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**THE PRODUCTION OF PRECARITY:
HOW US IMMIGRATION “STATUS”
AFFECTS WORK IN CENTRAL
TEXAS**

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ABSTRACT

This paper analyzes how US immigration law exacerbates the precarity of immigrants' work situations in ways that demonstrate that insecure work is not a function of the neoliberal economic system alone; rather, it is partly a function of immigration law and bureaucracy. Precarious work situations of immigrants in the US perpetuate social and economic inequality, labor rights abuses, and human rights abuses. The extent to which immigration law is the cause of immigrant workers' precarious work situations explains why changes in labor law and human rights law are insufficient solutions to the issues that precarious work generates.

First, I discuss the history and uses of the term precarity. I also explain how work authorization relates to immigration status in the US, and the role of the state in producing precarity. In the second half of the paper, I use case studies from central Texas to illustrate why this relationship between worker status and immigration status is so problematic, and the various ways in which it breeds further precarity in work. Ultimately, I address why labor law and human rights law are not the solution, although they can realistically help to mitigate the situation while substantive US immigration law reform is not likely at this political moment.

The Production of Precarity: How US Immigration “Status” Affects Work in Central Texas

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I. Introduction

Over the last decade, a large volume of scholarly work has described the “precariat” as a worker who “lack[s] the basic securities of the mid-twentieth century period: guaranteed employment, opportunities for training and upward mobility, protection against dismissal, union representation, and income security.”¹ The most widespread usages of the term focus on employment and the labor market, tying “precarity” to economic insecurity.² In the view of economist Guy Standing and at least half a dozen other scholars, precarious, insecure work is a product of neoliberal, market-driven globalization.³ I argue that separate and apart from the market forces of globalization, US immigration law and policy generate precarity in immigrant work. US immigration enforcement mechanisms also exacerbate precarity.

Precarious work situations of immigrants in the US perpetuate social and economic inequality, labor rights abuses, and human rights abuses in varying degrees. While not all immigrants consider their work precarious, overall, the immigrant workforce is exceptionally prone to these abuses. The concept of immigration “status” in the US is more complex than political discourse suggests, and with it comes an equally complex spectrum of worker “status.” The conditionality of worker status stunts economic mobility and disrupts the growth of businesses and jobs in the US. The extent to which immigration law is the cause of immigrant workers’ precarious work situations explains why changes in labor law and human rights law are insufficient solutions to the issues that precarious work generates.

First, I discuss the history, uses and critiques of the term precarity to show why it is the appropriate term for this discussion. An overview of how international scholars define precarious work aims to summarize the most recent studies on precarity, particularly those that center on immigrant workers, and to allow for a comparative study of international immigration systems. I focus on the structure of the US immigration system to explain how work authorization relates to US immigration status, concluding that the work of non-citizens in the US is excessively precarious. I also explain how immigration status interacts with individuals’ substantive rights, especially labor rights, and discuss the role that the state plays in these relationships. I argue that the state plays an active role in institutionalizing precarity through its creation of a variety of “statuses,” promotion of capitalism, and bureaucratic administration.

* The author would like to thank Karen Engle, Kate Taylor, Elizabeth Schmelzel, Anna Banchik, Elissa Steglich, Bill Beardall, and Mark Miller for their support and comments. All errors should be attributed solely to the author.

¹ Shannon Gleeson and Marcel Paret, “Precarity and agency through a migration lens,” *Citizenship Studies Journal* 20, nos. 3-4 (2016): 278.

² *Ibid.*

³ *Ibid.*

In the second half of the paper, I use case studies from central Texas to illustrate why the relationship between worker status and immigration status is so problematic, and the great extent to which it breeds precarity in work while perpetuating social and economic inequality. My analysis details some of the effects that precarious work relationships have on the workers, employers, and the US economy at large. The three case studies from Texas are not meant to be exhaustive nor representative of all immigrant work experiences in the US; rather, they aim to show patterns in the way that US immigration law creates precarious work. Both the issues and the solutions described in my analysis are portrayed through a spacio-temporal lens, as the case studies show how both geographic location and changing political landscapes tend to affect individuals' experiences. The Texas cases also allow me to give special attention to the analytical concepts of relative privilege, conditionality, and noncitizenship assemblages.

To conclude, I address why labor law and human rights law are not the solution, although they can realistically help to mitigate the situation at this political moment, in which substantive US immigration law reform is not likely. I suggest that a change in substantive immigration law, as well as in the overwhelmingly discretionary nature of its implementation, is necessary to fulfill the needs of immigrant workers and the US labor market. The piece ends with a plea to readers to contribute to this change, whether acting as researchers or allies, or merely pushing back against oversimplified rhetoric and misinformation.

II. Defining Precarity

THE HISTORICAL USE OF “PRECARITY”: WHERE PRECARITY FITS INTO ACADEMIC DISCUSSION AND ECONOMIC THEORY

In the 1960s, French philosopher Pierre Bourdieu used the term “*precarité*” to describe “the colonial working class and later a new mode of dominance resulting from a (neoliberal) restructuring of global economy.”⁴ In the 1980s, French labor activists adopted the term as a rhetorical and mobilizing tool, followed by Italian trade unionists and Spanish social movements in the 1990s, and the Global Justice Movement in the early 2000s.⁵ From the early 2000s until the present, precarity has become a popular term, particularly in Europe, gaining scholarly popularity around 2009.⁶ “The movement fighting for rights for irregular migrants adopted it in the mid-1990s, and the link to migration and self-agency has characterized the understanding and political use of the concept” since then.⁷ Precarity is often defined in contrast to a previous period of perceived stability, or Fordism, in the US context.⁸ Described as a model of economic expansion based on mass production, Fordism is characterized by union-protectionism, job security, and the mechanical standardization of products paired with higher wages, or “living wages,” which allow workers to purchase the products they make.⁹

⁴ Martin Bak Jørgensen, “Precariat – What it Is and Isn’t – Towards an Understanding of What it Does,” *Critical Sociology* 43, nos. 7-8 (2016): 961.

⁵ Ibid.

⁶ Gleeson and Paret, “Precarity and agency,” 278.

⁷ Jørgensen, “Precariat –” 961.

⁸ Ibid.; see also, Ayşe Parla, *Precarious Hope: Migrants, Law and Relative Privilege* (unpublished manuscript, Princeton, n.d.), 28-9 (Chapter 3, “Precarious Hope”).

⁹ Jessop, Bob. “Fordism.” In *Encyclopædia Britannica*. <https://www.britannica.com/topic/Fordism>.

This paper adopts the view that precarious work is a product of neoliberal and market-driven globalization,¹⁰ but understands that other forces—in this case, US immigration law—exacerbate the situation.¹¹ In other words, I recognize the view that “precarity is the norm,” and that immigrants’ precarious work situations in the US are often better than the work situations in their countries of origin,¹² but reject that as an excuse for the structural disadvantages they face in the 21st century US labor market, especially when those structural disadvantages translate to labor rights abuses and human rights abuses.

Before defining precarious immigrant work, I am compelled to address another critique of “precarity,” which discounts the term as vague and overused. This paper values precarity as an analytical concept—different from similar terms like insecurity and vulnerability—and recognizes the view of Gleeson, “that the central significance of the precarity concept lies in the way in which it connects the micro and the macro, situating experiences of insecurity and vulnerability within historically and geographically specific contexts. An analysis of precarity thus calls for the study of broader political and economic shifts, and how they reshape the relationships between individuals and groups on the one hand, and capital and the state on the other.”¹³ I adopt Gleeson’s view that “precarity” is distinguishable from similar terms, and use the case studies from Texas as an example of connecting the micro to the macro. Gleeson goes on to explain that this is “precisely where the study of precarity intersects with the study of migration. Rather than simply a voluntary decision to leave behind one’s community of origin,” it encourages us to see the ways in which “...globalization and rising economic inequality have fueled migration.”¹⁴ While it is true that the number of international migrants has tripled over the last 40-50 years,¹⁵ in part due to growing inequality and modern ease of travel, I also argue that while immigrants to the United States have sought to work for centuries, the extent to which the situations these individuals face today is worse than required by neoliberal globalization alone is also *due to the modern development of immigration laws* and their unpredictable and uneven application.

¹⁰ Gleeson and Paret, “Precarity and agency,” 279 (citing to Standing, Polanyi, Kalleberg, Burawoy, Evans, Webster, Lambert, and Beziudenhout).

¹¹ Critics of Standing’s theory of precarity believe that a wider view of the history of capitalism shows that many workers were subject to precarity long before 20th and 21st century globalization began to affect the world economy and migration, and precarity was in fact “the norm and not Fordist economic organization.” Gleeson and Paret, “Precarity and agency,” 279-80. While I do not adopt that view in this paper, I recognize that this view gives nuances to my arguments.

¹² Jørgensen, “Precariat –,” 963.

¹³ Gleeson and Paret, “Precarity and agency,” 280; *see also* Parla, *Precarious Hope*, 28-9 (Chapter 3) (Where “the term precarity originally referred to specific conditions of work -flexible, contingent, irregular and therefore unpredictable and risky from the point of the worker- in Europe in the 1970s...precarity, posited as a feature of late capitalism, was simultaneously assumed to be an aberration from the norm, the norm being reliable employment along with a sense of security about the future in general. The promise of security and predictability about the future was...the essence of the Fordist vision...”)

¹⁴ Gleeson and Paret, “Precarity and agency,” 280.

¹⁵ *Ibid.*

WHAT MAKES “(IM)MIGRANT WORK”¹⁶ PRECARIOUS WORK?

Scholarly work seeking to define and understand precarious work has proliferated in recent years. Standing’s seminal 2011 book *The Precariat: The New Dangerous Class* explains how precarious workers live and work, “usually in a series of short-term jobs, without recourse to stable occupational identities or careers, stable social protection or relevant protective regulations.”¹⁷ These workers lack access (or sometimes perceive that they lack access) to basic securities including collective bargaining, access to trade unions, employment security, income security, opportunities for upward mobility, and protection against arbitrary dismissal.¹⁸ These conditions create increased risk and uncertainty in employment in what sociologist Martin Bak Jørgensen has called “flexibilization” of the labor markets: “shrinking of work rights and informalization¹⁹ through outsourcing, temporary jobs, sub-contracting and related processes,” like part-time work or work through agencies.²⁰ Precarious work tends to be associated with lower wages and fewer benefits, which can mean the reduction or elimination of employer contributions to pension and insurance programs.²¹

Precarious work is also characterized by what Judy Fudge calls the continuum of labor unfreedom, ranging from forced labor to no paid sick days or vacation (and the risk of loss of employment when sick), and, importantly, inequality in working conditions and wages between documented and undocumented workers.²² Labor exploitation of the precarious worker may involve a dearth of personal integrity; personal self-determination; political self-determination; the right to circulate in the labor market; the right to choose one’s residence; and the right to seek legal assistance.²³ Some

¹⁶ Generally speaking, in the United States, a migrant is a worker who moves from place to place to do seasonal work, while an immigrant is a person who comes to live permanently in a foreign country; however, immigration is frequently the result of migration. “Migrant,” in *Oxford English Dictionary*, accessed March 16, 2018, <https://en.oxforddictionaries.com/definition/migrant>; “Immigrant,” in *Oxford English Dictionary*, accessed March 16, 2018, <https://en.oxforddictionaries.com/definition/immigrant>. Although many of the topics discussed in this paper are relevant to migrant workers—and many international scholars use the terms “migrant/migration” in their writings where I use “immigrant/immigration” in the US context—I do not discuss the US’s migrant workers in this paper. (Migrant workers include those with H-2A Agricultural Worker visas and H-2B Non-Agricultural Worker visas, for example.) I use the term “immigrant work” to refer to all non-citizens who are living in the US, while also recognizing that this classification is more nuanced: There are US *citizens* who refer to themselves as immigrants also; there are migrant workers who decide to stay in the US and live as immigrants; some individuals I refer to as “immigrant workers” are authorized to work through “Nonimmigrant status”; and so forth.

¹⁷ Jørgensen, “Precariat –,” 961.

¹⁸ Gleeson and Paret, “Precarity and agency,” 278; Jørgensen, “Precariat –,” 961.

¹⁹ “For some, working in Non-Standard Employment is an explicit choice and has positive outcomes. However, for most workers, employment in NSE is associated with insecurity. NSE can also pose challenges for enterprises, the overall performance of labour markets and economies as well as societies at large. Supporting decent work for all requires an in-depth understanding of NSE and its implications,” which is outside the scope of this project. See, e.g., *Non-Standard Employment Around the World: Understanding Challenges, Shaping Prospects* (International Labour Organization, 2016).

²⁰ Jørgensen, “Precariat –,” 961; see also Fudge, “Precarious Migrant,” 4.

²¹ Gleeson and Paret, “Precarity and agency,” 278.

²² Judy Fudge, “Making Claims for Migrant Workers: Human Rights and Citizenship,” *Citizenship Studies* 18, no. 1 (February 25, 2014): 37.

²³ *Ibid.* at 39.

scholars attempt to quantify which characteristics make for precarious work: Gerry Rodgers identifies four “dimensions of labor market insecurity”;²⁴ Luin Goldring and Patricia Landolt identify eight indicators of precarious work in the “work-citizenship matrix.”²⁵ While their definitions contribute to the literature greatly in that they can be used to collect data and study trends over time, this paper does not require a confined definition of precarious work. In fact, it is appropriate in this context to focus instead on broader definitions of precarious work, several of which pose causal relationships that are significant to the discussion of US immigration law and work.

In defining precariousness, Ayşe Parla encourages our consideration of the literal definition of precarious, derived from Latin: “depending on the will or pleasure of another.”²⁶ She quotes the work of Didier Fassin, who writes about precarious lives as “not guaranteed but bestowed in answer to prayer, or in other words are defined not in the absolute of a condition, but in the relation to those who have power over them.”²⁷ To the extent that immigrants’ precarious work is tied to their US immigration status, which is so often dependent on the will of Congress, the Executive administration, regional immigration judges, asylum officers, and countless administrative, bureaucratic actors in between, it is in this way that immigration law works to create precarity.

While the remainder of this paper will focus on that phenomenon, one final definition of precarious work, from Leah Vosko, deserves our attention: Vosko defines precarious employment as “...shaped by the relationship between employment status (i.e. self-employed or paid employment), form of employment (e.g. temporary or permanent, part-time or full-time), and dimensions of labor market insecurity, as well as social context (e.g. occupation, industry, and geography) and social location (or the interaction of social relations, such as gender, and legal and political categories, such as citizenship).”²⁸ I argue that non-citizen immigrant workers are especially likely to participate in the types of work relationships that Vosko describes in her definition, and Vosko’s additional considerations of social context and social location are imperative to understanding my arguments, as the particular social contexts and social locations of non-citizen immigrants in the US undoubtedly aggravate precarious employment situations.

III. Precarious Work and US Immigration Status

Numerous scholars have turned their attention to the precarious work of immigrants specifically. Among them is Judy Fudge, who observes that most accounts of changing employment norms “have tended to emphasize the role of demand (the restructuring and relocation of firms) and to neglect the role of mass migration, especially across national borders, as a key dimension of

²⁴ “(1) the degree of certainty of continuing employment; (2) control over the labor process, which is linked to the presence or absence of trade unions and professional associations and relates to control over working conditions, wages, and the pace of work; (3) the degree of regulatory protection; and (4) income level.” Fudge, “Precarious Migrant,” 4.

²⁵ Luin Goldring and Patricia Landolt, “Caught in the Work–Citizenship Matrix: the Lasting Effects of Precarious Legal Status on Work for Toronto Immigrants,” *Globalizations* 8, no. 3 (2011): 332.

²⁶ Parla, *Precarious Hope*, Chapter 3, 3.

²⁷ *Ibid.* at 8.

²⁸ Fudge, “Precarious Migrant,” 5.

globalization.”²⁹ Like Fudge, I believe (im)migration should not be on the periphery, but rather, that it is central to a meaningful discussion of precarious work.

The relation between immigration and precarious work varies from country to country. For an immigrant working in the United States, employment and the labor market are often inextricably attached to his or her immigration status. Unless a person working in the US is a citizen, that person’s authorization to remain and work in the US is conditional and, arguably, unstable, or “precarious,” because a person who is a non-citizen is potentially removable (that is, susceptible to deportability or inadmissibility). Some have even described the (im)migrant as “the precarious figure per se.”³⁰ By including foreign workers in its labor markets while regularly denying these workers the rights and entitlements afforded to citizens, the US thus participates in inclusive exclusion.³¹ This results in precarious work.

From 1913, when the US Department of Labor was founded, until 1939, the US government exercised its plenary power³² over immigration through the Department of Labor.³³ In 1940, Immigration and Nationality Services (INS) were moved to the Department of Justice.³⁴ It was not until 2003 that the government decided to divide the INS into two branches—US Citizenship and Immigration Services (USCIS) and Immigration Customs and Enforcement (ICE)—both of which are housed in the Department of Homeland Security (est. 2003) to the present.³⁵ USCIS is the government agency that oversees lawful immigration to the United States and other affirmative applications for status.³⁶ Until March 2018, the USCIS mission statement read: “USCIS will secure America’s promise as a nation of immigrants by providing accurate and useful information to our customers, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of our immigration system.”³⁷ Since the division of the INS in 2003 until 2018, USCIS continually referred to immigrants as “customers” throughout its publications and correspondence: It is a supplier of immigration benefits, allowing it not only to grant immigration legal “status,” but also to establish workers’ legal rights in the labor market through its granting and denying forms of status (e.g. residence, citizenship) that encompass worker authorization, as well as employment authorization documents (EADs) for most other types of status and cases pending both with USCIS and before the Executive Office for Immigration Review (its adversarial counterpart, the courts).

²⁹ Judy Fudge, “Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers” (working paper, University of Victoria, n.d.), 1.

³⁰ Jørgensen, “Precariat –,” 960.

³¹ Judy Fudge, “Modern Slavery, Unfree Labour and the Labour Market: The Social Dynamics of Legal Characterization” (working paper, Kent University, n.d.), 6 (citing Sharma, de Genova, Coutin, Balibar, Ticktin, Khosravi, Willen); *Precarious Hope*, 3 (Chapter 1); see also McNevin, “Political Belonging,” 137 on “necessary exclusion”; see also *Precarious Hope*, 4 (Chapter 1) on “indentured mobility”: when migrants are formally excluded (denied immigration status) but remain part of the labor market through prohibitive work contracts.

³² U.S. Const. art. I, § 8, cl. 4.

³³ US Citizenship and Immigration Services, “Our History,” *US Citizenship and Immigration Services*, last modified May 25, 2011, accessed December 22, 2017, <https://www.uscis.gov/about-us/our-history>.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ US Citizenship and Immigration Services, “About Us,” *US Citizenship and Immigration Services*, last modified December 30, 2016, accessed December 22, 2017, <https://www.uscis.gov/aboutus>.

³⁷ *Ibid.*

These changes, while subtle, marked a clear shift away from recognizing immigration as a legitimate matter of labor and justice and toward the view that immigration is an issue of security and business. This year marks another shift in the same direction: In his 2018 State of the Union address, Donald Trump made clear that in the view of his administration, immigration should be merit-based and not family-based.³⁸ In March of 2018, fifteen years after its establishment, USCIS significantly altered its mission statement, which now declares that “U.S. Citizenship and Immigration Services administers the nation’s lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values.”³⁹

Between 1970 and 2013, the number of international migrants in the world—those living outside of their country of birth—nearly tripled, from 82 to 232 million.⁴⁰ While a discussion of why people migrate is outside the scope of this paper, it suffices to say that the great majority of immigrants in the US will be part of the US labor market, and more often than not, those individuals have left precarious work and life situations in their countries of origin. The vast majority do not arrive to the US with employment-based visas, nor do most immigrants to the US consider themselves customers of the US government. Before moving on to the case studies, it behooves us to tackle the concept of “legal status.”

To some extent, “status” is a term of art defined by case law: whether an individual is “in status” or “out of status” at the time of their application to “adjust status,” for example, could be material to their application.⁴¹ For the purposes of this discussion, most types of “non-citizenship” can be equated to “precarious legal status” to some degree. This is because non-citizens are subject to removal, commonly called deportation.⁴² Fear and instability are inherent in deportability, which has been described as “a protracted and indefinite social condition” that distinctly conditions labor-power.⁴³ Importantly, while all non-citizens are precarious to some degree, some immigration statuses are much more precarious than others.⁴⁴

Judy Fudge’s work on this topic in the contexts of Canada and the UK pushes against binary legal/illegal statuses, preferring Agneiska Kubal’s concept of “semi-legality” to capture the range of migration statuses that are “less than lawful” and “liminal legality” to describe those who are “legally resident but in breach of the employment restrictions attached to their immigration

³⁸ Donald J. Trump, “President Donald J. Trump’s State of the Union Address,” speech, January 30, 2018, www.whitehouse.gov, last modified January 30, 2018, accessed March 17, 2018, <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/>.

³⁹ US Citizenship and Immigration Services, “About Us,” *US Citizenship and Immigration Services*, last modified March 6, 2018, accessed March 15, 2018, <https://www.uscis.gov/aboutus>.

⁴⁰ Gleeson and Paret, “Precarity and agency,” 280 (citing United Nations 2004, 2013).

⁴¹ *See, e.g.*, Ramirez v. Brown, 852 F.3d 954, 956 (2017).

⁴² Under the Immigration and Nationality Act, a person who has been lawfully admitted to the US subsequently can be found “deportable”; a person who has never been lawfully admitted to the US may also be “deported,” or removed, if they are found “inadmissible” (not “deportable”).

⁴³ Nicolas De Genova, “Spectacles of Migrant ‘Illegality’: The Scene of Exclusion, the Obscene of Inclusion,” *Ethnic and Racial Studies* 36, no. 7 (2013): 1189.

⁴⁴ Fudge, “Making Claims,” 38.

status.”⁴⁵ Others refer to “documented illegality”⁴⁶ and similarly advocate for non-dichotomous takes on legality.⁴⁷ Both academic and public discourse must follow their lead: “Citizenship” is a buzz-word, often taken as the dividing line between precarity and non-precarity, but it is important to note that there are dozens of lesser-known immigration statuses in the US breeding different degrees of precarity. The line between legality and illegality becomes particularly fluid in consideration of how the laws “translate into everyday practice and embodied experience.”⁴⁸ In this respect, citizenship is produced not only through law, but also regulations and social practices that make the experience of non-citizenship by individuals and groups unequal.⁴⁹

The work of Luin Goldring and Patricia Landolt deserves special attention in this matter, as they have collected extensive data concerning precarious work in Canada that is comparable to the US. In their 2012 study, they explain that precarious status can describe people with authorized temporary status as well as “people without authorization to work or reside in the country (including those with expired permits or denied refugee claims, those under deportation orders and people who entered without authorization).”⁵⁰ They also note that precarious status includes the possibility that individuals can and often do move between these categories.⁵¹ To expound on that last point, they provide the helpful “chutes and ladders” theory of immigration and legal status trajectories, which “reframes the orderliness and unidirectionality of the [process] by recognizing multidirectional movement between tracks.”⁵² Finally, while many of their studies involve precarious work, they also usefully define precarious immigration status in general to include the lack of permanent residence or permanent work authorization, limited or no social benefits, the inability to sponsor relatives, and deportability.⁵³

Immigration literature frequently emphasizes the vulnerability of “illegal” people and deportability, centering on the power of sovereign states “to surveille, detain, and remove migrants from their respective territories....This ‘deportation regime’ (De Genova 2010) is organized around the assignment of varied legal statuses,” and lack of status can “commonly push migrant workers into grey areas of the economy where wages are low, benefits are non-existent, and basic workplace protections have limited penetration.”⁵⁴ The lives of immigrant workers are thus rendered precarious “in multiple, and reinforcing ways, combining vulnerability to deportation and

⁴⁵ Judy Fudge, “Illegal Working, Migrants and Labour Exploitation in the UK: The Immigration Act of 2016” (working paper, University of Kent, 2017), 9.

⁴⁶ See generally, Luin Goldring, Carolina Berinstein, and Judith K. Bernhard, “Institutionalizing precarious migratory status in Canada,” *Citizenship Studies* 13, no. 3 (2009).

⁴⁷ Goldring and Landolt, “Caught in the Work–Citizenship,” 337.

⁴⁸ Ayşe Parla, *Precarious Hope: Migrants, Law and Relative Privilege* (unpublished manuscript, Princeton, n.d.), Chapter 1, “The Borders and Boundaries of ‘Migrant,’” 3.

⁴⁹ Goldring and Landolt, “Assembling noncitizenship,” 854; see also, Gibney and the difference between citizenship as social entitlement and citizenship as legal status (Fudge, “Making Claims,” 37-8); see also, Parla, *Precarious Hope*, 27-8 (Chapter 3).

⁵⁰ Luin Goldring and Patricia Landolt, *The Impact of Precarious Legal Status on Immigrants’ Economic Outcomes*, report no. 35 (Toronto: Institute for Research on Public Policy, 2012), 12-13.

⁵¹ Ibid; see generally, Hiroshi Motomura, *Immigration Outside the Law* (Oxford University Press, 2014), digital file (describing the relative transience of “status”).

⁵² Goldring and Landolt, *The Impact*, 8.

⁵³ Ibid. at 12-13.

⁵⁴ Gleeson and Paret, “Precarity and agency,” 280.

state violence, exclusion from public services and basic state protections, insecure employment and exploitation at work, insecure livelihood, and everyday discrimination or isolation.”⁵⁵

US IMMIGRATION STATUS, WORK AUTHORIZATION AND THE ROLE OF THE STATE

Through immigration law, the state creates a variety of “statuses,” many of which are precarious and generate a “differentiated supply of labor that produces precarious workers and precarious employment norms.”⁵⁶ The state plays an active role in institutionalizing precarity in this way, and identifying that role potentially “enables us better to assess the adequacy of international human rights instruments that are designed to protect migrant workers.”⁵⁷ Following the views of Nicholas De Genova and Anne McNevin, it is apparent that the US government has incentive to accept irregular migration in facilitating transnational capital accumulation, and so “...neoliberal economies have generated demand for cheap, flexible and compliant labour. Irregular migrants meet this demand...as they are usually impervious to wage and condition regulations, highly mobile and easily expendable/deportable according to market fluctuation.”⁵⁸ The US government thus has little incentive *not* to use its power over immigration to throw workers into illegality arbitrarily.⁵⁹ This interest is also served by the political climate and furthered through rhetoric that simplifies immigration law beyond recognition.⁶⁰

According to the Bureau of Labor Statistics of the US Department of Labor, there were 27 million foreign-born persons in the US labor force in 2016, comprising 16.9 percent of the total,⁶¹ taking into account the informal and additional undocumented workers who did not make it into this statistic, the actual number of foreign-born workers in the US is likely even higher. Their experiences in the labor force are not equal; rather, they are stratified by immigration status.⁶² According to the US Department of State, only 140,000 employment-based immigrant visas are made available each fiscal year, compared to an infinite number of Employment Authorization Documents, or EADs, issued by USCIS.⁶³ While EADs do not grant any form of legal immigration status, they serve as “work permits” for more than a dozen categories of immigration status applications.⁶⁴ In other words, the EAD is tied to multiple applications for “status,” especially those that can be filed simultaneously with the Application to Register Permanent

⁵⁵ Ibid.

⁵⁶ Fudge, “Precarious Migrant,” 2.

⁵⁷ Ibid.

⁵⁸ Anne McNevin, “Political Belonging in a Neoliberal Era: The Struggle of the Sans-Papiers,” *Citizenship Studies* 10, no. 2 (2006): 140.

⁵⁹ McNevin, “Political Belonging,” 145.

⁶⁰ “...the rhetoric of control and restriction goes hand in hand with systematic tacit tolerance to accommodate the dictates of the labor market under global capitalism for a flexible and disposable workforce.” *Precarious Hope*, 2 (Chapter 1).

⁶¹ Department of Labor, *Foreign-Born Workers*.

⁶² (as well as other factors, such as race and education, not discussed here).

⁶³ Congressional Research Service, *Numerical Limits on Permanent Employment Based Immigration: Analysis of the Per-country Ceilings*, report no. 7-5700, 2, July 28, 2016, accessed December 22, 2017, <https://fas.org/sgp/crs/homsec/R42048.pdf>.

⁶⁴ E.g., Special Immigrant Juvenile Visas; T Nonimmigrant Status for victims of trafficking; U Nonimmigrant Status for victims of a crime; VAWA victims of domestic violence; beneficiaries of the Nicaraguan Adjustment and Central American Relief Act; “paroled” beneficiaries of the Cuban Adjustment Act; the diversity lottery; etc.

Residence or Adjust Status (Form I-485). Multiple forms of temporary status that are precarious in themselves, including Temporary Protected Status (TPS) and Deferred Action for Childhood Arrivals (DACA), also come with work authorization.⁶⁵ Finally, pending applications, many of which will not ultimately be granted, allow individuals to work with authorization if they apply for and continue to renew their EADs.⁶⁶

The nature of pending applications for status ranges greatly. One common example is a pending asylum application: 150 days after submitting the application, the asylum seeker is eligible to submit an EAD application,⁶⁷ as are their spouse and their children. Meanwhile, asylum interviews are not uncommonly scheduled up to three years into the future, and some judges' acceptance rates are abysmally low.⁶⁸ Another example is the great number of individuals who seem eligible to adjust status through a family petition: an immediate relative⁶⁹ of a US citizen, for example, can file their Application to Register Permanent Residence or Adjust Status (I-485) simultaneously with their family-based petition (I-130) and acquire an EAD based on the pending I-485, but their immigration status and thus their worker status is still precarious while their application may be denied subject to forthcoming findings of inadmissibility, requests for evidence, and interviews.⁷⁰ Because immigration law is organized under administrative agencies and administrative courts, its decisions lend themselves to precarity when proceedings are terminated or administratively closed, or applications are pending for years (including during the appeals process), but EADs remain available.⁷¹ In a case where the judge does not grant asylum, for example, they might grant Withholding of Removal, or an order that the individual not be removed to the country where they fear persecution.⁷² In this case, the individual must pay to

⁶⁵ INA § 274a.12(c).

⁶⁶ U.S. Citizenship and Immigration Services, "Employment Authorization Document," *U.S. Immigration and Citizenship Services*, last modified April 5, 2018, accessed April 13, 2018, <https://www.uscis.gov/greencard/employment-authorization-document>.

⁶⁷ 180 days after submitting the asylum application, the applicant is eligible for work authorization. U.S. Citizenship and Immigration Services, *The 180-day Asylum EAD Clock Notice*, 1, May 9, 2017, accessed December 22, 2017, https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum_Clock_Joint_Notice_-_revised_05-10-2017.pdf.

⁶⁸ Syracuse University, comp. *Immigration Judge Reports - Asylum*. <http://trac.syr.edu/immigration/reports/judgereports/>.

⁶⁹ An unmarried child under 21, parent, or spouse. INA § 201(b)(2)(A)(i).

⁷⁰ Meanwhile, most non-immediate relatives cannot file their I-485 applications and thus cannot acquire an EAD while they "wait in line" fiscal year after fiscal year, *in some cases up to twenty-three years*, because the non-immediate relative visa categories have annual quotas. Department of State, *Visa Bulletin For December 2017*, by Bureau of Consular Affairs, report no. 12, Department of State Publication 9514 (Washington D.C., 2017), accessed December 22, 2017, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2018/visa-bulletin-for-december-2017.html>.

⁷¹ For example: An asylum case that is administratively closed by an immigration judge, in which the immigrant had already obtained an EAD based on the pending asylum case, remains eligible to renew the EAD for as long as the case is in administrative closure (theoretically, forever). The case is technically still pending, and thus still "alive" for purposes of renewing the EAD. The judge reserves the right to reopen proceedings and issue a deportation order, and the status remains precarious.

⁷² INA § 241(b)(3); 8 C.F.R. § 208.16(b).

renew the EAD every year and has no “path to citizenship” or permanent residency; they may not leave the country, and they qualify for some, but not all benefits proffered to asylees.⁷³

In this way, hundreds of thousands of workers who have precarious legal status or no status at all are permitted to work, and the work they do is overwhelmingly prone to precarity. Meanwhile, those who have been granted immigrant visas are still living and working in precarious circumstances to the extent that they are still at risk for deportation. The state effectively divides immigrant workers into tiers: (1) workers without work authorization; (2) workers with work authorization but not residency; and (3) lawful permanent residents. This categorization allows the government to control how many people are in each category, with the greatest precarity in the first group. (For example, the Trump administration’s choice to move TPS and DACA holders from the second group to the first makes them subject to deportation as well as stripping them of documentation that provides access to more stable work.) Immigrant workers thus nearly all experience an especially heightened sense of precarity.⁷⁴

US IMMIGRATION STATUS AND RIGHTS

In theory, some might say that everyone in the modern US labor market is subject to the same standards (i.e. equal labor rights), regardless of immigration status. The Fair Labor Standards Act and Title VII of the Civil Rights Act, for example, both apply to all workers on US soil, regardless of their immigration status. Similarly, international human rights laws are to be invoked on the basis of personhood and are thought to offer greater protection to these workers than claims based on a “formal legal status that not all immigrant workers enjoy.”⁷⁵ In practice, however, legislative and structural factors tend to make immigrants in the US vulnerable to abuses of both their statutory labor protections and their human rights. Meanwhile, the threat of removal from the country under immigration laws commonly makes many individual workers reluctant, if not wholly unwilling, to exercise the legal rights they do formally possess by virtue of working in the US or simply being a human being.

An example of a legislative factor that promotes the precarious work of undocumented immigrants in the state of Texas is the inability of workers who are out of status to obtain a Texas driver’s license. This policy severely restricts worker mobility, in both the physical and socioeconomic sense. It creates wage differentials in areas like construction, where those who are willing to drive are often selected as group leaders and offered higher wages. It also allows companies to discriminate in hiring workers with a Texas driver’s license only; while there is nothing illegal about driving with a Mexican license in Texas, it may be viewed as precarious and thus unfavorable. Additionally, immigrants without legal status risk detention every time they drive without a valid license. That unnecessary stress may affect the work they decide to accept

⁷³ Some of the most tragic “withholding” cases are those of women who are otherwise eligible for asylum, but are barred from asylum due to a previous deportation order that was no fault of her own (coerced to sign voluntary departure; unable to express fear at the border due to inadequate interpretation services; failed attempts to escape domestic violence). Individuals seeking Withholding of Removal are detained in for-profit prisons and are not eligible for bond. 400,000 asylum seekers are detained annually: about 1 in 4 of the total population detained by ICE is detained in Texas. Ruthie Epstein, “Immigration Detention in Texas [FACT SHEET],” Human Rights First, last modified September 5, 2012, accessed December 22, 2017, <https://www.humanrightsfirst.org/2012/09/05/immigration-detention-in-texas-fact-sheet>.

⁷⁴ Jørgensen, “Precariat –,” 962.

⁷⁵ Fudge, “Making Claims,” 30.

(rejecting a higher paying job with a longer daily commute), or more simply, the fear may affect their health and their job performance. This is one of many examples of what Virginia Mantouvalou has termed “legislative precariousness.”⁷⁶

An example of a structural factor is the nature of the labor contracts most commonly used in fields highly represented by immigrant workers, including construction, agriculture, and service.⁷⁷ The common use of independent contractors in these fields is significant to the enforcement of labor rights in that independent contractors are not protected by the Fair Labor Standards Act and most other statutory labor protections: they are not eligible for minimum wage, overtime, and anti-discrimination protections, nor for unemployment benefits or workers’ compensation benefits should they be injured on the job.⁷⁸ Non-employees generally do not have a right to health or retirement benefits and are not eligible to be represented by unions.⁷⁹ It is unsurprising that within the capitalist business structure, those who have the benefit and peace of mind of labor rights in place—as well as the means to take advantage of those rights—will use them to their advantage, whereas undocumented workers may not be aware of their rights, may fear retaliation, or may feel they do not have the bargaining power, time, energy, and access to resources needed to fight unscrupulous employers, including access to the legal system.⁸⁰

One arena in which immigrants, especially undocumented immigrants, have made significant strides in reducing their precarious work situations is in enforcement of their employment rights in civil courts.⁸¹ While it is true that undocumented workers have historically been afraid to utilize the civil courts to enforce their employment rights, those who have tried have had dramatic and

⁷⁶ Virginia Mantouvalou, “Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor,” *Comparative Labor Law & Policy Journal* 34, no. 1 (2012): 133.

⁷⁷ “In 2016, foreign-born workers were more likely than native-born workers to be employed in service occupations (23.5 percent versus 16.5 percent); in production, transportation, and material moving occupations (14.8 percent versus 11.1 percent); and in natural resources, construction, and maintenance occupations (13.6 percent versus 8.3 percent).” Department of Labor, *Foreign-Born Workers: Labor Force Characteristics — 2016*, comp. Bureau of Labor Statistics, report no. USDL-17-0618 (2017), accessed December 22, 2017, <https://www.bls.gov/news.release/pdf/forbrn.pdf>. While these statistics are countrywide, the gap may be wider in specific regions, including central Texas.

⁷⁸ U.S. Department of Labor Wage and Hour Division, *Employment Relationship Under the Fair Labor Standards Act (FLSA)*, fact sheet no. 13, 1-2, July 2008, accessed March 18, 2018, <https://www.dol.gov/whd/regs/compliance/whdfs13.pdf>; see generally, 29 U.S.C. §§ 201-219 (FLSA).

⁷⁹ *Ibid.* While arguably this reality affects their citizen-independent contractor counterparts to the same degree, where immigrants are disproportionately represented in these jobs and do not have access to other protections through invoking citizenship, their work is more visibly precarious in the absence of labor rights frameworks.

⁸⁰ Misclassification of employees as supposed independent contractors has become rampant as a means for employers to circumvent these labor protections, and immigrant employees—especially undocumented workers—are especially likely to be deliberately misclassified as independent contractors because that helps employers hire undocumented workers while evading their legal obligation to verify the immigrant work authorization of their *employees*. Ironically, however, the misclassification also has an important practical *benefit* for undocumented employees, because the misclassification is the legal subterfuge that allows many employers to hire undocumented workers, pretending they are independent contractors whose work authorization the employer is not required to verify. William H. Beardall, Jr., interview by the author, Austin, TX, April 2018.

⁸¹ Beardall, interview by the author.

increasing success during the last decade.⁸² Civil courts in Texas and across the US have generally recognized not only that undocumented immigrants have essentially the same employment rights as citizens, they have also increasingly adopted precedents *prohibiting* any inquiry into the worker-plaintiffs' immigration status, precisely in order to prevent any "chilling effect" that might discourage undocumented workers from successfully enforcing their employment rights.⁸³

IV. How the Relationship Between Immigration Status and Work Perpetuates Precarity: Case Studies

Although labor rights and human rights abuses of undocumented immigrants (including detained and non-detained immigrants) are the most egregious examples, as explained in the previous sections, this topic also affects documented workers in the US. The three cases of precarity described in this section—three real life cases of precarious immigration status that affect work in Texas, arguably in order from most to least precarious—illustrate this paper's argument that the relationship between immigration status and work perpetuates precarity. These examples are demonstrative, not exhaustive, and aim to show a diversity of situations in one geographical location. Names have been changed to preserve confidentiality.

Case 1. Angel is an undocumented immigrant who entered the US without inspection⁸⁴ and has made the US his home for nine years. Angel is a small-business owner and works as an independent subcontractor in Austin, Texas, where he is married to a US citizen. Angel has been apprehended by law enforcement one time only, when he was driving with a burnt-out taillight. Angel returned to his home country of Mexico for a few months to say goodbye to his ailing father before entering the US without inspection a second time. This second entrance rendered him "inadmissible" and permanently barred him from adjusting his immigration status through his wife or applying for a waiver (unless he departs and spends ten years outside of the US first).⁸⁵ While Angel and his wife try to grow their business, they know that endeavor will end immediately if he is deported. Without any "path to citizenship" in sight, Angel is one of approximately 1,830,000 undocumented people living in the state of Texas.⁸⁶

Case 2. Bernardo entered the US without inspection in the early 1990s, fleeing the Civil War in El Salvador. While other members of his family arrived in time to benefit from the amnesty of 1986 and are now US citizens, Bernardo did not. He obtained Temporary Protected Status after 2001, including the work authorization that comes with that status, which he renewed approximately every eighteen months, until an attorney checked the wrong box on his TPS renewal application and he was placed in removal proceedings. After waiting six years for his day in court, Bernardo

⁸² *Ibid.*

⁸³ *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004); *Cazorla v. Koch Foods of Mississippi, L.L.C.*, 838 F.3d 540 (5th Cir. 2016).

⁸⁴ "Entered without inspection" is a term of art derived from language in the pre-1996 Immigration and Nationality Act; today it refers to individuals who did not enter the US at a port of entry and were not "admitted" or "paroled" by US immigration officials. INA § 212(a)(6)(A)(i).

⁸⁵ INA 212(a)(9)(C)(i)(I).

⁸⁶ Bryan Baker and Nancy Rytina, "Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012," US Department of Homeland Security, last modified March 2013, accessed December 22, 2017, <https://www.dhs.gov/immigration-statistics/population-estimates/unauthorized-resident>.

asked the judge to reinstate his TPS or grant a second pending application for Cancellation of Removal, which would instead provide him a path to citizenship.⁸⁷ Bernardo now must wait three more years to hear the decision on his case due to the low number of these cases that may be granted statutorily each fiscal year.⁸⁸ He has been able to renew and will continue to renew his work authorization card throughout the entire process, while the Cancellation of Removal application is pending. In all likelihood, the judge's decision on the TPS application will be moot by the time the decision is released, since the Trump administration made the decision not to extend El Salvador's TPS designation in January 2018.⁸⁹ Bernardo is one of approximately 200,000 Salvadorans with TPS in the US, more than 36,000 of whom live in Texas.⁹⁰

Case 3. Cesar was brought to the US from Mexico as a toddler by his parents. Cesar is fluent in English and did not know he was undocumented until he was in high school and wanted a Texas driver's license, but was not eligible to get one. Shortly thereafter, the Deferred Action for Childhood Arrivals program was implemented, and Cesar was able to obtain his driver's license, employment authorization card, and enroll in an ivy league university. Cesar is now a student at a Texas law school. The executive branch of the US government enacted DACA as an executive order, and in September 2017, the Trump administration used its executive authority to announce that the program would be "sunsetting," or phased out.⁹¹ Some DACA recipients whose work authorization cards were nearing expiration at the time of the announcement to end DACA were able to extend their status, including two-year work permits, in 2017; Cesar was not among them, and, at the end of 2017, it seemed that Cesar would be unauthorized to work before the end of this school year, before taking his first legal job. In January and February of 2018, however, two federal judges issued injunctions relating to the continuation of the DACA program; one effect of these injunctions is that individuals who have been granted DACA, including Cesar, remain eligible to renew their status while the lawsuits make their way through the courts.⁹² Unless Congress provides a permanent fix, Cesar's future will remain uncertain. Cesar is not alone: While some DACA holders are already practicing law in Texas,⁹³ others are currently nearing law school graduation. Cesar is one of approximately 114,000 DACA holders in the state of Texas.⁹⁴

⁸⁷ See INA §240(B).

⁸⁸ INA § 240A(e)(1); 8 U.S.C. § 1229b(e)(1).

⁸⁹ Office of the Press Secretary, "Nielsen Carefully Considered Conditions on the Ground," news release, January 8, 2018, accessed April 6, 2018, <https://www.dhs.gov/news/2018/01/08/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected>.

⁹⁰ Robert Warren and Donald Kerwin, "A Statistical and Demographic Profile of the US Temporary Protected Status Populations from El Salvador, Honduras, and Haiti," *Journal on Migration and Human Security* 5, no. 3 (2017): accessed December 22, 2017, doi:10.14240/jmhs.v5i3.99.

⁹¹ Elaine C. Duke, "Rescission of the June 15, 2012 Memorandum Entitled 'Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children'," *Homeland Security*, last modified September 5, 2017, accessed March 18, 2018,

<https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

⁹² *Regents of Univ. of California v. United States Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018); *Inland Empire-Immigrant Youth Collective v. Nielsen*, No. EDCV172048PSGSHKX, 2018 WL 1061408, at *1 (C.D. Cal. Feb. 26, 2018).

⁹³ Michael Hall, "Young Americans," *Texas Monthly* (blog), entry posted December 2017, accessed December 22, 2017, <https://features.texasmonthly.com/editorial/young-americans/> (featuring UT Law alumnus Pedro Villalobos, a prosecutor for the state of Texas).

⁹⁴ US Citizenship and Immigration Services, comp., *Approximate Active DACA Recipients: State or Territory of Residence As of March 31, 2018*, 6, April 9, 2018, accessed April 10, 2018,

ANALYSIS: HOW THE PRECARIOUS RELATIONSHIP BETWEEN IMMIGRATION STATUS AND WORK PERPETUATES SOCIAL AND ECONOMIC INEQUALITY

EFFECTS ON THE WORKERS

Taken together, these cases illuminate some of the strange complexities of immigration law that are not usually portrayed on the news or discussed openly in the US labor market. In the first case, for example, the undocumented immigrant's work as a subcontractor may be seen as precarious—the work schedule is irregular; he has no vacation time or sick days; he has no benefits to speak of—but it took him many years to secure this position. Previously, the only way Angel could secure work in Austin without a work authorization card was by furnishing a fake social security number. Every week, taxes, social security, and insurance costs were taken out of his already-low wages, and he will never be able to claim most of those benefits. Despite not being able to adjust his immigration status or acquire work authorization, however, the state of Texas allows undocumented workers to register businesses and work for themselves, so Angel can run a Limited Liability Corporation with his wife, pay taxes with a Taxpayer Identification Number issued to the business, and employ his own workers instead. This situation is much different from some other locations, like in the UK, where working without authorization is criminalized.⁹⁵ In fact, even when Angel was using a fake social security number, he was technically protected from unfair violations of labor law by his employers under the Fair Labor Standards Act and employee protection statutes.⁹⁶ Angel's story demonstrates how precarity can manifest itself differently in different jurisdictions, heavily mediated by state legislation and administrative priorities.

Yet, Angel's lack of immigration status will continually breed precarity: Although he pays his bills on time, without a social security card Angel has no credit score and must rely on business loans from family and friends instead of a bank. Working six days a week from 6 AM until at least 7 PM (without overtime pay, since he works as an independent contractor⁹⁷), he has never had time to enroll in an English language course, which makes it more challenging to run a business and limits the types of jobs he can accept. When he paid taxes this year, he was fined for not having health insurance: since he is self-employed, he cannot afford private insurance, and he does not qualify for the Affordable Care Act without immigration status.⁹⁸ Undocumented immigrants contribute an estimated \$11.74 billion in state and local taxes each year.⁹⁹ Of course, the future of

https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_Population_Data_Mar_31_2018.pdf.

⁹⁵ Fudge, "Illegal Working," 18.

⁹⁶ US Department of Labor Wage and Hour Division, *Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division*, fact sheet no. 48, 1, July 2008, accessed December 22, 2017,

<https://www.dol.gov/whd/regs/compliance/whdfs48.htm>; see also, *Hoffman Plastic Compounds, Inc. v. NLRB*, No. 00-1595 (S. Ct.).

⁹⁷ U.S. Department of Labor Wage and Hour Division, *Employment Relationship*, 1-2; 29 U.S.C. § 207 (FLSA).

⁹⁸ Nor does he qualify for Medicaid or CHIP, should he actually need medical care.

⁹⁹ Institute on Taxation and Economic Policy, *Undocumented Immigrants' State & Local Tax Contributions*, March 1, 2017, accessed December 22, 2017, <https://itep.org/undocumented-immigrants-state-local-tax-contributions-2/>.

his business is at risk every day when Angel walks out the door and gets in his truck, since he does not qualify for any form of immigration relief and he could be detained and deported, forcing his wife to sell their assets, dissolve the corporation, and fire their workers.

In Case 2, the recipient of TPS has a social security card, but it is marked “VALID FOR WORK ONLY WITH INS AUTHORIZATION,”¹⁰⁰ showing he is not a permanent resident. He also has a work authorization card that appears to be expired, but a letter from his attorney (not the same attorney whose error caused his TPS to be revoked) explains that while he is waiting for his new card in the mail, he has met the conditions set out in a new policy instituted by USCIS last year that automatically extends the validity of EADs for 180 days due to increasing delays in processing.¹⁰¹ Once the new EAD arrives, he will renew his expired driver’s license, but until then the person working the desk at the San Antonio DMV will not accept his expired ID—nor his Salvadoran ID. He pays taxes and qualifies for some public benefits (like unemployment insurance) but not others (like the Supplemental Nutrition Assistance Program or Medicaid). While he has been paying into the social security system for nearly twenty years, he will not receive those benefits if he is ultimately deported to El Salvador. By the time the judge releases the decision in his case for Cancellation of Removal, El Salvador will no longer be designated for TPS, pursuant to the Secretary of Homeland Security Kirstjen Nielson’s determination, announced on January 8, 2018, that termination of the TPS designation for El Salvador was required pursuant to the Immigration and Nationality Act.¹⁰²

Luin Goldring has referred to this wide range of actors responsible for the practical distinctions between citizenship and non-citizenship as the “noncitizenship assemblage.”¹⁰³ “An understanding of noncitizenship as an assemblage intentionally moves away from [the] narrow concern with specific categories of noncitizenship and instead highlights relations across...categories of noncitizenship and between these and citizenship, and how they are dynamically constituted and assembled.”¹⁰⁴ In the case of Bernardo, his lawyers play a significant role in his assemblage, for better and for worse.¹⁰⁵ Goldring’s studies have concluded that migrants with precarious legal status, both authorized and unauthorized, face restrictions that condition their engagement with public and private institutions in Canada,¹⁰⁶ and the same can be said for the US. This is where precarity interacts with “conditionality”:

Noncitizenship assemblages are enacted through the conditionality of presence and access. Conditionality denotes the material and discursive conditions that must be met to acquire and exercise the formal or substantive right to remain present within a national territory

¹⁰⁰ Now “DHS,” not “INS,” on newly issued cards.

¹⁰¹ U.S. Immigration and Citizenship Services, “Automatic Employment Authorization Document (EAD) Extension,” *U.S. Immigration and Citizenship Services*, last modified February 1, 2017, accessed April 13, 2018, <https://www.uscis.gov/working-united-states/automatic-employment-authorization-document-ead-extension>. While it is true that federal law prohibits discriminatory documentary practices related to verifying the employment authorization and identity of employees during the employment eligibility verification process, the need to counteract that discrimination is not uncommon. See Goldring and Landolt, *The Impact*, 24.

¹⁰² Office of the Press Secretary, “Nielsen Carefully.”

¹⁰³ Goldring and Landolt, “Assembling noncitizenship,” 856-57.

¹⁰⁴ *Ibid.*

¹⁰⁵ See Goldring and Landolt, “Assembling noncitizenship,” 862 (expanding on the role of lawyers).

¹⁰⁶ *Ibid.*

and/or to access entitlements and social goods, including the labor market. Conditionality is framed by regulations, policies, and procedures that take hold through social relations, interactions, and negotiations. Conditionality is embedded in moral frameworks of deservingness, of who deserves to remain present and to gain access to resources and under what terms....The work of conditionality is characterized by unequal relations of power that are visible in macro-level processes and micro-level interactions.¹⁰⁷

In Case 1, the undocumented immigrant's access to a US citizen as part of his assemblage affects his prospects in the labor market significantly, allowing him access to a number of resources that are too often out of reach for undocumented immigrants, like the legal system, credit, and banking.¹⁰⁸ Living in Austin is also beneficial for Angel, where a relatively large Mexican-American population has created the infrastructure needed for him to run his business (for example, insurance agents that accept his Mexican driver's license; Certified Public Accountants willing to work with Individual Taxpayer Identification Numbers; employers who are bilingual). While most European scholars of precarity would quickly deem his work arrangements precarious, those who are familiar with the global south, including Kathleen Millar, recognize precarity with geographical and historical specificity, and the ways in which the flexibility of otherwise precarious labor provides a relative degree of control and autonomy in their lives.¹⁰⁹ While there is a fine line between flexibility and uncertainty that varies across settings/cultures, it generally is a negative aspect of the US labor market, and uncertain legal status in the US prevents many immigrants from making long-term plans, including for their careers or businesses.¹¹⁰ On the one hand, uncertainty may be used as "an instrument of sovereign power to keep migrants in their place -as undocumented legal subjects and as informal labourers"; on the other hand, uncertainty can "engender inventive daily tactics in response to bureaucratic frustrations."¹¹¹

In his studies of immigrant workers in Canada, Luin Goldring has found that employers take advantage of migrant workers with precarious legal status whether they have work authorization or not, causing workers with precarious status to "self-regulate," avoiding "detection or controversy for fear of losing jobs...and because of their lack of knowledge about the Canadian work environment and the rights and regulations that govern the workplace."¹¹² While we might expect that result in the US as well, especially in cases like those of Angel and Bernardo, the case of

¹⁰⁷ Ibid. at 857.

¹⁰⁸ Thanks to former Austin Police Chief Rudy Landeros, Wells Fargo currently accepts consular ID cards and passports for the sake of opening bank accounts, but it is still difficult to reap the benefits of banking without meaningful credit history.

¹⁰⁹ See Kathleen Millar, *The Tempo of Wageless Work: E. P. Thompson's Time-sense at the Edges of Rio de Janeiro*. *Focaal--Journal of Global and Historical Anthropology* 73 (2015): 28-40; see also, McNevin's spatio-political constructions of citizenship and the importance of space in understanding political relationships. McNevin, "Political Belonging," 138. Jørgensen also recognizes a "common 'warning', which can be derived from the literature on the precariat and more importantly by following recent mobilization, is not to depict precarious groups as victims. While the structural position in the economic and social system may be precarious, these groups are not only victims of precarization. When precarity is framed as a deviation from the social norms, such a framing simultaneously presents a diagnosis of the problem and a prognosis of the solution." Jørgensen, "Precariat -," 966.

¹¹⁰ *Precarious Hope*, 23 (Chapter 3).

¹¹¹ Ibid. at 24-26.

¹¹² Goldring and Landolt, *The Impact*, 29.

Cesar brings the question of relative privilege to the table.¹¹³ Cases like Cesar’s receive significant media attention: ABC/*The Washington Post*, CBS, CNN/*The New York Times*, Fox, NBC/*The Wall Street Journal*, and *USA Today* have all reported that the majority (often supermajority) of people in the US agrees that DACA recipients—by definition young, educated, English-speaking people with no significant criminal history—are “deserving” of a legal status that is not precarious, i.e. citizenship.¹¹⁴ In practice, their inclusion in certain political discourse often necessitates the exclusion of millions of other immigrants in the US who are deemed “criminal” for their civil violations and “undeserving”—including, at times, undeserving of labor and human rights. This is particularly problematic to the extent that “deserving of” and “discretionary” are legal terms found throughout the Immigration and Nationality Act. As already discussed, immigrants’ experiences are shaped by precarity and conditionality, and knowing that “[d]iscretion and deservingness may not operate evenly across these arenas,”¹¹⁵ it is worrisome that the determination of a person’s legal status in the US can rely so heavily on those terms. For example, to win his case of Cancellation of Removal, the judge must find that Bernardo is “deserving of” that form of relief.

Nevertheless, for Angel, Bernardo, and Cesar, the contemporary immigration regime remains “cruelly optimistic...in that it promises legality without guaranteeing it. To the extent that hope is legally produced through recurrent amnesties that suggest but only occasionally deliver legality, the hope for legalization is a precarious one based on compromised conditions of possibility....”¹¹⁶ When an individual’s ability to plan for the future is curtailed by false promises in a defective immigration system, hope naturally wanes and waxes with the political tides, since hope is necessarily oriented toward the future.¹¹⁷ While these three individuals’ experiences might be viewed as microcosms of the American Dream—“trying to compensate for the loss of something that never existed in the first place”—this focus on the personal stories of precarious immigrant workers also serves as a reminder that “not all optimisms are equally prone to cruelty.”¹¹⁸

¹¹³ See generally, Parla, *Precarious Hope*.

¹¹⁴ ABC News and Washington Post, comps., *Americans Back DACA by a Huge Margin*, 1-5, September 25, 2017, accessed March 19, 2018, <http://www.langerresearch.com/wp-content/uploads/1191a4DACAandImmigration.pdf>; CBS News, comp., *Most Americans Support DACA, Oppose Border Wall*, 2, January 13, 2018, accessed March 19, 2018, <https://www.cbsnews.com/news/most-americans-support-daca-but-oppose-border-wall-cbs-news-poll/>; CNN, ed., *CNN February 2018*, comp. SSRS, 6-15, February 28, 2018, accessed March 19, 2018, <http://cdn.cnn.com/cnn/2018/images/02/28/rel3d-.immigration.pdf>; Fox News, comp., *Fox News Poll: September 28, 2017*, 7, September 28, 2017, accessed March 19, 2018, <http://www.foxnews.com/politics/interactive/2017/09/28/fox-news-poll-september-28-2017.html>; Carrie Dann, “NBC/WSJ Poll: Majority Want DACA, but Trump Backers Oppose It,” ed. NBC News, *NBC News*, last modified September 21, 2017, accessed March 19, 2018, <https://www.nbcnews.com/politics/first-read/nbc-wsj-poll-majority-want-daca-trump-backers-oppose-it-n803371>; Nicole Gaudiano, *Survey says: Voters like a clean bill to protect DREAMers*, comp. Quinnipiac University, January 18, 2018, accessed March 19, 2018, <https://www.usatoday.com/story/news/politics/onpolitics/2018/01/18/survey-says-voters-like-clean-bill-protect-dreamers/1044854001/>.

¹¹⁵ Goldring and Landolt, “Assembling noncitizenship,” 854; 864 (“The socio-legal production of citizenship and noncitizenship through law, regulations, and social practices makes the exercise and experience of citizenship and noncitizenship by individuals and groups uneven” (citing Sharma; Walia)).

¹¹⁶ Ayşe Parla, *Precarious Hope: Migrants, Law and Relative Privilege* (unpublished manuscript, Princeton, n.d.), Chapter 5, “Troubled and Troubling Hope,” 21; see generally, Lauren Berlant, *Cruel Optimism* (Duke University Press, 2011).

¹¹⁷ Parla, *Precarious Hope*, 20.

¹¹⁸ *Ibid.* at 21.

Especially in light of this political moment in the US, both the effects of US capitalism on these case studies *and* the effects these individual cases have on the US economy at large require our attention.

EFFECTS ON THE ECONOMY

In the US, various researchers and research methods controlling for factors such as education and time in the US consistently find that undocumented workers earn significantly less than documented workers.¹¹⁹ While there is a dearth of longitudinal data in the US, a Canadian study on “The Impact of Precarious Legal Status on Immigrants’ Economic Outcomes” finds that having precarious legal status at any point is a significant determinant of economic incorporation.¹²⁰ And yet, an analysis of the 2017 Fortune 500 companies has found that 43 percent of the companies were founded by immigrants and/or their children.¹²¹ Immigrant-founded Fortune 500 firms are headquartered in 33 of the 50 states, employ 12.8 million people worldwide, and accounted for \$5.3 trillion in global revenue in 2016.¹²² These statistics exemplify the monetary power that immigrants and immigration status carry, as thousands DACA recipients are perfectly poised to boost economic growth if given the chance.

Meanwhile, an estimated 50,000 of workers with TPS in the US work in the construction industry, “concentrated in areas like Texas, Florida and California that are recovering from hurricanes and wildfires and where labor shortages in construction are especially acute.”¹²³ Commentators have highlighted that “the [Trump] administration is making these moves [to end TPS] in defiance of the business community,” pointing out that the Chamber of Commerce, National Association of Home Builders and other groups have lobbied to keep TPS workers.¹²⁴ While the Houston area continues to rebuild after hurricane Harvey, Austin is continually among the fastest-growing cities in the US,¹²⁵ and a decrease in the number of workers with work authorization would likely lead to more informal work relationships and thus greater labor rights abuses and less oversight of dangerous projects. Where construction, service, and hospitality workers are needed to cater to the growing population, legalization makes more sense for business than deportation.

Without work authorization, immigrants earn less in wages, have less access to loans, and will ultimately spend less money on goods and services in the US economy. Companies will struggle to meet demands and either be forced to lower their standards and regulations and continue to employ their workers without authorization, or else lose to their competition that does not play by the rules and continues to hire their workers without authorization.¹²⁶ I agree with Judy Fudge that

¹¹⁹ Goldring and Landolt, “Caught in the Work–Citizenship,” 329.

¹²⁰ Goldring and Landolt, *The Impact*, 4.

¹²¹ Center for American Entrepreneurship, *Immigrant Founders of the 2017 Fortune 500*, 2017, accessed December 22, 2017, <http://cae.stagingserver.co/>.

¹²² *Ibid.*

¹²³ Yuki Noguchi, “Ending Temporary Protection for Foreign Workers Could Hurt U.S. Rebuilding Efforts,” *National Public Radio: Economy* (audioblog), entry posted December 6, 2017, accessed December 22, 2017, <https://www.npr.org/2017/12/06/568569232/ending-temporary-protection-for-foreign-workers-could-hurt-u-s-rebuilding-effort>.

¹²⁴ *Ibid.*

¹²⁵ Forbes Business, “America’s Fastest-Growing Cities 2016,” *Forbes*, accessed December 22, 2017, <https://www.forbes.com/pictures/emeg45ehgji/1-austin-texas/#73febaa92726>.

¹²⁶ Noguchi, “Ending Temporary,” *National Public Radio: Economy* (audioblog).

there is a causal link between labor exploitation and “systemic and institutional features of state policies and practice relating to immigration and labor regulation combined with the ‘free market’ behaviour of employers.”¹²⁷ Meanwhile, blaming immigrants for the failures of capitalism that they cannot control will not boost the US economy.

WHAT THE CASES TEACH

“When workers are subject to variable rights and regulations because they have differing legal statuses, social inequalities become embedded in all manner of workplace practices, from hiring and firing to setting wages, following employment standards, allocating more difficult or dangerous tasks and so on.”¹²⁸ The US economy would benefit from doing just the opposite: recognizing immigrants as workers and encouraging their business endeavors and work goals instead of restraining them. These cases also capture the individualized experiences of immigrant workers, whose interactions with the labor market are affected by their assemblages and unequal social relations.

Immigration laws do not render immigrant work “legal” or “illegal” in a uniform way, and people’s access to resources and services greatly affect the nature of their work.¹²⁹ While a great number of immigrants come to the US with the intention of working, the number of visas given for the purpose of work authorization is exceptionally small. Instead, foreign-born workers must enter the bureaucracy of immigration law and try to fit themselves into the limited pigeon holes of status categories that are packaged with employment authorization documents. While USCIS views the work permit as secondary to the status—often not the understood “reason” for (im)migration—the work permit is essential to mitigating already precarious lives. Goldring’s study of conditionality frames this phenomenon, and his case studies “confirm that legal status trajectories can easily diverge from those expected and prescribed by policy. Directions and timelines may deviate and be indeterminate.”¹³⁰ This statement is true of all three of the case studies in this paper.¹³¹ What they all have in common is no direct path to citizenship in sight, while hope comes and goes with the whims of both powerful politicians and administrative actors. For some immigrant workers, like Bernardo, changing and qualifying for new forms of immigration relief makes for years of precarious work, while holding out hope that the waiting will pay off. Cesar does not know what to think at this point, while the absurd result for Angel is wishing (upon himself) that he suffer as a victim of a qualifying crime for a U visa, for example—since that seems like a more likely path to relief than waiting for a reform to the one line in the 1996 statute that is barring him from relief.¹³² Immigration laws that promote absurd results are conducive to the well-being of no one.

¹²⁷ Fudge, “Modern Slavery, Unfree,” 14.

¹²⁸ Goldring and Landolt, *The Impact*, 30.

¹²⁹ Goldring and Landolt, “Assembling noncitizenship,” 863.

¹³⁰ *Ibid.* at 862.

¹³¹ Angel entered the US without inspection to work, then intended to adjust through a family petition but was subject to unforeseen inadmissibility grounds, and now his future remains precarious; Bernardo entered without inspection fleeing war, worked without status, gained a temporary form of status unrelated to his reason for immigrating, had that status taken away due to the errors of an attorney and USCIS, qualified for a second form of status, and his future remains precarious; Cesar entered without inspection unbeknownst to him, acquired status, and now cannot anticipate if or when that status will expire, and his future remains precarious.

¹³² INA § 212(a)(9)(C)(i)(I).

Because an overhaul of substantive US immigration law is not likely at this time, labor rights and human rights frameworks, while not sufficient to *solve* the issues described in this paper, deserve attention. While this paper uses the cases of central Texas as mere examples and not necessarily representative, or paradigmatic examples, further research may reveal that foreign workers of central Texas are positioned particularly well to take the lead on ending labor and human rights abuses of immigrant workers—especially as compared to other places like the UK and Canada—in light of extant legal frameworks (touching on both labor rights and human rights) that simply lack implementation, and also in light of other factors, like demographics.¹³³ With these factors in mind, it would be enlightening to see studies like those conducted by Luin Goldring and Patricia Landolt carried out in central Texas.

Sociological studies have examined precarious work in central Texas, perhaps most prominently in Javier Auyero’s recent edited collection, *Invisible in Austin: Life and Labor in an American City*, in which case studies provide “...an exploration of current forms of social suffering in Austin, Texas...”¹³⁴ These cases of precarious workers display a variety of types of labor and a variety of ages and races without focusing on the immigrant worker, but significantly, 5 of the study’s 11 interlocutors are foreign born.¹³⁵ In other words, while Austin’s population is only about 20% foreign-born, more than double that number, 45%, of its precarious workers are foreign born in this sample, and not by sheer coincidence. (Meanwhile, all of the book’s foreign-born interlocutors arrived to the US without any immigration status through which they could seek work authorization.) At least two of the five—a political refugee and a DACA recipient—were “deserving” enough to acquire worker authorization through the *discretion* of an immigration agent: The first point I would like to take up in the final section of this paper.

V. What Are/Are Not the “Solutions”?

US law must either take steps away from the codification of the terms “deserving” and “discretionary” in its immigration statutes, or at least reevaluate how those terms are being interpreted through case law. For example:

The concept of ‘prosecutorial discretion’ appears in the immigration statute, agency memoranda, and court decisions about select immigration enforcement decisions. Prosecutorial discretion extends to decisions about which offenses or populations to target; whom to stop, interrogate, and arrest; whether to detain or to release a noncitizen; whether to initiate removal proceedings; whether to execute a removal order; and various other decisions. Similar to the criminal context, prosecutorial discretion in the immigration

¹³³ For example, I would argue that enforcement of a Mexican worker’s labor and human rights in the formal Texas labor market, facilitated by existing rights frameworks as well as Spanish-language resources and legal service providers, may allow for a greater degree of incorporation than, say, a Syrian in rural Sweden.

¹³⁴ Javier Auyero, ed., *Invisible in Austin: Life and Labor in an American City* (Austin: University of Texas Press, 2015), 2.

¹³⁵ 4 out of 11, or 35% of interlocutors are Hispanic/Latino, which is representative of Austin’s actual demographics. City of Austin, “Top Ten Demographic Trends in Austin, Texas,” *Austin Texas Gov*, accessed December 22, 2017, <http://www.austintexas.gov/page/top-ten-demographic-trends-austin-texas>.

context is an important tool for achieving cost-effective law enforcement and relief for individuals who present desirable qualities or humanitarian circumstances.¹³⁶

Although “gatekeeper discretion”¹³⁷ can and should be a tool that promotes more humane application of strict immigration statutes, in practice, decisions made at the “discretion” of DHS’s agencies often lead to violations of the legal rights of immigrant workers, which in turn leads to the production of precarious work.

Secondly, studies of precarious work that have been conducted in Canada, the UK, and throughout Europe should be replicated in central Texas. US activists for immigrants’ rights might look to what other jurisdictions are doing to address precarious work. For example, in one study, Goldring makes the following suggestions: To mitigate the effects of precarious status on immigrant economic outcomes and social inequality by “replacing probationary forms of temporary migration with permanent residence, faster transitions to secure legal status and permanent residence, open work permits for temporary migrant workers, improvements in labour market and workplace equity, and broader access to settlement services.”¹³⁸ Research gaps that he identifies, such as the focus on earnings and wage rates with limited consideration of the terms of employment and labor insecurity that might characterize immigrants’ work experience, should be addressed in further studies.¹³⁹

Ultimately, we must work to narrow the vast inequalities between citizen and non-citizen workers in the US, which will require a change in immigration law. I agree with Fudge that “[a]s unfreedom in the sense of exclusion from the political community of the nation state is a basic condition of the migrant worker, rights will only palliate, but not resolve, the essential problem. Invoking Arendt...[in] the contemporary ‘post-global era, where the forces of globalization have become part of the backdrop to our social and political reality’, citizenship must move into the global realm.”¹⁴⁰ According to Arendt, a lack of citizenship denotes a lack of the “right to have rights”;¹⁴¹ thus, many workers who have employment rights (de jure), are (de facto) unable to exercise them.¹⁴² Citizenship “denotes rights and responsibilities,” while non-citizenship denotes their “absence.”¹⁴³ While I agree that this trend is noteworthy, as discussed above, the concept of conditionality requires an analysis that is not so “siloes” but, rather, one that takes into account agency, temporality, and scale, among other limitations.¹⁴⁴ In the US context especially, citizenship theory should not be over simplified. In full view of the trends described throughout this paper—especially the finding that entering the country with precarious migratory status,

¹³⁶ Shoba S. Wadhia, “The Role of Prosecutorial Discretion in Immigration Law,” *Conn. Pub. Int. L.J.* 9 (2009-2010): 243-44.

¹³⁷ Goldring and Landolt, “Assembling noncitizenship,” 858.

¹³⁸ Goldring and Landolt, *The Impact*, 1.

¹³⁹ *Ibid.* at 16 (understanding the inherent difficulty in studying populations that tend to stay out of the spotlight deliberately, do not leave paper trails, and avoid formality, but making efforts to gain their trust and compensate them for their time).

¹⁴⁰ Fudge, “Making Claims,” 37.

¹⁴¹ *Ibid.* at 36.

¹⁴² *Ibid.* at 39.

¹⁴³ Goldring and Landolt, “Assembling noncitizenship,” 854 (citing Linda Bosniak (1994)).

¹⁴⁴ *Ibid.* at 856.

authorized or not, “has long-term negative effects on one’s conditions and terms of employment”¹⁴⁵—a change in substantive immigration law must be the eventual solution.

WHERE HUMAN RIGHTS AND LABOR RIGHTS SOLUTIONS FALL SHORT

Immigration law and human rights law are polar opposites in that one is historically territorial in scope (immigration) while the other is specifically not.¹⁴⁶ According to Fudge: “The problem is that ‘human rights norms cannot . . . ease the spectre of the territorial border and the significance of citizenship and immigration status for both entitlement to, and the enjoyment of human rights.’”¹⁴⁷ She goes on to explain how migrants test the limits of human rights frameworks and their recognition of the authority of sovereign nation-states and their immigration laws.¹⁴⁸ Goldring goes as far as to say that human rights are “largely irrelevant to the undocumented (and other non-citizens and non-residents) because citizenship is such a dominant framework for attaching rights to persons.”¹⁴⁹ In practice, these scholars have found that human rights instruments—even those international human and labor rights conventions specifically designed to protect migrants—do not stand up to the sovereignty of the state, which disrespects “soft law.”¹⁵⁰

While labor rights instruments “purport” to embrace equal treatment of citizen and non-citizen workers, according to Fudge, “they are perfectly compatible with the right of states to provide a range of different migrant statuses, some of which are very precarious, for workers they admit into their territory.”¹⁵¹ While labor rights emphasize the collective as the means of individual emancipation,¹⁵² legal immigration status does not. This type of organizing is generally difficult for individuals who do not want to put themselves and their families in jeopardy due to their precarious legal status (the threat of deportation, possibly to a country where they risk persecution).¹⁵³ Other obstacles to this type of organizing include divergent expectations among migrants, fueled by relative privilege, and simple logistics: Precarious workers may not be able to participate due to the fact that they are in detention, lack transportation, or work long hours. In short: “Precarity breeds misanthropy and erodes mutual identification and reciprocity, which are

¹⁴⁵ Goldring and Landolt, “Caught in the Work–Citizenship,” 327.

¹⁴⁶ Fudge, “Making Claims,” 33.

¹⁴⁷ *Ibid.* at 36.

¹⁴⁸ *Ibid.* at 42.

¹⁴⁹ Goldring and Landolt, “Caught in the Work–Citizenship,” 338.

¹⁵⁰ Fudge, “Precarious Migrant,” 3; Fudge, “Making Claims,” 33 (“The United Nations (UN) and the International Labour Organization (ILO) advocate a rights-based approach to managing temporary migration programmes, which embodies the principle of progressive inclusion that derives from the basic idea of the universal protection of human rights. The core notion is that migrants should be included within a host state by progressively granting them, on the basis of length of residence, contribution or social connection, the rights enjoyed by citizens in that country. The legal principle of progressive inclusion also reflects the position that rights should cross borders and be available to exercise against every state”). While this approach is noteworthy, I omit further discussion of it because it is tailored to temporary migration, not immigration. For more on the claims of presence, *see generally*, James Ferguson, “Rightful Shares and the Claims of Presence: Distributive Politics beyond Labor and Citizenship” (speech, The Role of Law in the Production of Inequality: Anthropological and Historical Perspectives, The University of Texas School of Law, Austin, TX, March 29, 2018).

¹⁵¹ “Making Claims,” 35.

¹⁵² Kolben, “Labor Rights,” 471.

¹⁵³ Parla, *Precarious Hope*, Chapter 5, 16.

the preconditions for solidarity.”¹⁵⁴ Add to this sentiment the fear of exposing deportability/inadmissibility, and it is no wonder why labor rights frameworks that rely on solidarity, like collective bargaining, unionization, freedom of association, and strikes, are insufficient to address the needs of this population.

Ayşe Parla also points out the indifference of “existing oppositional groups” to the question of undocumented migrants, as well as trade unions that employ actively nationalistic and protectionist rhetoric in Turkey.¹⁵⁵ Parla notes how these unions and organized labor power generally feel threatened by outsourcing and subcontracting, ultimately explaining the trade unions’ contempt of migrant workers through the lens of relative privilege, self-interest, and ethnic kinship.¹⁵⁶ This generally rings true in the US context as well, although I would argue there is room for creativity. For example, after recent litigation, the National Labor Relations Board continues to concern itself with the rights of undocumented workers, in particular those whose rights under the National Labor Relations Act are interfered with as a result of engaging in union activity (and other forms of protected activity covered by the Act).¹⁵⁷

This is a perfect example of how allies might impact labor abuses. Allies of precarious undocumented workers might target employers and use their privilege to vote, for example, to demand higher standards in labor rights—especially in fields of work where non-citizens who do not vote in US elections are overrepresented. An example of this is the successful fight for implementation of an Austin city ordinance that mandates rest and water breaks for construction workers in Austin.¹⁵⁸ Another example is today’s strong support by most US labor unions for comprehensive immigration reform that will give undocumented workers a path to citizenship, better labor protections, and reduced precarity—a fundamental change from the predominant position within the US labor movement during the 1980’s, which then *pushed* to include the work authorization requirements and sanctions in the 1986 IRCA.¹⁵⁹ In the same vein, there is also room for creative organizing around human rights abuses,¹⁶⁰ especially because human rights do not generally involve mobilization rights, instead tending to be “legalistic guarantees of individuals in relation to the state.”¹⁶¹ I choose to highlight the degree to which human rights and labor rights fall short in solving issues of precarious work merely to emphasize the causal link established between immigration law and precarious immigrant work.

WHAT IS NEXT?

“Precarity is not a new phenomenon, but identifying the links between conditions of migrants and precarity as a condition in the present phase of capitalist economy offers us a toolbox for

¹⁵⁴ Auyero, *Invisible in Austin*, 265 (quoting Loic Wacquant).

¹⁵⁵ Parla, *Precarious Hope*, Chapter 5, 19.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Mezenos Maven Bakery, Inc.*, 362 NLRB No. 41 (2015).

¹⁵⁸ Marty Toohey, “Mandatory breaks OK’d for Austin construction workers,” *Austin American Statesman*, July 30, 2010, accessed December 22, 2017, <http://www.statesman.com/news/local/mandatory-breaks-for-austin-construction-workers/O7xg13dYPbld5BXpCPqKIP/>.

¹⁵⁹ Beardall, interview by the author; David Bacon, Bill Ong Hing, *The Rise and Fall of Employer Sanctions*, 38 *Fordham Urb. L.J.* 77, 93 (2010).

¹⁶⁰ In Texas, see, e.g., *Martha Gonzalez v. CoreCivic, Inc.* (filed in the Texas Western District Court, Austin Office on February 22, 2018. Case Number 1:2018cv00169).

¹⁶¹ Kolben, “Labor Rights,” 472.

understanding contemporary practices, commonalities among immigrant and non-immigrant actors, and new forms of identity formations, alliance building and political strategies of resistance.”¹⁶² The US will benefit from further studies concerning this topic, especially studies on the “thorny field” of divergent expectations and relative privilege among immigrants.¹⁶³ Those differences can be used to tackle one of the most complex fields of law in the US.

In the process, I urge researchers to remind themselves that legality and illegality are “contestable performances of the state.”¹⁶⁴ The US must learn from the mistakes of governments like that of Theresa May in the UK, which are enforcing the criminal law with more force than labor law and human rights law.¹⁶⁵ As De Genova points out, even without fetishizing border enforcement and deportation (the “Border Spectacle”), there would still be migrant “illegality,” an effect of immigration law itself.¹⁶⁶ He eloquently explains that illegality must not be viewed as “the deliberate acts of a spectacular mass of sundry violators of the law”; rather, “as what it truly is: a transnational social relation of labour and capital, an antagonistic political relation of conflict in the process of being fixed as a relation of subordination. Indeed, the phantasm of exclusion is essential to that essentially political process of labour subordination, which in fact is always a matter of (illegalized) inclusion and incorporation.”¹⁶⁷

Instead of allowing politicians, the media, friends and family members to continue to refer to non-citizen workers in the US as “illegals,” readers should keep De Genova’s words—and the case studies described in this paper—in the forefronts of their minds, and must not shy away from discussing these complex issues merely because they are complex. As market participants, readers have an active role to play in determining the future of this discussion.¹⁶⁸ In this political moment, this field of study is changing at an unprecedented rate. Now more than ever, informed readers have a duty to speak up against misinformation, whether the conversation is taking place in the United States Congress,

¹⁶² Jørgensen, “Precariat –,” 970.

¹⁶³ Parla, *Precarious Hope*, Chapter 5, 17.

¹⁶⁴ McNevin, “Political Belonging,” 147.

¹⁶⁵ Fudge, “Modern Slavery, Unfree,” 15.

¹⁶⁶ De Genova, “Spectacles of Migrant,” 1190.

¹⁶⁷ *Ibid.*

¹⁶⁸ See generally, Rose Cuison Villazor and Pratheepan Gulasekaram, “Sanctuary Networks,” *Minnesota Law Review*, *Forthcoming*, Santa Clara Univ. Legal Studies Research Paper No. 14-17 ser., 33-35, accessed April 11, 2018, doi:10.2139/ssrn.3038943; *Am. Friends Serv. Comm. Corp. v. Thornburgh*, 961 F.2d 1405, 1406 (9th Cir. 1991) (refusing to comply with employer sanctions of IRCA “because [the American Friends Service Committee Corp.] believes that to do so would violate the religious beliefs and practices of its members. Those beliefs require that AFSC and its members ‘welcome—that they help and not show hostility to—the sojourner, the stranger, the poor, and the dispossessed in their midst’”).