

**CARING FOR THE ELDERLY  
UNDOCUMENTED WORKERS IN THE  
UNITED STATES: DISCRETIONARY  
REALITY OR UNDENIABLE DUTY?**

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*Although contributing substantially to the economic growth of the United States, undocumented workers presently receive little return on their investment, as current immigration laws deprive them of the social benefits received by all other workers, namely social security benefits. In this note, Laura Fernandez Feitl examines the criteria which must be met in order to qualify for social security benefits and discusses how the Social Security Administration deals with the funds it receives from undocumented workers who are not eligible for those benefits. Further, she analyzes the various arguments advanced in favor of granting undocumented workers social security benefits, paying particular attention to the growing area of international human rights law. She concludes by suggesting ways in which the U.S. government can act to ensure that undocumented workers receive the benefits they have worked so hard to achieve.*

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## I. Introduction

Current immigration laws create a class of outsiders living and working in the United States.<sup>1</sup> Although undocumented workers are a vital part of the country's economy, the United States currently does not provide this class of workers the social services or legal protections available to other members of society.<sup>2</sup> Thus, the number of families who need but are ineligible for benefits has increased as a portion of this undocumented group.<sup>3</sup> A complete stop to immigration would be difficult if not impossible,<sup>4</sup> thus immigration ought to be seen as "a phenomenon to be managed, not a problem to be solved."<sup>5</sup> Given the amount of undocumented workers in the United States and the unavailability of this immigration pattern,<sup>6</sup> the United States should vehemently protect the human rights of these undocumented workers.<sup>7</sup>

The current regulations of the Social Security Administration require that in order to be eligible for benefits, individuals must be U.S. citizens, lawful residents, or otherwise allowed to work in the United States.<sup>8</sup> The existing requirement applies even when the workers

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1. See Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 987; see also Hadley Blake, *Guess Who's Coming to Dinner: Federal Disaster Relief for Undocumented Aliens*, 48 WASH. U. J. URB. & CONTEMP. L. 217, 219 (1995) (defining an "undocumented alien," "illegal alien," or "unauthorized alien" as "a foreign national who has either illegally entered the United States or who has remained in the United States longer than he or she is legally permitted").

2. Undocumented immigrants are consistently victims of abuse because they are paid lower wages, penalized for taking part in union activities, and forced to work in deplorable conditions and environments. Neil A. Friedman, *Human Rights Approach to the Labor Rights of Undocumented Workers*, 74 CAL. L. REV. 1715, 1715-16 (1986).

3. Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration, Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1550 (1995).

4. See generally Dave McCurdy, *The Future of U.S. Immigration Law*, 20 J. LEGIS. 3, 3 (1994) (arguing that if the economies of the developing world do not improve, the numbers of immigrants searching for better economic opportunities will not be reduced).

5. *Id.*

6. Friedman, *supra* note 2, at 1716 (stating that in the disproportionate inequality of the global economy, the current immigration pattern is unavoidable).

7. *Id.* But see Ruben J. Garcia, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 128 (1995).

8. Telephone Interview with Michelle Jones, Customer Service Representative, Social Security Administration (Nov. 14, 2003) (on file with *The Elder Law Journal*); see also 42 U.S.C. § 402(y) (2003), which provides: "Notwithstanding any other provision of law, no monthly benefit under this subchapter shall be payable to any alien in the United States for any month during which such alien is not lawfully present in the United States as determined by the Attorney General."

spent years contributing to the social security fund and fulfill all other requirements except for their legal status as citizens or residents.<sup>9</sup> Opponents of providing benefits to undocumented immigrants argue that these undocumented workers are causing great social and economic privation,<sup>10</sup> and increasing crime rates in the United States.<sup>11</sup> Moreover, they argue that however oppressed and adverse their circumstances may be, their claim to benefits in the United States is weakened by the way in which they entered the country.<sup>12</sup> In addition, critics assert the undocumented represent unjust competition to unskilled American citizens and legal residents in the labor market.<sup>13</sup> Finally, they claim that “undocumented workers directly cost government agencies money for various social services that they utilize and indirectly cost more money in welfare and unemployment benefits to displaced legal workers, estimated to cost \$0.7 billion annually in additional unemployment compensation.”<sup>14</sup>

Policy makers should keep three ideas in mind when designing laws that will affect undocumented elderly workers. First, instead of taking jobs that would otherwise be filled by citizens or resident aliens, undocumented workers have had a positive effect on the United States.<sup>15</sup> For instance, the jobs that undocumented workers take are generally ones which most U.S. laborers would refuse.<sup>16</sup> Even if undocumented workers compete with legal workers, any earnings reductions or job losses experienced by the domestic workforce are compensated by the increase in national productivity, which augments the per capita income of the U.S. born population.<sup>17</sup> Moreover, economic and sociological studies on the question have concluded

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9. See 42 U.S.C. § 402(y).

10. Johnson, *supra* note 3, at 1511.

11. Barbara Yost & Daniel Gonzalez, *Immigrants Blamed for Crime: Ads Say Increases Due to Foreigners*, ARIZ. REPUBLIC, Jan. 10, 2004, at 4A.

12. GEORGE B. HIGH, CTR. FOR IMMIGRATION STUDIES, *FACING THE ISSUES? EMPLOYER SANCTIONS, TAX VIOLATIONS AND HOUSEHOLD WORKERS* (1993), at <http://www.cis.org/articles/1993/back393.html>.

13. *Id.*

14. R. Paul Faxon, *Employer Sanctions for Hiring Illegal Aliens: A Simplistic Solution to a Complex Problem*, 6 NW. J. INT'L L. & BUS. 203, 216 (1984).

15. See, e.g., Karen Gibbs, *Immigrants Form Economic Backbone*, WALL ST. WK. FORTUNE, Oct. 15, 2003, at <http://www.pbs.org/wsw/opinion/karen20031015.html>.

16. *Id.*

17. Friedman, *supra* note 2, at 1743 (citing Robert Pear, *Reagan's Advisers Say Bill on Aliens Can Hurt Economy*, N.Y. TIMES, Jan. 23, 1986, at A1).

that, in the long-run, immigrants have contributed to the well-being of American society.<sup>18</sup>

Taking into account the current economies of the countries sending immigrants to the United States and the failure of the U.S. government to address the issue, it is safe to conclude that it is nearly impossible to completely stop undocumented immigrants from coming into this country.<sup>19</sup> Undocumented immigrants come to the United States for reasons other than the availability of public benefits, such as employment and family reunification.<sup>20</sup> According to a 2002 study by the National Center for Policy Analysis, undocumented workers “paid approximately 46 percent as much in taxes as American-born citizens, but they received only 38 percent as much from the government.”<sup>21</sup> As a matter of policy and fairness, these workers should be allowed to receive social security benefits when they become eligible.

Providing retirement benefits to those undocumented elderly people who paid taxes will not be counter to the system of the Social Security Administration, which is merely to provide a social safety net for people who contributed to the fund during the required period of time.<sup>22</sup> Moreover, the status of “employee” encompasses various rights separate from the rights and protections linked with citizenship.<sup>23</sup> Courts have defined the term “employee” to include undocumented workers.<sup>24</sup> Employment provides for the necessary needs for survival, social benefits, such as disability insurance, health care, pensions, and political control.<sup>25</sup> Because some of these public benefits are

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18. Julian L. Simon, *The Nativists Are Wrong*, WALL ST. J., Aug. 4, 1993, at A8.

19. McCurdy, *supra* note 4, at 3 (citing Martha Angle, *Immigration's Bridges Have Ups and Downs*, 51 CONG. Q. WKLY. REP. 710 (1993)); *see also* Friedman, *supra* note 2, at 1742 (stating that “[t]he need for basic sustenance outweighs any fears [undocumented workers] have of deportation or exploitation.”).

20. *See* Friedman, *supra* note 2, at 1742; *see also* Plyler v. Doe, 457 U.S. 202, 228 (1982) (stating that the dominant incentive for illegal entry into the state of Texas is the availability of employment); Johnson, *supra* note 3, at 1513.

21. LAUREN MUTTI, NAT'L CTR. FOR POLICY ANALYSIS, IMMIGRANTS, WELFARE AND WORK, (June 24, 2002), *available at* <http://www.ncpa.org/pub/ba/ba400/>. *Contra* Faxon, *supra* note 14, at 216 (stating that many undocumented workers do not pay taxes, and that this failure results in a loss of government income of at least \$115 million annually).

22. SOC. SEC. ADMIN., SSA PUB. NO. 05-10024, UNDERSTANDING THE BENEFITS (2004).

23. Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607, 613 (1993-1994).

24. *See, e.g.,* Sure-Tan, Inc. v. NLRB 467 U.S. 883 (1984); Alvarez v. Sanchez, 482 N.Y.S.2d 184, 185 (1984) (mem.).

25. Ontiveros, *supra* note 23, at 614.

essential and are received in exchange for market productivity, instead of citizenship, it follows that both documented and undocumented workers should be given these benefits.<sup>26</sup> Accordingly, social security benefits should flow from the workers' status as employees, rather than from their status as citizens.

This note urges policy makers to create laws that protect the growing elderly sector of the undocumented immigrants by allowing those who would qualify for benefits if they possessed the required documentation to receive social security benefits. The current situation discriminates against this vulnerable sector of the population, encouraged by some to stay in the country to supply the American economy with cheap labor, but nonetheless deprived of the benefits that the United States provides to citizens and legal residents.<sup>27</sup> This recommendation is geared towards helping those workers who have reported their incomes and paid taxes to the appropriate government agencies but are still not able to receive benefits in their old age. To be clear, the problem of undocumented workers who have worked and have not had their wages reported nor their taxes paid by their employers is outside the scope of this note.

Part II of this note examines the foreign-born population currently working in the United States, especially the elderly undocumented workers.<sup>28</sup> Part III presents the current procedures of the Social Security Administration to deal with the funds it receives from undocumented workers who are not eligible for benefits.<sup>29</sup> Part III also analyzes several arguments that validate the grant of social security benefits to undocumented workers that have contributed to the Social Security fund. First, this note argues that undocumented immigrants are a vulnerable group, subject to exploitation and discrimi-

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26. *Id.* (explaining that undocumented workers make "the same human contribution as any other type of worker").

27. *Plyler v. Doe*, 457 U.S. 202, 219 (1982). *But see* Leslie Pickering Francis, *Elderly Immigrants: What Should They Expect of the Social Safety Net?*, 5 *ELDER L.J.* 229, 237-38 (1997) (stating that one of the arguments against undocumented immigrants is that "the availability of public benefits should not serve as an incentive for immigrants to come to the United States").

28. *See generally* WAN HE, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *THE OLDER FOREIGN-BORN POPULATION IN THE UNITED STATES: 2000* (2002), available at <http://www.census.gov/prod/2002pubs/p23-211.pdf>; *see also* Symposium, *Challenges in Immigration Law and Policy: An Agenda For the Twenty-First Century*, 11 *N.Y.L. SCH. J. HUM. RTS.* 559, 566 (1994).

29. Austin T. Fragomen, Jr. & Steven C. Bell, *Revisions to SSA "No-Match" Letter Program and Impact on Employers*, *IMMIGR. BUS. NEWS & COMMENT*, Apr. 1, 2003, 2003 WL 1560595 (Westlaw).

nation and thus deserving of tightened protection.<sup>30</sup> Second, extensive evidence exists that undocumented immigrants benefit the United States's economy.<sup>31</sup> Third, the current employer sanctions to deter the hiring of undocumented workers are highly ineffective, demonstrating that the current immigration pattern will not stop. Finally, international human rights law will be analyzed to demonstrate that undocumented workers deserve to be protected in their old age, regardless of their immigration status.<sup>32</sup> Part IV recommends that policy makers advocate for laws that protect the undocumented elderly immigrants. Part V concludes by encouraging courts and government agencies to move as expeditiously and effectively as possible towards the goal of protecting undocumented elderly people.

## II. Current Situation of Elderly Undocumented Immigrants

### A. Undocumented Immigrants: Demographics

Unsanctioned entry into the United States is a crime, and those who have entered unlawfully are subject to deportation.<sup>33</sup> It is difficult to determine the exact number of undocumented immigrants currently living and working in the United States.<sup>34</sup> In the latest estimate, the Immigration and Naturalization Service reported that roughly seven million immigrants were living without documents in the United States as of January 2000.<sup>35</sup> Around eighty percent of immigrants enter the United States before age forty-five, while no more than five percent come after retirement age for family reunification

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30. Bosniak, *supra* note 1, at 986-87.

31. CARLOS SADOVI, ILLEGAL IMMIGRANTS GET A FREE PASS FROM INS, AGRICULTURAL PERSONNEL MANAGEMENT PROGRAM (Oct. 6, 2000), at <http://are.berkeley.edu/APMP/pubs/i9news/freepass100600.html> (quoting Paul Zulkie, a Chicago immigration lawyer and the national secretary of the American Immigration Lawyers Association).

32. Friedman, *supra* note 2, at 1726.

33. Plyler v. Doe, 457 U.S. 202, 205 (1982).

34. Ontiveros, *supra* note 23, at 608; Edwin R. Rubin, *Toward an Immigration Policy for the 21st Century: A Plea for a Thoughtful, Fact-Based Debate*, N.J. LAW., Feb.-Mar. 1995, at 51.

35. U.S. CITIZENSHIP AND IMMIGRATION SERV., DEP'T OF JUSTICE, INS RELEASES UPDATED ESTIMATES OF U.S. UNDOCUMENTED RESIDENT POPULATION (Jan. 31, 2003), at <http://uscis.gov/graphics/publicaffairs/summaries/undocres.htm>.

purposes.<sup>36</sup> The labor sectors in which undocumented workers are concentrated include “garment, construction, electronics, hotel, restaurants, food processing, and building and landscape maintenance.”<sup>37</sup> In addition, they come to work as caretakers for children, the elderly, the ill, and the disabled.<sup>38</sup> In light of the despicable conditions that push undocumented workers to immigrate, they are better described as “economic refugees, rather than opportunists.”<sup>39</sup>

### B. Factors that Cause Immigration by Undocumented Workers

Judging by the large number of undocumented people in the United States and the deplorable circumstances they tolerate, “their presence cannot be passed off simply as ‘voluntary.’”<sup>40</sup> In reality, “decisions to migrate result from highly coercive political, social, and economic forces.”<sup>41</sup> People migrate for the prospect of finding employment and reuniting with family.<sup>42</sup> The countries from where most of the immigrant workers come are experiencing severe economic crises that aggravate structural patterns of emigration by the working population.<sup>43</sup> Thus, the problems in these countries which contribute to undocumented immigration into the United States continue to be overlooked, increasing the gap on the efficacy of the law.<sup>44</sup> Most immigrants are not aware of their rights and are attracted to the United States by the possibility of work or freedom.<sup>45</sup>

### C. Undocumented Immigrants’ Eligibility for Benefits

Undocumented immigrants are ineligible for most of the major federal public assistance programs usually offered to the indigent in

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36. JOE COBB, THE HERITAGE FOUND., IMMIGRATION (Sept. 28, 2003), at <http://www.heritage.org/research/features/ISSUES/96/chpt11.html> (citing John J. Miller, *Don't Close Our Golden Door*, WALL ST. J., May 25, 1995, at A14).

37. Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & SOC'Y REV. 1041, 1047 (1990); see also HIGH, *supra* note 12 (arguing that these are occupations which generally do not require expertise, the undocumented are hired primarily as unskilled workers, and they are willing to do those types of jobs).

38. HIGH, *supra* note 12.

39. Friedman, *supra* note 2, at 1718.

40. *Id.*

41. *Id.*

42. See *id.* at 1742.

43. Bosniak, *supra* note 1, at 989.

44. See *id.* at 1017.

45. Ontiveros, *supra* note 23, at 630.

the United States, such as Medicaid, food stamps, and Supplemental Security Income (SSI).<sup>46</sup> However, they are eligible for emergency medical care provided by Medicaid.<sup>47</sup> The common misconception is that immigrants use and abuse public benefits and services.<sup>48</sup> To the contrary, “immigrants who arrived in the past decade received public assistance at significantly *lower* rates than native-born Americans.”<sup>49</sup>

Several deterrents exist for undocumented persons to take advantage of the few public benefits and services available to them, such as the risk of deportation if they attempt to ask for benefits.<sup>50</sup> Moreover, undocumented immigrants are not allowed to receive the benefit of federal programs even though they typically pay social security taxes on their income.<sup>51</sup> In fact, “these immigrants subsidize employment and social security benefits for all United States citizens.”<sup>52</sup>

### III. Should Elderly Undocumented Workers Receive Social Security Benefits?

#### A. Arguments Against Providing Social Security Benefits to Undocumented Elderly Workers

Some argue that the situation the undocumented are forced to endure is the price they must pay for violating the law.<sup>53</sup> Others think that the accessibility to public benefits should not be seen as a reason for workers to migrate to the United States.<sup>54</sup> These people believe that certain rights are in fact benefits to which undocumented workers should not be entitled.<sup>55</sup> Still others complain that undocumented workers do not pay income taxes; that they send their income to their home countries; and that they represent a direct cost for government

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46. Johnson, *supra* note 3, at 1528. *But see Plyler v. Doe*, 457 U.S. 202 (1982) (establishing that undocumented immigrants are eligible for public education K–12 free of cost).

47. Johnson, *supra* note 3, at 1528–29.

48. *Id.* at 1529.

49. *Id.* *But see* Faxon, *supra* note 14, at 216 (asserting that undocumented workers cost government agencies money for social services that they use).

50. Johnson, *supra* note 3, at 1529.

51. Symposium, *supra* note 28, at 594.

52. *Id.*

53. Garcia, *supra* note 7, at 128.

54. Francis, *supra* note 27, at 237–38.

55. See, e.g., Jim Brown, *Border Senators Sponsor Immigrant Health Act—Medical Marxism?*, AGAPE PRESS, June 28, 2002, at <http://headlines.agapepress.org/archive/6/282002f.asp> (last visited Apr. 11, 2005).



agencies for using a variety of social services.<sup>56</sup> In sum, opponents to providing the undocumented with any type of benefits argue that their economic suffering should not be addressed because they are not a legal party to the economic relationship.<sup>57</sup>

### B. The Social Security Administration and Undocumented Workers

The Social Security Act provides for the assignment of social security numbers to maintain accurate records in the administration of various social security programs.<sup>58</sup> It directs the Secretary of the Social Security Administration to establish and maintain records of wages and to assign social security account numbers to all eligible workers.<sup>59</sup> In addition, the Secretary has the power to issue replacement social security cards and new social security numbers to correct account earnings that are scrambled with the wage information of another worker.<sup>60</sup> In sum, the Social Security Act empowers the Secretary to make rules and regulations and to establish procedures necessary to the administration of benefits.<sup>61</sup>

Undocumented workers who pay unemployment insurance, income tax, and social security cannot collect social security retirement benefits because these benefits are limited to U.S. citizens.<sup>62</sup> When a mismatch is found between a name or a social security number on a W-2 form and the agency's records, the social security earnings are kept in the Social Security Administration's suspense file and the agency attempts to investigate the inconsistencies.<sup>63</sup> The first step the agency takes is to send no-match letters when they receive the mismatch information for an employee.<sup>64</sup> "In recent years, such discrepancies have arisen with regard to 6–7 million workers annually and \$280 billion have been deposited in the earnings suspense file."<sup>65</sup> The

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56. See Faxon, *supra* note 14, at 216.

57. See Ontiveros, *supra* note 23, at 626.

58. See 42 U.S.C. §§ 405(c)(2)–(5) (2003).

59. *Id.* § 405(c)(2)(B)(i).

60. *Id.* § 405(a).

61. *Id.* § 405(c)(2)(A)–(D).

62. Rubin, *supra* note 34, at 53.

63. Fragomen & Bell, *supra* note 29; see also Clara W. Dworsky, "Scrambling" *Saves the Day*, 13 EXPERIENCE 42, 42 (2003).

64. Fragomen & Bell, *supra* note 29, at \*1.

65. *Id.*; see also Jack E. Perkins, *House Immigration Subcommittee Explores Social Security Totalization with Mexico*, 80 NO. 35 INTERPRETER RELEASES 1296, 1296 (Sept. 15, 2003) (stating that as of September 2003, the amount of total wages for all

Earnings Suspense File (ESF) is a compilation of wages earned that “cannot be credited to a specific individual’s earnings record because the name and the Social Security Number (SSN) do not match up.”<sup>66</sup> However, not all of the earnings come from undocumented workers, because mismatches take place for many reasons, including “typographical errors, names changes, and incomplete or blank names or SSNs.”<sup>67</sup>

When the Social Security Administration learns of a person’s undocumented status, the agency performs an investigation.<sup>68</sup> If the undocumented worker has been using a fraudulent social security number, the earnings are declared to be “scrambled.”<sup>69</sup> “Scrambled” earnings are wages for one person that have been credited by mistake to another person’s account.<sup>70</sup> Under the current method of correcting misreported earnings to the Social Security Administration, many immigrants are afraid to come forward for fear of deportation or prosecution for breaking the law.<sup>71</sup> It is a felony for a person to falsely represent that a social security number is his or her assigned number.<sup>72</sup> Similar prohibitions exist against supplying false information in relation to a person’s earning records.<sup>73</sup> Fraudulent use of a social security number carries a penalty of up to \$5,000 and five years in prison.<sup>74</sup>

A social security number, however, cannot be provided to an undocumented worker merely to solve a scrambled earnings problem.<sup>75</sup> The ideal response in dealing with scrambled situations is to ascertain the identity of the individuals involved and to provide the correct wages to the correct person.<sup>76</sup> The current problem is that in order for an undocumented worker to receive social security benefits when he retires, he must be lawfully admitted to the United States

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workers in the Social Security Administration’s Earnings Suspense File was \$345 billion).

66. Perkins, *supra* note 65, at 1296.

67. *Id.* at 1297.

68. Dworsky, *supra* note 63, at 42.

69. *Id.*

70. *Id.*

71. Charles Wheeler, *Alien Eligibility for Public Benefits: Part I*, IMMIGR. BRIEFINGS, Nov. 1988, at 13, 88-11 Immigr. Brief 1 (Westlaw).

72. 42 U.S.C. § 408(a) (2003).

73. 20 C.F.R. § 422.108 (2004).

74. 42 U.S.C. § 408(a).

75. Dworsky, *supra* note 63, at 43.

76. *Id.*

with permission to work.<sup>77</sup> Hence, even if the identity of the worker is matched with the earnings, the undocumented worker cannot receive the retirement benefits until he or she obtains the proper documentation.<sup>78</sup>

To be clear, the Social Security Administration has mechanisms in place so that people can correct their earning record.<sup>79</sup> The procedure requires the showing that even though their social security number does not match their name, they have worked and paid social security taxes for the required amount of time.<sup>80</sup> If a worker was not legally authorized to work but subsequently gains the appropriate documentation, the worker can get credit for past employment and contributions received while he or she was not authorized to work.<sup>81</sup> The Social Security Administration will require evidence from the applicant showing that the worker did perform the employment and that the credits were credited to a different account.<sup>82</sup> This evidence could be provided through “IRS W-2 withholding forms, written statements from the employer, tax returns, or other employment records of wages earned.”<sup>83</sup> The Social Security Administration can unscramble the alien’s account and give credit “even in situations where the employer has failed to withhold taxes, failed to properly forward the deductions, or failed to report all the earnings to the SSA.”<sup>84</sup> The current practice demonstrates that the Social Security Administration does not have a problem recognizing earnings and benefits that an undocumented worker received while working without the proper legal status.<sup>85</sup>

The present situation ignores the established system in which employers will keep hiring these workers,<sup>86</sup> and increases the chances

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77. *Id.*

78. Wheeler, *supra* note 71.

79. See *Social Security Credit for Past Misreported Earnings*, 8 LAB. MGMT. DECISIONS (1999), available at [http://are.berkeley.edu/APMP/pubs/lmd/html/wintspring\\_99/LMD.8.1.ssccredit.html](http://are.berkeley.edu/APMP/pubs/lmd/html/wintspring_99/LMD.8.1.ssccredit.html) (last visited Apr. 11, 2005).

80. Most people need forty credits (ten years of work) to qualify for benefits from the Social Security Administration. SOC. SEC. ADMIN., *supra* note 22.

81. *Social Security Credit for Past Misreported Earnings*, *supra* note 79; see also Wheeler, *supra* note 71.

82. 42 U.S.C. § 405(c)(5) (2003); 20 C.F.R. §§ 404.820–.822 (2004).

83. Wheeler, *supra* note 71.

84. *Id.*

85. See generally *Social Security Credit for Past Misreported Earnings*, *supra* note 79.

86. See Calavita, *supra* note 37, at 1051.

that undocumented workers will become public charges.<sup>87</sup> Instead, workers who can prove that they worked and fulfilled requirements to receive social security benefits should be given the opportunity to take care of themselves in their elderly years. If the Social Security Administration agreed to give these undocumented workers social security benefits, it could use established systems to determine which employees do not qualify for the benefits.<sup>88</sup> It could also impose penalties to both the employer and the employees for not paying taxes.<sup>89</sup> The Social Security Administration can impose penalties of “up to 100 percent of the social security tax due, the tax itself, plus interest.”<sup>90</sup> The Immigration and Naturalization Service can also impose penalties for hiring an undocumented worker “from \$250 to a maximum of \$2,000 for each undocumented person employed.”<sup>91</sup> In addition, other penalties can be imposed by the Internal Revenue Service and state authorities for failing to pay federal withholding taxes and state taxes.<sup>92</sup>

### C. Undocumented Immigrants Are a Vulnerable Group

This note attempts to bring attention to the undocumented elderly workers in the United States, a section of the population that is neglected regardless of their special vulnerable status.<sup>93</sup> The Inter-American Commission on Human Rights expressed its preoccupation with regard to the elderly because “often they are obliged to live under seriously unprotected conditions.”<sup>94</sup> Moreover, the Commission referred to the elderly as an “especially vulnerable group” and stated they “must receive priority attention from the government.”<sup>95</sup> The concept that vulnerable groups must be given particular measures of protection to guarantee their enjoyment of basic human rights is accepted in human rights law.<sup>96</sup> The elderly need even more attention

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87. See Faxon, *supra* note 14, at 216.

88. HIGH, *supra* note 12.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. See Diego Rodriguez-Pinzon & Claudia Martin, *The International Human Rights Status of Elderly Persons*, 18 AM. U. INT'L L. REV. 915, 922, 941 (2003).

94. Ch. V, Inter-Am. C.H.R., DEA/Ser. L/V/II.63, <http://www.cidh.org/annualrep/83.84.eng/toc.htm> (last visited Jan. 31, 2005).

95. *Id.*

96. Rodriguez-Pinzon & Martin, *supra* note 93, at 922.

because it is a group subordinated within the already displaced group of immigrants.<sup>97</sup> The Inter-American Commission on Human Rights affirmed “that governments should adopt provisions that go beyond the measures adopted for the majority of the population so that minority groups can adequately enjoy those rights.”<sup>98</sup>

Because immigrant workers forego political participation, they cannot lobby for their special needs.<sup>99</sup> Barred from the electoral process, noncitizens lack the power to effectively resist attempts to restrict their rights and may fear risking deportation through engaging in political activity.<sup>100</sup> This marginalization makes it inherently difficult for the interests of immigrants, particularly undocumented ones, to be vindicated in the political process.<sup>101</sup> As a consequence, undocumented immigrants are usually “forced to accept slavery-like conditions under the constant threat of deportation.”<sup>102</sup> For instance, the *San Francisco Examiner* found that “immigrants in the Bay Area are beaten and abused because of their race and intimidated because of their often tenuous legal status in this country.”<sup>103</sup> In addition, in Sonoma County, California, a Mexican immigrant reported he lived in “unsanitary housing and worked thirteen-and-a-half-hour shifts, with no overtime pay and few breaks.”<sup>104</sup> Finally, workers at a winery claimed they were “forced to live in storage sheds, physically threatened, and denied overtime pay.”<sup>105</sup> It is no surprise then that “illegal aliens are preferred . . . because they tend to work scared and hard.”<sup>106</sup>

As reported by the Center for Immigration Studies, undocumented immigrants are exploited by employers who pay them low wages, offer poor working conditions, and intentionally decline to pay taxes that guarantee social security and unemployment benefits.<sup>107</sup> The readiness of employers to abuse their workers is exacerbated by

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97. Johnson, *supra* note 3, at 1556 (stating that “because of the intersection of immigration status, ethnicity, class, and gender, these groups are subordinated within the subordinated group”).

98. Rodriguez-Pinzon & Martin, *supra* note 93, at 995.

99. See Johnson, *supra* note 3, at 1556.

100. *Id.* at 1544.

101. *Id.* at 1575.

102. Lora J. Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2183 (1994).

103. *Id.*

104. *Id.*

105. *Id.* at 2183–84.

106. Calavita, *supra* note 37, at 1052.

107. HIGH, *supra* note 12.

the compliance of the government in this exploitation.<sup>108</sup> The Supreme Court of the United States in *Plyler v. Doe*<sup>109</sup> stated that undocumented immigrants' labor is in one way welcomed but leaves the workers defenseless against abuse, exploitation, or neglect.<sup>110</sup>

As a result of their vulnerable status, undocumented immigrants are victims of racism and discrimination, especially at times of economic depression.<sup>111</sup> Arguably, racism and ethnocentrism are some of the causes of limiting benefits to noncitizens in the United States.<sup>112</sup> In 1994, California passed Proposition 187, which required providers of public social services to deny services to anyone whom the service provider determined or reasonably suspected was undocumented.<sup>113</sup> Subsequently, a federal court enjoined enforcement of the initiative.<sup>114</sup> At the national level, moreover, proposed health care reform, with so-called universal coverage, would have excluded undocumented persons from participation.<sup>115</sup> In 1994, Congress specifically excluded undocumented persons from receiving long-term emergency aid given to persons adversely affected by an earthquake in Los Angeles, California.<sup>116</sup> No evidence, however, was presented that undocumented persons had utilized such aid in the past, or that many were expected to seek benefits.<sup>117</sup>

U.S. immigration law and politics have been historically intertwined with prejudice.<sup>118</sup> The undertone of racism in U.S. immigration policies is exemplified by the Chinese Exclusion Act of 1882,<sup>119</sup> the

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108. Garcia, *supra* note 7, at 128.

109. *Plyler v. Doe*, 474 U.S. 202 (1982).

110. *Id.* at 219 n.18.

111. Calavita, *supra* note 37, at 1056.

112. Johnson, *supra* note 3, at 1536.

113. CAL. WELF. & INST. CODE § 10001.5 (Deering 1995) (preempted by League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244 (C.D. Cal. 1997)).

114. U.S. District Judge Mariana Pfaelzer ruled that major portions of the initiative were an unconstitutional infringement on the federal government's exclusive power to regulate immigration. Paul Feldman, *Major Portions of Prop. 187 Thrown Out by Federal Judge*, L.A. TIMES, Nov. 21, 1995, at A1.

115. See Sheryl Stolberg & Edward Chen, *Illegal Immigrant Health Policy Told*, L.A. TIMES, Sept. 20, 1993, at A1.

116. See Emergency Supplemental Appropriations Act of 1994, Pub. L. No. 103-211, § 403, 108 Stat. 3, 40 (1994).

117. Indeed, Congress spent little time discussing the bill. See 140 CONG. REC. S1207-08 (daily ed. Feb. 9, 1994); 140 CONG. REC. H231 (daily ed. Feb. 3, 1994).

118. See Symposium, *supra* note 28, at 595; see also Blake, *supra* note 1, at 238 n.11.

119. Symposium, *supra* note 28, at 595 (citing Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943)).

National Origins Quota Act,<sup>120</sup> and the immigration laws of the 1940s, when the U.S. government implemented barriers to halt Jewish immigration.<sup>121</sup> The majority assumes that they can have unlimited access to labor by the undocumented on their terms, while denying these workers full membership in society.<sup>122</sup> An example on point is the case of Zoe Baird, candidate for Attorney General, who was not appointed because she had hired an undocumented household worker without paying social security and unemployment compensation taxes.<sup>123</sup> In addition, one of Proposition 187's most vocal proponents, 1994 U.S. Senate candidate Michael Huffington, hired an undocumented worker as a nanny in violation of the employer sanctions provisions of the Immigration Reform and Control Act of 1986.<sup>124</sup> Huffington's position was not affected by the fact that Huffington's own employee paid federal income taxes, Medicare taxes, and Social Security taxes.<sup>125</sup> Even when it is known that undocumented immigrants pay their taxes,<sup>126</sup> they are perceived as "parasites on the economy."<sup>127</sup> Thus, for public policy reasons, racism must be eliminated from immigration law.<sup>128</sup>

#### D. Undocumented Immigrants Benefit the U.S. Economy

Both lawful and undocumented immigrant workers occupy a crucial place in the labor markets that supply the manufacturing and service sectors of the U.S. economy.<sup>129</sup> A 1995 Cato Institute study found that the available number of undocumented workers in the United States does not illustrate a negative economic effect.<sup>130</sup> In fact, the large number of undocumented workers is an "asset that keeps

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120. *Id.* (citing Act of May 19, 1921, ch. 8, 42 Stat. 5 (repealed 1952)).

121. *Id.* (citing Daniel J. Steinbock, *Refuge and Resistance: Casablanca's Lessons for Refugee Law*, 7 GEO. IMMIGR. L.J. 649, 678 & n.191 (1993)) (stating that social conditions in the United States between 1938-41 "included a substantial amount of . . . anti-Semitism").

122. Garcia, *supra* note 7, at 137.

123. HIGH, *supra* note 12.

124. William Claiborne, *Huffingtons Say Employing Nanny Tested Consciences*, WASH. POST, Oct. 28, 1994, at A22.

125. *Id.*

126. MUTTI, *supra* note 21.

127. Garcia, *supra* note 7, at 137.

128. Symposium, *supra* note 28, at 595.

129. Bosniak, *supra* note 1, at 988-89.

130. MUTTI, *supra* note 21.

[the American] economic engine rolling.”<sup>131</sup> Most labor market studies of undocumented workers that use aggregate statistics find that the presence of undocumented immigrants “either has no effect on native workers or actually increases their labor market opportunities.”<sup>132</sup>

Undocumented workers contribute to and stimulate the U.S. economy.<sup>133</sup> Some estimate that over seventy percent of undocumented immigrants pay social security and federal taxes; yet, on average, only five percent use free public hospitals, only four percent ever collect unemployment benefits, and only one-half of one percent receive welfare payments.<sup>134</sup> Undocumented workers in the United States contribute to the economy by paying taxes but are not utilizing their portion of social services.<sup>135</sup> Thus, the economic benefits of undocumented labor contrast strikingly with its apparent costs.<sup>136</sup>

## E. Current Employers’ Sanctions for Hiring Undocumented Workers

### 1. EMPLOYERS EXPLOIT UNDOCUMENTED WORKERS

Immigration is of prime interest for employers.<sup>137</sup> Current immigration law does not center on the purpose of preventing undocumented workers from coming into the United States; instead, “it reflects the desire to control and exploit them once they are here.”<sup>138</sup> Historically, business has lobbied to weaken immigration laws in order to have a low-wage labor force in their hands.<sup>139</sup> Around forty-

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131. SADOVI, *supra* note 31; *see also* MICHAEL FIX & JEFFREY S. PASSEL, *THE URBAN INST., IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT* 53 (1994) (asserting that “[a]nother way in which immigrants contribute to employment and overall economic growth is through their effect on aggregate demand for goods and services. Immigrants own and rent properties, . . . buy groceries, clothes, shoes . . . . Their spending ripples through the economy, creating jobs and generating revenues for businesses and governments.”).

132. FIX & PASSEL, *supra* note 131, at 51 (citing selected studies from 1988, 1991, and 1998 about the labor market impacts of undocumented immigrants). *Id.* at tbl.B-6; *see also* Friedman, *supra* note 2, at 1743.

133. *See generally* JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* (1989); David A. Sklansky, *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1453 & n.106 (1983); *see also* Rubin, *supra* note 34, at 53.

134. *See generally* SIMON, *supra* note 133; Michael J. Mandel, *The Immigrants*, BUS. WK., July 13, 1992, at 114.

135. Friedman, *supra* note 2, at 1743.

136. Calavita, *supra* note 37, at 1053.

137. Johnson, *supra* note 3, at 1555.

138. Ontiveros, *supra* note 23, at 617.

139. Johnson, *supra* note 3, at 1555.



eight percent of interviewed employers in 1990 from Los Angeles, Orange, and San Diego counties reported that they had undocumented immigrants working for them.<sup>140</sup> About half of these thought that twenty-five percent of their workers were undocumented.<sup>141</sup> Thirty-five percent of the interviewed employees admitted to have bought or borrowed false documents in order to find work.<sup>142</sup> Moreover, many of the employers declared that they intended to continue to hire undocumented workers if the need persisted.<sup>143</sup>

Accordingly, while immigration laws indicate that undocumented workers are not welcomed, in fact, employers regularly receive and rely on these immigrants “for the cheap and compliant labor they provide in the home, business, industry, and agriculture.”<sup>144</sup> Parallel with this is the fact that employers are obliged to withhold social security tax, federal payroll tax, federal insurance contributions tax, and federal unemployment tax.<sup>145</sup> The reality is that every year in the United States the Internal Revenue Service does not receive employer reports for large amounts of income.<sup>146</sup> It is generally recognized that it is undocumented workers who provide the majority of the labor in this underground economy.<sup>147</sup>

## 2. IRCA’S EMPLOYER SANCTIONS ARE INEFFECTIVE

The Immigration Reform and Control Act of 1986 (IRCA)<sup>148</sup> requires that all employers verify the work status of new employees by inspecting their documents.<sup>149</sup> The Act came as a result of the “fundamental contradiction between the economic utility of immigrants

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140. Calavita, *supra* note 37, at 1046, 1050.

141. *Id.* at 1050.

142. *Id.* at 1051.

143. *Id.*

144. HIGH, *supra* note 12.

145. See generally Larry Tunnell et al., *Nannygate: An Overview of Payroll Tax Rules and Immigration Laws*, 175 J. ACCOUNTANCY 36 (1993).

146. *Id.*

147. *Id.*

148. The Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. §§ 1324(a), 1324(b) (2004)); see also Bosniak, *supra* note 1, at 1018–19 (describing Immigration and Naturalization Service border apprehension rates and interviews with undocumented workers that indicate that the IRCA has not significantly deterred the hiring or influx of undocumented individuals); cf. Catherine L. Merino, *Compromising Immigration Reform: The Creation of a Vulnerable Subclass*, 98 YALE L.J. 409, 411–12, 420–23 (1988) (concluding that after the implementation of the IRCA a large number of undocumented workers are allowed to continue to work in the United States).

149. Calavita, *supra* note 37, at 1049.

versus political demands to restrict this source of cheap labor.”<sup>150</sup> The law mandates that employers verify identity and eligibility to work in the United States from all new employees.<sup>151</sup> In addition, employers must fill out a quarterly form in order to cover the disbursement of social security and unemployment compensation taxes for a specific period of time.<sup>152</sup> If the wages of an employee are large enough to require withholding income tax, those payments must also be made quarterly by the employer.<sup>153</sup>

Focusing on the undocumented employee’s crime ignores the underlying reality that employers persist in breaching the employer sanctions laws passed by Congress.<sup>154</sup> The current sanctions impose civil and criminal penalties for violations of its provisions.<sup>155</sup> They also shift the suspicion to the employee for fraudulent document use and/or perjury as long as the employer claims that he was not aware of the worker’s legal status and asserts that he believed the documents were legitimate.<sup>156</sup> The ongoing loopholes in the legislation concerning immigration and employment are sufficiently broad to satisfy almost all of the employers’ needs for undocumented workers.<sup>157</sup>

### 3. BETTER MECHANISMS OF PROTECTION FOR THE ELDERLY ARE NEEDED

Because employers are rarely inspected to ensure continued compliance with the IRCA, they repeatedly violate the law and continue to hire undocumented workers.<sup>158</sup> In fact, “the cost to employers of doing without undocumented workers will often outweigh the penalty.”<sup>159</sup> Employers are used to paying other regulatory fines in the normal course of business, “and they are likely to do so in this context as well.”<sup>160</sup> The employer sanctions were designed to appease both the public that wanted laws to sanction employers and employers

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150. *Id.* at 1045.

151. *Id.* at 1049.

152. HIGH, *supra* note 12.

153. *Id.*

154. Garcia, *supra* note 7, at 133.

155. 8 U.S.C. §§ 1324a(a)(1)(A), 1324a(e), 1324a(f) (1999 & Supp. 2004).

156. Bosniak, *supra* note 1, at 1036; *see also* Calavita, *supra* note 37, at 1058 (describing the “good faith” defense employers enjoy).

157. *See* Calavita, *supra* note 37, at 1064.

158. Foo, *supra* note 102, at 2187.

159. Bosniak, *supra* note 1, at 1014.

160. *Id.* at 1015.

who needed economic benefits from workers.<sup>161</sup> The resulting situation encourages employers to keep hiring undocumented workers while the government relies on this deficient and merely symbolic law to deny these workers public benefits.<sup>162</sup>

## F. International Human Rights Law and Undocumented Workers

### 1. BACKGROUND ON APPLYING INTERNATIONAL LAW

International law includes declarations that proclaim the rights of all human beings and guarantee the right to work, fair wages, safe working conditions, reasonable hours, and the right to organize and bargain collectively.<sup>163</sup> Two ways exist to invoke international law, either by treaty law or by customary international law.<sup>164</sup> Treaty law is composed of documents that are signed, ratified, and self-executing.<sup>165</sup> To the contrary, customary international law is composed of principles that bind developed countries.<sup>166</sup> If a treaty has not been ratified, customary international law provides an alternate, independent route for enforcing human rights.<sup>167</sup>

### 2. UNDOCUMENTED WORKERS AND HUMAN RIGHTS LAW

“International law, if capable of application and invocation in the United States, can protect the rights of undocumented workers” because it includes assertions that concern the rights of all human beings.<sup>168</sup> In addition, undocumented workers deserve humanitarian treatment under international law, because their status has habitually permitted countries to make their rights substandard in relation to the majority of the population.<sup>169</sup>

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161. Calavita, *supra* note 37, at 1059.

162. See Rubin, *supra* note 34, at 53.

163. See, e.g., U.N. CHARTER art. 55, para. (a); American Convention on Human Rights, Nov. 22, 1969, art. 16, O.A.S.T.S. No. 36, at 1, Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6; *International Covenant on Civil and Political Rights*, adopted Dec. 16, 1966, art. 22, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967).

164. Friedman, *supra* note 2, at 1724.

165. *Id.*

166. *Id.*

167. *Id.* at 1726.

168. *Id.* at 1723.

169. *Id.* at 1726.

United Nations declarations require faithful compliance from member states such as the United States.<sup>170</sup> The 1948 Universal Declaration of Human Rights includes the first reference to elderly people's rights. Article 25(1) states:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>171</sup>

The broad but inclusive language of the Universal Declaration embraces foreigners as well as nationals as no distinction is made between legal and undocumented people.<sup>172</sup> The United States has ratified the U.N. Charter,<sup>173</sup> which guarantees nondiscrimination, and some U.S. federal courts have held that the Charter is self-executing.<sup>174</sup> When a treaty is self-executing, it comes into effect automatically when a state becomes a party to that treaty, no legislation or other action is needed for enforcement.<sup>175</sup> Moreover, "international human rights instruments evidence the widespread acceptance of an anti-exploitation principle."<sup>176</sup>

### 3. THE RIGHT TO SOCIAL SECURITY AND INTERNATIONAL LAW

"The right to social security is essential, particularly when a person does not have the necessary property available, or is not able to secure an adequate standard of living through work, due either to unemployment, old age or disability."<sup>177</sup> Human rights bodies have relied on civil and political rights to extend protections to the elderly, predominantly in the area of social security benefits.<sup>178</sup> Article 9 of the

170. *Id.* at 1731.

171. *Universal Declaration of Human Rights*, G.A. Res. 217 (III), U.N. GAOR, 3d Sess., at 76, U.N. Doc. A/810 (1948).

172. See, e.g., RICHARD B. LILICH, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* 42-44 (1984) (stating that even the simplest interpretation of the Universal Declaration on Human Rights guarantees a broad-reaching coverage).

173. Friedman, *supra* note 2, at 1727.

174. See, e.g., *Keeney v. United States*, 218 F.2d 843, 844-45 (D.C. Cir. 1954); *Curran v. City of New York*, 77 N.Y.S.2d 206 (Sup. Ct. 1947).

175. See 16 C.J.S. *Constitutional Law* § 48 (2003).

176. Friedman, *supra* note 2, at 1734.

177. See ASBOJRN EIDE, *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 32 (Asbojrn Eide et al eds., 1995) (reporting that everyone is the beneficiary of human rights).

178. Rodriguez-Pinzon & Martin, *supra* note 93, at 923.

International Covenant on Economic, Social, and Cultural Rights (ICESCR) establishes “the right of everyone to social security, including social insurance,”<sup>179</sup> and was interpreted by the Committee on Economic, Social, and Cultural Rights to implicitly refer to the right to old-age benefits.<sup>180</sup> Likewise, the prohibition of discrimination based on “other status” could include legal status.<sup>181</sup>

Article 9 of the ICESCR pronounces the right to social security as an “entitlement and not just a benefit.”<sup>182</sup> The ICESCR’s entitlement to social security is the only right that creates a clear protection for older people.<sup>183</sup> The United States should look at its European counterparts and their obligations toward the elderly under human rights instruments.<sup>184</sup> Article 4 of the European Social Charter establishes safeguards for the rights of the elderly.<sup>185</sup> The Revised European Social Charter of 1996 and accompanying Explanatory Report also mention the right of elderly persons to social protection.<sup>186</sup>

#### 4. THE INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES

The International Convention, which entered into force on July 1, 2003, offers a broad set of rights for the protection of migrants, regardless of their citizenship status.<sup>187</sup> Contrary to what is feared by

179. *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., at 50, U.N. Doc. E/C N.4/1987/17 (1966).

180. See U.N. ESCOR, 13th Sess., 39th mtg., at 1, U.N. Doc. E/C.12/1995/16/Rev.1 (1995). The United States has signed (Oct. 5, 1977) but not ratified this international treaty. United National Treaty Databases, Status of Multilateral Treaties Deposited with the Secretary General, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty5.asp>.

181. *International Covenant on Economic, Social and Cultural Rights*, art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3 (requiring the state parties to the Covenant to stop discriminating on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”).

182. Rodriguez-Pinzon & Martin, *supra* note 93, at 958.

183. See *id.* at 957.

184. See *id.* at 976.

185. Additional Protocol to the European Social Charter, opened for signature May 5, 1988, art. 4, E.T.S. No. 128 (entered into force Apr. 9, 1992) (addressing the rights of the elderly to social protection), available at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> (last visited Jan. 31, 2005).

186. See European Social Charter (Revised), E.T.S. 163, art. 23 (entered into force Jan. 7, 1999), available at <http://www.worldpolicy.org/globalrights/treaties/eurosocial.html> (last visited Jan. 31, 2005).

187. HUMAN RIGHTS WATCH, MIGRANT WORKERS NEED PROTECTION: UN TREATY COMES INTO FORCE (July 2003), available at <http://www.hrw.org/press/2003/06/mwc063003.htm>.

many industrialized countries, this U.N. treaty is not weak on illegal immigration, it just requires that states that ratify it do not subject undocumented migrants to abuse.<sup>188</sup> Article 27(2) of this Convention reads:

Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.<sup>189</sup>

In the present argument, the “benefits” mentioned in the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families are the social security retirement benefits. This article recommends that signatory parties reimburse undocumented workers the amount of contributions made by them with respect to the social security fund.

## 5. INFUSION

Although courts may not accept principles of international human rights law as directly binding, the principles may be applied indirectly by using them to interpret and fill gaps in domestic law.<sup>190</sup> Infusion is a valuable tool because it relies on “historically and doctrinally sound methods of legal analysis and allows judges to refer to principles of international human rights law in applying the law of their jurisdiction.”<sup>191</sup> Through infusion, the United States can officially recognize human rights guarantees as domestic practice, increasing the range of these protections under domestic and international law. In so doing, the United States can achieve substantial benefits for undocumented workers.<sup>192</sup>

In the past, courts in the United States have extensively relied on the use of external sources to interpret domestic law.<sup>193</sup> Infusion allows principles drawn from human rights instruments to become domestic law even when these international principles may not be bind-

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188. *Id.*

189. *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, art. 27(2), G.A. Res. 158, U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/45/158 (1990).

190. See Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 34 (1983).

191. Friedman, *supra* note 2, at 1737.

192. *Id.*

193. See Christenson, *supra* note 190, at 35.

ing on the United States.<sup>194</sup> Infusion also assures that domestic law is interpreted in harmony with international law, helping preserve consistency between international law and domestic law,<sup>195</sup> as the supremacy clause requires.<sup>196</sup>

#### IV. Recommendation

As a response to the vulnerable situation of undocumented workers who are prone to be exploited while working in this country, the United States needs to take care of this class of workers. Furthermore, the United States benefits from the labor of undocumented workers. Employers keep relying on their labor, and the sanctions currently established do not deter employers from hiring them nor pressure employers to report their incomes and pay their taxes.<sup>197</sup> Hence, the U.S. government should start responding to the needs of this growing sector of the elderly population.

In addition, the Social Security Administration must deliver retirement benefits to those elderly undocumented workers who can prove that they worked and contributed to the fund. The Social Security Act empowers the Secretary of the Social Security Administration to make rules and regulations and to establish procedures necessary for the administration of benefits.<sup>198</sup> Therefore, the Secretary should develop mechanisms to make it easier for undocumented workers to correct their social security record and, thus, be able to solicit social security benefits in their old age.

In addition, the Social Security Administration must attempt to calculate the percentage of the ESF money that has been contributed by undocumented workers.<sup>199</sup> Once it is clear what percentage of the suspense file was contributed by undocumented workers, it will be

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194. Paul L. Hoffman, *The Application of International Human Rights Law in State Courts: A View from California*, 18 INT'L LAW. 61, 62 (1984).

195. Bernhard Schluter, *The Domestic Status of the Human Rights Clauses of the United Nations Charter*, 61 CAL. L. REV. 110, 149 (1973).

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

197. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (establishing sanctions imposed similar to those under the IRCA of 1986. However, it leaves the same protections for employers participating in any of the pilot programs. They are shielded from civil or criminal liability for actions taken in good faith reliance on information provided through the confirmation system.).

198. 42 U.S.C. § 405(c)(2)(A)-(D) (2003).

199. Fragomen & Bell, *supra* note 29, at \*1 (describing what the suspense file is and how the money is placed in there by the Social Security Administration).

easier to develop mechanisms to match the funds that belong to those workers. The aforementioned suggestion is a preliminary step that must be taken even before courts and government agencies can advocate for the rights of the undocumented. When these measures are taken, all undocumented workers will have to do is provide documentation to prove they worked for the required amount of time and paid all required taxes by law.

The Internal Revenue System, the Social Security Administration, and the U.S. Citizenship and Immigration Services all should encourage these undocumented workers to come forward and request their benefits. Undocumented workers who have been employed under a fraudulent social security number are not earning credits to receive social security benefits in their old age unless their records are amended.<sup>200</sup> Under the current method of correcting misreported earnings to the Social Security Administration, many immigrants are afraid to come forward for fear of deportation or prosecution for breaking the law.<sup>201</sup> The European Committee of Social Rights has said that states “must strive to ensure that all persons who are entitled to social assistance are aware of their entitlements and are not hindered in obtaining their benefit.”<sup>202</sup>

If the Social Security Administration receives information from an undocumented worker dealing with an unlawful act, the agency may notify the Social Security Administration’s Inspector General for possible prosecution.<sup>203</sup> Thus, an effort should be made to encourage the undocumented workers who have worked and can correct their records to come forward without fear of retaliation. Otherwise, the fact that undocumented workers can correct their records for past employment after they obtain permission to work in the United States is practically worthless.<sup>204</sup>

A major loophole in the current Social Security Administration system to provide credit for past misreported earnings is that the

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200. Wheeler, *supra* note 71.

201. *Id.*

202. See European Comm. of Soc. Rts., United Kingdom, in 2 European Social charter, Conclusions XV-1 621, 643 (2001), available at <http://www.humanrights.coe.int/cseweb/FR/PDF/html%20concs/Conclusions%20xvi%20united%20kingdom.html> (last visited Feb. 4, 2004).

203. Wheeler, *supra* note 71.

204. See *Social Security Credit for Past Misreported Earnings*, *supra* note 79 (describing the mechanism in place for employees to correct their records with the Social Security Administration).



agency relies on employers paying the appropriate taxes for their employees, as well as filing form W-2c “Corrected Wage and Tax Statement.”<sup>205</sup> The current practice of employers hiring the undocumented while not reporting their wages to the Internal Revenue System and the Social Security Administration only seriously affects the undocumented themselves.

This note encourages Congress to tackle this pressing issue and provide social security benefits for undocumented elderly workers. As the Supreme Court of the United States stated, Congress, “vested by the Constitution with the responsibility of protecting our borders and legislating with respect to aliens,” is responsible to address the issues affecting the millions of undocumented workers in the United States.<sup>206</sup> It is ultimately up to Congress to decide whether citizenship should be a required element to receive social security benefits.

Protecting undocumented workers during their elderly years by providing them with social security benefits does not conflict with other policy concerns. More so, ethical concerns compel such protection.<sup>207</sup> The United States is a country that benefits economically from migration. Thus, it should sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which would strengthen legal protection, including the provision of benefits for elderly migrants and their families.<sup>208</sup>

When faced with the reality of the U.S. economy’s reliance on immigrant undocumented labor, the United States has the duty to move as expeditiously and effectively as possible towards the goal of protecting them in their old age. This recommendation does not propose that the U.S. government bare the cost of providing benefits to the elderly undocumented. Instead, it proposes to look at the available resources in the Social Security Administration’s suspense file, and deliver them to the workers who have paid their share of taxes. The United States must do more than just abstain itself from violating human rights if it hopes to realistically assure the protection of the

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205. *Id.*

206. *Plyler v. Doe*, 457 U.S. 202, 252 (1982).

207. Friedman, *supra* note 2, at 1744 (pointing out that the United States must uphold its own image as a human rights protector, otherwise, “the moral force of the U.S. as a human rights advocate would be severely undermined”).

208. HUMAN RIGHTS WATCH, *supra* note 187.

rights of older persons.<sup>209</sup> Moreover, “[t]he principles of nondiscrimination and equality before the law require that states adopt special measures to protect the disadvantaged and vulnerable groups.”<sup>210</sup>

## V. Conclusion

Undocumented workers in the United States endure systematic deprivations of their human rights. Even with the crucial position of undocumented immigrants in the American economy, the United States has not recognized them as members of society.<sup>211</sup> “The law has both created and reflected this ambivalence, according a dual legal identity to the undocumented, they are both outsiders and members.”<sup>212</sup> International sources of legal norms and human rights instruments include the rights of undocumented workers and the elderly.<sup>213</sup> Because the United States boasts of its image as a leader in human rights,<sup>214</sup> it cannot fail to guarantee the rights of one of the most vulnerable groups in society, the undocumented elderly workers. It is beneficial for the United States to bring domestic judicial policy into harmony with international obligations.

The usual criticism of this recommendation is that protecting undocumented workers will undermine immigration policy by encouraging illegal immigration. As history has shown, denying rights to undocumented workers simply does not decrease immigration by people without documents.<sup>215</sup> Their search for basic survival overcomes any fears of deportation or abuse.<sup>216</sup> Most importantly, denying these workers social security benefits when they fulfilled the requirements to receive them constitutes a violation of these workers’ human rights.

Citizenship status does not reduce a person’s susceptibility to health problems and other needs; old age affects everyone regardless of nationality. The fact that most of the undocumented force comes to

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209. Rodriguez-Pinzon & Martin, *supra* note 93, at 945.

210. *Id.*

211. Bosniak, *supra* note 1, at 956.

212. *Id.*

213. See *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, *supra* note 189; *Internal Covenant on Economic, Social and Cultural Rights*, *supra* note 181; LILLICH, *supra* note 172.

214. See Friedman, *supra* note 2, at 1744.

215. See *id.* at 1742 (stating that illegal immigration persists in spite of the extent of rights provided to undocumented workers).

216. *Id.*

work and not to drain public benefits should also shed light on the unfairness of the present situation. The offered recommendation would thus shift the focus from deciding who is eligible for social security based on citizenship to how to administer the available benefits to those who have worked in the United States.

Moreover, the arguments made above reveal the pressing need to protect these workers, especially in their elderly years. In the past, U.S. public policy has, on the whole, overlooked the plight of immigrants.<sup>217</sup> Thus, lawmakers and policy makers should consider the multiple impacts that the growing undocumented elderly population has on the United States as a whole. Society does not benefit from a long-suffering and silent workforce willing to work in substandard conditions. Declining to protect the undocumented elderly renders this large group of people a further burden on society. Therefore, the United States would serve its own best interest by providing undocumented elderly workers with their earned social security benefits. The problems affecting the elderly undocumented immigrants should no longer be ignored.

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217. COALITION ON HUMAN NEEDS, CHN ISSUE BRIEF ON IMMIGRANT ISSUES, available at <http://www.chn.org/issuebriefs/immigrants.asp> (last visited Jan. 31, 2005).