970s, an estimated 900,000 were undocumented. See Jeffrey S. Passel, *Undocumented Immigration*, *ANNALS AM. ACAD. POL. & SOC. SCI.*, Sept. 1986, at 181, 190.

44. *Plyler v. Doe*, 457 U.S. 202, 206 (1982).

45. See Telephone Interview with Antonia Hernandez, *supra* note 40.

46. See *id.*; Telephone Interview with Vilma Martinez, Former President & Gen. Counsel, MALDEF, Partner, Munger, Tolles & Olsen LLP (July 11, 2006).

47. See TAKAKI, *supra* note 19, at 420–71.

though they drew inspiration from the civil rights model of social reform, their efforts were guided primarily by a commitment to expanding access to justice for monolingual clients.⁴⁸ For example, although New York's Asian American Legal Defense and Education Fund was conceived as a national "reform" organization along the lines of the NAACP LDF when it began in 1974—and did engage in impact litigation on employment and voting discrimination—its early work concentrated on the provision of individual legal services in the areas of labor, housing, immigration, and family law to poor Chinatown residents.⁴⁹

The individual service approach of early Asian-American public interest groups underscored the inability of the new federal legal services program, begun in 1965, to effectively respond to the legal needs of immigrant communities.⁵⁰ Despite its limitations, however, the federal legal services program emerged as an important forum for immigrant advocacy, though—like its civil rights counterparts—its early development downplayed immigrant rights in favor of broader themes. In rural areas, the emphasis was on migrant farmworker rights, which were deeply influenced by immigration, but not defined by it. In the Southwest, migrant farmworker projects became the contact point between the legal services program and the growing stream of Mexican immigrants, who filled the fields in California and other important farming areas.⁵¹ Groups like the California Rural Legal Assistance program became closely identified with migrant

48. See Telephone Interview with Stan Mark, Program Dir., Asian Am. Legal Def. & Educ. Fund (June 19, 2006).

49. See *id.* Other major Asian-American groups—including Oakland's Asian Law Caucus, started in 1972, the Asian Law Alliance, started in San Jose in 1978, and the Asian Pacific American Legal Center, begun in 1983 in Los Angeles—developed similar hybrid programs that combined law reform with access to legal services. See Dale Minami, *Asian Law Caucus: Experiment in an Alternative*, 3 AMERASIA J. 28 (1975); Telephone Interview with Stewart Kwoh, Executive Dir., Asian Pac. Am. Legal Ctr. (June 20, 2006); History of the Asian Law Alliance, http://www.asianlawalliance.org/whoweare/who_we_are.htm (last visited Feb. 23, 2008). For Middle Eastern immigrant groups, the Arab-American Anti-Discrimination Committee was established in 1980 and hired its first attorney in 1982; it has focused on coordinating pro bono attorneys for Arab Americans in employment discrimination and immigration cases. See Telephone Interview with Nadal Abadelgafer, Legal Assoc., Arab-Am. Anti-Discrimination Comm. (Dec. 7, 2005).

50. As one indication of this, in the most prominent study of legal rights activities of the period, immigration-related legal services were not listed among the principal areas of activity for federal legal services program lawyers. See HANDLER, HOLLINGSWORTH & ERLANGER, *supra* note 3, at 52–56 & tbls.3.1 & 3.2.

51. See MASSEY, DURAND & MALONE, *supra* note 37, at 59–60.

farmworker organizing,⁵² and gained notoriety for impact suits on behalf of immigrants challenging working conditions and seeking access to public benefits.⁵³ East of the Mississippi, however, it was nonimmigrants—mostly African Americans, but also whites and native-born Latinos and Asian Americans—who dominated the migrant farmworker client base.⁵⁴ As federally funded migrant programs spread out from a handful of major farming regions in the early 1970s to every state in the union a decade later,⁵⁵ immigrant issues grew in importance, but were still viewed as ancillary to the broader movement for migrant labor rights.⁵⁶

Within legal services programs in urban immigration hubs, the broad mission was access to justice, echoing back to the tradition of legal aid. Yet as the law reform model gained traction within the federal legal services program,⁵⁷ and patterns of systemic abuse emerged amid the thicket of individual immigrant grievances, momentum built for investing in immigrant rights as a distinct area of practice. Early reform efforts,⁵⁸ combined with the increasing service demands of growing urban immigrant populations, underscored the

52. See Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 298 (1996). For a discussion of the political backlash against California Rural Legal Assistance's advocacy, see JOHN A. DOOLEY & ALAN W. HOUSEMAN, LEGAL SERVICES HISTORY ch. 1, 20–21 (1984).

53. See Michael Bennett & Cruz Reynoso, *California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice*, 1 CHICANO L. REV. 1, 17 (1972).

54. See Telephone Interview with Roger Rosenthal, Executive Dir., Migrant Legal Action Program (July 19, 2006).

55. See *id.*; see also DOOLEY & HOUSEMAN, *supra* note 52, ch. 1, 40 n.49.

56. See Telephone Interview with Roger Rosenthal, *supra* note 54. Advocacy around labor violations fueled efforts by the growers' lobby to reduce funding for migrant projects and to abolish legal services altogether. Laura K. Abel & Risa E. Kaufman, *Preserving Aliens' and Migrant Workers' Access to Civil Legal Services: Constitutional and Policy Considerations*, 5 U. PA. J. CONST. L. 491, 496 (2003); see also BRENNAN CTR. FOR JUSTICE, HIDDEN AGENDAS: WHAT IS REALLY BEHIND ATTACKS ON LEGAL AID LAWYERS? 5 (2001), available at <http://www.brennancenter.org/dynamic/subpages/atj7.pdf>.

57. See HANDLER, HOLLINGSWORTH & ERLANGER, *supra* note 3, at 34–35.

58. For examples of legal services impact cases from this era, see *Hampton v. Wong*, 426 U.S. 88, 116 (1976) (holding unconstitutional a civil service regulation barring noncitizens from federal employment); *Lau v. Nichols*, 414 U.S. 563, 566–69 (1974) (holding that the San Francisco school district's failure to provide English language instruction to Chinese students constituted discrimination under Title VI), *abrogated by* *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001) (“[W]e have since rejected *Lau*'s interpretation of § 601 as reaching beyond intentional discrimination.”); and *Silva v. Bell*, 605 F.2d 978, 988–90 (7th Cir. 1979) (issuing visas based on historical immigration patterns to Western Hemisphere applicants who had been denied visas in the 1970s under a policy that counted Cuban refugees against hemispheric quotas).

need for systemwide coordination of impact suits and technical assistance to support immigrant representation in frontline programs,⁵⁹ ultimately leading to the creation of a federal legal services backup center for immigration projects that fused the law reform movement with the emergent field of immigrant rights.⁶⁰

C. *The Modern System*

The development of a nascent immigrant rights bar marked the cusp of a new period of international engagement for public interest law—one characterized by the acceleration of existing immigration trends, the resuscitation of old strains of human rights advocacy, and the creation of distinct modes of transnational practice adapted to the global economic arena.⁶¹ Yet although there were systemic continuities, Reagan's election in 1980 forged a new dividing line for public interest law, ushering in a modern era framed by two fundamental policy shifts that operated to both push and pull public interest lawyers toward the international sphere.

At the level of international relations, Reagan's election marked the transition from *Cold War containment* to *neoliberal market integration*. Anticommunism, to be sure, remained a defining feature of Reagan foreign policy, but Reagan was also a champion of market integration, reorienting international institutions like the World Bank and International Monetary Fund to promote free markets, while laying the groundwork for later achievements, such as the creation of the World Trade Organization (WTO) and North American Free Trade Agreement (NAFTA).⁶² These developments asserted new challenges for public interest lawyers. At home, efforts to downsize the federal government operated to limit the scope of the regulatory bureaucracy and the social welfare state—thus curtailing two major arenas of public interest law practice.⁶³ The outflow of corporate activity to developing countries with minimal regulatory regimes,

59. See Telephone Interview with Peter Schey, Executive Dir., Ctr. for Human Rights & Constitutional Law (June 14, 2006).

60. See *id.* (discussing the establishment of the National Center for Immigrants' Rights in 1978); see also DOOLEY & HOUSEMAN, *supra* note 52, ch. 3, 68 n.2.

61. This openness has its parallels in private-sector practice. See Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737 (1994); Susan Bisom-Rapp, *Exceeding Our Boundaries: Transnational Employment Law Practice and the Export of American Lawyering Styles to the Global Worksite*, 25 COMP. LAB. L. & POL'Y J. 257 (2004).

62. See STIGLITZ, *supra* note 15, at 13–14.

63. See Trubek, *supra* note 9, at 458.

where U.S.-based transnational corporations could take advantage of cheap labor and lax environmental standards, started to pull public interest lawyers toward the international sphere as a new frontier in the struggle to assert principles of social justice as a counterweight to the spread of free market ideology. Free trade, in turn, produced its own market dislocations in developing countries, which fueled increased levels of out-migration, particularly from México, generating a surge in illegal entry that began to reverberate through the domestic public interest bar.

The trend toward market integration reinforced internal policy dynamics, which were marked by the rise of domestic political conservatism. The major change was the declining role of the federal government as the guarantor of legal rights associated with political liberalism.⁶⁴ This was most striking in the judicial arena, where the struggle over the ideological composition of the federal bench began to move the weight of the judiciary toward a constitutional vision skeptical of economic regulation and claims of minority rights.⁶⁵ In this context, public interest lawyers had to weigh alternatives to the traditional federal court litigation paradigm, such as state court advocacy⁶⁶ and nonlitigation strategies.⁶⁷ Obstacles to domestic litigation also began to push public interest lawyers to look more intensively outside the United States for new legal resources and advocacy opportunities. The international human rights system, which grew during the 1980s into a powerful institutional rejoinder to governmental abuse outside U.S. borders, emerged as a ready-made tool to reframe public interest law's domestic agenda.⁶⁸ The appeal of human rights as an alternative to domestic law underscored how far the public interest law movement had traveled from the heady days of the early law reform phase—and punctuated the arrival of the modern era of internationalization.

64. See Michael McCann & Jeffrey Dudas, *Retrenchment . . . and Resurgence? Mapping the Changing Context of Movement Lawyering in the United States*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS* 37, 38 (Austin Sarat & Stuart A. Scheingold eds., 2006).

65. See *id.*

66. See Harold A. McDougall, *Lawyering and the Public Interest in the 1990s*, 60 *FORDHAM L. REV.* 1, 43 (1991).

67. See Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 *UCLA L. REV.* 443, 447 (2001).

68. See Alan Jenkins & Larry Cox, *Bringing Human Rights Home*, *THE NATION*, June 27, 2005, at 27, 28–29.

II. TRANSNATIONAL PROCESSES IN THE MAKING OF MODERN PUBLIC INTEREST LAW

The modern system of public interest law that has emerged since the 1980s is distinguished by its openness: influenced by transnational economic and political relations, attentive to possibilities for extraterritorial advocacy, and concerned with a broad notion of transnational justice. This Part analyzes the structural forces driving internationalization, looking specifically at the role of three transnational processes—immigration, market integration, and human rights—in shaping the domestic public interest field. It suggests three significant linkages: (1) the rise of immigrant rights practice as a response to the increasing number and changing status of immigrant *clients*, (2) the emergence of new modes of transnational advocacy within developing free market *arenas*, and (3) the movement to promote international *norms* of legal accountability in the effort to “bring human rights home.”

A. *Clients*

Public interest lawyers have always found immigrant clients on the front lines of practice—defining the most immediate frontier of international engagement. What has changed since the 1980s is the nature of this engagement: there has been a *quantitative* increase in immigration to the United States,⁶⁹ combined with a *qualitative* change in both its pattern (more geographically dispersed)⁷⁰ and composition (more undocumented entrants).⁷¹ These changes, forged along the axis of race, have redefined immigrant advocacy, transforming it from an ancillary part of civil rights and poverty law practice into a distinctive field. This development is framed at the international level by the transition from the Cold War (sparking the influx of *political* refugees in the 1980s) to market integration

69. See JEFFREY S. PASSEL & ROBERTO SURO, RISE, PEAK AND DECLINE: TRENDS IN U.S. IMMIGRATION 1992–2004, at 13 (2005) (showing that total immigration to the United States increased from ten million in the 1980s to fourteen million in the 1990s and was estimated to grow to sixteen million in the 2000s).

70. See PASSEL, UNAUTHORIZED MIGRANTS, *supra* note 43, at 12 (stating that since 1990, “[t]he rapid growth and spreading of the unauthorized population has been the principal driver of growth in the geographic diversification for the total immigrant population into the new settlement states such as Arizona, North Carolina, Georgia, and Tennessee”).

71. See *id.* at 6 (showing the growth in the ratio of “unauthorized migrants” to “legal immigrants” and noting that “[s]ince the mid-1990s, arrivals of unauthorized migrants have exceeded arrivals of legal immigrants”).

(stimulating the growth in *economic* refugees in the 1990s). Entrance during this period has exposed immigrants to acute legal vulnerability, with political refugees dependent on adjudications of asylum and undocumented workers able to invoke only a thin layer of workplace protections. The response of public interest lawyers in this context has been to assert *immigrant rights* in the face of their deprivation.

1. *Refugees.* Through the 1970s, the foundation of immigrant advocacy was primarily built upon investments by civil rights and legal services programs, which extended assistance to the growing immigrant client population to advance broader organizational missions. The refugee crisis of the early 1980s galvanized a new wave of institution building focused on the unique legal status of noncitizens. Until 1980, Cold War imperatives dictated U.S. refugee law, which defined a refugee as someone fleeing any “Communist or Communist-dominated country,” the Middle East, or a “catastrophic natural calamity.”⁷² The Refugee Act of 1980 eliminated these foreign policy considerations from the statute,⁷³ and brought the definition of asylum in line with international standards by permitting legal admission for those who could prove a “well-founded fear of persecution” in their home countries.⁷⁴ Though there was support by public interest lawyers for Haitians fleeing political repression, it was the U.S. response to civil war in Central America that proved to be a decisive catalyst for the immigrant rights bar. Whereas U.S. opposition to the governing socialist party in Nicaragua meant that asylum claims from that country generally succeeded, the situation

72. See Act of Oct. 3, 1965, Pub. L. No. 89-236, sec. 3, § 203, 79 Stat. 911, 913 (amending the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163, 178–79 (1952)).

73. Refugee Act of 1980, Pub. L. 96-212, tit. II, sec. 201(a), § 101(a), 94 Stat. 102, 102–03 (“The term ‘refugee’ means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”).

74. *Id.* § 208. The Department of Justice first introduced asylum regulations in 1974, see STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 939 (4th ed. 2005), however, “the standard of proof for access to asylum was not the ‘well-founded fear of persecution’ language of the Refugee Convention,” to which the United States became bound in 1968, James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. L.J. 481, 504 (2000).

was different for those fleeing El Salvador and Guatemala, where U.S. support for military dictators made it reluctant to grant asylum to refugees from those countries—and thus concede persecution committed by U.S.-backed right-wing regimes.⁷⁵

The public interest response to the influx of Central American refugees proceeded along legal services and law reform paths. The legal services component was shaped by the constriction of the federal legal services program as a venue for immigrant advocacy. Federally funded groups continued to represent asylum seekers in the immediate aftermath of a 1980 prohibition on representing “known” aliens under a narrow interpretation that applied the restriction only to aliens facing a final deportation order.⁷⁶ Congress, however, quickly closed this loophole, barring legal services groups from using federal funds to represent asylum seekers who entered the United States after 1980, as well as other undocumented immigrants.⁷⁷ These restrictions spurred the development of an alternative organizational structure to assist asylum seekers in navigating the administrative process to gain legal status. A key part of this new structure grew out of the Sanctuary Movement,⁷⁸ in which churches were turned into sanctuaries for refugees denied legal entrance.⁷⁹ In dioceses with large refugee populations, local Catholic church leaders also supported the establishment of legal programs to meet the needs of refugees, some of which were eventually consolidated into the Catholic Legal Immigration Network, Inc. (CLINIC) in 1988.⁸⁰ There was also a

75. See BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 247–51 (2004).

76. See 125 Cong. Rec. H7085 (1979). On the alien restriction, see Gerald M. Caplan, *Understanding the Controversy over the Legal Services Corporation*, 28 N.Y. L. SCH. L. REV. 583, 588 (1983).

77. See Pub. L. 97-377, 96 Stat 1830, 1874 (1982). Congress restricted immigrant representation by limiting client eligibility to lawful permanent residents; spouses, parents, or children of U.S. citizens who had filed for permanent status; refugees and asylees; and those granted withholding of deportation. See 45 C.F.R. § 1626.5(a)–(e) (2007). Legal services groups could use non-federal funds to provide assistance to ineligible immigrants; many groups, however, fearing reprisal from the Legal Services Corporation, chose not to. Robert L. Bach, *Building Community Among Diversity: Legal Services for Impoverished Immigrants*, 27 U. MICH. J.L. REFORM 639, 643 (1994).

78. See generally SUSAN BIBLER COUTIN, *THE CULTURE OF PROTEST: RELIGIOUS ACTIVISM AND THE U.S. SANCTUARY MOVEMENT* (1993).

79. See Marah Carter Stith, *Immigration Control: A Catholic Dilemma?*, 84 U. DET. MERCY L. REV. 73, 89 (2007).

80. Catholic Legal Immigration Network, Inc., About Us, <http://www.cliniclegal.org/Aboutus.html> (last visited Feb. 23, 2008).

wave of grassroots activity, animated by a commitment to the Movement, which produced important refugee groups in New York, Los Angeles, and other key refugee destinations.⁸¹ Additional refugee organizations started during this period, some grounded in religious traditions emphasizing social justice,⁸² and others defined by a secular immigrant rights orientation.⁸³ Augmenting this refugee legal services structure were pro bono projects devoted to asylum,⁸⁴ and an emerging group of asylum-oriented law school clinical programs, beginning with Harvard's Immigration and Refugee Clinic.⁸⁵

81. Among these groups formed in the early 1980s were the Central American Refugee Center in New York, *see* Telephone Interview with Patrick Young, Dir. of Legal Servs., Cent. Am. Refugee Ctr. (Feb. 21, 2006), and El Rescate in Los Angeles, *see* Susan Bibler Coutin, *Cause Lawyering in the Shadow of the State: A U.S. Immigration Example*, in *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA*, *supra* note 10, at 117, 120. For other groups that emerged during this time, see Centro Presente, Mission Statement, <http://www.cpresente.org/missionstatement.html> (last visited Feb. 23, 2008) (founded in 1981); Central American Resource Center in Washington, D.C., CARECEN, History and Advocacy, <http://www.carecencd.org/English/History.htm> (last visited Feb. 23, 2008) (founded in 1981); and Central American Resource Center in Los Angeles, CARECEN, History, <http://www.carecen-la.org/> (last visited Feb. 23, 2008) (founded in 1983).

82. *See, e.g.*, American Friends Service Committee, Miami, Fl., Immigration Legal Services, <http://www.afsc.org/miami/legal-services.htm> (last visited Feb. 23, 2008); e-mail from Lucio M. Perez-Reynoso, Miami Area Program Dir., Am. Friends Immigration Servs. to Scott L. Cummings (Nov. 19, 2007) (confirming that the program, sponsored by the Quakers, was started in the early 1980s to provide services to Central American refugees).

83. Such groups included the Northwest Immigrant Rights Project in Washington State, Northwest Immigrant's Rights Project, About NWIRP, <http://nwirp.org/AboutUs/AboutNWIRP.aspx> (last visited Feb. 23, 2008) (founded in 1984); CASA of Maryland, Inc., CASA of Maryland, CASA History, <http://www.casademaryland.org/> (follow "About Us: History" hyperlink) (last visited Feb. 23, 2008) (founded in 1985); Las Americas Immigrant Advocacy Center in El Paso, Texas, Las Americas Immigrant Advocacy Center, Our History, <http://www.las-americas.org/about/history.html> (last visited Feb. 23, 2008) (founded in 1987); and the Political Asylum Project of Austin, Texas, PAPA, About Us, http://www.main.org/papa/about_us.html (last visited Sept. 23, 2008) (founded in 1987). In addition, the National Immigration Project of the National Lawyers Guild became a freestanding organization in 1980. *See* National Immigration Project of the National Lawyers Guild, Inc., About Us, <http://www.nationalimmigrationproject.org/about/about.html> (last visited Feb. 23, 2008).

84. *See, e.g.*, Political Asylum/Immigration Representation Project, About PAIR, <http://www.pairproject.org/about.htm> (last visited Feb. 23, 2008) (stating that the project was formed in Massachusetts in 1989).

85. Harvard opened its clinic in the early 1980s. *See* HARVARD LAW SCH. IMMIGRATION AND REFUGEE CLINICAL PROGRAM, CLINICAL REPORT 1 (2003) (on file with the *Duke Law Journal*). Other early clinical programs that worked on asylum cases included those at the University of San Diego (late 1970s), George Washington (1979), Loyola University New Orleans (early 1980s), the University of California at Davis (1981), Cardozo (mid-1980s), CUNY, (1987), John Marshall (late 1980s), and Yale (1988).

While the entrance of refugees during the 1980s spurred direct legal services groups focused on filing asylum petitions, it also generated a law reform response, as lawyers sought to ensure that the federal government administered the asylum process in a way that was consistent with statutory and constitutional requirements, while also treating asylum seekers from different countries fairly. The Immigrant Legal Resource Center in San Francisco was an early pioneer in the field, helping to litigate the seminal case *INS v. Cardoza-Fonseca*,⁸⁶ in which the Supreme Court held that the “well-founded fear of persecution” standard established in the 1980 Refugee Act governed asylum petitions made in the context of deportation proceedings, even though the standard for withholding deportation was technically higher.⁸⁷ The ACLU also emerged as a major player in the immigrant rights field during this time. With the Ford Foundation providing seed money, the ACLU launched its Immigrants’ Rights Project in 1987,⁸⁸ which asserted challenges to the detention of Haitian refugees in Guantánamo Bay⁸⁹ and the unfavorable treatment of Guatemalan and Salvadoran asylum seekers.⁹⁰ As this litigation underscored, the emergent field of immigrant rights was premised on a deep critique of U.S. Cold War policy and a willingness to champion the cause of its immediate victims.

2. *Undocumented Workers.* While the growth of the asylum bar constituted a twilight political battle of the fading Cold War era, the explosion of immigrant workers’ rights advocacy reflected the legal paradox at the heart of the ascendant period of market integration. This paradox centered on the differential legal status accorded labor and capital under the regime of market integration—and played out most dramatically in the evolving economic relationship between the United States and México. In particular, as the United States moved toward liberalization measures with México permitting the free flow of goods and capital, it simultaneously moved to heighten the legal

86. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

87. *Id.* at 449.

88. Telephone Interview with Lucas Guttentag, Dir., ACLU Immigrant Rights Project (July 19, 2006).

89. *See Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1032 (E.D.N.Y. 1993).

90. *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 810–11 (N.D. Cal. 1991).

barriers to labor mobility.⁹¹ The Immigration Reform and Control Act of 1986 (IRCA) marked the new policy watershed, granting amnesty to those undocumented immigrants already inside the United States, while seeking to prevent new entrants by increasing border security and imposing sanctions on employers that hired undocumented workers.⁹² Yet, while IRCA raised the costs of illegal entry, the pursuit of market integration, culminating in the passage of NAFTA in 1994, simultaneously raised the benefits, as a booming economy in the United States and economic disruption in México combined to increase migration, most of it undocumented.⁹³

After IRCA, undocumented immigration from México not only grew, but changed in ways that increased legal vulnerability. Tightened border security at key points of entry diverted undocumented immigration to other regions, which caused settlement patterns to spread across the United States.⁹⁴ Those who made it across the border began to stay longer,⁹⁵ increasing their dependence on steady employment, which reinforced the movement out of seasonal agricultural work into the urban low-wage sector.⁹⁶ Employers began to impose the costs of IRCA compliance on workers by lowering wages, contracting out work to subcontractors with lower labor standards, and engaging in more informal work transactions.⁹⁷ Undocumented immigrant workers, whose precarious legal status made them loathe to contest mistreatment, experienced heightened insecurity as part of a second-tier labor system. In this environment, a dominant question for lawyers representing immigrants became how to afford legal protection to a class of people

91. See MASSEY, DURAND & MALONE, *supra* note 37, at 74–101.

92. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

93. The total Mexican-born population in the U.S. grew from nearly 2.2 million in 1980 to nearly 4.3 million in 1990 to nearly 6.7 million in 2000. PASSEL, UNAUTHORIZED MIGRANTS, *supra* note 43, at 37. Since 1990, approximately 80 percent of Mexican immigrants have entered without authorization. *Id.* at 16. Undocumented Mexican immigrants accounted for over half of the total number of undocumented immigrants in the United States as of 2004. *Id.* at 10, 16 (showing estimates of nearly 6 million undocumented Mexican immigrants and 10.3 million undocumented immigrants overall).

94. See MASSEY, DURAND & MALONE, *supra* note 37, at 127–28.

95. See *id.* at 128–33.

96. See ALEJANDRO PORTES & RUBÉN RUMBAUT, IMMIGRANT AMERICA: A PORTRAIT 41 (1990).

97. See MASSEY, DURAND & MALONE, *supra* note 37, at 120–23.

defined by their illegality. The workplace—where baseline protections existed—emerged as a central arena of legal struggle.

Two major legal events pushed forward the development of an immigrant workers' rights infrastructure in the post-IRCA era. The first was the foreclosure of legal services programs funded by the federal Legal Services Corporation (LSC) as a venue for undocumented worker redress. Concerns about undocumented workers' demands on governmental resources culminated in 1996, when Congress prohibited LSC-funded programs—already precluded from using federal funds to represent undocumented immigrants—from using their *non-federal* funds as well.⁹⁸ As a result, immigrant advocates were forced to move into non-LSC sites in order to serve undocumented clients. The second major event occurred six years later with the Supreme Court's decision in *Hoffman Plastics Compound v. NLRB*,⁹⁹ which denied undocumented workers the traditional labor law remedy of back pay when illegally fired for union organizing.¹⁰⁰ Although the decision struck a blow to immigrant worker protection, causing some employers to believe that they could violate undocumented workers' labor rights with impunity,¹⁰¹ it also had the effect of stimulating greater coordination among immigrant rights advocates and greater investments in immigrant rights from organized labor. It is against this backdrop that lawyers began to forge a network of non-LSC groups, grassroots worker centers, impact organizations, and law school clinical programs dedicated to protecting the rights of undocumented immigrant workers.

In rural areas, the LSC restrictions sparked a split in the migrant farmworker advocacy field. Despite the bar on assistance to undocumented workers, federally funded migrant projects were able to continue representing agricultural guest workers—commonly referred to as H-2As in reference to the visa program allowing temporary admission¹⁰²—on matters arising “under the provisions of the worker's specific employment contract,” including wages,

98. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(d)(2)(B), 110 Stat. 1321, 1321–56.

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

100. *Id.* at 152.

101. See Victor Narro & Marielena Hincapié, *Organizing Immigrant Workers After Hoffman Plastic: The Opportunity and the Challenges*, 60 GUILD PRAC. 182, 185 (2003).

102. 8 U.S.C. § 1101(a)(15)(h)(ii) (2000).

housing, and transportation.¹⁰³ Because of the strong demand for agricultural guest workers after NAFTA,¹⁰⁴ H-2A representation continued to play an important role within LSC-funded groups despite the 1996 restrictions.¹⁰⁵ Thus, existing migrant projects continued to respond to claims of labor abuse against H-2As (and other legal residents), while new programs developed to reach out to migrant farmworkers in underserved areas.¹⁰⁶

Yet the prohibition on representing undocumented agricultural workers,¹⁰⁷ as well as nonagricultural guest workers (so-called H-2Bs), contributed to a major restructuring of migrant groups. New organizations spun off from LSC-funded entities to escape LSC restrictions. For example, the Virginia Justice Center for Farm and Immigrant Workers was set up in 1998 after breaking off from an LSC group to pursue advocacy for migrant farmworkers and other low-wage immigrant workers.¹⁰⁸ Similarly, the North Carolina Justice Center in Raleigh separated from the federal legal services program after the 1996 restrictions, drawing upon Interest on Lawyers Trust Accounts and foundation funds to set up an Immigrants Legal Assistance Project emphasizing impact litigation on behalf of immigrant workers, primarily undocumented farmworkers and H-2Bs.¹⁰⁹ Existing organizations that had no prior connection to immigrant rights also initiated new immigrant worker projects. The Southern Poverty Law Center, known for its litigation against hate crimes, launched the Immigrant Justice Project in 2004 focused on enforcing the labor rights of undocumented immigrant migrant workers throughout the Southeastern United States.¹¹⁰ In addition, clinical programs entered the field: for instance, in 2001, the Villanova School of Law initiated a Farmworker Legal Aid clinic,

103. 45 C.F.R. § 1626.11 (2005).

104. See MASSEY, DURAND & MALONE, *supra* note 37, at 83–84.

105. See Bruce Goldstein, *Immigration Policy and Low-Wage Workers: The Farmworker Case*, 38 CLEARINGHOUSE REV. 375, 377 (2004).

106. See, e.g., Southern Migrant Legal Services Office, <http://www.trla.org/office/?of=60> (last visited Feb. 23, 2008).

107. See Goldstein, *supra* note 105, at 377 (stating that three-fifths or more of farmworkers lack lawful status).

108. See Legal Aid Justice Center, History of the Legal Aid Justice Center, http://www.justice4all.org/about_us/history (last visited Feb. 23, 2008).

109. See Telephone Interview with Carol Brooke, Migrant Worker Attorney, N.C. Justice Ctr. (Dec. 1, 2005).

110. See Southern Poverty Law Center, Immigrant Justice Project, <http://www.splcenter.org/legal/ijp.jsp> (last visited Feb. 23, 2008).

which grew out of a collaboration between the law school and local immigrant groups that identified workplace issues as an area of major need.¹¹¹

In metropolitan areas, the development of an immigrant workers' rights legal services infrastructure grew out of distinct strains, one rooted in grassroots organizing groups and the other in traditional legal services providers. The grassroots approach built upon a foundation of community-based efforts to support immigrant workers that developed independent of, and prior to, the LSC restrictions. Beginning in the late 1980s, activists began developing a network of immigrant worker centers—grassroots organizations that arose in places like New York, Los Angeles, and Chicago to improve working conditions for low-wage workers from immigrant communities.¹¹² Some centers, like the Workplace Project on Long Island and Korean Immigrant Worker Advocates in Los Angeles, were established specifically to address labor abuse in targeted industries with large immigrant workforces.¹¹³ Other centers started with a mission of providing social services to immigrant communities and then adopted a workplace focus as labor problems emerged as a central concern for members. For example, CASA of Maryland, which started in 1985 to serve Central American refugees, shifted its focus in the early 1990s to immigrant labor issues in response to a “day laborer crisis” near its offices,¹¹⁴ instituting a program to provide day laborers with job training and placement services.¹¹⁵ The Coalition for Humane Immigrant Rights of Los Angeles, formed in the wake of IRCA to coordinate services between different immigrant agencies in Southern California, initiated an outreach and education project for day laborers in the early 1990s,¹¹⁶ which grew and was eventually spun off as the influential National Day Laborer Organizing Network.¹¹⁷

111. Telephone Interview with Michele Pistone, Dir., Farmworker Legal Aid Clinic, Villanova Sch. of Law (Dec. 12, 2005).

112. See JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* 7–26 (2006).

113. See *id.* at 16, 25.

114. See *id.* at 16.

115. See CASA of Maryland, Center for Employment and Leadership Mission, <http://www.casademaryland.org/> (follow “Employment” hyperlink) (last visited Feb. 23, 2008).

116. Telephone Interview with Victor Narro, Project Dir., UCLA Downtown Labor Ctr. (June 29, 2006).

117. See National Day Laborer Organizing Network, About NDLO, <http://ndlon.org/> (follow “Our History” hyperlink) (last visited Feb. 23, 2008); see also Steven Greenhouse, *Labor Federation Forms a Pact with Day Workers*, N.Y. TIMES, Aug. 10, 2006, at A18. The

Because of the high incidence of legal abuse among immigrant workers, legal services emerged as a significant component of the worker centers' agenda.¹¹⁸ As the worker center field grew rapidly over the next decade, expanding from fewer than five centers in the early 1990s to nearly 140 in 2005,¹¹⁹ the groups drew attention as important sites for providing legal help in response to immigrant labor abuse in the restaurant, garment, domestic work, and day labor sectors.¹²⁰

While worker centers developed organically to meet the legal needs of undocumented workers, traditional legal services groups were spurred into action by the service gap left by the LSC restrictions. In major immigrant centers, existing organizations expanded their programs to assist immigrant workers. For instance, in Los Angeles, Bet Tzedek Legal Services, one of the main non-LSC legal services providers in the city, launched an employment project focused on immigrant workers in the San Fernando Valley in 2001. In New York, Mobilization for Youth withdrew from LSC funding in 2003, consolidating its immigrant worker representation into a newly formed Workers Justice Project, which took on individual wage-and-hour cases, as well as group labor cases filed in connection with grassroots labor organizing campaigns.¹²¹ In some areas without pre-existing non-LSC programs, new groups emerged to fill the vacuum created by the LSC restrictions. In 2003, for example, the Northwest

Coalition for Humane Immigrant Rights of Los Angeles also started a domestic worker project in 1991 that initially focused on outreach and education on labor issues. See Telephone Interview with Victor Narro, *supra* note 116; see also Scott L. Cummings, *Developing Cooperatives as a Job Creation Strategy for Low-Income Workers*, 25 N.Y.U. REV. L. & SOC. CHANGE 181, 191–94 (1999) (describing an effort to start a domestic worker cooperative launched with the assistance of the Coalition for Humane Immigrant Rights of Los Angeles). For studies of the labor issues faced by domestic workers and day laborers, see PIERRETTE HONDAGNEU-SOTELO, *DOMÉSTICA: IMMIGRANT WORKERS CLEANING AND CARING IN THE SHADOWS OF AFFLUENCE* (2001); and ABEL VALENZUELA JR. ET AL., *ON THE CORNER: DAY LABOR IN THE UNITED STATES* (2006), available at http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf.

118. See JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* 74 (2006) (finding that over 50 percent of the worker centers surveyed provided some type of legal services).

119. See Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417, 421 (2005).

120. See Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465, 471–95 (2005).

121. See Telephone Interview with Lynn Kelly, Executive Dir., Mobilization for Youth (July 28, 2006).

Workers' Justice Project started in Portland, Oregon, to represent low-wage immigrant and contingent workers on discrimination, wage-and-hour, and labor organizing claims, while providing litigation support to worker organizing groups, like Oregon's migrant workers' union.¹²²

A handful of law school clinical programs also organized around the theme of workers' rights, helping to provide services to the immigrant community while operating as critical sites of innovation and transmission for new advocacy models. The Immigrant Rights Clinic at the New York University School of Law was an early leader in the field, drawing attention to creative advocacy approaches, such as worker organizing campaigns and international strategies.¹²³ The CUNY School of Law Immigrant and Refugee Rights Clinic, led by a former NYU clinician, provided litigation support to a number of worker center organizing campaigns,¹²⁴ including a high-profile campaign by the Restaurant Opportunities Center of New York that won unpaid wages, as well as guaranteed sick days and paid vacations for immigrant workers at two popular Manhattan restaurants owned by the Smith & Wollensky chain.¹²⁵ In another law school-worker center collaboration, the Central Texas Immigrant Worker Rights Center in Austin began in 2003 to offer weekly rights education classes, provide legal advocacy in wage-and-hour cases, and connect immigrant workers with law student advocates through the University of Texas Transnational Workers Rights Clinic.¹²⁶

As the concept of immigrant workers' rights reverberated through the direct legal services community, it also began to emerge as a major theme of impact litigation groups. Organizations that traditionally focused on labor and employment issues started devoting more resources to immigrant issues. The trajectory of the National Employment Law Project (NELP) in New York, established

122. See Telephone Interview with D. Michael Dale, Executive Dir., Nw. Workers Justice Project (June 12, 2006).

123. See Daphne Eviatar, *Rebellious Lawyers Are Shaking Up Law School Clinics*, LEGAL AFFAIRS, Nov.-Dec. 2002, http://www.legalaffairs.org/issues/November-December-2002/review_eviatar_novdec2002.msp.

124. Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879, 1893-94 (2007)

125. See Steven Greenhouse, *Two Restaurants to Pay Workers \$164,000*, N.Y. TIMES, Jan. 12, 2005, at B3.

126. The Central Texas Immigrant Worker Rights Center, <http://www.equaljusticecenter.org/CTIWRC.htm> (last visited Feb. 23, 2008).

in 1969 as a backup center for legal services programs, is illustrative. Because low financial eligibility standards in the federal legal services program excluded many of the working poor,¹²⁷ NELP's early casework focused on unemployment insurance benefits.¹²⁸ When NELP was defunded as a backup center as part of the 1996 LSC overhaul,¹²⁹ it lost almost all of its staff and had to seek funding from private foundations, which started to provide resources to enforce the employment rights of welfare recipients and contingent workers in the wake of welfare reform.¹³⁰ Through its contingent worker project, NELP's attorneys began to represent increasing numbers of low-wage immigrant workers on basic labor enforcement issues and witnessed employer efforts to deny liability for violations by pointing to the undocumented status of the workers. After *Hoffman Plastics*, NELP's immigrant work expanded dramatically, as reports increased that employers around the country were seeking information about the legal status of immigrant plaintiffs both as a means of denying liability and intimidating workers who brought suit.¹³¹ In response, NELP dedicated two full-time lawyers to immigrant worker issues, making immigrant workers' rights NELP's second-most funded project (behind unemployment insurance).¹³² The organization has since become one of the leaders of the national Low-Wage Immigrant Worker Coalition, formed to provide backup support to lawyers facing post-*Hoffman* challenges to the legal status of their clients and to conduct workers' rights trainings for advocates around the country.¹³³ Following a similar trajectory, the Legal Aid Society's Employment Law Center, a non-LSC group in San Francisco, became active in the area of immigrant workers' rights in the late 1990s, launching a formal National Origin, Immigration, and Language Rights Program to litigate impact cases,¹³⁴ and expanding its Workers'

127. See Alan W. Houseman, *Civil Legal Assistance for the Twenty-First Century: Achieving Equal Justice for All*, 17 YALE L. & POL'Y REV. 369, 430–31 (1998).

128. Telephone Interview with Cathy Ruckelshaus, Litig. Dir., Nat'l Employment Law Project (June 13, 2006).

129. See *supra* text accompanying note 98.

130. See Telephone Interview with Cathy Ruckelshaus, *supra* note 128.

131. See Nancy Cleeland, *Employers Test Ruling on Immigrants*, L.A. TIMES, Apr. 22, 2002, at C1.

132. Telephone Interview with Cathy Ruckelshaus, *supra* note 128; see also Daniela Gerson, *Court Rules Illegal Immigrants Eligible for Lost Wages*, N.Y. SUN, Feb. 22, 2006, at 4.

133. See Narro & Hincapié, *supra* note 101, at 187.

134. See Telephone Interview with Christopher Ho, Senior Staff Attorney, The Legal Aid Soc'y—Employment Law Ctr. (July 11, 2006).

Rights Clinic to represent immigrant workers on wage-and-hour claims.¹³⁵

While immigrant issues thus infiltrated traditional employment-based groups, workers' rights, in turn, began to emerge as a salient issue for organizations traditionally focused on immigration and civil rights. The National Immigration Law Center (NILC), structured as an impact litigation and technical assistance back-up center for immigration groups, started an immigrant worker project in 2002. Around the same time, MALDEF entered directly into the immigrant workers' rights field, collaborating with day labor centers in Los Angeles to challenge ordinances in Redondo Beach and Los Angeles County designed to prevent day laborers from congregating to seek work.¹³⁶ After *Hoffman Plastics*, MALDEF also was involved in a major suit on behalf of undocumented immigrant janitors denied labor protections by a large California supermarket chain that had subcontracted out for their services.¹³⁷

Although Asian-American workers faced labor abuse across a range of industries, it was the revelation of severe exploitation in garment sweatshops in the 1990s that focused attention on the cause of Asian-American immigrant workers' rights.¹³⁸ Though groups like the Asian American Legal Defense and Education Fund had represented garment workers as far back as the 1970s,¹³⁹ changes in production in the ensuing two decades erected new legal challenges. In particular, the industry underwent a massive restructuring during the 1980s in response to global outsourcing that fueled subcontracting in domestic garment production as a way to cut labor costs.¹⁴⁰ One

135. See Telephone Interview with Joan Graff, Exec. Dir., Employment Law Ctr. (June 20, 2006).

136. See Narro, *supra* note 120, at 490–96.

137. *Flores v. Albertsons, Inc.*, No. CV 01-00515, 2002 U.S. Dist. LEXIS 6171, at *4–5 (C.D. Cal. Apr. 9, 2002).

138. See, e.g., SWEATSHOP SLAVES: ASIAN AMERICANS IN THE GARMENT INDUSTRY (Kent Wong & Julie Monroe eds., 2006); see also Edna Bonacich, *Intense Challenges, Tentative Possibilities: Organizing Immigrant Garment Workers in Los Angeles*, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 130, 131–32 (Ruth Milkman ed., 2000).

139. Telephone Interview with Ken Kimerling, Legal Dir., Asian Am. Legal Def. & Educ. Fund (June 13, 2006).

140. See EDNA BONACICH & RICHARD P. APPELBAUM, BEHIND THE LABEL: INEQUALITY IN THE LOS ANGELES APPAREL INDUSTRY 8–16 (2000).

result was the proliferation of small garment contractors that extracted labor cost reductions by exploiting immigrant workers.¹⁴¹

The extremes of sweatshop abuse were revealed in 1996, when the discovery of seventy-one enslaved Thai workers in a garment factory in El Monte, California, caused the sweatshop issue to explode onto the national scene.¹⁴² A lawsuit by the Asian Pacific American Legal Center (APALC) against both the individual operators of the El Monte facility and the manufacturers and retailers that contracted with it (which included Mervyn's and Montgomery Ward) resulted in a high-profile settlement that brought national attention to the sweatshop issue¹⁴³—and generated interest in legal advocacy to hold garment manufacturers and retailers “jointly liable” with their sweatshop contractors for labor violations. Because of the success of the El Monte case, workers' rights became a major area of advocacy for APALC, which hired a number of highly-credentialed young lawyers, many through fellowship programs, to litigate sweatshop impact cases against prominent retailers such as BCBG, bebe, and Forever 21. The Forever 21 case, in particular, underscored the challenge that the growth of workers' rights advocacy posed to APALC's traditional identity-based mission, pitting the organization against the Korean-owned garment retailer on behalf of Latino garment worker clients claiming labor abuse.¹⁴⁴

The rise of immigrant workers' rights as an important dimension of legal advocacy also underscored the ambivalent—and often hostile—relationship between immigrant workers and traditional unions. Organized labor had been a major supporter of the IRCA employer sanctions regime, viewing undocumented immigrant labor as a threat to U.S. organizing efforts, and thus had little involvement with immigrant worker advocacy in the 1990s. After the AFL-CIO formally reversed course in 2000, embracing immigrant workers and calling for the repeal of employer sanctions, it began taking steps to support immigrant workers' rights. One of the first was to help convene (in connection with NELP, NILC, and other immigration and labor groups) the Low-Wage Immigrant Worker Coalition, which

141. *See id.* at 18–19.

142. *See* Julie Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. GENDER RACE & JUST. 405, 405 (1998).

143. *See* *Bureerong v. Uvawas*, 922 F. Supp. 1450 (C.D. Cal. 1996); George White, *Sweatshop Workers to Receive \$1 Million*, L.A. TIMES, Mar. 8, 1996, at B1.

144. *See* *Castro v. Fashion 21, Inc.*, 88 F. App'x 987, 987 (9th Cir. 2004).

resulted in efforts to create immigrant worker materials, conduct trainings, and devise a national legal and legislative strategy to advance a pro-immigrant worker agenda.¹⁴⁵ In 2004, the AFL-CIO created an Immigrant Worker Program in the Associate General Counsel's office to provide formal union support to the Coalition,¹⁴⁶ as well as technical assistance to local workers' rights organizations.¹⁴⁷

Despite this logistical support, the AFL-CIO has not provided direct funding to immigrant workers' rights groups, underscoring the broader financial insecurity of the field. Some progressive union locals have given seed money to legal groups, but this support has been ad hoc and sporadic.¹⁴⁸ For start-up funds, postgraduate fellowship programs have proved to be crucial catalysts for immigrant worker projects. The Skadden Fellowship program, which provides two-year post-law school fellowships, has been a key supporter of public interest groups moving into immigrant worker advocacy, launching immigrant workers' rights projects at APALC, NELP, the ACLU, and the Employment Law Center—and producing many leaders in the immigrant workers' rights field.¹⁴⁹ The Echoing Green Foundation, which provides seed money to start up innovative social ventures in a range of fields,¹⁵⁰ has made grants to help launch well-known groups, such as the Workplace Project in Long Island, the Northwest Workers' Justice Project in Portland, Make the Road by Walking in Brooklyn, and the Workers' Rights Law Center in upstate

145. Telephone Interview with Ana Avendaño, Assoc. Gen. Counsel & Dir., Immigrant Worker Program, AFL-CIO (June 19, 2006).

146. For instance, the AFL-CIO maintains a listserv to coordinate among the members of the Coalition and has been involved in the production of a litigation guide for immigrant worker advocates. See AFL-CIO LAWYERS COORDINATING COMM., LITIGATION GUIDE FOR IMMIGRANT WORKER ADVOCATES (n.d.) (on file with the *Duke Law Journal*).

147. Telephone Interview with Ana Avendaño, *supra* note 145.

148. For example, the Service Employees International Union provided funding to support the development of the Northwest Workers' Justice Project. Telephone Interview with D. Michael Dale, *supra* note 122.

149. See SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES, SKADDEN FELLOWSHIP FOUNDATION REPORT, 1989–2007, at 1 (2007). There are over forty Skadden Fellows who have been funded to undertake immigrant workers' rights advocacy since the program's inception, most of them funded in the past ten years. See *id.* The Equal Justice Works (formerly the National Association for Public Interest Law) fellowship program has also funded lawyers to undertake immigrant workers' rights advocacy. Equal Justice Works, Equal Justice Works Fellowships, <http://www.equaljusticeworks.org/programs/fellowships> (last visited Feb. 23, 2008).

150. See Echoing Green, Approach, <http://www.echoinggreen.org/approach> (last visited Feb. 23, 2008).

New York. Major foundations, like the Open Society Institute,¹⁵¹ have entered into the immigrant workers field to help sustain ongoing initiatives, while the Mexican government has also made tentative steps to support immigrant projects.¹⁵² Interest on Lawyers Trust Accounts programs and attorney's fees have played an important funding role, and there has been some law firm funding for immigrant worker advocacy,¹⁵³ though this source may be limited by the potential conflict between plaintiff-side employment litigation and the interests of corporate clients defending against workplace suits.

3. *Deserving Immigrants.* As undocumented immigration became a deeply polarizing political issue during the 1990s, it sparked a backlash aimed at securing the borders to thwart illegal entry at its source,¹⁵⁴ while limiting access to public benefits by immigrants (both legal and illegal) already on the inside, whose lower incomes and higher poverty rates raised concerns about their reliance on governmental programs.¹⁵⁵ Immigrant rights advocacy—defined by its response to undocumented work—also took shape in reaction to this anti-immigrant mobilization.

One strain of advocacy aimed at protecting immigrant access to public resources, which prominently came under attack with the 1994 passage of California's Proposition 187 as a statewide ballot initiative.¹⁵⁶ Proposition 187—which barred undocumented immigrants in California from using public social services,

151. For instance, the Open Society Institute provided funds for CASA of Maryland's Workers' Rights Legal and Organizing Center in Baltimore. See CASA de Maryland, Day Laborers Find Solutions in Baltimore, http://www.casademaryland.org/index.php?option=com_content&task=view&id=133 (last visited Feb. 23, 2008).

152. Telephone Interview with D. Michael Dale, *supra* note 122 (noting that the Northwest Workers' Justice Project receives some money from the Mexican government); see also Katherine Corcoran, *Mexican Consul Offers Free Legal Hotline*, MERCURY NEWS (San Jose), Jan. 26, 2006, at 3B.

153. The Employment Law Center, for instance, receives law firm support. Telephone Interview with Joan Graff, *supra* note 135.

154. MASSEY, DURAND & MALONE, *supra* note 37, at 91–96.

155. For instance, one study showed that the 1994 real median income for immigrants was \$33,601, compared to \$46,011 for natives, while the 1994 poverty rate for immigrants was 25.7 percent, compared to 13.1 percent for natives. JEFF CHAPMAN & JARED BERNSTEIN, ECON. POLICY INST., IMMIGRATION AND POVERTY: DISAPPOINTING INCOME GROWTH IN THE 1990S NOT SOLELY THE RESULT OF GROWING IMMIGRANT POPULATION 3, 5, available at <http://www.epinet.org/briefingpapers/130/bp130.pdf>.

156. See Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 118 (1995).

nonemergency health care, and schools—galvanized the immigrant rights advocacy community, which filed a series of class action and individual lawsuits challenging the law’s implementation. These actions were brought by the elite immigrant rights impact litigation bar: the Center for Human Rights and Constitutional Law, the Immigrant Legal Resource Center, NILC, APALC, MALDEF, the ACLU, and other organizations represented different groups of plaintiffs in the consolidated federal actions that invalidated portions of the law.¹⁵⁷ Though a settlement of the case in 1999 by newly elected Governor Grey Davis ended the appeals process,¹⁵⁸ the downfall of Proposition 187 signaled the opening of a new front in the legal struggle for immigrant rights, as advocacy groups fought similar measures in Arizona¹⁵⁹ and Virginia.¹⁶⁰

Although the denial of public aid to the undocumented generated the most political attention, it was the ban on means-tested welfare benefits for *legal* immigrants that prompted a major influx of organizational resources into the immigrant rights field. The 1996 welfare reform law denied many legal immigrants the right to receive disability benefits and food stamps, while authorizing states to enact similar bars in allocating welfare and Medicaid.¹⁶¹ In response, the Open Society Institute created the \$50 million Emma Lazarus Fund to promote immigrant naturalization and to engage in policy advocacy to restore immigrant eligibility for public benefits.¹⁶² Some of this funding went to support legal advocacy, both in the form of individual assistance to those seeking to naturalize and impact suits attempting to protect access to benefits.¹⁶³ As one outgrowth, some

157. See *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1247–49 (C.D. Cal. 1997); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 761–62 (C.D. Cal. 1995).

158. See ACLU, Chronology of Proposition 187, <http://www.aclu.org/immigrants/gen/11652prs19990729.html> (last visited Feb. 23, 2008).

159. See Maria Pabon Lopez, *The Intersection of Immigration Law and Civil Rights Law: Noncitizen Workers and the International Human Rights Paradigm*, 44 BRANDEIS L.J. 611, 626 (2006).

160. See Christina Bellantoni, *Virginia Counties Decry Alien Bill; Law Would Bar Health Benefits*, WASH. TIMES, Mar. 29, 2005, at A1.

161. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 400–451, 110 Stat. 2105.

162. See Bill Ong Hing, *The Emma Lazarus Effect: A Case Study in Philanthropic Revitalization of the Immigrant Rights Community*, 15 GEO. IMMIGR. L.J. 47, 48, 80–81 (2000).

163. See *id.* at 72 n.67 (noting that the Immigrant Legal Resource Center set up an “attorney of the day” service to assist with requests for naturalization services); *id.* at 81 n.109 (noting that MALDEF received funding to challenge Proposition 187).

legal aid and welfare rights groups that received Emma Lazarus funding¹⁶⁴ became active in the effort to preserve immigrant benefits, litigating challenges to state denials of food stamps and Medicaid to legal immigrants.¹⁶⁵

As advocacy around welfare reform focused particular attention on the restoration of benefits for certain categories of immigrants—refugees, the disabled, and children—it highlighted a more systemic issue: policymakers and funders deemed some groups within the immigrant community as more deserving of support than others.¹⁶⁶ The outlines of a hierarchy of immigrant eligibility emerged most visibly within the federal legal services program, where after the 1996 restrictions a complex system of representation arose to assist immigrants who could demonstrate either *claims to legal status* or *claims to victimhood*.

Those with legitimate claims to legal status—naturalized citizens, lawful permanent residents, and those petitioning to obtain lawful permanent residence—continued to remain eligible under rules in place since the early 1980s.¹⁶⁷ Those without legal status could nonetheless qualify for services under a series of modifications to the eligibility requirements that reflected sympathy for immigrants whose illegal status was a product of victimization—or made them more vulnerable to it. Thus, the 1996 Kennedy Amendment permitted programs to use non-LSC funds to help victims of domestic violence petition for permanent status under the Violence Against Women Act;¹⁶⁸ in 2002, LSC issued a program letter stating that groups could assist clients under the Victims of Trafficking and Violence

164. See Emma Lazarus Fund, Grants Awarded, <http://web.archive.org/web/20001118090700/www.soros.org/emma/html/h-p.html> and <http://web.archive.org/web/20000901043142/www.soros.org/emma/html/q-z.html> (describing grants to the Legal Aid Society of New York and Welfare Law Center).

165. See, e.g., *Aliessa v. Novello*, 754 N.E.2d 1085, 1088 (N.Y. 2001) (case filed by the Legal Aid Society of New York) (striking down a New York law denying legal immigrants access to Medicaid); *Teytelman v. Wing*, 773 N.Y.S.2d 801, 803–05 (Sup. Ct. 2003) (case filed by Legal Aid Society of New York, the Welfare Law Center, and other groups) (challenging the New York Food Assistance Program’s use of non-needs-based eligibility criteria to restrict access by legal immigrants).

166. Cf. JOEL F. HANDLER & ELLEN JANE HOLLINGSWORTH, *THE “DESERVING POOR”: A STUDY OF WELFARE ADMINISTRATION* 16–20 (1971).

167. 45 C.F.R. pt. 1626 app. (2007); 45 C.F.R. § 1626.6 (2007).

168. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009–546 (codified in scattered sections of 8 U.S.C. and 18 U.S.C.).

Protection Act;¹⁶⁹ and in 2003, LSC included asylum seekers as eligible clients.¹⁷⁰ LSC programs were also permitted to represent undocumented youth committed to the dependency and delinquency systems who were petitioning for legal permanent residence under the Special Immigrant Juvenile Status program, as well as torture victims.¹⁷¹ The impact of these eligibility requirements could be seen in the client base of major legal services organizations. For example, at the Legal Aid Foundation of Los Angeles, immigrants represented roughly 40 percent of the caseload from 2000 to 2004; about half of these were domestic violence clients, while the other half were a combination of legal permanent residents and those seeking legal adjustment, including victims of trafficking and torture.¹⁷²

Outside of LSC, victimization issues have similarly become popular areas of advocacy, reflecting client need, as well as funding priorities. For instance, the National Immigrant Justice Center—Chicago’s major immigrant advocacy group with five offices and over thirty-five staff—has projects focused on asylum, children, trafficking, domestic violence, and the rights of detainees; though it is not restricted by LSC, it does not engage in undocumented worker representation.¹⁷³ The same is true for Seattle’s Northwest Immigrant Rights Project, which has grown from a small group representing Central American asylum seekers in the 1980s, into a large-scale immigrant legal services provider, with nearly thirty staff members who serve around fifteen thousand immigrant clients per year in the areas of asylum, trafficking, domestic violence, and children’s rights.¹⁷⁴ Los Angeles’s Public Counsel houses special immigration projects on asylum, domestic violence, trafficking, and children,¹⁷⁵ while the Florida Immigrant Advocacy Center, which has grown from ten to

169. Program Letter 02-5 from Randi Youells, Vice President for Programs, Legal Servs. Corp., to All LSC Program Dirs., *available at* http://www.rin.lsc.gov/Reference%20Materials/Refrmts/Progltrs/Prgltr2002_5.htm.

170. See Sara Campos, Sheila Neville & Linton Joaquin, *Representing Immigrants: What Do LSC Regulations Allow?*, 38 CLEARINGHOUSE REV. 253, 258 (2004).

171. See *id.* at 260.

172. E-mail from Bruce Iwasaki, Executive Dir., Legal Aid Found. of L.A., to Scott L. Cummings (Aug. 27, 2005).

173. National Immigrant Justice Center, Client Programs, <http://www.immigrantjustice.org/client/programs> (last visited Feb. 23, 2008).

174. Northwest Immigrant Rights Project, Services Provided, <http://www.nwirp.org/ServicesProvided/Overview.aspx> (last visited Feb. 23, 2008).

175. Public Counsel, Immigrants’ Rights Project, <http://www.publiccounsel.org/overview/irp.html> (last visited Feb. 23, 2008).

forty staff members since it opened in response to the 1996 restrictions, also has a programmatic focus on asylum, domestic violence, and children.¹⁷⁶ Within the asylum field, certain groups have developed specializations in gender-based persecution: Greater Boston Legal Services, in connection with Harvard Law School's Immigration and Refugee Clinic, has been at the forefront of this effort, while newer groups, like the Tahirih Justice Center in Virginia, have focused attention on providing services for women seeking asylum from Africa, Asia, and the Middle East. In addition, since 1990, there has been an expansion of law school clinics focused on refugee and asylum issues,¹⁷⁷ while a number of clinics have been started to take on immigrant domestic violence and trafficking cases.¹⁷⁸

As immigrant rights groups and clinical programs have embraced issues impacting women and children, organizations dedicated to women's and children's rights have also focused more attention on immigrant issues. The Center for Battered Women in New York, for

176. Florida Immigrant Advocacy Center, Direct Services, <http://www.fiacfla.org/directservices.php> (last visited Feb. 23, 2008).

177. Since 1990, law schools starting clinics handling asylum matters include St. Mary's University (1990), Boston College (1992), Minnesota (1992), the Hastings College of Law (1993), Washington (1993), DePaul (1995), Georgetown (1995), Iowa (1995), Maryland (1995), Notre Dame (mid-1990s), Temple (1996), Brooklyn (1997), Houston (1999), Texas (1999), Villanova (1999), University of Detroit Mercy (2000), the University of the District of Columbia (2001), USC (2001), Connecticut (2002), Cornell (2003), Hofstra (2003), St. John's (2003), Ave Maria School of Law (2004), Florida International University (2004), Chicago-Kent (2005), and North Carolina (2006).

178. CUNY Law School started a Battered Immigrant Women Clinic in 1998, <http://www.law.cuny.edu/cli/proj.html#battered> (last visited Sept. 25, 2007); the St. John's University Immigrant Rights Clinic, which started in 2003, represents clients in Violence Against Women Act and Victims of Trafficking and Violence Protection Act cases, St. John's University School of Law, Immigration Rights Clinic, <http://www.stjohns.edu/academics/graduate/law/academics/clinical/immigration> (last visited Feb. 23, 2008); and the Pace Immigration Justice Clinic, begun in 2005, also works on Violence Against Women Act and trafficking cases, Pace Law School, Clinics, <http://www.law.pace.edu/jjls/clinic.html> (last visited Feb. 23, 2008). In 2005, Stanford started its Immigrants' Rights Clinic to assist domestic violence victims in petitioning for status under the Violence Against Women Act (VAWA), while also providing deportation defense, Stanford Law School, Immigrants' Rights Clinic, <http://www.law.stanford.edu/program/clinics/immigrantsrights/#overview> (last visited Feb. 23, 2008). Other law schools with clinics that represent VAWA clients include John Marshall, Houston, Iowa, Maryland, North Carolina, St. Mary's, Seattle, Seton Hall, Temple, the University of the Pacific McGeorge School of Law, and USC. In addition, Northwestern has a Children and Family Justice Center, started in 1992, that represents clients in asylum and other immigration matters. *See* Northwestern Law, Children and Family Justice Center, <http://www.law.northwestern.edu/cfjc/> (last visited Feb. 23, 2008).

instance, reported that between 1988 and the end of the 1990s its client base shifted from 90 percent native born to 70 percent immigrant.¹⁷⁹ Impact groups have devoted resources to address problems at the intersection of women's and immigrants' rights. In 1994, the National Center for Lesbian Rights in San Francisco started its Immigration Project to provide representation in impact cases and individual asylum claims,¹⁸⁰ while NOW Legal Defense Fund began its Immigrant Women Program in 1999 to combat domestic violence and promote economic empowerment. Similarly, youth organizations have begun to engage immigrant issues directly: The Door in New York City has started to provide immigration assistance to youth (including those in deportation proceedings),¹⁸¹ while Legal Services for Children in San Francisco has developed a Detained Immigrant Children Project and assisted youth petitioning for Special Immigrant Juvenile Status.¹⁸²

4. *Criminal Aliens.* The backlash against illegal immigration culminated in 1996, when Congress enacted a series of policy reforms intended to strengthen the system of immigration deterrence. In addition to reducing incentives to entry by restricting public aid, Congress also enacted measures that imposed harsher punishment for transgressing the rules of legal entry.¹⁸³ Because of pressure against criminalizing *all* undocumented immigrant workers, upon whom businesses had come to rely, the new legislation focused on those immigrants for whom there was the least amount of public sympathy: so-called "criminal aliens."

179. See Symposium, *Partnerships Across Borders: A Global Forum on Access to Justice*, 24 FORDHAM INT'L L.J. S277, S289 (2000).

180. Brochure, Nat'l Ctr. for Lesbian Rights Immigration Project, available at http://www.nclrights.org/site/DocServer/immigration_english.pdf?docID=1401.

181. The Door, Legal Services, <http://www.door.org/programs/legal.html> (last visited Feb. 23, 2008).

182. See Legal Services for Children, Programs, http://www.lsc-sf.org/web/about_programs.html (last visited Feb. 23, 2008) (describing the Detained Immigrant Children Project); Legal Services for Children, LSC's Clients, http://www.lsc-sf.org/web/about_client.html (last visited Feb. 23, 2008) (describing a successful petition for Special Immigrant Juvenile Status).

183. See Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79, 92-93 (1998).

Taken together, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)¹⁸⁴ and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),¹⁸⁵ made it more likely that immigrants convicted of crimes would be deported and, if they returned, prosecuted and jailed.¹⁸⁶ Prior to 1996, noncitizens were subject to deportation if convicted of crimes within a relatively narrow range of categories and in some cases were entitled to apply for a waiver of deportation.¹⁸⁷ The 1996 laws greatly expanded the definition of “aggravated felony” triggering mandatory deportation and reduced opportunities to seek relief from deportation for the commission of other “crimes of moral turpitude.”¹⁸⁸ Those deported for an aggravated felony who illegally reentered the country faced heightened enforcement and prosecution¹⁸⁹ and were subject to substantial criminal penalties.¹⁹⁰ One result of this increased focus on immigration crime was to place federal public defenders assigned to represent indigent clients in popular immigrant destinations on the front lines of a new arena of immigrant advocacy. The Federal Defender’s Office in Los Angeles, for instance, saw a sharp increase in the proportion of noncitizen clients on its docket: the percentage of undocumented immigrant clients grew from about 6 percent in 1994

184. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009–546 (codified in scattered sections of 8 U.S.C. and 18 U.S.C.).

185. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

186. The new laws also restricted the grounds for judicial review of immigration decisions, *see* 8 U.S.C. § 1252 (Supp. III 1998), provoking important legal challenges by public interest groups. *See* *INS v. St. Cyr*, 533 U.S. 289, 293 (2001) (upholding court’s habeas corpus jurisdiction to hear ACLU’s challenge to IIRIRA’s elimination of discretionary authority to waive deportation for aliens who entered guilty pleas prior to the Act’s effective date); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 472–74 (1999) (holding that IIRIRA eliminated federal court jurisdiction to hear suit brought by lawyers associated with the National Lawyers Guild and Center for Constitutional Rights challenging the selective deportation of immigrants based on their membership in the Popular Front for the Liberation of Palestine).

187. *See* Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 107–11 (1998).

188. *See id.* at 111–14 (1998).

189. *See* BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: IMMIGRATION OFFENDERS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 2000, at 1 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iofajs00.pdf>.

190. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 478 (2007).

to over 36 percent in 2004.¹⁹¹ Significant resources were therefore invested to defend against illegal reentry prosecutions and other immigration-related crimes.¹⁹²

While the new laws made it more likely that immigration violations (crossing the border) would result in criminal sanctions, they also attached harsher immigration consequences (deportation) to criminal violations. Thus, it became increasingly important that public defenders in the state system understood the immigration consequences of criminal proceedings, such as pleading guilty to a crime that might constitute a deportable “aggravated felony.”¹⁹³ To address this issue, the New York State Defenders Association started an Immigrant Defense Project to provide immigration law backup assistance to New York defense lawyers representing immigrant clients.¹⁹⁴ In conjunction with the Immigrant Legal Resource Center, the National Lawyers Guild, and the National Legal Aid and Defender Association, the New York State Defenders Association also launched the Defending Immigrants Partnership to “ensure that indigent noncitizen defendants are provided effective criminal defense counsel to avoid or minimize the immigration consequences of their criminal dispositions.”¹⁹⁵ In addition, the growing linkages between immigration and criminal law prompted responses by frontline legal services groups: Texas RioGrande Legal Aid, for example, moved to consolidate civil and criminal defense under the umbrella of one legal aid program to serve its immigrant client base more effectively.¹⁹⁶

The close interaction between the criminal and immigration law systems also brought the issue of immigrant detention to the fore. One factor drawing public attention to the issue was the growth of the detained immigrant population after the passage of IIRIRA and

191. E-mail from Ingrid V. Eagly, Office of the Fed. Pub. Defender, L.A., to Scott L. Cummings (Nov. 17, 2005).

192. See Daniel P. Blank, Note, *Suppressing Defendant's Identity and Other Strategies for Defending Against a Charge of Illegal Reentry After Deportation*, 50 STAN. L. REV. 139, 143 (1997).

193. 8 U.S.C. § 1101(a)(43) (2000) (enumerating crimes that constitute aggravated felonies).

194. New York State Defenders Association, Immigrant Defense Project, <http://www.nysda.org/idp/index.htm> (last visited Feb. 23, 2008).

195. National Legal Aid & Defender Association, About the Defending Immigrants Partnership, http://www.nlada.org/Defender/Defender_Immigrants/Defending_Immigrants_About (last visited Feb. 23, 2008).

196. See Karen Gleason, *Indigent Defense Program to Start Up Soon*, DEL RIO NEWS-HERALD (Tex.), Apr. 25, 2006.

AEDPA,¹⁹⁷ which imposed mandatory detention on many criminal aliens pending deportation.¹⁹⁸ In response, legal groups have developed projects specifically focused on providing redress to the detained immigrant population. CLINIC has been at the forefront of this movement, representing detained long-term residents seeking prehearing release or relief from deportation,¹⁹⁹ as well as detainees subject to indefinite detention due to refusal by their home countries to repatriate them.²⁰⁰ The U.S. Department of Justice's Executive Office for Immigration Review has contracted with CLINIC and other groups in immigration detention facilities around the country to carry out Legal Orientation Programs, which provide educational presentations on immigration court procedures, one-on-one counseling, and pro bono referrals to detained immigrants with the goal of improving "judicial efficiency" and assisting "all parties in detained removal proceedings."²⁰¹ A handful of law school clinics, including NYU and Arizona, have worked on detention issues. The organized bar has also responded to immigrant detention by supporting pro bono programs, such as the South Texas Pro Bono Asylum Representation Project, which finds volunteer lawyers from the private bar to represent detainees on a range of immigration matters.²⁰² The ABA Immigration Pro Bono Development and Bar Activation Project has launched two special initiatives around detention: the Detention Standards Implementation Initiative, which works with local bar associations and law firms to monitor detention

197. See ALEINIKOFF, MARTIN & MOTOMURA, *supra* note 38, at 697 ("Daily capacity [in federal immigration detention facilities] increased from about 8200 beds in 1997 to around 23,000 in early 2003, but enforcement officials still consider that short of overall need.").

198. 8 U.S.C. § 1226(c) (2000). The ACLU unsuccessfully challenged this provision on due process grounds. *Demore v. Kim*, 538 U.S. 510 (2003).

199. See Catholic Legal Immigration Network, Inc., Detained Long-Term Residents, <http://www.cliniclegal.org/Programs/DetainedLongTermResidents.html> (last visited Feb. 23, 2008).

200. See *id.*

201. See U.S. Department of Justice, Executive Office for Immigration Review, Pro Bono Program—Major Program Initiatives, <http://www.usdoj.gov/eoir/probono/MajorInitiatives.htm> (last visited Feb. 23, 2008). The EOIR also has established a "Pro Bono Project" in concert with the Board of Immigration Appeals "to increase pro bono representation for individuals detained by the U.S. Immigration and Customs Enforcement (ICE) with immigration cases under appeal." *Id.*

202. *ProBAR Marks 15th Anniversary*, 67 TEX. B.J. 319, 319–20 (2004).

centers, and the Detained Immigrant and Refugee Children's Emergency Pro Bono Representation Initiative.²⁰³

The ABA's focus on immigrant children underscores a second factor raising the profile of the detention issue: the harsh treatment of unaccompanied juvenile immigrants—many refugees seeking asylum who are indefinitely detained under the legal guardianship of the U.S. government, sometimes in state facilities for convicted juvenile offenders.²⁰⁴ Despite the settlement in a class action litigated by the Center for Human Rights and Constitutional Law requiring the U.S. to place juvenile immigrants in appropriate facilities pending release to adult custodians,²⁰⁵ many minors have still remained in secured facilities. In response, CLINIC has launched a project to assist detained juvenile immigrants to secure release into the custody of family members or file asylum, trafficking, or Special Immigrant Juvenile Status claims.²⁰⁶ In addition, Los Angeles-based Latham & Watkins started a high-profile project in 2001, making representation of unaccompanied refugee children its signature pro bono initiative.²⁰⁷

The final catalyst for immigrant detention advocacy was 9/11, which transformed the detention debate by focusing on executive power to hold suspected terrorists in the name of national security. One response focused on efforts to provide direct services to Arab and South Asian Muslim men detained after 9/11 and held for long periods without charges: law school clinics and pro bono attorneys led

203. American Bar Association, Commission on Immigration, Detention Standards, http://www.abanet.org/publicserv/immigration/detention_standards.shtml (last visited Feb. 23, 2008).

204. See CHILDREN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH, *SLIPPING THROUGH THE CRACKS: UNACCOMPANIED CHILDREN DETAINED BY THE U.S. IMMIGRATION AND NATURALIZATION SERVICE 1-5* (1997).

205. See Devon A. Corneal, *On the Way to Grandmother's House: Is U.S. Immigration Policy More Dangerous Than the Big Bad Wolf for Unaccompanied Juvenile Aliens?*, 109 PENN. ST. L. REV. 609, 645 (2004) (citing the settlement agreement in *Flores v. Reno* requiring the United States to "place each detained minor in the least restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with its interests to ensure the minor's timely appearance before the INS and the immigration courts and to protect the minor's well-being and that of others").

206. See Catholic Legal Immigration Network, Inc., Indefinite Detainees, <http://www.cliniclegal.org/Programs/IndefiniteDetainees.html> (last visited Feb. 23, 2008).

207. See LATHAM & WATKINS LLP, PRO BONO ANNUAL REVIEW 16 (2006), available at http://www.lw.com/upload/pubContent/_pdf/pub1812_1.pdf (emphasizing the firm's commitment to assisting refugee children); see also *Lawyers Try to Improve Lot of Young Refugees*, N.Y. TIMES, June 9, 2002, at 26 (highlighting Latham & Watkins's commitment to pro bono work).

attempts to represent the detainees, though many were ultimately denied access to counsel.²⁰⁸ The Asian American Legal Defense and Education Fund challenged the related practice of closing deportation hearings to the public in “special interest” cases in which the government alleged that immigrant detainees had suspected terrorists ties;²⁰⁹ it also set up a legal hot line and clinics to provide information to immigrants from predominately Muslim countries required to report to local immigration officials under the government’s Special Registration program.²¹⁰ On the law reform side, the ACLU brought suit challenging the practice of targeting Muslims for search and detention upon entering the country,²¹¹ while other groups have attacked the Department of Homeland Security’s policy of mandatory detention for asylum seekers from Muslim countries.²¹²

War on Terror advocacy has thus brought the immigrant rights bar full circle, underscoring the deep connection between U.S. policy abroad and the legal insecurity of immigrants at home. As in the Cold War period, when lawyers sought to protect Central American refugees denied legal status in the name of anticommunism, public interest lawyers have now found themselves defending Arab and South Asian immigrants deprived of legal rights in the name of antiterrorism. It is the reverberation of foreign policy back home—and the legal insecurity that it produces for noncitizens—that constitutes a central theme of immigrant rights in the modern era, sparking advocacy efforts to fortify the legal status of immigrants and resist the deprivation of their civil rights and civil liberties in the face

208. See AMNESTY INT’L, AMNESTY INTERNATIONAL’S CONCERNS REGARDING POST SEPTEMBER 11 DETENTIONS IN THE USA, available at <http://web.amnesty.org/library/Index/ENGAMR510442002>; see also Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1192–99 (2002). The Center for Constitutional Rights filed a class action lawsuit on behalf of those detained in the post-9/11 sweep, alleging violations connected to racial profiling, indefinite detention, and inhumane conditions. The district court in the case dismissed the charges of racial profiling and prolonged detention, but let stand challenges to the conditions of confinement and religious discrimination. See *Turkmen v. Ashcroft*, No. 02 CV 2307 (JG), 2006 U.S. Dist. LEXIS 39170, at *2–3 (E.D.N.Y. June 14, 2006). The case has been appealed.

209. See Sin Yen Ling, *Frontline Lawyering: Defending the Attack on Immigrant Communities After September 11*, 38 CLEARINGHOUSE REV. 238, 238–39 (2004).

210. See *id.* at 240–43.

211. See Class Action Complaint at 2, *Rahman v. Chertoff*, No. 05-C-3761 (N.D. Ill. filed June 28, 2005), available at <http://www.aclu.org/FilesPDFs/aclu%20of%20il%20-%20rahman%20complaint%20file-stamped.pdf>.

212. See Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1274–75 (2004).

of governmental power. The parallel movement to protect undocumented workers from abuses of private power in the marketplace has provided the other engine driving the growth of immigrant rights practice during this period—underlining the corresponding influence of market integration on the domestic public interest field.

B. Arenas

Within the system of market integration, immigration represents one type of transnational economic flow: the movement of outside workers into U.S. jobs. Because this *outside-in* movement imposes degraded legal status on undocumented workers, the public interest law project has focused on efforts to level the legal playing field by augmenting the system of immigrant rights *inside the United States*. Yet immigration is only half of the market integration story. Indeed, while immigration brings market integration home, the outflow of U.S. corporations in search of investment opportunities and low-cost production locales extends it to developing countries abroad.²¹³ This *inside-out* movement further challenges domestic legality—not by importing legally degraded labor, as is the case with immigration—but by exporting U.S. corporate activity to deregulated geographic spaces where it escapes the full force of U.S. law. Within these new arenas of U.S. economic activity, the main focus of public interest law becomes upgrading systems of legal governance and regulatory enforcement *outside of U.S. borders*. This involves advocating new theories of U.S. jurisdiction; entering new venues of global economic governance, such as the NAFTA system and the WTO; and building alliances with new partners, both transnational activist networks challenging market integration from below,²¹⁴ and governmental and

213. See JAMES M. CYPHER & JAMES L. DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT* 271–89, 559–80 (1997).

214. On the emergence of transnational activist networks and social movements, see Luis Eduardo Guarnizo & Michael Peter Smith, *The Locations of Transnationalism*, in *TRANSNATIONALISM FROM BELOW* 3 (Michael Peter Smith & Luis Eduardo Guarnizo eds., 1998); John A. Guidry, Michael D. Kennedy & Mayer N. Zald, *Globalizations and Social Movements*, in *GLOBALIZATIONS AND SOCIAL MOVEMENTS: CULTURE, POWER, AND THE TRANSNATIONAL SPHERE* 1 (John A. Guidry, Michael D. Kennedy & Mayer N. Zald eds., 2000); Louis Kriesber, *Social Movements and Global Transformation*, in *TRANSNATIONAL SOCIAL MOVEMENTS AND GLOBAL POLITICS: SOLIDARITY BEYOND THE STATE* 3 (Jackie Smith, Charles Chatfield & Ron Pagnucco eds., 1997); Donatella della Porta & Sidney Tarrow, *Transnational Processes and Social Activism: An Introduction*, in *TRANSNATIONAL PROTEST AND GLOBAL ACTIVISM* 1 (Donatella della Porta & Sidney Tarrow eds., 2005).

philanthropic institutions promoting the rule of law from above. Thus, transnational economic activity shapes new forms of *transnational advocacy*, with public interest lawyers following market activity across U.S. borders into regional and global economic arenas.

1. *The Region.* For U.S. public interest lawyers, the move toward regional market integration, punctuated by NAFTA, has focused attention on the unique relationship between the United States and México, which is defined by a gulf in economic and regulatory circumstances that prompts in-migration by Mexicans seeking jobs and out-migration by U.S. companies seeking low-cost labor and a less stringent regulatory environment. As the regional market has been liberalized, advocates have attempted to extend new mechanisms of transnational regulation to corporations throughout the regional system, while also promoting cross-border investments in community-based economic development in México as a step toward ameliorating conditions for the poor.

a. Labor. Corporate access to cheap Mexican labor has been the driving force—and major battlefield—of regional market integration. Its symbol is the Mexican maquila program, which has permitted foreign-owned assembly plants to import unfinished goods duty free to the border region, process them using cheap Mexican labor, and then export the final products to the United States with duties imposed only on labor's value added.²¹⁵ Despite its opposition to the maquila program as it evolved after its creation in 1965, U.S. organized labor retained an isolationist stance toward México through the 1980s, driven by its staunch opposition to the emerging NAFTA movement and its deep skepticism of the official Mexican union, the pro-integration Confederación de Trabajadores Mexicanos (CTM).²¹⁶ The passage of NAFTA in 1994 altered the terrain in two ways that created new opportunities for public interest advocacy focused on transnational workers' rights.

First, NAFTA sparked the formation of new transnational labor networks, composed of progressive unions, like the Mexican Frente

215. See Sanford E. Gaines, *NAFTA as a Symbol on the Border*, 51 UCLA L. REV. 143, 162–63 (2003).

216. See David Brooks & Jonathan Fox, *Movements Across the Border: An Overview*, in CROSS-BORDER DIALOGUES: U.S.-MEXICO SOCIAL MOVEMENT NETWORKING 1, 12–13 (2002).

Auténtico del Trabajo (FAT),²¹⁷ and grassroots organizations, such as the San Antonio–based Coalition for Justice in the Maquiladoras (CJM),²¹⁸ that came together to address cross-border grievances.²¹⁹ In addition, NAFTA had the effect of internationalizing domestic labor disputes under a side labor agreement that permitted private parties to challenge their home country’s failure to enforce domestic labor laws in venues set up within foreign member states.²²⁰ Though the agreement lacked hard enforcement mechanisms, its unique structure did create the potential for political pressure to complement organizing campaigns: successful petitions could be used to provoke high-level “ministerial consultations” about labor violations,²²¹ outside expert reviews,²²² and—in limited cases—arbitration of disputes.²²³

Because the structure of the side labor process required workers to object to their *own government’s* labor violations by filing a complaint in *another member country’s* National Administrative

217. See Manuel García Urrutia M., *The Authentic Labor Front in the NAFTA-Era Regional Integration Process*, in CROSS-BORDER DIALOGUES: U.S.-MEXICO SOCIAL MOVEMENT NETWORKING, *supra* note 216, at 77, 82–83.

218. Telephone Interview with Martha Ojeda, Executive Dir., Coal. for Justice in the Maquiladoras (June 13, 2006).

219. See Tamara Kay, *Labor Transnationalism and Global Governance: The Impact of NAFTA on Transnational Labor Relationships in North America*, 111 AM. J. SOC. 715, 718–19 (2005).

220. North American Agreement on Labor Cooperation, U.S.–Can.–Mex., arts. 3–4, Sept. 14, 1993, 32 I.L.M. 1499 [hereinafter NAALC]; see also Jonathan Graubart, “*Politicizing*” a New Breed of “*Legalized*” Transnational Political Opportunity Structures: Labor Activists Uses of NAFTA’s Citizen-Petition Mechanism, 26 BERKELEY J. EMP. & LAB. L. 97, 98–99 (2005).

221. NAALC, *supra* note 220, art. 22(1).

222. A member country may request that matters not resolved via ministerial consultations (except those that involve the right to organize, bargain collectively, and strike) be referred to an outside Evaluation Committee of Experts, which is obligated to issue a final report. *Id.* arts. 23–26.

223. If the matter involves the enforcement of a nation’s “occupational safety and health, child labor or minimum wage technical labor standards,” any member country may request further consultations, a review by the ministerial council, and finally outside arbitration. *Id.* arts. 27–29. Commentators have noted that NAFTA creates weaker enforcement of labor rights than investment rights since NAFTA’s Chapter 11 permits foreign investors to sue member governments for cash compensation for regulatory policies that investors claim violate their NAFTA privileges. See, e.g., Chantell Taylor, *NAFTA, GATT, and the Current Free Trade System: A Dangerous Double Standard for Workers’ Rights*, 28 DENV. J. INT’L L. & POL’Y 401, 403 (2000). U.S. public interest groups have tried to block Chapter 11 suits and gain access to litigation records. See PUBLIC CITIZEN, *NAFTA’S THREAT TO SOVEREIGNTY AND DEMOCRACY: THE RECORD OF NAFTA CHAPTER 11 INVESTOR-STATE CASES 1994–2005*, at vii (2005).

Office (NAO),²²⁴ it encouraged the formation of transnational networks to execute submissions. On the Mexican side, this meant enlisting U.S. legal groups to bring Mexican grievances to the U.S. NAO—a dynamic that, in turn, drew U.S. groups across the border in support of Mexican labor struggles, which coalesced around two main issues within the maquila sector.

The first wave of Mexican complaints centered on the official system for state certification of union representation, which critics charged was biased in favor of unions affiliated with the CTM and effectively excluded the certification of independent unions, like those allied with the FAT. The D.C.-based International Labor Rights Fund (ILRF), started in the 1980s to monitor labor standards under international trade agreements, emerged as a key organization in these campaigns, providing legal support for petitions challenging Mexican labor practices.²²⁵ In one of the earliest petitions, filed in 1994 by the ILRF and CJM against Sony,²²⁶ workers alleged that local labor boards illegally denied an independent union's request for official registration.²²⁷ Though the independent union did not achieve victory on the Sony plant floor, the United States issued a strong condemnation of Mexican practice and recommended ministerial consultations,²²⁸ which labor activists used to publicly criticize the labor certification process.²²⁹ Three years later, the ILRF helped to file another challenge to the certification system, singling out the labor board for bias and delay that harmed an independent organizing drive at the Han Young truck assembly plant. The U.S. response this time was even stronger, citing the fact that only one independent union existed in the entire maquila sector and charging the local board with imposing obstacles to independent labor organizing in a manner that “is not consistent with Mexico's obligation to effectively enforce its labor laws.”²³⁰

224. NAALC, *supra* note 220, art. 16(3). The NAOs are organized under each member country's department of labor.

225. See Graubart, *supra* note 220, at 115.

226. U.S. NAO Public Submission No. 940003, *In re Sony Corporation* (1994), available at <http://www.dol.gov/ilab/media/reports/nao/submissions/sub940003.htm>.

227. *Id.*

228. U.S. NAT'L ADMIN. OFFICE, PUBLIC REPORT OF REVIEW OF NAO SUBMISSION NO. 940003 (1995), available at <http://www.dol.gov/ilab/media/reports/nao/pubrep940003.htm>.

229. See Graubart, *supra* note 220, at 118.

230. U.S. NAT'L ADMIN. OFFICE, PUBLIC REPORT OF REVIEW OF NAO SUBMISSION NO. 9702 (1998), available at <http://www.dol.gov/ilab/media/reports/nao/pubrep9702.htm>. In another

The positive reception given to the petitions around independent union certification prompted advocates to pursue a parallel set of NAFTA complaints focused on workplace conditions, particularly health and safety issues. While attempting to redress health problems within the maquilas, these petitions also sought to *test* the side labor process: unlike the independent union complaints, petitions alleging health and safety violations were technically open to review by a committee of outside experts—and even arbitration. As with the independent union organizing drive, the health and safety campaign was forged by the ILRF, which in 1997 charged México with permitting maquiladoras to impose illegal pregnancy screening on female job applicants.²³¹ In response, the Mexican government launched an outreach campaign on antidiscrimination laws and a number of U.S. companies discontinued the screening practice.²³² CJM coordinated the most systematic and well-documented health and safety petition in 2000 on behalf of workers at two U.S.-owned plants who placed leather covers on steering wheels and gear shifts and suffered from a range of musculoskeletal disorders.²³³ This petition represented the first drafted with U.S. law school clinics as legal counsel: the International Human Rights Clinic at St. Mary's School of Law in San Antonio helped to prepare the submission,²³⁴ as

petition on independent union organizing, the United Electrical, Radio and Machine Workers Union filed the 1997 ITAPSA petition targeting a U.S.-owned auto parts subsidiary, which had entered into a secret protection contract with the CTM that effectively precluded employees from joining the FAT-affiliated union. U.S. NAO Public Submission No. 9703, ITAPSA (1997), available at <http://www.dol.gov/ilab/media/reports/nao/submissions/sub9703.htm>. The petition, which condemned the labor board's failure to respond to election manipulation, was brought in connection with a large binational coalition of unions and NGOs, which included not only grassroots groups like CJM, but also major U.S. public interest groups like the Center for Constitutional Rights and the National Lawyers Guild. *See id.* The United States issued a report charging the labor board with failing to act impartially, which Mexican activists used to pressure the government to sign onto a declaration in support of secret elections and the public registration of union contracts. *See* Graubart, *supra* note 220, at 126–27.

231. U.S. NAO Public Submission No. 9701, Concerning Pregnancy-Based Sex Discrimination in Mexico's Maquiladora Sector (2007), available at <http://www.dol.gov/ilab/media/reports/nao/submissions/sub9701.htm>.

232. *See* Graubart, *supra* note 220, at 120.

233. U.S. NAO Public Submission No. 2000-01, *In re* Auto Trim de Mexico, S.A. de C.V. (2000), available at <http://www.dol.gov/ilab/media/reports/nao/submissions/Sub2000-01pt1.htm>.

234. *Id.* § III. Monica Schurtman, the professor who supervised the St. Mary's clinical students who helped prepare the submission, moved to the University of Idaho College of Law during the case, where she continued working on the submission through its Legal Aid Clinic. *Id.*

did the Columbia Law School International Human Rights Clinic.²³⁵ Despite the optimism generated by the NAO's aggressive handling of the case, the transition from the relatively labor-friendly NAO under the Clinton administration to the more hostile Bush NAO thwarted the effort to appeal health and safety claims up the NAFTA system,²³⁶ and signaled a new era of diminished interest in the side labor process as a vehicle for reforming Mexican labor practices.²³⁷

Yet while the Bush election marked the decline of the side labor agreement as a site for contesting *Mexican labor practices*, the victory of Vicente Fox in México that same year—on a platform that included a commitment to migrant rights—signaled new opportunities for public interest lawyers to contest *U.S. labor practices vis-à-vis immigrant workers*.²³⁸ With the Fox administration as a potential ally, U.S. public interest lawyers began to view the Mexican NAO as a potential venue for advancing the cause of immigrant workers in the United States. This strategy, which involved U.S. lawyers crossing the border to generate political support from Mexican officials and turning it back to advance domestic rights campaigns, had its roots in efforts that predated Fox's victory: in 1998, the ACLU went to the Mexican NAO with a submission charging the United States with violating its labor laws by requiring the Department of Labor to investigate the immigration status of those reporting labor violations—and thus deterring the reporting of violations by undocumented immigrants.²³⁹ The Mexican NAO accepted this submission and the labor department subsequently changed its policy to protect migrant privacy.²⁴⁰

235. U.S. NAO Public Submission No. 2000-01, *supra* note 233, § III.

236. Though there were ministerial consultations in Auto Trim, U.S. Secretary of Labor Chao disappointed advocates by refusing to pass review of the health and safety issues raised by that case, along with ITAPSA and Han Young, to an outside committee of experts. See Letter from Monica Schurtman, Assoc. Professor of Law & Supervising Attorney, Univ. of Idaho Legal Aid Clinic, et al., to Elaine Chao, Sec'y, U.S. Dep't of Labor (Mar. 20, 2002), available at <http://mhssn.igc.org/nafta6.htm> (protesting Chao's refusal to convoke an "Evaluation Committee of Experts").

237. See LINDA DELP ET AL., NAFTA'S LABOR SIDE AGREEMENT: FADING INTO OBLIVION? AN ASSESSMENT OF WORKPLACE HEALTH & SAFETY CASES 34–35 (2004).

238. See Michael J. Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Rights*, 4 U. PA. J. LAB. & EMP. L. 529, 546 (2001–2002).

239. See Mexican NAO Submission No. 9804, Yale/INS (1998) (on file with the U.S. NAO).

240. Bureau of Int'l Labor Affairs, U.S. Dep't of Labor, Status of Submissions Under the North American Agreement on Labor Cooperation, <http://www.dol.gov/ilab/programs/nao/status.htm#iib5> (last visited Feb. 23, 2008); see also Telephone Interview with Michael

Since 2000, a handful of law school affiliated programs and independent advocacy groups have brought immigrant rights submissions in the Mexican NAO, reflecting the fact that the petitions themselves are experimental exercises in political influence undertaken by organizations with both the resources and inclination to try out innovative strategies. In 2001, NYU's Immigrant Rights Clinic (run by Michael Wishnie, who also worked on the previous ACLU suit against the Department of Labor) filed a petition arguing that New York State's workers' compensation system subjected immigrant workers to unwarranted delays and inadequate compensation, violating the U.S. pledge under NAFTA to effectively enforce its labor law.²⁴¹ A 2003 petition by the Farmworker Justice Fund challenged the discriminatory treatment of H-2A agricultural guest workers in North Carolina under U.S. law,²⁴² while the Brennan Center for Justice and the Northwest Workers' Justice Project filed a petition with the Mexican NAO in 2005 alleging that the rule prohibiting LSC-funded attorneys from representing H-2B nonagricultural guest workers violates the United States's obligation to allow workers to enforce their rights.²⁴³ The H-2 petitions, in particular, played out against the backdrop of negotiations between the United States and México over a guest worker program, which the lawyers pointed to as the process they sought to influence by highlighting issues with Mexican officials that could be explored as part of the framework for reform.²⁴⁴

Outside of the NAFTA system, the issue of migrant farmworker abuse has prompted other efforts at transnational advocacy. The temporary nature of farm work creates cross-border migratory circuits that pose challenges for migrant advocates since workers in the United States for short periods may not develop a full understanding of their labor rights or stay long enough to pursue

Wishnie, Clinical Professor of Law, Yale Law Sch. (July 14, 2006) (noting, however, that the policy change likely had little to do with the NAFTA petition).

241. Mexican NAO Submission No. 2001-01, New York State Case (2001), available at <http://www.dol.gov/ilab/media/reports/nao/mxsub2001-1.htm>; see also Sam Smith, *Mexico Rips Pataki over Worker Woes*, N.Y. POST, Nov. 28, 2004, at 10.

242. Mexican NAO Submission No. 2003-1, North Carolina Case (2003) (on file with the U.S. NAO).

243. Mexican NAO Submission No. 2005-01, Forestry Guest Worker Case (2005), available at <http://www.dol.gov/ilab/media/reports/nao/submissions/2005-01petition.htm#i>.

244. Telephone Interview with D. Michael Dale, *supra* note 122.

claims to completion.²⁴⁵ The Centro de los Derechos del Migrante, Inc. (CDM), launched in Zacatecas, México in 2005, has attempted both to provide education on rights and to deal with the issue of coordinating labor rights litigation in U.S. courts with clients who move back and forth across the border.²⁴⁶ In addition to offering know-your-rights trainings on workplace issues before migrants leave for the United States, CDM has provided two related services to connect Mexican residents with U.S. lawyers. For workers who return to México with labor claims but have not filed cases, the group has attempted to make referrals to U.S. advocates who can pursue their cases.²⁴⁷ For workers who return with U.S. cases already open and ongoing, CDM has served as the Mexican arm for U.S.-based counsel, tracking down hard-to-find clients and conducting research and discovery in México. The Global Workers Justice Alliance has offered similar services in connection with clients from Central America, underscoring how the circulation of workers across borders has prompted lawyers to follow in the pursuit of effective representation.²⁴⁸

b. Environment. In the environmental context, transnational advocacy has responded to the inability to contain pollution within national borders²⁴⁹—a problem exacerbated by post-NAFTA increases in investment in the maquila border zone.²⁵⁰ NAFTA's side environmental agreement, which allows citizen submissions to challenge violations of a member country's environmental laws,²⁵¹ was

245. See Jack Daniel, Alegria de la Cruz, Mike Meuter & Jeff Ponting, *Indigenous Farmworker Project: Legal Protection for California's Isolated Farmworkers*, 38 CLEARINGHOUSE REV. 289, 290 (2004).

246. Telephone Interview with Rachel Micha-Jones, Dir., Centro de los Derechos del Migrante, Inc. (Nov. 11, 2005).

247. This program has been supported by the Zacatecan government, which runs its own U.S. guest worker program. *Id.*

248. See Global Workers Justice Alliance, Programs, <http://www.globalworkers.org/programs> (last visited Feb. 23, 2008).

249. See Elizabeth A. Ellis, Note, *Bordering on Disaster: A New Attempt to Control the Transboundary Effects of Maquiladora Pollution*, 30 VAL. U. L. REV. 621, 622–25 (1996).

250. See Gaines, *supra* note 215, at 165 (reporting “a sharp increase in foreign direct investment flows to Mexico after NAFTA, nearly doubling the number of *maquiladora* plants from 2114 in 1993 to 3729 in 2001”).

251. See Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 LOY. L.A. INT'L & COMP. L. REV. 389, 389–90 (2004).

established in part to respond to the issue of transborder pollution;²⁵² it has been little used for this purpose, however, reflecting both the political constraints of the process and the availability of alternative venues for transborder advocacy.²⁵³

The system's constraints are a product of its unique structure, which departs from the side labor process in key respects. Citizen submissions by nongovernmental organizations (NGOs) are directed to the Commission for Environmental Cooperation, whose Council is comprised of the environmental ministers from the three member countries and served by a Secretariat. The Secretariat receives submissions and is empowered to either dismiss them or request a response from the country whose environmental enforcement is being challenged.²⁵⁴ Once a response is requested, however, the Secretariat may only proceed to develop and publish a factual record of the case with the authorization of two of the three members of the Council.²⁵⁵ Accordingly, political pressure can block investigation in a way not possible under the side labor process, which proceeds through member state NAOs.²⁵⁶ Furthermore, the citizen submission process ends with the publication of a factual record; there are no opportunities for ministerial consultations or outside review.²⁵⁷ Although U.S. groups engaged in early efforts to use the environmental process to raise public attention and gain political advantage in environmental enforcement campaigns, the limitations of the system soon came into view.

As in the labor context, a central thrust of the early petitions was to test how aggressive the Secretariat would be in executing its mandate. One question in particular was whether the Secretariat

252. The North American Agreement on Environmental Cooperation (NAAEC) contained provisions for developing recommendations on establishing a transboundary environmental impact process, but they have not been implemented. See John H. Knox, *The CEC and Transboundary Pollution*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 80, 82–83 (David L. Markell & John H. Knox eds., 2003).

253. Telephone Interview with Mary Kelly, Program Dir., U.S./Mex. Border Initiatives, Env'tl. Def. (Oct. 12, 2005).

254. North American Agreement on Environmental Cooperation, U.S.–Can.–Mex., art. 14, Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC].

255. *Id.* art. 15.

256. See Jonathan Graubart, *Giving Meaning to New Trade-Linked “Soft Law” Agreements on Social Values: A Law-in-Action Analysis of NAFTA’s Environmental Side Agreement*, 6 UCLA J. INT’L L. & FOREIGN AFF. 425, 431–33 (2001–2002).

257. The NAAEC only provides for ministerial consultations and the arbitration of disputes in cases initiated by member countries. NAAEC, *supra* note 254, arts. 22–24.

would review U.S. policy decisions that undercut environmental enforcement. Along these lines, Earthlaw, a group affiliated with the University of Denver's Environmental Law Clinic, brought a 1995 petition that specifically targeted a reduction in funding to enforce the Endangered Species Act.²⁵⁸ Though couched in the language of *enforcement*, however, the Secretariat interpreted this submission as a challenge to U.S. *policy* and rejected the submission after finding that it constituted a dispute over competing legislative mandates, rather than putting at issue the United States's failure to enforce environmental laws.²⁵⁹ Later efforts to narrowly target nonenforcement also proved disappointing: though the Council agreed to develop a factual record in a case contesting the lack of standing of citizen groups to enforce the U.S. Migratory Bird Treaty Act, it later narrowed the inquiry under pressure from the United States and the final report did not address critical issues surrounding the government's discretionary nonenforcement of the law against logging operations.²⁶⁰ In light of the restrictions placed on the Secretariat's role, major environmental groups withdrew from the process as a mechanism for influencing U.S. decisionmaking,²⁶¹ though

258. See Secretariat Public Submission No. SEM-95-001, Spotted Owl Case (1995), available at <http://www.cec.org/files/pdf/sem/95-1-sub-EO.pdf>.

259. See COMM'N FOR ENVTL. COOPERATION—SECRETARIAT, DETERMINATION OF PUBLIC SUBMISSION NO. SEM/95-001, at 4 (1995), available at <http://www.cec.org/files/pdf/sem/95-1-DET-E2.PDF>; see also COMM'N FOR ENVTL. COOPERATION—SECRETARIAT, DETERMINATION OF PUBLIC SUBMISSION NO. SEM/95-002, at 4 (1995), available at <http://www.cec.org/files/pdf/sem/95-2-DET-OE.pdf> (rejecting a challenge to a bill precluding logging lawsuits against the U.S. government because it concerned the "application of a new legal regime" rather than "a failure to enforce an old one").

260. See COMM'N FOR ENVTL. COOPERATION—SECRETARIAT, FINAL FACTUAL RECORD PUBLIC SUBMISSION NO. SEM-99-002, at 18–19, 59–63 (2003), available at http://www.cec.org/files/pdf/sem/MigratoryBirds-FFR_EN.pdf.

261. Of the other four petitions filed against the United States, one was withdrawn, see Letter from Dawn M. McKnight, Sw. Ctr. for Biological Diversity, to the Secretariat of the Comm'n for Env'tl. Cooperation (June 5, 1997), available at <http://www.cec.org/files/pdf/sem/96-4-wit-e.pdf> (withdrawing Public Submission No. SEM-96-004 regarding Fort Huachuca); two were terminated, see COMM'N FOR ENVTL. COOPERATION—SECRETARIAT, DEVELOPMENT OF A FACTUAL RECORD IS NOT WARRANTED PUBLIC SUBMISSION NO. SEM-98-003, at 23 (2001), available at <http://www.cec.org/files/pdf/sem/98-3-det-e3.pdf> (terminating Public Submission No. SEM-98-003 regarding the Great Lakes); Commission for Environmental Cooperation, Citizen Submissions on Enforcement Matters: Jamaica Bay, <http://www.cec.org/citizen/submissions/details/index.cfm?varian=english&ID=45> (last visited Feb. 23, 2008) (noting that Public Submission No. SEM-00-003 regarding Jamaica Bay was terminated after a thirty-day response deadline expired); while the last one is still pending, see COMM'N FOR ENVTL. COOPERATION—SECRETARIAT, NOTIFICATION TO COUNCIL THAT A DEVELOPMENT OF A FACTUAL RECORD IS WARRANTED PUBLIC SUBMISSION NO. SEM-04-005, at 29 (2005), available at <http://www.cec.org/files/pdf/sem/04-005.pdf>.

some advocates have continued to view it as useful in mobilizing political pressure in Canada and México.²⁶²

The retreat from the side environmental process as a lever to influence U.S. action suggests not simply its political limits, but also the possibility for alternative advocacy strategies embedded within the transborder regulatory framework. On the litigation side, groups have pressed for environmental review of transborder projects.²⁶³ For example, the environmental group Earthjustice (formerly the Sierra Club Legal Defense Fund) has won rulings requiring the federal government to comply with U.S. environmental laws before permitting privately owned power plants on the Mexican side of the border to import power into California.²⁶⁴ Outside of the domain of U.S. courts, there are institutions governing transborder issues that provide opportunities for advocacy through more cooperative routes.²⁶⁵ For instance, the NAFTA-inspired Border Environment Cooperation Commission, which provides for public input into proposed border region infrastructure projects, and the North American Development Bank, which finances the projects, have provided some basis for participation by border groups on infrastructure planning, channeling efforts away from the NAFTA process.²⁶⁶

Though NAFTA has not been a popular venue for attacking transborder pollution, it has nonetheless been credited with stimulating cross-border environmental networks.²⁶⁷ Because the structure of transborder environmental regulation is primarily organized around regional cooperation, and offers limited avenues

org/files/pdf/sem/00-4-ADV-E.PDF (recommending the development of a factual record for Public Submission No. SEM-04-005 regarding coal-fired power plants).

262. See Graubart, *supra* note 256, at 458–59.

263. Courts have permitted the application of environmental laws to federal projects that affect the global commons. See *Env'tl. Def. Fund v. Massey*, 986 F.2d 528, 536–37 (D.C. Cir. 1993) (applying the National Environmental Protection Act to impacts on the global commons).

264. See Earthjustice, Full Environmental Review Order for Mexican Power Imports, Mar. 7, 2006 http://www.earthjustice.org/our_work/victory/mexican-power-imports-full-environmental-review.bin.

265. See Knox, *supra* note 252, at 81–82.

266. See Mary E. Kelly, *Cross-Border Work on the Environment: Evolution, Successes, Problems, and Future Outlook*, in *CROSS-BORDER DIALOGUES: U.S.-MEXICO SOCIAL MOVEMENT NETWORKING*, *supra* note 216, at 133, 137.

267. See *id.* at 135–40.

for litigation,²⁶⁸ much of the work of these networks has focused on organizing and policy advocacy.²⁶⁹ In one example, Environmental Defense, in collaboration with Mexican NGOs, participated in negotiations between the United States and México to help establish a binational air quality management district in the El Paso–Ciudad Juárez area that created a local advisory committee to promote citizen participation in developing strategies to improve air quality in the region.²⁷⁰ Cross-border activism has also been employed to block corporate attempts to build environmentally damaging projects:²⁷¹ in a notable case, the Natural Resources Defense Council (NRDC) coordinated a consumer boycott as part of a five-year campaign to halt the construction of a proposed Mitsubishi industrial salt plant in a biosphere reserve off the coast of Baja California that is a birthing area for grey whales.²⁷² As these efforts suggest, transnational advocacy in the environmental context reflects an impulse to collaborate in the face of mutual environmental threats, as well as a shared political commitment to redress environmental harm wherever it occurs.

c. Community Development. Although the labor and environmental impacts of free trade have received the most attention, public interest lawyers have also supported cross-border efforts to promote community development in Mexican towns connected by social and economic ties to the immigrant community in the United States. These transnational relationships have long existed among immigrants, but have been reinforced and adapted in the context of

268. Advocates have nonetheless resorted to U.S. courts on those occasions when litigation provides opportunities to prevent transborder environmental degradation. One well-known example of this occurred in Sierra Blanca, Texas, where the Sierra Blanca Legal Defense Fund filed a federal lawsuit in its successful effort to stop a nuclear waste plant from being built in a predominately Latino border town. *Sierra Blanca Protests Sweep Both Sides of the Border*, BORDERLINES, Oct. 20, 1998, <http://us-mex.irc-online.org/borderlines/updater/1998/oct20sierra.html> (last visited Sept. 21, 2007); Environmental Justice Case Study: The Struggle for Sierra Blanca, Texas Against a Low-Level Nuclear Waste Site, <http://www.umich.edu/~snre492/blanca.html> (last visited Feb. 23, 2008).

269. See Knox, *supra* note 252, at 81.

270. See Carlos Rincón & Peter Emerson, *Binationally Managing Air Quality in the U.S.-Mexico Borderlands: A Case Study*, BORDERLINES, Jan. 2000, <http://americas.irc-online.org/borderlines/PDFs/bl63.pdf> (last visited Feb. 23, 2008).

271. See Fernando Bejarano, *Mexico-U.S. Environmental Partnerships*, in CROSS-BORDER DIALOGUES: U.S.-MEXICO SOCIAL MOVEMENT NETWORKING, *supra* note 216, at 113, 115.

272. See Brooks & Fox, *supra* note 216, at 25.

market integration.²⁷³ Advances in communications technologies have made it easier to maintain transnational networks, while the Mexican government has taken steps to promote closer transnational ties.²⁷⁴ This political attention, in turn, is a function of the economic clout of immigrants, who remit \$10 billion per year to México—the second-largest source of foreign direct investment.²⁷⁵ The magnitude of remittances reflects an important aspect of immigration in the era of market integration: as stricter border policies reduce the rate of return for Mexican immigrants to the United States, remittances have become a substitute strategy for supporting family back home.²⁷⁶

The organizational expressions of this transnational activity are Mexican “hometown associations” (HTAs)—grassroots immigrant groups that operate to collectivize immigrant remittances and transfer them to development projects in the immigrants’ hometowns.²⁷⁷ México has provided important financial incentives to promote collective remittances through matching grant programs,²⁷⁸ while U.S.-based foundations have also entered the HTA field, offering some grant money to facilitate research and technical support.²⁷⁹ As a result,

273. See LINDA G. BASCH, NINA GLICK SCHILLER & CHRISTINA SZANTON BLANC, *NATIONS UNBOUND: TRANSNATIONAL PROJECTS, POSTCOLONIAL PREDICAMENTS, AND DETERRITORIALIZED NATION-STATES* 7 (1994); see also THOMAS FAIST, *THE VOLUME AND DYNAMICS OF INTERNATIONAL MIGRATION AND TRANSNATIONAL SOCIAL SPACES* (2000).

274. Gaspar Rivera-Salgado, *Mexican Migrants and the Mexican Political System*, in *INVISIBLE NO MORE: MEXICAN MIGRANT CIVIC PARTICIPATION IN THE UNITED STATES* 31, 31 (Xóchitl Bada et al. eds., 2006).

275. See INTER-AMERICAN DIALOGUE, *ALL IN THE FAMILY: LATIN AMERICA’S MOST IMPORTANT INTERNATIONAL FINANCIAL FLOW* 1, 3–4 (2004).

276. See Luis Eduardo Guarnizo & Luz Marina Díaz, *Transnational Migration: A View from Columbia*, 22 *ETHNIC & RACIAL STUD.* 397, 407–08 (1999).

277. See MIKE DAVIS, *MAGICAL URBANISM: LATINOS REINVENT THE US CITY* 77–89 (2000); ROBERT S. LEIKEN, *THE MELTING BORDER: MEXICO AND MEXICAN COMMUNITIES IN THE UNITED STATES* (2000); Gaspar Rivera-Salgado, *Cross-Border Grassroots Organizations and the Indigenous Migrant Experience*, in *CROSS-BORDER DIALOGUES: U.S.-MEXICO SOCIAL MOVEMENT NETWORKING*, *supra* note 216, at 259, 263; Gaspar Rivera-Salgado, *Mixtec Activism in Oaxacalifornia: Transborder Grassroots Political Strategies*, 42 *AM. BEHAV. SCIENTIST* 1439, 1451–52 (1999).

278. See Anapum Chander, *Homeward Bound*, 81 *N.Y.U. L. REV.* 60, 74 (2006) (describing México’s “Tres por Uno” (“Three for One”) program, under which the federal, state, and municipal governments match contributions to development projects made by HTAs).

279. Major foundations, including Rockefeller and MacArthur, have provided grants to fund HTA research and activism. The North American Integration & Development Center, *Immigrant Remittance Corridors*, <http://naid.sppsr.ucla.edu/ImmigrantRemittanceCorridors.htm> (last visited Feb. 24, 2008); Meg Sullivan, *Mexican Immigrants in U.S. Keep Close Ties with Their Hometowns*, *USC CHRONICLE*, Apr. 17, 2000, <http://uscnews.usc.edu/detail.php?recordnum=5382>.

the number of HTAs has grown significantly since the early 1990s, increasing to over five hundred by the end of the decade, with nearly 250 in Los Angeles alone.²⁸⁰ Although HTAs emerged primarily as vehicles for investment in community infrastructure projects,²⁸¹ they have begun to promote employment-generating opportunities as a way to stem out-migration from the hometowns.²⁸²

As HTA operations have become more sophisticated and their cross-border transactions have increased, their need for legal assistance has grown. And although HTAs generate significant cash investments in their hometowns, their meager operational budgets typically allow little funding for private legal assistance, which has pushed them to look to low-cost or no-cost alternatives. Legal services lawyers in areas of high immigrant density, particularly Los Angeles and Chicago, have connected with HTAs as a strategy of promoting community economic development. This has linked pockets of U.S. legal services lawyers into cross-border circuits of HTA investment, internationalizing traditionally localized community economic development practice.

In many ways, the representation of HTAs mirrors the type of work community economic development lawyers undertake on behalf of U.S.-focused community-based organizations. HTAs are often organized as nonprofit groups with development and social service goals and thus require standard legal assistance with respect to issues of tax exemption, corporate governance, and fundraising.²⁸³ In Los Angeles, legal services groups have therefore provided training and direct services to support HTA nonprofit formation and operation. For instance, at the Legal Aid Foundation, lawyers in the Community Economic Development unit have conducted workshops for HTA members on how to form nonprofit, tax-exempt organizations and participate in the local planning process.²⁸⁴ Similarly, in Chicago, the

280. See LEIKEN, *supra* note 277, at 12.

281. Carol Zabin & Luis Escala Rabadan, *Mexican Hometown Associations and Mexican Immigrant Political Empowerment in Los Angeles* (Aspen Inst., Nonprofit Sector Research Fund, Working Paper Series 98-042, 1998), available at http://www.ime.gob.mx/investigaciones/bibliografias/zabin_Escala1.pdf.

282. Telephone Interview with Efrain Jimenez, Sec'y of Projects, Federación de Clubes Zacatecanos (Sept. 26, 2005).

283. See Zabin & Escala, *supra* note 281, at 7-12.

284. E-mail from Nona Randois, Directing Attorney, Cmty. Econ. Dev. Unit, Legal Aid Found. of L.A., to Scott L. Cummings (Nov. 20, 2007). Neighborhood Legal Services, an LSC-funded group in Los Angeles's San Fernando Valley, has also represented HTAs on nonprofit

Community Economic Development Law Project has represented a handful of HTAs from Michoacán,²⁸⁵ while Enlaces América, a project of Chicago's Heartland Alliance that grew out of the Mexico-U.S. Advocates Network in the late 1990s,²⁸⁶ has instituted a Hometown Association Leadership Development Initiative designed to build HTA organizational capacity.²⁸⁷ Civil rights groups focused on the immigrant community have also stepped into the HTA field: in 2005, MALDEF launched a Hometown Association Leadership Program to provide training to HTA officials on how to form nonprofit groups, facilitate decisionmaking, and build HTA political coalitions, while also offering workshops relevant to HTA members on topics such as business development and domestic violence.²⁸⁸ In rural areas, some farmworker groups have also been active in supporting HTA development and individual remittances. The Oregon Law Center in Woodburn, Oregon has provided trainings to HTAs and their members (from indigenous communities in México and Guatemala) on farmworker employment issues, although it limits actual representation to individual HTA members.²⁸⁹ In upstate New York, Farmworker Legal Services reports helping individual migrants in remitting money to friends and family.²⁹⁰

Although the community-based structure of HTAs resonates with community economic development, the transnational nature of their investment strategies and political activism has also generated tensions. The fact that HTAs' end goal is to promote development abroad raises concerns about service allocation within legal groups with limited resources. In response to this concern, Public Counsel, Los Angeles's pro bono program, has chosen to decline service to

incorporation and tax-exemption issues. E-mail from Joshua Stehlik, Supervising Attorney of Cmty. Dev. and Workers' Rights, Neighborhood Legal Servs. of L.A. County, to Scott L. Cummings (Nov. 19, 2007).

285. Telephone Interview with Susan Kaplan, Dir., Community Economic Development Law Project (Nov. 14, 2007).

286. See Enlaces América, Who We Are, <http://www.enlacesamerica.org/aboutus/index.html> (last visited Feb. 24, 2008).

287. See Enlaces América, Hometown Association Leadership Development Initiative, <http://www.enlacesamerica.org/leadership/hometown.html> (last visited Feb. 24, 2008).

288. Press Release, J.C. Flores, MALDEF Launches Immigrant Leadership Program (May 18, 2005), available at <http://www.maldef.org/news/press.cfm?ID=261>.

289. E-mail from Julie Samples, Attorney & Coordinator, Indigenous Farm Worker Project, Or. Law Ctr., to Scott L. Cummings (Nov. 16, 2007).

290. E-mail from Lewis Papenfuse, Executive Dir., Farmworker Legal Servs. of N.Y, Inc., to Scott L. Cummings (Nov. 15, 2007).

those HTAs that engage primarily in activities abroad. The transnational objectives of HTAs also create tensions with the mandate of LSC-funded organizations, which are required by federal regulations to serve clients within geographically bounded service areas.²⁹¹ In addition, the high level of involvement by HTAs in hometown politics cuts against the traditional orientation of community economic development advocacy, which focuses on assisting community groups engaged in economic revitalization activities, rather than partisan political activity.

While public interest lawyers in immigrant centers like Los Angeles have supported transnational development through their work with HTAs, their counterparts on the border have promoted a parallel set of development initiatives with transnational dimensions. Unlike HTA advocacy, which is driven by remittances, border development is directed to the infrastructure deficits of border towns, where growth pressures caused by the maquila sector have led to sprawling development, seen in the spread of informal housing settlements—called colonias—on both sides of the border.²⁹² Texas RioGrande Legal Aid, with a service area extending the length of the Texas border, has an active program addressing colonia housing issues, which focuses on regularizing the land tenure of residents, many of whom have purchased land under financial contracts that leave them vulnerable to dispossession. The group also supports the development of new housing projects and small businesses, while assisting colonia residents to gain access to public utilities.²⁹³ Through these strategies, colonia lawyers, like those assisting HTAs, mobilize self-help responses by poor communities struggling under the system of regional market integration.

2. *The Developing World.* The dynamics that have shaped regional practice in North America are also at play on the wider global stage as the United States has developed closer ties with the developing world. As with México, U.S. economic policy has been a key driver, with the push to expand U.S. corporate access to

291. See 45 C.F.R. §§ 1634.1–2 (2007).

292. Jane E. Larson, *Negotiating Informality Within Formality: Land and Housing in the Texas Colonias*, in *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* 140, 141 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005).

293. Texas RioGrande Legal Aid, Inc., *Colonias & Real Estate*, <http://www.trla.org/teams/colonias.php> (last visited Feb. 24, 2008).

developing markets extending production patterns—and the potential for corporate abuse—to locations previously less subject to U.S. economic influence: Latin America and Asia in the 1980s, and Central and Eastern Europe since the fall of the Berlin Wall. In addition, U.S. linkages with the developing world have been reinforced through foreign aid programs, originally initiated to advance the Cold War agenda and then moving toward the objective of open markets.

a. Trade. For U.S. public interest lawyers, the spread of free trade has magnified the complexity of advocating for corporate accountability across the regulatory divide that separates the United States from the developing world. In this environment, lawyers have deployed three basic strategies to advance accountability within the free trade regime: (1) participation in global institutions governing trade, (2) domestic litigation asserting rights against corporations operating abroad, and (3) transnational collaborations to promote corporate social responsibility.

i. Governance. In an effort to inject social standards into the trade regime, U.S. lawyers have pursued multi-tiered advocacy focused on the interplay between the domestic implementation and global governance of free trade. The key organizations involved in these campaigns—the ILRF, Earthjustice, and Public Citizen—reflect the centrality of labor, environmental, and consumer issues in the free trade debate.

Within the domestic political arena, these groups have attempted to raise public interest issues within the Office of the United States Trade Representative (USTR), the executive agency authorized to negotiate and administer U.S. trade commitments. On the labor front, the ILRF was an early pioneer in trying to link foreign countries' access to U.S. markets to compliance with international labor standards through enforcement of "labor conditionality," which ties duty-free treatment of products from developing countries to the enforcement of workers' rights.²⁹⁴ From 1985, when labor conditionality was adopted, to 1995, the ILRF was involved in nearly one-third of all petitions to the USTR requesting that a country's

294. See 19 U.S.C. § 2462(c)(7) (2000).

eligibility for trade benefits be reviewed due to labor violations,²⁹⁵ including high-profile cases requesting the revocation of Indonesia's preferential trade status because of its association with Nike sweatshops.²⁹⁶ This tactic, however, was frustrated by the political discretion accorded the USTR, which explicitly used labor conditionality to reward Cold War allies and discipline foes—a practice that the ILRF challenged through litigation, but ultimately lost.²⁹⁷ While the ILRF has continued to use labor conditionality to spotlight abuses under free trade, it has emphasized nonlitigation efforts, such as documenting labor violations by trading partners and testifying against new free trade accords.²⁹⁸ Earthjustice has played a similar role on trade-related environmental issues through its International Office, which it created in 1996 to coordinate the group's trade and human rights advocacy.²⁹⁹ One important aspect of its work has focused on opening up the USTR's trade negotiation process to public input: it sued the USTR to release documents associated with negotiations to establish a Free Trade Area of the Americas,³⁰⁰ while also challenging the exclusion of public interest groups from the Trade Advisory Committees that counsel the USTR on trade policies affecting public health.³⁰¹ Public Citizen, which launched a major Global Trade Watch program in 1995 to link consumer protection and trade, has promoted the participation of NGOs in setting trade policy,³⁰² undertaken extensive documentation and reporting campaigns on the costs of free trade for consumers, and

295. Pharis J. Harvey, Int'l Labor Rights Fund, U.S. GSP Labor Rights Conditionality: "Aggressive Unilateralism" OR a Forerunner to a Multilateral Social Clause? 3 (n.d.) (on file with the *Duke Law Journal*).

296. See Ann Harrison & Jason Scorse, *Improving the Conditions of Workers? Minimum Wage Legislation and Anti-Sweatshop Activism*, 48 CAL. MGMT. REV. 144, 145 (2006).

297. See Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 186 (2002).

298. See *id.*

299. Telephone Interview with Martin Wagner, Managing Attorney, Int'l Office, Earthjustice Legal Def. Fund (July 12, 2006).

300. Press Release, Earthjustice, U.S. Trade Representative Sued for Hiding Documents from Public (Mar. 7, 2001), available at http://www.earthjustice.org/news/press/001/us_trade_representative_sued_for_hiding_documents_from_public.html.

301. See Earthjustice, Health Trade Advisory Committees: Earthjustice: Environmental Law, http://www.earthjustice.org/our_work/cases/2005/page.jsp?itemID=27548798 (last visited Feb. 24, 2008).

302. See Public Citizen, On Procedures for Obtaining Trade Policy Advice from Non-Governmental Organizations, <http://www.citizen.org/trade/harmonization/comments/articles.cfm?ID=4492> (last visited Feb. 24, 2008).

opposed efforts to extend free trade into Central and South America and Africa.³⁰³

These and other groups have also pursued reform at the supranational level by working to open international trade institutions to public participation.³⁰⁴ This effort has centered on the WTO, which operates as an institutional forum for facilitating trade negotiations, implementing trade agreements, and resolving trade disputes among member states.³⁰⁵ Though NGO access to the WTO is limited,³⁰⁶ U.S. groups have used the available opportunities to press for greater responsiveness to environmental, labor, and public health issues. Beginning in 1999, a handful of U.S. organizations—including the Center for International Environmental Law and Public Citizen—have consistently attended the WTO Ministerial Conferences, where they are authorized to go to (but not participate in) public sessions and meet with member representatives.³⁰⁷ Environmental groups have also attempted to intervene in the WTO's dispute resolution process, under which member states can bring complaints of trade violations to dispute resolution panels, with appeals available to the Appellate Body and remedies that include compensation and, in extreme cases, suspension of the offending state from the WTO.³⁰⁸ The Center for International Environmental Law successfully pressed the WTO to authorize the submission of public interest amicus briefs.³⁰⁹ However, the WTO's decision to grant the panels complete discretion over whether to accept public interest submissions has meant that they are

303. Public Citizen, Global Trade Watch, <http://www.citizen.org/trade/> (last visited Feb. 24, 2008).

304. Telephone Interview with Martin Wagner, *supra* note 299.

305. See JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 16–18, 26–29 (1998).

306. See Marrakesh Agreement Establishing the World Trade Organization art. V, Apr. 15, 1994, 33 I.L.M. 13 (1994) (“The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.”).

307. See World Trade Organization, Relations with Non-Governmental Organizations/Civil Society, http://www.wto.org/english/forums_e/ngo_e/intro_e.htm (last visited Sept. 21, 2007).

308. See Susan H. Shin, *Comparison of the Dispute Settlement Procedures of the World Trade Organization for Trade Disputes and the Inter-American System for Human Rights Violations*, 16 N.Y. INT'L L. REV. 43, 49–54 (2003).

309. See Brief for Center for International Environmental Law et al. as Amici Curiae to the Appellate Body, On United States—Import Prohibition of Certain Shrimp and Shrimp Products (July 23, 1998), available at <http://ciel.org/Publications/shrimpturtlebrief.pdf>.

rarely reviewed,³¹⁰ and, accordingly, few amicus briefs have ever been filed.³¹¹

As a result, U.S. groups have taken tentative steps to build up alternative institutional power to challenge the WTO's authority over free trade policy. For instance, environmental groups have begun testing methods of participating in emerging multilateral environmental agreements and promoting closer collaboration between the governing bodies of such agreements and the WTO.³¹² On the labor front, the ILRF has sought to strengthen the International Labour Organization as a counterweight to the WTO in balancing the competing demands of trade and labor protections,³¹³ while groups have also advocated for the adoption of UN rules on corporate social responsibility.³¹⁴ Yet the marginal nature of these efforts thus far highlights the power and continued insularity of the WTO and brings into sharp relief the unequal terrain on which trade policy is determined.

ii. Extraterritorial Legality. Advocacy within international institutions attempts to shape the legal contours of the transnational trade regime by expanding the range of stakeholder inputs and

310. See REPORT OF THE APPELLATE BODY, UNITED STATES—IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS, WT/DS58/AB/R, ¶¶ 107–08 (Oct. 12, 1998). On the WTO's stance on NGO participation, see generally Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331 (1996).

311. See World Trade Organization, Amicus Curiae Briefs, http://www.wto.org/english/tratop_e/dispu_e/repertory_e/a2_e.htm (last visited Feb. 24, 2008); Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶ 9, WT/DS257/AB/R (Jan. 14, 2004), available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/257ABR.doc> (noting amicus brief filed by Defenders of Wildlife, NRDC, and Northwest Ecosystem Alliance). The Center for International Environmental Law has continued to advocate for WTO reform through participation in public hearings. See Federal Register Comments on US Position Regarding Qatar Ministerial Meeting of the World Trade Organization, <http://ciel.org/Publications/FRNQatarCommentsFinal.pdf> (last visited Feb. 24, 2008).

312. CTR. FOR INT'L ENVTL. LAW 2001–2002 ANNUAL REPORT 21, available at http://www.ciel.org/Publications/CIEL_Report_2002.pdf.

313. See Int'l Labor Rights Fund, *Developing Effective Mechanisms for Implementing Labor Rights in the Global Economy*, in WORKERS IN THE GLOBAL ECONOMY 1, 7 (Randolyn Kay Gardner ed., 2001).

314. See Lary Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 288 (2006); EarthRights International, U.N. Norms and International Programs, <http://www.earthrights.org/legal/unnorms/> (last visited Feb. 24, 2008).

exploiting opportunities to embed social standards within free trade frameworks. More traditional litigation efforts, in contrast, seek to force U.S. corporations abroad to internalize the costs of harms committed within territories where no viable mechanisms of legal enforcement exist.³¹⁵ Litigation strategies to impose labor and environmental standards on transnational corporations have therefore emerged as both a complement to institutional-level reform efforts and an expression of frustration with existing enforcement mechanisms.³¹⁶ Limits on the extraterritorial application of federal law have spurred advocates to look at both international and state law as tools to challenge corporate abuse outside U.S. borders.³¹⁷

International law efforts to promote corporate accountability in developing countries have focused on the extension of the Alien Tort Statute (ATS),³¹⁸ which provides federal court jurisdiction for noncitizens bringing tort claims alleging human rights violations.³¹⁹ The use of the ATS to contest the human rights violations of *corporate actors* has built upon its successful deployment as a vehicle to challenge human rights abuses by *foreign governmental officials*—launched by the landmark *Filartiga v. Pena-Irala*³²⁰ case in 1980. The pioneering group was the ILRF, which spearheaded a test case that for the first time used the ATS to attack corporate action abroad, alleging that Unocal authorized the government in Burma to commit forced labor, torture, and other abuses in helping to build its pipeline project.³²¹ The ILRF case was joined by a parallel suit orchestrated by EarthRights International,³²² a group founded on an Echoing Green

315. Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT'L & COMP. L. REV. 401, 401–03 (2001).

316. *Id.* at 401–02.

317. Courts have limited the extraterritorial application of environmental and labor laws. James Salzman, *Seattle's Legal Legacy and Environmental Reviews of Trade Agreements*, 31 ENVTL. L. 501, 507 (2001); Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 1017 (1995).

318. See Scott Pegg, *An Emerging Market for the New Millennium: Transnational Corporations and Human Rights*, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 1, 17 (Jedrzej George Frynas & Scott Pegg eds., 2003).

319. Alien Tort Statute, 28 U.S.C. § 1350 (2000).

320. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (holding that the ATS conferred federal court jurisdiction on a claim by the family members of a Paraguayan torture victim against his Paraguayan torturer).

321. *Nat'l Coal. Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 348 (C.D. Cal. 1997) (upholding ATS claims by individual plaintiffs).

322. See *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000); *Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

grant in 1995 by two recent law school graduates and a Burmese human rights activist who sought to bring together traditional litigation with human rights tactics to advance international environmental rights.³²³ From its inception, EarthRights was organized around opposition to the Unocal pipeline, and one of its founders developed the idea of an ATS suit in connection with the Center for Constitutional Rights, which litigated *Filartiga*.³²⁴ In a consolidated appeal, the Ninth Circuit in *Doe I v. Unocal Corp.* upheld the ATS claims against Unocal for forced labor, rape, and murder,³²⁵ and the case settled for an undisclosed amount.³²⁶

The *Unocal* case highlighted both the potential for and complexities of using human rights litigation to hold transnational corporations to account. At one level, the case represented an important ATS innovation: unlike the conventional model of bringing ATS cases against foreign individuals on behalf of human rights victims residing in the United States, *Unocal* opened domestic courts to victims from all over the world to challenge corporate actors.³²⁷ But by confronting global corporations on their own terms, *Unocal* also raised the stakes for advocacy groups in ways that have presented new challenges for their practice. The sheer scale and expense of litigating against global companies have required that ATS suits proceed as partnerships between NGOs and for-profit firms specializing in labor and environmental issues, which are able to finance large-scale, risky cases.³²⁸ Yet while this model has brought together NGOs and progressive public interest firms in productive collaborations, it has also exposed ATS litigation to the charge that it is driven by fee-hungry plaintiffs' lawyers.³²⁹

In addition, efforts to fit corporate abuse within the rubric of human rights have also confronted lawyers with strategic tradeoffs.

323. Telephone Interview with Marco Simons, U.S. Legal Dir., EarthRights Int'l (June 23, 2006).

324. *Id.*

325. *Doe I v. Unocal Corp.*, 395 F.3d 932, 953, 956 (9th Cir. 2002), *vacated and reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *district court opinion vacated by* 403 F.3d 708 (9th Cir. 2005).

326. *See Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (granting the parties' stipulated motion to dismiss).

327. Telephone Interview with Marco Simons, *supra* note 323.

328. EarthRights has also reached out for assistance from law school clinics at Rutgers, Harvard, Yale, Virginia, and George Washington. *Id.*

329. *See Van Schaack, supra* note 13, at 2314.

Though forced labor easily fits within the scope of ATS claims,³³⁰ more traditional labor abuses—such as violations of the right to organize—may not fall within the types of universally accepted international law violations that are required under the Supreme Court’s ruling in *Sosa v. Alvarez-Machain* to state a common law cause of action.³³¹ This has caused labor groups to raise the issue of human rights more obliquely, focusing on specific allegations of egregious abuse against labor activists: recent ILRF cases therefore spotlight the torture and murder of union organizers in U.S. subsidiaries in Latin America.³³² Similarly, in the environmental context, EarthRights has not succeeded in attempts to bring environmental degradation, by itself, under the human rights tent of ATS jurisdiction.³³³ The group has thus been forced to pursue environmental justice indirectly, again through claims of activist repression. For example, its case against Shell has alleged complicity in the murder and abuse of environmental activists by the Nigerian military in support of Shell’s oil pipeline.³³⁴ By foregrounding human rights in this way, the ATS cases also blur the distinctions between labor and environmental harms, subsuming them both under the rubric of corporate abuse: the ILRF has thus litigated cases that center on environmental damage,³³⁵ while EarthRights has paired claims of repression against environmental activists with allegations of forced labor.³³⁶

Because of the constraints on ATS jurisdiction, advocates have also attempted to enlist state courts to police transnational corporate actors. Building on the domestic sweatshop work of groups like

330. E.g., Igor Fuks, *Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability*, 106 COLUM. L. REV. 112, 125 (2006).

331. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (“[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”).

332. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1250–53 (11th Cir. 2005) (reversing a lower court dismissal of an ATS claim of torture in connection with actions by employees of a Del Monte subsidiary in Guatemala against labor activists); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1356 (S.D. Fla. 2003) (dismissing ATS claims against Coca-Cola USA and its Colombian subsidiary for the murder of a labor activist).

333. *Bano v. Union Carbide Corp.*, 273 F.3d 120, 127–32 (2d Cir. 2001) (affirming dismissal of ATS claims in connection with the Bhopal chemical plant disaster in India).

334. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92 (2d Cir. 2000).

335. See *Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 22 (D.D.C. 2005).

336. See *Doe I v. Unocal Corp.*, 963 F. Supp. 880, 883 (C.D. Cal. 1997).

APALC, this litigation has focused on using state law theories to extend joint liability for labor violations to U.S.-based retailers that contract their production to sweatshops abroad. One prominent case, which settled in 2002,³³⁷ was brought by antisweatshop groups on behalf of garment workers in the U.S. commonwealth of Saipan charging major garment retailers (including The Gap, Target, JC Penney, and The Limited) with making false statements that their garments were “sweat-free” in violation of California’s unfair business practices law.³³⁸ In 2005, the ILRF filed a case against Wal-Mart on behalf of a class of workers from supplier factories in Africa, Central America, and Asia that assigns liability for labor violations to Wal-Mart on the ground that its supplier contracts contain a code of conduct enforceable by the workers as third-party beneficiaries.³³⁹

iii. Collaboration. While U.S. public interest lawyers deploy traditional legal strategies with an eye toward radiating law outward into the global economic arena, they also confront the limits of this approach in a legal environment comprised of heterogeneous regulatory regimes that permit corporations to shop for countries that insulate them from legal liability.³⁴⁰ Faced with this uneven playing field, advocates supplement traditional legal tactics with alternative strategies, such as the documentation and reporting of abuse, the development of corporate codes of conduct, and the promotion of international norms governing global corporate activity. These strategies rely on the mobilization of transnational activist networks

337. See Global Exchange, *The Saipan Victory*, <http://www.globalexchange.org/campaigns/sweatshops/saipan> (last visited Feb. 24, 2008).

338. This case was brought in connection with two federal cases alleging labor, RICO, and international law violations. See Global Exchange, *Summary of the Saipan Sweatshop Litigation*, <http://www.globalexchange.org/campaigns/sweatshops/saipan/summary112399.html> (last visited Feb. 24, 2008). The Saipan settlement resulted in a code of conduct governing garment production on the island as well as damages amounting to \$20 million for the workers. Jenny Strasburg, *Saipan Lawsuit Terms OK'd: Garment Workers Get \$20 Million*, S.F. CHRON., Apr. 25, 2003, at B1. A similar state lawsuit was brought against Nike for allegedly misleading statements of compliance with labor rights abroad. See *Kasky v. Nike, Inc.*, 45 P.3d 243, 247 (Cal. 2002).

339. See Press Release, Int'l Labor Rights Forum, *Sweatshop Workers on Four Continents Sue Wal-Mart in California Court* (Sept. 13, 2005), available at http://www.laborrights.org/press/Wal-Mart/lawsuit_pressrelease_091305.htm.

340. See César A. Rodríguez-Garavito, *Nike's Law: The Anti-Sweatshop Movement, Transnational Corporations, and the Struggle over International Labor Rights in the Americas*, in *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY*, *supra* note 292, at 64, 65

to develop standards, call attention to violations, and monitor compliance.³⁴¹

These dynamics are illustrated by the development of transnational advocacy networks formed to oppose sweatshops. These networks—composed of public interest law organizations, labor and religious groups, and student associations—emerged in the 1990s as the global counterpart to domestic efforts to stem the exploitation of immigrant workers in U.S. garment production firms.³⁴² Transnational strategies evolved as the phase out of global import quotas on garment items pulled more production overseas to countries with weak labor standards,³⁴³ underscoring the increasing impotence of antisweatshop advocacy that focused solely on the shrinking base of U.S. producers.³⁴⁴

Los Angeles's APALC, which spearheaded domestic impact litigation against sweatshops, also helped to coordinate a transnational response to labor abuse along the global garment supply chain. In 1995, APALC co-founded Sweatshop Watch, a coalition of immigrant rights and labor groups formed in the wake of the El Monte Thai worker case to advocate for corporate accountability in the garment industry.³⁴⁵ Although Sweatshop Watch was a party in the class action litigation against U.S. garment retailers for selling products made by sweatshops in Saipan,³⁴⁶ it has generally emphasized policy advocacy and cross-border organizing over lawsuits, acknowledging the legal and logistical limits on transnational litigation. For instance, in 1998, Sweatshop Watch convened a conference with participants from Latin America, Europe, and Asia to chart strategies for advancing living wage demands within the global garment production sector.³⁴⁷ That same year, it collaborated

341. *See id.* at 67.

342. *See* BONACICH & APPELBAUM, *supra* note 140, at 174–75.

343. Katie Quan, *Strategies for Garment Worker Empowerment in the Global Economy*, 10 U.C. DAVIS J. INT'L L. & POL'Y 27, 29–30 (2003).

344. Telephone Interview with Julie Su, Legal Dir., Asian Pac. Am. Legal Ctr. (July 13, 2006).

345. In addition to APALC, the founders of Sweatshop Watch included the Asian Immigrant Women Advocates, Asian Law Caucus, Asian Pacific American Labor Alliance, Coalition for Humane Immigrant Rights of Los Angeles, Employment Law Center, International Ladies' Garment Workers' Union, Korean Immigrant Workers Advocates, La Raza Centro Legal, Los Angeles County Commission on Women, and Mexican American Legal Defense and Education Fund. *See* Quan, *supra* note 343, at 32.

346. *See* Global Exchange, *supra* note 338.

347. *See* Quan, *supra* note 343, at 33.

with labor and workers' rights groups to develop a model code of conduct requiring companies that produce university logo items to meet minimum labor standards and in 1999 helped to launch the Worker Rights Consortium to monitor and enforce the codes against universities and their suppliers abroad.³⁴⁸ More recently, Sweatshop Watch has led efforts to develop new global antisweatshop strategies, convening a 2004 gathering to create an action plan for garment advocacy in the face of free trade³⁴⁹ and launching a Globalization and Economic Justice Project to “spark more dialogue about the strategies needed to continue promoting workers' rights in the global economy.”³⁵⁰ Through these efforts, Sweatshop Watch's agenda—initially forged in the struggle for domestic immigrant rights—has been pulled in the direction of transnational collaboration.

b. Aid. While trade policy has contributed to the emergence of U.S. advocacy organized around the development of different forms of global regulation, U.S.-driven foreign aid programs have opened distinct avenues of global influence that have also operated to pull public interest lawyers toward the developing world. The implementation of foreign aid programs has placed U.S. public interest lawyers in conflicting relationships with development agencies—at times opponents and champions of aid-driven reform in the developing world. The common theme has been a commitment to promoting the rights of marginalized groups within the foreign assistance framework. Beginning in the 1970s, this commitment pitted public interest lawyers against development agencies, which were charged with sponsoring development projects that curtailed fundamental rights and imposed environmental and economic harms on vulnerable local populations. By the 1990s, however, the movement to use foreign aid to export the “rule of law” abroad created new opportunities for collaboration between the development community and public interest lawyers, who were enlisted as agents of legal modernization projects in developing countries promising to build legal systems that married a respect for open markets with a commitment to human rights.

348. *See id.*

349. *See* Sweatshop Watch, The Future of California's Garment Industry, <http://www.sweatshopwatch.org/index.php?s=73> (last visited Feb. 24, 2008).

350. *See* Sweatshop Watch, Globalization and Economic Justice Project, <http://www.sweatshopwatch.org/index.php?s=42> (last visited Feb. 24, 2008).

i. Law and Development. The movement to export U.S. law as a way of fostering development can be traced back to the first law and development movement in the 1950s and 1960s, which promoted legal reform as a way of facilitating active state management of developing economies to cultivate internal industries.³⁵¹ The carriers of reform were U.S. law professors,³⁵² who were enlisted to transmit the antiformalist, policy-oriented model of American legal education to developing countries, where it was believed that educational reform would mold a new generation of pragmatic, problem-solving lawyers to advance economic modernization.³⁵³ As a project of legal reform, the law and development movement died out in the 1970s, when those once sympathetic to its aims began to view the movement as American-led legal imperialism.³⁵⁴

As law fell out of favor among liberals as a vehicle for promoting economic development in poor nations, it gained traction as a weapon for contesting the use of development policy for conservative ends. During the 1970s and 1980s, development initiatives constituted an important aspect of Cold War policy, with USAID targeting assistance to countries as a way to avoid instability and Communist

351. See David M. Trubek & Alvaro Santos, *The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 1, 2 (David M. Trubek & Alvaro Santos eds., 2006).

352. The main funders were the Ford Foundation and USAID. See John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 *AM. J. COMP. L.* 457, 457–58 n.4 (1977); see also Hugo Frühling, *From Dictatorship to Democracy: Law and Social Change in the Andean Region and the Southern Cone of South America*, in *MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD* 55, 56 (Mary McClymont & Stephen Golub eds., 2000) (“[In 1966,] the Ford Foundation provided \$3 million to establish the International Legal Center in New York City as a vehicle for mobilizing legal assistance to developing countries.”).

353. See David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 351, at 74, 76–77 [hereinafter Trubek, *The “Rule of Law”*]. On the law and development movement generally, see JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980); KENNETH L. KARST & KEITH S. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK* (1975); Lawrence M. Friedman, *Legal Culture and Social Development*, in *LAW AND THE BEHAVIORAL SCIENCES 1000* (Lawrence M. Friedman & Steward Macaulay eds., 1969); Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 *YALE L.J.* 1 (1998); David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 *YALE L.J.* 1 (1972).

354. See David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 *WIS. L. REV.* 1062, 1080 (1974).

influence, while the Ford Foundation promoted sustainable development and public health initiatives to benefit the global poor.³⁵⁵ But as aid programs operated as a force for change in the developing world, they also came to be viewed by some legal groups as carrying with them the potential for as much harm as good.

Within the women's movement, it was the U.S. effort to use aid to restrict reproductive rights abroad that focused attention on the developing world. The conservative backlash against the *Roe v. Wade*³⁵⁶ decision spread into the international domain with the Nixon administration eliminating USAID funding for foreign programs that provided information about "abortion as a method of family planning," and the Reagan administration later imposing a "global gag rule" that precluded all U.S. funding for foreign NGOs that performed or promoted abortions.³⁵⁷ Although domestic legal challenges to these rules failed,³⁵⁸ they helped to sensitize U.S. women's groups to the scope of gender inequity abroad and built support for greater investment in law reform programs to protect the rights of women globally.³⁵⁹ The main organizational outgrowth of this international movement was the creation of the Center for Reproductive Rights, which split off from the ACLU in 1992 to focus on mobilizing women's rights around the world, with an agenda encompassing advocacy within international fora and treaty monitoring to promote women's rights in developing countries.³⁶⁰

Environmental groups also followed the flow of international aid, tracing the dispensation of U.S. funds to support development projects in poor countries that contributed to environmental

355. See Jay S. Ovsiovitch, *Feeding the Watchdogs: Philanthropic Support for Human Rights NGOs*, 4 BUFF. HUM. RTS. L. REV. 341, 347–50 (1998).

356. *Roe v. Wade*, 410 U.S. 113 (1973).

357. See AGENCY FOR INT'L DEV., U.S. DEP'T OF STATE, A.I.D. POLICIES RELATIVE TO ABORTION-RELATED ACTIVITIES 2 (1974); White House Office of Policy Dev., *US Policy Statement for the International Conference on Population*, 10 POPULATION & DEV. REV. 574, 578 (1984).

358. See Julia L. Ernst, Laura Katzive & Erica Smock, *The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PA. J. CONST. L. 752, 775 (2004).

359. See Elizabeth M. Schneider, *Transnational Law as a Domestic Resource: Thoughts on the Case of Women's Rights*, 38 NEW ENG. L. REV. 689, 689–90 (2004).

360. See Center for Reproductive Rights, International Litigation, http://www.reproductive-rights.org/ww_litigation.html (last visited Feb. 24, 2008).

damage.³⁶¹ In 1976, lawyers at the NRDC set up an international program with the central objective of forcing U.S. adherence to environmental standards in the administration of its foreign aid policy.³⁶² After USAID settled a lawsuit that led to a system of environmental review for U.S.-sponsored overseas projects,³⁶³ the NRDC began to work with groups outside the United States on monitoring implementation of the USAID environmental mandate.³⁶⁴ This led, in turn, to heightened sensitivity about the scale of environmental problems outside of U.S. borders—reinforced by new scientific evidence of the global scope of environmental pollution—which spurred an expansion of the NRDC's international work.³⁶⁵

With the movement toward free markets in the 1980s, environmental groups began to focus on the World Bank, which provided international aid funds for development projects, often conditioned on structural adjustments designed to open the markets of recipient countries. U.S.-based environmental groups, concerned about the impact of World Bank-financed infrastructure and resource extraction projects on protected environments and indigenous populations,³⁶⁶ worked in coalition with developing country NGOs to intervene in World Bank processes at three levels. First, groups interceded during the loan negotiation process to raise environmental concerns with proposed projects—a tactic used by the NRDC to successfully incorporate pro-environmental terms into World Bank financing in the mid-1980s.³⁶⁷ Second, as groups became increasingly disappointed with the World Bank's track record on environmental review and indigenous resettlement, pressure began to mount for a campaign to reform the Bank's decisionmaking structure to provide for meaningful public participation.³⁶⁸ That campaign was led by U.S.-

361. Telephone Interview with S. Jacob Scherr, Dir., Int'l Program, Natural Res. Def. Council (June 12, 2006).

362. *See id.*

363. *See* *Envtl. Def. Fund v. U.S. Agency for Int'l Dev.*, 6 *Envtl. L. Rep.* 20,121 (D.D.C. Dec. 5, 1975); Exec. Order No. 12,114, 44 *Fed. Reg.* 1957 (Jan. 4, 1979).

364. Telephone Interview with S. Jacob Scherr, *supra* note 361.

365. *See id.*

366. *See* Galit A. Sarfaty, *The World Bank and the Internalization of Indigenous Rights Norms*, 114 *YALE L.J.* 1791, 1792 (2005).

367. *See* David A. Wirth, *Legitimacy, Accountability, and Partnership: A Model for Advocacy on Third World Environmental Issues*, 100 *YALE L.J.* 2645, 2645–48 (1991).

368. *See* Lori Udall, *The World Bank and Public Accountability: Has Anything Changed?*, in *THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS* 391, 394–98 (Jonathan A. Fox & L. David Brown eds., 1998).

based NGOs, including Environmental Defense and the Center for International Environmental Law,³⁶⁹ which pressured Congress to cut off funding for the World Bank in the absence of reforms.³⁷⁰ One important result of this campaign was the 1993 creation of an independent Inspection Panel to review citizen complaints about the World Bank's failure to follow its own policies, with the Panel empowered to investigate and make recommendations for corrective action to the Bank's executive board.³⁷¹ With this Panel in place, environmental groups undertook a third form of activism: assisting local groups in the submission of petitions. Through 2002, U.S.-based groups participated in eleven of twenty-eight filings, most challenging the impact of infrastructure and extractive industry projects on local environments and communities.³⁷² The Washington, D.C.-based Center for International Environmental Law was the key organization behind these petitions, providing some form of technical assistance in each case.³⁷³ However, though these petitions did lead to environmental mitigation and compensation for the displaced in a few cases, because of the Panel's lack of enforcement power, the overall results of the process were limited at the project level and in some cases fueled backlash against the Panel by member states.³⁷⁴

ii. Rule of Law. While public interest lawyers in the 1990s resisted outside development projects that threatened to harm local populations in the name of open markets, they also became key participants in a massive new aid movement to promote development from within through comprehensive legal reform based on the "rule

369. See Dana Clark, *Understanding the World Bank Inspection Panel*, in DEMANDING ACCOUNTABILITY: CIVIL-SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL 1, 7 (Dana Clark et al. eds., 2003).

370. See Jonathan A. Fox & L. David Brown, *Introduction* to THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS, *supra* note 368, at 1, 7.

371. See Inspection Panel, *Operating Procedures*, Aug. 19, 1994, 34 I.L.M. 511; see also LINDA A. MALONE & SCOTT PASTERNAK, *DEFENDING THE ENVIRONMENT: CIVIL SOCIETY STRATEGIES TO ENFORCE INTERNATIONAL ENVIRONMENTAL LAW* 108-13 (2004).

372. See Kay Treakle, Jonathan Fox & Dana Clark, *Lessons Learned*, in DEMANDING ACCOUNTABILITY: CIVIL-SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL, *supra* note 369, at 247, 248-50.

373. See generally Center for International Environmental Law, *Brief Summaries of Inspection Panel Claims*, <http://www.ciel.org/Ifi/ifibs.html> (last visited Sept. 22, 2007).

374. See Treakle, Fox & Clark, *supra* note 372, at 258-65.

of law.”³⁷⁵ This movement continued to link the agendas of foreign aid and free markets, but also exposed the tensions between them. On the one hand, investors promoted the rule of law as a way to facilitate the integration of developing countries into the free market system, through reforms designed to reduce political corruption and ensure strict enforcement of contract and property rights.³⁷⁶ On the other hand, proponents of human rights, who viewed rule-of-law reforms as a means to guarantee individual rights against governmental and corporate abuse, also supported the movement.³⁷⁷ The tensions between these agendas centered on the degree to which the rule of law contemplated strict corporate accountability and redistributive social welfare policies—and were reflected in the ideologically diverse range of funders backing the rule-of-law movement, with the Ford Foundation, Open Society Institute, USAID, World Bank, International Monetary Fund, and UN acting as the core sponsors.³⁷⁸ There were, however, important areas of convergence: in particular, both free market and human rights proponents agreed that the broad outlines of rule-of-law reform must include an empowered judiciary to protect private property and individual liberty, and access to justice for all social classes to ensure political legitimacy.³⁷⁹ Programmatically, this convergence has meant a new funding emphasis on building public interest law systems within emerging democratic societies as a way to strengthen judicial independence and legal enforcement.³⁸⁰

Because the rule-of-law project is sponsored primarily by U.S. institutions, U.S. lawyers have played central roles in its implementation. Although the lawyers engaged in rule-of-law reforms are sensitive not to be seen as missionaries, the overall project is missionary in scope, thus reprising concerns about American legal imperialism voiced during the first law-and-development movement. U.S. lawyers have responded to these concerns by structuring their

375. See Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT’L ECON. L. 179, 184–93 (1999).

376. See Trubek, *The “Rule of Law,”* *supra* note 353, at 74.

377. See *id.* at 84.

378. See Chua, *supra* note 353, at 17–18.

379. See *id.* at 11–12; see also deLisle, *supra* note 375, at 181.

380. The rule-of-law movement has built upon previous efforts to extend public interest law abroad. See Stephen Ellman, *Cause Lawyering in the Third World*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 349, 355–70 (Austin Sarat & Stuart A. Scheingold eds., 1998) (describing efforts to export public interest law in the 1980s).

involvement around technical support for local institutions, collaborations with local leaders, and training for foreign professionals.³⁸¹ Although these arrangements do not eliminate U.S. influence, rule-of-law proponents have viewed them as efforts to promote indigenous initiatives and foster more incremental change.

With respect to program implementation, U.S. lawyers have played important roles providing technical advice on adapting public interest systems to the local legal environment. Some work has been done to establish public interest law firms abroad;³⁸² however, the major efforts have been around promoting access to justice and clinical legal education. Access to justice programs have emerged as popular rule-of-law reforms, focused on providing free individual representation for poor clients in cases typically directed at governmental institutions. The Ford Foundation has sponsored legal aid in South America,³⁸³ China,³⁸⁴ and Eastern Europe,³⁸⁵ enlisting U.S. lawyers in the project of developing new institutional systems abroad. For instance, in 1997, Ford funded the creation of the Public Interest Law Initiative at Columbia University to focus on building public interest law systems in Central and Eastern Europe.³⁸⁶ The organization has provided technical assistance in the implementation of access to justice programs in Poland and Bulgaria, and is undertaking research and providing programmatic support in connection with initiatives in the Balkans and Russia.³⁸⁷ USAID programs have also enlisted U.S. lawyers to assist developing legal aid programs abroad, supporting the Center for Law and Social Policy's

381. See Frühling, *supra* note 352, at 58.

382. See *id.*; Helen Hershkoff & Aubrey McCutcheon, *Public Interest Litigation: An International Perspective*, in *MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD*, *supra* note 352, at 283, 294.

383. See Frühling, *supra* note 352, at 70–73.

384. See Benjamin L. Liebman, *Legal Aid and Public Interest Law in China*, 34 *TEX. INT'L L.J.* 211, 232 (1999).

385. See Aubrey McCutcheon, *Eastern Europe: Funding Strategies for Public Interest Law in Transitional Societies*, in *MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD*, *supra* note 352, at 233, 233–34.

386. The organization has spun off from Columbia and changed its name to the Public Interest Law Institute. See Public Interest Law Institute, About PILI, <http://www.pili.org/> (follow “about us: about pili” hyperlink) (last visited Feb. 24, 2008).

387. See Public Interest Law Institute, Legal Aid Reform, <http://www.pili.org/> (follow “programs: legal aid reform” hyperlink) (last visited Feb. 24, 2008).

Russian Rule of Law Consortium, which pursues the development of traditional civil legal aid systems for the poor in ten Russian states.³⁸⁸

U.S. lawyers have also played key roles in the emerging international pro bono network of NGOs and corporate law firms.³⁸⁹ An important trend has been the expansion of transnational law practice,³⁹⁰ with elite law firms increasingly opening up branch offices abroad to cultivate foreign business and facilitate international transactions.³⁹¹ One result of the increase in transnational practice has been the extension of pro bono networks across national borders,³⁹² with foreign offices taking steps to promote pro bono opportunities, both as a way of responding to local legal services needs and meeting professional service obligations established in the United States.³⁹³ This development can be seen in Latin America, where there is a major push to create pro bono structures to fill holes in legal aid systems. As large firms expand into major Latin American cities, they are learning that to justify their lucrative practices, they have to give something back to the community.³⁹⁴ Local NGOs have sought to tap into this professional impulse as a way to supplement legal aid services in foreign systems. The Ford Foundation has been a leading financial sponsor of international pro bono networking,³⁹⁵ which has been coordinated through the Cyrus Vance Center for International Justice Initiatives, a project of the Bar of the City of New York. The

388. See e-mail from Alan W. Houseman, Dir., Ctr. for Law and Soc. Policy, to Scott L. Cummings (July 11, 2006). USAID has also funded the human rights group Global Rights to provide training and capacity building for nascent legal aid programs in Mongolia, Burundi, Sierra Leone, Liberia, Morocco, and India. See Telephone Interview with Jennifer Rasmussen, Deputy Dir. for Core Program Design, Global Rights (July 16, 2006).

389. Nathan Koppel, *American Export*, AM. LAW., Sept. 2003, at 92, 92.

390. See Abel, *supra* note 61, at 739.

391. In 1988, forty-four of the one hundred largest U.S. firms had at least one office abroad, for a total of 136 international offices. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 48 (1991). By 2005, eighty of the largest one hundred U.S. firms had a total of 487 international offices. See *The Billion-Dollar Club Expands*, AM. LAW., July 2005, at 123, 123–29. The number of international offices is based on information provided by the firms on their websites and in the National Association for Law Placement Directory of Legal Employers. See National Association for Law Placement, NALP Directory of Legal Employers, <http://www.nalpdirectory.com>.

392. See Koppel, *supra* note 389, at 92.

393. See Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 97 (2004).

394. Pro bono programs have been started in México under the auspices of the Mexican Bar Association (Asociación de Servicios Legales), and in Brazil (Instituto Pro Bono). See, e.g., Instituto Pro Bono, <http://www.probono.org.br> (last visited Feb. 24, 2008).

395. See, e.g., Frühling, *supra* note 352, at 78.

Center has sponsored conferences and facilitated information exchange between Latin American professional associations and U.S. pro bono leaders, such as Los Angeles's Public Counsel, as well as law firm pro bono coordinators.³⁹⁶

Lawyers within U.S. law school clinics have also been involved in helping to establish clinical education programs in developing countries. One rationale for the expansion of clinics abroad has been to promote the development of practical legal skills that students can later use to advance rule-of-law initiatives.³⁹⁷ Proponents have also emphasized the importance of clinics augmenting legal services to the poor.³⁹⁸ The free market and social justice rationales have coalesced to ignite an increase in financial support, some of which has been used to enlist U.S. clinical educators as program advisors. Since the 1980s, the Ford Foundation has been a key player in South America, where it has brought in U.S. clinicians from American, Wisconsin, Yale, and other schools to assist in the development of clinical programs oriented around human rights.³⁹⁹ The Open Society Institute's clinical initiative was launched in the mid-1990s and has placed more emphasis on using clinics to promote market integration and democratization in Central and Eastern Europe.⁴⁰⁰ Balancing the twin goals of market integration and human rights has been the main thrust of the USAID and World Bank-funded Central and Eastern

396. See THE CYRUS R. VANCE CTR. FOR INT'L JUSTICE INITIATIVES, STRATEGY SUMMIT FOR THE AMERICAS: A PROFESSION SUPPORTIVE OF DEMOCRACY SUMMIT REPORT 4 (2005), available at http://www.nycbar.org/VanceCenter/PDF/strategysummit/English_Final%20Report.pdf.

397. See Aubrey McCutcheon, *University Legal Aid Clinics: A Growing International Presence with Manifold Benefits*, in MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD, *supra* note 352, at 267, 271.

398. See *id.* at 272–73; see also Louise G. Trubek & Jeremy Cooper, *Rethinking Lawyering for the Underrepresented Around the World: An Introductory Essay*, in EDUCATING FOR JUSTICE AROUND THE WORLD: LEGAL EDUCATION, LEGAL PRACTICE AND THE COMMUNITY 1, 8–9 (Louise G. Trubek & Jeremy Cooper eds., 1999).

399. Richard J. Wilson, *Three Law School Clinics in Chile, 1970–2000: Innovation, Resistance and Conformity in the Global South*, 8 CLINICAL L. REV. 515, 555–56 (2002); see also Stephen Golub, *From the Village to the University: Legal Activism in Bangladesh*, in MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD, *supra* note 352, at 127, 144–45 (detailing Ford's clinical initiative in Bangladesh).

400. See Open Society Institute, Europe, <http://www.justiceinitiative.org/activities/lcd/cle/> (last visited Feb. 24, 2008) (describing how Open Society's Central and Eastern Europe Program began in 1996 and has funded nearly seventy-five clinics in twenty-two countries); see also Richard J. Wilson, *Training for Justice: The Global Reach of Clinical Legal Education*, 22 PENN ST. INT'L L. REV. 421, 424–25 (2004).

European Law Initiative of the ABA,⁴⁰¹ a third major source of clinical funding that has recruited U.S. lawyers to help set up refugee, prisoner, and women's rights clinics in Europe, the former Soviet republics, and South Asia.⁴⁰² On top of these philanthropic initiatives, the Fulbright program has also been important in funding U.S. clinicians to spend time at law schools abroad to expand and deepen clinical education curricula.⁴⁰³

In addition to providing technical assistance through rule-of-law programs to support the development of public interest law abroad, U.S. lawyers have also established networks to facilitate connections with foreign counterparts. Technology-based programs have spurred cross-border collaboration. For instance, Lawyers Without Borders was established in 2000 as an e-mail listserv that connects advocates from the developing world with "rule of law needs" to a network of U.S. lawyers, who serve as "global ambassadors" by responding to legal inquiries.⁴⁰⁴ Similarly, the Environmental Law Alliance Worldwide (E-LAW) is a listserv that permits members in over sixty countries to request legal and scientific information, access model environmental policies, and connect with teams of international lawyers in support of environmental campaigns.⁴⁰⁵ Within the legal education arena, the Global Alliance for Justice Education (GAJE) was founded in the late 1990s to facilitate the network of clinical and practice-oriented law school professors from around the world interested in promoting social justice pedagogy.⁴⁰⁶ GAJE has sponsored four global meetings and a series of regional gatherings focused on examining different models of justice education and

401. See CEELI, CEELI Funding, <http://www.abanet.org/ceeli/about/funders.html> (last visited Feb. 24, 2008).

402. See CEELI, CEELI Focal Area: Legal Education Reform, <http://www.abanet.org/ceeli/areas/legaled.html> (last visited Feb. 24, 2008).

403. See Richard J. Wilson, *The New Legal Education in North and South America*, 25 STAN. J. INT'L L. 375, 380–81 n.12 (1989) (discussing the author's Fulbright year in Colombia); Telephone Interview with Frank Bloch, Professor, Vanderbilt Univ. Law Sch. (Aug. 3, 2006) (noting his Fulbright year in India).

404. See Darhiana Mateo, *Pro Bono Goes Global: A Look at Lawyers Without Borders*, BUS. L. TODAY, Jan.–Feb. 2006, at 35, 35.

405. See Laila Weir, *Logging in for the Environment: Environmental Lawyers Around the World Join Forces Via E-LAW*, STAN. SOC. INNOVATION REV., Winter 2005, at 54, 54.

406. See Clark D. Cunningham, *Clinical Education Changing the World and the World Changing Clinical Education: The Global Alliance for Justice Education* (July 14, 2005), available at <http://www.gaje.org/History/Cunningham-AusClinicConf05.htm>.

promoting transnational collaborations, while also creating a listserv to facilitate ongoing communication.⁴⁰⁷

Finally, American LL.M. programs have provided important linkages between the U.S. public interest community and foreign lawyers, who capitalize on U.S. training and contacts to support the development of public interest systems in their home countries. One direct effort to train foreign public interest lawyers was NYU's LL.M. program in Public Service Law,⁴⁰⁸ which was started under the auspices of the Global Public Service Law Project initiated in 1998 to examine global public interest models and promote cross-cultural collaboration and training.⁴⁰⁹ Though the program suspended operations in 2006 for lack of funding, it succeeded during its tenure in producing graduates who returned to public interest law positions in Africa, East Timor, the Philippines, and Argentina.⁴¹⁰ At Georgetown, the law school has sponsored a Leadership and Advocacy for Women in Africa program since 1993 that provides an LL.M. to African lawyers committed to returning to their countries of origin to advocate for women's rights; the program includes academic training, a six-month internship with a D.C.-area public interest or governmental organization, and public interest seminars designed to expose students to U.S. public interest methodologies.⁴¹¹ Like the efforts around access to justice and clinical education, the goal of U.S.-based training is to produce lawyers who will carry with them the ideology and technique of U.S.-style public interest law to build institutional systems abroad.

C. Norms

As the rule-of-law movement abroad underscores, the public interest impulse outside U.S. borders is articulated in the language of human rights, which proponents seek to embed in embryonic legal systems to counter the deregulatory thrust of market integration and

407. See Telephone Interview with Frank Bloch, *supra* note 403.

408. See New York University School of Law, Global Public Service Law Project: LL.M. in Public Service Law, <http://www.law.nyu.edu/programs/globalpublicservice/llm/index.html> (last visited Feb. 24, 2008).

409. See John E. Sexton, *The Global Law School Program at New York University*, 46 J. LEGAL EDUC. 329, 335 (1996).

410. See New York University, Global Public Service Law Project: Focus on Alumni, available at <http://www.law.nyu.edu/programs/globalpublicservice/about/alumni.pdf>.

411. See Mary Hartnett, *The Need for International Women's Human Rights Lawyers: Now More than Ever*, HUM. RTS., Summer 2002, at 21, 21.

to assert in international political institutions (like the UN) as a bulwark against the power of international financial institutions (like the WTO). Human rights is thus viewed as a way to infill the multiple fissures in global governance with laws of uniform consistency—to globalize a set of universal political norms to act as a countervailing force against economic globalization. For U.S. public interest lawyers, the interest in “bringing human rights home,”⁴¹² represents the optimism of this international human rights movement, but also a pragmatic acknowledgment of the limits of domestic law to produce political change at home. The picture of American public interest lawyers—who a generation ago championed the transformation of domestic law for progressive ends—now turning to human rights as a master frame for social change highlights the contrasting fortunes of public interest law at home and its human rights counterpart abroad. It also suggests the strong influence of changing U.S. policy on the circuitous path of human rights domestication. Whereas the international human rights system promoted in the Cold War era was, in part, a way to *export* American-style public interest law to activists in foreign countries resisting authoritarian regimes, the current U.S. human rights movement represents an effort by public interest lawyers to *import* the very norms and methods built through international struggle to contest what they view as the erosion of domestic legal standards resulting from new American policy imperatives: market integration, conservatism, and the War on Terror.

1. *Process.* The new interest in human rights among public interest lawyers has been seen in the increasing number and range of groups launching domestic human rights projects, incorporating human rights arguments into domestic litigation, and taking domestic causes to international human rights bodies. This Section examines the major organizational actors promoting domestic human rights and traces the strategies they have employed to import international norms into domestic practice.

412. See Maria Foscarinis, *Advocating for the Human Right to Housing: Notes from the United States*, 30 N.Y.U. REV. L. & SOC. CHANGE 447, 453 (2006) (“[T]he Ford Foundation organized a day-long conference called ‘Bringing Human Rights Home,’ highlighting the domestic use of human rights strategies and encouraging funders to support such efforts.”).

a. Institutions. The lure of human rights for U.S. lawyers has grown against the backdrop of expanding institutional opportunities for human rights advocacy at the international level. Beginning in the late 1960s, the UN Commission on Human Rights enlarged its power to hear and respond to complaints of human rights violations. First, the Commission created a procedure to allow NGOs to identify country-specific human rights violations at its annual session and authorized the investigation of gross violations.⁴¹³ Second, the Commission established a procedure to examine individual complaints alleging a “consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms” in any country in the world.⁴¹⁴ These procedures, combined with a parallel system for individual complaints established under treaty-based committees,⁴¹⁵ created new opportunities for advocates to raise specific allegations of human rights violations within UN deliberative bodies as a means of mobilizing international pressure for domestic change. These mechanisms grew in importance in the late 1970s and 1980s, as the Commission started to apply them with greater force to a broader range of countries and violations.⁴¹⁶ During the same period, the regional Inter-American human rights system began to develop as an important venue for contesting governmental abuse in Latin America, with the Inter-American Commission on Human Rights empowered both to examine individual claims of human rights violations and investigate countrywide human rights conditions.⁴¹⁷ These changes widened the scope of participation for NGOs within key human rights institutions and thus stimulated the growing movement to enforce human rights within the international system.⁴¹⁸

413. See U.N. Econ. & Soc. Council [ECOSOC] Res. 1235 (XLII), U.N. Doc. E/4393 (June 6, 1967).

414. ECOSOC Res. 1503 (XLVIII), U.N. Doc. E/4832/Add.1 (May 27, 1970). In the 1980s, the Commission also began to initiate inquiries into “thematic”—as opposed to country-specific—violations, initially focused on investigating the disappearances under Argentina’s military dictatorship. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 641–42 (2000).

415. The International Covenant on Civil and Political Rights created a Human Rights Committee empowered to issue human rights reports and hear individual complaints. See G.A. Res. 2200 (XXI), U.N. Doc. A/6316 (Dec. 16, 1966).

416. STEINER & ALSTON, *supra* note 414, at 613, 620.

417. See Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 *HUM RTS. Q.* 439, 440–43 (1990).

In a prominent example of the emerging power of human rights enforcement, human rights groups combined traditional “naming and shaming” documentation efforts with advocacy in the UN and Inter-American systems to pressure the Argentinian military dictatorship to cease the “disappearances” of political opponents.⁴¹⁹

b. Sponsors. International human rights activism moved forward with the key financial support of the Ford Foundation, which made significant investments in human rights in South America as a way of opposing the U.S. Cold War alliance with repressive authoritarian leaders.⁴²⁰ In 1978, Ford funded what would become two of the most important U.S.-based international NGOs: the Lawyers Committee for Human Rights (now Human Rights First) and the International Human Rights Law Group (now Global Rights).⁴²¹ As Reagan’s election again pushed anticommunism to the fore, Ford increased its investment in human rights in the 1980s to support democratic movements, transforming the field of international human rights NGOs, which more than doubled between 1983 and 1993.⁴²²

The geographic division of labor that evolved through the 1980s—with U.S. legal groups focused on domestic rights at home and international groups promoting human rights abroad—bore the strong imprint of Ford, which viewed domestic and human rights strategies as two sides of the same coin.⁴²³ This division began to break down within Ford in the 1990s. One influence was the increasing

418. On the role of NGOs in the human rights movement generally, see David Weissbrodt, *The Role of International Nongovernmental Organizations in the Implementation of Human Rights*, 12 TEX. INT’L L.J. 293 (1977), updated and reprinted in David Weissbrodt, *The Contribution of International Nongovernmental Organizations to the Protection of Human Rights*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 403 (Theodor Meron ed. 1984).

419. See KECK & SIKKINK, *supra* note 31, at 103–10.

420. See Yves Dezalay & Bryant G. Garth, *Constructing Law Out of Power: Investing in Human Rights as an Alternative Political Strategy*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA, *supra* note 10, at 354, 363; Frühling, *supra* note 352, at 60–63.

421. See Dezalay & Garth, *supra* note 420, at 363.

422. Ford Foundation grants for international human rights work grew from nearly \$2 million in 1983 to nearly \$9 million in 1993. See KECK & SIKKINK, *supra* note 31, at 99 fig.2. During the same period, the number of international human rights NGOs grew from 79 to 168. See *id.* at 11 tbl.1.

423. The Ford Foundation’s ten-year public interest funding campaign, which was the key stimulus to the nascent field, formally ended in 1981, see FORD FOUND., ANNUAL REPORT 1981, at 8 (1981), at the same moment that Ford made human rights one of its five major program areas, see FORD FOUND., ANNUAL REPORT 1982, at 20 (1982).

frustration with domestic rights litigation that had been mounting through the 1980s.⁴²⁴ So long as domestic strategies had proven successful, Ford saw no need to promote human rights on the domestic front, viewing human rights as a potential distraction from the project of building progressive domestic legal precedent. Yet when the limits of the domestic rights framework became apparent, Ford began to explore the possibility of developing alternative strategies, including the incorporation of human rights. In addition, there was increasing concern within Ford about the damage to the global human rights movement caused by American exceptionalism, which was fueled by complaints from overseas grantees who saw hypocrisy in the United States's resistance to the adoption of international standards.⁴²⁵

It was against this backdrop that Ford moved to integrate its human rights and public interest law programs. In the late 1990s, Ford's strategy emphasized technical assistance and networking to build the domestic human rights field. In 1997, Ford provided support to the Human Rights USA campaign to assess attitudes toward human rights in the United States and funded the International Human Rights Law Group and the Lawyers Committee for Human Rights to train domestic legal groups to use human rights more effectively.⁴²⁶ Ford then sponsored a meeting of domestic advocates to develop strategies for introducing human rights into U.S. public interest law, which resulted in the formation of the U.S. Human Rights Network,⁴²⁷ and helped to launch Columbia's Human Rights Institute to facilitate domestic human rights training.⁴²⁸

After 9/11, Ford began to provide direct support to domestic groups applying international human rights. For instance, in 2002, the foundation funded a number of organizations to protect the human rights of noncitizens in the wake of 9/11;⁴²⁹ in 2003, Ford funded the Lawyers Committee for Civil Rights in San Francisco and New

424. Telephone Interview with Larry Cox, Senior Program Officer for Int'l Human Rights, Ford Found. (Oct. 13, 2005).

425. *Id.*

426. FORD FOUND., 1997 FORD FOUNDATION ANNUAL REPORT 79 (1997).

427. See U.S. HUMAN RIGHTS NETWORK, SOMETHING INSIDE SO STRONG: A RESOURCE GUIDE ON HUMAN RIGHTS IN THE UNITED STATES 7 (2003).

428. See FORD FOUND., ANNUAL REPORT 2001, at 120 (2001), available at <http://www.fordfound.org/pdfs/impact/ar2001.pdf>.

429. FORD FOUND., ANNUAL REPORT 2002, at 70–72, 74 (2002), available at <http://www.fordfound.org/pdfs/impact/ar2002.pdf>.

York's Center for Economic and Social Rights to build domestic human rights programs;⁴³⁰ and in 2004, Ford made a \$1 million human rights grant to the ACLU.⁴³¹ Unable to fund all of the growing domestic human rights activity, Ford also began to promote the concept to other funders, publishing a series of case studies of successful Ford grantees,⁴³² and helping to launch the U.S. Human Rights Fund in 2005 to provide \$10 million to support a "strategic, field building initiative that aims to promote human rights in the United States."⁴³³ Partly as a result of Ford's leadership, other important foundations entered the domestic human rights field, including the Open Society Institute.⁴³⁴

Fellowship programs have also played a key role in funding highly credentialed lawyers to undertake human rights work for limited periods, allowing them to gain entry into the field and develop professional skills and networks.⁴³⁵ There are a small number of organization-based programs that internally fund fellows to do human rights work at the host site. For instance, the ACLU and Human Rights Watch instituted a two-year Aryeh Neier Fellowship to honor the leadership of Neier, who was the first director of Human Rights Watch,⁴³⁶ while Human Rights Advocates created an internship program to fund law students to attend sessions of the UN and make arguments in front of international bodies.⁴³⁷ Nationally, the prestigious Skadden Fellowship program, which has traditionally focused on domestic public interest law advocacy, has dedicated one of its fellowship positions to support international human rights.⁴³⁸ At

430. FORD FOUND., ANNUAL REPORT 2003, at 64, 66 (2003), available at <http://www.fordfound.org/pdfs/impact/ar2003.pdf>.

431. FORD FOUND., ANNUAL REPORT 2004, at 61 (2004), available at <http://www.fordfound.org/pdfs/impact/ar2004.pdf>.

432. FORD FOUND., *supra* note 12.

433. U.S. Human Rights Fund, About the US Human Rights Fund, <http://www.ushumanrightsfund.org/about> (last visited Feb. 24, 2008).

434. E-mail from Kate Black, Open Soc'y Inst., to SJ-Fellows Listserv (Oct. 27, 2005).

435. See generally HARVARD LAW SCHOOL, SERVING THE PUBLIC: A JOB SEARCH GUIDE, VOLUME II-INTERNATIONAL, 2005-2006, at 126-52.

436. Human Rights Watch, 2007-2009 Aryeh Neier Fellowship, <http://www.hrw.org/about/info/hrw-aclu-fellowship.html> (last visited Feb. 24, 2008).

437. Human Rights Advocates, Frank C. Newman Internship Program, <http://www.humanrightsadvocates.org/frank.html> (last visited Feb. 24, 2008).

438. Skadden Fellowship Foundation, List of Fellows, About the Foundation, <http://www.skaddenfellowships.org/sitecontent.cfm?page=recentFellows&listYear=2007> (last visited Feb. 24, 2008) (listing Adam Weiss's project in London to provide "legal assistance

the law school level, Yale's Robert L. Bernstein Fellowship in International Human Rights has funded two recent Yale Law School graduates to undertake human rights work for one year.⁴³⁹ These programs, though not exclusively targeted at domestic human rights work, break down barriers between public interest law and human rights by exposing domestic lawyers to human rights methodologies and producing high-prestige lawyers who circulate between the domestic and international fields.

c. Education. While increased funding has strengthened demand for domestic human rights advocates, law school human rights programs have operated to reinforce supply. Indeed, law schools have become important incubators of domestic human rights practice, exposing students to the theoretical and practical dimensions of human rights law and connecting domestic students to efforts by foreign counterparts around the world. Since the early 1980s, there has been a notable expansion in the number of international human rights courses offered within the law school curriculum,⁴⁴⁰ as well as an increase in human rights centers.⁴⁴¹

From an advocacy perspective, a key dimension of this international trend is the rise in human rights clinical courses.⁴⁴² Two of the earliest and most influential clinics were started at Yale in 1989 and American University's Washington College of Law in 1990.⁴⁴³

under European law for low-income EU nationals and their families migrating within Europe with a special focus on sexual minorities”).

439. Yale Law School, Bernstein Fellowship, <http://www.law.yale.edu/intellecualife/bernsteinfellowship.htm> (last visited Feb. 24, 2008). The University of Minnesota Human Rights Center provides fellowships for residents of the Upper Midwest to undertake short-term placements in human rights organizations. See University of Minnesota Human Rights Center, Upper Midwest Human Rights Fellowship Program, 2008 Guidelines and Application, <http://www1.umn.edu/humanrts/center/uppermidwest/guidelines.html>.

440. See Peter Rosenblum, *Teaching Human Rights: Ambivalent Activism, Multiple Discourses, and Lingering Dreams*, 15 HARV. HUM. RTS. J. 301, 302 (2002).

441. Examples of human rights centers include American University Washington College of Law's Center for Human Rights and Humanitarian Law (1990); Fordham's Joseph R. Crowley Program in International Human Rights (1997); Indiana's Program in International Human Rights Law (1997); Northwestern's Center for International Human Rights (1998); Columbia's Human Rights Institute (1998); Iowa's Center for Human Rights (1999); Florida State's Center for the Advancement of Human Rights (2000); NYU's Center for Human Rights and Global Justice (2002); and Northeastern's Program on Human Rights and the Global Economy (2005).

442. See Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505, 548 (2003).

443. See RICHARD J. WILSON ET AL., THE WORK OF THE INTERNATIONAL HUMAN RIGHTS LAW CLINIC AT AMERICAN UNIVERSITY: TWELVE YEARS OF OPERATION 3 (May 2002).

Although both clinics have privileged international over domestic approaches to human rights, they have evolved in slightly different directions that have reinforced connections between human rights and public interest law. The Yale clinic has emphasized human rights litigation in U.S. courts, bringing the high-profile challenge to the U.S. government's detention of Haitian refugees in Guantánamo Bay,⁴⁴⁴ and winning the first federal court ruling applying the ATS to human rights violations committed by non-state actors.⁴⁴⁵ Though Yale's clinic has not specifically promoted domestic human rights, it has been a venue for public interest-minded students to experiment with human rights advocacy, producing graduates who have gone on to play important roles bringing international strategies into the domestic public interest arena.⁴⁴⁶ American's clinic has split its focus between political asylum and human rights,⁴⁴⁷ and has gained attention for its work within the Inter-American Commission on Human Rights,⁴⁴⁸ where clinic students have filed a number of cases targeting disappearances, the detention of political prisoners, and the forced displacement of indigenous peoples.⁴⁴⁹ The clinic has been a pioneer in using the Commission as a venue to challenge U.S. practices, bringing early death penalty cases and playing a key role coordinating a hearing to air complaints about the United States's treatment of immigrant workers in the wake of *Hoffman Plastics*.⁴⁵⁰

444. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 158 (1993).

445. *Kadic v. Karadzic*, 70 F.3d 232, 236, 239 (2d Cir. 1995).

446. These graduates include Fordham's Catherine Powell, Yale's Michael Wishnie, and Texas's Sarah Cleveland. See Sarah H. Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533 (1998) (book review); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001); Wishnie, *supra* note 238.

447. Telephone Interview with Richard Wilson, Professor of Law & Founding Dir., Int'l Human Rights Clinic (July 12, 2006).

448. See *id.*

449. See WILSON ET AL., *supra* note 443, at 15–17.

450. See EMPLOYMENT RIGHTS ARE HUMAN RIGHTS: STORIES OF UNDOCUMENTED WORKERS: THE DENIAL OF EMPLOYMENT RIGHTS DUE TO IMMIGRATION STATUS 5–10 (Anais Sensiba & Shaun Yavrom eds., 2d ed. 2005) [hereinafter EMPLOYMENT RIGHTS ARE HUMAN RIGHTS]. In addition, Richard Wilson, the director of American's clinic, has also worked closely with U.S. NGOs and clinics to promote human rights advocacy. See, e.g., RICHARD J. WILSON & JENNIFER RASMUSSEN, PROMOTING JUSTICE: A PRACTICAL GUIDE TO STRATEGIC HUMAN RIGHTS LAWYERING (International Human Rights Law Group, 2001); Richard Wilson, *Clinical Legal Education for Human Rights Advocates*, in HUMAN RIGHTS EDUCATION FOR THE TWENTY-FIRST CENTURY (George J. Andreopolis & Richard Pierre Claude eds., 1996).

Following these programs, about fifteen human rights clinics have been established since the early 1990s. Some have focused specifically on women's issues,⁴⁵¹ others have emphasized immigration,⁴⁵² and the rest have taken on a broad range of international human rights issues,⁴⁵³ with the overall focus on civil and political—as opposed to economic and social—rights. Although these programs have a variety of structures and focus on different elements of advocacy,⁴⁵⁴ they have generally served to expose American law students to international human rights problems and methodologies,⁴⁵⁵ while also offering resources to support the work of academics and lawyers in the human rights field.

d. Entrepreneurs. The evolution of clinic programs, spurred by the leadership of pioneering clinic directors, highlights the broader importance of entrepreneurialism as a factor in spreading human rights techniques within public interest law.⁴⁵⁶ From a practice standpoint, though many groups have shaped the domestic human rights field, two have made distinct contributions. The Center for Constitutional Rights (CCR) has played a key role in designing and executing test-case litigation to embed human rights within American law, gaining wide notoriety for resuscitating the ATS as a tool to

451. *E.g.*, CUNY School of Law, Clinical Programs: International Women's Human Rights: Program Overview, <http://www.law.cuny.edu/clinics/clinicalofferings/IWHRC.html> (last visited Feb. 24, 2008); Georgetown Law, International Women's Human Rights Clinic, <http://www.law.georgetown.edu/clinics/iwhrc/> (last visited Feb. 24, 2008).

452. Examples include Connecticut Law School's Asylum and Human Rights Clinic, Seton Hall's Immigration and Human Rights Clinic, and St. Mary's Immigration and Human Rights Clinic.

453. Examples include NYU's International Human Rights Clinic (1992), Berkeley's International Human Rights Law Clinic (1998), Columbia's Human Rights Clinic (1998), the University of San Francisco's International Human Rights Law Clinic (1998), Illinois's International Human Rights Clinic (2001), Harvard's Human Rights Clinic (2002), Seattle University's International Human Rights Clinic (2002), Virginia's Human Rights Clinic (2003), George Washington's International Human Rights Clinic (2004), and Cardozo's Human Rights and Genocide Clinic (2005). See Hurwitz, *supra* note 442, at 549.

454. Arturo J. Carrillo, *Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process*, 35 COLUM. HUM. RTS. L. REV. 527, 531–34 (2004).

455. See Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 59 (2000).

456. Margaret E. Keck & Kathryn Sikkink, *Transnational Advocacy Networks in International and Regional Politics*, 51 INT'L SOC. SCI. J. 89, 91 (1999); see also Anthony J. Nonnes & Grant Neeley, *Public Interest Group Entrepreneurship and Theories of Group Mobilization*, 49 POL. RES. Q. 119 (1996).

attack human rights abuse.⁴⁵⁷ After their success in the landmark *Filartiga* case, CCR attorneys worked to systematically expand the reach of the ATS,⁴⁵⁸ enlarging the number of torts deemed to constitute human rights violations for purposes of the statute, while also extending the range of potential defendants.⁴⁵⁹ As a result of CCR's advocacy, the ATS has gained attention from activists and academics in the human rights field,⁴⁶⁰ while CCR lawyers have become critical transmitters of information on human rights, conducting trainings on ATS litigation,⁴⁶¹ authoring books and articles on human rights,⁴⁶² and speaking at conferences and media events.

Unlike CCR, whose domestic work has grown out of its long-standing commitment to internationalism, the ACLU's emergence as a leading proponent of domestic human rights reflects the ascendance of internationalism within a group historically committed to domestic public interest law. The ACLU did have a limited tradition of human rights work and adopted a formal policy recognizing that "international human rights are significant to the ACLU" in 1973.⁴⁶³ Because of ambivalence among board and staff, however, human rights did not occupy a significant place on the ACLU's agenda during this period. Paul Hoffman, who was the legal director of the ACLU of Southern California from 1984 to 1994, took up the mantle of human rights, persuading the board to approve UN advocacy and

457. Center for Constitutional Rights, Fact Sheet ATCA: Pioneering the Field of Civil Human Rights Law, <http://ccrjustice.org/learn-more/faqs/factsheet%3A-alien-tort-statute> (last visited Feb. 24, 2008). The Center for Justice and Accountability in San Francisco has also been a leader in applying the ATS to foreign human rights violators. The Center for Justice and Accountability, About CJA, <http://www.cja.org/aboutCJA/aboutCJA.shtml> (last visited Feb. 24, 2008).

458. Telephone Interview with Michael Ratner, President, Ctr. for Constitutional Rights (July 12, 2006).

459. *See id.*

460. *E.g.*, Jacques deLisle, *Human Rights, Civil Wrongs and Foreign Relations: A "Sinical" Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DEPAUL L. REV. 473, 481–82 (2002).

461. *See* Michael Ratner, Representing the Guantanamo Detainees Presentation at the Human Rights at Home: International Law in U.S. Courts Conference, *available at* <http://www.aclu.org/hrc/RatnerPresentationon.pdf> (discussing ATS claims for Guantánamo detainees).

462. *E.g.*, BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (1996).

463. Memorandum from Ann Beeson, Steve Shapiro & Anthony D. Romero to the ACLU Executive Comm. 2 (Apr. 2005) (detailing ACLU human rights work) (on file with the *Duke Law Journal*).

human rights litigation as part of the ACLU's mission;⁴⁶⁴ the group's overall human rights work during this period, however, was limited by staff capacity and political resistance.⁴⁶⁵ Anthony Romero, who left the Ford Foundation's human rights program to become the ACLU's national executive director in 2001,⁴⁶⁶ picked up the human rights strand initiated by Hoffman and—spurred by 9/11—made major investments in the domestic human rights program. After convening a national conference entitled *Human Rights at Home* in 2003,⁴⁶⁷ the ACLU launched a Human Rights Working Group “to apply human rights strategies to the ACLU's work on national security issues, immigrants' rights, women's rights, and criminal justice.”⁴⁶⁸ As a result, the ACLU has increased its human rights litigation and UN advocacy.⁴⁶⁹ In addition, the ACLU has deliberately sought to raise the profile of domestic human rights issues, publishing human rights reports, sponsoring conferences, and actively promoting human rights in the press.⁴⁷⁰

e. Networks. The ACLU's role in reaching out to public interest lawyers and transmitting human rights strategies is part of the broader development of a domestic human rights network, which has emerged over the last decade as an ensemble of groups seeking to mobilize resources within the human rights system to influence U.S.

464. Telephone Interview with Paul Hoffman, Partner, Schonbrun DeSimone Seplow Harris & Hoffman LLP (July 24, 2006). During his tenure, Hoffman also launched the ACLU's annual International Civil Liberties Report. See Paul Hoffman & Nadine Strossen, *Enforcing International Human Rights Law in the United States*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY (1994). Hoffman, who founded a small law firm in Los Angeles after leaving the ACLU, continues to play an active role in the human rights field, litigating *Sosa v. Alvarez-Machain*, 542 U.S. 692, 695 (2004), with the ACLU and *Doe I v. Unocal Corp.*, 395 F.3d 932, 936 (9th Cir. 2002), with the Center for Constitutional Rights.

465. See Beeson, Shapiro & Romero, *supra* note 463, at 7.

466. Telephone Interview with Anthony Romero, Executive Dir., ACLU (Dec. 27, 2005).

467. See ACLU, *Human Rights at Home: International Law in U.S. Courts*, <http://www.aclu.org/hrc> (last visited Sept. 23, 2007).

468. See Press Release, ACLU, *Advocates Urge Accountability for U.S. Abuse of Power and Hurricane Katrina's Human Rights Crisis* (Mar. 16, 2006), available at <http://www.aclu.org/intlhumanrights/gen/24573prs20060316.html>; Press Release, ACLU, *Citing Growing Abuses, ACLU Intensifies International Human Rights Advocacy in the United States* (Dec. 6, 2004), available at <http://www.aclu.org/International/International.cfm?ID=17150&c=36>.

469. See Ann Beeson & Paul Hoffman, *Introduction to ACLU, INTERNATIONAL CIVIL LIBERTIES REPORT 1* (2004).

470. *E.g.*, HUMAN RIGHTS WATCH & ACLU, *HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES: A REPORT ON U.S. COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (1993).

policy.⁴⁷¹ As part of a strategy of U.S. human rights “socialization,”⁴⁷² network actors have operated in loose coordination to access outside institutions to amplify their claims, share information on tactics and goals, and train new organizations in human rights techniques.⁴⁷³

In the United States, network building has occurred with different degrees of organizational formality and coordination. Connections have been forged through informal contacts between public interest and human rights lawyers, which are facilitated by the physical proximity of flagship public interest groups and the human rights community in the New York–Washington, D.C. corridor, as well as professional movement by lawyers between the two sectors.⁴⁷⁴ There are also public-private networks, as big law firms have partnered with public interest groups on human rights cases, while feeding associates with international law experience into the public interest field.

Transnational linkages have also been stimulated by the institution of regular UN conferences,⁴⁷⁵ which connect U.S. advocates with their counterparts abroad and thus provide opportunities for sharing strategies, while situating U.S. activism within a broader frame of human rights struggle.⁴⁷⁶ In addition to networking, these conferences have permitted domestic lawyers to become familiar with substantive human rights standards, understand the procedures governing UN human rights bodies, and directly engage in UN-level advocacy. Domestically, conferences have spurred the formalization of networks between public interest lawyers and human rights advocates. One important initiative has been the U.S. Human Rights

471. Keck & Sikkink, *supra* note 456, at 93.

472. See Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction to THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 1, 8–15 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999).

473. See Keck & Sikkink, *supra* note 456, at 90, 92, 95.

474. For instance, Ann Beeson, Associate Legal Director for the ACLU, came from Human Rights Watch, while Dalia Hashad, USA Program Director for Amnesty International USA, and Catherine Albisa, Executive Director of the National Economic and Social Rights Initiative, came from the ACLU.

475. The 1995 UN World Conference on Women is often cited as a major stimulus to the development of international contacts and strategies within the women’s rights movement. See Schneider, *supra* note 359, at 689–90.

476. It is for this reason that the Ford Foundation funded travel for the participation of U.S. groups in the UN meetings on the environment in Rio de Janeiro, human rights in Vienna, women in Beijing, and racism in Durban. See FORD FOUND., *supra* note 12, at 8.

Network, which formed after a Howard University Law School conference in 2002 to “assess, strengthen and expand the use of human rights in the United States,”⁴⁷⁷ and has since brought together lawyers and grassroots activists across disciplines to advance the “U.S. Human Rights Movement.”

Other organizations have been established to facilitate information exchange and provide technical assistance to strengthen the capacity of public interest groups to apply human rights. Columbia Law School’s Bringing Human Rights Home project is one of the most prominent network actors. Established in 1998 to build the capacity of U.S. lawyers to apply human rights domestically, it sponsors a “Lawyers Network” that has over eighty member organizations,⁴⁷⁸ and works with Columbia’s Human Rights Clinic to train public interest lawyers in human rights law.⁴⁷⁹ The project also conducts research on human rights legal theories and provides backup support to legal groups bringing human rights claims in U.S. courts and international bodies,⁴⁸⁰ while hosting the U.S. Human Rights Online section of *probono.net*, a web-based information clearinghouse.⁴⁸¹

The flow of ideas and tactics across the domestic human rights network has been a two-way street: while domestic public interest groups have incorporated international techniques, internationally focused groups have launched domestic programs—reflecting cross-fertilization, but also competition for funding and status. Long a major supporter of human rights litigation abroad, Global Rights launched a U.S. project in 1998, with funding from the Ford and MacArthur foundations, in response to pressure from international partner organizations that chafed at the United States’s role in exporting human rights abroad while failing to abide by their

477. See U.S. HUMAN RIGHTS NETWORK, SOMETHING INSIDE SO STRONG, *supra* note 427, at 7.

478. Members include the NAACP, ACLU, Asian American Legal Defense and Education Fund, and Legal Momentum, as well as major human rights organizations like Amnesty International, Human Rights Watch, and Human Rights First. Telephone Interview with Cynthia Soohoo, Dir., Bringing Human Rights Home (Sept. 28, 2005).

479. See Columbia Law School, Bringing Human Rights Home Program, http://www.law.columbia.edu/center_program/human_rights/BHRH (last visited Feb. 24, 2008).

480. See FORD FOUND., *supra* note 12, at 40.

481. See *probono.net*, Human Rights, <http://www.ushumanrightsonline.net/index.cfm> (last visited Feb. 24, 2007).

mandates at home.⁴⁸² The project has since worked to assist groups in filing human rights amicus briefs in U.S. courts,⁴⁸³ litigating ATS cases, bringing Inter-American petitions, and undertaking advocacy within the UN.⁴⁸⁴ Amnesty International started its USA Program in 2001, again with Ford funding, initially focusing on criminal justice issues, particularly around prison conditions and racial profiling, and more recently expanding into the areas of border enforcement, Katrina displacement, and War on Terror policies.⁴⁸⁵ Human Rights First has also moved to apply human rights domestically, launching its post-9/11 domestic U.S. Law and Security Program focused on War on Terror detention and intelligence gathering practices,⁴⁸⁶ while Human Rights Watch has started a U.S. project on workers' rights.⁴⁸⁷

f. Venues. Whereas the classic public interest law model centered on precedent-setting federal court litigation, domestic human rights advocacy seeks to incorporate human rights norms through “multiple ports of entry.”⁴⁸⁸ By no means have domestic human rights advocates eschewed the high-stakes federal court case, as ATS litigation underscores. But they have also gone outside of the federal courts—by choice and out of necessity—targeting other venues of influence to advance human rights agendas: the UN and Inter-American regimes “above” the federal system and local

482. Telephone Interview with Jennifer Rasmussen, Deputy Dir. for Core Program Design, Global Rights (July 16, 2006).

483. Global Rights filed an amicus brief in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), see Brief for Global Rights as Amicus Curiae Supporting Respondents, *id.* (No. 03-1027), and was one of several amici in *Medellin v. Dretke*, 544 U.S. 660 (2005), which challenged the United States's failure to apply the Vienna Convention to Mexican nationals on death row, see Brief for Bar Associations and Human Rights Organizations as Amici Curiae Supporting Petitioner, *id.* (No. 04-5928).

484. Telephone Interview with Jennifer Rasmussen, *supra* note 482.

485. Telephone Interview with Dalia Hashad, USA Program Dir., Amnesty Int'l USA (July 18, 2006).

486. Telephone Interview with Hina Shamsi, Senior Counsel, U.S. Law and Sec. Program (July 23, 2006); see also Human Rights First, Program Areas at Human Rights First, <http://www.humanrightsfirst.org/issues.htm> (last visited Feb. 24, 2008) (describing the group's “U.S. Law and Security” program). Human Rights First also has a long-standing program in support of asylum seekers, directed during its early years by the leading refugee and asylum advocate Arthur Helton. See Press Release, Human Rights First, Human Rights First Mourns Death of Arthur C. Helton in U.N. Bombing (Aug. 20, 2003), available at http://www.humanrightsfirst.org/media/2003_alerts/0820.htm.

487. Jenkins & Cox, *supra* note 68, at 28.

488. Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1579 (2006).

legislative bodies “below.” The range of tactics slides along a spectrum of legalism: traditional litigation when there are domestic legal hooks and acceptable targets, quasi-judicial international tribunals when the goal is to enlist international pressure and gain the imprimatur of legal authority, and grassroots legal activism when local legislative actors are more amenable to human rights claims than central decisionmakers.

i. Courts. Despite their limitations from the perspective of liberal law reformers, federal courts nonetheless remain a critical site for advancing human rights, given their prestige as the most important arbiters of American law. Though there is a great deal of controversy over whether U.S. courts should consider international sources,⁴⁸⁹ the availability of routes to present human rights claims in domestic courts,⁴⁹⁰ combined with the receptiveness of some judges to international arguments, has stimulated action. In an effort to embed human rights precedent within American jurisprudence, domestic advocates have developed two related strategies. One is the deployment of human rights to *determine case outcomes*: human rights claims are asserted with the goal of having a court incorporate them as the formal grounds of adjudication. The other is the use of human rights for the purpose of *reinforcing case outcomes*: human rights claims are raised not to provide the actual grounds for decision, but to explain the international legal context to reinforce the propriety of a decision on domestic law grounds.⁴⁹¹

The outcome-determinative use of human rights is framed by opportunities to advance claims under substantive law and jurisdictional rules.⁴⁹² The starting point for litigators is thus the Constitution, which proclaims treaties the “supreme Law of the Land,”⁴⁹³ and federal common law, which accords the same status to

489. See Ann-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1118–19 (2000).

490. See FRANCISCO FORREST MARTIN, CHALLENGING HUMAN RIGHTS VIOLATIONS: USING INTERNATIONAL LAW IN U.S. COURTS 67–78 (2000) (discussing federal and state court jurisdiction over international human rights claims).

491. See Stephen A. Rosenbaum, *Pro Bono Publico Meets Droits de L'Homme: Speaking a New Legal Language*, 13 LOY. L.A. INT'L & COMP. L. REV. 499, 502–03 (1991).

492. See Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 10–17 (2002).

493. U.S. CONST. art. VI, cl. 2.

customary international law.⁴⁹⁴ Yet steep jurisdictional barriers to litigating treaty-based violations,⁴⁹⁵ as well as legal constraints on customary international law claims,⁴⁹⁶ have limited efforts to raise human rights directly in federal courts.

An alternative human rights litigation strategy has centered on the extension of the ATS,⁴⁹⁷ traditionally used to target *foreign* governmental and corporate actors, as a tool to hold *domestic actors* accountable for human rights violations in U.S. courts. The domestic ATS cases can be grouped into two broad categories based on the identity of the defendants as governmental or private actors. Both categories, by virtue of the statutory mandate, have involved the assertion of rights by immigrants or noncitizen detainees.

In suits against governmental defendants, public interest lawyers have made limited use of the ATS to challenge federal detention practices as contrary to international law, contesting inhumane conditions for asylum seekers,⁴⁹⁸ and the mistreatment of immigrant detainees.⁴⁹⁹ After 9/11, CCR has used the ATS as part of its effort to contest the detention and torture of Guantánamo detainees,⁵⁰⁰ and the roundup and detention of Arab and South Asian Muslims immigrants

494. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. j (1987) (“Customary law and law made by international agreement have equal authority as international law.”).

495. Within American law, international treaties are not deemed “self-executing,” and because the United States has ratified most of its human rights treaties with “reservations” as to their legal effect, they cannot be enforced through private actions in court. See Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71, 109–10 (2000).

496. U.S. courts have been reluctant to extend customary law beyond core *jus cogens* proscriptions, such as genocide, slavery, and torture. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. k (1987). And courts have issued contradictory rulings about whether customary law claims arise under federal law for jurisdictional purposes. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 & n.19 (2004).

497. See Jeffrey Davis, *Justice Without Borders: Human Rights Cases in U.S. Courts*, 28 LAW & POL’Y 60, 62–63 (2006).

498. See, e.g., *Jama v. U.S. Immigration & Naturalization Serv.*, 343 F. Supp. 2d 338 (D.N.J. 2004) (granting in part and denying in part a motion to dismiss ATS claims against the Immigration and Naturalization Service and its private contractor for torture, beatings, and other mistreatment of asylum seekers held in detention).

499. See, e.g., *Papa v. United States*, 281 F.3d 1004, 1008 (9th Cir. 2002) (reversing the dismissal of ATS claims in a suit by Brazilian citizen Lucia Papa and her six children against the Immigration and Naturalization Service for the death of Papa’s husband).

500. See *Rasul v. Bush*, 542 U.S. 466, 472 (2004).

on security grounds.⁵⁰¹ On the private defendant side, immigrant plaintiffs have used the ATS to sue their domestic employers for egregious labor violations that are alleged to cross the line of international law. Attorneys at the NYU Immigrant Rights Clinic pioneered these cases, which involved undocumented domestic workers claiming that their employers held them in servitude, forcing them to work long hours under onerous conditions for little or no pay.⁵⁰² Yet these innovative efforts to extend the ATS have been met by their own jurisdictional constraints. On the governmental defendant side, the issue of U.S. sovereign immunity and the exclusivity of other remedies against governmental officials limit the potential scope of ATS's jurisdictional hook;⁵⁰³ on the private defendant side, immunity has confounded some of the domestic worker cases brought against foreign diplomats,⁵⁰⁴ while the issue of private employer liability under the ATS remains unresolved.⁵⁰⁵

Alternatively, public interest lawyers have sought to use human rights not as a basis for decision, but as a frame of reference to educate judges about relevant human rights standards and thus to help them situate domestic decisions within a broader international context. This outcome-reinforcing use of human rights has been

501. See Third Amended Complaint at ¶¶ 1, 12, *Turkmen v. Ashcroft*, No. 02 CV 2307(JG) (E.D.N.Y. 2006) (filed Sept. 13, 2004).

502. Using this tactic, the clinic has settled a number of forced labor cases on behalf of domestic workers. See *Topo v. Dhir*, No. 01 Civ. 10881(PKC), 2004 U.S. Dist. LEXIS 4134, at *1-2 (S.D.N.Y. Mar. 16, 2004) (suit by an Indian domestic worker forced to do child care and housework for over 100 hours per week, receiving \$50 for seventeen months of work); *Okezie v. Udogwu*, No. 99 Civ. 03345 (S.D.N.Y. 2003) (filed May 7, 1999); *Manliguez v. Joseph*, 226 F. Supp. 2d 377, 380-82 (E.D.N.Y. 2002) (suit by a Malaysian domestic worker paid \$1,050 for two years of work in which she took care of three children and did burdensome household chores, while receiving little food and no rest); *Hikabanze v. Shamapande*, No. 00 Civ. 9712 (S.D.N.Y. 2001) (filed Dec. 22, 2000) (suit by a Zambian domestic worker paid \$70 for 160 hours of work per week); Helen Peterson, *Maid: I Was Slave for 9 Years*, N.Y. DAILY NEWS, May 20, 2000, at 19 (suit by a Nigerian woman held as a "virtual slave" by a New York City employee and his wife for nine years). Washington Square Legal Services also settled an ATS case of involuntary servitude and forced labor brought against U.S. employers of Mexican landscaping workers. See *Castillo v. Neave*, No. 03 Civ. 00763 (S.D.N.Y. 2003) (filed Feb. 3, 2003).

503. See *Turkmen*, 2006 U.S. Dist. LEXIS 39170, at *154-57 (June 14, 2006) (dismissing ATS claims on the ground that the Liability Reform Act makes an action under the Federal Tort Claims Act the exclusive remedy for tort violations committed by federal employees).

504. Telephone Interview with Muneer Ahmad, Assoc. Professor, Am. Univ. Wash. Coll. of Law (June 13, 2006).

505. *Doe I v. Unocal*, 395 F.3d 932, 945-46 (9th Cir. 2002), which squarely posed the question, settled before the Ninth Circuit's rehearing en banc. See *Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (granting the parties' stipulated motion to dismiss).

advanced through the medium of the amicus brief in connection with high-profile Supreme Court litigation. This mechanism has received a great deal of attention, as the Supreme Court has referenced international human rights standards in striking down sodomy laws⁵⁰⁶ and the death penalty for juveniles and defendants with mental retardation,⁵⁰⁷ and in upholding law school affirmative action.⁵⁰⁸ In each case, public interest and human rights groups filed amicus briefs laying the basis for the international human rights arguments that the Court cited.⁵⁰⁹ This human rights amicus strategy has been coordinated by a handful of NGOs and law school clinics that watch the Court and have the resources to intervene. On the NGO side, the Bay Area's Human Rights Advocates has been an important player, helping to file amicus briefs on affirmative action, the death penalty, and the ATS,⁵¹⁰ while Global Rights has focused on War on Terror detention practices.⁵¹¹ Yale's International Human Rights Clinic and San Francisco Law School's International Human Rights Clinic have also played key roles, working to coordinate briefs in the major Supreme Court cases in which human rights received significant attention.⁵¹² The amicus tactic trades on the notion that U.S. judges

506. See *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

507. See *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2001).

508. See *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

509. See Brief for the Human Rights Committee of the Bar of England and Wales et al. as Amici Curiae Supporting Respondent, *Roper*, 543 U.S. 558 (No. 03-633); Brief for Mary Robinson et al. as Amici Curiae Supporting Petitioners, *Lawrence*, 539 U.S. 558 (No. 02-102); Brief for Human Rights Advocates and the University of Minnesota Human Rights Center as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241); Brief for Former U.S. Diplomats Morton Abramowitz et al. as Amici Curiae Supporting Petitioner, *McCarver v. North Carolina* (No. 00-827), *cert. dismissed as improvidently granted*, 533 U.S. 975, *resubmitted in Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452).

510. See Human Rights Advocates, Litigation, <http://humanrightsadvocates.org/litigation.html> (last visited Sept. 23, 2007).

511. See Brief for Global Rights as Amicus Curiae Supporting Respondents, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027); Brief of Amicus Curiae Global Rights in Support of Petitioners, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

512. Yale filed the briefs in *Lawrence* and *Atkins*. See Brief for Mary Robinson et al. as Amici Curiae Supporting Petitioners, *supra* note 509; Brief for Former U.S. Diplomats Morton Abramowitz et al. as Amici Curiae Supporting Petitioner, *supra* note 509. The University of San Francisco Law School filed the briefs in *Roper* and *Grutter*. See Brief for the Human Rights Committee of the Bar of England and Wales et al. as Amici Curiae Supporting Respondent, *supra* note 509; Brief for Human Rights Advocates and the University of Minnesota Human Rights Center as Amici Curiae Supporting Respondents, *supra* note 509. Individual law school faculty members have also been involved in filing human rights briefs. See, e.g., Brief for Human Rights Watch et al. as Amici Curiae Supporting Respondent and Affirmance, *Reno v. Ma*, 531 U.S. 924

are influenced by what their foreign counterparts do abroad and seeks to exert a subtle form of peer pressure as a way of informing domestic jurisprudence. But it also highlights the weakness of international law, using it as an interpretive guide, rather than a set of norms legally binding on the United States.

ii. Supranational Bodies. Public interest lawyers have increasingly ventured outside the U.S. legal system to raise human rights claims in international venues, reflecting both the constraints of litigating human rights in domestic courts, as well as the desire to connect with foreign allies and mobilize the authority of international bodies. The main advantage of this external strategy is that it removes much of the complex legal maneuvering that stymies domestic litigation, permitting human rights claims against the United States and its officials to be aired without assertions of immunity or formalistic substantive limitations. The costs, though, are significant: international bodies are subject to immense political pressure by the United States, impose their own jurisdictional hurdles, and are handicapped by their lack of enforcement powers. As a result, U.S. lawyers enter these arenas facing a set of trade-offs: able to fully adopt the rhetorical power of the human rights framework and operate within a quasi-judicial forum, but unable to translate that power into the implementation of hard legal reforms. Unlike U.S. litigation that attempts to achieve a judicial determination binding on the parties, the process of petitioning international bodies is designed to achieve distinct objectives: publicizing U.S. wrongdoing, generating international pressure on U.S. actors, influencing the administration of U.S. justice, and galvanizing domestic constituencies to mobilize for reform.

The two primary international bodies for advocacy by U.S. public interest lawyers have been the UN and the Inter-American Commission. Within the UN, advocates have pursued two different tracks, reflecting the bifurcated structure of human rights monitoring and enforcement within the institution. On one track, advocates have targeted the UN Commission on Human Rights,⁵¹³ empowered to

(2000) (No. 00-38) (challenging indefinite immigrant detention on human rights grounds with an amicus brief filed by a professor at California Western School of Law).

513. In 2006, the Commission was reorganized as the Human Rights Council, though NGO participation will operate by the same procedures. See G.A. Res. 60/251, ¶¶ 1, 11, U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

hear and investigate NGO complaints of gross human rights violations through public debate and confidential petitioning procedures,⁵¹⁴ and, as a body organized under the UN Charter, not something from which the United States can opt out. One strategy of influence is through direct participation in Commission proceedings: NGOs granted consultative status are permitted access to attend meetings, address Commission members, and circulate written statements.⁵¹⁵ There is a small but significant group of U.S. public interest organizations with consultative status:⁵¹⁶ the ACLU, in particular, has made active use of its status, filing written statements protesting the torture and detention of prisoners in the War on Terror.⁵¹⁷ In addition to participation, NGOs are able to invoke the Commission's confidential complaint procedure to generate internal investigations of gross violations by the U.S., and to publicly identify violations at the annual session of the Commission, which may take up a matter by soliciting a formal response from the government, issuing a critical resolution calling for specific measures, or appointing a Special Rapporteur or working group to conduct further investigation and submit a report.⁵¹⁸

American lawyers have also sought to influence human rights through advocacy in front of UN bodies created under the auspices of international treaties. Although the United States has signed onto a number of human rights treaties, their reach has been limited either

514. See STEINER & ALSTON, *supra* note 414, at 611.

515. See U.N. Econ. & Soc. Council [ECOSOC], G.A. Res. 1996/31, ¶¶ 33–36, U.N. Doc. E/RES/1996/31 (July 25, 1996).

516. U.S. public interest groups that have gained consultative status include the NRDC (1973), Sierra Club (1973), the National Organization for Women (1975), Earthjustice (1991), Environmental Defense (1993), the ACLU (1996), the Center for Reproductive Rights (1997), the American Indian Law Alliance (1999), the Native American Rights Fund (2002), and the NAACP (2003). See U.N. ECON. & SOC. COUNCIL, LIST OF NON-GOVERNMENTAL ORGANIZATIONS IN CONSULTATIVE STATUS WITH THE ECONOMIC AND SOCIAL COUNSEL AS AT 31 AUGUST 2006, available at http://www.un.org/esa/coordination/ngo/pdf/INF_List.pdf. Starting in 1996, domestic groups gained consultative status under a rule change by the UN Economic and Social Council permitting the participation by NGOs with an exclusively domestic focus. See U.N. Econ. & Soc. Council [ECOSOC], G.A. Res. 1996/31, *supra* note 515, ¶¶ 5, 8.

517. See, e.g., U.N. Comm. On Human Rights, *Torture and Detention: Written Statement Submitted by the American Civil Liberties Union in Special Consultative Status to the Commission on Human Rights Regarding Item 11(a) of the Provisional Agenda, Sixty-First Session, Mar. 14–Apr. 22, 2005*, available at <http://www.aclu.org/FilesPDFs/written%20statement%20on%20torture%20and%20detention.pdf>.

518. See STEINER & ALSTON, *supra* note 414, at 612, 620–21.

by nonratification or through the assertion of reservations;⁵¹⁹ as a result, even in those treaty-based committees that permit individual petitions alleging human rights violations, U.S. action is largely shielded from review.⁵²⁰ Nonetheless, U.S. public interest groups have sought limited room to operate by taking advantage of the fact that the United States, as a signatory to international treaties, has an obligation to report on treaty compliance, even if it is not bound by the individual petitioning process. U.S. groups have therefore played a role in augmenting the record before committees through the submission of “shadow reports,”⁵²¹ which document U.S. human rights violations and thus highlight discrepancies between the official U.S. position on treaty compliance and its actual practice on human rights.⁵²² In an attempt to expand interest in this tool, the ACLU organized a 2005 conference to train advocates on UN reporting obligations under various treaties and the role of NGOs in submitting shadow reports.⁵²³

Since the early 1990s, the Inter-American system has emerged as another forum for airing U.S. human rights claims that offers a greater degree of legal formality than the more decentralized UN system. Originally created to investigate and issue reports on gross

519. Of the seven core human rights treaties, the United States has ratified the Convention Against Torture, International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Racial Discrimination. See United States Department of State, Treaties in Force, <http://www.state.gov/documents/organization/89668.pdf> (last visited Feb. 24, 2008).

520. Of the treaties that the United States has ratified, it has only granted the Committee Against Torture the authority to investigate complaints; but this authority only extends to petitions by state parties, not individual complainants. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, <http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm> (last visited Feb. 24, 2008).

521. See US Human Rights Network, *Why Do “Shadow Reporting?”*, Apr. 2007, http://njjn.org/media/resources/public/resource_492.doc (“In U.N. terminology, a ‘shadow report’ is information submitted by non-governmental organizations (NGOs) to the treaty monitoring bodies that addresses omissions, deficiencies, or inaccuracies in the official government reports.”); see also Office of the United Nations High Commissioner for Human Rights, *The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies*, Fact Sheet No. 30, at 20 (2005) (noting points during the state reporting process at which NGOs can provide input to treaty bodies).

522. See, e.g., HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, *HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES: A REPORT ON U.S. COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 3 (1993).

523. See Conference, *Shadow Reports: Documenting U.S. Failure to Comply with Human Rights Treaties*, Oct. 6–7, 2005, available at www.aclu.org/humanrightconference/LA_Training.pdf.

human rights violations, the Inter-American Commission on Human Rights has since 1965 also exercised the power to adjudicate individual complaints of isolated human rights violations against members of the Organization of American States.⁵²⁴ The Commission's limitations are significant: it has no authority to execute a judgment,⁵²⁵ and the United States has refused to recognize its competence to issue orders.⁵²⁶ However, the Commission's procedural repertoire—which includes the authority to receive legal petitions,⁵²⁷ hold hearings,⁵²⁸ make on-site investigations,⁵²⁹ and issue reports⁵³⁰—has made it an important mechanism for generating international publicity about U.S. actions.⁵³¹

The Commission's appeal as a venue for U.S. advocates has been shaped by its jurisdictional mandates and its political connection to Latin American states.⁵³² Because of the Commission's exhaustion of remedies requirement, only cases that have been litigated up the ladder of domestic appeals may be presented.⁵³³ One result of this procedural rule has been the relatively large proportion of death penalty challenges among U.S. petitions,⁵³⁴ which are meticulously litigated through habeas corpus and are then moved into the Inter-American system as a last-ditch effort to avoid execution. U.S. civil cases have also been brought to the Commission, but they lack the

524. See INTER-AM. C.H.R., RULES OF PROCEDURE art. 49 (“The Commission shall receive and examine any petition that contains a denunciation of alleged violations of the human rights set forth in the American Declaration of the Rights and Duties of Man.”).

525. See Medina, *supra* note 417, at 441.

526. See Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 276 (2004). The Commission has rejected the argument that it has no authority to issue orders against nonparties to the American Convention on Human Rights, such as the United States. See Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, July 14, 1989, Inter-Am. C.H.R. (Ser. A), Rep. No. 10 (1989).

527. See INTER-AM. C.H.R., *supra* note 524, art 13.

528. See *id.* art. 30(5).

529. See *id.* art. 40.

530. See *id.* arts. 43, 45.

531. See YING-JEN LO, HUMAN RIGHTS LITIGATION PROMOTING INTERNATIONAL LAW IN U.S. COURTS 72 (2005).

532. As of 2005, there were twenty-eight U.S. cases in which the Commission had issued written opinions. See Inter-American Commission on Human Rights, Cases Published by the IACHR, <http://www.cidh.oas.org/casos.eng.htm> (last visited Feb. 24, 2008).

533. See INTER-AM. C.H.R., *supra* note 524, art. 31.

534. Seventeen of the twenty-eight U.S. cases in which the Commission had issued a written ruling through 2005 involved the death penalty; another three cases involved criminal defendants. See Inter-American Commission on Human Rights, *supra* note 532.

tactical urgency of death penalty challenges in which one goal of invoking the Commission's power is to seek delay by any means necessary. In the civil arena, the objective is to enlist international support in building a case that generates meaningful political pressure on U.S. actors, usually over a longer time period. A handful of petitions have thus been brought on immigration issues,⁵³⁵ suggesting the potential for mobilizing political pressure from sending countries, and Native American land claims,⁵³⁶ raising the possibility of political resonance with indigenous movements throughout the region. The Inter-American Court, which has the power to impose remedies that the Commission lacks, has been less useful for U.S. advocates due to its limited jurisdiction: it can only adjudicate claims brought by state parties against those states that have both ratified the American Convention on Human Rights and accepted its contentious jurisdiction, which the United States has not done.⁵³⁷

iii. Local Fora. The barriers to federal court litigation and the relative weakness of international institutions have prompted some advocates to focus on promoting grassroots human rights organizing strategies and legislative campaigns targeted at local governmental decisionmakers. A handful of legal groups have directly undertaken human rights organizing. For instance, El Rescate, a major immigrant organization in Los Angeles, has a long-standing Human Rights Department that promotes the human rights of immigrants through monitoring, community education, and legislative advocacy.⁵³⁸ Other legal groups, such as MALDEF, have more recently begun to train communities on human rights norms and mechanisms of

535. Four of the twenty-eight U.S. cases through 2005 involved immigration issues; in addition, four of the death penalty cases involved Mexican nationals deprived of consular assistance. *See id.*

536. Two of the twenty-eight U.S. cases through 2005 involved Native American land claims. *See id.*

537. *See* American Convention on Human Rights art. 61, Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123. The Court does have advisory jurisdiction to issue opinions interpreting other human rights instruments, which México invoked in gaining a 2003 ruling that the *Hoffman Plastics* decision violated international law. *See* Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. C.H.R. (Ser. A), Rep. No. 18 (2003).

538. *See* El Rescate 20th Anniversary Annual Dinner Celebration, El Rescate Human Rights Department, at 17 (2002) (on file with author).

enforcement.⁵³⁹ In addition, grassroots human rights organizations have used traditional human rights documentation strategies to expose human rights concerns in connection with welfare reform and public school education.⁵⁴⁰

Because the prospects for U.S. ratification of core human rights treaties are slim, there have been efforts to pass local human rights ordinances in major cities with receptive legislatures. In San Francisco, the Women's Institute for Leadership Development for Human Rights, in connection with Amnesty International, helped gain the 1998 passage of a local ordinance that requires city departments to conduct analyses of budgets, funding allocations, employment practices, and service delivery to identify areas of discrimination against women and girls in accordance with the Convention to Eliminate Discrimination Against Women (CEDAW).⁵⁴¹ The ordinance also created a CEDAW Task Force composed of city officials and community members to implement the ordinance.⁵⁴² Following this effort, groups in New York, including Legal Momentum and the ACLU's Women's Rights Project,⁵⁴³ are working to pass a similar initiative.⁵⁴⁴ The engagement of public interest groups at the local legislative level underscores a willingness to adapt tactics away from traditional legal advocacy to take

539. See Katherine Culliton, Presentation on Behalf of the Mexican American Legal Defense and Educational Fund: Los Derechos Humanos y Derechos Laborales de los Inmigrantes Latinos en los Estados Unidos 4–5 (Apr. 16, 2004) (on file with author).

540. See generally N.Y. CITY WELFARE REFORM & HUMAN RIGHTS DOCUMENTATION PROJECT, HUNGER IS NO ACCIDENT: NEW YORK AND FEDERAL WELFARE POLICIES VIOLATE THE RIGHT TO FOOD 2 (2000), available at http://www.urbanjustice.org/pdf/publications/humanrights/full_rpt.pdf; Urban Justice Center Human Rights Project, Past Projects, Events and Trainings: The Right to Education Project, <http://www.hrpujc.org/projects.html> (last visited Feb. 24, 2008).

541. See WILD for Human Rights, Summary of San Francisco's CEDAW Ordinance, Apr. 14, 1998, <http://www.wildforhumanrights.org/ourwork/cedawsummary.html> (last visited Feb. 24, 2008).

542. See *id.* In 2001, the ordinance was expanded to require a similar racial analysis for compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195. See WILD for Human Rights, <http://www.wildforhumanrights.org/ourwork/cedaw.html> (last visited Sept. 23, 2007).

543. See New York City Human Rights Initiative, About the New York City Human Rights Initiative, <http://www.nychri.org/aboutus.htm> (last visited Feb. 24, 2008).

544. See ACLU, The New York City Human Rights Initiative, http://www.aclu.org/hrc/NYC_Initiative.pdf (last visited Feb. 24, 2008). Los Angeles and Chicago have also passed local CEDAW resolutions. See New York City Human Rights Initiative, Other Human Rights Initiatives and Resources, <http://www.nychri.org/resources.htm> (last visited Feb. 24, 2008).

advantage of alternative political openings for domestic human rights incorporation.

2. *Substance.* Though still limited in scope and early in its development, the movement to promote human rights as a domestic advocacy strategy has left an imprint on traditional substantive categories of public interest law, with domestic lawyers integrating human rights both as a way to reinforce the existing U.S. framework of civil and political rights, while also seeking to enlarge the sphere of economic and social rights.

a. Civil and Political Rights. Driven by the greater political openness to civil and political rights claims in the United States, as well as the funding priorities of the major domestic human rights sponsors, public interest lawyers have emphasized civil and political rights advocacy both as a means of reviving the American civil rights legacy and resisting the threat to civil liberties posed by the expansion of executive power after 9/11. Yet the level of interest in human rights strategies has not been consistent across the public interest field, reflecting the continuing legacy of historical disputes over international engagement, as well as the degree to which domestic groups have embraced international constituencies.

The traditional civil rights bar has been relatively cool to the human rights agenda, echoing back to Cold War-era divisions over human rights. For instance, the NAACP LDF—committed to consolidating and protecting domestic gains for African Americans—has moved incrementally toward human rights strategies. The major effort to import human rights into domestic racial justice practice has been around racial bias in the criminal justice system. The administration of the death penalty, in particular, has been subject to systematic efforts to bring human rights to bear, reflecting both the strong anti-death penalty orientation of international treaties⁵⁴⁵ and the distinct historical trajectory of U.S. death penalty litigation, which was marked by early failure in the Supreme Court to invalidate the

545. See, e.g., International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 1999 U.N.T.S. 171 (declaring every person's right to life); see also American Convention on Human Rights, *supra* note 537, art. 4; Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, O.A.S. T.S. No. 73.

death penalty on the ground of racial discrimination.⁵⁴⁶ The limit on domestic redress, coupled with the building international movement to restrict the death penalty,⁵⁴⁷ spurred U.S. advocates, including those in the NAACP LDF's Capital Defense Project, to create networks with international human rights groups and European abolitionists.⁵⁴⁸ Beginning in the 1980s, advocates mounted a campaign to challenge the juvenile death penalty that combined human rights advocacy, organizing, and traditional litigation. At the Inter-American Commission, lawyers brought a series of petitions challenging U.S. juvenile death penalty practice,⁵⁴⁹ all of which resulted in findings that the United States violated the right to life set forth in the American Declaration.⁵⁵⁰ This Commission litigation complemented human rights organizing against the juvenile death penalty, coordinated primarily by the National Coalition to Abolish the Death Penalty,⁵⁵¹ which worked to build political support at the UN level by providing testimony and materials to UN monitoring bodies.⁵⁵² In the United

546. See *McCleskey v. Kemp*, 481 U.S. 279 (1987) (holding that a study showing racial disparity in Georgia's capital sentencing system was insufficient to prove that a black defendant's death sentence violated the Eighth or Fourteenth Amendments in the absence of evidence of arbitrariness or discriminatory purpose).

547. See, e.g., Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1130 (2002).

548. Telephone Interview with Steven Hawkins, Former Dir. of the Nat'l Coal. to Abolish the Death Penalty, Program Officer, JEHT Found. (Dec. 1–2, 2005).

549. The first such case was in 1985, brought by the ACLU, International Human Rights Law Group, and Amnesty International on behalf of death row inmates in South Carolina and Texas. See *Roach & Pinkerton v. United States*, Case 9647, Inter-Am. C.H.R., Rep. No. 3/87, OEA/Ser.L./V/II.71, doc. 9 rev. 1 (1987) (filed Dec. 4, 1985). On the evolution of the Inter-American Commission on Human Rights's death penalty jurisprudence, see generally Brian D. Tittmore, *The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections*, 13 WM. & MARY BILL RTS. J. 445 (2004).

550. *Napoleon Beazley v. United States*, Case 12.412, Inter-Am. C.H.R., Rep. No. 101/03, OEA/Ser.L./V/II.118, doc. 5 rev. 2 (2003) (filed Feb. 19, 2002); *Douglas Christopher Thomas v. United States*, Case 12.240, Inter-Am. C.H.R., Rep. No. 100/03, OEA/Ser.L./V/II.118, doc. 5 rev. 2 (2003) (filed Jan. 4, 2000); *Gary T. Graham v. United States*, Case 11.193, Inter-Am. C.H.R., Rep. No. 97/03, OEA/Ser.L./V/II.118, doc. 5 rev. 2 (2003) (filed Apr. 26, 1993); *Michael Domingues v. United States*, Case 12.285, Inter-Am. C.H.R., Rep. No. 62/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1 (2002) (filed May 1, 2000).

551. The Coalition was led by Steven Hawkins, who came from the NAACP LDF's Capital Defense Project. See Telephone Interview with Steven Hawkins, *supra* note 548.

552. See U.N. Econ. & Soc. Council [ECOSOC], Comm. On Human Rights, *Promotion and Protection of Human Rights: Written Statement Submitted by the National Coalition to Abolish the Death Penalty to the Commission on Human Rights*, U.N. Doc. E/CN.4/2005/NGO/275 (Mar. 8, 2005).

States, the legal campaign culminated in *Roper v. Simmons*,⁵⁵³ in which the Supreme Court struck down the juvenile death penalty, referencing an amicus brief condemning the practice on international law grounds filed by Human Rights Advocates.⁵⁵⁴

Current racial justice–human rights collaborations continue to target the death penalty, while asserting broader challenges to discrimination within the criminal justice system. For instance, American’s International Human Rights Clinic has provided trainings for the NAACP LDF and other groups on the application of human rights to the death penalty,⁵⁵⁵ while American clinic director Richard Wilson has worked with the NAACP LDF to expand its human rights advocacy in the criminal context, drafting a report on the use of human rights to combat racial profiling and counteract jury discrimination.⁵⁵⁶ The NAACP LDF and Human Rights Watch have asserted human rights strategies to improve prison conditions,⁵⁵⁷ while the ACLU Criminal Punishment Project and Amnesty International have both issued reports detailing the racially discriminatory administration of the U.S. death penalty.⁵⁵⁸ In addition, Global Rights has a new project on racial discrimination in the United States focused in part on “[f]ighting racism in the [U.S.] criminal justice system,” which has provided human rights trainings and sponsored conferences on antiracism advocacy.⁵⁵⁹

553. *Roper v. Simmons*, 543 U.S. 501 (2005).

554. *Id.* at 575–78. The NAACP LDF, with the ACLU and other groups, also submitted an amicus brief that focused on the domestic law issues. See Brief for NAACP Legal Defense and Educational Fund, Inc. et al. as Amici Curiae Supporting Respondent, *id.* (No. 03-633).

555. See Richard Wilson, International Law: A Breakthrough Year, NAACP Legal Defense & Education Fund Annual Training Conference, July 19–22, 2001 (on file with author). See generally Richard J. Wilson, *Defending a Criminal Case with International Human Rights Law*, 24 CHAMPION 28 (2000).

556. See Telephone Interview with Richard Wilson, *supra* note 447.

557. In particular, the NAACP LDF and Human Rights Watch have protested the treatment of prisoners evacuated after Hurricane Katrina. NAACP Legal Def. & Educ. Fund, News, Louisiana Detainee Abuse Requires Federal Probe/Prisoners Evacuated After Hurricane Describe Beatings by Officers, Oct. 5, 2005, <http://www.naacpldf.org/content.aspx?article=696>.

558. See ACLU, *Race and the Death Penalty*, Feb. 26, 2003, <http://www.aclu.org/capital/unequal/10389pub20030226.html>; Amnesty International, United States of America: Death by Discrimination—The Continuing Role of Race in Capital Cases, Apr. 24, 2003, <http://web.amnesty.org/library/index/engamr510462003>.

559. See Brochure, Global Rights, United States: Racial Discrimination in the U.S., available at http://www.globalrights.org/site/DocServer/GR_Fact_Sheet_US.pdf?docID=2604. Global Rights has also taken an international approach to supporting affirmative action. See GLOBAL RIGHTS, AFFIRMATIVE ACTION: A GLOBAL PERSPECTIVE 1 (2005), available at http://www.globalrights.org/site/DocServer/AffirmativeAction_GlobalPerspective.pdf?docID=2

Whereas racial justice advocates have struggled to define the appropriate relationship between civil rights and human rights, lawyers within the immigrant rights field have more readily embraced the human rights framework.⁵⁶⁰ This is a function of the distinctive features of immigrant rights advocacy: significant aspects of U.S. immigration law are based on international principles; the American doctrine of plenary power, which grants the U.S. government broad authority to exclude and deport immigrants, has erected high barriers to domestic legal challenges to U.S. immigration policy;⁵⁶¹ and the growth of undocumented immigrants deprived of domestic political rights has pushed lawyers to look to alternative sources of law. The international foundations of immigration law have shaped advocacy around refugee issues,⁵⁶² framed by the 1980 Refugee Act, which was drafted to align U.S. law with the UN Convention on the Status of Refugees.⁵⁶³ Major refugee cases since the 1980s have been litigated in part around the question of U.S. compliance with the UN Convention.⁵⁶⁴

623; AMERICANS FOR A FAIR CHANCE & INTERNATIONAL HUMAN RIGHTS LAW GROUP, CALIFORNIA SHADOW REPORT: AFFIRMATIVE ACTION IN HIGHER EDUCATION 25, 27 (2001), available at <http://www.ushrnetwork.org/pubs/CERD%20Shadow%20Reporting%20Final.pdf>.

560. See, e.g., Joan Fitzpatrick & William McKay Bennett, *A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States*, 70 WASH. L. REV. 589 (1995); Berta Esperanza Hernández-Truyol, *Reconciling Rights in Collision: An International Human Rights Strategy*, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 254 (Juan F. Perea ed., 1997).

561. See *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889); see also Mark R. von Sternberg, *The Plenary Power in a Human Rights Perspective*, 16 PACE INT'L L. REV. 65, 68 (2004) (describing the “reduced level of constitutional control” over immigration).

562. See Kevin Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643, 654 (2004); see also Jacqueline Bhabha, *Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights*, 15 HARV. HUM. RTS. J. 155, 157–58 (2002); Inna Nazarova, Comment, *Alienating “Human” from “Right”: U.S. and UK Non-Compliance with Asylum Obligations Under International Human Rights Law*, 25 FORDHAM INT'L L.J. 1335, 1411–12 (2002).

563. Compare United Nations Protocol Relating to the Status of Refugees art. 1(2), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (amending the 1951 UN Convention Relating to the Status of Refugees), with Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (conforming with 1967 UN Protocol). *INS v. Stevic*, 467 U.S. 407, 421–22, 427–28 (1984), discusses the conformity between 1980 Refugee Act and 1967 UN Protocol.

564. See, e.g., *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 187–88 (1993) (rejecting the argument that the UN Convention barred the president from interdicting and returning Haitian refugees); *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 436–41 (1987) (referencing the Convention in affirming the application of the asylum standard in the deportation context); *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1356 (D.C. Cir. 2000) (referencing objection to the Illegal Immigration Reform and Immigrant Responsibility

Barriers to domestic redress imposed by the breadth of governmental power over immigration have also led immigrant rights advocates to participate actively in international venues. The Inter-American Commission has been the site of cases challenging Haitian and Cuban detention at Guantánamo,⁵⁶⁵ the deprivation of consular assistance to Mexican nationals on death row,⁵⁶⁶ and federal law mandating removal for criminal aliens.⁵⁶⁷ The legal vulnerability of migrant workers has also sparked efforts to bring human rights to bear, with groups like the National Network for Immigrant and Refugee Rights working at the UN level to report on the abuses of undocumented workers in the United States and promote efforts to gain ratification of the UN convention on migrant workers.⁵⁶⁸

Border enforcement has become a central front in the battle over illegal immigration, with heightened barriers to entry measured by an increase in migrant deaths and smuggling.⁵⁶⁹ Because enforcement,

Act's summary removal procedures on the ground that it violated international protections for refugees); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 551–54 (9th Cir. 1990) (referencing the United States's obligations under the Convention in affirming a permanent injunction against the Immigration and Naturalization Service practice of requiring Salvadoran asylum seekers to sign voluntary departure agreements). See generally Arthur C. Helton, *The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Human Rights Law*, 100 YALE L.J. 2335 (1991).

565. Rafael Ferrer-Mazorra et al. v. United States, Case 9903, Inter-Am. C.H.R., Report No. 51/01, OEA/Ser.L./V/II.111, doc. 20 (2001) (filed Apr. 10, 1987); Haitian Centre for Human Rights et al. v. United States, Case 10.675, Inter-Am. C.H.R., Report No. 51/96, OEA/Ser.L./V/II.95, doc. 7 rev. at 550 (1997) (filed Oct. 1, 1990).

566. See Roberto Moreno Ramos v. United States, Case 12.430, Inter-Am. C.H.R., Report No. 1/05, OEA/Ser.L./V/II.124, doc. 5 (2005) (filed Nov. 4, 2002); Javier Suarez Medina v. United States, Case 12.421, Inter-Am. C.H.R., Report No. 91/05, OEA/Ser.L./V/II.124, doc. 5 (2005) (filed July 23, 2002); Cesar Fierro v. United States, Case 11.331, Inter-Am. C.H.R., Report No. 99/03, OEA/Ser.L./V/II.118, doc. 5 rev. 2 (2003) (filed July 21, 1994); Ramon Martinez Villareal v. United States, Case 11.753, Inter-Am. C.H.R., Report No. 52/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1 (2002) (filed May 16, 1997). Sandra Babcock, who filed Suarez Medina's petition, played an important role in Mexican death penalty cases as the director of the Mexican Capital Legal Assistance Program, a group funded in 2000 by the Mexican government to defend Mexican nationals on death row. See Beth Hawkins, *Blows Against the Death Penalty*, CITY PAGES (Minneapolis/St. Paul, MN), June 9, 2004, available at <http://citypages.com/databank/25/1227/article12185.asp>.

567. Mario Lares-Reyes et al. v. United States, Petition 12.379, Inter-Am. C.H.R., Rep. No. 19/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1 (2002) (filed Nov. 21, 2000) (holding that the case was inadmissible because petitioners failed to exhaust domestic remedies).

568. See Telephone Interview with Eunice Cho, Educ. Program Coordinator / BRIDGE Project Coordinator, Nat'l Network for Immigrant and Refugee Rights (Nov. 15, 2005).

569. See MASSEY, DURAND & MALONE, *supra* note 37, at 113–14; Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 221 (2003); Guillermo Alonso Meneses, *Human Rights and Undocumented Migration Along the Mexican-U.S. Border*, 51 UCLA L. REV. 267, 268 (2003).

which involves a core exercise of the government's plenary power, is not susceptible to domestic legal challenge,⁵⁷⁰ lawyers have turned to the human rights system in an effort to bring international attention to the border crisis. At the supranational level, there have been two Inter-American petitions: one by the ACLU and California Rural Legal Assistance that challenged the implementation of Operation Gatekeeper on the ground that it diverted immigration to dangerous passageways and thus increased migrant deaths,⁵⁷¹ and a more recent petition by the Border Action Network condemning the United States for not prosecuting Minutemen vigilantes.⁵⁷² The ACLU has also reported to the UN on the human costs of enforcement,⁵⁷³ while Amnesty International has engaged in efforts to document the "humanitarian crisis" at the border.⁵⁷⁴ In addition, at the grassroots level, a trio of programs has been launched—the Border Action Network in Arizona,⁵⁷⁵ the U.S.-México Border Program of the American Friends Service Committee in San Diego,⁵⁷⁶ and the Border Network for Human Rights in Texas and New Mexico⁵⁷⁷—that focus on human rights documentation,⁵⁷⁸ reporting,⁵⁷⁹ and organizing to reform border practices.

570. There are, however, efforts by organizations to seek legal redress of immigrant abuse by Border Patrol officers. See Texas RioGrande Legal Aid, Inc., Border Issues, <http://www.trla.org/teams/border.php> (last visited Feb. 24, 2008); Brennan Ctr. Legal Servs. E-lert, U.S. Citizen Represented by Texas RioGrande Legal Aid Settles Civil Assault Suit Against U.S. Border Patrol Officer Based on Incident While Crossing U.S.-Mexico Border, Sept. 8, 2006 (on file with the *Duke Law Journal*).

571. See Victor Nicolas Sanchez et al. v. United States, Petition 65/99, Inter-Am. C.H.R., Rep. No. 104/05, OEA/Ser.L./V/II.124, doc. 5 (2005). The ACLU and California Rural Legal Assistance also raised the issue to the UN Commission on Human Rights. See Press Release, ACLU, Rights Group Ask United Nations Panel to Investigate Migrant Deaths at U.S. Border (Apr. 14, 1999), available at <http://www.aclu.org/temp/pr1999/13560prs19990414.html>.

572. See Border Action Network, News: Human Rights Petition Calling for End to Vigilante Activities Proceeds, <http://www.borderaction.org/news2.php?articleID=49> (last visited Feb. 24, 2008).

573. See ACLU, DIMMING THE BEACON OF FREEDOM: U.S. VIOLATIONS OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 8 (2006).

574. See AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: HUMAN RIGHTS CONCERNS IN THE BORDER REGION WITH MEXICO (1998), available at <http://web.amnesty.org/library/Index/engAMR510031998>.

575. See Border Action Network, Campaigns: Border Militarization Project, <http://www.borderaction.org/campaigns2.php?articleID=5> (last visited Sept. 23, 2007).

576. See Telephone Interview with Pedro Rios, Project Voice Program Coordinator, Am. Friends Serv. Comm. (July 25, 2006).

577. See FORD FOUND., *supra* note 12, at 64.

578. In one example, the U.S.-México Border Program collaborated with the ACLU in producing a video documenting vigilantism on the border. See WITNESS, Video: Rights on the

Within the fields of Native American and women's advocacy, human rights efforts have similarly advanced against the backdrop of domestic constraints and international opportunities. Native American legal groups have responded to the steep barriers to challenging U.S. power over native lands under federal law⁵⁸⁰ by pragmatically pursuing international efforts to protect land and promote self-determination.⁵⁸¹ The Indian Law Resource Center, for example, has defended land rights before the UN and Inter-American Commission,⁵⁸² and provided human rights training to indigenous leaders in the United States.⁵⁸³ The Indian Law Resource Center and the Native American Rights Fund have also entered coalitions with indigenous groups around the globe to promote international agreements that would provide stronger indigenous rights to ancestral lands; affirm a broad sphere of political, cultural, and economic autonomy; and promote greater indigenous political participation.⁵⁸⁴

Line: Vigilantes at the Border, http://www.witness.org/index.php?option=com_rightsalert&Itemid=178&task=view&alert_id=43 (last visited Feb. 24, 2008).

579. The Border Network for Human Rights filed a shadow report with the Human Rights Committee on U.S. compliance with the International Covenant on Civil and Political Rights. See BORDER NETWORK FOR HUMAN RIGHTS, "BEHIND EVERY ABUSE IS A COMMUNITY": U.S./MEXICO BORDER REPORT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING THE UNITED STATES' COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 1 (2006) [hereinafter BORDER NETWORK FOR HUMAN RIGHTS], available at http://www.borderaction.org/PDFs/BNHR_Report_to_HRC.pdf.

580. See generally AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM (Carole Goldberg et al. eds., 2003) (examining doctrines of discovery, plenary power, and trusteeship).

581. See ROBERT T. COULTER, USING INTERNATIONAL HUMAN RIGHTS MECHANISMS TO PROMOTE AND PROTECT RIGHTS OF INDIAN NATIONS AND TRIBES IN THE UNITED STATES: AN OVERVIEW 1 (2002).

582. See *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1 (2002) (filed Apr. 2, 1993) (holding, in a case brought by the Indian Law Resource Center on behalf of Western Shoshone in Nevada, that the United States had denied the petitioners' rights to ancestral property through unfair procedures in the Indian Claims Commission); U.N. Econ. & Soc. Council [ECOSOC], Subcomm. on the Promotion & Prot. of Hum. Rts., *Written Statement Submitted by the Indian Law Resource Centre*, U.N. Doc. E/CN.4/Sub.2/2000/NGO/21 (Aug. 7, 2000).

583. See Indian Law Resource Center, Human Rights Training for Indian Leaders in the United States, <http://www.indianlaw.org/main/projects/ihr/hrt/northamerica> (last visited Feb. 29, 2008).

584. See Organization of American States, Draft American Declaration of the Indigenous Peoples, Sept. 18, 1995, OEA/Ser.L./V/II.91, doc. 7 pmb. (1995); U.N. Commission on Human Rights, Sub-Comm. on the Prevention of Discrimination and Protection of Minorities, *Draft United Nations Declaration on the Rights of Indigenous Peoples*, Annex, U.N. Doc. E/CN.4/Sub.2/1994/56 (Oct. 28, 1994); see also Indian Law Resource Center, American Declaration on the Rights of Indigenous Peoples, <http://www.indianlaw.org/main/projects/>

Within the women's rights field, frustration with the incrementalism of domestic antidiscrimination litigation and the defensive posture of reproductive rights,⁵⁸⁵ combined with a sense of excitement about the dynamism of international activity (culminating in the 1995 UN World Conference in Beijing) to spur efforts to bring human rights home.⁵⁸⁶ In the late 1990s, NOW LDF took the lead in championing domestic human rights, drafting human rights amicus briefs in the U.S. Supreme Court in support of affirmative action and the Violence Against Women Act,⁵⁸⁷ while advocating for local CEDAW implementation. Other women's rights organizations have become actively involved in the domestic human rights movement, testifying before governmental bodies on the value of human rights,⁵⁸⁸ advocating for the expansion of reproductive rights in the UN system,⁵⁸⁹ and challenging U.S. domestic violence laws in the Inter-American Commission.⁵⁹⁰

ihr/oas (last visited Sept. 23, 2007) (discussing progress in negotiating the declaration); Native American Rights Fund, Current Cases & Projects: OAS Draft Declaration on the Rights of Indigenous Peoples, <http://www.narf.org/cases/oas.html> (last visited Nov. 20, 2007); Native American Rights Fund, Current Cases & Projects: U.N. Draft Declaration on the Rights of Indigenous Peoples, <http://www.narf.org/cases/un.html> (last visited Nov. 20, 2007). The UN Declaration was passed in 2006 by the Human Rights Council after more than a decade of advocacy. See Valerie Taliman, *U.N. Human Rights Council Adopts Declaration on Indigenous Peoples*, INDIAN COUNTRY TODAY, July 5, 2006.

585. See Schneider, *supra* note 359, at 704–06.

586. See Rhonda Copeland, *Introduction: Bringing Beijing Home*, 21 BROOK. J. INT'L L. 599, 600 (1996).

587. See Brief of NOW Legal Defense and Education Fund et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) (raising human rights arguments in support of affirmative action); Brief Amici Curiae on Behalf of International Law Scholars and Human Rights Experts in Support of Petitioners, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29) (raising human rights standards in the International Covenant on Civil and Political Rights in support of the Violence Against Women Act). Martha Davis, who was the main lawyer at NOW LDF behind the human rights campaign, joined at the faculty at Northeastern University School of Law, where she continues to work on domestic human rights issues. See, e.g., Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 359 (2006).

588. See Schneider, *supra* note 359, at 711 (noting the work of CUNY's International Women's Human Rights Law Clinic).

589. See THE CTR. FOR REPROD. L. & POLICY & U. OF TORONTO INT'L PROGRAMME ON REPROD. & SEXUAL HEALTH L., BRINGING RIGHTS TO BEAR: AN ANALYSIS OF THE WORK OF UN TREATY MONITORING BODIES ON REPRODUCTIVE AND SEXUAL RIGHTS 17 (2002), available at http://www.reproductiverights.org/pdf/pub_bo_tmb_full.pdf.

590. See Press Release, Mother of Slain Children Takes Case to International Tribunal (Dec. 27, 2005), available at <http://www.aclu.org/womensrights/violence/23228prs20051227.html> (describing an ACLU petition with the Inter-American Commission challenging the Supreme

In the civil liberties arena, it was 9/11 that provided the catalyst for the surging interest in human rights.⁵⁹¹ CCR and the ACLU have been the main players in this domain, coordinating domestic litigation and international advocacy around two dimensions of U.S. War on Terror policy: detention and torture. With respect to detention, U.S. groups have deployed human rights in diverse venues as a way of generating multiple points of pressure on U.S. decisionmakers. CCR's strategy on the Guantánamo detentions, for instance, has included filing a petition to the Inter-American Commission to determine the legal status of the detainees,⁵⁹² representing petitioners in the two major Supreme Court cases on the detainees' right to habeas corpus,⁵⁹³ and filing an amicus brief in support of the Supreme Court's decision to strike down military commissions in part based on their inconsistency with U.S. obligations under the Geneva Conventions.⁵⁹⁴ On the detention issue, the ACLU has pushed human rights in several venues: it submitted Supreme Court amicus briefs raising human rights issues that challenged the application of enemy combatant status to U.S. citizens,⁵⁹⁵ filed a federal lawsuit with international claims contesting secret renditions,⁵⁹⁶ and called for

Court's decision in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), which refused to recognize a domestic violence victim's civil rights claim against a local town for failing to enforce a restraining order).

591. See HUMAN RIGHTS IN THE 'WAR ON TERROR' (Richard Ashby Wilson ed., 2005); LAWYERS COMM. FOR HUMAN RIGHTS, *IMBALANCE OF POWERS: HOW CHANGES TO U.S. LAW & POLICY SINCE 9/11 ERODE HUMAN RIGHTS AND CIVIL LIBERTIES* (2003).

592. See CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 6, at 16. In 2007, CCR, in conjunction with American's International Human Rights Clinic, also filed a submission to the Inter-American Commission "condemning the U.S. government's appalling response to the deaths of three Guantánamo detainees" in 2006. See Center for Constitutional Rights, CCR Files Submission to Inter-American Commission on Human Rights Condemning US Government Response to 3 Deaths at Guantanamo, <http://ccrjustice.org/newsroom/press-releases/ccr-files-submission-inter-american-commission-human-rights-condemning-us-go> (last visited Feb. 24, 2008).

593. Ctr. for Constitutional Rights, *Al Odah v. United States*, Synopsis, <http://ccrjustice.org/ourcases/current-cases/al-odah-v.-united-states> (last visited Feb. 24 2008) (discussing CCR's role in *Rasul v. Bush*, which in 2004 upheld federal court jurisdiction to review detainees' habeas petitions, and *Al Odah v. United States*, which in 2007 challenged the subsequent legislative repeal of judicial review of detainee habeas claims under the Military Commissions Act of 2006).

594. Ctr. for Constitutional Rights, *Hamdan v. Rumsfeld* (amicus), [http://ccrjustice.org/ourcases/past-cases/hamdan-v.-rumsfeld-\(amicus\)](http://ccrjustice.org/ourcases/past-cases/hamdan-v.-rumsfeld-(amicus)) (last visited Feb. 24, 2008).

595. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004).

596. See *US Civil Rights Group to Sue CIA*, BBC NEWS, Dec. 3, 2005, <http://news.bbc.co.uk/2/hi/americas/4494246.stm> (last visited Sept. 23, 2007).

international action on post-9/11 detentions and secret renditions through appearances before the UN.⁵⁹⁷ The ACLU has also brought human rights to bear in challenging torture, partnering with Human Rights First in a lawsuit against Secretary of Defense Rumsfeld for his alleged role in authorizing torture as an interrogation tactic in Iraq and Afghanistan.⁵⁹⁸

b. Economic and Social Rights. While the security context highlights the deployment of human rights strategies to restrain the *expansion* of federal power into the sphere of individual liberty, advocates have also used human rights as a tool to resist the *diminution* of federal power in the areas of social welfare and economic regulation. Yet, in contrast to the civil and political rights domain, advocacy efforts to promote economic and social rights have been more limited in scope, reflecting their weaker tradition within U.S. law,⁵⁹⁹ as well as the funding preferences of major foundations.

Human rights advocacy around social welfare issues has centered on welfare reform and housing.⁶⁰⁰ The major welfare reform effort was spearheaded by a coalition of groups that included CCR, CUNY's International Women's Human Rights Clinic, and the Center for Economic and Social Rights,⁶⁰¹ which came together in support of the grassroots Poor People's Economic Human Rights

597. See Ann Beeson & Paul Hoffman, *supra* note 469, at 1; Letter from Steven Watt & Ben Wizner, ACLU, to Stephen J. Toope, Chairman-Rapporteur, Working Group on Enforced or Involuntary Disappearances, Office of the High Comm'r on Human Rights (Mar. 30, 2006) (on file with author) (arguing that the U.S. practice of rendition violates international human rights law); see also ACLU & HUMAN RIGHTS WATCH, WITNESS TO ABUSE: HUMAN RIGHTS ABUSES UNDER THE MATERIAL WITNESS LAW SINCE SEPTEMBER 11, at 1-5 (2005), available at <http://hrw.org/reports/2005/us0605/us0605.pdf> (arguing that the United States's use of the material witness law to indefinitely detain terror suspects violates international human rights law and domestic constitutional law).

598. See Press Release, ACLU and Human Rights First Sue Defense Secretary Rumsfeld over U.S. Torture Policies (Mar. 1, 2005), available at <http://www.aclu.org/safefree/general/17594prs20050301.html>.

599. See Geoffrey C. Hazard, Jr., *Social Justice Through Civil Justice*, 36 U. CHI. L. REV. 699, 711-12 (1969); see also CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 1-5 (2004).

600. Human rights strategies are also being explored in the education context. See Janet M. Hostetler, *Testing Human Rights: The Impact of High-Stakes Tests on English Language Learners' Right to Education in New York City*, 30 N.Y.U. REV. L. & SOC. CHANGE 483 (2006).

601. In 2004, the National Economic and Social Rights Initiative was spun off from the Center for Economic and Social Rights and has since focused on network building and domestic human rights trainings. See Telephone Interview with Catherine Albisa, Executive Dir., Nat'l Econ. and Social Rights Initiative (Nov. 9, 2005).

Campaign to file a petition in the Inter-American Commission challenging the termination of benefits under welfare reform.⁶⁰² In the area of housing, the National Law Center on Homelessness & Poverty has led a coalition of homelessness groups into the international arena, where it has been actively involved in crafting UN declarations on the right to housing, building networks around human rights issues, conducting research on human rights litigation strategies,⁶⁰³ advocating local right-to-housing ordinances, and sponsoring a number of symposia.⁶⁰⁴

The application of international human rights in the environmental context has been used to advance the dual goals of traditional environmentalism, focused on conserving natural resources, and environmental justice, which emphasizes the discriminatory impact of locating environmental hazards in communities of color.⁶⁰⁵ With respect to conservation, environmental groups have promoted the human right to a healthy environment at the supranational level, primarily through advocacy in the UN and Inter-American systems. Earthjustice has been the leading group in the UN effort, documenting cases that stress environmental abuse, submitting annual reports to the UN Commission on Human Rights,⁶⁰⁶ and spearheading efforts to pass a Declaration of Human

602. The petition is under revision for resubmission. See Ctr. for Soc. and Econ. Rights, Petition to the Inter-American Commission on Human Rights, <http://cesr.org/node/361?PHPSESSID=d14496f981b2d559e03e763b1c6186c2> (last visited Feb. 24, 2008). On the Poor People's Economic Human Rights Campaign, see FORD FOUND., *supra* note 12, at 54–56 (describing the Campaign's additional human rights work, which included submitting a proposal to the state assembly on how human rights could be incorporated into Pennsylvania law and organizing marches and "Freedom Bus Tours" to highlight human rights abuses among those cut off welfare).

603. See generally NAT'L L. CTR. ON HOMELESSNESS & POVERTY, U.S. FEDERAL AND STATE CASE LAW ASSERTING ECONOMIC AND SOCIAL RIGHTS AS HUMAN RIGHTS (2005), available at <http://www.nlchp.org/content/pubs/US%20Case%20Law.pdf>.

604. For a description of the human rights efforts of housing advocates, see Foscarinis, *supra* note 412, at 450–54; Maria Foscarinis, *Homelessness and Human Rights: Towards an Integrated Strategy*, 19 ST. LOUIS U. PUB. L. REV. 327, 342–54 (2000); Maria Foscarinis, Brad Paul, Bruce Porter & Andrew Scherer, *The Human Right to Housing: Making the Case in U.S. Advocacy*, 38 CLEARINGHOUSE REV. 97 (2004); Telephone Interview with Maria Foscarinis, Executive Dir., Nat'l Law Ctr. on Homelessness & Poverty (Oct. 27, 2005).

605. See LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 16 (2001).

606. See EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT: HUMAN RIGHTS AND THE ENVIRONMENT 1 (2005), available at http://www.edo.org.au/edoact/submissions/Earthjustice_2005EnvironmentalRightsReport.pdf; Telephone Interview with Martin Wagner, *supra* note 299.

Rights and the Environment.⁶⁰⁷ The Center on International Environmental Law, in turn, has pressed for the passage of a similar Inter-American resolution.⁶⁰⁸

At the grassroots level, environmental justice advocates have made limited use of the human rights framework to advance specific domestic campaigns, with Earthjustice again playing a key role. In one high-profile example, Earthjustice successfully applied international strategies in the wake of a failed domestic lawsuit against Shell requesting that it relocate Louisiana “Cancer Alley” residents next to a Shell Oil refinery and chemical plant.⁶⁰⁹ After a U.S. court ruled that the chemical plant posed no health risk, Earthjustice lawyers took the case to international venues: they testified in front of the UN Commission on Human Rights and met with the UN Special Rapporteur investigating illegal dumping of toxic materials, generating international attention that influenced Shell to settle the case on favorable terms in 2002.⁶¹⁰ This human rights victory prompted one Earthjustice attorney involved in the Cancer Alley campaign to spin off a new organization, Advocates for Environmental Human Rights, which filed a 2005 Inter-American Commission petition on behalf of an African-American community in New Orleans challenging the approval of nearby toxic industrial operations on human rights grounds.⁶¹¹

607. For the Draft Principles on Human Rights and the Environment, see U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned, Human Rights and the Environment*, 74, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994) (prepared by Fatma Zohra Ksentini).

608. See CTR. FOR INT’L ENVTL. LAW, *supra* note 312, at 28. Earthjustice has also been active in the Inter-American Commission, where it has brought a petition against the United States protesting its failure to take effective steps against greenhouse gas emissions. See Press Release, Earthjustice, Inuit Human Rights Petition Filed over Climate Change (Dec. 7, 2005), available at <http://www.earthjustice.org/news/press/005/inuit-human-rights-petition-filed-over-climate-change.html>.

609. See FORD FOUND., *supra* note 12, at 92–94.

610. See *id.* at 95–97.

611. See Press Release, Common Dreams, African Americans Sue U.S. for Environmental Human Rights Abuses (Mar. 3, 2005), available at <http://www.commondreams.org/news2005/0303-02.htm>. Advocates for Environmental Human Rights also participated in a special session on Hurricane Katrina in connection with the UN Human Rights Committee’s hearings on U.S. compliance with the International Covenant on Civil and Political Rights. See E-mail from Monique Harden, Co-Dir. and Attorney, Advocates for Envtl. Human Rights, to Scott L. Cummings (July 16, 2006).

On the labor front, there have been a number of efforts to advance the notion that “workers’ rights are human rights,”⁶¹² primarily by raising the issue of immigrant labor abuse in international venues.⁶¹³ Within the UN, for instance, groups have raised concerns about the U.S. treatment of migrant workers to the Commission on Human Rights.⁶¹⁴ In response to a broad-based campaign on immigrant labor rights after *Hoffman Plastics*, the Inter-American Commission held a general interest hearing to examine the United States’s ongoing noncompliance with human rights laws.⁶¹⁵ The hearing, which took place in 2005, was designed as part of a general strategy to exert continuing public pressure on the United States to revisit its treatment of undocumented workers. The hearing was also used to advance a prominent grassroots labor campaign by the Coalition of Immokalee Workers in Florida, which had launched a boycott of Taco Bell for its practice of negotiating bulk discounts from suppliers, which the Coalition charged caused the suppliers to commit labor abuses against immigrant workers.⁶¹⁶ Within two weeks

612. See American Rights at Work, Human Rights Scholars and Advocates Support Human Rights for Workers in the United States, <http://www.rightsatwork.org/humanrights/signon.cfm> (last visited Feb. 24, 2008); see also Rebecca Smith, *Human Rights at Home: Human Rights as an Organizing and Legal Tool in Low-Wage Worker Communities*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 285 (2007).

613. There have also been limited efforts by U.S. lawyers to advance worker claims in the UN’s International Labour Organization through its procedure for submitting complaints on the infringement of the right to freedom of association by member states. In one example, American’s International Human Rights Clinic filed a 2004 International Labour Organization complaint on behalf of workers in an Alcoa subsidiary in Piedras Negras, which elicited a strong rebuke of the Mexican government for deficiencies in its system of labor certification. See COMM. ON FREEDOM OF ASS’N, INT’L LABOUR ORG., CASE NO. 2393, REPORT NO. 340, at paras. 1033, 1056 (July 29, 2004).

614. See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Specific Groups and Individuals: Migrant Workers*, ¶¶ 4–6, U.N. Doc. E/CN.4/2006/NGO/87 (Feb. 28, 2006) (submitted by Human Rights Advocates); U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, Sub-Comm’n on the Promotion & Prot. of Human Rights, *Specific Human Rights Issues: Contemporary Forms of Slavery*, at 3, U.N. Doc. E/CN.4/Sub.2/2005/NGO/23 (July 15, 2005) (submitted by the Robert F. Kennedy Memorial Center for Human Rights).

615. The American International Human Rights Clinic coordinated this campaign on behalf of a long list of human rights and immigrant rights groups. See EMPLOYMENT RIGHTS ARE HUMAN RIGHTS, *supra* note 450, at 5–10.

616. See Coal. of Immokalee Workers, About CIW, <http://www.ciw-online.org/about.html> (last visited Sept. 24, 2007).

of the Coalition's testimony in front of the Commission,⁶¹⁷ Taco Bell's parent company settled the boycott, agreeing to increase payment for tomatoes—to be passed on as a wage increase for workers—and to impose a supplier code of conduct respecting labor rights.⁶¹⁸

As these campaigns reach for international authority to achieve domestic results, they highlight the gap that separates the contemporary domestic human rights movement from public interest law in its initial phase. Whereas early public interest law sought to enlist the federal government as a liberal ally in combating discriminatory state practice and regulating private business, domestic human rights has emerged as a vehicle for contesting the now conservative centers of federal power by turning to human rights institutions as a potentially progressive alternative. In this sense, the field of domestic human rights is an expression of public interest law's resilience—a reinterpretation of goals and strategies in the face of political realignment. But by the same token, it is also a reflection of the relative weakness of public interest law, unable to fully achieve its aims through the domestic channels that it pioneered four decades ago.

III. AMERICAN LAWYERS AND THE PURSUIT OF TRANSNATIONAL JUSTICE: AN INTERPRETIVE FRAMEWORK

The dominant account of public interest law in the United States has depicted lawyers for the disenfranchised as part of an elite vanguard who use domestic courts to redefine the legal foundations of American democracy to promote a liberal conception of individual rights and equality.⁶¹⁹ Though this account of public interest lawyering has always been a partial one, it has nonetheless shaped debates about the appropriate objectives of legal advocacy in a democratic society, the desirability of litigation strategies versus political mobilization, and the role of legal professionals as social change actors. Globalization alters the terrain of these fundamental debates by enlarging the scale of advocacy in ways that present a mixed picture for public interest lawyers: exposing the geographic scope of

617. See MATERIALS IN SUPPORT OF THE TESTIMONY OF THE COALITION OF IMMOKALEE WORKERS BEFORE THE INTER-AMERICAN COMMISSION 1–14 (2005), available at http://www.rfkmemorial.org/human_rights/2003_CIW/OASSubmissionBackCIW.pdf.

618. See Eric Schlosser, *A Side Order of Human Rights*, N.Y. TIMES, Apr. 6, 2005, at A23.

619. See Orly Lobel, *The Paradox of Extra-Legal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 949–50 (2007).

social injustice but also the potential for transnational social change, revealing the limits of the domestic legal system but also the possibilities for transnational legal mobilization, and highlighting the risks of professional engagement in global social struggle but also suggesting its transformative power. This Part provides a preliminary framework for understanding the role of public interest lawyers as agents of transnational justice, examining the *goals* they pursue, the *tactics* they deploy, and the professional *roles* they assume in the contemporary global context.

A. Goals

Because the quest to influence governmental power has been the core mission of American public interest law, the impact of globalization on public interest goals can be understood in relation to the reconfiguration of governmental authority.⁶²⁰ On the one hand, global change has weakened the federal government's role in domestic regulation by empowering transnational corporate actors and authorizing international financial institutions to dictate rules from above. In the face of declining federal authority, public interest law seeks to activate alternative sources of power, reinforcing systems of market *regulation* while promoting the mobilization of activist networks to widen the scope of citizen *participation* in global governance. Yet globalization does not simply siphon power away from the central government. To the contrary, in a global environment where the United States is the sole superpower, increasing interdependence serves to magnify the importance of federal decisionmaking, particularly with respect to core foreign policy issues: defining immigrant eligibility, policing territorial borders, and protecting against security threats. In this context, the federal government remains an important target of public interest advocacy, though the goal becomes mounting legal *resistance* to its abuses.

1. *Regulation.* Market integration has pulled the regulatory project of public interest law into the international domain, where it seeks to set the economic rules of the game for economically mobile capital and labor. Outside of U.S. borders, advocacy has been directed toward the extension of transnational regulatory regimes to

620. See Sarat & Scheingold, *supra* note 10, at 4.

govern market transactions that escape federal control. Thus, public interest lawyers have become involved in the design and implementation of regulatory mechanisms that radiate into the global marketplace in pursuit of transnational corporations. Because of the heterogeneity of legal hooks for transnational regulation, this objective has been pursued within multiple arenas:⁶²¹ U.S. courts (ATS corporate litigation), international trade venues (the WTO dispute resolution and NAFTA side agreement systems), developing countries (rule-of-law reform efforts), the human rights system (the International Labour Organization and UN), and the media (codes of conduct).

Inside the United States, the influence of free market policies on the domestic economy has also impacted how public interest lawyers articulate and advance the cause of market regulation at home. In the face of the movement toward greater labor flexibility, especially in the service sector, public interest lawyers have focused on promoting the enforcement of basic employment rights for low-wage workers, particularly immigrants, who often labor under contingent arrangements or in the underground economy where the risk of economic exploitation is significant. The rise of the immigrant workers' rights movement signals the growing importance of this domestic regulatory agenda, which combines traditional litigation with worker center-led grassroots organizing and the strategic use of international mechanisms, such as NAFTA's side labor process, to advance systematic labor rights enforcement campaigns.

The impulse to "re-regulate" can also be seen in efforts to apply an economic and social rights framework to respond to the needs of low-income people outside the workforce—visible in the human rights challenges to welfare reform and homelessness—and in the movement to internationalize environmental justice advocacy to block corporations from concentrating environmental harms in poor communities of color. Economic and social rights strategies around safety net and environmental issues highlight how global engagement can operate both to complement and redefine domestic public interest objectives by articulating the market-based harms of deregulation in the language of human rights as a way to bring international pressure to bear.

621. Cf. Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 J. SMALL & EMERGING BUS. L. 93, 104–26 (1999) (describing the range of efforts to promote transnational regulation to protect labor standards).

2. *Participation.* The classical objective of public interest law is to remedy the deficiencies of majoritarian democracy by opening political institutions to participation by “underrepresented” social groups.⁶²² Globalization reframes the goal of participation by channeling it into attempts to correct the “democracy deficit” in international institutions.⁶²³

Within international financial institutions and multilateral trade systems, while the stakes of participation are high, the processes are difficult to penetrate. The best opportunity for political intervention is at the stage of formulating international agreements, when U.S. advocates can attempt to influence domestic decisionmakers designing the basic terms of the deal. Once the agreements are finalized, the options for intervention are diminished. Overall, public interest groups have been hampered in the negotiation phase by their relative political weakness, while legal intervention to open trade negotiations to public participation has produced limited results: while Earthjustice is still challenging the exclusion of public interest groups from USTR trade policy discussions, the ILRF failed in its earlier effort to enforce labor conditionality, while Public Citizen lost its bid to force the environmental review of trade agreements.⁶²⁴

Against this backdrop, public interest groups have pressed for greater participation within already established international trade and finance systems, but the record thus far suggests that the achievement of formal participation rights within international bodies has not been matched by significant power to influence substantive policy. At the regional level, public interest organizations won a notable victory in the creation of quasi-legal review processes under NAFTA; after a decade of using the side agreements to promote labor and environmental rights on both sides of the U.S.-México border, however, advocates have discounted the system as a means to advance systemic reform.⁶²⁵ A parallel NGO-led movement to open the World Bank procedures for administering development assistance in the 1990s succeeded in creating an independent review system; yet

622. See HANDLER, *supra* note 29, at 192.

623. See ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* 75 (2004).

624. See Jose A. Egurbide, *Stop Biting the Hand that Feeds Us: Safeguarding Sustainable Development Through the Application of NEPA's Environmental Impact Statement to International Trade Agreements*, 22 PEPP. L. REV. 1089, 1137–41 (1995) (describing the failure of Public Citizen's lawsuit to force environmental review of NAFTA).

625. See *supra* Part II.B.1.a–b.

political pressure and the absence of legal enforcement powers has meant that the Inspection Panel's role has been largely confined to raising the public visibility of community displacement and environmental harm caused by Bank-sponsored projects.⁶²⁶ Similarly, though a campaign at the WTO in the late 1990s won the right to file public interest amicus briefs before dispute resolutions panels, panel discretion to consider the briefs has emptied the right of meaningful political content. A handful of domestic groups have nonetheless consistently monitored WTO proceedings in an effort to demand greater citizen participation and public accountability, but their presence only highlights their marginal status: although legal groups like Public Citizen and the Center for International Environmental Law offer hard-hitting critiques of the WTO's lack of transparency, they can do nothing to engage in rulemaking directly.⁶²⁷

Lawyers have had greater success penetrating international human rights institutions, which are specifically designed as a check on governmental abuse and thus rely on active NGO participation for legitimacy. U.S.-based public interest groups have become increasingly involved in the UN system since the mid-1990s, with more organizations gaining consultative status, actively attending UN meetings, providing testimony, and submitting shadow reports.⁶²⁸ In addition, U.S. groups have turned to the Inter-American system with greater frequency, not just to file petitions,⁶²⁹ but also to participate in discussions on human rights standard setting, as seen in the wide participation by public interest groups in the Inter-American Commission hearing on workplace abuse after *Hoffman Plastics*.⁶³⁰ The relatively strong public interest engagement in the UN and Inter-American human rights systems underscores the asymmetrical opportunities for participation within international bodies: NGOs are able to operate with greater authority under the progressive mandate of international political governance, but are still marginalized by the free market imperative of international economic governance.

3. *Resistance.* While international institutions have become targets in the movement to expand citizen participation in global

626. See *supra* notes 366–74 and accompanying text.

627. See *supra* notes 305–11 and accompanying text.

628. See *supra* notes 515–18 and accompanying text.

629. See *supra* notes 524–37 and accompanying text.

630. See EMPLOYMENT RIGHTS ARE HUMAN RIGHTS, *supra* note 450, at 5–10.

governance, they have also become sites for engaging in domestic political struggles over the meaning of legal rights for less powerful groups at home. Though public interest lawyers have long used law to check federal power, and continue to turn to federal courts to advance their causes, the shift toward conservative control of the federal government has realigned political incentives, increasing the threat of federal decisionmaking to liberal causes and reducing the benefits of federal advocacy for liberal lawyers. From the perspective of liberal public interest groups, the federal government has thus been transformed over the past twenty-five years from ally to opponent, operating to unravel basic legal protections—while the human rights system has emerged as the new standard bearer of legal progressivism. In response to this new configuration of power, the U.S. public interest law movement has shifted emphasis in the post-civil rights era: moving away from *enlisting* federal power to protect domestic rights toward *resisting* federal power through the application of international human rights. One can view this effort to constrain federal power through human rights spatially as a project of applying vertical pressure, invoking the power of supranational institutions from above and the energy of grassroots action from below.

The goal of constraining federal power has placed public interest lawyers in different advocacy positions with respect to domestic and foreign policy. On the domestic social policy front, the aim has been to deploy human rights to reinforce what liberal lawyers view as the crumbling edifice of federal civil rights and social welfare protection. This has involved both the defensive application of human rights in an attempt to preserve protections associated with the high water marks of the Civil Rights Movement and New Deal, as well as the offensive use of human rights to promote liberal causes with a weaker foundation in American law. In response to civil rights and social welfare retrenchment, lawyers have thus promoted countervailing human rights strategies in U.S. courts, the UN, and the Inter-American Commission to fortify defendant rights in the criminal justice system, provide a bulwark for affirmative action, resist the erosion of reproductive rights, and contest the enactment of welfare reform. At the local level, women's rights and racial justice groups have attempted to implement human rights treaties from the bottom up, championing the passage of human rights ordinances that require

municipal governments to review employment practices and take affirmative measures to prevent racial and gender discrimination.⁶³¹

In addition to stemming domestic legal backsliding, lawyers have in limited cases deployed human rights to proactively build support for historically disfavored domestic causes. The movement against the juvenile death penalty, which combined domestic litigation with advocacy in the UN and Inter-American Commission, was able to leverage international pressure by highlighting the wide distance between U.S. practice and international norms on the administration of justice.⁶³² Other efforts have proven less successful, such as the campaign to strengthen the right to indigenous control over ancestral lands waged by Native American organizations, which have been unable to translate support for international resolutions on the Rights of Indigenous Peoples into political power at home.⁶³³ Moving into the domain of economic and social rights, lawyers have—more tentatively—used human rights strategies to promote the extension of U.S. law well beyond historical baselines, advocating for the establishment of a human right to housing and a healthy environment at the UN, while using human rights norms to support right-to-housing and environmental justice campaigns at the local level.⁶³⁴

Although support for human rights strategies as a way to influence domestic social policy is building, there are conflicting views about its political desirability and little evidence of its political effectiveness. While the optimistic version of the movement to bring human rights home emphasizes the dynamic potential of integrating international human rights and domestic public interest law strategies, the pessimistic view sees the progressive turn toward human rights as the capstone achievement of domestic political conservatism, punctuating the demise of U.S. law as a progressive force for social change. The domestic human rights movement can claim important accomplishments: supportive human rights references in Supreme Court opinions, pronouncements from the UN and the Inter-American Commission on U.S. violations, and human rights ordinances adopted in progressive cities. But beyond this record, domestic human rights advocates at this stage have to be satisfied with nascent efforts at movement building, as well as

631. *See supra* notes 541–44 and accompanying text.

632. *See supra* notes 549–54 and accompanying text.

633. *See supra* notes 582–84 and accompanying text.

634. *See supra* Part II.B.1.b.

documentation and reporting strategies that have worked to generate pressure on politically weaker nations but have uncertain application to the United States, whose power can more easily allow it to deflect criticisms, opt out of human rights obligations, or attempt to restructure human rights institutions to its advantage. From this vantage point, investments in human rights strategies may be seen by liberal critics as a diversion from the more difficult long-term project of domestic political restructuring.

The picture looks slightly different when the lens is trained on human rights advocacy around U.S. foreign policy, in which the goal is to impose standards on the exercise of executive power over noncitizens. Here, distinct patterns emerge with respect to the two main areas of concern: the regulation of immigration and the administration of national security. With respect to immigration, the story appears to be one of the increasing use—but declining effectiveness—of international law strategies. In the 1980s and 1990s, immigrant rights lawyers won important court victories in impact cases that sought to align domestic refugee law with international human rights standards. However, while advocates have increasingly turned to human rights as a resource for undocumented immigrants—using the UN and Inter-American systems to dramatize abuses stemming from U.S. labor law and border enforcement practices—there have been no policy achievements to match the human rights rhetoric.

In contrast, public interest lawyers have been more successful in using the moral authority of human rights to mobilize international opposition to U.S. antiterrorism policies. Public interest groups have been able to effectively use human rights arguments to generate international censure of the harsh interrogation and indefinite detention of “enemy combatants” in the War on Terror precisely because such conduct is seen as contravening fundamental civil and political rights that enjoy strong international support—freedom from torture, access to counsel, and access to courts. To maximize international pressure, CCR and the ACLU have deftly combined international and domestic strategies, bringing human rights violations to the UN and Inter-American systems, but also relying heavily on domestic litigation strategies to raise human rights claims against executive branch actors.⁶³⁵

635. See *supra* notes 591–98 and accompanying text.

The successful litigation efforts in the Guantánamo cases, in particular, have raised hopes for domestic human rights. They also suggest that the effectiveness of human rights strategies depends on the substantive area of their application and the venue through which they are interpreted. Whereas the application of human rights to affect social policy issues of purely *domestic* concern suffers from an inability to enlist strong international sympathy, the lever of human rights has greater potential when foreign policy issues are at stake, as these issues directly implicate the interests of the international community and are more likely to elicit stronger condemnations of U.S. practice. Traditional human rights methods of “naming and shaming” have more resonance when the question is one that either directly affects foreign nationals (immigration) or arouses international outrage in a way that complicates U.S. foreign policy objectives (the War on Terror). The experience of post-9/11 advocacy also indicates that human rights may have more impact when mediated through domestic bodies with institutional legitimacy. The Bush administration defied requests by the Inter-American Commission to revise the operation of the military tribunal system at Guantánamo, but promptly suspended the system in the wake of the Supreme Court’s *Hamdan v. Rumsfeld* decision,⁶³⁶ suggesting that the power of human rights is contingent on the authority of the body invoking them. In the end, *Hamdan* did not guarantee human rights compliance by U.S. officials, who responded by gaining congressional authorization for the Military Commissions Act of 2006, which continued to allow the use of evidence obtained by torture and the exclusion of classified exculpatory evidence, while suspending federal jurisdiction to hear detainee habeas petitions.⁶³⁷ Nonetheless, the power of court orders to force governmental action—albeit deficient—suggests that resistance through human rights is strengthened through its association with traditional venues of legal authority.

B. *Tactics*

As the movement between litigation and nontraditional advocacy in the domestic human rights arena highlights, public

636. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

637. See Sheryl Gay Stolberg & Neil A. Lewis, *President Signs New Rules to Prosecute Terror Suspects*, N.Y. TIMES, Oct. 18, 2006, at A20.

interest law in the global age operates along a tactical continuum that ranges from traditional forms of adversarial legalism to more open-ended and nontraditional methods, such as public relations campaigns and grassroots organizing. While public interest lawyers have long struggled with where to situate themselves along this continuum, globalization presents distinct trade-offs, altering the strategic value and applicability of different tactical options, multiplying the venues for legal engagement, and creating possibilities for new professional alliances.

1. *Pluralism.* The conventional critique of public interest law rests on two central claims. The first holds that, as a methodological matter, public interest law wrongly gives primacy to litigation as a social change tool, diverting resources from more effective forms of political action.⁶³⁸ The second holds that, as an ideological matter, public interest law is built on the false promise of legal rights, which operate both to legitimate the status quo and promote individualism at the expense of collective action.⁶³⁹ What emerges from a review of public interest lawyering in the international arena, however, is a portrait of practice in many ways at odds with these two critiques. First, this lawyering is not defined by a litigation-centric perspective; instead, litigation is generally viewed as part of a broader repertoire of advocacy techniques that lawyers bring to bear, often in complementary and politically sophisticated ways, to solve problems. Second, rights are viewed not as ends in themselves, but as a means to advance defined political objectives, deployed pragmatically to spur collective mobilization.

In contrast to the traditional focus on litigation, lawyering in the international sphere readily incorporates nonlegal techniques—organizing, policy advocacy, and publicity—to advance goals. The emphasis on multifaceted advocacy over narrow legal representation is a product of both strategic necessity and tactical innovation. To the degree that public interest lawyers find domestic courts inhospitable, alternative strategies are a must: as lawyers move into what they view

638. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 339 (1991); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 6 (2d ed. 2004); Lobel, *supra* note 619, at 939.

639. See Richard L. Abel, *Lawyers and the Power to Change*, 7 *LAW & POL'Y* 5, 8–9 (1985); Robert W. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 413, 418 (David Kairys ed., rev. ed. 1990); Mark Tushnet, *An Essay on Rights*, 62 *TEX. L. REV.* 1363, 1382–83 (1984).

as more receptive fora, such as the human rights system, traditional strategies do not apply with the same force, and nontraditional techniques, such as lobbying and reporting, are required. And even in contexts in which domestic courts are technically available, the perception of their limited effectiveness prompts lawyers to supplement legal with nonlegal strategies.⁶⁴⁰ An important example of this within the immigrant rights field is the emergence of worker centers that combine legal, organizing, and policy advocacy to respond to immigrant labor abuse, which advocates see as resistant to conventional rights enforcement strategies.⁶⁴¹ The complex nature of transnational problems, which cut across multiple jurisdictional boundaries, also invites flexible responses. In the environmental context, in particular, the transnational scope of environmental harm causes lawyers to approach problems from the perspective of an advocacy campaign rather than a legal case. For instance, the NRDC's international program reports that it operates in a "campaign mode" with lawyers taking on a particular cross-boundary environmental issue and pursuing it in different domestic and international venues with the goal of bringing multiple pressures to bear to achieve an outcome.⁶⁴²

The current wave of international practice also challenges the claim that the pursuit of legal rights necessarily co-opts transformative political action. As the domestic human rights and immigrant rights movements highlight, lawyers are both sensitive to the potential political risks of rights strategies and skillful in deploying rights in flexible and pragmatic ways to leverage short-term policy gains and stimulate long-term political mobilization. Thus, rights are not simply viewed as claims to be invoked in court, but are also seen as resources to help frame policy demands and motivate grassroots action.⁶⁴³

640. Cf. FORD FOUND., *supra* note 12, at 7 (stating that a changing domestic political environment "has made for increasingly layered advocacy strategies that simultaneously involve education, organizing, policy, legal and scholarly work at both the local and national level").

641. See GORDON, *supra* note 11, at 202 (noting that "the combination of legal pressure and protest was often more effective than a lawsuit alone in settling cases").

642. Telephone Interview with S. Jacob Scherr, *supra* note 361.

643. Cf. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1020 (2004) (describing the evolution of an approach to public law litigation in which court intervention destabilizes the parties' pre-existing litigation expectations in a way that opens up possibilities for new experimentalist collaboration to resolve difficult institutional problems).

At the international level, labor and environmental advocates have leveraged the influence of human rights venues to publicize grassroots demands and strengthen local organizing campaigns: the Coalition of Immokalee Workers won a favorable settlement of its forced labor claim against Taco Bell after testifying in front of the Inter-American Commission, and Earthjustice's UN advocacy was credited with pressuring Shell to settle its long-standing dispute over relocating "Cancer Alley" residents in Louisiana.⁶⁴⁴ These efforts suggest that, although systemic human rights reform may be far off, the strategic use of international levers, when combined with sophisticated political campaigns, can produce concrete benefits.

When lawyers are able to claim rights in U.S. courts, they do—but not without an assessment of the political trade-offs. The use of the ATS provides one example. For CCR and the ACLU, litigation under the ATS has been part of a conscious strategy to expand the scope of human rights in U.S. courts on the theory that it offers an additional entry point for contesting governmental misconduct, particularly in the War on Terror, where government policy has been resistant to change through legislative channels. Lawyers have also used the ATS as part of broader strategies to contest corporate abuse that bring together legal and political action. For instance, Earthrights' involvement in the *Unocal* case grew out of its founders' deep engagement in local Burmese organizing against Unocal and was planned to strengthen local resistance.⁶⁴⁵ The use of the ATS in cases by undocumented domestic workers against their employers has also proceeded as part of a broader plan of political organizing. Particularly because domestic worker cases typically use the ATS to invoke human rights violations as an addendum to state and federal wage-and-hour claims, the goal is not necessarily to win on the merits, but to frame the problem of domestic work in terms that will generate public attention and mobilize political action.⁶⁴⁶ Along these lines, ATS advocates suggest that even when litigation does not create binding human rights precedent or produce clear monetary wins, it is still useful as a means to educate the public, mobilize grassroots campaigns, and forge human rights activist networks.⁶⁴⁷

644. See *supra* notes 609–10, 616–18 and accompanying text.

645. See Telephone Interview with Marco Simons, *supra* note 323.

646. See Wishnie, *supra* note 238, at 541.

647. See Van Schaack, *supra* note 329, at 2338–39.

This view resonates more broadly within the domestic human rights field, as advocates seek to deploy rights in ways that support direct and indirect political goals. For instance, the director of Columbia's Bringing Human Rights Home project emphasizes the benefit of human rights to frame organizing campaigns, noting that human rights are useful to "change the dialogue about an issue or to create public pressure" and that it is often fruitful to think of human rights not as a trump card, but rather as "another arrow in the domestic quiver" and a "moral force for political organization."⁶⁴⁸ Similarly, the National Economic and Social Rights Initiative has been a leader in the use of human rights as an organizing tool, stressing the solidarity-building nature of human rights rhetoric, which it suggests cuts across more narrow identity categories and can therefore promote the formation of diverse coalitions.⁶⁴⁹

Immigrant rights lawyers emphasize the potential of asserting rights in different venues for drawing publicity to their cause and stimulating grassroots activism among client groups. At the supranational level, advocates suggest that the ability of clients to enter into international venues like NAFTA to raise rights violations lends legitimacy to their causes that is psychologically satisfying and may provide a springboard for future activism.⁶⁵⁰ The human rights system, in general, is viewed as a useful framework for publicizing the gap between official rhetoric and action, compelling official justification for governmental conduct and raising the political costs of violations.⁶⁵¹ At the grassroots level, immigrant worker advocates cite the rhetorical power of rights as a means of promoting group solidarity and cultivating worker consciousness of labor abuse.⁶⁵²

Yet, while the pragmatic use of rights can complement political action and promote solidarity, it also has the potential to reinforce existing fault lines. Some proponents see human rights universality as a means of transcending the divisions and responding to the failures of U.S. "identity politics"—and thus opening a path toward building a

648. Telephone Interview with Cynthia Soohoo, *supra* note 478.

649. See National Economic and Social Rights Initiative, NESRI Commentary, http://www.nesri.org/human_rights_us/nesri_commentary.html (last visited Nov. 21, 2007) ("The simple use of the term human rights instead of women's or workers or prisoners or immigrant or sexuality rights, for example, elicits an understanding of rights as inherently the same for all people rather than as defined by this or that particular status.").

650. See Telephone Interview with Michael Wishnie, *supra* note 240.

651. See *id.*

652. See GORDON, *supra* note 11, at 183–84.

politically viable progressive movement.⁶⁵³ This embrace of universality, however, raises familiar concerns of ethnocentrism: Whose universality is being proclaimed? And does universality suggest a retreat from a deep engagement with the persistent and differential experience of discrimination? Accordingly, those groups that have moved most forcefully into the human rights arenas—CCR and the ACLU—are ones that have never been identity-based. Lawyers at identity-based organizations, in contrast, have struggled more deeply over the importation of human rights, with the standard-bearers of the U.S. civil rights movement, particularly the NAACP LDF, stepping with greater circumspection into the human rights domain. The reluctance to engage human rights is a matter of strategy as well as principle, with some advocates for identity-based groups fearful that the move toward human rights signals retreat from the cause of building strong domestic laws. And finally, despite attempts to merge the different strands of advocacy, the universality of human rights remains in tension with the particularity of immigrant rights, which calls for a recognition of difference rather than its submersion.

Despite the innovative use of rights to activate mobilization, rights strategies continue to present their own political dilemmas. Human rights claims, like their domestic counterparts, remain vulnerable to the risk of state co-optation identified by rights critics. For instance, commentators have noted that although the United States promotes human rights as a core principle of its foreign policy abroad, it has vigorously resisted the application of human rights norms to governmental action in the War on Terror.⁶⁵⁴ Though this discrepancy has given activists room to pressure domestic human rights compliance through charges of hypocrisy, it also suggests that skillful use of the rhetoric of human rights can obscure inconsistencies. It is also the case that human rights, like domestic rights, are subject to political backlash. This can be seen in the growing hostility to the use of human rights in domestic courts and efforts at the supranational level to restructure aspects of the human rights system, such as the UN Commission on Human Rights, which have been sources of embarrassment to the United States.⁶⁵⁵

653. See FORD FOUND., *supra* note 12, at 7.

654. See Hajjar, *supra* note 30, at 600.

655. See Warren Hoge, *Officials at U.N. Seek Fast Action on Rights Panel*, N.Y. TIMES, Jan. 1, 2006, at A1, A10.

In addition, although efforts to use human rights to stimulate grassroots mobilization provide useful examples of marrying international strategies with local struggles, their scale may limit the challenge to global systems. One goal, to be sure, is to knit together the pieces of local mobilization into a broader tapestry of political resistance.⁶⁵⁶ Despite the increased attention that they have received, however, these efforts on the whole have been loosely coordinated and inadequately resourced, making them outmatched in their battles against corporate adversaries and government policymakers. At this stage, therefore, though transnational lawyering strategies seem less associated with litigation and more integrated into broader political struggle, they nevertheless face a set of globalized political constraints parallel to the domestic ones that challenged civil rights efforts to use law to bring about social change.

2. *Polycentrism.* Tactical decisions—*how* to advocate—are framed by locational decisions—*where* to advocate. It is often the case that a lack of alternative options dictates the locus of advocacy. Yet the move into different venues is not simply a matter of lawyers being pushed out of domestic fora. Instead, groups may choose to enter international venues out of an effort to influence international decisionmaking processes that impact client constituencies. In addition, international venues offer alternative platforms from which to assert political pressure for domestic gain. This polycentrism invites lawyers to move into multiple arenas, where they are required to calculate strategic costs and benefits, weighing which venues offer the greatest possibilities for politically meaningful intervention.

In undertaking this calculus, lawyers balance aims of enforceability, legitimacy, and publicity. The question of enforceability implicates debates about “hard” versus “soft” law strategies and their relative merits. Do lawyers turn to venues that have the capacity to issue directives that are binding on state and private actors and have clearly defined methods of enforcement (“hard” law)? Or do they opt for venues that lack mechanisms for directly constraining action, but nonetheless establish norms and offer

656. See Boaventura de Sousa Santos, *Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality*, in LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY, *supra* note 340, at 29, 48–58.

opportunities for participation that promote negotiation and flexible compliance standards (“soft” law)?⁶⁵⁷

Public interest lawyers operating on the global stage resist this either-or dichotomy, looking instead for ways to enlist both hard and soft law systems in mutually reinforcing ways. Advocacy around workers’ rights offers one perspective on this dynamic. Where venues offer the potential for legal enforceability, lawyers take advantage of them to bring workers’ rights claims. Domestically, lawyers have therefore invested heavily in wage-and-hour enforcement actions for immigrant workers, while the potential for enforceability has also drawn lawyers to use the ATS in federal courts to pursue transnational labor claims against offending corporations. Outside of U.S. courts, however, opportunities for hard enforcement are sharply curtailed. Engagement in soft law regimes is therefore increasingly common. But even when advocates enter soft law venues, it is not always the case that they do so simply with an eye toward leveraging political pressure. Rather, some groups have also sought to “harden” soft law systems by expanding the possibilities for legal enforcement from within. Engagement in soft law venues may therefore reflect not just a commitment to flexibility, but also an effort to *transform the venues themselves*.

Advocacy within the NAFTA side labor agreement, which provides a soft monitoring and reporting system, suggests this type of effort. Though labor advocates have used the NAFTA process as a venue to raise public awareness about labor abuse, their early efforts were also designed as test cases to push the system in the direction of greater enforceability. In particular, the early maquiladora labor cases on health and safety issues saw advocates pushing to see how far the United States would go in pressing for outside expert review and arbitration, which are technically available under the agreement. This effort failed, in part because of the transition from the Clinton to Bush administration, but it reflected an effort to promote greater enforcement within the system, rather than simply a commitment to its soft law orientation.⁶⁵⁸ A different example of the interaction of hard and soft law regimes occurs in the context of corporate codes of conduct promoted by domestic NGOs and voluntarily adopted by corporations, which then agree to be monitored for compliance. Here,

657. See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 388–95 (2004).

658. See *supra* notes 231–37 and accompanying text.

too, the division between hard and soft is blurry, with advocates attempting to “harden” the codes by funneling them into more traditional legal venues. The Wal-Mart case brought by the ILRF on behalf of sweatshop workers in developing countries is one example of this: its hard law theory, holding Wal-Mart contractually responsible for supplier labor violations, was premised on Wal-Mart’s adoption of a soft law code of corporate conduct governing its standards for engaging suppliers.⁶⁵⁹ In this sense, the Wal-Mart case reflects an effort to bootstrap soft law into hard though conventional litigation. From this point of view, enforceability can be seen as both a *criterion* influencing the selection of a particular venue and an end *goal* of advocacy.

Enforceability, however, is not the only metric for evaluating engagement with international venues. To the degree that the choice of venue is made to advance a political cause, a central question is how venue selection may impact the *audience* advocates seek to influence. At times, that audience may be a group’s own constituency, which the group seeks to mobilize by using an international decision to publicize a cause and galvanize grassroots action. For example, when the Center for Economic and Social Rights filed its 2003 Inter-American petition challenging the international legality of welfare reform, it was timed to coincide with a march planned to commemorate Martin Luther King Jr.’s Poor People’s Campaign.⁶⁶⁰ Thus, the goal was partly to use the media attention generated by the petition to draw people to the march. In addition, the petition sought to reframe the issue of welfare reform in human rights terms as part of a coordinated effort to promote grassroots education about human rights among the welfare population and raise awareness about the antipoverty organizing efforts of the Philadelphia-based Kensington Welfare Rights Union and the Poor People’s Economic Human Rights Campaign that it led.⁶⁶¹ Again, the aim was to produce publicity that would bring community members into the campaign’s organizing fold.

In other contexts, venue selection is designed to put pressure on an identified set of corporate or political decisionmakers. There, the strategy is to use a venue’s authority to spotlight wrongdoing and legitimate grievances, bringing negative publicity to bear in an effort

659. See *supra* note 339 and accompanying text.

660. See FORD FOUND., *supra* note 12, at 11.

661. *Id.* at 31.

to force decisionmakers to take remedial action. In the case of corporate wrongdoing, the choice of venue is often designed to elicit a negative reaction from consumers or investors: Earthjustice's use of the UN system in the Shell "Cancer Alley" case and the Coalition for Immokalee Workers' testimony in front of the Inter-American Commission in its dispute with Taco Bell are leading examples. Foreign officials are also important audiences for advocates. For instance, Mexican officials have become a key audience for U.S. immigrant worker advocates, who attempt to enlist Mexican official concern over the treatment of expatriate workers as a way to leverage domestic policy change. Thus, the NAFTA side labor claims filed on behalf of H-2A agricultural workers alleging discrimination and H-2B nonagricultural workers excluded from federal legal services representation were both filed to mobilize Mexican governmental officials to lobby for specific legislative reform in the context of the political debate over U.S. guest worker proposals.⁶⁶²

3. *Alliance.* The pattern of public interest alliance building that has emerged in the global era reflects the border-crossing logic of globalization, with lawyers engaged in collaborations that traverse geographic, organizational, and professional divides. At the most basic level, alliances provide more resources to undertake advocacy and implement victories. Strategic alliances also have the potential to increase the visibility of particular campaigns, while providing public interest lawyers with greater credibility in front of decisionmakers and community members. In the global era, the transnational scale of advocacy makes alliance formation more complex, with lawyers required to navigate greater distances and foreign cultural terrains. But globalization also diversifies and improves channels of communication in ways that help to facilitate new cross-border relationships. The ability to quickly communicate across time zones and send large documents via e-mail allows lawyers to overcome the logistical concerns attending to cross-border advocacy. In addition, the relative ease of international travel is key for lawyers seeking to establish linkages with groups abroad. Online listservs have also facilitated alliance building, with sites like E-LAW in the

662. Telephone Interview with D. Michael Dale, *supra* note 122.

environmental field and U.S. Human Rights Online promoting information exchange among international groups.⁶⁶³

Against this technological backdrop, cross-border alliance building is driven by clients, cases, and causes. Lawyers for internationally mobile clients form alliances to better address client problems. Within the migrant farmworker arena, for instance, alliances have developed to facilitate the representation of clients who cross the border for seasonal jobs: domestic legal services groups have established linkages with newly formed organizations like the Centro de los Derechos del Migrante in México to stay in contact with transient farmworker clients and access case-relevant home-country information.⁶⁶⁴ Transnational alliances are also forged around specific cases or campaigns. For example, in *Doe v. Unocal*, it was the labor and environmental activist alliance between U.S. groups (ILRF and EarthRights International) and Burmese organizations that both generated the case in the first instance and facilitated the ongoing coordination of the litigation, media, and organizing campaigns.⁶⁶⁵

Alliances are also built around commitment to larger causes: indigenous rights activism has connected U.S. Native American rights groups with counterparts around the region to advocate for UN and Organization of American States-level policies, environmental groups like Environmental Defense have established links with Mexican allies to redress transborder pollution, and domestic human rights advocates have become closely networked to international groups in the quest to advance universal legal standards. Yet while these transnational alliances permit dispersed groups to coordinate advocacy campaigns, they also generate their own internal power dynamics that can reinforce pre-existing cleavages. To the extent that U.S.-based lawyers have more resources, they can influence agendas and dictate strategy in a way that magnifies their authority. This is an acute concern within the web of alliances formed to help promote public interest law models abroad: despite conscientious efforts to avoid the imposition of U.S. ideas in developing countries, critics still

663. E-LAW: Environmental Law Alliance Worldwide, <http://www.elaw.org> (last visited Feb. 24, 2008); probono.net, <http://www.ushumanrightsonline.net/index.cfm> (last visited Feb. 24, 2008).

664. See *supra* notes 246–48 and accompanying text.

665. See *supra* notes 321–27 and accompanying text.

view the current wave of rule-of-law reform as an imperialistic attempt to Westernize local culture.⁶⁶⁶

Another dynamic in alliance formation is collaboration between nonprofit organizations and for-profit law firms. These types of alliances are not limited to the international arena, but some have emerged in response to the particular demands of internationally oriented practice. In the corporate ATS cases, in particular, for-profit public interest firms have been crucial players, fronting the costs and shouldering the risks of resource-intensive projects that require coordination across significant geographic and cultural distances. Although these private actors help to sustain high-cost litigation, they also draw criticism from those who emphasize the potential for self-interested attorneys to use the ATS as a vehicle to generate large fees, rather than pursue transnational justice.⁶⁶⁷

Law firms have also become increasingly interested in international pro bono representation. Big-firm pro bono lawyers have been important allies in domestic human rights cases, providing attorney resources for human rights amicus briefs in cases challenging antisodomy laws⁶⁶⁸ and the juvenile death penalty,⁶⁶⁹ while also assisting on the *Hamdan* case.⁶⁷⁰ U.S.-based law firm lawyers are also increasingly investing in rule-of-law projects abroad,⁶⁷¹ as exemplified by DLA Piper Rudnick Gray Cary's New Perimeter program, which is a nonprofit affiliate set up to conduct pro bono on international development projects for the firm.⁶⁷² Such international pro bono programs provide law firm attorneys cosmopolitan travel experiences, link up domestic offices and foreign branches, and expose lawyers to transnational practice relevant to commercial clients. Like their domestic counterparts, however, these pro bono ventures are also

666. See Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law,"* 101 MICH. L. REV. 2275, 2280–86 (2003).

667. See Johnson, *supra* note 562, at 658.

668. See Brief for Mary Robinson et al. as Amici Curiae Supporting Petitioners, *supra* note 509.

669. See Brief for the Human Rights Committee of the Bar of England and Wales et al. as Amici Curiae Supporting Respondent, *supra* note 509.

670. See Press Release, Perkins Coie LLP, Perkins Coie Hamdan Team Honored by King County Bar Association (Mar. 26, 2007).

671. See Koppel, *supra* note 389, at 92.

672. See Press Release, DLA Piper Rudnick Gray Cary US LLP, DLA Piper's International Pro Bono Initiative Completes Projects and Establishes New Priorities in Its Second Year (May 22, 2006), available at <http://www.dlapiper.com/global/media/detail.aspx?news=2184>.

constrained by law firm business considerations:⁶⁷³ their main focus is on civil and political rights in domestic courts, and rule-of-law and economic development projects abroad. And within the domain of civil and political rights, some cases are more palatable than others: for instance, though big law firms signed on to challenge the validity of Guantánamo military commissions⁶⁷⁴—which raise a classic question of access to justice—they have been reluctant to take on more controversial War on Terror cases alleging government-authorized torture.

Global interdependence has also shaped the formation of alliances that cut across conventional professional lines. Lawyer-nonlawyer collaborations develop in response to the distinctive needs of specific advocacy projects. In the immigrant worker context, for example, lawyers collaborate with organizers in boycotting employers to pressure settlements in labor cases. Alliances also coalesce around campaigns to reform policy, in which lawyers gain grassroots credibility from community-based partners—a dynamic evident in the collaboration between the ACLU and Legal Momentum with organizing groups, such as New York’s Urban Justice Center, to pass CEDAW legislation in New York.

Lawyers also seek out nonlawyers to make up for resource deficits. Thus, lawyers turn to university-based programs for support in pursuing more experimental international test cases: students in law school clinical programs have accordingly played important roles in NAFTA labor and environmental cases, as well as a number of significant human rights cases, including recent challenges on behalf of Guantánamo detainees.⁶⁷⁵ Foreign governmental officials have proven to be important supporters on immigrant worker issues, sponsoring trainings provided by México-based farmworker projects, like the Centro de los Derechos del Migrante, and providing some funding for U.S. immigrant worker programs, such as the Northwest Workers’ Justice Project.⁶⁷⁶ Organized labor has recently made efforts to support immigrant workers: the AFL-CIO’s Immigrant Worker

673. See Cummings, *supra* note 393, at 116–35.

674. See Neha S. Gohil & Shams S. Mitha, *Representing Guantanamo Bay Detainees*, 35 A.B.A. SEC. TORT TRIAL & INS. PRAC. SEC. REP. 68, 68 (2005).

675. See Craig Whitlock, *U.S. Frees Longtime Detainee: Court Had Ruled in Favor of Turk*, WASH. POST, Aug. 25, 2006, at A9 (detailing the work of the Seton Hall Law School clinic in securing the release of a Turkish citizen).

676. See *supra* note 152 and accompanying text.

Program now provides technical assistance to workers' rights organizations and helps to coordinate immigrant worker advocacy. In addition, progressive unions and AFL-CIO sponsored groups such as the Coalition for Justice in the Maquiladoras have been critical players in the NAFTA side labor cases.

Advocacy around international issues has also blurred conventional programmatic distinctions and produced coalitions that traverse professional categories. The concept of human rights, in particular, has infused multiple disciplines, with groups like the U.S. Human Rights Network helping to disseminate human rights methods and goals across traditional civil rights, civil liberties, and poverty law areas.

The issue of immigration has similarly cut across advocacy domains, generating new configurations of lawyers working to solve immigrant problems. One example of this is in the criminal defense arena, where public defenders faced with increasing numbers of immigrant clients have joined up with immigrant rights attorneys in alliances such as the Defending Immigrants Project to coordinate strategy so that immigrant criminal defendants can minimize the immigration consequences of criminal convictions. Immigration has also influenced the organization of traditional civil rights and poverty law practice, with civil rights groups (MALDEF) moving more heavily into immigrant issues, general impact groups (ACLU) focusing on immigrant rights, employment law reform organizations (NELP) establishing immigrant projects, and immigration groups (NILC) setting up employment programs. Some of these groups, in turn, have come together in different configurations to collaborate on immigrant worker advocacy through alliances such as the Low-Wage Immigrant Worker Coalition and collective projects such as the Inter-American Commission hearings on *Hoffman Plastics*. Particularly after 9/11, coalitions have formed around immigrant civil liberties issues, with an important example being the coalition of clinical programs, civil rights groups, and immigration attorneys that worked to represent the Arab and South Asian immigrants detained in the immediate aftermath of 9/11.

C. Roles

A central tension of public interest law is how lawyers balance professional obligations to clients with personal commitments to

causes.⁶⁷⁷ Lawyering in the international sphere reproduces these tensions on a wider stage, raising distinct challenges to the norm of client accountability and influencing professional motivations for pursuing global causes.

1. *Representation.* The conventional view of the lawyer's professional role emphasizes the obligation to place the client's interests above the lawyer's political or personal aspirations. Public interest practice tests this view by substituting moral *neutrality* with moral *commitment* as the defining feature of legal advocacy.⁶⁷⁸ Commitment to cause, however, does not mean that public interest lawyers reject professional norms; rather, public interest practice operates along a spectrum of client-centeredness,⁶⁷⁹ with legal services lawyers who privilege access to individual client services at one end and law reformers who care chiefly about the political ends of representation at the other. From the perspective of client accountability, the central concern across the spectrum is lawyer power. At the client service end, the main issue is *private* accountability:⁶⁸⁰ How do lawyers exercise their power to choose poor clients and make decisions on their behalf? At the law reform end, the question is one of *public* accountability:⁶⁸¹ Who defines the cause and resolves conflicts over how to pursue it? Public interest lawyers operating in global arenas face challenges across both dimensions of accountability.

At frontline legal services offices, where priority is given to client service over systemwide reform, globalization has meant responding to the legal needs of the expanding base of immigrant clients. This has generated a dilemma of access. Lawyers faced with expanding immigrant demand for services confront difficult questions of triage:

677. See STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 7–9 (2004).

678. See William H. Simon, *The Ideology of Advocacy*, 1978 WIS. L. REV. 30, 31 (1978).

679. See DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE & PAUL R. TREMBLAY, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (2d ed. 2004).

680. The poverty law literature emphasizes the risk of lawyers coercing and disempowering vulnerable clients. See Cummings & Eagly, *supra* note 67, at 495–98.

681. The public interest law literature focuses on the conflicts lawyers face both in terms of defining social change goals, see Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976), and reconciling competing interests within the client constituency, see William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997).

which immigrants get served and in what types of cases? The answer to this question depends in part on lawyer location. Within federally funded legal services programs, LSC policy mandates the triage decision, with lawyers limited to the representation of legal immigrants or those whose undocumented status is connected to morally sympathetic circumstances (for instance, victims of trafficking and family abuse). Lawyers committed to less constrained advocacy for undocumented immigrants look for more supportive organizational locales, but outside of LSC programs, triage decisions are often driven as much by the availability of funding as by an assessment of client needs. Advocates complain that resources for assistance with workplace abuse, the defining injustice of the undocumented immigrant experience, are limited, while funders are attracted to support “victimization” projects— asylum, trafficking, domestic violence, and juvenile neglect.⁶⁸² In the face of resource constraints, lawyers committed to workers’ rights formulate other triage strategies, such as taking on cases based on their potential to achieve systemwide impacts or conditioning representation on client agreements to help run workers’ rights organizations.

Language access also defines the boundaries of legal services provision.⁶⁸³ Organizations that lack bilingual lawyers or staff members in languages relevant to immigrant client communities impose significant barriers to access for monolingual clients. Legal services groups have attempted to respond to this problem by actively recruiting bilingual staff and conducting targeted outreach to immigrant communities. The multiplicity of Asian languages is a particular concern. In response, legal aid groups like Greater Boston Legal Services and the Legal Aid Foundation of Los Angeles have established Asian outreach projects in which lawyers who speak Cantonese, Mandarin, and Vietnamese provide community education and direct services to clients.⁶⁸⁴ There are also fledgling efforts to use technology to extend bilingual services: the LSC-funded Legal Services for New York City, in conjunction with the New York State

682. See *supra* Part II.A.3.

683. See, e.g., Symposium, *The Effect of Globalization on Domestic Legal Services*, 24 FORDHAM INT’L L.J. S277, S296 (2001) (comments of Lucie White, Professor of Law, Harvard Law School); see also Patricia Hanrahan, *Serving Clients with Limited English Proficiency: Resources and Responses*, 38 CLEARINGHOUSE REV. 276, 277 (2004).

684. Greater Boston Legal Services, Asian Outreach Unit, <http://www.gbls.org/asian/index.htm> (last visited Feb. 24, 2008); Legal Aid Foundation of Los Angeles, Asian and Pacific Islander, <http://lafla.org/clientservices/api/index.asp> (last visited Feb. 24, 2008).

Bar and probono.net, launched a free on-line referral and information service in Spanish.⁶⁸⁵ Yet as limited English proficient immigrants grow in number and diversity, while fanning out to nontraditional settlement states, legal services programs continue to struggle to meet the goal of equal access.⁶⁸⁶ Once immigrant clients are accepted for representation, language difference compromises communication about case strategies and goals, which renders poor clients more vulnerable to lawyer influence over the basic terms of representation. Though legal services programs have made efforts to address language access by setting guidelines for translation,⁶⁸⁷ commentators note that in practice translation services are frequently unavailable and—when they are available—often involve nonprofessionals who inject third party viewpoints into the lawyer-client relationship, thus challenging the aims of client-centered service.⁶⁸⁸

At the other end of the public interest spectrum are those lawyers who view representation as a means to the end of legal and political reform. Domestic reform lawyers have been the subject of two basic criticisms. The first questions the systemic legitimacy of small groups of lawyers pursuing their own version of social change without significant political checks. On the one hand, this concern is heightened in the global context to the degree that U.S. lawyers are seen intervening as legal crusaders in countries around the world. Why should U.S. lawyers be involved in setting human rights standards in Burma and Nigeria, policing labor and environmental practices in México, protesting World Bank projects in India, or asserting reproductive rights on behalf of women in Africa? In this spirit, critics assail the use of the ATS to advance human rights claims, emphasizing the undemocratic nature of U.S. lawyers asking judges to adjudicate international norms.⁶⁸⁹ On the other hand,

685. See Brennan Ctr. Legal Servs. E-lert, Spanish Speakers in New York Facing Civil Legal Problems Gain New, Free Online Legal Assistance Service: LawHelp.org/NY, Mar. 3, 2006 (on file with the *Duke Law Journal*); see also LawHelp.org/NY, <http://www.lawhelp.org/NY/index.cfm/language/1/state/NY> (last visited Feb. 24, 2008) (providing information in Spanish on legal services, legal rights, and court procedures in New York).

686. See Hanrahan, *supra* note 683, at 281.

687. See Program Letter from Helaine M. Barnett, President, Legal Servs. Corp., to All LSC Program Directors 04-2 (Dec. 6, 2004) (on file with author).

688. See Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999 (2007).

689. See Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 361–63 (1998).

however, public interest lawyering in the international arena can be seen as promoting democracy to the extent that it challenges the exclusion of less powerful groups from bodies of international decisionmaking and counteracts the negative impact of U.S. policy abroad in cases where domestic channels of redress are blocked. Reform lawyering can also be seen as advancing the democratically formulated goals of the international community to the extent that lawyers attempt to enforce universal human rights in countries where egregious abuse cannot be remedied by the political process.⁶⁹⁰

The second major criticism of reform lawyering centers not on democratic legitimacy, but rather on client group accountability. Here, reform lawyers are faulted for pursuing causes in a top-down fashion, generating advocacy agendas without input from affected communities.⁶⁹¹ Reform lawyering in the international arena reproduces, and in some situations heightens, this concern. The nature of human rights lawyering, in particular, raises challenges for client accountability. In terms of agenda setting, the project of human rights tends to be top-down, with lawyers seeking to build international law either out of a normative commitment to universality or as a pragmatic alternative to domestic constitutionalism. The execution of human rights advocacy also raises issues of client accountability: human rights lawyers chart test cases to push the boundaries of international law and exert control over questions of goals, strategy, and venues. In addition, the transnational nature of human rights litigation tends to increase complexity, which operates in favor of greater lawyer control. Particularly with respect to ATS cases, questions of jurisdiction, immunity, and enforcement are highly arcane,⁶⁹² requiring deference to lawyer expertise. There are also logistical barriers that make client input more difficult. At one extreme are the Guantánamo cases, in which lawyers are limited in the ability to communicate with clients by government fiat; but even in less unique situations, the transnational scope of litigation makes coordination with clients more complex, particularly when access to technology is not readily available.

There are countervailing international dynamics that operate to ground lawyering more firmly in grassroots activity. As seen in the

690. See Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1234 (2005).

691. See Bell, *supra* note 681, at 512.

692. See Eric Gruzen, *The United States as a Forum for Human Rights Litigation: Is This the Best Solution?*, 14 TRANSNAT'L L. 207, 241 (2001).

labor context, the development of sophisticated and cohesive transnational activist networks around maquiladora and sweatshop issues offers a counterweight to lawyer power in the design and execution of reform campaigns. As transnational human rights, environmental, and other networks continue to grow and develop mechanisms for coordination,⁶⁹³ they can more effectively demand lawyer responsiveness to network-defined decisions. Yet the rise of transnational networks also magnifies the accountability problems inherent in group representation, with lawyers placed in the position of navigating conflicts among network members and having to discern the collective will from fluid and informal decisionmaking processes.⁶⁹⁴

2. *Motivation.* Motivation is a central component of professional identity, distinguishing the work of public interest lawyers, who are moved by a calling to pursue some version of social justice.⁶⁹⁵ In the pursuit of justice, however, there are multiple routes to take, not all of which involve global engagement. What factors shape the decisions of public interest lawyers to pursue international advocacy?

At the ideological level, the increasing salience of global interconnections may influence how lawyers perceive their advocacy role, injecting new explanations of injustice and presenting new prescriptions for reform. In this sense, “globalization” becomes a way of both understanding abuse and motivating efforts to fight it: workers’ rights advocates thus describe the need to fight globally linked garment sweatshops with global activism,⁶⁹⁶ while environmentalists emphasize the global struggle to combat transborder pollution.⁶⁹⁷ From an advocacy perspective, exposure to international human rights further reframes the way lawyers view possibilities for reform, legitimizing the notion that the United States

693. See KECK & SIKKINK, *supra* note 31, at 121–63, 165–98.

694. For a comprehensive discussion of the challenges of balancing ideals of community and individual autonomy in group representation, see Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers’ Representation of Groups*, 78 VA. L. REV. 1103, 1110 (1992).

695. Cf. SCHEINGOLD & SARAT, *supra* note 677, at 3 (“At its core, cause lawyering is about using legal skills to pursue ends and ideals that transcend client service—be those ideals, social, cultural, political, economic or, indeed, legal.”).

696. Telephone Interview with Julie Su, *supra* note 344.

697. Telephone Interview with S. Jacob Scherr, *supra* note 361.

must adhere to its international obligations,⁶⁹⁸ and reviving efforts to stimulate more proactive economic and social rights agendas.⁶⁹⁹

Motivation is also shaped by organizational context.⁷⁰⁰ For frontline legal services attorneys, global engagement is largely reactive, driven by the logic of individual case representation. For instance, lawyers at legal services groups on the border, like Texas RioGrande Legal Aid, report entering México to pursue cases involving transnational kidnapping,⁷⁰¹ while lawyers representing migrant farmworkers follow their clients to their home countries in the conduct of wage-and-hour cases. Yet organizational norms can influence how far legal services lawyers are willing to travel in the pursuit of client service. In the economic development context, some legal services groups are eager to help promote investment projects by HTAs to benefit communities in México, while others view their missions in strictly domestic terms and therefore limit their services to HTAs that focus their work primarily on helping immigrants in the United States.

For law reform groups, global engagement is largely a matter of deliberate strategic choice, with international advocacy guided by an impulse to press new claims and test new venues. Here, too, organizational norms are an important factor in lawyer receptivity to international opportunities. Lawyers in reform organizations like CCR and the ACLU, with organizational histories of international work and funding commitments to promote human rights, have moved most aggressively. Lawyers in civil rights groups like the NAACP LDF, in contrast, have entered the international domain more slowly out of concern for renegeing on the fight for domestic legal justice.

Although public interest lawyers are influenced by ideological and organizational factors, their decisions to engage globally are also

698. Telephone Interview with Laura Abel, Deputy Dir., Poverty Program, Brennan Ctr. for Justice (June 15, 2006).

699. Telephone Interview with Maria Foscarinis, *supra* note 604.

700. See Robert Nelson & David Trubek, *Introduction: New Problems and New Paradigms in Studies of the Legal Profession*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES* 1, 15 (1992).

701. See Texas RioGrande Legal Aid, Bi-National Project on Family Violence (BPFV), <http://www.trla.org/teams/binational.php> (last visited Feb. 24, 2008) (discussing a project providing representation to clients on domestic violence claims that has helped women to regain custody of children kidnapped and taken across the border).

shaped by personal and professional motives.⁷⁰² International advocacy harbors the promise of adventure and the exotic. Particularly for public interest lawyers whose lower salaries make foreign travel more difficult, opportunities to travel abroad in connection with work are coveted. The chance to connect with foreign counterparts, share domestic experiences, and see new locales is a powerful draw. To the extent that advocacy in the global arena is seen as the vanguard of new social movements,⁷⁰³ lawyers are attracted out of a desire to be a part of something that gives larger meaning to individual efforts. Moreover, there is professional prestige associated with the international sphere and opportunities to parlay international experiences into better jobs at home. Lawyers who forge new international paths by using human rights laws, bringing cases in international venues, or creating connections with transnational groups receive professional attention in the form of conference invitations, media opportunities, fellowships, and academic jobs. From these platforms, lawyers tout accomplishments and legitimize global strategies—adding further momentum to public interest law’s internationalization.

CONCLUSION

The emergence of a strong international theme within U.S. public interest law highlights the reversals of fortune, strategic adaptations, and deep tensions that characterize the movement in the contemporary era. The international turn is a product of domestic political realignment: inside the United States, the public interest law movement, built upon a symbiotic relationship with the federal government, now finds itself in opposition to the main levers of federal power. It has, therefore, looked outside U.S. borders—not just for legal resources, but also for connections with international struggles to infuse it with a renewed sense of movement energy and political mission. And it is there that U.S. lawyers have found new political allies, as well as opportunities to engage in large-scale

702. See Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES*, *supra* note 380, at 31.

703. See, e.g., della Porta & Tarrow, *supra* note 214, at 10 (describing how transnational changes have facilitated “the spread of movements targeting international institutions, practices, and relationships, producing a growing concern with global issues”).

reforms that seem only a dim possibility at home.⁷⁰⁴ Particularly on issues of labor rights and environmental justice, U.S. lawyers have found global partners eager to assert social standards within the regime of free trade. U.S. lawyers have similarly invested in rule-of-law reforms in developing countries, not out of an impulse to remake the world in the American image, but rather drawn by the lure of enormous possibilities for profound legal and political change. Back at home, lawyers have also tapped into international movements to promote domestic reforms, taking up the banner of immigrant rights and enlisting the legal and rhetorical power of human rights in the service of domestic causes. In contrast to the self-confident insularity of public interest law during the civil rights era, these movements suggest that U.S. lawyers now perceive that the rest of world has political lessons to teach and legal models to emulate.

Whether this global receptivity will translate into enduring change, however, is less clear. Though public interest lawyers have tried to deploy human rights to counteract the erosion of regulatory and social welfare systems at home and abroad, the effort has been largely limited to using international venues to publicize U.S. actions. To the extent that legal enforcement against corporations has been sought through domestic human rights litigation, the result has been individual recovery, but also political backlash, evident in efforts by business groups to lobby for the repeal of the Alien Tort Statute.⁷⁰⁵ The immigrant rights movement has provoked similar political opposition, focused on increased border enforcement, and though there has been discussion of comprehensive immigration reform, its central feature—a guest worker program—risks perpetuating labor abuse to the extent that it makes immigrants dependent on their employers to remain in the country. These developments raise questions about whether rights-based advocacy can effectively stem abuses in the marketplace. In the political arena, human rights has gained more traction post-9/11, but even here, the potential for political reversal is strong, as was evident in the post-*Hamdan* legislation reestablishing military commissions, stripping

704. See DEZALAY & GARTH, *supra* note 8, at 129–33.

705. See, e.g., John E. Howard, Op-Ed, *Alien Tort Claims Act: Is Our Litigation-Run-Amok Going Global?*, U.S. CHAMBER OF COMMERCE, Oct. 2002, <http://www.uschamber.com/press/opeds/0210howardlitigation.htm> (last visited Feb. 24, 2008).

Guantánamo detainees of habeas corpus rights, and precluding judicial enforcement of the Geneva Conventions.⁷⁰⁶

The fragility of international advocacy should not be read, however, as an indictment of the broader effort. Rather, it underscores a consistent historical lesson of the public interest law movement: legal victories are not etched in stone and must be monitored and protected from counterattack to be sustained. This was true as much in the civil rights era as it is now. In this sense, the story of internationalization can be viewed as but the most recent chapter in the ongoing struggle to use law to reform politics—a struggle in which public interest lawyers are always operating from a politically weak position. To be sure, the turn to the international sphere underscores the extent to which liberal rights advocacy has fallen out of political favor, particularly when compared to the increased legal rights activity by conservative public interest groups.⁷⁰⁷ However, it is also a measure of the resilience of the public interest law movement, which has embraced the strategic incorporation of international advocacy as a pragmatic adaptation to a hostile domestic environment—with the ultimate goal of using internationalism to reclaim the domestic arena once again as a site of progressive change.

706. See Military Commissions Act of 2006, Pub. L. 109-366 Stat. 2600 (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.). The habeas stripping provisions were challenged in the Supreme Court. See Linda Greenhouse, *Justices Ready to Answer Detainee Rights Question*, N.Y. TIMES, Dec. 6, 2007, at A32.

707. See Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of "Public Interest Law,"* 52 UCLA L. REV. 1223, 1263–73 (2005).