

Are Migrant Worker's Rights Human Rights?  
*Hoffman Plastics v NLRB* and the Sovereign Power to  
Discriminate Under International Law

Lisa M. Simeone, Doctoral Student  
Department of Anthropology  
University of Chicago  
Human Rights Workshop  
November 15, 2005

**Are Migrant Workers' Rights Human Rights?**  
***Hoffman Plastics v NLRB* and the Sovereign Power to Discriminate**  
**Under International Law**

**ABSTRACT**

In *Hoffman Plastics v NLRB*, a sharply divided Supreme Court found a union organizer ineligible for remedial backpay under the NLRA because of his lack of work authorization in the United States. By giving precedence to immigration law in an NLRB case, the majority opinion challenges the primacy of fundamental labor protections. In an interdependent economy characterized by a mobile labor force and highly competitive markets, the labor rights and social protection of undocumented workers involve complex issues of national sovereignty, corporate accountability and international governance that are in a constant state of negotiation. These trends have created a growing international population unable to benefit from the legal and social protections of either sending or receiving countries. Because *Hoffman* exemplifies these trends, it represents a valuable lens through which to explore the theoretical, historical and practical dimensions of the clash between nationality-based interpretations of labor law and a broader internationalist notion of human rights.

*“The concept of human rights can again be meaningful only if they are redefined as a right to the human condition itself, which depends upon belonging to some human community, the right never to be dependent upon some inborn human dignity which de facto, aside from its guarantee by fellow men... does not exist.”*

-Hannah Arendt, *The Burden of Our Times*

When Joe Castro applied for a job at a chemical plant in California, he took a calculated risk, like many migrants in his situation. He presented a friend's birth certificate, along with a driver's license and Social Security number obtained with that birth certificate, as proof of identity. After six months as a machine operator, Mr. Castro took a greater risk: he joined a union-organizing campaign and was promptly laid off. His predicament, recognized by the National Labor Relations Board (NLRB), the District of Columbia Court of Appeals and the Supreme Court as a cut-and-dried case of union-busting, is hardly unusual among the estimated 6.5 million undocumented low-wage workers in the United States. What made *Hoffman Plastics v NLRB* controversial was the Supreme Court's finding that Mr. Castro's first risk undermined his right to take the second. In a 5-4 vote, the Court predicated his entitlement to remedial backpay on his immigration status, arguably undermining one of the nation's few meaningful deterrents against exploitation of its most vulnerable workers. Furthermore, by giving precedence to immigration law in an NLRB case, the majority opinion challenges the primacy of fundamental labor protections at a time when the relationship between international human rights standards and U.S. domestic policy and practice has become contentious indeed.

The U.S. is the largest employer of irregular migrants in the world, drawing disproportionately from Mexico to meet its need for low skills at a low cost.<sup>1</sup> Though the net impact of migration remains a hotly debated political issue in both sending and receiving countries, consensus is growing among development economists and migration scholars that an internationally mobile workforce is a permanent feature of the global economy, and that it generally enhances wealth in the industrialized world.<sup>2</sup> As of the

---

<sup>1</sup> According to Peter Stalker, the U.S. undocumented population is roughly double that of Europe. Some 2000 estimates: 9 million (Urban Institute), 8.5 million (Migration Policy Institute), 7.8 million (Pew Hispanic Center). The Pew Hispanic Center puts the Mexican percentage at 55%, and estimates an undocumented workforce of 6.5 million. The Mexican Government estimates (conservatively) that only 2.5 million of its nationals lack authorization, out of a total of 6 million currently working in the U.S. See Footnote #72 for Mexican estimates of its diaspora.

<sup>2</sup> To take only example, a statistical analysis for 15 European countries over the period 1991 to 1995 found that for every 1% increase in a country's population through immigration there was an increase in Gross Domestic Product of 1.25 to 1.5%. See S. Glover et al (2001), *Migration: An Economic and Social Analysis*. RDS Occasional Paper No. 67. (London). Further data sources: World Bank (2000). *World Development Report*, Washington DC; SOPEMI (2004). *Trends in International Migration*, (Paris: OECD); M. Fix and J. Passel (1994). *Immigration and Immigrants: Setting the Record Straight*. (Washington DC, Urban Institute); Economic Council of Canada (1991). *New Faces in the Crowd: Economic and Social Impacts of Immigration* (Ottawa); Econtech (2001). *The Economic Impact of 2000/01 Migration Programme Changes*. Report prepared for the Australian Department of Immigration and Multicultural Affairs (Sidney).

year 2000, roughly 175 million or 3% of the world's people are living outside their home countries, which is double the number in 1970. 60% reside in North America, Europe and Australia, where they represent about 10% of the population.<sup>3</sup> Rather than displace native workers, migrant workers generally gravitate to the top and the bottom of the economic spectrum, bringing technical skills in short supply or conversely, performing the unpopular "3-D jobs" which are dirty, dangerous and degrading. Data from developed countries show persistent professional and manual labor shortages, even during periods of relatively high unemployment.<sup>4</sup> Under the pressures of market liberalization, employers from these countries reap the benefits of a relatively inexpensive, eternally renewable supply of software designers, biotechnology engineers, factory workers, poultry processors, and strawberry pickers. The flexibility of this workforce is key to maintaining profit margins, particularly in labor-intensive industries which may experience extreme shifts in production during periods of economic contraction, and do not have the option of relocating their operations abroad. Commentators have observed that the segmentation and instability characterizing the global economy creates a structural "need" for irregular workers, who represent low overhead, are willing to work uncompensated overtime and can be dismissed when necessary, all without undue union interference. To quote two prominent German economists: "Given the weighting of costs and benefits, from an economic perspective the optimal number of illegal employees is certainly above zero."<sup>5</sup>

The Mexican Government, the American Federation of Labor (AFL-CIO) and the Confederation of Mexican Workers (CTM) immediately grasped *Hoffman's* negative implications for the enforceability of labor protections and the possibility of collective bargaining in work environments with an even partially undocumented (and predominantly Mexican) workforce. Complaints were filed with the Inter-American Court and the International Labour Organization (ILO) citing violations of international conventions protecting freedom of association and the right to organize. These concerns were rhetorically and theoretically validated by the respective bodies in both cases, yet the State's discretion to constrain the rights of irregular migrants remains essentially unchallenged. This is because *Hoffman* tests a foundational ambiguity within international human rights norms which results from the tension between universalist

---

<sup>3</sup> United Nations Population Division (2002). The International Organization for Migration (IOM) predicts that the total number of international migrants will approach 250 million by the year 2050, due to increasing economic disparities, the effects of social instabilities such as war, famine and disease, as well as environmental degradation and the effects of global warming. See International Labour Organization (ILO), IOM and Office of the UN High Commissioner for Human Rights (OHCHR), in consultation with Office of the UN High Commissioner for Refugees (UNHCR), (August 2001) *International Migration, Racism, Discrimination and Xenophobia*, a publication prepared for the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

<sup>4</sup> U. Mehrlander (1994), *Immigration as an Economic Asset* (London: Institute for Public Policy Research); M. Abella and Y. Park (1994). *Adjustments to Labour Shortages and Foreign Workers in the Republic of Korea*, International Migration Paper #1 (Geneva: ILO); G. Tapinos (1994). "The Macroeconomic Impact of Immigration: Review of the Literature Published Since the mid-1970's," in *Trends in International Migration* (Paris: SOPEMI/OECD).

<sup>5</sup> Christina Boswell and Thomas Straubaar, "The Illegal Employment of Foreigners in Europe," in *Intereconomics* (January/February 2004).

standards of “personhood” and the sovereign power to discriminate against non-nationals under customary international law.

This tension has complicated the drafting and ratification of Conventions and Resolutions since the inception of the United Nations system, but has become particularly strained under burgeoning interest in the special human rights issues confronting the world’s growing non-national workforce. The appointment by the United Nations High Commissioner for Human Rights of Special Rapporteurs both on the Human Rights of Migrants and of Non-Nationals, as well as the recent entry into force of an International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC), indicate a recognition of the need to consider the special problems confronting mobile workers who cannot make claims of membership in their country of residency. A number of regional and international commissions have also been formed to address the challenges presented by the accelerated international labor flows generated by globalization. At the same time, however, nation-states are instituting increasingly restrictive immigration policies in response to internal nativist pressures and national security concerns.

In an interdependent economy characterized by a mobile labor force and “unfettered,” highly competitive markets, the labor rights and social protection of undocumented workers involve complex issues of national sovereignty, corporate accountability and international governance which are in a constant state of negotiation. In fact, limitations on the benefits of social membership reflect the refusal of industrialized nation-states to fully recognize in their legal codes and practice a growing dependence on unauthorized workers in many sectors of the economy. This is due partly to a reluctance on the part of those countries to assume the dependency costs of the surplus labor supply deemed necessary by employers to remain profitable. However, economic motives are buttressed by the racial politics which have always surrounded the integration of the foreign-born in receiving states. The current politics of national security have provided ample political justification for rights constraints, while the criminalization of unauthorized entry and workforce participation reinforces a legal basis for discrimination. These trends have created a growing international population unable to benefit from the legal and social protections of either sending or receiving countries. Because *Hoffman* exemplifies these trends, it represents a valuable lens through which to explore the theoretical, historical and practical dimensions of the clash between nationality-based interpretations of labor law and a broader internationalist notion of human rights.

### ***Hoffman* Summary and Analysis**

The Hoffman Decision was only the latest in a series of conflicting rulings regarding the interplay between immigration and labor law, both in the courts and the NLRB. In January of 1992, The NLRB found that Hoffman had unlawfully laid off four employees for the express purpose of undermining an organizing drive. At that time, Hoffman was ordered to “cease and desist” from further violations, to post a “detailed

notice” to employees of this remedial order, and to offer reinstatement and backpay to the affected employees. However, during the compliance hearing before the Administrative Law Judge (ALJ) to determine the amount of the backpay award, Castro testified that he had been hired under false documentation. The ALJ consequently denied him both remedies, holding that to do so in light of his illegal act would have been contrary to both the Immigration and Control Act of 1986 (IRCA) and *Sure-Tan, Inc. v NLRB*, the 1984 Supreme Court Decision which had first considered immigration as a factor in denying a remedial award.

Almost six years later, the NLRB reversed the ALJ’s decision with respect to backpay, citing *NLRB v APRA Fuel Buyer’s Group* (1995) as precedent, and stating that “the most effective way to accommodate and further the immigration policies embodied in IRCA is to provide the protections and remedies of the NLRA to undocumented workers in the same manner as to other employees.”<sup>6</sup> *APRA Fuel* had attempted to “harmonize immigration and labor policies” by finding undocumented workers eligible for the available remedies, but making reinstatement contingent on subsequent work authorization, and limiting accrual of backpay from the date of wrongful termination to determination of status by the INS.<sup>7</sup> On appeal, the Second Circuit had found the *APRA Fuel* compromise to be consistent with *Sure-Tan*, which had included language affirming coverage of unauthorized workers under the NLRA. The workers in *Sure-Tan* had been deprived of their remedies not because of their lack of status but because they had elected for voluntary departure, and could not benefit from the award without violating immigration law at re-entry.<sup>8</sup>

However, Chief Justice Rehnquist argued in *Hoffman* that this is precisely the sort of violation which Jose Castro committed when he presented his friend’s birth certificate for employment, following the criminalization of this act by IRCA. The Court grounded its ruling within the *Southern Steamship* line of cases which disqualified employees for remedies under the NLRA because of criminal behavior. It set aside an NLRB award in its 1939 *NLRB v Fansteel Matallurgical Corp.* because of a confrontation between strikers and police; two years later it found mutinous crew members similarly undeserving in *Southern S.S. Co. v NLRB*. An additional importance of *Southern* lies in the Court’s rejection of the Board’s finding that the employees had not actually violated the federal mutiny statute. It established that the NLRB had no authority over policy “so far removed” from its jurisdiction. Likewise, “allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy.”<sup>9</sup>

In the minority opinion, Justice Breyer vehemently disagreed with both this interpretation of precedent and the policy effect of granting remedies to irregular

---

<sup>6</sup> 326 NLRB at 1060. With one dissenting member, the Board offered \$66,951 of backpay, plus interest, for the full 3 1/2 year period from termination to Castro’s admission of unlawful status.

<sup>7</sup> See *APRA Fuel Oil Buyers Group, Inc.* 320 NLRB 408 (1995)

<sup>8</sup> This logic also informed the Ninth Circuit’s 1986 decision, *Local 512, Warehouse and Office Workers’ Union v NLRB (Felbro)*, which blunted the effect of *Sure-Tan* by rejecting the NLRB’s position that an unlawfully present employee was required to prove legal status in order to collect remedies.

<sup>9</sup> *Hoffman Plastic Compounds v. National Labor Relations Board* (NLRB) 535 U.S. (2002)

migrants under the NLRA. He dismissed the majority's position that presentation of false documentation constitutes "serious illegal conduct" of the degree implied in the *Southern* cases. On the matter of jurisdiction, Breyer points to language in *Southern* directing administrative agencies to accommodate one statutory scheme to another when necessary. Immigration laws do not contain guidance regarding their intersection with labor law, which makes it impossible to deduce congressional priority.<sup>10</sup> Yet *Sure-Tan* contains language affirmatively linking immigration and labor rights objectives in order to ensure that "there will be no advantage under the NLRA in preferring illegal aliens."<sup>11</sup> Thus, he argues that the *Hoffman* decision undermines the Board's authority, and contradicts case law by creating a perverse incentive for employers to use unauthorized workers as a way of circumventing labor protections.<sup>12</sup>

At the formal crux of their disagreement is the question of whether backpay encourages workers to immigrate or discourages employers from exploiting undocumented workers. The majority appears confident that the "traditional remedies" of a "cease and desist order" and a posting of rights and violations are sufficient "to effectuate national labor policy regardless of whether the 'spur and catalyst' of backpay accompanies them."<sup>13</sup> The minority contends that, as the only cost to employers for past misconduct, remedial backpay is the only loaded gun in the NLRA arsenal, and as such is key to the enforcement of labor law in the United States. In their view, the prospect of obtaining backpay in the event of a successful lawsuit barely registers in the consciousness of a migrant decision-maker, yet has a powerful effect on the employer tempted to take advantage of the undocumented labor pool. To quote Justice Breyer:

As *all* the relevant agencies (including the Department of Justice) have told us, the NLRB's limited backpay order will *not* interfere with the implementation of immigration policy. Rather, it reasonably helps to deter unlawful activity that both labor laws and immigration laws seek to prevent.<sup>14</sup>

As *Hoffman* makes clear, IRCA changed the legal landscape for immigrant workers and employees by criminalizing presentation of false documents and the employment of unauthorized workers. Ironically, however, another recent case, *Montero v INS*, retained the legal convention that the due process rights afforded in criminal cases are not available to migrants in deportation proceedings. In *Montero*, the Second Circuit Court of Appeals upheld a Bureau of Immigration Appeals (BIA) decision to allow deportation based on information which was reported by a sweatshop employer in violation of the NLRA. Though the "tip" was clearly provided to the INS with the intent of squelching an organizing campaign, the Court held that the "exclusionary rule," which

---

<sup>10</sup> Breyer cites an IRCA conference committee report to the same effect: "IRCA does not 'undermine or diminish in any way labor protections in existing law, or...limit the powers of federal or state labor relations boards...to remedy unfair practices committed against undocumented employees.'" The majority objected to the legal significance of this source.

<sup>11</sup> See *Sure-Tan, Inc. v NLRB* 467 U.S. (1984)

<sup>12</sup> *Hoffman, Op Cit.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

would have disqualified such ill-gotten evidence in a criminal court, generally does not apply in the immigration context due to the plenary power of the executive branch of government. To quote *INS v Lopez-Mendoza*, a prior Supreme Court decision involving the plenary power doctrine: “The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws.”<sup>15</sup> Though *Lopez-Mendoza* left open the possibility for exceptions to this disqualification in cases of extreme Constitutional infringement, workplace immigration apprehensions are considered routine enforcement of a federal regulatory scheme.

No serious observer of U.S. immigration policy would argue that employer sanctions and workplace raids have been effective at reducing the incidence of unauthorized employment. INS statistics reveal that the vast majority of its resources are invested in border control, not internal enforcement.<sup>16</sup> IRCA requires minimal verification of work authorization prior to employment and assesses token fines, facilitating “wink and nod” practices by employers. In the words of Doris Meissner, former INS Commissioner: “Neither Republicans nor Democrats nor a broad range of interest groups is prepared to support an employer sanction program that actually works.”<sup>17</sup> While these measures have little deterrence value, they have been shown to lead to discriminatory hiring and employment practices. As was seen in *Montero*, the INS’ reactive practice of responding to tips effectively deputizes employers who wish to use immigration law as an intimidation “management” tool. Operation Vanguard, an internal enforcement initiative launched by the INS in the late 1990’s, is a classic example of a policy that terrorized migrants without even attempting to drain the undocumented labor pool. If a review of employer records finds irregularities, the employer is given the opportunity to evade legal sanction by firing the workers in question. Such a program targets the employees, not the employer. In fact, the argument has been made that IRCA brought the INS into the workplace not to enforce immigration law, but to undermine labor law, at least under the prosecutorial discretion exercised by administrations since its passage.<sup>18</sup>

Like in *Hoffman*, the Court in *Montero* refused to consider how immigration law had been utilized by the employer as a tool with which to violate labor law. By ruling that conventional remedies are inappropriate to the acknowledged victims of exploitation, the Courts have clearly minimized the comparative importance of the NLRA, and have located ultimate responsibility for the abuse with the worker who has trespassed the national boundary. *Montero* and *Hoffman* exemplify a prominent judicial trend which

---

<sup>15</sup> See *Montero v INS*, 124 F. 3<sup>rd</sup> 381, 382 (2d Cir. 1997), and *INS v Lopez-Mendoza*, 468 U.S. 1032 (1984).

<sup>16</sup> In fiscal year 1999, the INS apprehended 1,714,035 aliens. 1,579,010 were caught at the border. 383 warnings were made to employers nationwide, down 40% from 1998. 417 notices of intent to fine were issued that year, a decrease of 59%. In 2000, warnings decreased another 26%, and notices of intent to fine decreased by another 57%. U.S. Immigration & Naturalization Service, *1999 and 2000 Statistical Yearbooks*.

<sup>17</sup> Jonathan Peterson, *INS Penalty System Falls Down on Job*, L.A. Times, 8/6/2001.

<sup>18</sup> See Lori Nessel’s analysis of *Montero* in “Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform,” in *Harvard Civil Rights-Civil Liberties Law Review* (Summer, 2001).

overlooks the symbiotic relationship between employers and the INS in the post-IRCA environment, and in so doing subsumes the enforcement of labor law to a more pressing concern: the maintenance of membership boundaries through the selective apportionment of rights and opportunities. Both cases demonstrate how the selective criminalization of irregular migration operates as a legal and logical strategy serving the interests not only of employers, but also of the state by drawing a bright line of sovereignty beyond which an individual armed with human rights cannot cross.

## **The Legal and Theoretical Foundations of Migrant Rights**

From an international perspective, it may appear evident that *Hoffman* flagrantly discriminates against migrant workers. In the words of Gabriela Rodriguez Pizarro, the United Nations Special Rapporteur on the Human Rights of Migrants: “It is essential to recognize that States are obliged under international law to protect the rights which migrants are entitled to under the Universal Declaration of Human Rights and other international legal instruments, regardless of the individual’s legal status in the country.”<sup>19</sup> All seven of the major UN treaties address issues faced by migrants and non-citizens. Freedom from discrimination and the right to organize are two of the four “core” worker rights that are considered by the ILO to be fundamental and binding to all ILO members.<sup>20</sup> In addition, migrant rights, freedom from discrimination and the freedom of association are all central to charters and protocols, at both international and regional levels, which influence national policymaking and may be used by international courts in the mediation of disputes between countries.<sup>21</sup> The proliferation of international

---

<sup>19</sup> Gabriela Rodriguez Pizarro, United Nations Special Rapporteur on the Human Rights of Migrants (2001), “Position Paper on the Nexus Between Asylum and Migration,” United Nations High Commissioner for Human Rights (Geneva).

<sup>20</sup> UN Treaties following the 1945 adoption of the Universal Declaration on Human Rights, in chronological order: International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); International Convention on the Elimination of All Forms of Racial Discrimination (1966); Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); Convention on the Rights of the Child (1989); and International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990). Relevant ILO instruments include: Migration for Employment Convention (Revised), #97, (1949); Discrimination in Employment Convention, 1958 (#111); Migrant Workers (Supplementary Provisions) Convention, #143 (1975). See also ILO Declaration on Fundamental Principles and Rights at Work (1998), in which four fundamental principles are identified as fundamental and applicable to all people without distinction: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect to employment and occupation.

<sup>21</sup> See the Charter of the United Nations (1945); Protocol relating to the Status of Refugees (1951); Convention on the Reduction of Statelessness and relating to the Status of Stateless Persons; Vienna Convention on Consular Relations and optional Protocols (1963); Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live (adopted by consensus in UN General Assembly Resolution 40/144, 1985). Regional instruments include the Charter of the Organization of American States; American Declaration of the Rights and Duties of Man (1948); American Convention on Human Rights (1969); European Convention on the Protection of Human rights and Fundamental Freedoms (in particular Protocols #4 and #7, 1950); European Framework Convention for the Protection of

institutions of governance since the Second World War would seem to mirror the globalization of capital and the mobility of populations, offering the appropriate regulatory tools for economic, social and political systems which appear increasingly complex and interdependent.

Some scholars anticipate the emergence a transnational order which derives its legitimacy from a universal, if abstract respect for international human rights norms, rather than from traditional notions of popular consent and representation.<sup>22</sup> This prediction is rooted in the observation of numerous changes to the nation-state which deserve consideration: the restructuring and integration of markets, the increase in cross-border movement, state disinvestment in the well-being of its population, the recognition of dual nationality in many countries, and the resiliency of transnational loyalties among migrants. As Saskia Sassen has perceived, “this territorial and institutional transformation of state power and authority has produced operational, conceptual and rhetorical openings for nation-based subjects other than the national state to emerge as legitimate actors in international global arenas that used to be exclusive to the State.”<sup>23</sup> In her view, the simultaneous civic participation of migrants in both sending and receiving countries represents a challenge to the historical relationship between the “citizen” and the State, indeed a transformation in the institution of citizenship itself. However, cases like *Hoffman* demonstrate precisely how nation-states stave off the powerful political, cultural and economic implications of these transnational trends through legal tools which retain their potency within the current international regime. Though the “nation” may be changing in composition and orientation vis a vis the state, the “state” continues to exercise significant control over the institutional structures through which these changes are ultimately articulated.

Despite their conceptual breadth, UN norms and standards are generally enforceable only insofar as they are adopted within the legal frameworks of member states. Human rights *do* represent a significant shift in international law from its focus on negotiations between sovereign governments to the guarantee of obligations which these governments owe to individuals. Yet any assurance of these “inalienable rights” must be made in reference to the boundaries of an international system of states held in fragile equilibrium by mutual interest. Whether or not it is in the interest of receiving countries to recognize the rights of non-nationals whom they have not chosen to admit is a question which has not been resolved.

A close look at a few major human rights instruments illustrates this ambiguity. For example, the International Covenant on Civil and Political Rights (ICCPR) limits the

---

National Minorities; African (Banjul) Charter on Human and Peoples’ Rights (1981).

<sup>22</sup> See Yasemin Nuhoglu Soysal (1994), *Limits of Citizenship: Migrants and Postnational Membership in Europe*, and David Jacobson (1996), *Rights Across Borders: Immigration and the Decline of Citizenship*

<sup>23</sup> Saskia Sassen (2002), “The Repositioning of Citizenship: Emergent Subjects and Spaces for Politics,” in *Berkeley Journal of Sociology*. “Multiple interdependencies are thereby established and grounds for claims in the receiving and the originating country can be established even when the immigrants are undocumented and laws are broken.”

right of liberty of movement to “[e]veryone lawfully within the territory of a State,” and provides procedural rights in the deportation context only to “alien[s] lawfully in the territory of a State Party.”<sup>24</sup> In regards to labor rights, the ICCPR allows for exceptions to the freedom of association when “in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”<sup>25</sup> Upon ratification, several European states entered reservations under this article allowing for the restriction of migrant political activities, though arguments can (and have) also been made that suppression of labor rights undermines public order by harming workers, sabotaging organizing efforts and putting conscientious employers at a competitive disadvantage. The European Convention on Human Rights also contains an exemption for irregular migrants, allowing curtailment of the right to liberty and security on the part of individuals seeking unlawful entry or otherwise subject to deportation.<sup>26</sup> Though the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) prohibits “distinction as to race, colour or national or ethnic origin,” notably in the enjoyment of “the rights to work, to protection against unemployment, to equal pay for equal work, [and] to just and favourable remuneration,” it also adopts the alienage restrictions contained in the ICCPR.<sup>27</sup> ICERD respects the states’ discretion to “make distinctions” on the basis of nationality, stating that:

[T]his Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State party to this Convention between citizens and non-citizens...Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.<sup>28</sup>

Even when human rights instruments are silent on the question of immigration status, their adoption of the ICERD bases of non-discrimination leaves open the question of whether the prohibition against “national origin” discrimination may serve to protect non-citizens who are discriminated against on the basis of their “nationality.” Though some commentators have minimized the significance of this variation, their equivalence has not proven evident.<sup>29</sup> Even in the context of such comprehensive instruments as ILO’s Employment Discrimination Convention #111, an amendment seeking to broaden protections to non-national workers was rejected in 1996, and coverage was designated

---

<sup>24</sup> ICCPR, Articles 12(1) and 13.

<sup>25</sup> ICCPR, Article 22. This Article is consistent with Article 16 of the European Convention. See Manfred Nowak (1993), *CCPR Commentary*, p. 394.

<sup>26</sup> *European Convention on Human Rights and Fundamental Freedoms*, Article 2 of the 4<sup>th</sup> Protocol and Article 5. For a comprehensive discussion of alienage restrictions in international human rights law, see Linda Bosniak (2004), “Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers’ Convention,” in *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Barbara Bogusz, Ryszard Cholewinski et al, (Leiden/Boston: Martinus Nijhoff Publishers)

<sup>27</sup> ICERD, Article 5(e)(i).

<sup>28</sup> *Ibid*, Article 1.

<sup>29</sup> See Richard B Lillich (1984), “The Human Rights of Aliens,” in *Contemporary International Law* 43.

by the Committee of Experts to encompass only individuals who “are nationals of the country in question, but who have acquired their citizenship by naturalization or who are descendants of foreign immigrants, or persons belonging to groups of different national extraction living in the same state.”<sup>30</sup> In fact, only two measures ventured boldly into the grey area of nationality-based discrimination prior to the 1990 adoption of the MWC. In 1975, ILO Convention #143 was developed specifically to address the vulnerability of migrants to abuse and exploitation, and guarantees “equality of treatment for [the undocumented migrant worker] and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.”<sup>31</sup> Migrants were also designated as a protected class in the UN General Assembly’s non-binding Declaration on the Human Rights of Individuals who are not Citizens of the Countries In Which They Live (1985).” However, like with the MWC, controversy surrounding their inclusion resulted in years of debate and a resulting lack of support from most key receiving countries.

It is important to note that all exceptions to rights guaranteed within the international treaties are subject to a “proportionality requirement,” by which the distinction must be based on reasonable and objective criteria. In the words of David Weissbrodt, UN Special Rapporteur on the Rights of Non-Citizens: “The architecture of international human rights law is built on the premise that all persons, by virtue of their essential humanity, should enjoy all human rights unless exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective.”<sup>32</sup> This duly noted qualification to the “entitlement” referenced in Pizarro’s statement, quoted above, allows significant room for interpretation by states. Insofar as the *Hoffman* Court has argued that its decision fulfills the “legitimate State interest” of immigration enforcement, it has the supreme judicial authority to deem the diminishment of labor protections as proportional to that objective. It would be inaccurate to say that international human rights law consistently allows for discrimination against irregular migrants: the UN Human Rights Committee (HRC), the ILO Committee of Experts and the International Courts have made a number of rulings affirming equal protection of non-nationals living in alien territory. However, the lack of enforceability for these rulings and the general uncertainty of human rights standards as they apply to the undocumented has led many legal theorists to challenge their utility as a social justice strategy.

Alex Aleinikoff, for example, argues that the 14<sup>th</sup> Amendment has a far better track record for justifying equal protection of non-nationals than international law,

---

<sup>30</sup> ILO, “Equality in Employment and Occupation (1996), p. 14, para. 34. The Committee of Experts modified this position somewhat in its 2002 advisory opinion finding discriminatory a Spanish law which denied irregular workers the right to join trade unions. See ILO Governing Body, 327<sup>th</sup> Report of the Committee on Freedom of Association, case #2121 (Spain), GB. 283/8, P561 (Mar. 2002).

<sup>31</sup> *Migrant Workers (Supplementary Provisions) Convention, #143 (1975)*, Article 9(1). Undocumented workers receive equal consideration in regards to “basic human rights,” but a distinction is made under Convention #143 in regards to “non-fundamental workplace rights.”

<sup>32</sup> David Weissbrodt, *Final Report of the Special Rapporteur*, submitted in accordance with Sub-Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council decision 2000/283, UN Doc. E/CN.4/Sub.2/2003/23 2003), p. 5.

partially because of a reluctance on the part of the U.S. courts to recognize its authority. In a Virginia capital punishment case, *Breard v Greene*, the Supreme Court upheld the State's execution of a Paraguayan national, despite the State Department's attempt to intervene pending consideration by the International Court of Justice (ICJ).<sup>33</sup> Despite mounting controversy surrounding the American death penalty, the government's appeal was not humanitarian; it emanated from the more pragmatic concern that a violation of the Vienna Convention might endanger U.S. citizens in the future. Human rights law evolved partially from the need to establish minimum standards governing the treatment of foreign nationals under customary international law. Yet, because aliens are subject to the laws of the nation in which they reside, this remains one of the most contentious and least developed areas in the field. For instance, while Europe has developed an institutional structure for enforcement of international and regional norms, the U.S. only ratifies human rights conventions under the condition that they are not self-executing, and accepts no obligations above those codified within the Constitution and national statutes. Aleinikoff uses *Breard* to illustrate the power and persistence of the nation-state, despite the emergence of transnational linkages in the commercial, cultural and inter-personal spheres. In his words, "the U.S. government's inability to command fidelity to international law and the Governor's assertion that the legal claim based on international law was illegitimate and discriminatory is hardly a ringing endorsement of the post-national perspective."<sup>34</sup>

The United States can sustain this position of relative indifference because the sovereign right to discriminate between nationals and non-nationals is a pillar of international law. A migrant at the border interfaces with the receiving state as a representative of her state of origin, and is legally considered as such. Immigration law is tied logically and historically with international laws which developed with the emergence of the nation-state system to regulate their interactions. Plenary power jurisprudence reflects these origins; immigration and foreign affairs have always been linked by the courts as the exclusive responsibility of the federal government.<sup>35</sup> To quote a formative Supreme Court decision which upheld a public charge determination by denying judicial review: "it is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."<sup>36</sup>

Both international and U.S. legal frameworks extend protection more willingly to non-citizen residents who have established themselves over time, even when they were not formally admitted to the society of which they have become part. As Hiroshi Motomura and Kenneth Heath have each shown, courts have made exceptions to the

---

<sup>33</sup> *Breard v Greene*, 528 U.S. 371 (1998)

<sup>34</sup> Alexander Aleinikoff (1999) "Between National and Post-National: Membership in the United States," *University of Michigan Law School Journal of Race and Law*, 4 Mich. J. Race & L. 241. "The United States is virtually alone among Western states in its preservation of the death penalty."

<sup>35</sup> See Hiroshi Motomura (1999), "Federalism, International Human rights, and Immigration Exceptionalism," *University of Colorado Law Review*, 70 U. Colo. L. Rev. 1361.

<sup>36</sup> *Nishimura Ekiu v United States*, 142 U.S. 651 (1892)

plenary power doctrine, allowing judicial review of immigration decisions, in cases involving long-term migrants. This population has also received Constitutional due process and equal protection rights at the state and local levels.<sup>37</sup> This logic was articulated by the Supreme Court explicitly in *Matthews v. Diaz*, the case to justify welfare eligibility restrictions on the basis of immigration status:

The fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for all aliens...The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence...Those who qualify under the test Congress has chosen may reasonably be presumed to have a greater affinity with the United States than those who do not. In short, citizens and those who are most like citizens qualify. Those who are less like citizens do not.<sup>38</sup>

Whether an immigrant falls under international or domestic, federal or local jurisdiction depends on his or her particular position in relationship to an ever-shifting sense of what constitutes the nation. "Citizenship" may be defined as an exclusive legal category obtained only through birth or naturalization; or as a "bundle" of rights, benefits and obligations accessed through social institutions; or as a cultural unit with a particular historical and mythological narrative. The consensus of a polity vis a vis the relative importance of these notions determines its legal, social and cultural response to the outsider seeking work, refugee, opportunity. Some countries, like Germany and Japan, have fostered a differential exclusion model which permits labor market access as necessary, but denies openings for political and social participation. Other Western European countries like England and France have prioritized the assimilation of minority groups into majority cultures, while "settler societies" like the United States, Canada and Australia have had to largely disassociate citizenship from nationality due to their conditions of constant demographic change.<sup>39</sup> These generalizations do not fully characterize the debates surrounding the issue in any of these countries, however. Each has its share of pundits and politicians who occupy the range from liberal rights-based cosmopolitanism to a consequentialist nationalism which would allow for targeted, temporary immigration only in cases of severe labor shortages. In between are the neo-liberal consequentialists for whom borders are an inefficient state interference in the global economy, and the rights-based nationalists who believe that border control is

---

<sup>37</sup> *Yick Wo v Hopkins*, 118 U.S. 356 (1886), in which the Supreme Court struck down local ordinances outlawing Chinese laundries; *Graham v. Richardson*, 403 U.S. 365 (1971), in which states tried to restrict welfare benefits for resident aliens. See Motomora, *Op. Cit.*, and Kenneth Heath (1999), "The Symmetries of Citizenship: Welfare, Expatriate Taxation and Stakeholding," *Georgetown Immigration Law Journal*, 13 Geo. Immigr. L.J. 533

<sup>38</sup> *Matthews v Diaz*, 426 U.S. 84 (1977)

<sup>39</sup> See Amanda Aizlewood (1999), "Comparing Conceptions of Citizenship: An Analysis of Public Attitudes in Five Liberal Democracies," for Department of Canadian Heritage, Reference SRA-470. In 1999, Germany adopted *jus solis* legislation, allowing citizenship by birth as well as through descent in recognition of demographic exigencies, and accommodating its immigration policy to its more assimilationist European Union partners.

critical to national security and international stability.<sup>40</sup> As expressed by Linda Bosniak, “In an era of widespread transnational migration, national political communities necessarily face questions of where to draw the boundary between insider and outsider. Significantly, however, these boundary questions are not confined to the territorial border; rather, they reach deep into the heart of the national political community, and profoundly affect the nature of relations among those residing within.”<sup>41</sup>

The notion of gradated entitlement expressed in *Matthews v Diaz* has troubling implications within the philosophical framework of the liberal democracy. According to communitarian philosopher Michael Walzer: “The number and range of people in [citizenship’s] commonality grows by invasion and incorporation. Slaves, workers, new immigrants, Jews, Blacks, women – all of them move into the circle of the new protected, even if the protection they actually get is still unequal or inadequate.”<sup>42</sup> Walzer completely rejects the idea of *de facto* belonging, emphasizing boundaries as protection from dilution of civic and cultural unity, and urging full rights for everyone within. He would find none of the immigration approaches described above to be acceptable, due to his intolerance for a second class status of membership. Yet undocumented migrants complicate notions of national membership by making claims of belonging through their very presence and participation in community life. Bosniak has written persuasively about the contradictions inherent in the normative assumption of universality, grounded in T.H. Marshall’s social democratic conception of citizenship, that all members of the polity enjoy the full set of rights which have been fought for and gained within a teleological trajectory of inclusion.<sup>43</sup>

Walzer’s conception of the nation as a community of full members highlights the ascriptive nature of liberal statehood, and raises the question of how a social order committed to universal ideals can tolerate legal inequality. Though citizenship may not have the same importance in American Constitutional theory that it does in other legal systems, most Americans are not required to “earn” it, and may well chose never to exercise or even consider it over the course of their lives. Only the non-citizen is required to bear legal responsibility for her relationship to society, in proportion to her degree of admittance. From her vantage point, the narrative of universal “consent of the governed” reifies and perpetuates the exclusivity on which it is ultimately dependent. For there have always been “new immigrants” and other populations within the territorial closure of the nation yet outside the body politic of the State, populations with incomplete access to the civic, political and social rights central to Marshall’s construct. If they do not qualify as

---

<sup>40</sup> See Heath, *Op. Cit.*, and Martin Ruhs and Ha-Joon Chang (2004), “The Ethics of Labor Immigration Policy,” in *International Organization*, 58, pp. 69-102.

<sup>41</sup> Linda Bosniak (2000), “Universal Citizenship and the Problem of Alienage,” *Northwestern University Law Review*, 94 Nw. U.L. Rev. 963. Also see Didier Bigo (2004), “Criminalization of ‘Migrants: The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion,” in *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Barbara Bogusz, Ryszard Cholewinski et al., Leiden/Boston: Martinus Nijhoff Publishers.

<sup>42</sup> Michael Walzer (1989), “Citizenship,” in *Political Innovation and Conceptual Change*, Terrence Ball et al eds., pp. 211, 217.

<sup>43</sup> *Ibid.*

partial insiders, then they must be construed as interlopers who have violated the social contract binding the community. Is the irregular migrant the subject of rights or the object of regulation? A victim or a threat?

Aleinikoff and Bosniak both point out that undocumented immigrants enjoy significant privileges of membership in the United States. Aleinikoff agrees with Walzer that membership has always been construed quite broadly within the American logic of territorial identification, but expresses greater optimism regarding the sustainability of a society in which newer arrivals are engaged in a protracted process of entry. Like Motomura, he considers residency to be an intermediary step to citizenship, and finds the national argument for the inclusion of non-citizens into civil society to be far more compelling than that of humanitarian universality.<sup>44</sup> California's Proposition 187, a referendum which would have denied education and social services to undocumented immigrants, was defeated not because of its human rights implications, but through a traditional appeal to equal protection and federal plenary power under the Constitution. Aleinikoff maintains that this and other recent immigration policy battles are only the latest in an ongoing process of American identity-building which he finds flexible enough to accommodate migrant rights without deferring to deterritorialized human rights standards.

Bosniak, on the other hand, is not so sure that democratic traditions are prepared to welcome the lowest tier of migrant workers into the fold. She writes that “[s]tates’ gatekeeping powers, which entail powers to determine the composition of the community to which state obligations are owed, are viewed as legitimately justifying a principle of discrimination, subject to some limitations, in the applications of human rights protections to aliens.”<sup>45</sup> In Bosniak's view, the “differential treatment” established through cases like *Hoffman* and *Matthews v Diaz* for migrants living within the U.S. are an extension of the State's exclusionary powers, not only in terms of federal plenary authority, but also insofar as the fear of deportation and actual discriminatory policies and practices function in substitute for actual exclusion at the border. The resulting consequences of our undocumented neighbors' incomplete immersion into community life – workplace exploitation, lack of preventative and primary health care, driving without insurance, Sisyphean poverty – “spill over” into the society around us even as migrants adapt to the rights and responsibilities of public life – education, vaccination campaigns, cheap consumer goods, privacy and many other legal protections unrelated to their status as migrants. *Hoffman* is a prime example of how such an internal threshold decision challenges the coherence of the political community. By further qualifying the degree to which long-term undocumented residents may be considered deserving of routine civil remedies, and by drawing boundaries which affect the exercise of labor rights more generally within the domestic workplace, *Hoffman* demonstrates how the state has actually tightened its controls over the lives of all its members via immigration enforcement.

Borders may have become less significant demarcations of economic, social and

---

<sup>44</sup> Aleinikoff, *Op. Cit.*, and Motomura, *Op. Cit.*

<sup>45</sup> Bosniak (2004), *Op. Cit.*

inter-personal realms of commerce, yet they appear to be gaining political significance as symbolic markers of state power. The opposition between forces of flow and fortification requires vigilance on the part of state actors committed to withstanding the current of transnationalism. Through the discourse of security, they have naturalized “the illegal migrant” as an inevitable, even intentional threat to national stability. In reality, this category of person may be more rationally understood to be a statist construct, the by-product of the disarticulation between immigration policy and labor market demand. Dora Kostakopoulou has pointed out that the status of “illegality” serves as a powerful tool for legitimating state power because of its roots in the private ownership of land. Established in an era of warfare and territorial invasion, the modern nation-state must create its own external threat, the construction of “illegal as invader” in order to preserve its authority in the face of an increasingly decentralized economy.

The unfolding of the complex logic involved in the association of territoriality with statism and nationalism shows that the nation-state’s mastery of space is premised on ideas derived from private land ownership. Ownership and sovereignty over territories are conceptually linked. It is this link between political authority and collective ownership of land that explains why exclusiveness seems to be logically entailed by the concept of territorial sovereignty.<sup>46</sup>

Kostakopoulou joins other European scholars in advocating for a “focal territoriality” which privileges relational over territorial structures, challenging the wisdom of a “Fortress Europe” which would compromise economic efficiency and development based on the fantasy that border control is even possible. Such theoretical formulations may reflect to some extent the transformations taken place within the European Union (EU), though xenophobic rhetoric continues to characterize the immigration policy debate, and the consolidation of a consistent EU migration framework promises to be one of the most antagonistic and belated elements of integration. Meanwhile, economic and military supremacy combined with territorial insularity place the United States in a very different position. Thanks to its traditionally high rates of migration and birthright citizenship, the U.S. does not face the population decline which threatens future productivity in the rest of the industrialized world.<sup>47</sup> It benefits from favorable terms of trade in most international markets, and has the military means to protect its access to natural resources without making diplomatic concessions. As the current superpower, the U.S. has every reason to assert its territorial integrity through modes of inclusion which invoke its creed of tolerance and diversity without sacrificing its posture of relative superiority. For developed countries and the U.S. in particular, a

---

<sup>46</sup> Dora Kostakopoulou (2004), “Irregular Migration and Migration Theory: Making State Authorization Less Relevant,” in *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Barbara Bogusz, Ryszard Cholewinski et al (Leiden/Boston: Martinus Nijhoff Publishers). See also Didier Bigo (2004), “Criminalization of ‘Migrants’: The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion,” in the same volume.

<sup>47</sup> For a sobering look at population decline in developed countries, see the United Nations Population Division’s 2000 Report, *Replacement Migration: Is it a Solution to Declining and Ageing Population?* (New York)

logic of categorization which clearly differentiates “deserving” from “non-deserving” migrant proves quite useful, not only because it legitimates the security-based exclusivity principle of “illegality”, but also because it facilitates the “sticky” distribution of rights and benefits, discouraging access to civil society among migrants who are least entitled. The manipulation of these boundary-setting definitions allows employers to take maximum advantage of the global labor supply while dependency costs are suppressed for the state. However, an emphasis on rights classifications is also deeply embedded within the institutional regimes of human rights protection at the international level.

## **Rights Classifications and the Institutional Regimes of Protection**

Despite broad claims of universal coverage, much of the international human rights regime was in fact deliberately assembled to accommodate state interests in regard to “migration management.” The Office of the United Nations High Commissioner on Refugees (UNHCR) was founded after three decades of highly politicized wrangling over “the refugee situation,” as hundreds of thousands of ethnic minorities fled the disintegration of Europe’s sprawling empires and the creation of nation-states with *jus sanguinis* citizenship requirements. The League of Nations could not reach consensus on a “refugee” definition due to members’ defense of their sovereign right to exclude foreigners and the concern that their own political dissidents could achieve international recognition as such. As negotiations dragged on, restrictive admissions policies were adopted at the national levels which effectively doomed hundreds of thousands of Jews to extermination by the Nazis.<sup>48</sup> These controversies were hardly resolved through the drafting of the Refugee Convention in 1951, when cold war tensions led the U.S. to steward the formation of the non-governmental International Organization of Migration (IOM), partially out of concern that a UN agency would not adequately counter the Soviet Union’s vocal insistence regarding the repatriation of its émigrés.

As Hannah Arendt pointed out in *The Origins of Totalitarianism*, the emergence of these international protection agencies and a host of “minority treaties” after the Second World War affirmed the fact that nation-states could not be expected to protect minority rights. Arendt survived her refugee experience in Vichy France convinced that the universalist ideals of individual freedom and self-determination require membership in a polity with the collective power to guarantee them. Because post-war European nation-states were founded on the conflation of “ethnos” and “demos,” minorities were by nature excluded from their “inalienable rights.” This paradox, which Arendt considered central to the liberal tradition, has made it possible for the citizens of every democracy in history to tolerate colonialism, racism, and the contradiction presented by the “illegal worker.” Much as the latter can be understood as occupying a structural gap between legal and economic schemes, Arendt considered statelessness to be an inevitable result of the modern nation-state system, because the exclusive nature of citizenship would consign those forced from their homes into an indeterminate borderland. Ironically, “only with a completely organized humanity could the loss of a home and

---

<sup>48</sup> See Gil Loescher (2000), *Beyond Charity: International Cooperation and the Global Refugee Crisis*, New York: Oxford University Press, pp. 32-54.

political status become identical with expulsion from humanity altogether.”<sup>49</sup>

The urgent need to address this predicament led the UN General Assembly to establish the principle of non-refoulement within the Refugee Convention, the first and most widely ratified of the major human rights treaties. Under Article 33, States are prohibited from returning a refugee to a country “where his life or freedom would be threatened.”<sup>50</sup> States are obligated to afford such individuals full privileges of residency. However, the Convention confers no obligation to grant asylum, leaves the question of return to third countries unaddressed, and designates a “refugee” quite broadly as “a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.” Divergent notions of what constitutes a “well-founded fear” have hampered consistency in the application of the Convention among its signatories, leaving a far from seamless web of international protection. On the contrary, the history of refugee and asylum policy shows that nations have been more likely to help those fleeing from political antagonists than their allies and, to quote a leading UN specialist, “all governments were more willing to act in a non-political, non-discriminatory fashion towards refugees when they needed immigrant labor.”<sup>51</sup>

The concern on the part of UN member governments that refugees be clearly differentiated from other migrants is reflected in the language used throughout UNHCR and IOM documents. In a joint paper prepared for the Global Consultations on International Protection in 2001, for example, “UNHCR estimates that, at the end of 2000, there were approximately 14.7 million asylum-seekers and refugees and other *persons of concern to UNHCR* (emphasis mine), outside their country of origin (no more than 10% of the total number of migrants, according to IOM.)<sup>52</sup> The agencies assert a clear and unexamined distinction between “forced” and “voluntary” movements, stressing that “[r]efugees are not migrants in the lay sense of the word. They move through compulsion, not on the basis of meaningful choice, and their immediate objective is to seek protection, not a migration outcome.”<sup>53</sup> They are primarily concerned with weeding out the “legitimate” asylum seeker amidst the hordes of “uncontrolled irregular migration,” and present assessment and classification as an essential migration management strategy.

Similarly, the IOM’s contribution to the paper supports the state control agenda of “effective border management to enable action to be taken before borders are crossed,” and complements the UNHCR’s necessarily narrow focus through the return of failed

---

<sup>49</sup> Hannah Arendt, *The Origins of Totalitarianism*, Andre Deutsch, 1986, p. 297.

<sup>50</sup> UN Convention Regarding the Rights of Refugees (1951)

<sup>51</sup> Loescher, p. 39.

<sup>52</sup> See United Nations High Commissioner on Refugees (UNHCR) and International Organization of Migration (IOM), *Refugee Protection and Migration Control: Perspectives from UNHCR and IOM*, Paper for the 2<sup>nd</sup> Meeting of the Global Consultations on International Protection, U.N. Doc. EC/GC/01/11 (31 May 2001)

<sup>53</sup> *Ibid.*

asylum-seekers: “It is recognized that the return of persons found not to be in need of international protection or not otherwise authorized to enter and remain is essential to maintaining the integrity of a migration management system as well as to maintaining the integrity of the institution of asylum.”<sup>54</sup> IOM’s description of their repatriation process suggests distinct treatment standards between asylum-seekers and migrants who have entered without inspection: one group is welcomed in a “reception center,” while the others are brought to a “safe house.” Throughout the document, the refugee and successful asylee are personified as innocent, blameless, perhaps a bit naïve and consequently deserving protection, as opposed to the voluntary migrant who has the wherewithal to manipulate the system in order to escape poverty or otherwise improve her station within the global order.<sup>55</sup>

Both the mandates and the political orientation of the UNHCR and IOM are reflected in this emphasis on the level of agency available to the individual migrant, as compared with that of the ILO, which is more interested in the repressive conditions leading to both forced and voluntary migration. ILO’s tendency toward structural and economic rather than legal and political analysis stems from its origins as a strategy to circumvent the spread of socialism through the improvement of industrial working conditions. First championed by a pair of 19<sup>th</sup> Century European businessmen, the ILO Constitution was written by a nine-country commission chaired by Samuel Gompers of the American Federation of Labor, and adopted as part of the 1919 Treaty of Versailles.<sup>56</sup> These trade union roots are evident in the “tripartite organization” of its Governing Body, which includes labor, employer and government representation. ILO’s corresponding contribution to the 2001 Global Consultations on International Protection reflects this very different mandate, focusing on the responsibility of states and employers to guarantee the rights of migrant workers. This paper challenges the control paradigm in favor of one which considers the root causes of political and economic instability. It argues that refugees and migrants experience the same kinds of discrimination in the workplace, alleges that meaningful asylum estimates are impossible given poor quality data, and problematizes the political nature of the refugee recognition process:

Many people are displaced today due to conditions that implicitly or explicitly constitute violations of their economic, social and cultural rights, both individual and collective. However, current international law has tended to recognize only

---

<sup>54</sup> *Ibid.* This document states that the practice of returning undocumented migrants discourages illegal entry. This assertion is not substantiated, and would be difficult to prove given poor statistical data and the numerous variables contributing to the phenomenon.

<sup>55</sup> When addressing the complexities inherent in international migration, the IOM’s value-laden characterizations become particularly evident. For example, in an attempt to differentiate clearly between trafficking and smuggling, the authors concede that “[d]espite the distinctions, there are grey areas between the two, and persons who willingly cooperate with *and even solicit* (emphasis mine) smugglers’ assistance to cross a border may also be subject to serious human rights violations in the process.” As I interpret such a qualification, this statement implies that those who take action are generally less worthy of international protection than those who are passive victims of their fate.

<sup>56</sup> From “ILO History,” ILO Orientation Course for New Officials, 2-4 October 2001, Geneva. The countries represented on the first Labour Commission included Belgium, Cuba, Czechoslovakia, France, Italy, Japan, Poland, the United Kingdom and the United States.

victims of violations of certain political rights – refugees – as needing protection and assistance. Contrary to the notion of indivisibility, those victims facing denial of economic, social and cultural rights that often threaten their very survival, as communities as well as individuals – have no such recognition.<sup>57</sup>

The longstanding indeterminacy of the human rights approach to international migration, discussed above, can be partially attributed to an inability to bridge these diametrically opposed frames of reference, one oriented towards exclusion and the other towards inclusion. Even the MWC, which represents the most successful attempt to date, manifests the shortcomings of a compromise which fully satisfies no one.<sup>58</sup> Though the MWC is the first major human rights instrument to recognize the scale and permanence of labor mobility, differential provision of rights between regular and irregular workers perpetuates the disconnect between legal norms and the practical dynamics of low-wage work in the global economy.<sup>59</sup> Begun in 1979, the MWC took 11 years to draft and another 13 to accumulate the 20 ratifications required to enter into force.<sup>60</sup> Deep within the working group's record of proceedings lurk the difficult questions of responsibility which haunt our world of good intentions, great wealth and staggering inequality. Who's responsible for irregular migration? Should sending states shoulder the responsibility for failing to develop? Are receiving states responsible for demanding immigrant workers? Is it the individual's fault for choosing to migrate? Is "economic migration" forced or voluntary? If the uneven stakes of globalization were put into play during the colonial era, how can receiving countries pay their debt? How can sending countries ever hope to catch up?

Simply by surfacing these issues within the UN system, the MWC has pushed forward the terms of the migration debate significantly. It makes great strides in its overt attribution of certain rights to the undocumented: due process in criminal proceedings, emergency medical care, children's education, domestic privacy, the right to participate in trade unions, and the guarantee of "decent work," to name just a few. However, to quote Linda Bosniak: "State parties are entitled to discriminate against undocumented migrants with respect to rights, to family unity, liberty of movement, participation in the public affairs of the state of employment, equality of treatment for family members,

---

<sup>57</sup> International Labour Organization (ILO), *The Asylum-Migration Nexus: Refugee Protection and Migration – Perspectives from ILO*, Paper for the 2<sup>nd</sup> Meeting of the Global Consultations on International Protection, (31 May 2001)

<sup>58</sup> Other collaborative documents: "Memorandum of Understanding Between the Director-General of the International Labour Organisation and the United Nations High Commissioner for Refugees," Signed 10/21/83, Geneva; the 1/16/03 Letter from Ruud Lubbers, High Commissioner for Refugees to Juan Somavia, Director-General of the ILO, seeking collaboration; see also working papers from the Action Group on Asylum and Migration (AGAMI).

<sup>59</sup> See Bosniak (20004), *Op. Cit.*

<sup>60</sup> The MWC entered into force on July 1, 2003. Countries to have ratified the Convention as of 6/04: Azerbaijan, Belize, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Colombia, Ecuador, El Salvador, Egypt, Ghana, Guatemala, Guinea, Kyrgyzstan, Mali, Mexico, Morocco, Philippines, Senegal, Seychelles, Sri Lanka, Tajikistan, Timor-Leste, Uganda, Uruguay. See "Towards a Fair Deal for Migrant Workers in the Global Economy," Report VI from the 92<sup>nd</sup> Session of the International Labour Conference, June 2004.

freedom from double taxation, and further employment protections and trade union rights, among others.”<sup>61</sup> The MWC also contains numerous provisions invoking the sovereign power to regulate borders, and mentions the undocumented worker’s obligation to observe the laws of the receiving state, underpinning the criminalization of illegal migration as a control mechanism. Most concerning, the MWC does not guarantee protection from deportation for complainants, which seriously undermines an immigrant’s ability to exercise rights under the Convention without suffering Joe Castro’s fate. This notable omission underscores the lack of utility of human rights instruments for undocumented workers in many situations. To take Article 68 as an example:

States of employment shall take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanction on employers of such workers. The rights of migrant workers vis-à-vis their employer arising from employment shall not be impaired by these measures.

What, in real terms, does this mean for *Hoffman*?

### **“The Hoffman Test”: International and Domestic Responses to a Human Rights Violation**

Though the *Hoffman* ruling was made a year before the MWC was entered into force, the AFL-CIO and the Mexican Government recognized in the case an opportunity to test U.S. accountability to core human rights standards. The Mexican Embassy in Washington immediately issued a statement of concern urging resumption of bilateral migration talks which had been frozen by the 9/11 attacks, and soon announced that a formal challenge was forthcoming.<sup>62</sup> Mexican President Vicente Fox accused the Bush Administration of poor diplomacy in his remarks before a group of private investors: “The only lasting solution will be to legalize the situation of millions of undocumented Mexican workers who are already in this country and establish a secure and orderly framework for migrant workers. That will be the litmus test of our true commitment to a new and closer relationship.”<sup>63</sup> In May 2002 it submitted a request for advisory opinion with the Inter-American Court (IAC); an Amicus Curiae Brief was signed by dozens of immigrant rights organizations in a unified attempt to bring U.S. immigration policy under international scrutiny. Mexico also solicited a formal opinion from the ILO, while the AFL-CIO and Confederation of Mexican Workers (CTM) filed corresponding complaints, heralded by press release as “what could become one of the highest profile labor cases to come before an international body.”<sup>64</sup>

---

<sup>61</sup> Bosniak (2004), *Op. Cit.*, p. 315.

<sup>62</sup> United Mexican States (4/1/02), “The Embassy of Mexico is Concerned About the Consequences of a U.S. Supreme Court Ruling.”

<sup>63</sup> Reuters (5/10/02), “Mexico’s Fox Tells U.S. to Prove Its Commitment”

<sup>64</sup> AFL-CIO (11/8/02), “AFL-CIO Files Complaint with United Nations ILO on Hoffman Plastics Supreme Court Decision Denying Immigrant Workers’ Rights”

Noting the complete lack of reference to international law in the *Hoffman* decision, the AFL-CIO alleged in their complaint that Hoffman's differential application of labor remedies violates fundamental anti-discrimination and freedom of association standards. Echoing Justice Breyer's dissenting opinion, they criticized the court for dichotomizing their approach to immigration and labor law rather than seeking an effective balance. They also accused the U.S. of committing an unallowable exception under ILO Convention 87 (Freedom of Association); inadequate protection under 98 (Right to Organize); and a wholesale assault on the Declaration on Fundamental Principles and Rights at Work, by encouraging the hiring and exploitation of the undocumented, which would in turn undermine the collective bargaining and "decent work" conditions for all workers.<sup>65</sup> The Complaint also referenced a case in Spain (#2121) for which ILO had issued an advisory opinion in March 2002, finding a national law prohibiting trade union participation by irregular workers to be in violation of Convention 87. Importantly, this decision had revised prior internal guidance to the contrary.<sup>66</sup> (See Footnote #30 above.)

AFL-CIO's initiative in this effort is notable due to its relatively recent about face regarding rights for the undocumented. Unions had firmly backed IRCA in 1986 under the conviction that immigration depresses wages and displaces native workers. However, over a decade which saw a significant increase in the immigrant workforce and an alarming decrease in union membership, leaders began to realize that employer sanctions and the consequent reliance on contract labor were thwarting organizing without making a dent in irregular employment.<sup>67</sup> In February 2000, the AFL-CIO Executive Council passed a resolution in support of immigrant workers, calling for an amnesty, full workplace rights, whistleblower protections from deportation, and a basic safety net.<sup>68</sup>

The Mexican Government supported the CTM's complaint with a letter to the Director-General of the ILO, declaring that "to be undocumented is not to be a criminal; it is to not have the option of entering a country in normal conditions, without extreme risk."<sup>69</sup> It was unable to file a "bilateral complaint" because neither country is party to specific relevant Conventions other than the Declaration, which extends to all ILO members. Unlike the Conventions, the Declaration is non-binding, and as such does not give rise to legal obligations. Without grounds for action, the ILO was limited to providing an advisory interpretation, as it had in Case #2121 (the Spain case.) The ILO

---

<sup>65</sup> American Federation of Labor and Congress of Industrial Organizations (November 8, 2002), Complaint to the ILO Committee on Freedom of Association against the Government of the U.S. for Violation of Fundamental Rights of Freedom of Association and Protection of the Right to Organize and Bargain Collectively Concerning Migrant Workers in the United States

<sup>66</sup> ILO Governing Body, 327<sup>th</sup> Report of the Committee on Freedom of Association, case #2121 (Spain), GB. 283/8, P561 (Mar. 2002).

<sup>67</sup> In 2000, the percentage of U.S. workers belonging to unions dropped from 13.5% to 13.3%, with only 9% in the private sector. David Bacon (5/3/01), "Labor Fights for Immigrants," *The Nation*.

<sup>68</sup> AFL-CIO Executive Council Resolution on Immigrant Workers, dated February 16, 2000.

<sup>69</sup> Correspondence to Juan Somavia, ILO Director General, from the Comision de Poblacion, Fronteras y Asuntos Migratorios of the Mexican Congress, dated April 16, 2002. Also see Correspondence to Juan Somavia, ILO Director General from the Mexican Confederation of Workers, dated April 10, 2002.

Committee on Freedom of Association released a report in October 2002 finding reason for concern. It distinguished *Hoffman* from Case #2121 in that the U.S. government had not issued a blanket prohibition against union participation for undocumented workers, as Spain had. Also, “the committee wishes to make clear that its task is not to judge the validity of the Court in *Hoffman*, which is based upon complex internal legal issues and precedents, but rather to examine whether the outcome of this decision is such as to deny workers’ fundamental right to freedom of association.”<sup>70</sup> The committee found this to be the case, observing that *Hoffman* effectively invalidates backpay awards for all irregular workers, whether or not the employer know of their status upon hiring, which renders the Court’s criminal fraud argument irrelevant. This implies full impunity for unscrupulous employers, who may violate IRCA with full confidence that they can evade both immigration and labor sanctions, simply by firing workers if detected by the INS or challenged by a union. The following month, the First Supplementary Report of the Director-General contained a similar, if more vague response to Mexico’s request for opinion, citing Article 9 of Convention 143:

Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant workers shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularized, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.<sup>71</sup>

In their advisory opinion request to the Inter-American Court, the Mexican Government plainly sought a precedential interpretation which would address the ambiguity surrounding nationality-based discrimination in human rights law. Mexico’s interest in promoting regularization and the rights of the undocumented arises from the fact that virtually all Mexican emigrants live and work in the United States, and send home remittances estimated at about 10 million dollars a year, constituting the country’s third largest source of income, after petroleum and tourism.<sup>72</sup> Its letter poses these questions directly: Can an American State establish in labor law distinct treatment between legal and undocumented immigrants? Can fundamental human rights be predicated on legal status? Would such a distinction be discriminatory? Can an American State allow immigration control to supercede human rights obligations? How should states consider the anti-discrimination and due process principles codified within

---

<sup>70</sup> ILO Committee on Freedom of Association Report to the Governing Body, U.S. (Case No. 2227) The American Federation of Labour and Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM), dated October 18, 2002.

<sup>71</sup> ILO Convention 143, *Op. Cit.*, Article 9.

<sup>72</sup> See footnote #1 for a range of estimates re: number of undocumented migrants in the U.S. According to a study sponsored by the governments of Mexico and the U.S., the U.S. Mexican-born population in 1996 was 7-7.3 million, of whom 4.9 million were legal residents and the rest were undocumented. Of the legal residents, barely 500,000 were naturalized as citizens. In total, Mexican residents in the U.S. represent 98.5% of the country’s diaspora. See Migration between Mexico and the United States: Binational Study (Mexico City, 1997) and International Monetary Fund, *Balance of Payments Yearbook 2002*; and World Bank, *World Development Indicators 2002*.

international law? Because these issues have been bandied about at the theoretical level for years, and because the applicability of decisions are often limited by “case by case” particularities, “the Government of Mexico considers that this submission does not ask the Court to make a theoretical pronouncement, but to consider concrete situations where it is called on to examine the acts of the organs of any American State, to the extent that such acts may result in the violation of any of the rights protected in the treaties and instruments invoked in this request.”<sup>73</sup> In September of 2003, the IAC complied by ruling that nationality is irrelevant to those rights which emanate from the contractual relationship between the worker and the employer. Their decision supported the normative trend distinguishing the resident, employed and participating migrant from the aspiring entrant, and acknowledged the link between irregular work and exploitation:

If undocumented workers are contracted to work, they immediately are entitled to the same rights as all workers. This is of maximum importance, since one of the major problems that comes from lack of immigration status is that workers without work permits are hired in unfavorable conditions, compared to other workers.<sup>74</sup>

These relatively straightforward affirmations of rights for undocumented workers are encouraging from an advocacy perspective, but are not likely to influence *Hoffman*'s outcome. Both bodies propose “bilateral cooperation” between the U.S. and Mexico, and ask to be kept informed of developments. However, no specific policy recommendations are made, and if *Breard v Greene* is any indication, they would probably not be taken very seriously by domestic decision-makers if they were. In their reply to the AFL-CIO complaint, the U.S. Government reminded the ILO that it had not ratified Conventions 87 or 98, that the Declaration is non-binding, and that limiting one minor remedy does not deny freedom of association anyway. It reiterated the Court's arguments that Joe Castro had obtained employment through “serious illegal conduct,” that the award was beyond the bounds of NLRB remedial discretion, and that the penalties actually levied were adequate to bring the employer into compliance. Finally, it predicted that the decision would not be applied broadly, and invoked the Constitution as a most adequate mechanism through which to ensure rights protection in the United States.<sup>75</sup>

There have been mixed reports regarding the impact of Hoffman on program administration and in the lower courts. Shortly after the ruling, the Department of Labor (DOL) released a fact sheet clarifying that Hoffman would not affect enforcement of the Fair Labor Standards Act (FLSA) or the Migrant and Seasonal Agricultural Workers Protection Act (MSAWPA).<sup>76</sup> The Equal Employment Opportunity Commission (EEOC)

---

<sup>73</sup> Request for Advisory Opinion Submitted by the Government of the United Mexican States to the Inter-American Court of Human Rights, Submitted 10 May, 2002.

<sup>74</sup> Inter-American Court of Human Rights Advisory Opinion on the Rights of Undocumented Workers (OC-18/3), dated September 17, 2003.

<sup>75</sup> ILO Committee on Freedom of Association Report, *Op. Cit.*

<sup>76</sup> U.S. Department of Labor, Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers - Effect of Hoffman Plastic Decision on Laws Enforced by the Wage and Hour Division (2002) In July of 2004, the U.S. Department of Labor and the Mexican Secretary for Foreign Affairs signed a Joint

issued a similar statement vis a vis Title VII of the Civil Rights Act, even as it rescinded its 1999 *Guidance on Available Remedies to Undocumented Workers* for review. A July 2002 memo from the NLRB General Counsel instructed its regional offices to ensure *Hoffman's* limitation to *work not performed*, and denied its relevance to other Board remedies. In a May 2004 article in the Illinois Bar Journal, Michael Fridkin of the Chicago Lawyers' Committee for Civil Rights Under Law surveyed post-termination backpay for work not performed, backpay for uncompensated labor, compensatory and punitive damages for personal injury, and other punitive damage claims under anti-discrimination laws before concluding that "if lower-court decisions are any indication, Hoffman Plastic will not end undocumented workers' right to monetary relief under anti-discrimination and federal wage laws."<sup>77</sup> On the other hand, the Mexican American Legal Defense and Educational Fund (MALDEF) and the National Employment Law Project (NELP) published a report in 2003 providing *post-Hoffman* case examples of extra-judicial threats to suppress organizing and evidence to show that employers are hiring undocumented workers and using fear of deportation as a threat to "stimulate production."<sup>78</sup> Most of these cases, of course, never come before a court or administrative agency for redress.

## Conclusion

In fact, many aspects of U.S. immigration policy run afoul of international standards, strictly speaking. For example, undocumented and H-2B skilled workers have no right to legal assistance, and H-2A migrant workers are excluded from the Migrant and Seasonal Agricultural Workers Protection Act (MSAWPA), as well as collective bargaining under the NLRA.<sup>79</sup> Undocumented eligibility for workers' compensation, vocational rehabilitation and healthcare benefits also varies, because they are state administered programs. *Hoffman's* elimination of NLRA backpay for work which would have been performed is in this sense only the latest in a series of rights restrictions for migrants. Senator Kennedy called the ruling "a dramatic setback to America's workers," and announced that he would seek legislation to change it.<sup>80</sup> Shortly afterwards, a report by the U.S. General Accounting Office found that "since backpay is one of the major

---

Declaration to improve compliance with and awareness of safety, wage and hour protections, which are guaranteed under the FLSA, regardless of immigration status.

<sup>77</sup> Fridkin, Michael K., "Undocumented Workers' Remedies for Employment-Law Violations in Illinois," in Illinois Bar Journal, Vol. 92, May 2004

<sup>78</sup> Mexican American Legal Defense and Educational Fund (MALDEF) and National Employment Law Project (NELP) (2003), "Used and Abused: The Treatment of Undocumented Victims of Labor Law Violations Since Hoffman Plastic Compounds v NLRB

<sup>79</sup> Migrant and Seasonal Agricultural Workers Protection Act (MSAWPA), 29 USCA 1802-18 (1999) and the Legal Services Corporation Act (LSCA) Pub.L.93-355, 88 Stat. 378 (codified as amended at 42 U.S.C.A. 2996 (1995) Without MSAWPA protection, H-2A workers are not entitled to disclosures during recruitment, are recruited by labor contractors who need not be registered and monitored by the DOL or conform with transportation safety standards. If H-2A workers are injured en route to the fields, they are not entitled to full monetary remedies and cannot sue in court. They are tied to one employer and do not qualify for union-busting relief. See *Amici Op. Cit.*)

<sup>80</sup> Charles Lane (5/28/02), "Court Denies Back Pay to Fired Illegal Immigrants," Washington Post.

remedies available to workers for a violation of their rights, the Court's decision effectively diminishes the bargaining rights of such workers under the NLRA."<sup>81</sup> Yet corrective legislative or executive action has yet to be taken, with the exception of a very general proposal put forth by the Bush Administration in February 2004, which would provide temporary legalization opportunities for immigrants already in the country. The response was tepid from all sides because it looked too much like an amnesty, but would not provide a guaranteed path to permanent residency.

The lack of political will to follow through with reforms of any kind is hardly surprising considering the sensitivity and complexity of the issues involved, and the simple fact that the system as currently contrived meets the needs of the state quite well. Texas Congressman Phil Gramm, a legendary nativist throughout his career, spoke the truth when he told reporters that, "[I]t is delusional not to recognize that illegal aliens already hold millions of jobs in the United States with the implicit permission of governments at every level, as well as companies and communities."<sup>82</sup> Some would say that the U.S. representative at the 2004 International Labour Conference misrepresented himself in his statement that "while unauthorized migration was an important concern in his country, all of the labour laws applied to all workers equally."<sup>83</sup> This was the position taken by the U.S. in its rebuttal to the AFL-CIO complaint (see above), in its follow-up report under the 1998 ILO Declaration, and in response to a complaint alleging similar freedom of association encroachment in 1992.<sup>84</sup> Yet, as discussed above, these contradictions in rhetoric and entitlement have long characterized the U.S. Government's approach to resident undocumented workers.

Many theorists consider these policy inconsistencies to reflect increasingly fragmented dynamics of governance brought about by globalization. Yasemin Soysal and David Jacobson predict the eclipse of national citizenship in favor of international claims of individual rights within a political field dominated by non-state actors.<sup>85</sup> Aleinikoff, on the other hand, supports a model of trans-governmentalism, through which states disaggregate functionally and network internationally, but continue to govern within the nation-state context. He believes that the "thicker cross-national relations" of this arrangement may lead to broader terms of inclusion within national confines without challenging its basis of legitimacy.<sup>86</sup> Saskia Sassen calls attention to new forms of

---

<sup>81</sup> General Accounting Office, GAO-02-835 (Sept. 2002), "Collective Bargaining Rights: Information on the Number of Workers With and Without Bargaining Rights." This report found that *Hoffman* diminishes the rights of 5.5 million undocumented workers in the United States.

<sup>82</sup> Bacon, *Op. Cit.*

<sup>83</sup> International Labour Organization, International Labour Conference Provisional Record 22, 92<sup>nd</sup> Session, Geneva, June 2004, p. 5.

<sup>84</sup> In the 1992 response, the U.S. Government reported that "the NLRB has broad remedial authority to take such action as is necessary to effectuate the policies of the NLRA." See Complaint by the United Food and Commercial Workers International Union (UFCW), the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the International Federation of Commercial, Clerical, Professional and Technical Employees (FIET) against the Government of the United States, Report #284, Case #1523, P159 (1992)

<sup>85</sup> See Soysal and Jacobson, *Op. Cit.*

<sup>86</sup> See Aleinikoff, *Op. Cit.* p. 9, and Anne-Marie Slaughter, "The Real New World Order," in

citizenship grounded in political “presence,” emanating from the concrete interactions of daily life, won through skirmishes for space and recognition at the local level and rendering national categories unimportant.<sup>87</sup> Though it is certainly true that immigrants are commanding more visibility and consideration in the public arena than ever before, fears of deportation, poor work conditions and inadequate pay will forever compromise the robust participation of the undocumented and their family members within the political community without better rights protection. According to Patrick Taran, a Senior Migration Specialist with the ILO:

Much more than sparse campaigns are needed to defend and advance migrants rights and dignity in the context of today’s globalizing world, with its polarized accumulation of wealth and power and increasing exclusions. To build any kind of coherent movement, common approaches, strategies, coordination, and the ability to mobilize human resources are needed. All this is required to generate alternative solutions, influence the course of events, contribute to the elaboration of national policies, and so on. And it ain’t gonna happen spontaneously.<sup>88</sup>

Such a coordinated effort is frustrated by the fragmented, even factional nature of intergovernmental and nongovernmental operations, and their close links to the wealthier funding states, as discussed above.<sup>89</sup> Taran works towards the elaboration of legal mechanisms of governance at the regional and international levels to regulate the economic and social forces of globalization. This indeed appears to be happening within the European Union, and several African regional trade blocs have begun to, modestly, address labor mobility. However, in Asia and North America, trade agreements have fastidiously avoided the issue, and most countries have yet to take meaningful steps to address the social consequences of *ad hoc* immigration policies.

In sync with Walzer’s conception of the national community, some see restrictive immigration policy as key to socioeconomic, political and cultural survival. Others worry that restrictions stifle economic growth and development, counter democratic ideals, and undermine privacy through internal exclusions and identity checks. A recent analysis of International Social Survey data showed increasingly positive attitudes towards immigrants among younger and more educated participants, especially those in predominantly “exclusivist” and “assimilationist” receiving states, like Japan and

---

*Foreign Affairs*, Sept.-Oct. 1997.

<sup>87</sup> See Sassen, *Op. Cit.*

<sup>88</sup> Patrick A. Taran (2004), “Globalization/Migration: Imperatives for Civil Society and International Organizations,” in *Irrregular Migration and Human Rights: Theoretical, European and International Perspectives*, Barbara Bogusz, Ryszard Cholewinski et al, Leiden/Boston: Martinus Nijhoff Publishers, p. 288.

<sup>89</sup> In “Role of Citizenship in Contemporary Society – Issues Facing Non-Citizens,” a presentation to the Open Society Justice Initiative Expert Meeting on “Clarifying and Expanding the Rights of Non-Nationals,” New York, 9-10 November 2003, David Weissbrodt observed that “Intergovernmental and nongovernmental organizations focus narrowly on distinct groups without perceiving the need for global responses that might broadly benefit non-citizens. Although international human rights law offers some protection for the rights of non-citizens, much needs to be done to define more broadly the relevant rights and to implement those rights in practice.”

Western Europe. Yet the study also detected more assimilationist responses than predicted among the same demographics in the traditionally “multi-culturalist” states of the U.S. and Canada.<sup>90</sup> These mixed results may reflect the fact that discrimination is generally linked to the poverty of the migrant pool and their position in the national labour market. ILO research on discrimination against migrants has shown rates of up to 41% in a testing situation, involving paired applicants for low-wage jobs.<sup>91</sup> These attitudes of exclusion are targeted towards those migrants who are least likely to possess the educational, linguistic and skill advantages which aid in the adaptation and “integration” process.

French political scientist Didier Bigo has written that freedom of mobility is a significant class factor within the transnational “governmentality” of globalization, differentiating “the new rich and the others, all those people who are prisoners of the local and cannot benefit from the time space compression of the world.”<sup>92</sup> Given the choice, most immigrants might well stay in their home communities, enjoying the continuity of generational relationships, practices and institutions. However, the destabilizing effects of globalization are not likely to dissipate anytime in the near future, as unequal terms of trade and the informalization of the labor market disenfranchise and displace subsistence farmers and the urban working classes in developing regions. In a 2001 report on the national security implications of global migration, the U.S. National Foreign Intelligence Board predicted that “illegal migration – facilitated increasingly by alien-smuggling syndicates and corrupt government officials – will grow dramatically, matching or exceeding other forms of migration into many countries in Europe and in the more developed countries of Asia, Africa and Latin America.”<sup>93</sup> Even as this phenomenon is widely recognized as the spontaneous response to a structural need, the logic of deterrence, control and punishment is successfully deployed as a viable means of “migration management.” Though prevalent strategies such as entry controls, employer sanctions and periodic regularizations consistently fail in practice, and may even inhibit the natural circular migration most conducive to development, the gap between stated policy goals and tacit toleration allows for the effective maintenance of an economic “shock absorber”: compliant, highly productive, easily removable workers deprived of all political bargaining power.<sup>94</sup>

---

<sup>90</sup> See Aizlewood, *Op. Cit.* The Study compared public attitudes towards immigration and citizenship in five liberal democracies: Germany, Great Britain, the United States, Japan and Canada.

<sup>91</sup> See F. Bovenkerk (1992), “Testing Discrimination in Natural Experiments: A Manual for International Comparative Research on Discrimination on the Grounds of ‘Race’ and ‘Ethnic Origin,’” (Geneva: ILO); M. Bendick (1996), “Discrimination Against Racial/Ethnic Minorities in Access to Employment in the United States: Empirical Findings from Situation Testing,” International Migration Paper #12 (Geneva, ILO); R. Zegers de Beijl (2000), “Documenting Discrimination Against Migrant Workers in the Labour Market: A Comparative Analysis of Four European Countries,” (Geneva: ILO); and E. Allasino et. Al. (2004), “Labor Market Discrimination Against Migrant Workers in Italy,” International Migration Paper #67 (Geneva: ILO)

<sup>92</sup> Didier Bigo, *Op. Cit.*, p. 62.

<sup>93</sup> National Foreign Intelligence Board (2001), “Growing Global Migration and its Implications for the U.S.,” Director of Central Intelligence, NIE 2001-02D, p. 3.

<sup>94</sup> See Boswell and Straubhaar, *Op. Cit.*, and Peter Stalker (2001) *The No-Nonsense Guide to International Migration*, Oxford: New Internationalist Publications, Ch. 6.

Receiving countries have consistently held that, thanks to their sovereign power to discriminate against non-nationals under international law, they need not demonstrate a link between the cause and effect of their approach to international migration, the “objective and reasonably relevant” condition notwithstanding. Without an international human rights regime capable of enforcing its standards or willing to consistently address normative applications to undocumented workers, the state-sanctioned violation of their “inalienable rights” is likely to continue. Marx showed us how membership principles become critical in an environment in which the control, access and distribution of resources and power are contested. The legal marginalization of undocumented workers through decisions like *Hoffman* has proven to be an effective way of preserving a civic boundary configuration which maximizes both flexibility and control for the post-industrialized state and its employers, without risking compromise of its political and ideological foundations. The criminalization of illegal entry and unauthorized residency is a convenient strategy for legitimizing this arrangement, and serves the added “benefit” of feeding the discriminatory undercurrents which, as Hannah Arendt has argued, flow through the bedrock of all liberal democracies. This self-replicating cycle of social exclusion buttresses an emerging international “apparatus of governmentality,” structured and managed to generate maximum profits at minimum cost, perpetuating the skewed distribution of opportunity and wealth which has become an enduring feature of the modern world.

## BIBLIOGRAPHY

### Primary Source Documents

- American Declaration of the Rights and Duties of Man (ADHR), OAS RES. XXX, International Conference of American states, 9<sup>th</sup> Conference, OAS Doc. OEA/SER. L/V/I/ 4 Rev. XX (1948)
- American Federation of Labor and Congress of Industrial Organizations, Complaint to the ILO Committee on Freedom of Association against the Government of the U.S. for Violation of Fundamental Rights of Freedom of Association and Protection of the Right to Organize and Bargain Collectively Concerning Migrant Workers in the United States (November 8, 2002)
- APRA Fuel Buyers Group, 320 NLRB 408, 415 (1995)
- AFL-CIO Executive Council Resolution on Immigrant Workers, dated February 16, 2000.
- Breard v Greene*, 528 U.S. 371 (1998)
- California Proposition 187 (West 1994) (approved by electors Nov. 1994)
- Charter of the Organization of American States (April 30, 1948)
- Civil Rights Act, Title VII, as amended (1964)
- Correspondence to Juan Somavia, ILO Director General, from the Comision de Poblacion, Fronteras y Asuntos Migratorios of the Mexican Congress, dated April 16, 2002.
- Correspondence to Juan Somavia, ILO Director General from the Mexican Confederation of Workers, dated April 10, 2002.
- Correspondence to Juan Somavia, ILO Director General from Ruud Lubbers, UN High Commissioner for Refugees, dated January 16, 2003
- Hoffman Plastic Compounds v. National Labor Relations Board (NLRB) 535 U.S. (2002)
- ILO Committee on Freedom of Association Report to the Governing Body, U.S. (Case No. 2227) The American Federation of Labour and Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM), dated October 18, 2002.
- ILO Convention C87 Concerning Freedom of Association and Protection of the Right to Organise, July 9, 1948 (entered into force July 4, 1950)

ILO Convention C98 Concerning Right to Organise and Collective Bargaining, 96 U.N.T.S. 257 (entered into force July 18, 1951)

ILO Convention C111 Concerning Discrimination (Employment and Occupation), June 15, 1958, 362 U.N.T.S. 31, (entered into force June 15, 1960)

ILO Declaration on Fundamental Principles and Rights at Work, art. 2, June 18, 1998, 37 I.L.M. 1233 (1988)

ILO Convention C143 Concerning Migrant Workers (June 24, 1975)

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996)

Immigration and Nationality Act, 8 U.S.C.A.

Immigration Reform and Control Act of 1986

Inter-American Court of Human Rights Advisory Opinion on the Rights of Undocumented Workers (OC-18/3), dated September 17, 2003.

International Convention on the Elimination of All Forms of Racial Discrimination, March 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969)

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990).

International Covenant on Economic, Social and Cultural rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976)

International Labour Organization (ILO), *The Asylum-Migration Nexus: Refugee Protection and Migration – Perspectives from ILO*, Paper for the 2<sup>nd</sup> Meeting of the Global Consultations on International Protection, (31 May 2001)

International Labour Organization (ILO), International Organization for Migration (IOM), Office of the United Nations High Commissioner for Human rights (OHCHR), in consultation with Office of the United Nations High Commissioner for Refugees (UNHCR), Report on *International Migration, Racism, Discrimination and Xenophobia*, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (August 2001)

Joint Statement of the Executive Heads of the International Labour Office (ILO), International Organization for Migration (IOM), Office of the High Commissioner for Human Rights (OHCHR) and United Nations Educational,

- Scientific and Cultural Organization (UNESCO) on the Occasion of the Entry into Force of the International Convention on Protection of Migrants Rights (1 July 2003)
- Local 512, Warehouse and Office Workers' Union v NLRB (Felbro) 795 F. 2d 705 (9<sup>th</sup> Cir. 1986).
- Montero v INS, 124 F, 3d 381, 382 (2d Cir, 1997).
- National Foreign Intelligence Board, "Growing Global Migration and Its Implications for the United States," (NIE 2001-02D), March 2001.
- Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996), amended by Pub. L. No. 104-302, 110 Stat. 3656 (1996).
- Request for Advisory Opinion Submitted by the Government of the United Mexican States to the Inter-American Court of Human Rights, Submitted 10 May, 2002.
- Sure-Tan, Inc. v NLRB 467 U.S. (1984)
- Universal Declaration of Human Rights, G.A. res. 217 (AIII), U.N. GAOR, 3<sup>rd</sup> Session, U.N. Doc A/810 (1948)
- U.S. Equal Employment Opportunity Commission, *Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws* (June 27, 2002)
- U.S. Department of Labor, *Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers - Effect of Hoffman Plastic Decision on Laws Enforced by the Wage and Hour Division* (2002)
- U.S. Department of Labor, News Release: *U.S. Labor Secretary Elaine L. Chao and Mexican Foreign Secretary Luis Ernesto Derbez Sign Joint Declaration to Improve Working Conditions for Mexican Workers* (21 July 2004)
- United Nations General Assembly, 58<sup>th</sup> Session, Briefing by the ILO for UN General Assembly delegates, UN Officials and Others on the 2004 International Labour Conference General Discussion on Migrant Workers, New York (11 November 2003)
- United Nations General Assembly, 58<sup>th</sup> Session, *Report of the Secretary-General on International Migration and Development*, U.N. Doc. A/58/98 (2003)
- United Nations High Commissioner on Refugees (UNHCR) and International Organization of Migration (IOM), *Refugee Protection and Migration Control: Perspectives from UNHCR and IOM*, Paper for the 2<sup>nd</sup> Meeting of the Global

Consultations on International Protection, U.N. Doc. EC/GC/01/11 (31 May 2001)

United Nations Population Division, Department of Economic and Social Affairs, International Migration Report, (2002)

## Secondary Sources

Aleinikoff, T. Alexander, "Between National and Post-National: Membership in the United States," *University of Michigan Law School Journal of Race and Law*, 4 Mich. J. Race & L. 241, (Spring 1999)

Aleinikoff, Alexander and Douglas Klusmeyer, eds., *Citizenship Today: Global Perspectives and Practices*, Washington D.C.: Carnegie Endowment for International Peace (2001)

Bigo, Didier, "Criminalization of 'Migrants: The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion,'" in *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Barbara Bogusz, Ryszard Cholewinski et al., Leiden/Boston: Martinus Nijhoff Publishers (2004)

Bohning, Roger, "The ILO and new UN Convention on Migrant Workers: the Past and Future," *International Migration Review*, Vol 25, No. 698 (1991)

Bosniak, Linda, "Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers' Convention," in *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Barbara Bogusz, Ryszard Cholewinski et al, Leiden/Boston: Martinus Nijhoff Publishers (2004)

Bosniak, Linda, "Universal Citizenship and the Problem of Alienage," *Northwestern University Law Review*, 94 Nw. U.L. Rev. 963, (Spring 2000)

Boswell, Christina and Thomas Straubaar, 2004. "The Illegal Employment of Foreigners in Europe," in *Intereconomics*. January/February.

Brettel, Caroline and J. Hollifield, eds. 2000. *Migration Theory*. New York: Routledge.

Cholewinski, Ryszard, 1997, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, Oxford: Clarendon Press.

Cleveland, Sarah, Beth Lyon and Rebecca Smith, "Inter-American Court of Human Rights Amicus Curiae Brief: the United States Violates International Law When

- Labor Law Remedies Are Restricted Based on Workers' Migrant Status," *Seattle Journal for Social Justice*, 1 Seattle J. Soc. Just. 795 (Spring/Summer 2003)
- Fridkin, Michael K., "Undocumented Workers' Remedies for Employment-Law Violations in Illinois," in *Illinois Bar Journal*, Vol. 92, May 2004
- Hasenau, M., "Setting Norms in the United Nations System: The Draft Convention on the Protection of the Rights Of All Migrant Workers and their Families," *International Migration Review*, Vol. 28, No. 133 (1990)
- Heath, Kenneth D., "The Symmetries of Citizenship: Welfare, Expatriate Taxation and Stakeholding," *Georgetown Immigration Law Journal*, 13 Geo. Immigr. L.J. 533, (Summer 1999)
- Hirschman, Charles, Philip Kasinitz and Josh DeWind, eds. 1999. *The Handbook of International Migration: The American Experience*. New York: Russell Sage.
- Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards* (2002)
- Johnson, Kevin R., *The "Huddled Masses" Myth*. 2004. Phila: Temple University Press.
- Kostakopoulou, Dora, "Irregular Migration and Migration Theory: Making State Authorization Less Relevant," in *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Barbara Bogusz, Ryszard Cholewinski et al, Leiden/Boston: Martinus Nijhoff Publishers (2004)
- Loescher, Gil, *Beyond Charity, International Cooperation and the Global Refugee Crisis*, New York: Oxford University Press (year?)
- Mexican American Legal Defense and Educational Fund (MALDEF) and National Employment Law Project (NELP), "Used and Abused: The Treatment of Undocumented Victims of Labor Law Violations Since Hoffman Plastic Compounds v NLRB, (date?)
- Motomura, Hiroshi, "Federalism, International Human rights, and Immigration Exceptionalism," *University of Colorado Law Review*, 70 U. Colo. L. Rev. 1361, (Fall 1999)
- Nessel, Lori A., "Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform," *Harvard Civil Rights-Civil Liberties Law Review*, 36 Harv. C.R.-C.L. Rev. 345 (Summer 2001)
- Peterson, Jonathan. 8/6/2001. *INS Penalty System Falls Down on Job*, L.A. Times,

- Pizarro, Gabriela Rodriguez, United Nations Special Rapporteur on the Human Rights of Migrants (2001), "Position Paper on the Nexus Between Asylum and Migration," United Nations High Commissioner for Human Rights (Geneva).
- Ruhs, Martin and Ha-Joon Chang, "The Ethics of Labour Immigration Policy," in *International Organization* 58 (Winter 2004).
- Sassen, Saskia, 1999. *Guests and Aliens*, New York: The New Press.
- Sassen, Saskia, "The Repositioning of Citizenship: Emergent Subjects and Spaces for Politics," in *Berkeley Journal of Sociology* (March 7, 2002).
- Stalker, Peter. 2001. *The No-Nonsense Guide to International Migration*, Oxford: New Internationalist Publications.
- Stalker, Peter. 2000. *Workers Without Frontiers*. Geneva: International Labour Organization.
- Taran, Patrick A., "Globalization/Migration: Imperatives for Civil Society and International Organizations," in *Irrregular Migration and Human Rights: Theoretical, European and International Perspectives*, Barbara Bogusz, Ryszard Cholewinski et al, Leiden/Boston: Martinus Nijhoff Publishers (2004)