

# TEXAS INTERNATIONAL LAW JOURNAL



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## Working Borders: Linking Debates About Insourcing and Outsourcing of Capital and Labor

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Proceedings of the Inaugural Conference  
of the Bernard and Audre Rapoport  
Center for Human Rights and Justice

February 10-11, 2005

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

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# TEXAS INTERNATIONAL LAW JOURNAL

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The members of the *Texas International Law Journal* would like to thank you for your interest in our journal. In the rapidly expanding field of international law, it is important to stay abreast of recent developments and to have access to cutting-edge legal analysis. We seek to fulfill these needs by concentrating on groundbreaking articles that will be useful to both practitioners and scholars. We hope you enjoy this latest issue.

The *Journal* is one of the oldest and most-established student-published international law journals in the United States. In the wake of the Bay of Pigs disaster and the Cuban Missile Crisis, our publication began as an offshoot of the Texas International Law Society.<sup>1</sup> In January 1965, under the guidance of Professor E. Ernest Goldstein, we planted the Texas flag in the international arena with our first issue entitled *The Journal of the University of Texas International Law Society*. Publications thereafter were biannual, taking the name *Texas International Law Forum* until Vol. 7, No. 1, Summer 1971, when the *Journal* adopted its present title and became a triannual publication. The *Journal* now publishes quarterly. Of the more than one hundred student-published international law journals across the country, only three schools have an older international heritage: Harvard, Columbia, and Virginia.

Over the years, the *Journal* staff has made the most of our established position. We have developed an excellent reputation by forging close ties with numerous scholars and authors worldwide. As a result, we receive over 600 unsolicited manuscripts each year and are extremely selective in our publication choices. This heritage has helped us develop one of the largest student-published subscription circulations of any international law journal in America. Subscribers to the *Journal* number well over 500. They include law schools, government entities, law firms, corporations, embassies, international organizations, and individuals from virtually every state in the Union and more than forty-five countries.

With over twenty board members and ninety staff members, we maintain a refined and well-organized editing process. As nations forge closer ties in the new millennium, we are confident that the *Journal* will continue to provide a significant contribution to the burgeoning field of international law.

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1. See E. Ernest Goldstein, *Thank You Fidel! Or How the International Law Society and the Texas International Law Journal Were Born*, 30 TEX. INT'L L.J. 223 (1995).

International War Crimes Tribunal for the former Yugoslavia and Rwanda; and **The Honorable Dalia Dorner**, associate justice of the Supreme Court of Israel.

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# Working Borders: Linking Debates About Insourcing and Outsourcing of Capital and Labor

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## I. FOREWORD: KAREN ENGLE

**Karen Engle\***

On February 10 and 11, 2005, the Bernard and Audre Rapoport Center for Human Rights and Justice held its inaugural conference, "Working Borders: Linking Debates About Insourcing and Outsourcing of Capital and Labor." The event brought together lawyers, economists, historians, and policy makers from the University of Texas and from around the country to examine critically contemporary proposals about immigration and outsourcing and to begin to analyze the ways in which each implicates how we understand work and citizenship. Participants also probed how different proposed policies might affect the extent to which workers are enfranchised in a global economy. The conference was the first of its kind to relate the growing public debates over "outsourcing"—the movement of "American" jobs and capital overseas—to "insourcing"—the migration of workers into the United States.

The conference consisted of a keynote address, three roundtable discussions, and two living newspaper theatrical performances to dramatize the issues. Over 100 people attended the conference. The audience was comprised of the media, government, community groups, activists, concerned citizens, students, and faculty. The conference was videotaped, and we are pleased that the *Texas International Law Journal* has agreed to publish the proceedings.

As the Rapoport Center's inaugural event, the conference was intricately tied to the Center's mission. Bernard Rapoport has always stood at the intersection of activism and intellectual discourse. In his book, *Being Rapoport: Capitalist with a Conscience*, Bernard Rapoport writes: "During my childhood, my father taught me Marxism and hard work. My mother taught me Judaism and compassion for humanity. Both of my parents taught me to love learning. To know these simple facts is to know much about who I am and why I have led my life the way I have."<sup>1</sup> The Bernard and Audre Center for Human Rights and Justice aims to stand in that same intersection, which is an intersection that combines learning and compassion.

The Center's mission is to build a multidisciplinary community engaged in the study and practice of human rights that promotes the economic and political enfranchisement of marginalized individuals and groups both locally and globally. That's a tall order, but key here are multidisciplinary and the pairings of economic *and* political as well as locally *and* globally. I will say something about each of these, in reverse order, and will connect them to the conference theme.

*Locally and Globally:* Most human rights centers around the country send students abroad to go work on human rights and make the world a better place. They think about human rights violations as incidents that happen elsewhere and about international law as the applicable law *outside* the United States. In contrast, public interest law centers in the United States tend to focus on issues of civil rights or economic rights within the country.

The Rapoport Center aims to break down the dichotomy between outside and inside. Whether our work is in the United States (such as with the Transnational Worker Rights Clinic or the Immigration Clinic) or abroad (working on indigenous land rights claims in Latin America), we do the work always with an eye toward the extent to which neither national nor international solutions are sufficient to address the issues that we are tackling. In this sense, we hope to "denationalize" human rights.

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\* W.H. Francis, Jr. Professor in Law, The University of Texas School of Law; Director, Bernard and Audre Rapoport Center for Human Rights and Justice.

1. BERNARD RAPOPORT & DON E. CARLETON, *BEING RAPOPORT: CAPITALIST WITH A CONSCIENCE* 1 (2002).

The Working Borders conference embodied that approach. Immigration and outsourcing are generally not thought about together. One would seem to be about the flow of capital and the other about the flow of labor. One would seem to be about increasing jobs in the United States, the other about lost jobs—*from* the United States. Regardless, both are commonly thought of as U.S. issues. The popular American discourse about labor and immigration tends to focus very little on the economics and politics of the places people are fleeing or the places where the jobs are going. The proposals discussed in the conference roundtables were legislative proposals within the United States to address these issues. But the roundtables highlighted the extent to which the issues could not be addressed within such a solipsistic lens. Bernard Rapoport wrote me a note during Maria Echaveste's keynote address to the effect of "if we would help Mexico's economy, we would have fewer immigration problems." That type of thinking is an example of the type of thinking that we hoped to pursue with the juxtaposition of immigration and outsourcing.

*Political and Economic Enfranchisement:* The Rapoport Center also differs from many other human rights centers in our refusal to separate civil and political from economic and social rights. Although the Center supports work on protecting individuals from traditionally recognized human rights abuses by state actors, we also expand the focus to study the underlying structures that continue to permit, perhaps even require, global inequality. In attending to economic issues, we hope better to understand the extent to which the political and civil and economic and social are mutually constitutive. The Working Borders conference's attempt to comprehend the complex relationship between the regulation of the flows of capital and workers is one slice of that project.

*Multidisciplinarity:* The Rapoport Center is based in the School of Law, but we invite and encourage participation from across disciplines. At an institutional level, we work with other departments and other multidisciplinary institutes at the University. Our events have attracted and included faculty and students from anthropology, sociology, history, literature, public policy, government, and economics. The wide range of speakers and disciplinary focuses of the speakers at the Working Borders conference exemplified and embodied our multidisciplinary commitment.

Multidisciplinarity, though, is about more than improving comprehension of a situation. It is also about communication—about communicating to different audiences and about doing it in a variety of ways. In this sense, one of the most exciting parts of the conference to me was its inclusion of theater. The University of Texas Department of Theater and Dance offers a graduate concentration in "Performance as Public Practice." As a part of the conference, graduate students from that program scripted two short pieces to set the stage for each of the roundtables. Graduate and undergraduate students performed the pieces at the start of each of the sessions. These proceedings include the scripts from the performances.

Many people put time and energy into ensuring the creation of the Center and the successful inaugural conference. The proposal for the Center was put together by a group of faculty at the University of Texas, from the law school and from the anthropology department—myself, Sarah Cleveland, Willy Forbath, Charlie Hale, Barbara Hines, Steve Ratner, Shannon Speed, and Gerald Torres. Dean Bill Powers first presented the proposal to the Rapoport Foundation and has generously provided significant time and institutional resources to the Center and its projects. Of course, the Rapoport Foundation worked with us in styling the grant. In addition to Bernard Rapoport, Rick Battistoni, a member of the Foundation Board, and Maggie McCarthy, executive director of the Foundation, provided invaluable assistance. Jeremy Freeman, a law student who interned for the Center last



summer, played a huge role in formulating Center programs and activities and in linking the conference to the Center's mission.

The Center's three Human Rights Scholars, Jeremy Freeman, Paola Marusich-Blancarte, and Ashley Morris, worked countless hours on both the logistical and substantive components of the conference. They helped pull together materials, researched and suggested potential participants, and—with the help of other law student “angels”—made sure that all the participants were in all the right places at the right times. Katrin Flechsig, the Center administrator, secured arrangements for all the speakers, assisted with publicity, and made sure that every last detail of the conference was attended to. Hollin Dickerson, editor in chief of the *Texas International Law Journal*, attended the conference, met with all the participants and has ensured its timely publication. Stacy Wolf, from the University of Texas Department of Theater and Dance engaged in numerous conversations with me to imagine the role that theater could play in the conference and then moved it toward reality by encouraging her graduate students to participate. Shannon Baley, Claire Canavan, Kevin Hodges, and Megan Sullivan made it reality by producing and directing the performances included in the conference. Nicolas Shumway provided financial assistance from the Theresa Lozano Long Institute for Latin American Studies at the University of Texas, which served as a cosponsor of the conference.

Of course, ultimately the speakers and roundtable participants ensured the success of the conference, not only through their participation at the conference but through much work behind the scenes as well. Barbara Hines, for the insourcing roundtable, and Dan Danielsen, for the outsourcing roundtable, put together extensive readings for the participants to consider and react to both before and at the conference. Both roundtables engaged in conference calls before the actual event to plan the direction of the conversations.

Below is the description of the conference that we sent to participants and invitees, which resulted from numerous conversations among those involved with the Center, as well as with Dan Danielsen, Betty Sue Flowers, David Kennedy, Lyndon Olson, and Chantal Thomas. Jeremy Freeman wrote the initial draft. In addition, the Rapoport Foundation Board offered useful guidance and support on the final program.

## II. CONFERENCE DESCRIPTION

### **Working Borders: Linking Contemporary Debates over Insourcing and Outsourcing of Capital and Labor**

**February 10 & 11, 2005**

In January, declaring the U.S. immigration system “broken,” President Bush proposed repairing the system through a new temporary-worker program that would create “an immigration system that serves the American economy, and reflects the American Dream.”<sup>2</sup> Bush explained that, “if an American employer is offering a job that American citizens are not willing to take, we ought to welcome into our country a person who will fill that job.”<sup>3</sup> Although immigration reform had surprisingly broad support prior to September 11, 2001, the Bush proposals were opposed by some on both the Left and Right. Citing fears that the

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2. Press Release, Office of the Press Secretary, President Bush Proposes New Temporary Worker Program (Jan. 7, 2004) [hereinafter Bush Proposal], <http://www.whitehouse.gov/news/releases/2004/01/print/20040107-3.html> (last visited Apr. 12, 2005).

3. *Id.*

influx of temporary workers would undercut the U.S. labor market by taking away “American” jobs,<sup>4</sup> critics developed alternative immigration reform proposals.<sup>5</sup> The immigration reform debate became one of degree. How much should we restrict the free movement of labor, and how should we design programs to facilitate inward movement of needed foreign workers without threatening “American” jobs?

Meanwhile, concern was growing about jobs lost when capital moves abroad. At first, this concern was not bipartisan. A month after announcing its immigration reform proposal, Gregory Mankiw, the chairman of the White House Council of Economic Advisors, characterized the supposed movement of U.S. jobs abroad as a “good thing” and “just a new way of doing international trade.”<sup>6</sup> Democratic presidential contender John Kerry replied: “[The Bush Administration has] delivered a double blow to America’s workers, three million jobs destroyed on their watch, and now they want to export more of our jobs overseas.”<sup>7</sup> Soon that response was echoed on the other side of the aisle, when Dennis Hastert, speaker of the House of Representatives, argued that foreign workers posed a threat to local jobs, explaining that “outsourcing can be a problem for American workers and the American economy.”<sup>8</sup> Members of both parties and houses developed proposals designed to discourage U.S. businesses from outsourcing or “offshoring” U.S. jobs to other countries.<sup>9</sup> Just like the various proposals to regulate the influx of foreign workers, legislative plans to regulate the outflow of “American” jobs differ only by a matter of degree and still perceive the global movement of jobs as a zero-sum game.

This conference will explicitly link these two debates. What is the relationship between the movement of labor (insourcing) and the movement of capital (outsourcing)? What are the effects of various immigration reforms on outsourcing and vice versa? Could or should the movement of capital be targeted to reflect economic needs of the United States in the same way that some parts of immigration law are meant to accomplish national economic goals? Is it easier or more appropriate to restrict the movement of labor than the movement of capital? Why is the discouragement of capital flight seen to pose more of a threat to the “free market” than restrictions on labor mobility?

Outsourcing—like the globalization of production and investment more broadly—has changed our sense of what it means to “Buy American.” What does it mean, today, for a car to be American? That it was assembled in Detroit by American citizens? Designed by American designers? Produced by companies owned by American investors? Made with components manufactured in the United States? We might equally well wonder whether and in what way strawberries picked by migrant Mexican workers in California are “American.”

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4. See Press Release, AFL-CIO, Statement by AFL-CIO President John J. Sweeney on President Bush’s Principles for Immigration Reform (Jan. 8, 2004), <http://www.aflcio.com/mediacenter/prspmt/pr01082004.cfm> (last visited Apr. 12, 2005).

5. The American Friends Service Committee provides a summary of immigration reform proposals. Rosita Choy, Pending Immigration Legislation in Congress, at <http://www.afsc.org/immigrants-rights/policy/pending-legislation.htm> (last visited Apr. 12, 2005).

6. Jonathan Weisman, *Bush, Adviser Assailed for Stance on ‘Offshoring’ Jobs*, WASH. POST, Feb. 11, 2004, at A6, available at <http://www.washingtonpost.com/ac2/wp-dyn/A30194-2004Feb10?language=printer> (last visited Apr. 12, 2005).

7. *Id.*

8. Daniel W. Drezner, *The Outsourcing Bogeyman*, FOREIGN AFFAIRS, May/June 2004, <http://www.foreignaffairs.org/20040501faessay83304/daniel-w-drezner/the-outsourcing-bogeyman.html?mode=print> (last visited Apr. 12, 2005).

9. The National Foundation for American Policy tracks the legislative status of state and federal outsourcing proposals at <http://www.nfap.net/researchactivities/globalsourcing/appendix.aspx> (last visited Apr. 17, 2005).

Debates about immigration reform and outsourcing each implicate America's place in a global economy as well as the potential and appropriate reach for national and international regulatory responses to global flows of goods, capital, and labor. They also implicate ideas about America's identity and about its attitudes toward poverty at home and abroad.

This conference will bring together academics from a variety of disciplines to consider the underlying concerns that animate today's insourcing and outsourcing proposals and their implications for citizenship, race relations, and the global political economy. Can we broaden the range of policy alternatives in each debate by linking and comparing them?

We will also place these debates in historical context. To what extent and in what ways has the U.S. economy always relied upon decisions about comparative advantage that have manifested themselves in cross-border movement of labor and capital? Is outsourcing simply a perpetuation of free trade? Might some contemporary attempts to regulate outsourcing and insourcing represent the replay of xenophobic or nativistic worries, or has recent economic globalization raised altogether new difficulties and/or opportunities for policy makers? Does the global movement of labor or capital now operate in a new way?

The conference will approach these questions through a series of three plenary panels. The first panel will consider current legislative proposals for and debates around immigration reform while the second panel will consider "outsourcing" proposals and debates. Panelists will comment critically on specific legislative proposals through their own methodological lens so that each panel will provide historical, political, cultural, and economic analyses of the contemporary debates. The conference will culminate in a final roundtable conversation that asks participants from the insourcing and outsourcing panels to relate the two debates.

We plan to share the insights gained from the conference through publication of the proceedings.

### III. KEYNOTE ADDRESS: MARIA ECHAVESTE

#### **Welcome:**

Dean William Powers, Jr., *The University of Texas School of Law*

#### **Introduction of Keynote Speaker:**

Gerald Torres, *The University of Texas School of Law*

#### **Keynote Address:**

Maria Echaveste, *The University of California at Berkeley School of Law and Goldman School of Public Policy*

#### **William Powers, Jr.:**\*

Good afternoon everyone. I am Bill Powers, and I am the Dean of the Law School. It is my great pleasure to welcome you all here today for this event that will last this afternoon and through tomorrow—a wonderful conference, Working Borders: Linking Debates About Insourcing and Outsourcing of Capital and Labor.

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\* Dean, the University of Texas School of Law; John Jeffers Research Chair in Law, Hines H. Baker and Thelma Kelly Baker Chair, University Distinguished Teaching Professor.

I want to give a special welcome to all of our speakers, and especially to people that have come from out of town. For those of you who are coming from out of town, I welcome you to the University, to Texas, and to Austin. I hope you not only have a great conference, but enjoy our hospitality while you are here. And I'd like to give a special welcome to Maria Echaveste, who is our keynote speaker. You will hear more about her in a moment when she is introduced. But I want to give her a warm welcome for helping us inaugurate our Center and for kicking off this conference.

We all know that we're going through a period—and have been for years, maybe centuries—of integrating the world's economies as the world gets smaller, especially through free trade zones such as the European Economic Community, and of course, NAFTA (the North American Free Trade Agreement). These economic issues, and especially free trade, give great challenges to the domestic laws of various jurisdictions in a whole variety of areas—the environment, civil rights, labor issues, and issues of capital. This conference will be addressing two of those issues and their interrelated nature: the movement of capital and labor. As I said, these international issues put challenges on domestic legal systems. Are they up to the task of answering questions of environmental issues, or labor issues, or issues of capital, or especially issues of civil rights? Are the domestic legal systems up to the task of resolving problems and stresses that are caused in situations that go across borders? And this is where international human rights can and will play a great role.

So I wish you well on the conference. I know it will be an informative and insightful one. But in addition to that, this is a really happy day for our law school because this conference inaugurates the Bernard and Audre Rapoport Center for Human Rights and Justice. This Center will bring together students, scholars, and human rights activists from around the state and around the country and, indeed, from around the world. It will bring these people to our law school in a variety of particular programs to discuss the human rights agenda for the next decades.

This Center, and indeed this conference, would not have been possible without the vision and insight and hard work of the director of the Rapoport Center for Human Rights and Justice, Professor Karen Engle.

About a year and a half ago, Karen came to my office with this idea. Events like this don't just happen. They take hard work, vision, courage, dedication, and perseverance, and you (Karen) have shown all of those. I just want to congratulate you on directing the Rapoport Center. I know it's going to be a great asset to our law school.

There's one other person on our faculty that I'd like to recognize, Professor Sarah Cleveland. One of the centerpieces of the Rapoport Center is the Transnational Workers' Clinic. The Rapoport Center will bring together people to talk about issues of human rights and to set the agenda for human rights, but it will also be part of the educational program here at the law school by helping people that need help—workers in central Texas who have human rights issues that need to be addressed. This clinic will give that kind of help. That is important in and of itself, but maybe even more important is that it weaves into the fabric of our educational practices, and for our students, that this too is part of their education. Sarah has been faculty director of this clinic. Sarah has also—even for years before Karen was here—been talking about human rights and international programs and has worked tirelessly and shown great vision. I want to thank you (Sarah) also. We would simply not be here today without the work of Karen Engle and Sarah Cleveland. On behalf of our law school, I want to thank you both.

Finally, none of this would be possible without the enormous generosity and character and vision of Audre and Bernard Rapoport. Let me just say a little about the Rapoport's role in making Texas, our country, and the world a better place.

It is hard to find any efforts where human dignity is being served and individual rights are being protected, or indeed where good things are happening at this university, without finding Bernard and Audre Rapoport behind them. I am enormously grateful for your generosity in funding the Bernard and Audre Rapoport Center for International Human Rights and Justice here at the law school. And for that, I say thank you. It is an inadequate word, but my feelings go well beyond that. It is not just gratitude: it is admiration, respect, and fondness and affection, not just for your generosity but for your vision for decades, for a lifetime, of making our world a better place for people who otherwise do not have a voice, for people who need protection of individual and human dignity.

We try to honor you and Audre with having your name on this Center, but in fact, you honor us. I am proud of what you have done for our university. I am proud to call you a friend. And I am extremely proud that the names of Bernard and Audre Rapoport will be forever woven into this very important Center at the University of Texas School of Law. So again, B, I just want to thank you for all you have done for us.

And now, on to the conference. I am also proud to have as a colleague and a friend Professor Gerald Torres. Professor Torres will introduce the keynote speaker.

### **Gerald Torres:**\*

Thank you, Dean Powers.

It is my honor to introduce our keynote speaker Maria Echaveste to you today. She has built a distinguished career as a senior White House official. She has been a long time community leader, a corporate attorney, a professor, and an advocate for the rights of migrant workers. She has recently founded a group, Neuva Vista, which is a public policy and strategic planning/consulting firm that specializes in a variety of issues including labor and immigration issues.

She served as assistant to the president and deputy chief of staff for President Clinton from May 1998 through January 2001. In this role, Ms. Echaveste had oversight responsibility for many of the most important domestic policy initiatives of the Clinton presidency, including civil rights and immigration.

From February 1997 to May 1998, Ms. Echaveste was assistant to the president and director of public liaison at the White House.

Prior to working at the White House, she was administrator of the United States Department of Labor Wage and Hours Division. At the Department of Labor, she worked to eradicate sweatshops and child labor and to implement the Family Medical Leave Act.

Currently, she teaches at the U.C. Berkeley School of Law and the Goldman School of Public Policy and is a fellow at the Center for Latin American Studies at Berkeley. She is involved in politics and national policy as a member of the Executive Committee of the Democratic National Committee and was an advisor to Howard Dean's presidential campaign.

She is a member of the board of directors of People for the American Way and of CARE (Cooperative for Assistance and Relief Everywhere), which, as you know, fights to eradicate global poverty and hunger. She also serves on the board of advisors of the Woodrow Wilson Center Mexico Institute.

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\* H.O. Head Centennial Professor in Real Property Law, The University of Texas School of Law.

Now all of that is very, very impressive. But more impressive to me is the distance that Maria traveled to be able to do those things. The path that she has taken to get to where she is now I think almost uniquely positions her to open this conference.

She is the daughter of farm workers from Central Mexico who came to the United States under the Bracero Program in the 1940s. She was born—and we can claim her as one of our own—in Harlingen, Texas; although she moved and was raised in my home state of California. So I think it makes her doubly blessed.

She picked cotton and vegetables through high school. While in high school she was first able to ascend the escalator in the American economy by becoming a cashier at a *bodega*. From that position, she got a full scholarship to attend Stanford University, where she and I overlapped for the first time. She graduated with a degree in anthropology and then took a year off before starting law school at Boalt Hall. After graduating from Boalt, she went on to practice corporate law in Los Angeles and New York City.

While in New York City, Mayor David Dinkins appointed her to the Board of Elections. It was during that period that she met a formidable person, Hillary Clinton, and signed on with the Clinton campaign. This, actually, is the first time I met Maria.

At that time, I was living safely in Minnesota; and Minnesota, at that point, was a safe Democratic state. Because of this, neither Bill Clinton nor Al Gore were going to go north—and maybe it was the weather, I'm not sure—to campaign. They wanted surrogates to campaign on their behalf. Somehow, my name came to the attention of Maria. She gave me a call and asked if I wouldn't debate environmental issues on behalf of the campaign. I have to say I agreed to readily, and it was fun.

After the victory in 1992, what most people do not know is Maria played a key role in assembling the government Bill Clinton put in place for his first administration. She had a key role in helping him select a government top to bottom that would fulfill the promises that he made. Remember, one promise he made was he was going to have a government that looked like America, and Maria made sure he did.

It was through that that she introduced me to the attorney general of the United States. And thus, I owe Maria a very, very deep measure of gratitude for giving me the chance to serve my country and to enjoy some of the most satisfying moments of my legal career.

She continues to play an important role in transnational labor issues. These are issues I want you to remember that she knows from the ground up, literally, from the fields to the boardrooms.

So I think there is no one better situated to kick off this opening event of the Bernard and Audre Rapoport Center for Human Rights and Justice. I give you Maria Echaveste.

**Maria Echaveste:** \*

That was very, very kind and such a warm introduction. I am a little surprised by it, but thank you.

I want to thank Dean Powers and, of course, Professor Torres and Professor Engle for inviting me to speak today. But before doing so, I want to also add my thanks to Bernard and Audre Rapoport for the leadership they have shown in forging the bonds between the academic world and policy makers, understanding that intellectual capital is as important as

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\* Center for American Progress fellow; Lecturer, Boalt Hall and Goldman School of Public Policy, the University of California, Berkeley.

financial capital. That at times, one must invest financial resources to develop the intellectual capital.

This latest example of their generosity shows their commitment to the development of progressive ideas focused on the economic and political enfranchisement of those without power; truly an act that requires our gratitude. So thank you.

This conference to which you have invited me—and again, I am very honored to open it and kick it off—is really ambitious in its vision. To explore the relationship between the trend of jobs moving abroad—outsourcing, the free and unrestrained movement of capital—and the insourcing of labor from abroad—the regulated and unregulated movement of people.

But it is not just connecting these two trends that is noteworthy, many politicians do not connect the two, but it is rather the focus of shining a human rights lens on those two trends that I think is groundbreaking. So I again commend you for having such a vision.

What I want to do in these keynote remarks is to first give you a brief state-of-play on immigration reform because I think we need to understand the political context.

Second, I would like to review the substantive areas that I believe any serious immigration reform ought to consider.

Finally, I would like to pose a series of questions regarding those substantive areas that would really benefit from the engagement of those who are concerned about human rights. Frankly, we do not hear enough from human rights advocates in the current Washington debate on immigration reform

### ***Political and Legislative Context***

As you may recall, there was a flurry of activity concerning immigration in the spring and summer of 2001 due to the growing relationship between U.S. President George W. Bush and Mexican President Vicente Fox. That discussion, nascent as it was, really only focused on possible ways of providing legal means for Mexican workers to come into our country and did not really address other profound failures of our current immigration system.

After the events of September 11, 2001, it took about eighteen months or so for these issues regarding immigration reform to get back onto the radar screen. Since the summer and fall of 2003, immigration has come back with a vengeance. There are a number of bills that have been introduced in Congress purporting to deal with some aspect of the immigration system.

Just this week, the House of Representatives voted in favor of the “Real I.D.” Act that would set federal standards for driver’s licenses, effectively prohibiting states so inclined from providing drivers licenses to the undocumented.<sup>10</sup> Even if it were to become law, this bill will not reduce the number of undocumented, it will not help us identify people who are here illegally, and it will not make us any safer in terms of national security. I might also add that it will actually make our roads less safe by having more uninsured drivers out there, but that is the subject for another presentation.

Other bills have been introduced. AgJOBS tries to address the status of the 60–70% of the two million farm workers who are here illegally.<sup>11</sup> That bill was introduced in September 2003 by the unlikely pair of conservative Senator Larry Craig from Idaho and the liberal senator from Massachusetts, Ted Kennedy.

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10. H.R. 418, 109th Cong. (2005)

11. Agricultural Job Opportunities, Benefits, and Security (AgJobs) Act of 2005, S. 359, 109th Cong. (2005).

We also have the DREAM Act, introduced by Republican senator Orrin Hatch of Utah and Democratic senator Dick Durbin of Illinois.<sup>12</sup> This bill would provide legal status to state institutions for undocumented students. We have the CLEAR Act, seeking to require local and state law enforcement agencies to enforce immigration laws, as a condition of receiving federal money.<sup>13</sup> Representative David Drier (Republican, California) introduced a bill to require everyone to have a fraud-proof Social Security card in the name of reducing illegal immigration.<sup>14</sup> In short, there is much activity but nothing has passed Congress. Moreover, to date, these are piecemeal efforts.

Even President Bush's statements on this issue only respond to part of the problem. He said in January 2004 and again in his February 2nd State of the Union address that America should not criminalize people who are simply trying to provide for their families. He proposed a temporary-worker program that would match a willing employer with a willing employee, but has yet to provide any details on how such a program would work.

For me, President Bush's statements are more important for the fact that he said them than the actual details at the moment. I know how hard it is to get a word into a State of the Union speech, so the fact that he gave this subject two paragraphs means—at least to my mind—that he may be willing to use his political capital to enact some type of reform. Frankly, I think he may find it easier to do than privatizing Social Security.

Part of the momentum that is building for immigration reform is due to the increase in support from Hispanic voters for President Bush from 2000 to 2004. The consensus is that about 40% of Hispanics voted for President Bush, a 5% increase, and perhaps more, from 2000. Now, there are many within the Republican Party who would very much like to make that percentage, and perhaps more, a permanent part of the Republican base. And some theorize that the way to do this is to enact immigration reform. Doing so, some Republican strategists think, would put a softer, gentler face on the perceived anti-immigrant face of the Republican Party.

Now, it is also true that when you ask Hispanics what are the top three issues that they care about when deciding which way to vote, immigration reform is not one of those. But what people fail to understand is that Latinos are quick to see attacks on immigrants as attacks on Latinos. And that is what President Bush and a number of his advisors are worried about.

So passing some type of immigration reform would allow Republicans to say there is at least a part of the Republican Party that understands that immigrants are people who want to work, who are not criminals, and who are not a threat to our national security. Obviously, this could benefit the long-term political plans of Republicans who are seeking a permanent realignment of the Hispanic electorate.

### ***Comprehensive Immigration Reform***

Apart from the political motivations, what I hope happens in this debate is that we actually have a more comprehensive, a more expansive, view of what the problems are and what the solutions could be.

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12. Development, Relief, and Education for Alien Minors (DREAM) Act of 2003, S. 1545, 108th Cong. § 4(a) (2003).

13. Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2003, H.R. 2671, 108th Cong. §§ 101–102 (2003).

14. Illegal Immigration Enforcement and Social Security Protection Act of 2005, H.R. 98, 109th Cong. § 3 (2005).



What do I mean about comprehensive immigration reform? I see it as three sets of issues.

First, what do you do about the undocumented who are already in this country?

Second, what do you do about the family backlogs that cause many to stop waiting and come to this country illegally?

And third, what do you do to regulate the future flow of workers, whether legal or illegal, who respond to the pull of jobs?

It seems to me that as you begin to try to answer those questions, if you are intellectually honest, you have to confront some hard questions regarding the relationship between the economy, human rights, and the very basic premises of this American society.

First, for those 10 million or so estimated undocumented, living and working in our country, the “what to do” and “how to do” is, of course, the crux of the problem. But let me suggest that the “why we should do something” should be grounded in our commitment to human rights. How can we tolerate having millions of people without status, without legal rights, working and living in our communities?

It reminds me of a science fiction story I once read where a society has its homes cleaned and food prepared by an invisible group of beings only seen by children before they are taught that those beings do not exist.

If we are not prepared to make visible these workers who toil among us without any legal status, are we prepared to do what it takes to identify the undocumented and make them leave?

President Bush says they should get temporary work visas and then leave. He says no to amnesty or legalization, but he has not explained why people, who have been here many years and have laid down deep roots, would participate in this program if the final outcome is a one-way ticket back to the home country. Even Senator Craig, no liberal, called Bush’s proposal the “report-to-deport” proposal.

And if people do not participate in a Bush-designed program, do we continue with this invisible population? Notwithstanding the rantings of some in Congress, it actually would be very difficult to find and deport 10 million people. And if we tried, you can be sure that many U.S. citizens and legal residents would be targeted, and perhaps inadvertently tangled up, in that deportation effort, which has happened, I remind you, in the past.

Where we could easily identify and deport workers, we have refused to do so. For example, in agriculture where the majority of workers are undocumented, we could have very effective deportation activities at the height of the harvest. But we do not do that. Indeed, as recently happened in December in Yuma, Arizona, the deportation of thirty or more undocumented workers led to outrage by the growers in that community. The growers’ association there was successful in obtaining the transfer of the immigration official in charge who had orchestrated the enforcement effort and a reduction of the enforcement efforts.

But let us also recognize that if we legalize the status of those who broke our immigration laws, we may be inadvertently sending a signal to some that if you break the law coming here, eventually some “legalization” action will be taken, creating a magnet for more illegal entry.

Should we have as part of a legalization program a future work requirement so it is not a reward for illegal behavior? If so, how long should people have to work? How do we protect against the possibilities of indentured servitude that might result if the possibility of gaining legal status is tied to continuing employment?

Turning for a moment to the issue of family backlogs, some argue that we mistakenly focus on unifying families. They argue that instead, we should look at the underlying questions of how much population growth do we want to come from immigration and whether that should be driven primarily by labor and skill needs, rather than family unification. And even when we focus on family unification, what adjustments should be made to the current system of preferences that ranks spouses and minor children under eighteen ahead of everyone else but that also has a system of country limits that results in years of waiting for those family members. What should be the limits on preferences for family members? Should we eliminate preferences of any kind for brothers and sisters; what about elderly parents? We have already limited welfare assistance to legal immigrants, requiring sponsors to be financially responsible for those incoming family members for a period of time. In short, to say that we should reduce family backlogs is a superficial response to a more complex set of issues.

Lastly, how should we address the future flow of migrants. We need to understand that there will be, for the foreseeable future, continued demand for immigrant workers. In such case, it behooves us to consider deeply the appropriate ways to regulate that flow in ways that reflect the best of human rights and American values. Even some in organized labor have finally accepted that any type of immigration reform needs to address this question, meaning that some type of guest-worker program needs to be designed. Again, saying we need such a program does not even begin to provide policy solutions.

What kind, under what conditions, and how will it impact U.S. legal workers? Neither Congress nor the president has really begun to offer any solutions. Here are some additional questions we should be asking of the president and of Congress.

What kind of legal rights should a foreign worker have? Do you start within the framework of human rights? What does that mean in this country where, frankly, most of the population thinks human rights have something to do with populations outside of the United States? That in fact, our system is so ahead of other societies that human rights is not something we need to consider here.

What kind of rights? Should they be the same as a U.S. worker? I submit that a temporary-worker program where those workers have different rights than legal U.S. workers is a recipe for disaster and exploitation.

To go back to what President Bush said, a program to match “a willing employer with a willing employee.” What does it mean to be a “willing” employee when you cast the net worldwide? It is not hard to imagine that if you seek workers in a global labor pool, there will always be workers “willing” to accept whatever U.S. companies wish to pay, compared to the options available in their home country. So if we are proposing a global labor pool, is it that hard to imagine developing a worldwide set of labor standards? Surely if the world community can agree on a uniform set of rules to govern trade, international rules to govern labor should not be impossible.

I am not suggesting that wages and working conditions be set at the same level if you work in the United States, or Bangladesh, or Mexico. But surely, some brilliant economist somewhere could come up with a formula that sets a floor for wages and working conditions so that workers are not competing solely on who can do the job for less. If globalization is here, at least with respect to the movement of capital, goods and, increasingly, labor, why should there be worldwide rules for some but not all of these components.

I am not sure, frankly, that we as a world society would want to restrain all capital movement. Companies will move where they determine they can, in fact, increase their

profit. And many of us here in this room and across this country, and around the world, have an interest in seeing increased profits because we are shareholders. But since we are also citizens of the world and part of a global community, what are the other values we are trying to promote, in addition to capitalism and the market economy? And how should we balance those competing interests?

I do not have an answer, but I do know this: that capital and business will always seek to find a way to improve the bottom line. It is the nature of capitalism. What can we do to restrain the excesses?

There are other rights that temporary workers need. What about the portability of the worker visa? Currently under the hodgepodge of programs that the U.S. government has, the visa is tied to an employer. If the employer is abusive and violating whatever labor laws exist, the worker is not free to leave other than to go back to his home country. If you make the visa portable, how do you regulate the movement of people who are here on a temporary basis?

How do you set the wages in terms of employment so that U.S. workers are not always undercut by cheaper labor? This is something that the Left and immigrant advocates sometimes have a hard time admitting—that, in fact, a large pool of cheap labor (whether it is cheap because it is migrant or because of the lack of legal status) does have a negative impact on employment and wages of domestic workers. Yet it is basic supply and demand. If you have a workforce that is larger and willing to work for less, wages go down.

There are now a series of studies looking at the changing workforce in the South. But if you look at what has happened to poultry, construction, hotel and restaurant, and other service jobs, you can see how that workforce in many parts of the country changed from historically white and African American workers to largely, if not entirely, Hispanic. We need to look closely at how wages and working conditions have changed, or not changed, as the workforce has changed. So again we have to ask, how do you protect American workers?

Who determines, and on what basis, that there is indeed a labor shortage? If you set the wages high enough, and if you provide certain benefits, I guarantee you that you are likely to find more U.S. workers available for those jobs.

The programs currently administered by the Department of Labor—which try to determine if there are labor shortages or try to determine what should the wages be for foreign workers—are insufficient. They are weak. There is a lack of administrative personnel that can, in fact, implement these programs. What you have are businesses, well-meaning businesses I might add, who feel that they cannot find the workers that they need, and complain about the paperwork that is involved at the Department of Labor. But the reality is: paperwork is exactly that. It is actually not protecting American workers in any effective way.

Even assuming for the moment that one could design and implement a more effective program for identifying real labor shortages and setting appropriate wages so as to protect American workers, there would still be another major problem. It is one of the toughest issues: worksite enforcement, or interior enforcement, or employer verification—whatever you want to call it. If we are serious about regulating the future flow of people, we have to get serious about insuring that unauthorized workers actually cannot work here.

Employer sanctions, enacted in 1986, did not work.<sup>15</sup> Whether because there was a complete lack of will to enforce, or because the well-intentioned effort to protect against discrimination left an opportunity for increased use of fraudulent documents, for almost twenty years we have had minimal disincentives for employers to hire undocumented persons. We are not serious about fines. If you compare our inadequate system with what European countries do when employers are found to have hired unauthorized personnel, it is astonishing. They will assess tens of thousands of dollars per illegal employee against an employer. We, in the very few cases that have been brought against employers for hiring undocumented persons, have levied minimal fines. Indeed, many employers consider the occasional slap on the wrist as a cost of doing business.

But are there other ways of trying to reduce the pull of jobs so as to reduce the numbers of illegal workers?

In 1986 when the last, big immigration bill came up, there was a debate on a national I.D. card that ultimately gave way to the weaker employer-sanctions framework. Twenty years later, there are some who argue that we should revisit this issue.

On the one hand, in 2005 there exists technology that simply was not available in 1986. We have databases and an ability to communicate and verify across systems in ways that could not even be imagined in 1986. But just because technology may make it easier, we need to recognize that technology alone will not solve this problem. The inaccuracy and incompleteness of the databases should not be overlooked. Privacy issues are continually emerging. Civil liberties issues concerning how much information the government should have and what it can do with such information are creating unlikely alliances between the Right and the Left. Are there less intrusive means of verifying who is authorized to work?

Right now, the Social Security Administration (SSA) has expanded its effort to clean up social security records. Employers send in every quarter or yearly, as part of the tax collection effort, the names and social security numbers of employees. SSA reviews its records and sends employers “no-match” letters, indicating that the social security numbers either do not exist or do not match the name and identity of the employees submitted. It is actually a fairly unobtrusive means of identifying who, at least at first blush, may not be legally entitled to work here.

The problem, however, is that only the employer is notified. While the employer is then required to inform the employees in question, there are no safeguards to ensure either that the notification takes place or that the employer does not wrongfully use such information. There are numerous instances of employers not informing employees of the “no-match” unless and until an employee starts to complain, starts to form a union, or in some way starts to agitate for improved working conditions. Surely there must be a way to use databases—whether Social Security, immigration records or other information—so as to identify who can work here properly? Can we do so in a way that respects civil liberties, privacy, and civil rights?

This last point regarding civil rights (another way of saying human rights) is particularly important. Many folks are willing to accept the use of a national I.D. card, or require all employers to verify employment using the latest technologies and databases, because they do not believe they will be affected by such procedures. Unfortunately, given our history of racial and ethnic discrimination, it is not inconceivable that without careful

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15. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101(a)(1), 100 Stat. 3359, 3360–74 (1986).

structuring, verification of legal status may become yet one more mechanism of discrimination and harassment.

Moreover, we also need to consider how creating a guest-worker class would impact our society. Especially, if we design a program where guest workers have different rights than other workers, how would we know who is who? How will we determine that someone is entitled to full rights as part of our society or only a temporary worker with minimal rights? Will we decide based on ethnicity, language, or national origin who is American and who is not? What do we do about the rights of U.S. citizens and legal immigrants who look like the guest workers being brought in? If we already have racial profiling along the border and in communities across the country, do we add yet another reason for law enforcement and government agencies—as some in Congress would have us do—to demand proof of authority to be here? Proof of who you are?

At some times, it feels that we are moving to a place in which some segment of our society may have to have some type of internal passport to go about their daily business or at least have it on their person. Otherwise, be hassled by agencies. Should we try to learn from other experiments with internal documentation, and internal travel authorizations such as those in South Africa or people moving between the Palestinian territories and Israel? Do we really want to give every single government employee the right to ask for documentation?

Even assuming we could design a mechanism to reduce the ability of employers to hire undocumented persons, we must recognize that there will still be individuals who will try to migrate illegally and work illegally.

This issue of migration—the pull of jobs, the movement of people—this is a worldwide phenomenon. We are not alone in this. In a way, the continual migration of people is a testament to the human spirit because human beings will seek to improve their lot in life wherever they are. At least some of them will.

So our challenge is really, how do we bring some order to that process? It is going to happen regardless. How can we minimize the number of deaths along the border? How can we respond to legitimate labor needs now and in the future? If you look at the demographics and if you look at our birthrate, if you look at the types of workers who will be needed in the future, there will be labor shortages. Under what terms and under what conditions will we try to address them?

So let me raise one last critical issue in the design of a future guest-worker program: whether those guest workers will have a path to permanency. That is to say, if they choose to become a part of American society, will we permit them to do so?

Why do I think this is so important? Well first off, there is no such thing as a temporary-worker program. In this respect, the anti-immigrant chorus is correct. It has to do with human nature. People live. They meet. They marry. They lay roots. They want to stay. Yes, of course, many people want to go back, and not many of them do.

I am in a weird situation in that my parents are exactly the type of workers President Bush wants. They worked here for forty years and they retired to Mexico. That is what many immigrants say they want: work for a time and then go home. Well, people rarely make the choice my parents made; most choose to stay here because their children are here. That is why I think it is so important to provide a path to eventual permanence, including citizenship. Otherwise, we will have thousands and thousands of workers who will not wish to return to their home country. By giving workers the option of permanency—with appropriate requirements, of course—we would be designing a program based on reality.

In conclusion, I hope that the questions I have posed can spark discussions and responses that are grounded on human rights and not simply the old, tired paradigm of “controlling borders” and “national security.”

As I travel and talk to members of Congress and groups who are advocating for change, there are no—I have not heard any, at least—fresh ideas about how to balance these competing interests. But what I will leave you with is what the organizers of this conference have already recognized.

The globalization of the labor supply is happening as much as the globalization of capital. What do we intend to do about it and what will be the values that guide us in shaping the America of the future?

Thank you.

I think we left some time for questions and we have a microphone. As you probably can gather, I am not afraid to speak my mind.

### *Question and Answer*

#### **Question 1 (Bernard Rapoport):**

We are faced with a serious problem where everything starts with money. You all are a group of lawyers here. The thing that bothers me about the law profession is this: the best lawyers have one job—to see how to circumvent good laws.

Four hundred billion dollars just came across the table, as you know, on which the big companies didn't have to pay any taxes. Right?

#### **Echaveste:**

Yes.

#### **Question 1:**

Now, how many workers could benefit if we had a fair economic system? We wouldn't have to be talking about all these problems to the extent that we do. Would you agree with that?

#### **Echaveste:**

I would, I would. But I would suggest that actually not all lawyers spend their time—

#### **Question 1:**

I know Sarah and Karen are great lawyers. I don't worry about them. But I think the law schools do have a challenge about that, and you think so too, right?

#### **Echaveste:**

I do. I think the profession is one that lends itself to actually tackling these hard issues because most of us are problem solvers as lawyers. Someone comes in with a problem and our job is to try to find a solution. Yes, there are businesses that come in that

basically want to find a way to get what they want even if it might, “just keep them out of trouble but let them do what I need to do.”

But that training—that is why it is so important to have a conference like this at a law school, and this shows my bias toward lawyers—unlike some other disciplines, we actually have to try to solve problems. This is where I think the discipline of human rights and labor protections and civil rights—that thinking about how do we balance those interests—is why I think that law schools may be a source, at least for some in the profession, of answers.

But it will ultimately require political strength and political will to want to do something to solve our problems. There are many in the Left, actually, who are what I call not true believers but idealistic. Idealistic to a point of not recognizing that you have to elect people who agree with you to try to implement policies that will change the world. Or at least try to.

So I think marrying the intellectual need that we have with a political understanding of what is going on is necessary because we sometimes try to do things in a vacuum.

### **Question 2 (Gerald Torres, The University of Texas School of Law):**

There are a couple of issues that you raised that are problematic. One is if you have a guest-worker program that assumes the workers will eventually go home, the problem of repatriation—which you have already experienced in this country—looms large. So, what has Germany done, for example? How has it approached the question of repatriation? One.

And two, isn't Peter Schuck right that we have to revisit the question of birthright citizenship in the United States?

### **Echaveste:**

Well, I think those two go hand in hand. This is where I think this idea about an American guest-worker program that would have a path to permanence is actually a unique opportunity for the world.

We have experiments and experiences in other countries of pretty extensive guest-worker programs, like the situation in Germany with the Turkish workers, where the ability to actually become a German citizen is very limited. And so what you now have are second- and third-generation, German-born Turks who have really no connection to Turkey, but are not fully integrated, if you will, into German society. There are, as many of you know, real efforts to recognize the reality that this second and third generation of German born Turks are not going to return to Turkey.

I think Germany and other countries started with that notion, “They will come here and work, and then they will go home.” And guess what? Life doesn't always work out that way. And in Germany, where there are such limitations on German birthright citizenship, the resulting generation of Turks born in Germany has created the current situation.

There are voices in this country who are starting to argue that the Constitution should be revised and that birthright citizenship, U.S. citizenship for someone born in this country, should not be automatic. It seems to me, at least, that while that is, I believe, an attempt to get people to go back home because your children will not be citizens of this country, I think the experience from other countries should show us that that is a wrong path to go. Such children, like the situation in Germany, become educated in the host country and actually have no connection to the home country, so where are they supposed to belong?

So this path to permanence is actually a pretty novel idea. I think for the United States it is ideally suited to the United States because we are, but for Native Americans, a country of immigrants. And therefore, how we welcome that guest worker would be in keeping with our American values and our history, to provide eventually for permanence. We can regulate it. We can set time limits. Good moral character. We can do lots of things to make sure that people who come here to work and choose to stay here are people that are going to benefit our society.

But the notion that they are going to go back automatically, or that by taking away automatic citizenship through birthright, is going to address the problem is one, I think, that history has already shown does not work. Why would we try the same thing?

### **Question 3 (Bill Beardall, Equal Justice Center and The University of Texas School of Law):**

First, as an adjunct professor who is co-teaching along with Sarah Cleveland the Transnational Workers' Rights Clinic here that is part of the Bernard and Audre Rapoport Human Rights Center, I want to thank you for the exquisite timing of your remarks. It just happens that the classroom component this week took up the current failures and limitations of our employer sanctions-based model. The class next week is already planned to deal with the guest-worker issue in the coming debate—or the current and coming debate—over that.

I think it shows the power of having students have the opportunity to think about these things intellectually while working on actual direct representation of transnational workers here in Austin and having access to experts like yourself who have been thinking about this, as I know, so acutely for a long time.

My question arises out of something else I know you have a lot of experience with and that is with government institutions' enforcement of the rights of powerless, low-wage workers, especially transnational workers, who do not have a political voice in the system.

As someone who has struggled with that, probably more mightily and heroically than anybody else in the history of the Department of Labor of the U.S. government, I know that you know what government can and cannot do as someone who worked on that, enforcing those rights from the standpoint of nongovernmental organizations (NGOs), working together with the Department of Labor to try to do that.

As we go forward, what thoughts do you have about what the role of government is, realistically? And what is the role of NGOs, realistically, in the enforcement of the legitimate rights of transnational workers in this global workforce?

### **Echaveste:**

Quite simply, government won't be able to enforce the laws. In the current state of the deficit and the federal budget, I would ask you to look very critically and suspiciously of any congressperson who says, "Well, we'll give the authority to the Department of Labor, or Home Land Security, or some agency to protect the rights of these workers." It will not happen. There just are not enough resources.

This then leads us to the problem that the most vilified profession at the moment is lawyering, if you listen to some folks currently occupying the White House. When you say, well, you need to have a private right of action to enforce those labor protections, we are going to have a fight on our hands. But it is absolutely critical.



One possible solution is if, in fact, we say straight out, “A foreign worker has the exact same rights as a U.S. worker. There is just difference in status; temporary versus permanent.” This does not lead to distinguishing between the two. There are private rights of action under the Fair Labor Standards Act and other types of law.<sup>16</sup>

We also have to fight a rearguard action, occurring right now, which is to limit class action. For low-wage workers, this is a big issue. No lawyer—even a well-meaning lawyer from Legal Aid who, by the way, cannot do many of these cases because of the status of the worker—is going to take a case that involves a few hundred dollars unless you can bring a number of them as a class action.

So then you leave it to the government to bring those cases. Except that we just determined that the government cannot do it because it does not have the resources. We will be in a situation in which our law books may say there are protections there. But we all should know by now that simply because a law has been enacted does not make it so, unless it is implemented.

I would make one of the critical issues in an ultimate negotiation with Congress on this ability to bring private rights of action to protect the rights of workers, both U.S. and foreign. I think it will be very uphill but I think it is also critical. Otherwise, again, it is just icing or pretty language but really meaningless.

#### **Question 4 (David Kennedy, Harvard Law School):**

This follows a little bit right on the point that you just made. It is about the theater of action for policy making on the issues that you raise. We have a tendency to imagine that labor standards should be done in the theater of international law, and the WTO should do it, or the United Nations should do it. But immigration is something we need to tackle here at home.

Here is a thought experiment. Imagine if we reversed that presumption. If we imagine extending much more dramatically our national law to cover extraterritorially human rights abuses in the labor field—the way we extend financial regulations and antitrust regulations without giving it a second thought—and just amending your statement of a private right of action to say not only for U.S. and foreign workers, but a private right of action for U.S. and foreign workers both here and abroad. While at the same time, trying to push a little bit the free movement of workers debate into the international realm. If I were advising a third world caucus in the Doha round, I would say, “Some mobility for labor is going to be much more important to you than a reduction in agriculture subsidies.” So if I were picking issues, I would say, put free movement of labor alongside free movement of capital in the international arena.

I am just wondering if you have any thoughts on that kind of strategy for reversing our sense that immigration is a problem we have to solve here, while labor standards are a problem that only can be solved by collective action abroad.

#### **Echaveste:**

Well, I guess I would question whether labor standards can only be solved abroad since I think within our own country, we have real violations of our own labor standards. So I cannot really distinguish between them.

But I do think that—perhaps not in my lifetime but perhaps in some of the students’ lifetimes here—the movement to recognize a sort of North American community, the way

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16. Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2000).

we have a European Union (EU), will be in our interest, in our collective interest, for all the reasons we have just discussed. If you look at Europe's experiment in terms of basically Fortress Europe, even Spain just this week announced what is essentially an amnesty for about 1 million undocumented because they have an undocumented population.<sup>17</sup> It also made clear what the fines were going to be passed once everybody came out of the shadows of what the employers will have to pay.

So regulating the movement of people from third world countries is a wonderful ambition but, as I say, probably long in coming. Not the least of which has to do with our own country's suspicion and lack of support for international organizations—our American exceptionalism, our sense somehow that international rules are for other countries and not for us. And that is a debate we need to engage more people on, building a constituency within the United States for internationalism, for international institutions, is probably one strategy, albeit a difficult one. But a necessary one.

I would just say that I actually think reducing crop subsidies relates very much to immigration. As many have noted, the one consequence of NAFTA was the real impoverishment and destruction of sustainable farms or subsistence farms in Mexico and other parts of Central America, but particularly Mexico. Farmers who, in fact, could not compete with the cheaper pork and beef that are being imported into Mexico, leading people to decide that they have to leave the countryside and come to the United States.

So I jokingly say, after comprehensive immigration reform, my next big battle is going to be crop subsidies. Because I think that there is something there that needs to be addressed.

### **Question 5 (James Galbraith, The University of Texas LBJ School of Public Affairs):**

This may be something of a purist position, but I think it is entailed logically. Start from the idea that we have a growing economy and a growing population. When a person arrives here and takes a job, unless that person is later displaced by another arrival, they're essentially going to be working here indefinitely for as long as they choose to. There is no reason to expect that the demand for their services will be less in the future than it is today.

That leads me to question the opening that you leave for a guest-worker program. It just seems to me that one has to consider whether we're better off having a population that comes in and essentially stays for a career, and certainly long enough to establish their political rights in this country, which certainly shouldn't be longer than five or ten years at the most. Certainly not the forty years that your parents were here. And a population that is rotated through, as in Bush's proposal—one is essentially encouraged to spend a few years and then get back out and go back, being replaced by another population just like it, which essentially never assimilates, never adopts American norms and cultural values. And it becomes perhaps a population that is difficult to trace if it gets involved in petty crime and this kind of thing.

So why would one prefer, in principle—apart from making a political compromise—having a guest-worker program as opposed to a kind of path of smooth immigration and normalization leading, as the norm, to citizenship and political rights for people to come and work in this country?

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17. Renwick McLean, *Spain Begins Offering Residency Papers to Unlawful Immigrants*, N.Y. TIMES, Feb. 8, 2005, at A3.

**Echaveste:**

That is a good question. I think, perhaps, I have been in Washington too long in which the political realities are such that the odd bedfellows that are going to bring you immigration reform consist of business, organized labor, and immigrant advocates.

There are parts of the business community that only want or feel that they will do fine with a temporary program, agriculture being one of them. But there are others who have experience with workers who would truly be satisfied with working in this country for a few months out of the year, or eight or nine months of the year, and then returning home.

The fact is that the permanent program, the program that allows people to come here for a job on a permanent basis, is so broken that most employers use the different visas as a way of getting workers here—albeit on a temporary basis until they hope they can arrange for permanent adjustments. This is, I think, why people have accepted the notion of a guest-worker program because a permanent program, a sort of permanent bringing in of people, appears to be politically undoable. But I think the question is a fair one. It might require some folks to actually go back to the drawing board and say, “Well, why not?”

I would say, however, that even though I said the temporary program is never temporary, we do not know, actually, what percentage of people, of those who come here, would in fact choose to be part of America. We suspect some percentage but we don't know. And so, what kind of permanent: if some percentage of that is going to move and seek to go back, why would you have a permanent program?

**Question 5:**

Well that, of course, is the choice left to that individual. That's the question.

**Echaveste:**

Right. And that is why I am so adamant, at least when I speak or in what I propose, that there be a path to permanence. There really should be, as part of a guest-worker program, that opportunity to become a permanent part of this country. Perhaps we are closer than we actually started out to be.

**Question 6 (Maggie McCarthy, The Bernard and Audre Rapoport Foundation):**

Maria, I wanted to say thank you for taking that long journey here to be at the University because I think I agree with Dean Powers. You are the perfect person to kick this off as I think you are both very inquisitive and informative, and I appreciate your making the journey to be with us.

I had a couple of things I wanted you to comment on, if you would, and one is that I see a number of the students here today, and I am very pleased to see them. And I should give this disclaimer. I am Maggie McCarthy, and I have the privilege of working with Bernard Rapoport at the Foundation. And so in making this grant, one of the things that I learned very early on is that there was a great deal of interest here at the University in this whole area of human rights.

So my first question would be, are you seeing a renewal or a renewed interest in this among young people to study this field of interest? And do you have any encouraging words for them?

And my second question regards the role that the university can play in informing public policy on these issues. Do you see them taking a larger role in influencing this from a field experience, from an academic experience?

**Echaveste:**

I have been in Berkeley for the last six months, so it is not surprising that I see there a real interest in human rights and issues of social change. But there is, I think, a greater interest and there are greater opportunities, even though I just said that overall the U.S. is not particularly a strong supporter of international organizations. That may be our government, but you will find across the country organizations and individuals who are, in fact, very focused on issues relating to international human rights and also issues relating to rights at home. It actually is very encouraging to see the interest.

The role of the university is one that hits very close to home in that I hope, in the years to come, I have more of a chance to help foster. I frankly think the policy makers, whether they are in a state capitol or in Washington, D. C., are too disconnected from the intellectual rigor and fervor of ideas. It may be that they just do not have time and they are spending all their time running for office and it is very hard to get them focused. But I also think that the academic world does not do a very good job of putting ideas in a usable form.

Plenty of people, and I have been the recipient of them, will present and give to policy makers their treatise, their forty-page article, and a number of really well thought out ideas. They do not have time to read them. So somehow trying to distill what is going on in the university and getting it into the mix of the policy makers is a critical role.

And I think part of it is the academic world does not understand the process by which policy gets done, and the political world is not fully familiar with the academic world. This is partly why I am at Berkeley—and why I am really going to enjoy being part of the academic scene—for the chance to bring people who actually know both worlds.

But it is so needed. And I think a university like the University of Texas, just like the University of California, has a particular role to play in helping identify, build, develop, and disseminate ideas that relate to the big challenges of this country and of the world. And so, a public university has, in some ways, a special and different role than a private university.

We ought to be engaged in these tough issues, and we need to make those connections user friendly, intellectually honest, based on research, data driven. Those are big ambitions but I think there is a real role, which is why I think a center like this is very exciting to try to make those connections.

**Question 7 (Audience Member):**

I had a question about enforcement. My understanding is from the Hagel-Daschle Bill,<sup>18</sup> A lot of that money, those fees that people would pay in—which I think is about \$1,000 to receive their proper documentation—about \$3,000 of that would go to further militarization of the border and \$300 for more criminalization of immigration. And so there is this interesting play of legalization but further criminalization and militarization at the same time.

How is it possible to work within that reality to dismantle such a system that is so deadly for so many people in that reality? Is that possible, and how do you see it as such?

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18. Immigration Reform Act of 2004, S. 2010, 108th Cong. § 216 (2004).

**Echaveste:**

This is why I tried to throw out some different ways of doing enforcement, and these are hard things for us. Can you imagine a place in which we have some type of counterfeit proof/card that authorizes us to work? Can we imagine a place in which every employer has to plug into a system and verify that you are actually legally able to work?

If we don't come up with something—and I am not sure those are the right ideas—but something different than the current employer sanctions or militarization of the border, we will not have solved the problem. And mind you, I have talked to folks on the Left who just cringe when you talk about interior enforcement, the way I have talked about it, and say, “Well, you are just going to drive people further underground.”

I submit to you that I would consider it a benefit if, instead of having ten million people underground, we had a much smaller percentage because there will always be people who will try to break the system and the rules. We need to understand that. But certainly, if we recognize that the people are coming to work, and it is the pull, we have to make employers really on the hook for hiring the undocumented. How do you do that?

I think if you had an effective system that was fair, that protected civil rights, that took into account civil liberties—and I do not know what that system is, but a system like that—you might actually find less of a need for the militarization along the border. Because when people cannot find jobs, they might actually not come or might go back.

I did not even have a chance to talk about another critical issue we need, which is, what is our development policy to the sending countries? Because I guarantee you, at least my informal survey of every cab driver I have ever ridden with, is that every single one of them intends to go back and left for the opportunity of this country. Most people do not choose to leave their country but for the need to provide for their families.

So we only deal with the border and completely ignore these other factors.

Thank you.

#### IV. ROUNDTABLE I: INSOURCING

**Chair:**

Karen Engle, *The University of Texas School of Law*

**Participants:**

Barbara Hines, *The University of Texas School of Law*

Linda Bosniak, *Rutgers School of Law*

William Forbath, *The University of Texas School of Law*

Harley Shaiken, *The University of California at Berkeley Department of Geography*

Alvaro Santos, *Harvard Law School*

**Karen Engle:**

On behalf of the Center, I'd like to welcome you all to day two of the Working Borders conference. Maria Echaveste did a great job of framing a number of the issues yesterday (particularly around immigration), but today we have to do the hard work of trying to respond to those and other issues—as we attempt to truly link contemporary debates about insourcing of labor (immigration) and outsourcing of capital (labor).

We have two different theater pieces today, one preceding each roundtable, to “set the stage” for each of the discussions. Shannon Baley, a doctoral student in the Department of Theater and Dance at the University of Texas, spent countless hours—with her team of fellow students—conceiving of and producing the pieces that you are about to see. They are inspired by the living newspaper genre of the 1930s. I would like to introduce her now so that she can describe the project for you.

**Shannon Baley:**\*

The performances you will see today present a modern take on the living newspaper, a documentary-style form of theater first introduced in the United States in the 1930s under the auspices of the Federal Theatre Project. Living newspaper performances sought to transform dry, seemingly undramatic political and social debates into dynamic, live performance. The Federal Theatre Project, an offshoot of the Works Progress Administration, introduced many programs to help re-employ thousands of unemployed actors, technicians, playwrights, and directors during the 1930s, but few had as wide-reaching an impact as the living newspaper. Agitprop par excellence, the living newspaper combined the revolutionary techniques of German epic theater and Russian constructivist theater with the immediacy of a newspaper article. Creators and supporters of living newspapers did their best to claim this genre’s unique Americanness. Hallie Flanagan, for example, the director of the Federal Theatre Project during its short lifespan from 1935 to 1939, called living newspapers as American as the March of Time and Walt Disney. Yet, ultimately, they could escape neither what some considered to be the form’s inherent sympathy for workers nor the socialist sympathies of many of its creators. This association between the living newspaper and support for the struggles of workers was of course a dangerous one in an era of rising anti-Communist sentiment. In the end, it was living newspapers, such as *Injunction Granted* (1935–36), an examination of the history of labor law struggles in the United States, and *Triple A Plowed Under* (1936), a dramatization of the crisis of U.S. agricultural policy, that helped initiate the shutdown of the Federal Theatre Project by Congress in 1939.

While the performances you see today are not quite the same as their 1930s predecessors—for one thing, ours are much shorter—much of what you will see has been created in the spirit of the living newspaper. From its inception, this has been a collaborative endeavor, from the research into the debates surrounding insourcing and outsourcing of labor to the development of the script itself. Like our living newspaper predecessors, we scoured news sources for anything that could give us insight into how labor’s insourcing and outsourcing could be dramatized. It has been delicate work to balance a presentation of “facts,” as received via sources like *The New York Times* and the *Washington Post*, with the human faces and voices of people affected by labor’s flux across borders. Most of what you will hear today in our performances consists of direct quotations from actual sources—from President George W. Bush announcing his guest-worker proposal to Miranda Ortiz, former employee of VF Jeanswear, mourning the loss of her job to cheaper labor in China.

For many of us associated with this project, creating *Living Borders* has been an exciting chance to test out the contemporary efficacy of living newspapers, a kind of history lesson via performance, and a means of using performance as civic engagement. It has also been a particularly exciting opportunity for interdisciplinary collaboration between the Bernard and Audre Rapoport Center for Human Rights and Justice at the Law School

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\* Doctoral candidate, Department of Theater and Dance, The University of Texas.

and the Department of Theater and Dance's Performance as Public Practice Program, which we hope is the beginning of a long and productive association. It is our sincere wish that these performances do the same work as their predecessors: entertain while provoking thoughtful and long-reaching dialogue and incite change while providing a human face to the larger ideas and issues discussed here today.

### ***LIVING BORDERS\****

#### **SCENE ONE: BORDER CROSSINGS**

##### **Characters (in order of appearance):**

**Edmundo Garcia:** Mexican citizen

**Ramirez Bermudez:** Mexican citizen

**Maria Gonzalez:** Mexican citizen

**Narrators (3):** American and Mexican citizens, sometimes reporters, sometimes observers

**President George W. Bush, United States**

**President Vicente Fox, Mexico**

**Senator Edward Kennedy (D-MA)**

**Representative Tom Tancredo (R-CO)**

**Representative J.D. Hayworth (R-AZ)**

**Francisco J. Alejo, Consul General of Mexico**

**Leon Stroud, U.S. Border Patrol Agent**

*Lights up. EDMUNDO GARCIA, RAMINEZ BERMUDEZ, and MARIA GONZALEZ are packing their bags in separate corners of the space, watching a large television, center. Out of the television emerges a press conference with BUSH and FOX sitting in the Hyatt Regency Hotel in Santiago, Chile, an upscale neighborhood with views of the snow-capped Andes mountains. Pushy photographers and reporters attempt to get the best access to the politicians.*

**Narrator 1:** November 22, 2004, the Asia-Pacific Economic Cooperation conference.

**Narrator 2:** U.S. President George W. Bush renews his commitment to his guest-worker plan.

**Bush:** I've proposed reforms that will match foreign workers with willing American employers when no Americans can be found to fill the jobs, a system that would grant legal

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\* The cast members of the *Living Borders* performance are Corey Atkins, Eliseo Josué Jacob, Ernesto Manzano, Rachael Miller, Megan Sullivan, and Ellen Underwood. Director: Claire Canavan; Dramaturg: Patrick McKelvey; Dramaturg and Coproducer: Kevin Hodges; Dramaturg and Coproducer: Shannon Baley; Script Developer: Megan Sullivan; Faculty Advisor: Stacy Wolf. Special thanks are given to Oscar Brockett, Charlotte Canning, Jill Dolan, Karen Engle, Sharon Grady, Cheryl Green, Adam Salamon, Eve Tulbert, Mary Catherine Vigness, and Elizabeth Wilson.

status to temporary workers who are here in the country working; that will increase the number of men and women on the path to American citizenship.<sup>19</sup>

*Slide: Picture of busy border crossings at Juarez or Nogales, jammed with cars, people, etc.*

**Narrator 3:** [In a recent meeting], Bush conceded a point that [Mexican President Vicente] Fox and his aides have been making: legalizing the flow of large numbers of immigrants would free the U.S. Border Patrol to concentrate on terrorists, drug smugglers, and other security threats.<sup>20</sup> Mexican President Vicente Fox.

*Slide: Waving American and Mexican flags.*

**Fox:** The climate favors advancing toward an internal migratory agreement that will permit migration flows and respect the human and worker rights of Mexicans.<sup>21</sup> We're not after amnesty for [illegal immigrants]. [We want to] legalize the work that Mexicans are doing in the United States, with dignity, with productivity, and making that economy more productive.<sup>22</sup>

**Bush:** I told President Fox that I had campaigned on this issue . . . . I made it very clear, my position, that we need to make sure that where there's a willing worker and a willing employer, that that job ought to be filled legally in cases where Americans will not fill that job.<sup>23</sup>

*BUSH shakes hands with FOX and poses, as if for a photo opportunity.*

**Narrator 1:** Bush's plan, not yet written into a bill, would be the first overhaul of immigration rules in eighteen years. It would allow three-year work visas for an undetermined number of the millions of illegal immigrants living in the United States. Guest workers could then apply for permanent legal status, but their applications would have to include letters from employers stating that migrants were filling the jobs that could not be filled by U.S. citizens.<sup>24</sup>

**Bush:** I'm working it.

*KENNEDY takes over the spotlight/news coverage, debating with BUSH. GARCIA, BERMUDEZ, and GONZALEZ continue packing/listening/watching.*

**Narrator 2:** Massachusetts Senator Edward Kennedy.

19. Press Release, Office of the Press Secretary, President Discusses American Dream (Aug. 7, 2004), <http://www.whitehouse.gov/news/releases/2004/07/print/20040708-17.html> (last visited Apr. 12, 2005).

20. Peter Wallsten & Richard Boudreaux, *Bush Renews Migrant Pledge*, L.A. TIMES, Nov. 22, 2004, at A1.

21. Chris Kraul & Ricardo Alonso-Zaldivar, *Congress May Reject Immigration Reforms*, L.A. TIMES, Nov. 6, 2004, at A3.

22. Wallsten & Boudreaux, *supra* note 20.

23. *Id.*

24. *Id.*



**Kennedy:** These are people who have lived here for a decade or more, put down roots, are raising U.S. children. Unless they are assured an opportunity to apply for permanent residence and ultimately citizenship, why would they come out of the shadows for a few years to risk deportation when the program ends?<sup>25</sup>

**Narrator 3:** President George W. Bush.

**Bush:** Many undocumented workers have walked mile after mile, through the heat of the day and the cold of the night. Some have risked their lives in dangerous desert border crossings or entrusted their lives to the brutal rings of heartless human smugglers. Workers who seek only to earn a living end up in the shadows of American life—fearful, often abused and exploited . . . . The situation I describe is wrong. It is not the American way. Out of common sense and fairness, our laws should allow willing workers to enter our country and fill jobs that Americans have not been filling.<sup>26</sup>

*BERMUDEZ, GARCIA, and GONZALEZ, now packed and enthused by BUSH'S speech, now approach the border. The mob of reporters, photographers, and politicians becomes less clear cut and more confused. BERMUDEZ, GARCIA, and GONZALEZ pick up pamphlets and begin studying them.*

*Slide: Summer 2004.*

**Narrator 3:** The hope for citizenship and confusion over Bush's proposal to create a guest-worker program has prompted large numbers of workers and families to surge toward the border.

*TANCREDO and HAYWORTH push forward for their moment in the spotlight, waving pamphlets, incensed.*

**Narrator 1:** Republican Congressman Tom Tancredo, Colorado.

**Tancredo:** The Republican platform on immigration smacks of doublespeak and goes against everything the American people believe should happen with our immigration policy . . . . [We] oppose amnesty [for migrant workers] because it would have the effect of encouraging illegal immigration and give an unfair advantage to those who have broken our laws.<sup>27</sup>

**Narrator 2:** The mountainous Sonoran Desert, between Yuma and Nogales, is the top smuggling entry point along the entire 1,952 mile line with Mexico.

**Narrator 3:** Through the middle of May of last year, apprehensions of crossers in the desert south of Tucson, Arizona, has jumped 60% over the previous year.

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25. Jerry Seper, *Immigration Plan Envisions 'Incentives' to Illegal Aliens*, WASH. TIMES, Aug. 10, 2004, at A1.

26. Press Release, Office of the Press Secretary, Remarks by the President on Immigration Policy (Jan. 7, 2004), <http://www.whitehouse.gov/news/releases/2004/01/print/20040107-3.html> (last visited Apr. 12, 2005).

27. Sergio Bustos, *Bush Guest-Worker Plan Angers Conservatives*, TUCSON CITIZEN, Aug. 28, 2004.

**Narrator 1:** Over 300,000 people were caught trying to enter the United States through the desert border last year.

**Narrator 2:** Recently, the Mexican government has tried to do something about this rising death toll.<sup>28</sup>

*Slides: From Mexican government's pamphlet, people crossing the desert, etc.*

*ALEJO joins HAYWORTH and TANCREDO, debating with them. As they argue, BERMUDEZ, GARCIA, and GONZALEZ slip across the border.*

**Narrator 3:** Francisco J. Alejo, Consul General of Mexico.

**Alejo:** In no way does this guide promote undocumented immigration into the United States. As it is clearly stated in the guide's introduction and back cover, the safe and appropriate way to enter any country—including the United States—is with a valid passport and visa.<sup>29</sup>

**Narrator 2:** Republican Congressman J.D Hayworth, Arizona.

**Hayworth:** The Mexican government's recent publication of a pamphlet of advice about how to cross our borders illegally is nothing less than act of deliberate hostility against the United States—an attack on our sovereignty [and] it must cease before it does permanent damage to our relationship.<sup>30</sup>

**Alejo:** The Mexican government respects the laws of other countries, including those of the United States. [The fact remains that] last year, more than 300 Mexicans died trying to enter the United States in search of jobs. The Mexican government has an obligation to take all actions to avoid this loss of life.<sup>31</sup>

**Tancredo:** [This cartoon pamphlet] is a great example of how hooked Mexico has become on remittances, dollars sent home by alien nationals working in the United States. Last year, Mexico nationals sent home \$18 billion to their families, more income than any other sources except for PEMEX, Mexico's state-owned petroleum company.<sup>32</sup>

**Alejo:** And what the American government likes to forget is that without illegal immigrants paying in \$7 billion to America's Social Security and Medicare systems for service that

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28. Timothy Egan, *Border Desert Proves Deadly for Mexicans*, N.Y. TIMES, May 23, 2004, at A11.

29. Francisco J. Alejo, *The Facts on Mexico's Guide for Immigrants*, AUSTIN AMERICAN-STATESMAN, Jan. 21, 2005.

30. Jon E. Dougherty, *Lawmakers Up in Arms Over Mexico's 'How-to' for Illegals*, NEWSMAX.COM, Jan. 7, 2005, at <http://www.newsmax.com/archives/articles/2005/1/6/155640.shtml> (last visited Apr.12, 2005).

31. Alejo, *supra* note 29.

32. Dougherty, *supra* note 30.

they can never hope to collect, these social services would be in much worse shape than they already are. This is one of the United States' dirty little secrets.<sup>33</sup>

*The politicians continue to argue—others wade in and join the name calling and finger pointing. The conflict builds to a crescendo until all combatants collapse to the ground. BERMUDEZ, GARCIA, and GONZALEZ pick their way through the tangle of bodies and sit down, exhausted. STROUD stands to the side, watching over them.*

*Slides: Sonoran desert, 130 degrees Fahrenheit, pictures of cacti, trash littering the desert, man with blisters, etc.*

**Narrator 1:** Edmundo Garcia, Mexican citizen, age twenty-eight.

**Garcia:** My feet hurt and I'm thirsty, but I will try again after a rest.<sup>34</sup>

**Narrator 2:** Ramez Bermudez, Mexican citizen, age thirty-two.

**Bermudez:** I own a twenty-five-acre farm in southern Mexico. I have a wife and two kids to support.

**Narrator 3:** Maria Gonzalez, Mexican citizen, age twenty-two.

**Gonzalez:** My sister did this crossing last summer, so she told me what to expect. I'm joining my husband in Chicago—he said that I could get a factory job starting at \$8 an hour. That's much more money than I could make back home.

**Narrator 1:** Leon Stroud, U.S. Border Patrol Agent, age forty-five.

**Stroud:** It's my job to arrest illegal immigrants and try to save their lives. I've seen thirty-four bodies already this summer. The season of death. That's what we call the hot months here in the Southwest.<sup>35</sup>

**Garcia:** I heard that the border patrols in Nogales and Juarez are way tougher than they are here since those terrorist attacks in 2001, so I decided to try to make it through here.

**Bermudez:** I can make \$200 a day picking cherries in California.<sup>36</sup>

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33. Robert Nelson, *Alien Nation*, PHOENIX NEW TIMES, Nov. 4, 2004, [http://www.phoenixnewtimes.com/issues/2004-11-04/news/feature\\_print.html](http://www.phoenixnewtimes.com/issues/2004-11-04/news/feature_print.html) (last visited Apr. 12, 2005).

34. Eagan, *supra* note 28.

35. *Id.*

36. *Id.*

**Gonzalez:** A friend of mine tried crossing in a drainage pipe between Juarez and El Paso. It's gang controlled, so they had to run the whole way, half an hour in the dark. She said she was terrified.

**Stroud:** A "10-7" means a dead car or a dead immigrant. I've never gotten used to it . . . . The hardest thing was, I sat with this fifteen-year-old kid next to the body of his dad. His dad was a cook. He wasn't fit enough to be trying to cross this border. We built a fire and tried to console him. It was tough.<sup>37</sup>

**Garcia:** I was on my third day in the desert, and I got such bad blisters I had to stop. I wore out the soles of my boots.

**Bermudez:** I walked four days in this heat. I knew what I was getting into. I've been caught four times.

**Gonzalez:** One of the women in our group sprained her ankle and couldn't go on any further. The rest wanted to leave her, but I wouldn't.

**Stroud:** Most people start off with no more than two gallons of water, weighing almost seventeen pounds, in plastic jugs. In the summer, with daytime temperatures over 100 degrees in the desert, a person would need a gallon of water just to survive walking five miles.<sup>38</sup>

**Garcia:** It's not like I'm planning to stay in the States. I'd miss my family and my home too much. I'm just trying to earn some extra money.

**Bermudez:** I paid \$1200 to a coyote who was supposed to pick me up in the desert. He never showed up and I got lost.

**Gonzalez:** We found a road and flagged down a border patrol cop. He didn't speak Spanish, but he took us to a medical aid station.

**Stroud:** I say a little prayer for everybody. You try not to let it get to you. But every one of these bodies is somebody's son or daughter, somebody's mother or father.<sup>39</sup>

**Garcia:** I will try to cross again in a few days.

**Bermudez:** I will try to cross again in a few days.

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37. *Id.*

38. *Id.*

39. *Id.*

**Gonzalez:** I will try to cross again in a few days. Who wants to go back to living with their mother-in-law?

**Stroud:** Do I favor a guest-worker plan? Sure, if it meant I was having to report less dead bodies.

**Garcia:** I heard the immigration plan was amnesty. I don't understand why I was arrested.

**Bermudez:** I don't believe they'll ever pass any kind of amnesty for people like us. Why should they when they're getting such cheap labor?

**Gonzalez:** I favor some sort of guest-worker program. But the ones that benefit the most from these proposals are American corporations and both countries' governments—

**All:** Not the workers.

*End of scene*

**Karen Engle:**

Welcome to the first roundtable. We have a distinguished group of participants. You have biographies for them in your packet, so I will just identify them briefly for you here. Alvaro Santos is an S.J.D. student at Harvard Law School where he is working on the World Bank as well as on labor law issues in Mexico. Harley Shaiken, from the University of California at Berkeley, is a member of the geography faculty and is also Chair of Latin American Studies. He works both on immigration and on outsourcing and will also be with us on the final roundtable. Willy Forbath, our very own, is a member of the University of Texas law faculty and also has an appointment in the history department. He is currently working on the history of U.S. immigration. And finally, Linda Bosniak from Rutgers University works on citizenship. She is at the law school in Camden, and her work is at the intersection of political theory and law.

Barbara Hines, who will be “setting the stage,” teaches and directs the immigration clinic at the law school here and is our rock star. I say she is a rock star because, at graduation, the students get to have read several words of thanks as they cross the stage. Most of the thanks are of course to family members, but over and over you hear students thank Barbara Hines. I counted last year, and I'm pretty sure only God received thanks more times than Barbara. Even then, it was a close call.

Barbara has been very involved with the Center from the beginning and has worked hard to make this roundtable happen today. She will start us off by summarizing some of the current legislative proposals about immigration and work, identifying some of the key points of contention that they raise. Each participant will then make initial seven- to ten-minute comments on the material after which Barbara and I will moderate a discussion.

**Barbara Hines:**\*

Thank you so much. All of you can know what my goal is going to be for the May graduation. We will all be counting.

I think this is really a very exciting panel and conference. I hope we will be able to have a really great discussion with the panelists and with the participants in the audience.

Some of what I was going to talk about was already discussed in the play that you saw, so I am going to try to limit my remarks. That will also give the other panelists more time to speak.

Our panel decided that we would like to focus on two pieces of legislation, which are included in the materials that you received. One is the Bush proposal, which is only a proposal and not actual legislation.<sup>40</sup> The other is the Agricultural Job Opportunities, Benefits, and Security Act, or AgJOBS Bill, which was just reintroduced yesterday.<sup>41</sup>

Our materials also include the Employee Free Choice Act, which Professor Shaiken will address.<sup>42</sup> We think that one of the important issues—and the purpose of this panel and this conference—is to look at immigration reform not only through legislative immigration proposals but also through the lens of labor and workers' rights.

We picked these two proposals because obviously, the first one has been suggested by President Bush, and the second one, the AgJOBS Bill, appears to have the most bipartisan support with sixty-two sponsors. The bill is also supported by agricultural interests and immigrant-worker and labor groups.

The importance of all of these legislative proposals has been discussed earlier. The undocumented population in the United States, which is very hard to measure, ranges somewhere between 7 to 10 million. Any legislation that is passed will have an enormous impact on that population. In addition, the legislation could lessen the human costs of migration so that people will not be forced to come to the United States in the way that was depicted in the play we saw.

President Bush and Mexican President Vicente Fox held a summit and began talking about migration issues three days before the attacks at the World Trade Center on September 11th. President Fox made immigration reform and guest-worker programs part of his presidential platform. After the events of September 11th, it took about three years to reinitiate this discussion. In January of 2004, President Bush began again to speak about temporary workers.

Currently, there are approximately five major bills pending in Congress.<sup>43</sup> They span from President Bush's guest-worker program; to guest workers plus some type of earned adjustment, which is the new phraseology for permanent residency; to more generous programs of residence based on having lived and worked in the United States for a certain number of years.

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\* Clinical Professor, The University of Texas School of Law.

40. Bush Proposal, *supra* note 2.

41. Agricultural Job Opportunity, Benefits, and Security Act of 2003, H.R. 3142 & S. 1645, 108th Cong. (2003).

42. Employee Free Choice Act, S. 1925, 108th Cong. (2003).

43. Border, Security and Immigration Reform Act of 2003, S. 1387, 108th Cong. (2003); Border Security and Immigration Improvement Act of 2003, S. 1461, 108th Cong. (2003); Agricultural Job Opportunity, Benefits, and Security Act of 2003 (Ag. Jobs), H.R. 3142 & S. 1645, 108th Cong. (2003); The Immigration Reform Act of 2004, S. 2010, 108th Cong. (2004); Safe, Orderly, Legal Visas and Enforcement Act of 2004 (SOLVE), S. 2381 & H.R. 4262, 108th Cong. (2004).

One of the issues that we are going to be talking about on our panel is how we decide who should come to the United States. Almost all of the proposed bills are based on work, that is, some type of employment. The only bill pending in Congress currently that is not based on the notion of employment is the DREAM Act.<sup>44</sup> That legislation will allow noncitizens who come to the United States as children and graduate from a high school or college to become permanent residents.

I think the divergence of ideas on these different proposals clearly shows that there is a great deal of debate on how to actually resolve and deal with migration issues. But the essential question is, how is temporary residency awarded? Who is eligible? What, if any, is the route to permanent residency? Will there be a route to move from temporary residency to permanent residency?

I would like to turn to the specifics of the proposals. One should note that all the proposals deal with unskilled temporary workers. It is important to keep in mind that we have always had temporary programs for professional workers including the H-1B program. (I always say that immigration practitioners speak in a secret code of numbers and letters.) So another question to consider is why it is easier for professional workers to enter the United States than unskilled workers.

The Bush proposal is only a proposal. There has been criticism that he has provided very few specifics. The bill that is the closest to the Bush proposal has been introduced by Senator John Cornyn. What are some of the basic assumptions of the Bush proposal? As you saw in the Living Newspaper performance, the assumptions are that our immigration laws do not work now but that they should work, that the laws should make us proud and should benefit the economy, and that workers should not be forced to cross the desert and risk their lives.

President Bush begins with the idea that an amnesty is for lawbreakers and that his proposal will not be an amnesty. One of the issues this raises is whether we can only look at immigration through the criminal and enforcement lenses, rather than the labor lens. There is a presumption under the Bush proposals that workers are going to go home. My question is whether that is a realistic.

While President Bush is proposing a guest-worker program, at the same time he has also made pronouncements that there has been an increase of 40% in border patrol enforcement. So, I believe, his solution is enforcement coupled with some kind of immigration reform.

How is he going to match willing workers with willing employers? The proposal really does not talk about this issue. But in other proposed bills there is a mechanism called a "labor attestation." A labor attestation is used in other types of immigration law, particularly in the professional workers' category, which is the H-1B. The proposed attestations include provisions such as a pretest of the labor market through advertising, listing the job with the state employment agency, offering the prevailing wage and certifying that the job is not available because of a lockout or a strike, and showing that there is no adverse affect on working conditions.

In order to encourage workers to return home, the Bush proposal includes payroll deductions that will be put into a tax-exempt account and will only be available when the worker returns to his or her homeland. The proposal speaks of bilateral agreements with the sending countries so that the workers can obtain credit in their own retirement system for work performed in the United States.

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44. The Development, Relief, and Education for Alien Minors Act of 2003 (DREAM), S. 1545, 108th Cong. (2003).

There is no provision in the Bush proposal for permanent residency other than through the normal channels of immigration, which is very problematic. Currently, the employment-based system for permanent residency is very difficult to navigate, particularly for unskilled workers. Another problem is the Mexican visa quotas. There is a 20,000 per country annual limitation on immigrant visas. Thus, the visa categories for Mexico are generally oversubscribed and exceed the 20,000 annual limitation.

In addition, there is very little in the Bush proposal regarding labor protections, other than a statement that the same laws that apply to other workers in the United States will apply to temporary guest workers. Another important issue deals with portability. Will the worker under these proposals be able to change jobs? While the Bush proposal states that there is a right to change jobs, there are no specifics about how that will be implemented. To conclude, this is a general overview of the Bush proposal and I hope we can talk about it in more detail during our panel.

The other proposal that we looked at is the AgJOBS Bill. As I said, the bill was just reintroduced yesterday and has much broader support than the Bush proposal. One difference between the two is that the Bush proposal deals with all types of temporary employment whereas AgJOBS focuses solely on agricultural workers. There is no requirement under AgJOBS to test the labor market for the temporary program. So I think there is a presumption that a shortage of workers exists in the agricultural industry, and therefore, there is no need to test the labor market.

A noncitizen will receive a temporary visa if he or she has already worked for a certain number of workdays in agriculture in the United States. If the temporary worker continues to work in the agricultural sector for a required period, he or she will be able to move from temporary residency to permanent residency. There is portability under the AgJOBS Bill. The worker can work in other nonagricultural industries so long as he or she continues to work the requisite number of agricultural workdays to move to "earned adjustment," which is the new term for permanent residency.

One crucial consideration is what happens to the family members. There is very little discussion of this issue in these bills. Under the AgJOBS proposal, family members who are here may remain in the United States but cannot obtain employment authorization, although they can adjust to permanent residency with the principal family member. Thus, we will have a group of family members who are lawfully in the country but who will not be able to work, at least legally, until granted permanent residency.

AgJOBS also streamlines the H-2A program, the current agricultural worker program, which has been criticized by labor groups for its lack of adequate worker protections and by agricultural organizations for its cumbersome process. The AgJOBS Bill will streamline the process by substituting a labor attestation program instead of the current system. Thus AgJOBS, like the Bush proposal, also envisions a new flow of workers.

One of the issues that Maria Echaveste raised yesterday is whether we should integrate the migrants that are already here or have a new flow of workers. AgJOBS in essence contemplates both of these issues.

As far as labor protections, temporary workers can arbitrate but only to obtain credit for the workdays needed in order to move to the permanent residency program. However, for the first time, under the AgJOBS Bill workers will have a private right of action to enforce their labor rights.

So what is lacking, or what should we be thinking about in these two proposals? I want to mention again that there are other proposals on the table but as I stated earlier, our panel decided that we would focus on the Bush proposal and the AgJOBS Bill. So, some



of the issues to consider are: What can we learn historically from previous programs that we have had? How should we define membership, citizenship, or legal status in the United States? What is the role of other countries? When one looks at the legislative proposals, they are clearly unilateral. There is no input from other countries as to how these programs might work most effectively. Finally, what labor protections are needed in order to make these not just immigration proposals but proposals that also include the rights and protection of workers?

Thank you.

### **William Forbath:**\*

Yesterday, Maria Echaveste nudged us to revisit guest-worker programs and our misgivings about them. She did so, partly, out of simple pragmatism. As Barbara Hines explained, the president has been touting guest-worker programs, and the AgJOBS Bill before Congress stands as the liberal alternative to the president's guest-worker proposal. AgJOBS enjoys bipartisan support in Congress, as well as endorsements from agricultural interests, from immigrant worker groups, and from labor groups. So, guest-worker programs are on Congress's agenda. But Maria Echaveste also had other reasons. Somewhat tentatively, she observed that the guest-worker idea seems to correspond to the real-world aspirations of many people who come across the border to work into the United States, including her own parents. A significant number of Mexicans and Central Americans do not come to the United States to stay, but instead with a firm intention to return home with money to buy a home or a business. What sociologists call circular migration—back and forth, one or more times, to work in the United States and to return home—has become a widely recognized way of life. Circular migrants are *de facto* guest workers. Yet we liberals, we on the Left, have always assailed guest-worker programs; we've always seen them as a form of indentured servitude and super-exploitation. And we've been right: past programs have been just that. But perhaps, Echaveste suggested, guest-worker programs define an area of movement and reform that we should not reject out of hand.

Sure enough, when Echaveste finished her talk, one of the great stalwarts of Left liberalism, my friend and University of Texas colleague Jamie Galbraith, objected. He said, "I don't understand why you are taking guest-worker-program expansion seriously as an alternative that we should contemplate. What possible advantage lies with it? A genuine liberal policy should be an open, generous immigration policy that welcomes newcomers as permanent members of American society and ushers them into citizenship." Echaveste conceded that Galbraith's rejoinder was a sensible one; perhaps she had been inside the Beltway too long.

I want to suggest a somewhat longer historical perspective on this unease. There is something in American political culture that has never liked the migrant who goes home. Consider the nation's founding document, the Declaration of Independence. One of the grievances that the Declaration recites against King George, one of his "injuries and usurpations" against the rights of the colonists, was his refusal to allow foreign-born subjects to migrate to the colonies and choose a new loyalty here in North America. From the time of independence onward until the late nineteenth century, Americans generally embraced the idea that to immigrate was not merely a civil but a natural right, a human right. In fact, one of the standard ways of putting the right was that every immigrant reenacts the Declaration of Independence. She comes here and she breaks her ties with some foreign monarch in order to become American. During the late nineteenth century,

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\* Lloyd M. Bentsen Endowed Chair in Law and Professor of History, The University of Texas.

movements to restrict immigration grew increasingly powerful. By the 1900s, the numbers of new immigrants of “inferior races” (Italians, Greeks, Slavs, Russian Jews, all of them seen, like Mexicans today, as belonging to “other races”) reached roughly one million a year. Yet even though vast numbers of native-born Americans wanted to close the gates on these “undesirable aliens” and their “pauper labor,” it proved extremely hard to do so. The anti-immigration forces always were met with the objection that it was part of our tradition, it was deep in the American grain, to welcome immigrants. Notice this, though: bound up with these traditional liberal notions was the idea that those who came to America came to stay, came to *become Americans*.

In fact, a very large proportion of the new immigrants of a century ago, like many from Mexico today, had no such intentions. They came to make money and return home. And vast numbers did so. Among Italian immigrants a century ago, roughly 40% returned to their homeland. They were called “birds of passage.” And one thing that almost everyone on both sides of the immigration debate could agree on was that these birds of passage, who came only in order to make money here and then return to their home towns and villages abroad, were unwanted and undesirable. No one had a good word to say for the people who came only to put away enough money to buy a farm back in southern Italy or in Greece.

One of the protests that accompanied this hostility to birds of passage was that they remitted their money back to the homeland. Much as we heard in the Living Newspaper presentation, the words were almost identical: “These Italian immigrants are not planning to settle here. And what’s more, they are filling the Bank of Italy with America’s money.” You could find in congressional report after congressional report tallies of just how much money was sent back to Italy, how much money went back to Greece: much the kind of protests that we heard leveled against Mexican migrants. Likewise, birds of passage were depicted in much the same terms Jamie used yesterday to describe what he feared would be the social traits of guest workers today. They were “unassimilable,” “unorganizable,” likely to vanish into the underclass, to become petty criminals.

And so, when in the early twentieth century America looked abroad for models of how to regulate immigration, one model they shunned was Europe’s early guest-worker program. It ran too deeply against the American grain. To confirm our hostility toward guest-worker programs, there came in the 1940s the Braceros Program with Mexico, which looked very much like the kind of indentured servitude that America’s labor spokesmen and nativists alike had abhorred. The Braceros Program tied migrant workers to a single employer. Heightened dependency underwrote heightened exploitation and helped thwart organizing or protest. Those who fled abusive employers had no legal way to find other employment. If they remained workers in the United States, they entered the “underground economy.”

I want, quickly now, to suggest that we revisit these issues. A century ago, a handful of thoughtful observers pointed out that the despised birds of passage were well suited to certain of America’s needs. If they were enacting their own life plans by coming here, making money, and returning abroad, they were also responding sensitively to America’s labor market. They came when the labor market was slack and they returned home when it was tight. If they remitted money, no matter; they added value to the American economy, and they helped improve the economic circumstances and resources of their home countries.

And today? I think we may need to take apart and reconstruct the categories of guest worker, migrant worker, and citizen worker. Some facts seem inescapable. Even if the twenty-first century American labor market acquires a much better floor, with better wages

and working conditions for so-called low-skill work, still, at least in flush times, there will remain jobs unfilled and more work to be done than workers (in our aging population) to do it. At the same time, the United States will not return to the mid-nineteenth century with its open immigration policy. No “advanced” welfare state will do so as long as significant inequalities remain among nations. We can hope, demand, and even expect that aging “first world” nations like ours will enact more liberal immigration policies that will enable more newcomers to become citizens. But there will remain a work gap, and as today, there will be Mexicans and others willing to do this work, with life plans and aspirations that don’t look toward settling permanently in the United States. They will want and deserve not only decent wages but decent conditions and medical insurance while they are here. More than that, they will want and deserve contributions to pensions and other forms of social insurance, which they will want to enjoy at home. While here, they will want and deserve a voice and a measure of real bargaining power in the workplace. Some guest workers may decide to sojourn longer than a year or two; they may want family members to join them; some, no doubt, will discover that, after all, they want to remain permanently. Some gateway to citizenship must also be provided. Could a twenty-first century guest-worker program include such features? Or, as most of us seem to assume, and as past experience suggests, are such programs destined to be oppressive and demeaning?

I don’t know, but consider these signs. For starters, the AgJOBS Bill, and even the president’s proposal, has eliminated the old Braceros Program’s bondage of guest worker to one employer. Guest workers could quit and find better work. The Bush and Fox administrations have also already made migrant workers’ social security payments “portable” into Mexico’s social insurance programs. Models of more substantial transnational sharing and “portability” of social welfare rights are available in Europe. But even here, we can and must begin to think about our systems of social provision in less strictly national terms; already, our system has acquired a transnational dimension. “Portability” across national borders means that the idea of being a worker and a long-term social rights bearer does not have to break down into a permanent American or a permanent outcast.

There remains the question of associational rights, of whether guest workers are not destined to be voiceless. Today, I read a *New York Times* article posted on the website of the Farm Laborers’ Organizing Committee.<sup>45</sup> The article describes the first union contract ever signed between farm workers and farm owners in North Carolina, and it is one covering guest workers under the H-2A temporary visa system, the nation’s current agricultural guest-worker program. The agreement not only raises wages, it also provides for a union hiring hall in Mexico as well as grievance procedures and a seniority system crafted to protect guest workers who protest or become union activists from being blacklisted, as in the past. This too offers a glimpse of a different possible future, in which the categories of guest worker, migrant worker, and rights bearer are no longer opposed.

But can the voices and associational interests of migrant workers extend outside the workplace? Can such noncitizens enjoy what we take to be quintessentially citizenship rights—of political participation and assertion? The experience of immigrant workers’ centers, such as the Workplace Project in Long Island, New York, suggests they can. The Workplace Project has enlisted hundreds of poor immigrants, most of them undocumented, and made them active participants in the organization’s battles against the brutal conditions of work in the “sweatshop economy” of the suburbs of New York City. In her recent book, *Suburban Sweatshops*, Jennifer Gordon describes the Workplace Project’s remarkable campaign for an unpaid wages statute, making quite substantial what had been New York’s

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45. Steven Greenhouse, *North Carolina Growers’ Group Signs Union Contract for Mexican Workers*, N.Y. TIMES, Sept. 17, 2004, at A16.

trivial sanctions for cheating workers of the minimum wage, to which they're entitled, even in the informal economy.<sup>46</sup> Gordon recounts these undocumented and sojourning workers' successful efforts to learn the ropes of state politics and to press a Republican state legislature to enact and a Republican governor to sign the labor reform. An extraordinary transformation in the identity of social outcasts into "noncitizen citizens," this reform was also obviously a limited one. In the event, however, it opened on to other unpredictable developments, as the reform-minded Eliot Spitzer began to wield the new law to bring multimillion dollar suits against large employers stiffing undocumented workers.<sup>47</sup> These suits, in turn, have led to settlements establishing workers' representation and grievance systems. For our purposes, Gordon's story suggests that guest workers are not destined to choose political quiescence; merely because one is sojourner in the United States does not mean that one prefers not to engage with the nation's politics.

There are other signs on the horizon. But I have talked too long, and the gist of my thinking is clear. I think that our long-standing misgivings about circular migration as part of the pattern of the American labor market are ones that will have to come to the end. I think that in the future, we will need to think much more imaginatively about the possibility that you have welfare rights, social-provision rights, that cut across borders. Thanks.

**Linda Bosniak:**\*

I'm going to talk about the debate over the membership status of insourced workers. As you know, the Bush guest-worker proposal is as much an immigration control policy proposal as it is a policy of labor provision: it's intended to drastically reduce the numbers of undocumented immigrants in this country—not through border control or interior enforcement measures (which seek to reduce the absolute numbers of foreigners residing and working here), but through a process of reclassification. Basically, the program would convert the status of existing unauthorized immigrant workers into temporary migrant workers; and in the process, it would transform the prevailing, informal undocumented labor regime into an above-board labor importation program—at least that is the intention.

You're familiar with the terms of the Bush plan such as they are. Barbara just outlined the terms of the Bush plan: under the proposal, most undocumented immigrants who are now working in the United States would be eligible to obtain a work visa in this country so long as they have a job with a U.S. employer. But these visas would be temporary, and temporary means they would provide no pathway to permanent resident status.

This last feature of the proposal—the fact that it would *not* provide an opportunity to acquire permanent residence and eventual citizenship—has been the subject of a lot of criticism by liberal and progressive commentators (many of you heard Maria Echaveste on this yesterday). The commitment to temporariness has been criticized on lots of grounds: first of all, on grounds that such a program will be self-defeating at the level of immigration control policy since a great many immigrants will decline to participate without that incentive (they'll see themselves as better off remaining off the books than registering with the government if it'll just lead to deportation down the line).

The idea of a *temporary* guest-worker program has also been criticized on various other grounds: as antithetical to our claimed liberal democratic commitments in that it

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46. JENNIFER GORDON, *SUBURBAN SWEATSHOPS* 69 (2005).

47. See Steven Greenhouse, *Rewards of a 90-Hour Week: Poverty and Dirty Laundry*, N.Y. TIMES, May 31, 2004, at B1.

\* Professor of Law, Rutgers University.

would entail toleration of a caste of metic-like, live-in servants; as fundamentally unfair, in that it fails to recognize the essential contributions these workers make to the national economy; and as fundamentally unrealistic, because it fails to acknowledge that in the *process* of living and laboring here, these workers would inevitably become part of our society in any event.

Of course, not everyone agrees with these critiques. In fact, critics from the right denounce the Bush proposal—not because it doesn’t go far enough toward granting membership to the immigrants but because it goes too far: according to Patrick Buchanan—whose views are typical—the plan “offers amnesty to millions [of illegal aliens] who broke in line, broke our laws and broke into our country . . . . Bush is not only rewarding wholesale criminality, he proposes to legalize it.”<sup>48</sup>

In response, President Bush himself takes every opportunity to *deny* that this program is an amnesty program. And he’s right if we understand “amnesty” to mean a process of offering the opportunity for full and permanent legal membership to undocumented immigrants—as the 1986 IRCA (Immigration Reform and Control Act) amnesty did. Clearly, that’s not what this plan would do. But there is an element of truth in the Buchanan charge: the plan *would* regularize the status of people previously subject to deportation; it *would* forgive the original unlawfulness and authorize their future presence. It’s just that this authorization would be “temporary” and limited, which brings us back to the original complaint.

I agree that any labor-importation program that fails to provide participants with the option to acquire permanent resident status is unfair and counterproductive. (This applies to the Bush proposal, and of course, it applies to our current undocumented labor regime as well). The question remains, though, as to what the alternative is.

The major alternative championed lately by many liberals is what’s been termed “earned legalization.” Under an earned legalization program, the immigrant gains the opportunity for legalization over time based on work to be completed in this country. There were earned legalization provisions in the AgJOBS Bill, which came close to passage but died last year; and earned legalization is the centerpiece of various bills being pressed by Democrats as alternatives to the Bush plan.

Earned legalization proposals have a certain intuitive appeal. The idea of “earning” sounds virtuous. It’s the antithesis of stealing or having something handed to you on a silver platter. Under earned legalization, the immigrant toils for this country for a period of time, and is duly rewarded as a result. Fair deal.

From a human rights perspective, it seems clear that the earned legalization model is an improvement over the temporary worker model in that it treats the contribution of the participating immigrants as worthy of social recognition. And as a matter of practical politics, it may be the best thing we’re going to get.

Still, it seems to me that earned legalization has its own difficulties. To begin with, while the immigrant is in the process of “earning” legalization, the possibilities for labor exploitation would surely be high—higher, arguably, than under a temporary program, where the immigrant has a lot less to lose if he or she loses the job. An earned legalization program would mean the ultimate in indentured labor (even if the immigrants were formally extended labor rights).

There is also the question of *which* work should be counted. The majority of people who would be eligible for earned legalization have already been here working, some for

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48. Patrick J. Buchanan, *Real Message of the Bush Amnesty*, WORLDNETDAILY, Jan. 12, 2004, at [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=36555](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=36555) (last visited Apr. 13, 2005).

many years. Why make these people work *again* in order to obtain permanent resident status? Why not recognize work already performed—the contribution already made—and make *that* the basis of legal status (retrospective earned legalization)? (There’s a precedent for this in the SAW Program (the Special Agricultural Workers Legalization program of 1986.))<sup>49</sup>

The reason the retrospective model hasn’t made much headway is that it can look too much like a reward for lawbreaking, which is something everybody has been trying to avoid. But any plan that gives undocumented immigrants the opportunity to *begin* to earn legalization through future work could be said to be rewarding lawbreaking as well (as Buchanan and other critics have argued).

We also might want to ask whether we should link legalization to performance of work at all? As many of you know, the Immigration Reform and Control Act’s<sup>50</sup> main legalization program didn’t make legal status contingent on work but rather on the fact of residence here over time. Legalization was granted, in other words, as a recognition of the social incorporation that comes with long-term residence rather than as a reward for economic contribution. To the extent the program’s success was limited, this was largely because it failed to extend the residence model far enough (what it did was impose a residence cut-off date that made many of the most recent undocumented immigrants ineligible).

Finally, even if we decide we prefer a reward-based membership model that grants membership for work done, rather than time spent as a resident, why reward only work done within the national territory? Why not make workers abroad who work for U.S. companies eligible for legalization? What’s the normative significance of “being here” as opposed to “being there”? I can’t help thinking about the Indian call-center operators with the impeccable American accents and the assumed American names and identities who work for American companies and talk to customers about the Superbowl and the local (American) weather. You could argue that these folks are among the first that ought to be offered a path to citizenship.

Obviously, this last suggestion is more rhetorical than anything else and takes us pretty far afield from any proposals that are actually on the political agenda. But we’re here to talk not just about what’s feasible but also about what’s at stake: and part of what’s at stake in this discussion about labor insourcing through guest-worker programs is the question of membership and its prerequisites.

The *reason* this is an unavoidable issue is that insourced workers are not just commodities or factors of production; they are human subjects. It’s like the Swiss writer Max Frische said of the European guest-worker programs of the 1960’s: “We wanted workers, but men came.”<sup>51</sup>

It is right for us to point out the contradictions in the views of those who insist on free trade policy while defending restrictions on the movement of labor. But this kind of internal consistency critique can only take us so far. Talking about immigration in the language of “transnational labor flows” and “insourcing” captures part of what is going on, but only a part. What is left—the remainder—is where the issues of political and social membership (and human rights generally) come in.

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49. 8 U.S.C. § 1160 (2000).

50. 8 U.S.C. § 1255(a) (2000).

51. UNESCO, Information Kit on the United Nations Convention on Human Rights, *at* <http://www.unesco.org/most/migration/convention> (last visited Apr. 15, 2005).

**Alvaro Santos:**\*

I would like to start my remarks by highlighting some important data that will help to capture the economic and social magnitude of the Mexican immigration into the United States.

Official statistics estimate that in the last thirty years, the average yearly flow of Mexican workers into the United States has increased by ten. Annual immigration went from 29,000 at the end of the 1960s to 306,000 in the year 2000.<sup>52</sup> This rise in immigration has importantly increased the population of Mexican origin living in the United States. According to the 2000 Census, in the United States, the population of Mexican origin represented 8.2% (22,954,617) of the total U.S. population (281,421,906). In this group, 8.5 million were born in Mexico, 7 million were born in the United States of Mexican parents, and 7.4 million were the second or higher Mexican generation born in the United States.<sup>53</sup>

In terms of its immediate economic impact, the money that immigrants sent to Mexico tripled in the period from 1996 to 2003 from \$4.2 billion to \$13 billion dollars. Mexico is the second largest receiver of remittances in the world, only after India and ahead of Turkey. The income received by remittances is equivalent to 26% of foreign direct investment, 70% of oil production, and surpasses tourism by 36%. Remittances represent approximately 2.1% of Mexico's Gross Domestic Product (GDP).<sup>54</sup>

What triggered the tremendous increase in Mexican immigration? Remember that there has always been immigration, including state-sponsored immigration, from Mexico to the United States as exemplified by the Bracero Program during the years 1942–64. But to understand the current phenomenon, it would be useful to review what factors have caused this dramatic increase.

There are various possible explanations for the causes of such a remarkable rise in the immigration flows into the United States since the beginning of the 1980s. The most cited include (1) demographic change, (2) economic restructuring, and (3) changes in U.S. immigration policies.<sup>55</sup> Firstly, a sustained increase in the size of population in Mexico over the second half of the twentieth century put greater pressure on the economy and the labor markets in the country as the young became economically active and found scarce opportunities for employment, turning the U.S. labor market into an escape valve.

Secondly, during this time, Mexico underwent a series of structural economic changes aimed at dismantling the development model of import substitution industrialization and introducing neoliberal economic reforms. The country embraced a policy of free trade, heralding the NAFTA as a sign of regime change; introduced a series of macroeconomic policies and a long list of regulations aimed at “deregulating” the market; established the price mechanism as the main device for allocating resources in the economy; and undertook massive privatizations of state owned enterprises.

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52. JEAN PAPAIL & ALEJANDRE JESÚS ARROYO, LOS DÓLARES DE LA MIGRACIÓN 36–37 (U. de G- Institut de Recherche Pour le Développement-PROFMEX 2004).

53. *Id.* at 35–36; see also Consejo Nacional de Población (CONAPO), Secretaría de Gobernación, *Población de Origen Mexicano Residente en Estados Unidos*, at [http://www.conapo.gob.mx/mig\\_int/series/0303.htm](http://www.conapo.gob.mx/mig_int/series/0303.htm) (last visited Apr. 23, 2005).

54. See PAPAIL & ARROYO, *supra* note 52, at 100–01; Manuel Orozco, *Worker Remittances: An International Comparison*, (Inter-American Dialogue Project commissioned by the Multilateral Investment Fund of the Inter-American Development Bank, Feb. 28, 2003), at [http://www.thedialogue.org/publications/country\\_studies/remittances/WorkerRemittances.pdf](http://www.thedialogue.org/publications/country_studies/remittances/WorkerRemittances.pdf) (last visited Apr. 23, 2005); BANCO DE MÉXICO, LAS REMESAS FAMILIARES EN MÉXICO 6 (Nov. 2004), at [http://portal.sre.gob.mx/ime/pdf/Remesas\\_Familiares.pdf](http://portal.sre.gob.mx/ime/pdf/Remesas_Familiares.pdf) (last visited Apr. 23, 2005).

55. See ESCOBAR LATAPÍ AGUSTÍN ET AL., LA DINÁMICA DE LA EMIGRACIÓN MEXICANA 7–13 (1999).

Although the effects of concrete neoliberal economic policies are still the subject of heated debate, there is a wide consensus in academic and policy-making circles that the development results of this model have been very disappointing. If we take the case of Mexico, there has been, since 1982, a decrease in the creation of jobs, a rise in unemployment, a rise in the informal employment, and a dramatic decrease in wages. The purchasing power of the current official minimum wage is calculated to be less than half of what it was in 1980.<sup>56</sup> So, this deep economic transformation has made living conditions more difficult for the majority of the population in Mexico and has stimulated the search for better opportunities abroad.

Thirdly, there is the change in U.S. immigration policies, which have an important impact on the incentives and costs of migration and thus on the numbers, characteristics, and occupation of new immigrants.<sup>57</sup>

Against this backdrop, my sense is that the current debate about reforming immigration policies in the United States is taking place in a vacuum, discussed independently in each country without considering the interrelated causes that are at the root of this phenomenon on both sides of the border. This may be due in part because we imagine the North American region primarily as a free trade area: there is free movement of goods and services and of capital, but not of labor. Free movement of labor is considered too problematic. It is immediately associated with complicated political tradeoffs that make for a different kind of regional integration, like the European one, that Mexico, the United States, and Canada did not sign up for. The result is that movement of labor is usually left out of the picture, treated as belonging to the realm of the political, not economic, integration and therefore something that needs to remain discussed among the traditional political constituencies.

My objective in this brief intervention is to challenge this distinction and propose a framework of analysis that overcomes the bias against including labor as part of the regional integration. I propose that we start by thinking of immigration as if there was a regional immigration policy, already in place, composed of both the immigration schemes in each country but also the domestic regulation in important areas of both sending and receiving countries. The most relevant domestic immigration scheme for the region is of course that of the United States, establishing concrete incentives and costs placed on different groups of people who want to migrate. These policies are currently the subject of debate in the United States and there are different possible scenarios for reform that will undoubtedly affect what kind of immigrants and how many will come to the United States in future years. But this is only part of the picture. We need to think of domestic regulations, such as employment and labor legal regimes and institutions, that greatly affect people's willingness to migrate and therefore shape the flow of people. Analyzing the interaction of potential immigration schemes and relevant domestic regulations will enable us to understand better the regulatory structure that sustains or enhances people's willingness to migrate, as well as the costs and benefits underlying this phenomenon, and will foster a discussion on how to reform this scheme with a better sense of its potential economic consequences for different groups in the region.<sup>58</sup>

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56. *Id.* at 46.

57. For an excellent summary of the different immigration programs throughout the twentieth century, see *id.* at 121–28.

58. For this analysis of transnational legal regimes, I appropriate the American legal realists' methodology as developed by Duncan Kennedy in *The Stakes of the Law, or Hale and Foucault*, in *SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* 83, 86–87 (1993).



This analysis will thus seek to connect the debate about alternative proposals for immigration reform in the United States with domestic labor regulations and policies in both Mexico and the United States. Take as an example one of the bills introduced in Congress, such as the AgJOBS Bill or the Solve Act. Any scheme of legalization of current undocumented workers and new visas for future immigrants would change immigration rules on several fronts affecting: (1) supply of labor in different economic sectors; (2) temporality or permanency of immigrants, determined by access to residence and citizenship as well as allowance for family reunification; (3) labor mobility, both external, in terms of restrictions for crossing the border during the time of the visa, and internal, with respect to portability of employment authorization and possibility to change employers; (4) wages and working conditions, and (5) immigrants' legal standing before courts to seek remedies for breach of their rights.

In my view, an analysis of the desirability and the effects of both regularization of status of undocumented workers and of the granting of new visas that stem from these proposals ought to be concerned with or should take into consideration at least three elements: first, the effects on bargaining power of workers; second, the distributive consequences among different groups of workers in the region; and third, the extent to which the policies involved create opportunities for economic development.

The first point of the analysis should lead us to consider how the legalization of currently undocumented workers and the granting of new visas would affect the bargaining power of workers across sectors and countries. Take the case of the manufacturing industry in Mexico. On first impression, one could argue that workers' bargaining power would increase. Why? Because the costs of the alternatives to the bargaining situation for these workers, such as migrating to the United States, would decrease. So, workers will depend less on their current jobs and would arguably fight to negotiate better wages and working conditions. This scenario could give workers an incentive to unionize or to create independent unions fighting for control over collective bargaining agreements. If their efforts fail, the choice of migrating would be more appealing than remaining in their current jobs and they would move to the United States. This kind of analysis, however, would require that we look at the domestic labor regulatory regime in each country and consider how the labor markets are structured. For instance, in employment law, what rules regulate hiring and firing of workers, what kind of protection exists against unjust dismissal or which rights to reinstatement or compensation? It would also require that we consider how wages and promotion are determined, whether there are limitations on hours of work per day, maternity leave, vacations, etc. In labor law, we would need to consider the rules and institutions of collective bargaining, such as requirements for the recognition of unions, as well as the limitations on the right to strike and on employers' antiunion practices. This is just a short list of considerations that the kind of analysis I am calling for would need to include to assess the potential costs and incentives that migrating would entail for different groups of workers in any given sector.

The second part of the analysis would focus on issues of distribution, that is, how would different alternative proposals and the new structure of costs and incentives affect different groups in the labor force? Again, if we take the manufacturing industry, it would be crucial to consider the effects of these policies not only between workers and employers but also among different groups of workers. There are many important intraclass distributional effects that we would miss if we don't consider the effects between unionized and nonunionized workers, but also between groups of workers across gender, race, and age lines.

So far, this analysis would help clarify the background conditions, composed by any given immigration scheme and its interaction with a domestic labor legal regime. Finally,

we can begin thinking of immigration from the point of view of economic development. And here, there is of course a wide range of possibilities.

Take as an example a policy that encourages workers' *return* to their home countries as a development policy. A program of temporary or guest workers is surely an incredibly contested topic. However, from the point of view of economic development, a policy of return could have enormous potential and it may be in the interest of a county like Mexico to encourage it. Why? Because returning immigrants would bring back incredible human capital with important economic potential and would guarantee a sustained flow of remittances to their local communities.

Such a policy could be structured by strong incentives for workers to go back. Such incentives may include (1) creating a social security fund for immigrants in Mexico for medical and travel insurance, pensions, and housing; (2) granting Mexican workers in the United States the right to vote for elections in Mexico so that they stay connected to their communities and the political events in Mexico; and (3) facilitating border crossing, thereby guaranteeing that the links between migrant workers and their local communities are not severed.

One of the immediate effects of the militarization of the border and the increase in security control since the beginning of the 1990s is that immigrant workers have found it incredibly difficult to go back and forth, following traditional seasonal movements, and have been effectively forced to remain in the United States. A policy of return would seek to reverse this trend and facilitate the circularity that has been characteristic of workers' migratory flow.

By ensuring that immigrants stay connected to their communities, a policy of return would also guarantee a sustain inflow of remittances into the country. As I mentioned earlier, remittances have become the second most important source of revenue for Mexico, after oil. On this topic, there is still much room to create financial mechanisms that smooth those transfers and decrease the onerous fees and commissions currently in place. It would be possible to introduce consumer protection devices in the United States and Mexico that allow workers and their families to send and cash money at a lower cost. However, thinking in terms of development, it ought to move us beyond guaranteeing better terms of transferring money to envisage strategies for investment programs in local communities. Almost all remittances are currently spent in consumption, with very little impact on savings or investment.<sup>59</sup> The point would be to channel those resources to their most productive use, designing strategies for investment in local or regional communities that would spur economic growth. Although the Mexican government (at the federal, state, and local level) has launched some initiatives to encourage immigrants to invest in their local communities by agreeing to match or even double every dollar spent in these funds, these programs haven't been very successful. Again, this seems to suggest that what is lacking is a strategy on where to channel these resources and how to allocate them more productively, creating the linkages between different economic sectors that can stimulate growth.

Moreover, the prospect of creating a regional development fund should be advanced more forcefully. The experience of the European integration shows that these funds played a key role in leveling economic conditions in countries like Spain, Ireland, and Greece that lagged far behind the most developed European countries in income per capita levels and wage differentials. Well-targeted projects helped boost economic conditions in countries that were large senders of immigrants and that, in turn, made immigration manageable and enabled a remarkably fast economic and political integration in the region.

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59. PAPAIL & ARROYO, *supra* note 52, at 99–100.

Finally, there is the inevitable and important question of how these policies can be negotiated by the governments given the pressures and tradeoffs of their own constituencies. Again, the range of possibilities is ample. Take the issue of border security, which figures prominently in the current reform proposals and is a primary concern for the United States. Mexico has an important bargaining chip in this area and could advance some proposals in exchange for the policies it wants to undertake. For instance, it can offer to establish buffer zones or preclearance zones in Mexican territory so that the traffic and the burden of security control at the border decreases. There are of course many imaginable arrangements, but the point would be to acknowledge the interests of both countries while thinking of immigration primarily in terms of economic development.

In conclusion, I would submit we have to recognize that immigration is a phenomenon inexorably related to the labor markets in both countries and that the costs and incentives that produce these flows are structured by the interplay of already existing immigration schemes with employment and labor regimes in both countries. The current debates about immigration reform in the United States and Mexico present an opportunity to reformulate the terms of the discussion and begin thinking of immigration as a development policy. Thinking of immigration as a drive for economic development in the region would require a strategy. Such a strategy would no doubt need to be implemented through specific laws and policies that will be the subject of heated debate. But we need a better analytical framework, like the one I have sketched here, to understand the causes of immigration and the consequences that different immigration schemes and their interaction with domestic regulation may have among different groups in society. If we are interested in immigration as an important source for economic development, we need to have an idea about the opportunities created by these legal regimes, the kind of policies that would be desirable, and the best strategies for negotiating them. This is, I think, the challenge we are facing. Thanks.

### **Harley Shaiken:**\*

Looking at immigration through the lens of labor offers a particularly valuable perspective. The question of worker rights is crucial and the respect of these rights for immigrants—documented and undocumented alike—defines the workplace for all workers. More generally, the issue of jobs is central to the debate on immigration on both sides of the border: the number of jobs, the quality of jobs, who wins, and who loses in the labor market.

Mexico is clearly a pivotal source of migrants to the U.S. In the 1990s, a quarter of all documented immigrants—a record 2.2 million people—came from Mexico.<sup>60</sup> Over half of eleven million undocumented immigrants—6 million people—were of Mexican origin as of March 2005.<sup>61</sup> Immigration is of course a complex, multifaceted phenomenon. As Douglas Massey points out, “emigrants are created by social and economic transformations in societies undergoing rapid change as a result of their incorporation into the global market economy.”<sup>62</sup> He observes that immigration “is simply the labor component of a globalizing market economy.” Although many factors drive immigration, Jeffrey Passel emphasizes

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60. Douglas S. Massey, *Closed-Door Policy*, 14 AMERICAN PROSPECT, Jan. 30, 2003, available at <http://www.prospect.org/print/V14/7/massey-d.html> (last visited Apr. 16, 2005).

61. JEFFREY S. PASSEL, ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION (2005).

62. Massey, *supra* note 60.

that “what drives the growth in immigrant populations in general is employment opportunities.”<sup>63</sup>

In terms of Mexico, a key issue is development. Simply put, rapid growth creates jobs. In Mexico in recent years, the economic growth rate has been anemic to nonexistent. Growth in GDP limped along at a rate of about 2.5% between 1995 and 2003.<sup>64</sup> In contrast, the workforce jumped from about 32 million prior to NAFTA to slightly over 40 million in 2002.<sup>65</sup> In other words, Mexico needs to create a million or so jobs a year just to stay even. Instead, it has been creating far fewer jobs annually. Is it any great surprise that hundreds of thousands of Mexicans migrate to the United States every year looking for work?

Ironically, as U.S. spending on border control achieved record levels, undocumented migration rose. U.S. Border Patrol officers doubled and the agency’s budget headed toward \$1 billion between 1985 and 2000.<sup>66</sup> What were the results of these efforts? In the period from 2000 to 2004, the average annual growth rate of undocumented migrants was about 485,000 per year, almost 60% of whom are estimated to be from Mexico.<sup>67</sup> Yet the issue of development has been discussed, if it is discussed at all, as independent of the issue of immigration. Unless the U.S. government is able to put development on the political agenda and is able to talk seriously about an ongoing program of development aid and loan guarantees to Mexico, no amount of fences, no investment in border enforcement is going to make much of a difference. It will redirect the crossings—tragically to more hazardous and at times deadly locations; it will not stop the flow unless the underlying forces causing the movement of people are addressed.

On the U.S. side, a central issue framing the discussion of immigration policy is economic prosperity particularly during a period when the job situation is weak and uncertainty characterizes the working life of millions of Americans. Immigrants undeniably make a critical contribution to this economy through the jobs they work, through the dedication and hard work they bring to those jobs. But they also make an unintended and unfortunate contribution to this economy because their wages are so low, not simply because of low skills, but because their very vulnerability leads to low wages. And vulnerable immigrants are an ever-larger part of the U.S. workforce. Moreover, the very vulnerability of immigrants puts considerable pressure on all workers.

In the 1990s, immigrants resulted in close to 50% of the new entrants in the workforce.<sup>68</sup> In this decade, they have resulted in at least 60% of the new entrants into the workforce between 2000 and 2004.<sup>69</sup>

How do these immigrant workers fare on the job? To answer this question, one has to look at the broader context of labor rights in the United States. Without examining this

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63. Sylvia Moreno, *Flow of Illegal Immigrants to U.S. Unabated*, WASH. POST, Mar. 22, 2005, at A2.

64. See UNITED NATIONS, ECONOMIC SURVEY OF LATIN AMERICA AND THE CARIBBEAN: 2003–2004 at 248 (2004), available at <http://www.eclac.cl/publicaciones/DesarrolloEconomico/5/LCG2255PI/Mexico.pdf> (last visited Apr. 16, 2005).

65. Sandra Polaski, *Jobs, Wages and Household Income*, in NAFTA’S PROMISE AND REALITY: LESSONS FROM MEXICO FOR THE HEMISPHERE 11 (2003), available at [http://www.ceip.org/files/pdf/NAFTA\\_Report\\_Chapterone.pdf](http://www.ceip.org/files/pdf/NAFTA_Report_Chapterone.pdf) (last visited May 19, 2005).

66. Massey, *supra* note 60.

67. PASSEL, *supra* note 61, at 3.

68. ANDREW SUM ET AL., FOREIGN IMMIGRATION AND THE LABOR FORCE IN THE U.S.: THE CONTRIBUTIONS OF NEW FOREIGN IMMIGRATION TO THE GROWTH OF THE NATION’S LABOR FORCE AND ITS EMPLOYED POPULATION, 2000 TO 2004, at 2 (Ctr. Labor Mkt. Stud., 2005), [http://www.nupr.neu.edu/7-04/immigrant\\_04.pdf](http://www.nupr.neu.edu/7-04/immigrant_04.pdf) (last visited Apr. 17, 2005).

69. *Id.* at 11–12.

context, language seeking to protect immigrant worker rights in proposed guest-worker programs will not make much of a difference overall.

The issue of labor rights, however, underscores a troubling paradox: at a moment when both American workers and immigrant workers are most vulnerable, the labor movement is at its weakest. For those who missed the mid-1920s, we are back to the union density of the mid-1920s: about 8% of the private-sector workforce.<sup>70</sup>

Why do unions have such a low density? Is it that American workers have decided they no longer need protection? Not really. Polls tell us that over 45% of workers want a union or feel a union would be a good thing to have in the workplace.<sup>71</sup> Yet only 8% have them. This yawning gap between those who say they desire a union and those who have one amounts to a “democracy deficit.” It reflects the severe erosion of labor rights in the United States in recent decades and of course the most vulnerable workers are the most negatively affected.

To the extent that the Wagner Act, passed in 1935,<sup>72</sup> was historically referred to as “labor’s Magna Carta,” we are headed very rapidly toward the Dark Ages today in terms of repealing the Wagner Act. Not legislatively, but through court decisions, aggressive employers, and hostile appointments to regulatory boards. On the ground, it has become ever more difficult, at times outright hazardous, to join a union.<sup>73</sup>

This grim situation may seem to take us far afield from the whole debate over immigration, but I would argue it is central to that debate. Because unless we explore the issue of labor rights, unless we explore the broader issue of development, then no set of immigration proposals—as important as they are, and as immediate as the need for these proposals is—is ultimately going to redress the underlying issues that shape immigration on the ground.

One possible legislative contribution to the issue of labor rights in the United States is the Employee Free Choice Act sponsored by Senator Kennedy and Representative George Miller.<sup>74</sup> In a word, the Employee Free Choice Act restores the original intent of the Wagner Act and the original practice of the first decade of that legislation, allowing workers an additional method of indicating that they want a union through simple signing of a petition or checking of a card. The bill currently has 211 sponsors in the House and thirty-nine sponsors in the Senate. While the bill has little chance of passage anytime soon, given the correlation of political forces in the House and Senate, it nonetheless indicates an important and realistic alternative.

Ultimately, the oldest slogan of the labor movement ought to be the slogan of all workers today: an injury to one is an injury to all. It is the cornerstone of a democratic society.

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70. Press Release, Bureau of Labor Statistics, U.S. Dep’t Labor, Union Members in 2004 (2005), <http://www.bls.gov/news.release/union2.nr0.htm> (last modified Jan. 27, 2005).

71. AFL-CIO, *The Silent War: The Assault on Workers’ Freedom to Choose a Union and Bargain Collectively in the United States* (2002), [http://www.aflcio.org/aboutunions/joinunions/howjoin/upload/vatw\\_issuebrief.pdf](http://www.aflcio.org/aboutunions/joinunions/howjoin/upload/vatw_issuebrief.pdf) (last visited Apr. 17, 2005); see also RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* (1999).

72. 29 U.S.C. § 141 (2000).

73. See HARLEY SHAIKEN, *THE HIGH ROAD TO A COMPETITIVE ECONOMY: A LABOR LAW STRATEGY* (Ctr. Am. Progress, June 25, 2004), <http://www.americanprogress.org/atf/cf/%7BE9245FE4-9A2B-43C7-A521-5D6FF2E06E03%7D/unionpaper.pdf> (last visited Apr. 17, 2005).

74. Employee Free Choice Act of 2003, H.R. 3619 & S. 1925, 108th Cong. (2003); AFL-CIO, *Kennedy, Miller Introduce Employee Free Choice Act in Congress* (Nov. 24, 2003), at <http://www.aflcio.org/aboutunions/ns11242003.cfm> (last visited Apr. 16, 2005).

*Discussion***Engle:**

Thank you all. That was fabulous and I think we have time for at least one exchange between the group before we pull in the audience. Let me try to identify a tension I see in the discussion and see if I can get the discussants to comment on it.

It seems to me that Barbara, Willy, and Linda were focused on one side of the border and Harley, to a certain extent, and Alvaro on the other. On this side of the border, the questions are about who is coming here and how should they be treated when they get here. With that focus, the problem with the Bush guest-worker proposal was in part, and I think this was part of Maria Echaveste's point yesterday as well, that it confers at best second-class citizenship. So that a lot of the critiques of the Bush proposal from liberals and the Left is that it does not provide any kind of meaningful participation or citizenship on the part of people who are coming as guest workers.

But then Harley started to move us across the Mexican border and Alvaro really took us there. Alvaro raised the possibility that Mexican workers might not want to stay here and that it might not be in the best interest of Mexico for them to do so. That's a position often taken by conservatives here and could be seen to support the guest-only nature of the Bush proposal. Of course, by talking about development, Harley and Alvaro were bringing in issues not traditionally addressed by conservatives and made us consider the impact of our laws on economic development as well as on meanings of citizenship on the other side of the border.

I am wondering whether we could push the discussion, perhaps in the way already begun by Alvaro's imagination of a new, European-style, free trade agreement that really did include movement of workers. I wonder, though, what such an agreement would do to some of the attempts to ensure full participation on this side of the border—concerns raised by Willy and Linda but also by Harley in his discussion about the lack of unionization and worker protection in this country, even for many people with legal citizenship.

In a way, I see the greatest tension perhaps between Linda and Alvaro on this. So maybe I will get the two of you to start, beginning with Linda.

**Bosniak:**

Okay. It is true that three of us were more internally focused and Alvaro was the one who was taking us outside the national, state context.

I think one way that we can try to open the discussion about membership beyond the borders of our political community is to talk about the practice of birthright citizenship in general. We defend the assignment of citizenship based on birth in the territory as a very important, fundamental right, and it is better than lots of alternatives including the alternatives in our own nation's history.

But we could argue that worldwide, the birthright citizenship regime is very problematic and might run very counter to commitments to human rights in general. I mean, this is really to open it up, but if you are saying that we need to, and I think we do, then why not ask maybe one of the hardest questions, which is: people are assigned a membership status at birth. And in a world of drastic inequalities, the fact of such assignment has all kinds of economic and social and political implications. Don't these need to be addressed?

In other words, the background premise in all of our discussion is the principle of assignment of membership based on a happenstance of birth. Again, we tend to defend that given the alternatives and given the history. But perhaps in a conversation about membership and human rights, this shouldn't be so easily taken for granted. The entire discussion about cross-national movements, whether for labor or other purposes, is set in the framework of a world-wide birthright citizenship regime—one that structures people's prospects and choices fundamentally.

**Santos:**

I think that is a very important insight, revising how we think of citizenship or full membership in a society. We usually take for granted our citizenship laws and the rights and exclusions that are associated with them.

Citizenship is not the only way to guarantee immigrants the benefits of membership in a society. There have been many studies on the pattern of immigration flows analyzing how communities stay connected through strong networks despite national boundaries. Studies analyzing the networks from communities in the five or six more important sending states in Mexico to their communities in the United States report that the incidence of people going for certain years and coming back is high. Of course, there are also people who would like to stay in the United States.

But if I were a policy maker, what I would do is try to bring back as many people as possible, after they have spent certain time abroad, to their local communities where they still have links. This policy will seek to take advantage of their experience and their human capital. The point is how to take advantage of the people who are the most entrepreneurial, who have left their country at great peril, and who have worked very hard for many years.

Lastly, going back to what Willy proposed in his remarks, we should start thinking of rights, welfare rights for immigrants, and ways in which we can guarantee them without linking them to citizenship. We need to devise mechanisms to enhance the well being of immigrant workers without making them contingent on their citizen status in any given country.

**Forbath:**

I think in the same spirit as Alvaro—perhaps he put the point more sharply. What is citizenship good for? What are we talking about when we are talking about citizenship? Why should it matter?

I think Harley is right when he says in the context of this conversation, what matters for both those who want in and those who want them out is work and the quality of work and what work brings with it. And what matters about citizenship on the ground is what kinds of freedoms and rights you have at the workplace, both in respect of what is the floor, that is, the minimum you earn. And also in respect of things that resonate most with human rights mavens like “dignity” and “association.” And more concretely and importantly, the right to organize and bargain with your employer.

To the extent that Mexicans and Americans alike can enjoy those rights in some more robust form, we will have gone a long way toward raising the level and easing the nastiness of the immigration problem and the illegal problem.

So that to be riveted on citizenship in the abstract instead of what citizenship means on the ground, seems to me, a big mistake.

**Shaiken:**

One of the things that has been very refreshing about everyone's commentary on the panel is that it has opened up the discussion in some important new ways. But I think it is important not only to open it up but also to narrow it down a bit as well.

You began by saying that there are two proposals out there: President Bush's, which is still very vague, and the AgJOBS Bill, which is quite specific. The AgJOBS Bill is very important given the broad base of support it has generated from the growers to the farm workers union. I think there are two criteria by which to judge it and then try to relate it back to our broader discussion.

The first criterion is, will it make life a bit better for those who are affected? I think it will.

The second criteria is, will it encourage or retard future change that we would call progressive? I think it will encourage future change.

So that gives us an opportunity both to focus on the immediate and critical issue and then the broader concepts of citizenship, development, worker rights, and human rights that we have brought up here. They ought not to be two separate discussions but we need to keep both in the same discussion.

**Engle:**

Can you say another word about why you think it will make life better for those who are affected and why you believe it will encourage progressive change because, when you asked the question of yourself, I could easily imagine your answer being "it will not."

**Shaiken:**

I think it is an imperfect bill. But I also feel it is hardly accidental that the United Farm Workers endorse the bill. Their members feel that the worst of all possible worlds is the current situation. To climb out of that, even modestly, is going to require a broader coalition that supports something like this.

It would be easy to give many specific criticisms of where the bill is inadequate, and I think we should not mute that. But given what might be possible and what might push ahead, something like this bill offers a realistic possibility.

**Engle:**

Does everyone agree with that? Linda, do you want to dissent?

**Bosniak:**

I wanted to respond to something Willy said, if I can, in response to Barbara.

Barbara talked about the need to shift the paradigm or the lens from an enforcement model to a labor model, and I believe it is very important that we do that in talking about immigration. No question. But I do not think we can stop at labor.

I think I heard in Willy's comment a kind of reductionism: a tendency to reduce the various dimension of membership to the question of labor and labor rights. (Although I doubt he would defend doing this if pressed further.)



But it seems to me we have to talk about immigration in a way that goes beyond both enforcement *and* labor; we need to talk about political participation, social recognition, economic rights, and other sorts of dimensions of human rights, both within and across borders, that are not contingent on work specifically. I did not hear that in what you were saying.

**Forbath:**

I suppose I would still try, at least for the sake of discussion, to stick with a stern line. People who emigrate to America—the poor and working class people who come to America, that is, the sort of constituents we are talking about—come in order to work and to improve their lives, whether to remain here or not. They most definitely aspire to membership in the sense of a freedom to speak, freedom to associate, create a community life. At the same time, they do so whether they envision themselves as permanently here or not.

So that I am not thinking that we should not insist on a conception of a program of movements of peoples who come as mere rights to work. Workers, not persons. Or workers, not men and women.

But I do not think it is as important, as you may, to assail the idea, for example, of earned legalization. I think that there has to be some way to give form, shape, and boundaries to a notion of a person who is coming here to work but may want to stay. I do not hear them necessarily saying that, “We just want to come, be in America, and unconnected to our working here, be entitled to full citizenship and full membership.”

So I think to insist on decoupling work from the acquisition of citizenship rights is to put the Left and progressive voices outside of what is most urgent for them and not along a path that builds towards the most liberal and generous kind of policy.

I do not think tying work and citizenship rights is such a bad idea as long as what comes with simply being a working person here is a robust set of rights to associate, rights to organize, rights to speak out, rights to social provision. Those seem, to me, to have more traction, both in the polity and in the aspirations of the people who come here.

**Engle:**

The interesting thing about that is that Barbara started off by talking about how the AgJOBS Bill actually does not offer legal status to people who accompany workers to the country. So if you want to tie citizenship to work, you have to be clear about what your conception of that would be. If one family member were in the paid labor force, would that be sufficient for the whole family (however that then gets defined)?

**Forbath:**

You have to tie the family as well.

**Engle:**

And there are also issues about what does and does not count as labor in this country, to which I imagine Linda was alluding.

**Bosniak:**

Right. And in fact the data that I have seen from sociologists of immigration show that a very large percentage of people come to this country not specifically to work but to rejoin family. There are of course also other kinds of reasons that people come having to do with flight from violent and disruptive situations as well.

But with regard to work, it may be that the anchor migrant somewhere along the line came to work but that initial migration has generated whole networks of migration that do not specifically turn on work anymore, at least not directly.

**Engle:**

Barbara is going to pose a question, and then we will open it up to the audience.

**Hines:**

I just thought the discussion about remittances was very interesting because Willy first talked about how remittances, historically, had been rejected. That the Italians were not supposed to send the money back and then they were not participating. And then Alvaro was talking about how important remittances were and so was Harley, in terms of development.

I think there really is a kind of different contradictory feeling among people in the United States about whether remittances are a good way to sell immigration reform because this is the way that we can develop in Mexico. Or whether this is a way of saying that immigrants do not really fully participate because what they are doing is they are just coming here and sending money back.

So I am just interested in your comments on the relationship between the issue of remittances and membership here and development in the other countries. For example, the Salvadorian government hired a lobbyist, at one point, to try to keep Salvadorians here after the end of the civil war because they needed the remittances. One-third of the economy in El Salvador is remittances; probably more than that are sent home. That is my question to the whole group.

**Shaiken:**

Do you want Alvaro specifically, or myself?

**Hines:**

Anyone. I just think the issue of the historical change in the role of remittances in this discussion is the question that I am raising.

**Shaiken:**

In terms of selling immigration reform in the United States, remittances do cut both ways.

In the context of the home country, they are absolutely vital but not really a development strategy. They keep people, families, and communities afloat. They do not necessarily result in the changes in infrastructure that are going to be necessary to have sustainable development and stronger economic growth. That would require a broader

partnership between the U.S. government and a country such as Mexico, whether through grants, loans, or loan guarantees in areas such as education and infrastructure.

One small example stands out. Mexico has an important new program called The 3-for-1 Program where hometown associations in the United States contribute funds that are then matched in Mexico. The Mexican government at various levels matches each dollar with three dollars and these resources are invested in communities.<sup>75</sup> I have visited a number of these sites. They are impressive. But what are the projects? Paved streets. A church. Projects like that. Very important to making people's lives a little bit better, but we have to look at the broader notion of how we work with Mexico or with the countries of Central America on crafting a broader development strategy.

The EU, in a much more elaborate way, provides a model. It can be done. What we need is the political will and the awareness to do it.

### **Question 1 (Michael Churgin, The University of Texas School of Law):**

This will be sort of scattershot in terms of what Willy was saying. Mexico now has a socialization agreement on Social Security. There has been a lot of criticism by the Right about socialization agreements. The Social Security administration of the two governments just worked it out themselves.

In terms of the remittances, the program that is now in effect with the Mexican consulate is giving out the cards. Several banks, such Wells Fargo Bank as well as others, have now signed on to make the remittances electronic, essentially to cut out the payments that were made to the various entities where you have to pay huge percentages to send the money. It has become a huge business, actually, for banks and they have become very supportive of keeping that up.

Going to Barbara's point about the AgJOBS Bill, I think in many ways the lack of family in the AgJOBS Bill mirrors what happened with IRCA. The IRCA bill in 1986 did not have anything for the families. So if you qualified, the family was left in limbo, which really drained immigration visa places, and they had to create a special category for these individuals. And I think that aspect, in many ways, is a remedy for disaster.

It is remarkable that the special agricultural worker program ended up dwarfing the regular legalization program—that more people ended up being legalized under the special agricultural worker part than under the general legalization part, which was not the theory when legalization went through. But part of it reflected the large role of the agricultural businesses in supporting the special agricultural worker program.

I think the compromise with the AgJOBS Bill, with the unions signing on, is really a crucial step and is building into the program some labor protections. As you all know, the Legal Services Corporation is barred from grantees or barred from assisting anyone but H-2A's in terms of representing individuals who do not have status in the United States in terms of issues of labor rights. H-2A's were the only exception put into the IRCA bill, and having some right of redress for labor will, I think, assist if the AgJOBS Bill could ever go through.

### **Question 2 (Sarah Cleveland, The University of Texas School of Law):**

I will exercise my prerogative as keeper of the microphone. This is an excellent panel, and I thought raised a lot of very provocative issues. I just wanted to make one

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<sup>75</sup> Ginger Thompson, *Mexico's Migrants Profit From Dollars Sent Home*, N.Y. TIMES, Feb. 23, 2005, at A1.

comment in response to Willy's very optimistic view of American attitudes toward labor and immigration, which is that we also, of course, have a parallel, much darker history.

At the same time that the independent Declaration of Independence was complaining about restrictions on immigration, we were forcibly importing slave workers. We had systems of indentured servitude. After the Civil War, they were replaced with systems of Jim Crow and contract labor in the South, coolie labor, *padrone* systems. And after African Americans became insufficiently available in agriculture, we adopted the Braceros Program and the H-2 programs.

So it seems to me that in many ways, the modern guest-worker programs are something of a melding of these two kinds of open-arms immigration traditions and then very coercive immigration-labor traditions.

I just want to tie this panel to this afternoon's panel by noting that all of the guest-worker proposals, even the most progressive AgJOBS Bill, are, in part, about protecting a ready supply of cheap labor for agriculture. And that this is a jobs sector that we have basically conceded to immigrant labor, that we have adopted the position that no American will take these jobs. If you unpack that, that means we are not willing to require agriculture to pay what it would take to get other people to take these jobs. And it might even mean that if they did have to pay that, they would go somewhere else, and agricultural production would be outsourced.

In other words, what we are essentially doing is saying that we are giving a subsidy to agriculture to keep the production in the United States, whereas the alternative might be for it to go overseas. I just would like to hear you comment on that, if you have thoughts.

**Engle:**

Do you want to respond, Willy, to the first part?

**Forbath:**

I think that Sarah is absolutely right that the guest-worker programs today, and those even on the table, are descendants on the one hand of a dark tradition of unfree labor infused with a sort of optimistic strand that one can recast these programs and make them humane and dignifying in one or another fashion.

Obviously, the thrust of what my remarks were is that it is worth at least contemplating pushing that as far as it can go. Not necessarily in the direction we often do, and rightly so, which is toward permanence but toward saying they won't do unless they provide permanency of citizenship—not because that isn't important but because that is our reflexive reaction.

There may be another way to push them as well, which is toward some conception of a transnational citizenship. There are millions and millions of people whose own aspirations, not whose straightened circumstances but their aspirations in the best of all worlds, are not necessarily toward permanency in the United States but to an identity that has them feeling quite at home and rights bearing in the United States, and also at home in Mexico or elsewhere.

That always was not just the faith of immigrants to the United States but the aspiration. And it is not an aspiration we have ever dignified. I detect some of our historic frown on them that want to go home, lingering over this conversation. So that was my impulse.

**Engle:**

Alvaro, do you want to respond to the second part of the question?

**Santos:**

I would like to provide a little bit of perspective because the focus has been mainly placed on agriculture. The composition of the Mexican immigrant workforce in the United States experienced a dramatic change from agriculture to urban jobs since the 1970s.

Just to give an impressionistic overview, in 1990, 37% percent of young Mexican men and 50% of young Mexican women worked in manufacturing. The industries in which Mexican men were most employed were machine operator with 13%, manual and precision jobs with 17%, and transportation with 15%. Agriculture followed with 11%. And women's contribution in nonagricultural jobs is even greater: in services, 21%; machine operator, 20%; administrative care, 10%; and agriculture, 4%.

I completely agree that any program of guest workers has to take into account the problems that Sarah Cleveland raised and the history of incredibly problematic abuse and exploitation.

But when we talk about immigration, while the spectrum is incredibly wider than just agriculture, it is usually underestimated. So it is important to think of mechanisms we can devise for immigrant workers in all these different sectors to have access to rights and remedies without making them dependant upon permanent residency or citizenship.

**Hines:**

And I might just add to that. All of the other bills, the ones that we did not talk about, actually have temporary worker bills that include all sorts of other sectors: the Hagel-Daschle bill, the McCain bill, Senator Cornyn's bill.

**Shaiken:**

Yes. Just two very brief comments. First, Sarah Cleveland is raising an excellent point. The notion that is often used, "Well, look. Americans won't work in this sector or at these jobs," is misleading. Where people work depends on what the wage rate is. The very basis of neoclassical economics is basically abandoned with the statement that "Americans won't work at certain jobs." Nonetheless, the statement is repeated so often we think it is true.

Second, on guest workers more generally. Every time I hear the term, I seem to replay the first thirty seconds of the famed CBS documentary *Harvest of Shame* in my mind. The whole history of these programs is flawed. That said, in the contemporary political context, in something like the AgJOBS Bill, that is the price of passage. If that is the price of passage and that tradeoff is worth it, then there can be less problematic guest-worker programs versus far more problematic approaches.

In general, what we need is the broader transformation of the U.S. labor market and labor rights that I spoke about. I do not view that as utopian. I view that as realistic, but not necessarily something that is going to happen soon. Something like AgJOBS could address a really tough issue in a modestly more effective way.

**Hines:**

I am going to close this way, but I hope this does not mean that we are going give up trying to advocate for some of these programs. There was an article in *The New York Times* today concerning a bill banning driver's licenses for immigrants and also really making some very severe restrictions on asylum.

But in the context of this, the article in *The New York Times* ended with: "Senator Trent Lott, Republican of Mississippi saying, 'The President's guest worker is not going anywhere. Period.' Mr. Lott added, 'He needs to go ahead and accept it. We are not going to do anything that looks like, smells like, or in anyway resembles amnesty. Period.'"<sup>76</sup>

**Engle:**

Well that was not meant to be such a downer. But we are going to keep talking about it.

**Hines:**

That is what I said. We are going to keep talking about it, but it does show that one of the things that we did not really talk about is how much opposition there actually is to some of these programs.

**Engle:**

So thank you very, very much to the panel and the audience for a fabulous discussion.

## V. ROUNDTABLE II: OUTSOURCING

**Chair:**

Sarah Cleveland, *The University of Texas School of Law*

**Participants:**

Dan Danielsen, *Northeastern University School of Law*

James K. Galbraith, *The University of Texas LBJ School of Public Affairs*

Tom Green, *Dell Computer*

Sharmila Rudrappa, *The University of Texas Department of Sociology*

Chantal Thomas, *Fordham University School of Law*

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76. David D. Kirkpatrick, *House Passes Tightening of Laws on Immigration*, N.Y. TIMES, Feb. 11, 2005, at A13.

## ***LIVING BORDERS***

### **SCENE TWO: WORLD TOUR**

**Characters (in order of appearance):**

**Narrators (3):** Like the reporters in Scene One, tour guides to the landscape of the discussion, business like and no nonsense

**Joyce Harrison:** U.S. citizen, African-American, former Mr. Coffee employee (age forty-eight)

**Lillie Scott:** U.S. citizen, African-American, former Mr. Coffee employee (age fifty-something)

**Alejandra Castilleja Rodriguez:** Mexican citizen, former Mr. Coffee employee (age forty-two)

**Guadalupe de los Santos:** Mexican citizen, mother of murdered woman

**Mexican Official**

**Rick Stanco:** U.S. citizen, supervisor at a North Carolina plant of Furniture Brands International

**Chinese Official**

**Miss Quin:** Chinese citizen, employee for Wal-Mart in Dongguan, China (age thirty-something)

**Karen X:** U.S. citizen, former employee of Bank of America employee (age thirty-something)

**Day Veerlapati:** Indian citizen, president and CEO of U.S.-based information technology (IT) company with outsourced jobs in India

**Ernestina Miranda:** Naturalized U.S. citizen of Mexican descent, late forties, former employee of VF Jeanswear in El Paso, Texas

**Raquel G. Ortiz:** U.S. citizen, former employee of VF Jeanswear (age fifty-six)

*Lights up on workers. Americans, Mexicans, Chinese, etc., on an assembly line in silhouette and working slow motion, assembling a fairly intricate piece of machinery. Throughout this part of the scene they slowly step away from the assembly line one by one until no one is left.*

*Slide: Map of The United States, highlighting Cleveland, Ohio.*

**Narrator 1:** After the closing of Sunbeam Corporation's Mr. Coffee plant in Cleveland, Ohio, in 2001, many of its former employees have bid farewell to financial security, such as Joyce Harrison, a former Mr. Coffee quality control supervisor.

**Harrison:** Even though some people are doing well, they'd go back to Mr. Coffee if they could . . . . Starting over, going to a new job, you lose your seniority and are all the way at the bottom. A lot of people were counting on retiring from there. [When I first got laid off,

the first job I found] was at a container-cleaning company for \$8 an hour. That's \$7 less than I made at Mr. Coffee.<sup>77</sup>

**Narrator 2:** Lillie Scott hoped that retraining as a nursing aide after being laid off from Mr. Coffee would help her successfully reintegrate into the workforce. It didn't.

**Scott:** I would get hired on at nursing homes, and after the ninety-day probation period, they'd lay me off to "avoid paying benefits." Now, even with unemployment, I have a hard time meeting my rent and other bills.<sup>78</sup>

**Harrison:** We made that company famous, and it is like they just threw us out to the dogs.<sup>79</sup>

**Narrator 3:** Those who inherited Lillie's and Joyce's jobs aren't that much better off.

*Slide: Map of the United States and Mexico showing dotted line from Cleveland leading to Mississippi and Matamoros, Mexico.*

**Rodriguez:** There is less of everything. I welded heating elements for eight years at Sunbeam's Matamoros plant.

**Narrator 1:** Alejandra Castilleja Rodriguez, although benefiting from Scott's and Harrison's jobs, earned less than half of their wages. And now she's lost her job.

**Rodriguez:** I spent a month looking for work after the plant closed. I ended up cleaning offices for less than half of what I made at Sunbeam. Now I take home about 800 pesos (\$69) a week, and I clean houses to earn extra money.

**Narrator 2:** Meanwhile, just across the border from El Paso, Texas, in Juarez, Mexico, female workers at *maquiladoras* like those that Mr. Coffee set up in Matamoros face an even greater danger than losing their jobs—kidnapping, assault, and death.

*Slide: Juarez maquiladoras, series of slides of colonias throughout this part of the scene*

**de los Santos:** We are asking for your help. We have the right to know who killed our daughters.<sup>80</sup>

**Narrator 3:** Guadalupe de los Santos is confident had her daughter been murdered in the United States, her killers would already be in prison. Her misfortune is that her daughter

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77. Sabrina Eaton, *It's China's Gain and Cleveland's Pain: Low Wages Lure Mr. Coffee to Mexico, Far East*, THE PLAIN DEALER, Nov. 15, 2004, at 1A.

78. *Id.*

79. *Id.*

80. Gabriela C. Guzman, *Search for Justice*, ALBUQUERQUE JOURNAL, Oct. 28, 2004.



was stabbed to death in the border city of Ciudad Juarez, [a community of *maquiladoras* that rely upon young women from rural Mexico for its primary labor].<sup>81</sup>

*Slide: Mother holding up picture of missing daughter.*

**Mexican Official:** La mayor parte de (esos crímenes) tiene relación con . . . causas y consecuencias específicas de género. Un número sustancial de ellos está vinculado con violencia sexual y otros con violencia doméstica e intrafamiliar.<sup>82</sup>

*Slides: Images of women missing/found, murdered/grieving families, etc.*

**Narrator 1:** Over the past ten years, some 4,000 women, *maquiladora* workers, have disappeared from the Juarez area, kidnapped as they walk to and from work, hundreds of women murdered, the others vanished. No one knows why this is happening and how it has continued for so many years. All of the murdered women fit a certain profile. They are young, attractive women who come from poor families and work in the *maquiladoras* that employ a large section of the city's residents. [So far, Mexican police and the U.S.-based corporations in Juarez have done very little to solve these crimes.]<sup>83</sup>

**de los Santos:** A low-income woman's life is worth very little.

*Slide: Map, showing line from Mexico to China.*

**Narrator 2:** It's worth even less now. Last year, Mr. Coffee's parent firm, Sunbeam Corporation, closed plants [in Mexico], citing the need to shift work to where production is cheapest. That place? China.<sup>84</sup>

*Slide: Giant manufacturing facility in China.*

**Stanco:** As many as thirty Chinese workers can be hired for the cost of one cabinetmaker in North Carolina.<sup>85</sup>

**Narrator 3:** People like Rick Stanco, foreman of the Furniture Brands factory in Thomasville, North Carolina, are looking for any way they can to keep their U.S. factories open.

**Stanco:** It's hard for us to compete with new, state-of-the-art Chinese facilities, like those in Dongguan (outside of Shanghai). These new factories, the size of eighty football fields, boast robotically controlled lacquer sprayers and dormitories that will house its 5,000 workers. We just can't match that.

*Slides: Furniture plants in North Carolina and in China, photos of new urban Chinese prosperity.*

81. *Id.*

82. See INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ORGANIZATION OF AMERICAN STATES, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS 2002, available at <http://www.cidh.org/annualrep/2002eng/toc.htm> (last visited Apr. 17, 2005).

83. Guzman, *supra* note 80.

84. *Id.*

85. Dan Morse, *In North Carolina, Furniture Makers Try to Stay Alive*, WALL ST. J., Feb. 20, 2004, at 1A.

**Chinese Official:** In the last twenty-five years, annual incomes of the Chinese have more than quadrupled, from about \$1,000 per capita to more than \$4,000.<sup>86</sup> And twenty years ago, we could barely afford to feed our people.

**Narrator 1:** Chinese workers, the latest beneficiary of U.S. outsourcing, are paid an average of \$0.47 per hour, compared with more than \$21 per hour for Americans who make electrical appliances like those at Mr. Coffee. A Chinese worker's wages are approximately \$1.89 less than what Sunbeam Corporation was paying its Mexican factory workers like Alejandra Rodriguez.

**Narrator 2:** Although Chinese economic growth has seemed to some like a miracle, for some Chinese workers it doesn't seem much different than the pre-Maoist days of eighty-hour work weeks and low pay with little hope of advancement or labor protections.

*Slide: Sign in Chinese Wal-Mart factory in Mandarin that reads, "If you don't work hard today, tomorrow you'll have to try hard to look for a job."*

*MISS QUIN emerges, hunched over a bowl of fried carrots.*

**Miss Quin:** Every day we eat vegetables, mostly we eat vegetables. I can't afford to buy meat. In four years, they haven't increased our salary. I spend all day making plastic trains for Wal-Mart, but I can't afford to buy toys for my nine-year-old son.<sup>87</sup>

*Slide: Map of the United States with line to India, images of IT workers in cubicles, answering phones, etc.*

**Narrator 2:** It's not only factory jobs that are being shuffled around. High tech industry workers like Karen X, an IT specialist for Bank of America, woke up one morning and found her job exported to India.

**Karen X:** The handwriting [was] on the wall. We were told our jobs "wouldn't last through September." One-third of these jobs are going to India, where work that costs \$100 an hour in the United States gets done for \$20.<sup>88</sup>

**Narrator 3:** The practice of outsourcing [of high tech jobs] became popular during the late-1990s dot-com boom, when projects were plentiful and domestic workers were scarce. And it has grown . . . . Why? Computer systems and technology have become vastly more complicated over the last few years, increasing the types of jobs that need to be done. And India, along with a large English-speaking population, has millions of unemployed, highly educated workers more than willing to work for American "back-door" companies.<sup>89</sup>

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86. Lawrence S. Pratt, *China's New Economy Beset with Problems*, CHI. SUN-TIMES, Oct. 9, 2004, at 22.

87. Peter S. Goodman & Philip P. Pan, *Chinese Workers Pay for Wal-Mart's Low Prices*, WASH. POST, Feb. 8, 2004, at A1.

88. Pete Engardio et al., *The New Global Job Shift*, BUS. WK. ONLINE, Feb. 3, 2003, at [http://www.businessweek.com/print/magazine/content/03\\_05/b3818001.htm?chan=mz&](http://www.businessweek.com/print/magazine/content/03_05/b3818001.htm?chan=mz&) (last visited Apr. 11, 2005).

89. Rachel Melcer, *IT Firms Weigh Patriotism vs. Cheaper Overseas Labor*, ST. LOUIS POST-DISPATCH, May 25, 2003, at E1.

*Slide: Image of India as new call center central.*

**Veerlapati:** In the U.S., people talk about software as an art form. But in India, it's strictly a matter of engineering, mathematics, and methodology.

**Narrator 2:** Day Veerlapati, president and chief executive of a U.S.-based IT company, sees the shift of white-collar jobs from the U.S. to India as not such a bad thing.

**Veerlapati:** Combine the two [working styles] and the result is a team with creativity and reliability that provides jobs in both countries. You marry India's methodological nature and high quality with the shoot-from-the-hip, cowboy American way and you have an ideal combination.<sup>90</sup>

**Narrator 3:** Although many multinational corporations and developing nations may be benefiting from their outsourcing, workers across the globe are struggling to survive the changes.

**Miranda:** After I got laid off from my job as a seamstress, I got offered a GED class in Spanish and only remedial English classes. What do we need with a GED? They trained a bunch of people to be nurse's aides, and then all of a sudden there were so many nurse's aides and no jobs for nurse's aides. It's ridiculous.<sup>91</sup>

**Ortiz:** Who wants to hire a broken-down old lady? I'd like to be an embalmer. That seems nice and peaceful. But they don't offer training classes for that.<sup>92</sup>

**Miranda:** I know it's bad here. My American dream has turned into a nightmare. But I know it's worse in Mexico.<sup>93</sup>

**Rodriguez:** And I know it's worse in China.

**Veerlapati:** Can we really deny workers in developing countries a better standard of living?

**Stanco:** Maybe what we need to start thinking about is not so much how we can protect American jobs, but how we can protect workers around the globe.

**Harrison:** Look for ways to fit into the new marketplaces.

**Scott:** Start thinking transnationally.

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90. *Id.*

91. Charlie LeDuff, *Mexican-Americans Struggle for Jobs*, N.Y. TIMES, Oct. 13, 2004, at A14.

92. *Id.*

93. *Id.*

**Miss Quin:** Across borders instead of across profits.

**Miranda:** Across people instead of across corporations or national interests.

*ORTIZ comes center with her letter, other characters echoing her perhaps, with letters of their own to their own governments in their own languages. A request from workers to their leaders.*

**Ortiz:** President Bush.<sup>94</sup>

**de los Santos & Rodriguez:** El Presidente Fox:

**Miss Quin:** President and Party Leader Hu Jintao:

**Ortiz:** I respectfully need your attention in the matter of my termination from VF Wrangler Jeans—

**Scott, Harrison, Rodriguez:** From Sunbeam Corporation—

**Miss Quin:** From Wal-Mart.

**Ortiz:** The factory is leaving for Mexico—

**de los Santos & Rodriguez:** For China—

**Miss Quin:** For another plant—

**All:** For cheap labor.

**Ortiz:** I have three complaints.

**Scott:** The company wants to give me \$110—

**de los Santos & Rodriguez:** Nada—

**Miss Quin:** Nothing—

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94. *Id.* (citing an excerpted letter by Raquel G. Ortiz).

**Ortiz:** For each year of service.

**Miranda:** No extension of health benefits.

**Ortiz, Scott, Harrison, Rodriguez, de los Santos:** No implementation of promises in the NAFTA treaty—

**Miss Quin:** In the agreement with my government—

**Ortiz, Scott, Harrison, Miranda:** To help American—

**de los Santos & Rodriguez:** Mexican—

**Miss Quin:** Chinese—

**All:** Workers.

**Ortiz:** I need training—

**Harrison:** I need training!

**Miss Quin:** I need training—

**All:** For a job that really exists.

*End of scene*

**Sarah Cleveland:**\*

Thank you all for joining us for the afternoon session entitled “Outsourcing,” which will be looking at the flip side of the issues we were considering this morning. As the excellent Living Newspaper presentation just portrayed, many issues have arisen surrounding the export of production and jobs from the United States and now even from other developing countries in search of lower wages and lower labor costs around the globe.

We have a terrific panel. You have their biographies, so I am not going to belabor their introductions. Dan Danielsen of Northeastern University School of Law will be setting the stage, providing the overall picture of the issues we will be confronting. Then Sharmila Rudrappa from the University of Texas Department of Sociology will be joined with Tom Green of Dell Computer, Chantal Thomas of Fordham University School of Law, and James Galbraith from the LBJ School of Public Affairs.

Thank you all for being able to join us.

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\* Marris McLean Professor in Law, The University of Texas School of Law.

**Dan Danielsen:**\*

Good afternoon everyone. I have been asked to make some preliminary remarks to set the stage for our discussion of outsourcing. To begin, it might be useful to refine our terms a bit and get a clearer sense of what we are talking about when we speak of the phenomenon of outsourcing.

When I began practicing corporate law in 1990, the term “outsourcing” primarily referred to a particular type of subcontracting. Essentially, firms would subdivide their business processes into functions and contract out the provision of some of those functions to other businesses. For example, firms might “out” “source” portions of the assembly of their products or the maintenance and support of their computer networks to third parties—mostly other domestic companies—to enhance the efficiency and competitiveness of their businesses.

In the last few years, outsourcing has come to refer to the practice of moving manufacturing jobs, and later a whole range of higher-skilled, white collar jobs, from the United States to lower cost labor markets abroad. In the last few years, and in particular in the context of the Bush-Kerry presidential campaign, political and media attention has focused on the movement offshore of white collar jobs. As several of the other panelists will be addressing this recent white collar outsourcing trend, I thought I would give you a sense of what one prominent and widely cited researcher has suggested the scope of the outsourcing phenomenon is likely to be for white collar workers.

In a recent study, Forrester Research predicted that the outsourcing trend for white collar workers will produce a loss of at least 3.3 million jobs and about \$136 billion dollars in wage earnings by 2015.<sup>95</sup> The study identified 242 different service jobs out of the 500-plus major occupations traced by the Department of Labor as being affected by the outsourcing phenomenon.<sup>96</sup>

The study also estimated that as a result of outsourcing, real wages for white collar workers would fall between 2% and 3% by 2015.<sup>97</sup> Such a reduction is similar to the reduction in real wages for blue collar workers in the manufacturing sector due to outsourcing over the last two decades.<sup>98</sup>

What are the causes and effects of this phenomenon? Well, one possible causal connection that the conference has put on the table for us to think about is the relationship between a dramatic liberalization of restrictions on global capital mobility, brought about, in part, through bilateral and multilateral trade agreements and implementing national legislation, and the lack of any significant liberalization of restrictions on labor mobility.

Now, one might argue that free movement of capital without free movement of labor permits capital to globalize production of goods and services and exploit large pools of excess labor capacity in underdeveloped and developing countries. At the same time, it would seem that labor’s inability to adjust to the movement of capital by relocation between low-wage and high-wage jurisdictions produces at least three different kinds of competition. The first is competition amongst workers in developing countries for scarce outsourced jobs. Since labor pools are large and the number of jobs is limited, competition

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\* Associate Professor of Law, Northeastern University School of Law.

95. Research Study by John C. McCarthy of Forrester Research Inc. as reported in Aaron Bernstein, *Shaking Up Trade Theory*, BUS. WK., Dec. 6, 2004, at 116.

96. *Id.*

97. *Id.*

98. *Id.*

between workers in developing countries keeps wages low and reduces the likelihood of collective bargaining. The second involves competition between workers in developed and developing countries. With the struggle for jobs in a global labor market seen as a zero-sum game, workers in both developed and developing countries make concessions in wages and benefits and eschew unionization while demonizing each other and thereby reducing the likelihood of transnational worker alliances that might strengthen the bargaining position of all workers worldwide. The third involves competition between developing countries seeking to attract foreign investment and outsourced jobs which might lead to inefficient economic restructuring, harmful regulatory and tax competition, and low wage rates and labor standards.

Now the hoped-for silver lining to these trends is the benefits predicted by the theory of comparative advantage. According to this theory, greater capital mobility and outsourcing should produce gains in global productivity and efficiency, increased global trade, reduced consumer prices on imports, and new jobs created by global economic growth.

With all these anticipated benefits, one might reasonably question whether outsourcing is really a problem. Unfortunately, the answer seems to vary depending on who you ask. For example, your answer might be quite different if you are a trade economist, or a multinational corporation; or a corporation that is limited a single jurisdiction and can't take advantage of reduced labor costs abroad; or a worker in the United States, in Mexico, in India or China; or a consumer, etc.

Most economists and multinational corporations have taken the position that outsourcing is not a problem. They reason that while outsourcing might result in short term job losses and economic dislocation, these effects are temporary and the law of comparative advantage will inevitably produce long term gains from trade that far exceed the short term losses. In a recent article, Nobel Laureate economist Paul Samuelson has deviated from this orthodox view by suggesting that perhaps comparative advantage and its assumption that the gains from trade will necessarily outweigh the losses is more innuendo than fact.<sup>99</sup>

Nevertheless, even if we accept the position of mainstream economists that comparative advantage will necessarily result in a larger global pie, there is still no reason to expect that the gains from this larger pie will be equitably distributed. In other words, even if we assume that the *economic* problem of outsourcing is resolved through the benefits predicted by comparative advantage, we are left with a *political* problem—how to manage the suffering and resentment of those who are the (hopefully) temporary losers of the globalization process?

Our panel discussion this afternoon will focus on some of the many legislative attempts to address this political difficulty in the United States at the local, state, and federal levels. These legislative efforts can be organized loosely into several different categories.

The first category involves bills that are designed to keep jobs in the United States or in a particular state or locality. These bills have taken a couple of forms. The most prominent form imposes “Buy America” preferences and restrictions on government contracting and procurement. These sorts of bills seek to use the spending power of government to force government vendors to manufacture products and/or perform services at home. Some of these bills restrict the ability of governments to contract for the provision of services offshore. Some establish minimum local employment thresholds for government vendors, such as a requirement that at least 50% of a qualified vendor's

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99. Paul A. Samuelson, *Where Ricardo and Mill Rebut and Confirm Arguments of Mainstream Economists Supporting Globalization*, 18 J. ECON. PERSP. 135, 135–36 (2004).

workers must be employed in the United States or in a particular state or locality. Some prohibit contracting with vendors who have outsourced more jobs than they have created in the United States. Some preclude government grants, loans, or other assistance to vendors who will layoff more workers in the U.S. than they do in other countries.

While the bills in this category have been numerous, few have passed. One notable exception was a provision included in the omnibus fiscal 2004 federal spending bill that prevented companies bidding on certain types of work previously done by government employees from moving offshore.<sup>100</sup>

A second group of bills in this category seek to keep jobs at home by providing tax and other incentives to businesses. One example is the 2004 America Jobs Creation Act.<sup>101</sup> This legislation created a tax holiday for multinational corporations to repatriate foreign-earned profits at a maximum tax rate of 5.25% instead of the regular corporate rate of 35%. The idea was that earnings retained offshore to avoid U.S. tax could be brought back onshore at a very low tax rate and reinvested in generating jobs. This legislation left the Internal Revenue Service and the Treasury Department to determine what sorts of restrictions should be put on how the repatriated funds could be used and what sorts of expenditures should count as legitimate “job creation” expenditures.<sup>102</sup> There have been numerous other bills creating tax credits and grants to businesses that retain or create local jobs, support local research and development, or provide transition training to workers whose jobs are being phased out through outsourcing.

In a similar vein, the John Kerry Presidential Campaign’s job-creation strategy sought to stimulate U.S. job growth by eliminating tax incentives for multinational corporations to retain foreign-earned profits abroad while creating compensating corporate tax cuts at home.<sup>103</sup>

A second category of legislation seeks to protect U.S. businesses from foreign competition. Some examples of this kind of legislation include federal and state legislation requiring call center employees to disclose their locations to callers and bills prohibiting the transfer of confidential consumer information offshore without the consent of individual consumers. In addition to these new legislative initiatives, there have been a number of attempts to protect U.S. manufacturing and service providers from competition through existing antidumping legislation. Some prominent examples of recent antidumping activity that you may have read about in the newspapers include actions by domestic producers regarding the importation of frozen catfish fillets from Vietnam, shrimp from Asia, and wood furniture from China.

A third category of bills seek to protect U.S. jobs by limiting foreign immigration. One successful measure involved letting lapse legislation that had increased the number of foreign temporary work visas granted for skilled technical workers from 65,000 to 195,000, thereby reducing the number of work visas granted by 130,000.<sup>104</sup> Another bill shortened the duration of temporary work visas granted.<sup>105</sup>

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100. See Michael Schroeder, *Business Defends Its Outsourcing*, WALL ST. J., Mar. 2, 2004, at A1.

101. American Jobs Creation Act of 2004, H.R. 4520, 108th Cong. (2004).

102. See Michael Schroeder, *Treasury Gives Corporations Latitude on Overseas Profits*, WALL ST. J., Jan. 14, 2005, at A2 (suggesting using funds for executive compensation, stock buy-backs, and dividends would not qualify but payment of lawsuit judgments might).

103. Ohio News Network, John Kerry’s Economic Plan, available at <http://www.onnnews.com/global/story.asp?s=1877124> (last visited Apr. 12, 2005).

104. American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

105. See Michael Schroeder & Timothy Aepfel, *Skilled Workers Mount Opposition to Free Trade, Swaying Politicians*, WALL ST. J., Oct. 10, 2003, at A1.



A fourth category of bills seek to provide trade adjustment assistance to displaced workers such as tax credits for health insurance and retraining.

All of these different bills have been the result of huge lobbying efforts by different constituencies inside the United States—organized labor, industry groups, consumers, foreign governments, white collar worker associations, and many other groups.

Before I close, I would like to raise a few questions for you to have in mind while you listen to the other panelists—questions I hope we might take up later in the discussion.

The first set of questions involves exploring the different understandings and assumptions about outsourcing that are embodied in the legislative proposals. Whose interests are protected by them and at whose expense? Are they likely to work? What would “working” mean in this context?

A second set of questions involves the focus of much of the legislation that has been proposed. A number of the legislative proposals—such as R&D grants, tax credits, and tax cuts—could reasonably be characterized as subsidies provided with the hope that they will induce the corporate recipients to create and preserve jobs at home. Are there other strategies that should be on the table? Why has the legislative focus been on subsidizing capital rather than labor? How should we think about the subsidies in light of the recent phenomenon of “jobless growth” in the United States?

A third set of questions arise from the fact that globalization of production and outsourcing are shaped, in no small measure, by bilateral and multilateral trading regimes and by private law regimes such as property and contract. Yet, none of the legislative proposals on the table focus on either of these rule systems. Why not? Are the current legislative responses to outsourcing consistent with U.S. obligations under World Trade Organization (WTO) agreements and other trade obligations? To what extent is our ability to address outsourcing nationally limited by our international trade commitments?

Fourth, if one focuses on global rather than national welfare, is it ever justifiable to use national legislation to protect relatively well-off workers in developed countries from competition from less well-off workers in the developing world? Could we imagine legislative approaches at the national or supranational level that might encourage transnational worker solidarity and cooperation rather than competition and a zero-sum-game mentality?

Fifth, the current trends of globalization and outsourcing seem to be creating leading, or boom, sectors and lagging, or bust, sectors and increasing income inequality in both developed and developing economies. Are there circumstances where worker transition-assistance programs should be seen, not as protectionism but rather as temporary investments in facilitating the specialization effects of comparative advantage by minimizing the transition time and cost for the productive redeployment of displaced workers? In other words, instead of seeing these measures as antitrade, we could see them as greasing the wheels of capitalism and comparative advantage while reducing the political pressure and instability resulting from income inequality and trade dislocation in these boom and bust sectors.

Sixth, some of the legislative proposals are aimed at limiting the inflows of foreign temporary workers. What is the relationship of these inflows to outsourcing? Might a tightening of an already scarce labor market for technical and other workers in the United States actually encourage companies to move offshore and outsource more? What is the effect of outsourcing on wage rates and labor standards domestically and globally? Many of these questions were ones that were raised in the first panel this morning, and I hope we will continue to explore them this afternoon.

Finally, imagine that we could abolish instantly all global restrictions on the free movement of labor. Would outsourcing cease? In other words, would transnational free movement of labor actually help to address the economic and political disruptions caused by globalization of production and capital mobility? Might the free movement of workers cause economic and political disruptions of equal global concern?

With that introduction, let's hear from the rest of the panel.

### **Cleveland:**

Thank you. I should note that as with the morning panel, we have asked each of the remaining panelists to limit their initial comments to about seven minutes, which will hopefully leave plenty of time for discussion and debate within the panel and with the audience as well. Sharmila Rudrappa.

### **Sharmila Rudrappa:**\*

The globalization of the American economy has led two major changes: the internationalization of production and the reorganization of the state.

#### **Changes in production**

The decline of manufacturing by the 1980s, though devastating, was seen as being replaced by the service industry, with Robert Reich claiming that in order to maintain competitive advantage on a global scale, we had to move into an era of information economy. But then the service industry, the mainstay of the present-day American economy, by the end of the twentieth century had started subcontracting jobs that deal with information as their raw materials, to so-called less developed nations such as India. While most of the jobs shifted by U.S. multinationals used to be in one single country, at present we see that plant closings in the United States are accompanied by simultaneous job shifts to multiple countries.<sup>106</sup> Capital is being reorganized in unprecedented ways.

#### **The state itself has been reorganized**

The state, defined for much of the twentieth century as an entity with sovereign and legitimate power to dictate policies and inflict violence on a population within a given territory, is perceived to be in crisis. Immigration, cultural globalization, capital's mobility, and the rise of global human rights institutions that can discipline state institutions are seen to weaken the nation-state. Specifically, globalization is believed to affect the nation-state in two ways. First, globalization has decoupled the concept of territoriality from the state. Second, state sovereignty has eroded, that is, sovereignty expressed as state capacity in terms of its abilities to take decisions independent of international actors, or groups within its borders, has been compromised. As a consequence of the above processes, nation-state legitimacy is in crisis.

In this panel we've been asked to address offshore outsourcing, and I will limit my comments to the outsourcing of service sector jobs, driven by developments in information

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106. Kate Bronfenbrenner & Stephanie Luce, *The Changing Nature of Corporate Global Restructuring: The Impact of Production Shifts on Jobs in the U.S., China, and Around the Globe* (Oct. 14, 2004) (unpublished research paper prepared for the U.S.-China Economic and Security Review Commission), *at* [http://www.uscc.gov/researchpapers/2004/cornell\\_u\\_mass\\_report.pdf](http://www.uscc.gov/researchpapers/2004/cornell_u_mass_report.pdf) (last visited Apr. 13, 2005).

technology (IT). Given the ways by which the state itself is being reorganized, I ask—what is the efficacy of going back to the state to legislate offshore outsourcing? Does the state have the capacity, or even the will to address such changes? Are there nonstate forms that can better address the concerns that come up with offshore outsourcing?

### Defining Outsourcing

While outsourcing encompasses forms of subcontracting in the manufacturing and the service sector, the term arises in popular consciousness as a national problem and gets politicized by media personas such as CNN's Lou Dobbs who refer to offshore outsourcing, that is, the movement of jobs outside American borders. The newest sector to be hit by offshore outsourcing is the service sector; or to conceive of it another way, we now see unprecedented growth in international trade in the services sector. International trade in services has created a crisis in the United States because of three reasons:

- (1) The services sector is the one sector on which the U.S. economy is currently based;
- (2) We are losing high value jobs in the services sector faster than creating them; and
- (3) The American (especially white) middle class, politically important and relatively protected up to the present, has been negatively affected by international trade in services.

According to the General Agreement on Trade in Services (GATS) 1995,<sup>107</sup> there are four categories in trade:

- (1) In Mode 1, supplier and buyer remain in their respective locations and trade services across geographical space. Consulting work done in the United States could be categorized as such, but also a large amount of "American" work reaching the shores of India are in this category.
- (2) Mode 2 refers to services where the service buyer moves to the geographical location of the provider. An example is tourism.
- (3) Mode 3 is where the service buyer launches an industrial establishment in another country, requiring direct foreign investment. This is situation of some *maquiladoras* in Mexico or transnational corporations that open call centers in India.
- (4) And we have Mode 4, which is the situation where the service seller moves to the location of the service buyer. This is the case of Mexican *domesticas* in upper middle class American homes or Indian software engineers on H-1B visas, working in American companies.

Interestingly, when the GATS first emerged in 1995, Mode 1, what we popularly call outsourcing today, was the least controversial. Developing countries resisted Mode 3 trade liberalization that entailed foreign direct investments because, given the size and political clout of some of the companies investing in their national boundaries, they feared their national sovereignty could easily be impinged. And Western industrial nations resisted

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107. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 28, 33 I.L.M. 1167 (1994) [hereinafter GATS].

Mode 4, which they worried would bring in foreign guest workers who were culturally different and whose presence within national boundaries could potentially compromise nation-building efforts.<sup>108</sup> Today, Mode 1, i.e., offshore outsourcing, and Mode 4, pertaining to temporary foreign workers, have emerged as major contentious issues in American politics. Unions such as Communications Workers of America are fighting both outsourcing of what they consider to be American jobs and the arrival of foreign workers on temporary, H-1B visas. While not necessarily xenophobic in any manner, these protests start taking on a xenophobic shade when we begin seeing that much of the international trade in services that is the focus of anxiety is centered on India. Much more than any other high-tech workers, Indian workers have come into the United States over the past decade, and much of the outsourced work in services reaches the shores of India.

Indian computer programmers and engineers were so crucial to the growth of the American IT industry that India claimed its most successful export to the United States was its software workers. These nonwhite, foreign workers were as American as apple pie because by the mid-1990s, every year over 40% of the H-1B visas—temporary work permits for high-tech workers—were issued to Indian software workers. Between 1998–99, computer-related and engineering occupations accounted for 70% of the total H-1B visas, and of these, nearly 74% of the systems analysts and programmers were born in India.<sup>109</sup> Today, however, we witness a curious turn in events; many of these software professionals are returning to India and “American” work is following them out. Starting as a trickle in the mid-1990s, outsourcing IT work to India was speeded up by 2000 because of the Y2K scare. Presently, America’s best export to India is IT jobs.<sup>110</sup> In 1996–97, exports from India to North America in computer software and services—what I am calling IT work—totaled just over \$651.59 million. By 2000–01, this had grown to \$3.71 billion.<sup>111</sup> What are the kinds of work being outsourced to India? Medical transcriptions, medical billing and collections, customer interaction centers, insurance claims processing, distance learning, human resources services, financial and accounting services, and litigation support services.

Though outsourcing and the issuance of temporary visas (H1-Bs) are not racially structured, we see that India has become the focal point for both developments. Some people believe that the arrival of a large number of Indians through the H1-B visa program led to the eventual movement of jobs to India, that is, they posit a causal relationship between insourcing Indian workers and outsourcing to India. Proving such a causal relationship remains empirically difficult. Instead, I propose a different kind of causality; the phenomenon of insourced Indian guest workers into the United States, or the GATS Mode 4 international trade in services, and offshore outsourcing, i.e., Mode 1 in international trade in services, to India are part and parcel of the same phenomenon, and that is the growth of a global labor market in Indian information technology workers. To put it simply, the emergence of a global labor market in Indian IT workers is the independent variable, causing India’s premium position in insourcing and outsourcing with

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108. Jagdish Bhagwati et al., *The Muddles Over Outsourcing*, 18 J. ECON. PERSP. 93 (2004).

109. In 1998–99 Indians received 47.5% of the H-1B visas, followed by the Chinese at 9.3%. Computer-related and engineering occupations accounted for 70% of the H-1B visas. See U.S. Immigration and Naturalization Service, Report on Characteristics of Specialty Occupation Workers (H-1B) (Feb. 2000), <http://www.uscis.gov/graphics/shared/services/employerinfo/report1.pdf> (last visited Apr. 13, 2005).

110. McKinsey Consulting estimated that in 2002 three countries received \$20 billion in outsourcing revenue from the U.S.: Ireland, \$8.3 billion; India, \$7.7 billion; Canada, \$3.7 billion. Naeem Mohaiemen, *The Dark Side of the Outsourcing Revolution*, ALTERNET, (Jan. 25, 2004), at <http://www.alternet.org/story/17601> (last visited Apr. 13, 2005). Though Ireland receives a greater chunk of revenue, much of the ire in the United States regarding offshore outsourcing is directed at Indians and India.

111. STATISTICAL Y.B. OF INDIAN I.T. AND ELECTRONICS INDUSTRY, 2000–01.

regard to trade in services. People point out that one of the advantages of the American labor market is that it has a relatively large number of educated workers. However, the workforce in India is well trained as well. The United States adds 1.2 million college graduates to its workforce; India adds 2.5 million. Of these, 250,000 earned engineering degrees, compared to 70,000 recently graduated engineers in the United States<sup>112</sup> I call these IT workers, located both here in the United States and in India, techno-*braceros*.<sup>113</sup>

While I'd like to speak more about global labor markets, in this panel we've been asked to address Mode 1, that is, trade in services where the supplier and buyer remain in their respective nations, or what we otherwise call outsourcing. While we engage in this discussion, let us keep in mind that overall, the United States has a trade surplus in services.<sup>114</sup> However, this surplus, when it is measured as a *percentage of the national GDP*, has fallen.<sup>115</sup> In 1997, this surplus was 1.3% of the GDP, in 1999 this was 1.1%, and by 2003 it had dropped to 0.6% of the GDP.<sup>116</sup>

### The Impacts of International Trade in Services on Workers

The impacts on American workers: A study by Emsellem and Wenger (2002) indicate that long-term unemployment increased in this present recession at a faster pace than any of the past recessions, and for unemployed workers, this current recession is far more severe.<sup>117</sup> There are several trends seen in the American labor market that could potentially be causally related to international trade in services.

- (1) In 2004, the unemployment rates for computer programmers was higher (7.7%) than unemployment rates (5.6%) for all categories of work. Enrollment in computer engineering in various universities around the country has fallen. And college graduates are finding it hard to get employment.
- (2) Though there are provisions to take care of workers whose livelihoods are affected because of international trade, these provisions are structured for trade in manufacturing. To compensate for workers' losses because of international trade, the Trade Adjustment Act (TAA) under the Trade Act of 1974 allows workers to receive some compensation and retraining benefits if their hours are reduced. However, these jobs must be involved in a production process as defined by the TAA. The TAA is concerned primarily with manufacturing

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112. ECONOMIC POLICY INSTITUTE, OFFSHORING [hereinafter EPI, OFFSHORING], at [http://www.epinet.org/issueguides/offshoring/epi\\_issue\\_guide\\_on\\_offshoring.pdf](http://www.epinet.org/issueguides/offshoring/epi_issue_guide_on_offshoring.pdf) (last visited Apr. 13, 2005).

113. I employ the term techno-*braceros* in my work because like the Mexican *braceros*, who were the mainstay of the American agricultural sector, these Indian workers are central to the American economy. Moreover, invoking the term *bracero* makes us think about affiliative, rather than filiative, political projects; summoning the term *bracero* invokes the whole issue of temporary-worker programs in the United States, affecting various workers from different parts of the world, and employed in different industries, in different time periods.

114. Bhagwati, Panagariya, and Srinivasan note that the United States is a substantial exporter of services in fields such as legal, medical, and accounting services. Bhagwati et al., *supra* note 108. According to the U.S. Bureau of Economic Analysis, the U.S. trade surplus in services in 2003 was \$51.1 billion.

115. However, this could also mean that other factors that contribute to the GDP, consumer spending, investment spending by business firms, and government spending, have risen to a far greater degree, contributing far more to GDP than trade in services. Kotz notes that in the United States, the key determinants of growth are "consumer spending, business fixed investment, and government spending." David Kotz, *Neoliberalism and the U.S. Economic Expansion of the '90s*, MONTHLY REV., Apr. 2003, at 15, 20. He observes that consumer spending began growing at 4.9% per year in 1997–2000, and it became the "chief force propelling GDP growth, since it represented about two-thirds of GDP." *Id.* at 21.

116. EPI, OFFSHORING, *supra* note 112.

117. MAURICE Emsellem & JEFFREY WENGER, TIME TO FIX THE FEDERAL UNEMPLOYMENT BENEFITS PROGRAM: LONG-TERM JOBLESSNESS RISING BEYOND THE RECESSION (2002), at <http://www.epinet.org/briefingpapers/unemployment.pdf> (last visited Apr. 13, 2005).

shifts. Hence, workers employed in places such as call centers or involved in computer programming or R&D operations who lose their jobs because of outsourcing are denied by the TAA because they do not produce a product as per the legislation's definitions. Bronfenbrenner and Luce give the example of workers at Accenture in Oaks, Pennsylvania, who asked for TAA assistance because their jobs were moved to the Philippines. These workers were involved in software development and maintenance, but were declared ineligible because they did not "produce an article within the meaning of the Trade Act of 1974."<sup>118</sup>

(3) The common understanding is that the first hired are the first fired. However, this is not what we see today. Increasingly, it is older men and women who are being laid off. These formerly high-tech, older workers are eligible for unemployment insurance, something that low-wage workers are not. However, they have also accrued more debt. A large part of their paychecks went into financing their debt, and without their jobs they are in dire straits. While unemployment insurance might tide them over for sometime, it is simply not enough. So we have a situation where men and women in their fifties are attempting to retrain themselves, making themselves completely anew. From software engineering or programming, they are entering into the healthcare profession because they feel this is one kind of service profession that cannot be outsourced.

The impacts on workers in India: International trade in the service sector has contributed spectacularly to India's economy and is seen as creating jobs and raising the standards of living in developing countries. Yet, this claim of raising standards of living in places such as India is questionable. Let's take the example of Bangalore, India.

(1) The boom in the IT sector is skewing wages in the city; for example, call center employees, who have no real skills in terms of training other than the ability to make a sales pitch in English, can make up to 20,000–25,000 rupies per month; doctors just out of medical school earn around half that figure for at least the first few years of being employed. There are active disincentives for persons to enter into these kinds of fields such as medicine that require long, hard training and strong incentives to get into computer programming technical colleges, where training periods are short but also, the skills learned are rendered obsolete very quickly. These kinds of call center jobs do not necessarily train workers with a wide range of skills.

(2) The software industry, which is the basis for Bangalore's boom, has very low multiplier effects. That is, there are very few industries that can spin off from the software industry. All it takes is someone sitting at a terminal and with broadband connectivity. These kinds of developments do not lead to the growth of subsidiary industries, which can then create employment opportunities for others.

### **Making Sense of Job Loss in the United States**

The jobless recovery that we see in the United States today, some believe, can be in large part explained by outsourcing. The WashTech's website ([www.techsunite.org/offshore](http://www.techsunite.org/offshore)) lists the top five worst culprits in outsourcing as EDS, IBM, Siemens, Convergys, and GE. Between January 1, 2000, and February 1, 2005, they say

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118. Bronfenbrenner & Luce, *supra* note 106, at 40.

that a total of 330,671 jobs have been outsourced to places such as Eastern Europe, Russia, Canada, Malaysia, China, and India. And 166,631 American jobs have been lost. The claim is that along with creating jobs outside of the United States, these companies are simultaneously laying off American workers. These claims raise questions for us: are the exact same kinds of jobs that are being lost here created in places like India? While the United States is certainly losing call center jobs, what is the extent of high-tech, high-value-added jobs that the United States is losing? If the jobs are on the lower scale of training input, how much of our political energies do we focus on jobs that, in the long run, have low multiplier effects in terms of creating subsidiary industries as well as creating new avenues for research and development?

Much of the legislative efforts are aimed at keeping jobs in the United States either through creating incentives to create jobs in the United States, creating disincentives to foreign direct investment by American companies, or limiting the arrival of temporary workers into the United States. However, we need to ask: given that the nature of work itself has changed and that the state itself has changed, how effective are these pieces of legislation?

### **The Changing Nature of Work**

#### ***Taylorization of Jobs***

Jobs that were once considered high tech are not necessarily high tech anymore. Service industry jobs, where a lot of information technology work is focused, have become taylorized. That is, a task is broken down to its simplest components; work has been reengineered. Once work is broken down to its components, it is far easier to figure out what can be outsourced and what segments need to be kept in. Once the smaller segments are completed, they are compiled back together. Telecommunications deregulations across various nations, and the ease and speed with which IT work—through bits and bytes—can now be transported, has all greatly facilitated outsourcing. Data entry and analysis concerning service tasks themselves can be thought of as being put together in assembly lines that traverse nations across the globe.

#### ***Changing Organizations of Work***

Moreover, we see changes in the organization of work itself. While time is of the essence in all industries, time pressures are “most intense for IT product and service producers. These companies confront life cycles or project deadlines that are measured in months.”<sup>119</sup> Meares and Sargent note, for example, that nearly two-thirds of Hewlett Packard’s revenues are generated from products that are less than two years old. Moreover, early entry into the market allows the company to capture a large part of the market share, which means it can secure the critical flow of funds that can be invested into the next generation of products. This time pressure is more crucial for small companies than larger ones that have deeper pockets and can command more investment capital. Hence, in the IT industry we see a large turnover of products with a very high rate of companies that die in the process of trying to compete. The way employers make decisions about hiring, retraining of workers, and other kinds of human resources investments is affected by the market in which they operate. The IT industry has increasingly been using various types of temporary workers. According to the National Association of Temporary and Staffing

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119. CAROL ANN MEARES & JOHN F. SARGENT, JR., U.S. DEP’T COMMERCE, THE DIGITAL WORKFORCE: BUILDING INFOTECH SKILLS AT THE SPEED OF INNOVATION 7 (1999), <http://www.technology.gov/Reports/TechPolicy/digital.pdf> (last visited Apr. 11, 2005).

Services, total wages paid to technical workers (including computer programmers, systems analysts, designers, and engineers) grew from \$1.9 billion in 1991 to \$4.9 billion in 1998.<sup>120</sup>

### *Altered State Practices*

In addition, we see that state practices themselves have altered over the past twenty years. Beginning much before Newt Gingrich's push for smaller government in the mid-1990s, we have witnessed the slow and inexorable privatizing of government over the past decade. For one, the federal government has retreated from regulating corporate behavior. State, regional, or city governments take over, competing with each other in the race to the bottom, giving corporations tax breaks, subsidized land, etc. so that they may attract and retain firms which can potentially create jobs in their particular jurisdictions. Alongside, we have witnessed the large cutbacks in social spending—which affects workers who have been laid off—retraining programs, so on and so forth. On top of all this, there is the growing privatization of government services: as President Bush stated, “Government should be market-based . . . . We should not be afraid of competition, innovation, and choice.”<sup>121</sup> The government itself outsources its service needs to private companies. Even the Department of Homeland Security outsources work, with the screening of baggage in airports being taken over by private interests. Or another example—the interrogation of prisoners in Abu Graib was outsourced. To give another concrete example of government outsourcing, the U.S. Navy, which, instead of having new networks installed, has outsourced its information technology that includes long-term maintenance and support. That means the Navy will not need its own employees to perform maintenance functions; “What we want to do,” a spokesperson says, “is take those people who were doing those tasks, which are sort of commodity tasks in our view now, and move them over to working on developing software for weapons systems, developing things that are core competencies of the Department of the Navy.”<sup>122</sup> This particular contract, in 2002, went to Electronic Data Systems Corporation, or EDS, which TechsUnite notes is the “worst culprit” in offshore outsourcing.

Much of the legislation is centered around creating disincentives for these individual firms from Mode 1 and Mode 3 forms of trade, or the legislation focuses around creating incentives for individual firms to keep work in the United States. These legislations, I maintain, are ineffective. The changes have been long term, accruing over a period of time. Moreover, these changes are economic. By invoking the economy, I do not imply that the operation of the market is beyond politics. On the contrary, I want to point out that putting in place legislation to treat the symptoms, instead of the fundamental causes of these changes, is not going to even begin addressing the concerns raised with offshore outsourcing.

### **Nonlegislative Approaches**

We need to ask ourselves how useful it is to utilize top-down approaches, that is, go straight to the state to intervene in ways that result in outcomes favorable for working

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120. *Id.* at 19.

121. NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, ADVANCING THE MANAGEMENT OF HOMELAND SECURITY: LIFTING THE WINNER'S CURSE AND AVOIDING BUYER'S REMORSE: LESSONS FROM HR OUTSOURCING EXPERIENCES 6 (summary report June 25, 2003), <http://www.napawash.org/si/HS-GREEN.pdf> (last visited Apr. 11, 2005).

122. Nancy Ferris, *Give and Take*, GOV'T EXECUTIVE, July 1, 2003, <http://www.govexec.com/features/0603/ots03s4.htm> (last visited Apr. 11, 2005).



people. In the concluding panel, David Kennedy and Harley Shaiken asked us to change habits of the mind when it came to thinking through the connections between insourcing and outsourcing. In addition, I ask that perhaps we need to change the habits of our hearts to look beyond national boundaries to create new working borders in thinking through issues related to work and a means to a just and equitable livelihood.

Perhaps another way to approach the issues raised by trade in services is to think about grassroots movements, such as perhaps revitalizing labor unions. I do not pose these as sure-fire ways of solving the kinds of problems that arise with insourcing and outsourcing, but I suggest that these may be ways by which working people, i.e., those most affected by these kinds of international trade in services might address the changes that afflict their lives.

### ***Cross-racial Unionizing***

The hue and cry over temporary immigrant workers in the information technology industry, though not meant to, can start taking on xenophobic tones mainly because close to 50% of these temporary workers are Indians. A large percent of these H1-B visa holders become permanent residents, and eventually citizens. This kind of anxiety over the arrival of foreign workers is reminiscent of Samuel Gompers' ardent support for Asian exclusion acts at the turn of the twentieth century. His stance was that he was not prejudicial against the Japanese and Chinese, but that their arrival into the United States degraded labor standards and lowered the conditions of working Americans. This is the exact same stance that many American information technology workers take at present when they speak of Indian workers. Perhaps one way to think about creative methods of organizing is for information technology unions to look to other service organizations such as HERE, Hotel Employees and Restaurant Employees, which has been very successful in organizing across racial boundaries.

### ***The Necessity for Forming Transnational Unions***

Garment workers have been especially successful in attempting such unions. Though fundamental problems exist, with the U.S. union workers sometimes being posited as imperialistic in its dealings with their Mexican or Guatemalan counterparts, organizations such as the Workers Rights Consortium (WRC) persist in these difficult transnational worker projects. The WRC is an affiliation of students, American union organizers, and union members in free trade zones in places such as Mexico who monitor various firms so that apparel are produced under sweatshop-free conditions.

### **Concluding Remarks**

But problems remain with unionizing; high-wage workers and high-skilled workers such as professors or information technology workers are notoriously difficult to unionize. Given that middle-class, high-tech workers in the service industry have not been amenable to union organizing, how does one go about unionizing them? The problem exists both here and in India. Perhaps much more in India, given that a lot of the individuals involved are from middle-class to upper-middle-class families who might have ideological stances against unions. In addition, we need to ask ourselves, given that the anti-outsourcing stance has shades of xenophobia, how is it possible to formulate cross-racial and transnational unions? And third, how to surmount class interests that are still tied to nation? These are challenges that remain, but the possibilities are immense with changes in the habits of the heart.

**Cleveland:**

Tom Green, Dell Computer.

**Tom Green:**\*

Good afternoon. I think I am the designated corporate boy up here today, so I will try to discharge my duties.

I want to key off of something that Dan started with, this question of outsourcing/offshoring. My executives use the term allshoring. Isn't that great? Allshoring. You have to really strip down why we are asking the question. There is the emotional response that we saw in the theater that commenced this afternoon's session. It is awful when a plant is closed and its workers cannot be reemployed. That is true. But what do some of the larger numbers look like? Is there a way to do it better than maybe Mr. Coffee did it?

Dan mentioned that the Forrester research study indicates that by 2015, there will be 3.3 million jobs lost in this phenomenon. On the other side of that coin, the Bureau of Labor Statistics estimates that from 2000 to 2010, 22 million jobs will be created in this country. Let me just put that in Dell's context a little bit.

Since we have started offshoring, as I am sure Sharmila knows, we have a lot of employees in Bangalore. During that period, we have created fifty what we call "customer contact centers" around the world; not just in Bangalore but in places like Slovakia; not just in places like Slovakia but also in Panama; not just in Panama but in places like Twin Falls, Idaho. Cost-driven, to be sure, but we have created fifty in about the last three-and-a-half years. And during that same period, while our customer contact centers have been mushrooming in these low-cost centers, we created in the last year alone 1,700 domestic jobs.

To me, one of the puzzling things about this question is that it is really not a zero sum gain, at least it has not been in our experience. The creation of a job in Bangalore has not meant, in our case, the elimination of a job in the United States. What we seem to be finding in our experience is that the creation in the United States of a different type of job and a different type of opportunity. I am speaking from Dell's experience, not as Dell's spokesman, by the way, but from my experience from working on this issue with Dell.

I am sure it is quite different with Mr. Coffee. I watched very closely the performers that were here earlier. What drove them to close an entire plant and open one up the next month is not the same type of process that we have gone through. That is just not the way that we have done business. And so I would posit that there are good ways to go about working in the global economy, and there are probably bad ways to go about doing business in the global economy.

In our case, there are just a couple of other Dell-type numbers I want to level-set us with. For the first time in Dell's history, last year we had more employees outside the United States than inside. That did not come about through the outsourcing phenomenon. Seventy percent of the growth opportunity in technology, the sales growth opportunity in technology, is outside of the United States. That is really the fact that we grapple with when we look at opening centers, manufacturing, and placing people overseas and hiring them there.

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\* Former Senior Vice President, Law and Administration, Dell Computers.

The growth in the United States, especially for Dell and a lot of the larger technology companies, while it is not stagnating, it is slowing compared to the opportunities overseas. So in many cases, we are placing employees near where our customers are. I do not want to overstate that. There is no doubt whatsoever that our Bangalore facility is servicing U.S. and European customer needs. But increasingly, in Slovakia, it is European needs. In our center in Morocco, Spanish-speaking, primarily in Spain, needs. So we are finding more and more that as we refine our outsourcing strategy, it is not just going for cost, although that is a big part of it.

Another thing I would like to see us talk about today that I have always found curious is some of the statistics that Sharmila talked about—what is really happening in Bangalore, the type of jobs that are created, the type of turnover that you see, the type of opportunities that really are not there for employees to move up the corporate stack. In other words, the implication being that these are not great jobs for Bangalore.

Why then? This is an honest question. This is also true in Twin Falls, for example—why then do these municipalities lavish companies like Dell with such incentives? There is a very broad public policy issue here on, “Just give us the jobs, and we’ll give you tax breaks for ten years.” That is what we get around the world. And so the deeper social implications of governments’ involvement in creating these customer contact centers globally, I think, could really bear some discussion.

In our case, participation in a worldwide economy means, of course, that we would like to be relatively unfettered in the participation. We would like to be trusted to do the right thing when it comes to our manufacturing overseas. By the way, we are still the only computer maker who manufactures domestically. We are the only one. Everybody else is entirely in China. We would like to be unfettered.

At the same time, there are numerous factors that keep us in line, I would say. In the last couple of years at Dell, there has been a great deal of scrutiny by NGOs of our global activities, our global employment, our subcontractors in China and elsewhere, asking us really tough questions. Questions that we initially did not have the answers to but that we now do. The effect on the brands of companies like Nike, Levi’s, and the rest of us do not go unnoticed by companies like Dell. We cannot afford to have that kind of negative impact on our brand, and so we get serious about who we employ, whether it is our Dell badge employees or subcontractors.

So there are lots of factors at work that keep big—not necessarily big “bad”—but big corporations in line. And I think that many of them are working quite well.

The alternative of really restricting what a U.S.-based corporation can do, if it is a worldwide corporation, if it is a global corporation, I think, is a true Pandora’s Box. To really restrict a company like Dell’s capabilities to participate in the worldwide economy has so many more negative implications than positive ones that, even as a dyed-in-the-wool liberal, it just does not make sense to me.

Just to give you my experience, by growing a company like Dell globally, by really permitting us, and even encouraging us, to place our customer contact centers, our R&D centers, and our sales centers closer to where the growth is, I think that Dell becomes stronger. And as a domestic company, the U.S. economy becomes stronger.

That is how I would like to be corporate boy up here today and posit some of those questions.

### **Cleveland:**

Thank you very much, Tom. Chantal Thomas.

**Chantal Thomas:**\*

Thank you. I want to add my voice to the chorus of praise and appreciation for the Rapoport, and very quickly because I only have seven minutes, Karen Engle and Sarah Cleveland, the Dean and all the wonderful students who have taken care of us. I was here as a visitor last semester, and it is really inspiring to see so many friendly and familiar faces and to be reminded what a truly special community this law school is. So, mazel tov.

We are here to today to talk about how to understand outsourcing and insourcing, and particularly—hopefully—in an international human rights frame. My formal contribution to this will be very limited because of time, but I will speak about what is missing from the legislative provisions that Dan described.

We heard about some corporate incentives, some adjustment assistance. But in terms of attempting to use market power to control outsourcing, the provisions were relatively limited to government procurement and contracting. And so a lot of people want to know, why not use market power? Why not use the legislature to leverage the U.S. market power to control corporate activities? This is the question that Tom was just talking about, the question of whether to try to actually somehow legally restrict corporations from outsourcing.

My contribution from an international economic law background is to observe that, separate and apart from the question of whether this would be a good idea, or whether it would open a Pandora's Box, we actually already have, as Dan suggested, a number of international obligations that really tie the hands of legislators to even engage in those kinds of activities. So the take-home point from me is that there is a relationship between the narrowness in scope of the legislative provisions that Dan described on the one hand and the pressures, both legal and political, of the contemporary global order to continue to move towards economic liberalization on the other.

Even setting aside the many regional organizations that the U.S. is in or is currently negotiating around the world, the central multilateral organization regulating trade flows, the WTO, imposes significant constraints on the extent to which members can make any distinction between foreign companies and local companies for purposes of regulation. Any attempt by the U.S. to try to counteract the foreign wage differential that leads to outsourcing by, for example, imposing greater market restrictions on foreign actors, would have to, if challenged, survive scrutiny under these rules.

Both the WTO agreements in trading goods and trading services—and we will not get into the details—contain a central principle disallowing special treatment for local companies called the national treatment rule. It is considered to be one of the foundational principles of the world trade regime, and it requires governments to accord treatment to foreign producers that is no less favorable than that for domestic producers. The breadth of the principle, as it is stated, is mirrored in the breadth of its application.

WTO decision makers have repeatedly found that the national treatment principle extends not only to de jure differences but also to facially neutral rules that create de facto preferences for local producers. Repeatedly, WTO judicial bodies have found that this national treatment principle has a broad scope of application and applies to any laws or regulations that might adversely modify the conditions of competition between domestic and imported products. In other words, it is not necessary to show a disparity between foreign and local on the face of the law or regulation. It is not even necessary to show a

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\* Professor of Law, Fordham University.

disparate impact. All we have to show is that it follows logically from some difference in treatment that there would be a modification of the conditions of competition, and you have violated the national treatment principle from the perspective of the WTO.

That goes a long way toward explaining why more has not been done by Congress to restrict outsourcing. There is very strong pressure coming from the international trade regime to actually refrain from preferring any company on the basis of whether they are producing locally or whether they are producing offshore.

Now it does not explain why Congress would have gotten itself into such a constraining position, given frequent expressions of dismay by members of Congress about globalization and the enduring suspicion of the public about whether globalization is good, on balance, or not. That is a complicated question that I have addressed elsewhere,<sup>123</sup> but suffice it to say I think it is a combination of our prevailing in the ultimate long-term benefits of liberalization and the logistical constraints and difficulties for members of Congress in understanding the issues and forming effective positions on them in a timely fashion.

And finally, there is the influence of domestic industry. It is no longer the case that large domestic companies do not fear globalization. Of course, they have learned how to make it work in their favor and that includes through outsourcing.

I think there is some room for maneuver in this international trade order that I have described. The WTO does contain some exceptions for so-called social regulation. The agreements on trade and goods and trade and services that I have mentioned will allow for restrictions on trade that would otherwise violate this national treatment principle if they are designed to meet social ends like protection of public morals, or protection of human life or health, or conservation of environmental resources, and if they are applied in a way that does not constitute any unjustifiable or arbitrary discrimination or disguised protectionism.

So there is a window there for some kinds of social regulations. WTO decisions on social regulation suggest that ultimately, it is possible to impose some kinds of trade sanctions or trade restrictions for social purposes if those provisions allow for some flexibility in terms of how the standards they set are met. That is, if it is not a one-size meets-all, fits-all standard based on the U.S. context and if the United States makes an effort to involve other countries in designing them.

It is this last part, I think, that makes international human rights and international labor law such a promising way forward but also really points to the challenges of moving forward: the emphasis on the importance of involving other countries in designing these kinds of minimum social standards.

I think any anti-outsourcing provisions that might be applied or adopted to try to address this foreign wage differential would have a better chance of surviving scrutiny from the trade regime if they reflected international rather than domestic labor standards. But it is not just the substantive content of the standard, it is the way in which the trade restriction is arrived at.

The WTO has repeatedly invalidated U.S. measures that sought to further social ends as seen in the *Shrimp Turtles Case*<sup>124</sup> and mostly recently, the gambling case,<sup>125</sup> which is now on appeal, or the use of U.S. trade to limit offshore provision of Internet gambling as

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123. Chantal Thomas, *Poverty Reduction, Trade, and Rights*, 18 AM. U. INT'L L. REV. 1399 (2003).

124. United States Import Prohibition of Certain Shrimp and Shrimp Products, May 15, 1998, WT/DS58/R, available at <http://www.wto.org>.

125. United States Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Nov. 10, 2004, WT/DS285/R, available at <http://www.wto.org>.

services where the U.S. imposed these measures unilaterally without attempting to engage the target countries in a discussion first and to arrive at shared standards.

It is therefore a multilateral agreement on minimum labor standards that is precisely the challenge here. And that is really, I think, the challenge in trying to address the problem of meeting the needs of workers here and abroad.

Even the International Labor Organization (ILO)'s core labor standards have been criticized by third world academics, governments, and policy makers because they focus on issues of concern to the global North, such as child labor, over concerns to the global South, such as migrant labor. Moreover, in the WTO, the developing countries have pressed for and obtained an official declaration condemning the use of labor standards for protectionist purposes stating that, "The comparative advantage of countries, particularly low wage developing countries, must in no way be put into question."<sup>126</sup> That is a quote from the Singapore Declaration of the Ministerial Conference in 1997.

If that is true, then the way forward is international human rights and international labor standards, but the question is how to negotiate that way forward in a way that reflects a global dialogue. And so here, I think, we have to think not only about more support for labor in addition to capital, as Dan was saying, but we have to overcome American exceptionalism and be willing to work with other countries, international organizations, and NGOs abroad. We have to confront concerns about global distribution in order to arrive at multilaterally generated standards that would have some chance of surviving scrutiny under the international trade regime and becoming another aspect of the global order that tries to insure some equity in addition to efficiency gains.

I will end there.

### **Cleveland:**

Thank you, Chantal. Our own James Galbraith.

### **James Galbraith:\***

Thank you. For me also, it is a great pleasure to be here, notwithstanding that my remarks may be a little bit dyspeptic.

I think that the issues addressed in the morning of this conference on immigration are extraordinarily important. These are questions over which we have a great deal of policy control and that will, in many ways, determine the moral character of our society in the next generation. I think the question of outsourcing does not have those characteristics.

First of all to the point Tom has already raised, how big is the prospective job loss associated with outsourcing? Even if one takes the Forrester research numbers of 3.3 million jobs lost over ten years, that is 330,000 a year. You can go back and another comparison is that that number of jobs was created in approximately forty-eight out of the ninety-six months of the Clinton-Gore administration, and in many of the other months, they came relatively close. So this is not a large but a fairly small number in relation to the job creation that is ordinary in the United States, I should say, under a competent Democratic administration.

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126. Singapore Ministerial Declaration, Dec. 13, 1996, WT/MIN(96)/DEC, para. 4, *available at* [http://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/wtodec\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm) (last visited Apr. 18, 2005).

\* Lloyd M. Bentsen Jr. Chair in Government/Business Relations and Professor of Government, LBJ School of Public Affairs, The University of Texas.

Secondly, can outsourcing be prevented? I think the answer to that is clearly that it cannot. I am not saying that nothing can be done or that there are no useful regulatory steps. Particularly Dan, I think, mentioned the question of extent of imposing privacy rules that would tend to limit the amount of confidential information that goes across national borders and out of legal control. That might be useful, but it is not going to be a very big deal.

For the most part, regulations that are intended to prevent a corporation from relocating its own operations to some foreign location can be circumvented by the simple device of dividing the operation into two pieces. Closing the domestic operation and then entering into a simple agreement to import whatever it is that you want from some other entity overseas. That then becomes trade rather than outsourcing and subject to the religious protection associated with free trade.

Third point. Is outsourcing a strategic threat? That case has been made. There is a very interesting article in *The American Conservative* of all places—Pat Buchanan’s journal—by the journalist Eamonn Fingleton on the loss associated with Boeing’s outsourcing of the manufacturing of aircraft wings—a very delicate and advanced area of technology—to Japan.<sup>127</sup> And I think there is something to that case, but it is a relatively small part of the outsourcing picture. It would be very hard for me to argue that we face a strategic threat from the proliferation of call centers around the world.

The effect on workers in third world countries has already been, I think, mentioned by Sharmila who spoke about how the wages being twice as high as they are for doctors. That reminds me a little bit about Barney Frank’s remark when Ronald Reagan said that Nicaragua was closer to Harlingen than Harlingen was to Boston. He said, “I’ve checked with my constituents and they have no objection at all.”

I have noticed visiting special economic zones in Zhuhai, China, and other places, that they do have security fences, but those fences are oriented outward. They are to prevent or to regulate the flow of people coming in. There is no restriction on people who might seek to leave.

So where does that leave us? In the larger question, we are back to the very large economic issue: does the United States have a trade problem? And if so, what should we be doing about it? That is a bit like asking whether McDonald’s has golden arches, at least to most people. We are running a deficit on our current account of 5.5% of GDP and if we were to approach closer to full employment, that deficit will certainly get much larger. But in what sense is that a problem?

The specific sense is really the risk that is associated with the possibility that our major creditors—China and Japan particularly—may decide that they no longer want to hold our IOUs and precipitate a kind of major shift in world financial relations that would presumably leave the Euro in the position that we now occupy as the privileged currency in the world. Is this likely to happen any time soon? The answer to that is, certainly I do not know. But it is not really in the interest, in the plain interest of any player, except possibly the Europeans who do not have the wit to see it, to bring about the events that would make such a transformation happen. In the first instance, the great financial losses would be inflicted on precisely China and Japan, who would lose the value of the dollars remaining in their portfolio. Every player in this game, every large player, therefore, has an incentive to behave quite cautiously; and for that reason, my bet is that the existing system, unbalanced and unsustainable in the very long run though it may be, is likely to continue for quite some time.

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127. Eamonn Fingleton, *Boeing, Boeing... Gone*, AMERICAN CONSERVATIVE, Jan. 31, 2005, at 7.

That being so, what should we do? Well, my first answer is we should focus our attention on creating new jobs right here in the United States, recognizing that four years ago, we had substantially more jobs than we do now, and they were better jobs. We discovered that we could have an unemployment rate well under 4% with very good social consequences, lower poverty rates for minority populations than at any time in history, no rising inflation. Why can't we reproduce those conditions by some form of determined public and private effort? The answer is of course we could, if we made that effort.

If we did bring our population to a higher state of employment, could we afford to provide minimally decent social benefits to the nonworking population? Yes, of course we could. We are an extremely rich and productive country. These are a matter of internal social relations about which our external environment really does not have a determining effect.

What should we do on the assumption that the world is not going to collapse around us in the short term or about our trade? We should think strategically about the medium-term issues, our vulnerability to a fluctuation or to a decline in the supply of imported energy, particularly oil, is a serious matter, that we should be thinking about. And our ability to sustain our position in the world economy as an exporter of advanced technologies is a serious question to which we should be devoting attention and resources; and we are not doing so at the present time.

My fourth point would be that it would make a great deal of sense given the fragility of our financial position to tone down the aggressiveness of our foreign policy. And let's hope that the world does not repudiate our leading position by retaliating against us in the financial markets for the egregious misconduct that we may be accused of in other spheres such as, specifically, military policy in the Middle East. And hope that the system lets us continue in our privileged position until we manage to adjust to a more sustainable long-run position.

Then finally, let's come back to immigration, the issue of the morning. It does seem to me that one issue that was really not sufficiently focused on this morning was the simple advantage that we would have as a society if everybody who lived here and worked here really did have the right to vote. Seventy years ago, people were not so coy about what was fundamentally at issue. When my father became an employee of the U.S. Department of Agriculture in Washington, D.C., in 1934, he was asked only one qualifying question for that job, and that was, "Son, do you consider yourself a good member of the Democratic Party?" (Actually, nobody was concerned about the fact that he was not a citizen of the United States. He did not become one for some years after that.)

It is clear that this issue of the status of individuals who live and work in the United States is primarily viewed by those in power as a political question—as a matter of maintaining political control. That is what the whole ruckus in California was about during the 1990s, and that is what it is about, really, in the larger country as a whole.

Since I have mentioned my father and we are on the subject of outsourcing, I only have one other thing to say, which was that I was visiting him last year, and the great economist, Amartya Sen, was over. My father said to him, "Amartya, you know, I am the father of outsourcing." And Amartya said, "What do you mean?" And Dad said, "Well, I was United States Ambassador in India in 1962 when the Indian Institutes of Technology were first established, and the U.S., through its aid program specifically, had a good deal to do with getting that operation underway. And it is from that, of course, that this great effusion of scientific and engineering talent that India now has sprung." And Amartya was pleased with that, and I was interested in it, and then it occurred to me, you know, if my



father is the father of outsourcing, do you know what that makes me? The outsourcer's apprentice.

### *Discussion*

#### **Cleveland:**

I am glad nobody had to follow James Galbraith. Thank you all for a very rich set of comments. I think you have put a tremendous number of issues on the table, and we had very good comments both from the perspective of the impact of outsourcing on the U.S. economy and developed economies, and also what the picture looks like from the receiving end of countries such as in India.

There was just one other perspective that I wanted to throw into the mix a little bit, and that is the perspective of developing countries that are competing with each other to try to get foreign investment and outsourced production. The international liberalization of trade has eliminated the quota system in textiles that had been used by the United States and other countries to encourage improved labor conditions in countries such as Mongolia, Cambodia, and Bangladesh. As of 2005, those quotas are no longer in place, and we are hearing this giant sucking sound in Latin America and Asia as much production is preparing to move to India and China.

One of the projects that the Transnational Worker Rights Clinic here at UT is looking at this spring addresses exactly that question: how Cambodia's effort to setup an ILO monitoring system for labor rights in the textile industry has been affected by the free trade regime and the increasing pressure on companies to seek lower production costs in China and India. That is one additional issue that might be put out on the table. I do not know if anyone wanted to comment on it specifically. If not, we can open it to questions.

Are there any follow up comments generally from the panel?

#### **Danielsen:**

It is somewhat related to what you are saying and also something that Tom said, which is this question that James put on the table about, well yes, the problem is growth and how do we have growth, and let's have new jobs. You could see from the legislative proposals that were put on the table that much of the strategy for getting new jobs is essentially tax cuts and corporate incentives of one kind or another.

Now, these kinds of incentives are taking place in the developing world as they try and attract the Dells of the globe to come by either regulatory limitations, limitations on tax cuts, or subsidies of various kinds. But they are also taking place in the United States between states, between urban centers, and between the United States and Europe.

There was a huge article in *The Wall Street Journal* recently about the incredible tax competition that has resulted from Ireland's reducing its corporate tax rates to 12.5%, which has produced a concomitant set of reductions all over Europe.<sup>128</sup> And now the average corporate tax rate, not the real rate but the rate-rate, is higher in the United States than in Europe, putting pressure on us, further reducing corporate taxes. So you are actually seeing an incredible proliferation of this problem, not just amongst poor countries competing, but also amongst wealthy kinds of countries.

I think that even if we take James' idea, okay, don't focus on outsourcing. Let's focus on new jobs. How do we do that? And should we be focusing on global welfare or

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128. *Review & Outlook: Supply-Side Ireland*, WALL ST. J., July 29, 1998, at A14.

national welfare? And in what sense should we be thinking about that as, if I may presume, progressives trying to deal with these problems in a sensitive way on a global basis?

It seems what we are getting, interestingly, is domestic growth versus global growth. You are getting growing income inequality inside of both rich and poor countries—significant transfers of wealth. And it seems another thing that is happening, maybe as a result of this tax competition and incentive competition that is going on, is a shift in the tax burden from capital to labor and a reduction in public services as a result of lower revenues, which is reducing our infrastructure and education investment, which is going to have an effect on business unless business does not have to stay here.

So it is an interesting nugget of problems that even if you want to focus on it as an economic problem of growth, what makes growth happen? If it is not corporate subsidies, were the Clinton-Gore folks lucky? Was it their deregulation and corporate welfare strategy that produced the technology boom? And if so, maybe that is the right way to go.

What should we be doing about this, if not addressing it in the context of outsourcing?

### **Galbraith:**

If you go back to the 1990s and you ask how did America create all those jobs, 20 million or so, in those years? We created a great many of them in healthcare. We created a great many of them in education, including higher education. We created a great many in housing. We created a great many in the care of the elderly, and we could create a great many more because, frankly, there are a lot of us who are going to be old in the next fifteen or twenty years, and we are going to need a great many people to care for us.

We topped it off by creating quite a lot of jobs, but not as many as many people supposed, in information and technology. How did we do that? We had a moment that lasted—you know this better than I do—three or four years in which there was an enormous expectation that profit could be had doing almost anything in that sector. And a vast amount of capital formation occurred, which went to companies, which then spent it on their business expansion plans. So you had a vast increase in private investment, which was fueled, in part, by capital coming in from overseas.

So we got lucky to some extent, but largely this was the result of a kind of national focusing of attention on the potential of the information and technology sector.

Now, the first things that I mentioned could all be replicated today, if we were to put more resources into these areas, rather than pulling resources out of them on the ludicrous pretext that we cannot afford to provide healthcare, or homecare, or educational services to our own population. We are the richest country in the world. Of course we can afford to do that. We will be richer still if we do it successfully. We will be poorer if we do not.

In addition to that, we should be thinking about the kinds of problems that face us today that are analogous to the information technology problems and potentials of the 1990s. It seems to me—and I don't know as much about this as perhaps other people may—but it seems to me that we are going to face a major energy problem over the next fifteen or twenty years. We are going to have to rebuild our society in extremely important respects. You can employ a lot of people doing that.

If we do that, we will prosper. If we prosper, much of the rest of the world will be much more prosperous than it otherwise would be. And we are one of the few countries which can act, as a matter of policy, in a way which really does change the economic conditions in a lot of other places. Most of the rest of the world, basically, cannot do that.

They can maybe influence their own conditions but they are not big enough, and they are not tied enough in to the rest of the world to make a difference for places outside their own borders.

**Question 1 (Barbara Harlow, The University of Texas Department of English):**

I wanted to ask about the shifting lexicon from outsourcing to subcontracting and eventually to free trade. If the various users could explain the usage, in particular with regard to the missing \$8.8 billion dollars in Iraq, which seems to have disappeared as it moved from outsourcing through subcontracting in the name of some kind of free trade. In other words, I am concerned about the ways in which the vocabulary, the lexicon, the semantics are used. How does this discussion help us to either conceal or reveal some of the rather more nefarious antics that are taking place today?

**Green:**

I actually agree with you. I think that a lot of these monikers that we come up with are about as pernicious as Washingtonian acronyms. I think it is very important to understand what we are talking about, at least from a corporate perspective.

My perception of what outsourcing, or at least what it used to be, is something that I and Dell pretty much abhor, that is, outsourcing a core competency of your company so someone else actually does it. So if it is your information technology function, you hire another company to handle that for you. If it is your manufacturing, you actually have another company off in Singapore or Malaysia now to do your manufacturing for you.

That is usually done in the name of efficiency but at least in our industry, that is almost never true. What is left behind if you outsource your core competencies? What is your company? What do you do? Well, you are basically just a holding company at best. And what we have seen as companies fall into financial ruin who do this is they do not last very long. That is what we think of as outsourcing. Now that is something we, frankly, do not do.

When I think of what offshoring is, what everybody means in our context is that you have employees offshore. They work for Dell. They function as a Dell employee. They have benefits. They are paid less because they are usually in countries where the wages are less. But they have benefits. They have some form of job security. They have some sort—and we are really working on this, but it is just in the beginning phases at Dell—some sort of career path. They are part of your global company. That is offshoring. There is a responsibility there.

There is also a responsibility, I think, if you outsource, but usually for companies, a main reason to outsource is they don't want to deal with it. It is hard or is it the type of employees they do not like to deal with. So they get rid of it. I think there is a problem with that. The notion of offshoring, of really going global with your employee base, especially if your customer base is global, is an entirely different question in my mind.

So terminology is important. It is a shame that corporations have fallen prey to the use of terms that do not mean anything or that we have to spend this much time explaining to each other.

**Cleveland:**

Just to follow up on your comment, Tom. David Kennedy asked a provocative question yesterday afternoon about what we would think about extending national labor regulation to the operations of U.S. companies that operate globally. Given Dell's concept, or growing concept, of a global corporation, I was wondering if you might comment on that or respond.

**Green:**

Sure. I am trying to remember what this acronym stands for. It is CAFOD (Catholic Agency for Overseas Development). It is an organization basically led by Catholic nuns in Great Britain, and it is one of the more effective NGOs on just that question. Even they, who have been in this business and have really been the ones who have brought Nike and Levi-Strauss in particular to heel, would not and do not advocate the imposition of U.S. wage and labor standards globally.

Instead what they do, and we have really come to enjoy working with them over about the last eighteen months, is engage you in a much deeper understanding of the wage and labor structures where you are employing people and sometimes where your subcontractors are. That does not mean just accepting them but investigating them, understanding them, and then bringing to bear.

What we have found is that if you try to impose U.S. labor standards in a place like Xiamen, China, where we do some manufacturing, not only will it not work but it would be quite destructive. There is no way for them to, in a sense, absorb what we think of when we think of wages and standards over here. So instead we must really engage with the local, and not just the political, base. There are forms of labor organizations in places like Xiamen, it is just we do not recognize them. So it is a real translation issue.

Another issue is making sure that there are some basic safety standards that we have adopted. In the technology industry, the top, I think, twelve companies have adopted an international code of labor conduct, and, more importantly, worker safety. It has not really been publicized but we did it last September and it is working.

I think we are just so much more advanced than anywhere else where we manufacture. Our manufacturing on Parmer Lane and I-35 in Roundrock, Texas, looks remarkably like our manufacturing in Malaysia and in Xiamen when you get inside there. But how the workers live, where they live, their proximity to where they live, healthcare availability, all of those things are totally different. So you have to work within the system where you are.

**Question 2 (Audience Member):**

Tom, I really liked that you said you did not want to be branded the way Nike was. This question is mostly to Chantal because you were talking about what kinds of things we have to deal with under the WTO. We are allowed to have stickers made in China, for example, that let consumers make a choice: do I want to buy this if it is made in China?

We are allowed to stick that sticker on even though it implies that there be some trade effect where maybe we wouldn't buy that.

I am wondering then, is there any future for just a little sticker that would say, "This corporation operates with good labor practices for that place"? It does not even have to tell us where that place is, because honestly, I do not care. As long as the labor practices there

are good, then we would be able to allow a truth in labeling, the same way we did with food, and have it be a consumerist movement.

**Thomas:**

Yes, we think that is a great idea. We can maybe start doing that here. The idea of consumer choice is the bedrock of free trade, so that is allowed. And what trade rules do not like is when governments decide for the consumer and impose top-down regulations, which has a lot of assumptions built into it, like that is a bad thing or there are not places for collective action through governmental regulations, and so on.

There are some sub-issues about when labeling requirements are themselves a restriction because they impose too many burdens on producers with fewer resources in poor countries. But setting those aside, I think that what your comment really points to, and I think it is a difficult issue, is how much of what we have to do is up to individual action? In other words, sometimes it is easy to conceptualize this as the corporations versus the governments, and we are the poor citizens who get caught in between.

But what you will often hear from free traders is, “Well, if people really care about these issues, then why don’t they vote with their dollars? Why is it that people are still going to Wal-Mart when they know about X, Y, and Z labor practices?” Because maybe they, as individuals, are making a decision that actually they care more about stretching their dollars than they do about labor practices. Now I think that that is a narrow view; it does not tell the whole story. It does not tell the story about the background conditions of people with fewer dollars to buy goods with not very much information. I think that is where labeling can come in. I think the more that we do that, the more we actually then do take responsibility for having an impact on this dialogue.

**Green:**

Just to follow up on it, this laptop does say “Made in Korea,” and it has the Energy Star moniker, which is a federal brand about energy efficiency for the unit.

In Europe, a Dell computer, the smallest Dell computers, all now have a label on it that will say “Blue Angel,” which is an environmental standard set in Denmark. Over the last five years, you really cannot sell electronics in Europe without a Blue Angel sticker or something like it. But I am not sure if Dell is putting ISO 9000 on the back. This really gets to the point of the question. ISO stands for International Standards Organization, and ISO 9000 starts getting into labor issues; it started making us really very uncomfortable when we first saw it. If you want to see a corporation blanch, talk to them about international labor standards. It is a really tough question. But they do require certification and they do enforce certification in order for you to get the ISO 9000 sticker. It is not where we need to be, frankly, to get to your point, but it is closer than we have ever been.

There may be ways where some of these questions could be addressed just with labeling. Look on the back of your laptops before you buy them. There are amazing things that you can learn.

**Rudrappa:**

I wanted to add to that as well. Think about something like the Workers’ Rights Consortium (WRC), which basically deals with garment workers that has actually come out of the action of university students, who want some kind of labor standards in the ways by which university apparel is made. That is such an interesting experiment that university students, labor unions here, and also labor unions in various sending countries where these

products come out of are actually trying to coordinate. There have been issues of imperialism in terms of setting labor standards, but these are up for negotiation.

The WRC has been quite effective over the past five years and I think this is something that we can adopt for even other kinds of industries rather than just textile workers, who seem to constantly be showing us the way we should be organizing.

**Cleveland:**

What is so interesting is that it is individuals and groups operating in a very grassroots way that have spurred this process, that these are bottom-up generated standards.

**Green:**

They have an amazing impact. They really do.

**Question 3 (Hollin Dickerson, *Texas International Law Journal*):**

Going back to a more normative level, we were talking about the emotional responses we have to outsourcing. Mr. Green, you had said something about how this creates different types of jobs for Americans. There seems to be this kind of undercurrent of paternalism in outsourcing such that, “Oh, we will send them medical transcription. They can do that, and we will get on with the real work that needs to be done.” I was just wondering how that played into the debate. And Sharmila, in your experience in Bangalore, if Indians felt that. If they perceived that that was thought about them and what, maybe, the responses to that were.

**Rudrappa:**

Well, if you think about the labor market in India regarding information technology, it is quite broad. As James was indicating, you have the IIT, the Indian Institute of Technology, which has about 150,000 people doing the entrance exam and maybe about 2,000 are selected from around the country. These are really the cream of intelligence and training. So you also have that sector that focuses on a lot of R&D kind of jobs, which are also going to India as well. General Electric, for example, is setting up R&D sectors there. But it is a much more diverse labor market. You have second-tier engineering schools, and you have also the kinds of call centers and programming jobs that people do. What people are trying to do in India is to focus on getting the R&D kinds of jobs rather than just the call centers. But in the United States, what gets really politicized are these call centers.

**Green:**

Just a quick comment. Smart municipalities overseas, including in Bangalore, build that into their incentives. Ireland figured this out very early too. They very quickly understand that, “We do not just want your call center. We just do not want your low level manufacturing.” And so the incentives built in—North Carolina essentially just did the same thing to us—tiering so you get a more complete stack of employees, which leads to a diversified economy, which leads to a healthier thing for everybody.

It is really the foolish companies who just dump. And that is basically being done by outsourcing companies—third parties who will handle your check processing, not by what I call more complete companies who go in with the idea of, “No. I want to build a

community” or, “Help be part of the community where my company’s workers will be.” Different concept.

**Question 4 (Ray Marshall, The University of Texas LBJ School of Public Affairs):**

We excuse corporations from paying \$400 billion in taxes. The only thing I think you are missing in your discussion is, nobody is talking about taxes. Where is the money coming from? I know you are in favor of reducing taxes but I do not think you are right.

**Galbraith:**

I am not particularly in favor of reducing taxes, but I am not opposed to having the government spend more than it takes in. In a functioning capitalist economy, somebody has to run at a loss. In the 1990s, the private sector was willing to do it. They were willing to borrow and to spend well in excess of their incomes because it was offset by the rise in the value of their stocks and of their homes. It is no longer the case; it has not been the case for four years.

So the government is going to be running a deficit. This is inevitable until the private sector’s position changes.

The issue you are raising is: given that the government has to tax to a certain extent in order to maintain its credit in the world, on whom should that tax burden fall? And there, you are exactly correct. If the burden falls on the poor and on low-income working people to an increasing extent, they are not able to provide the profitability for companies selling to those markets because they are burdened by the combination of their debts and their taxes and their rents before they get around to being able to buy goods and services.

On the other hand, if the burden falls largely higher in the scale and to some extent on corporate profits—this is an old point in Keynesian economics but is one which I think is valid—then when you run at a higher level of activity, yes, people are paying taxes at a higher rate, but they have more profits on which to be taxed.

The rich in this country, incidentally, were vastly richer in the late 1990s than they are today. They have suffered a huge fall in the value of their portfolios from which they have not recovered. Back in 2001, I gave a talk to the venerable Americans for Democratic Action and I said, “Look, George Bush at this point is going to go down as the greatest leveler of capital income since Pol Pot. If he applies for admission to Americans for Democratic Action, you are going to be faced with a tough choice. You will either have to accept his application and admit him. Or change the name of the organization to maybe Americans for Thoughtful Democratic Action.”

**Question 5 (Emanuel Marcus, The University of Texas LAMP Program):**

I am a puzzled by this. I really think that there have been mergers of giant corporations with a consequent loss of jobs; that is, 5,000 here, 10,000 there, week after week. Yet the unemployment rate stays around 4.5%.

An example: Hoover Vacuums outsourced its manufacturing recently and 5,000 people were laid off. My question is this: if 40,000 people, in order to keep a roof over their heads, have to go out and find two small paying jobs, does that mean a net increase of 5,000 jobs because 5,000 people got 10,000 lower paying jobs? Is that how the Labor Department figures its employment rate?

**Galbraith:**

I think the answer to that is no. The Labor Department counts people rather than jobs. The reason the unemployment rate appears to be as low as it is—in spite of the fact that we have created almost no net new jobs, perhaps still zero net jobs, in the last four years, notwithstanding a substantial growth of population—is that a great many people who in the late 1990s would have been looking for jobs and would have seen some reasonable prospect of finding them have stopped looking. So they are not counted as being in the labor force and therefore do not show up as unemployed.

A second reason is that as unemployment benefits—unemployment insurance—ran out, a great many people who were marginally qualified to be counted as disabled, asked to be classified that way instead. So disability payments have gone up quite a lot and those people are also not counted in the labor force.

So the 5.5% or so unemployment that has been the case for quite some time is really not comparable to unemployment in previous business cycles. A comparable number would be closer, I think, to 6.5–7%.

**Danielsen:**

There is one other small piece, which goes to something you were implying in what you said that, and I am not going to get it absolutely right, but McKinsey did a massive study on outsourcing and actually came out very much in favor of the global welfare benefits of outsourcing.<sup>129</sup> But they did acknowledge that only 36% of U.S. workers whose jobs were displaced wound up with jobs of equivalent or better pay and benefits. Only 36%.

So most of the people whose jobs are displaced get worse jobs. They get jobs but no benefits, or worse hours, or part time. And so that is another big piece of the phenomenon that is not really clear in just looking at the unemployment rate statistics.

**Galbraith:**

I do not want to hog the air but let me just follow up on that with a comment. We live in an economy that is full of small business and dispersed business operations. It is a very service-oriented economy. It is intrinsically more difficult to organize and to unionize than the manufacturing-based economy of the 1930s and particularly the 1940s was. And for that reason, the welfare of the large mass of American workers is much more a matter of public decision than of collective bargaining than was the case fifty years ago.

That is another reason why, it seems to me, the civil rights issue of our age is that people living and working in this country should enjoy political rights and should have the right to vote and to participate in how society makes the choices of dividing up its resources. If we end up in a plantation economy where workers are, by and large, not political participants, we are going to end up in a country which we would not recognize as being consonant with what we, I think, believe to be core American values. That is, to me, a very important reason to focus on the political aspects of the migration and immigration issues.

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129. MCKINSEY GLOBAL INSTITUTE, OFFSHORING: IS IT A WIN-WIN GAME? (2003).



**Question 6 (Ricardo Turollols, Amistad Vox):**

Basically what I see is a theme or a title of the sense of human rights. I think it captures the spirit very well.

Capital is very good at creating wealth but very bad at distributing it. And labor and the social system are very good at distributing but very bad at creating it.

The problem is, how do we address human rights and justice issues? Because every time we try to address it, it goes through the cracks.

**Cleveland:**

Thank you. Chantal Thomas, you had raised the issue of a multilateral agreement on labor standards.

**Thomas:**

Hopefully we will talk about it more in the third panel as well, how to bring all of the issues that have been raised in the first and second discussions into the fold of human rights and justice.

But I guess I would observe that there are, of course, lots of multilateral instruments that set out basic labor standards: traditional intergovernmental treaties, conventions, and agreements. The ILO has many conventions relating to, for example, the rights of migrant workers, minimum wage, organizing, the right to collective bargaining, and things like that. And you also have a growing body of international human rights laws, like the U.N. Convention on the Rights of Migrant Workers and Their Families.<sup>130</sup> There are therefore lots of pockets of intergovernmental activity to set multilateral standards around human rights relating to work.

But what I think is interesting, and what comes out in Tom's discussion and the comment that was raised, was how much of the enforcement of that and the absorption of what those standards really mean with respect to justice and equality and the values that you were talking about comes out of on-the-ground organizing of NGOs. There, I just want to observe, that I think globalization is also part of the solution. It is part of the problems we have identified. But we could not have the kinds of interactions that you are talking about with the group in London looking at what your production looks like in China or elsewhere without the ability to communicate as easily as we can without the flows of information and technology that are a part of globalization.

So I think what we are talking about is reducing the costs of organizations for individuals and for groups that have not only private interests at stake but public interests at stake. In other words, the transaction costs organizing toward public goods and not only private goods becomes, I think, easier with globalization. I think that is where we will see some of the articulation of specific standards of human rights and justice and the enforcement of them through ongoing monitoring on the ground.

**Question 7 (Doron Teichman, The University of Texas School of Law):**

I wonder if the discussion we are having here is the right discussion. The underlying theme here is the division of the pie; how are we dividing this pie. Let's market something well and if you want to divide the pie some other way, use that to transfer mechanisms in

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

order to divide the pie. Don't mess up the market. Let Dell make all the money in the world.

I was wondering how to stop dealing with the questions and start dealing with the more serious question of, if you want to be a member of this global market community, part of the price is a distribution system where we are transferring wealth from rich countries to poor countries while letting markets work the way they work.

### **Danielsen:**

I do not know if it would be a real example but it certainly asserts itself as an example of that sort of strategy and that is the EU. It was interesting this morning in the discussion about immigration how difficult it was to talk about the free movement of workers, even between the United States and Mexico, as part of an overall package of development growth strategy.

The thing that was interesting about the EU's success is that it was one of the most successful development strategies in ages for pulling up Greece and Portugal and Ireland. But there were enormous transfer payments and a lot of regulatory apparatus. So the EU did not just happen; they created a whole bunch of institutions and billions of regulations. It was not just "let the market happen," it was "reconstitute the market with a whole bunch of new bells and whistles." The regulatory strategies that were enabled there permitted the movement of workers, a central bank, a single currency, and a lot of stuff that maybe has generated growth, a lot of development, equalization amongst the poorer and the richer countries of Europe. We will see how it works with the expansion into the East.

### **Galbraith:**

I went to graduate school at a time when this particular set of ideas—particularly that you should let markets work and deal with the distributional effects afterward—was the state religion of the economics profession. I always wondered from whence it came. I never really found out. But I think it is fair to say it sprang full-blown from somebody's very clever imagination. But the desired system, in which markets first decide the allocation of resources and then you do nondistortionary lump sum transfers to reestablish the initial endowments that you would like to have, has never happened in human history. And so, I have decided that it really makes a certain amount of sense to look at what has happened in human history.

When you do that, you find very little evidence that societies that regulate distribution within reasonable bounds—that is to say, societies that specify limits to the maldistribution of pay structures and that provide for, say, taxation of capital—you find little evidence that those societies are less efficient than societies which have very weak tax structures and basically allow the markets to do whatever they want, forcing the population to accept the outcome. In other words, there is very little, in fact, no reason to believe that Denmark is less efficient than Spain. There is a good deal of reason to believe that Denmark is substantially more efficient than Spain, because its social arrangements permit almost everybody to work at a reasonable wage. And Denmark which is, in fact, not all that productive per capita has a much higher-than-average GDP per capita, that is to say, higher living standard than the average for the OECD, whereas Spain does not.

So my sense is that there must be reasons unknown to the economic theorist who developed this particular model. We should spend more time and effort trying to learn why, in fact, efficiency and equity go together as a rule and are not, as a rule, opposites or essentially goals or values between which a choice has to be made.

## VI. ROUNDTABLE III: LINKING OUTSOURCING AND INSOURCING IN A GLOBAL ECONOMY

### **Moderator:**

David Kennedy, *Harvard Law School*

### **Participants:**

Ray Marshall, *The University of Texas LBJ School of Public Affairs*

Harley Shaiken, *University of California at Berkeley, Department of Geography*

Sharmila Rudrappa, *The University of Texas, Department of Sociology*

### **David Kennedy:**\*

I will first ask Ray Marshall to make a few comments about how things look from his point of view, then I will say a few framing things as somebody who has also watched the debate yesterday and today, then I will offer Harley and Sharmila a chance to sum up their sense of how the issues fit together. Thereafter, we will have a discussion with our various team members from this morning.

Ray, it is a pleasure. You have been with us here all day and I know we would all appreciate anything you have to add to our conversation at this point.

### **Ray Marshall:**\*

The Working Borders conference was well conceived. Outsourcing and immigration are part of the same globalization processes, but are not well enough understood to provide the basis for sound policies. This conference therefore serves the useful purpose of deepening our understanding of these important issues.

One of the sources of confusion is the failure to clearly define the concepts used in debates over globalization and its impacts. Even the term means different things to different analysts. Many economists, for example, define and measure globalization as the sum of exports and imports and therefore minimize its impact. And transactions encompass investment, technology, information, and other activities, not just global trade. Globalization is really a much broader concept encompassing the impact of actual and potential international transactions on domestic institutions and people. In this broader context, globalization is one of the universal imperatives affecting the lives of everyone. For example, domestic workers' bargaining power is weakened because employers have the *option* to outsource, shift production to other countries, or import foreign workers.

There also is a lack of clarity about the benefits and losses from international transactions. Economists, for example, generally support open and expanding trading systems because, they argue, specialization causes the United States and other countries to experience net gains from trade.

The principle of comparative advantage teaches that the total value of transactions will be higher if countries specialize and trade those things for which they have the greatest advantage or the least disadvantage. This is a useful tautological concept, but it ignores interests and, as an exercise in comparative states, ignores time. Countries don't benefit from international transactions, individuals do. This problem might be partially solved by an effective way for the monetary winners from international transactions to compensate

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the losers, but we do not know whether or not the post-compensation welfare of the winners is more or less offset by the compensation to the losers.

A positive adjustment program is a practical way to deal with this problem, but those who lose from international transactions have limited political power to ensure that effective adjustment processes are part of international economic agreements.

There is an even greater political problem with trying to make enforceable minimum international labor standards part of global transaction agreements. Those who write international economic agreements vigorously resist the inclusion of labor standards. They use various weak arguments for excluding labor standards, but the real reason is the lack of political power by workers' organizations, not the validity of the arguments for exclusion.<sup>131</sup>

Time is a problem because what is true at any time may or may not be true in the future. Comparative advantages are not necessarily natural phenomena—they can and have been created by long-run strategies. National leaders can restrict international transactions in the short run in order to develop competitive advantages in the long run, which is what practically every industrialized country, including the United States, has done. Indeed, many of the advantages India, Taiwan, or South Korea have are due to strategies initiated in the 1950s or 1960s that would have been condemned as unwise economics at the time. And after the fact, orthodox economists argue that fundamental market forces, not strategies, caused these countries' successes.

Under modern conditions, the traditional theory of comparative advantage must be supplemented by a theory of competitive advantage to be a useful guide to action. Competition can either be by reducing costs directly, mainly through wage competition, or indirectly by increasing productivity. Competitive advantage can be achieved by increasing quality, best defined for market purposes as meeting customers' needs. It can be demonstrated that a strategy of improving productivity and quality, or value added, is the best course for nations to take if they want to maintain and improve their incomes and promote broadly shared prosperity.<sup>132</sup> Market forces alone will produce cost competition, which implies lower and more unequal incomes. Cost competition is more likely to produce international tension than high-value-added strategies.

In addition, effective policies must be based on an understanding of long-run trends whose strength can accelerate to the point that counteracting them through direct policy interventions would be very difficult given the interests supporting them and the momentum they have built up. For example, globalization of economic activity is not a new phenomenon, but the impact of deep economic integration brought about by modern information and transportation technologies is very different from the shallow integration of national economies in the 1950s. Shallow integration is much easier to regulate than deep integration, which affects the entire domestic economy, not just exporting and importing industries. The integrating processes are strong market forces and multinational corporations, which have become more powerful than either most national governments or international institutions. Once deep integration takes place, it has the power to weaken domestic environmental and labor protections and the rules for those transactions are formulated without the participation of worker or environmental organizations weakened by globalization.

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131. Ray Marshall, *Labor Standards, Human Capital, and Economic Development* (Econ. Pol'y Inst., Working Paper No. 271, 2005), at [http://www.epinet.org/workingpapers/epi\\_wp\\_271.pdf](http://www.epinet.org/workingpapers/epi_wp_271.pdf) (last visited Apr. 11, 2005).

132. See BACK TO SHARED PROSPERITY: THE GROWING INEQUALITY OF WEALTH AND INCOME IN AMERICA (Ray Marshall ed., 2000).

A second example of powerful long-run trends and forces taken from immigration is the difference between the power of a few people at the beginning of an immigration process and a larger population in a country that identifies with countries of origin. Once these populations become large and cohesive, they can become important political players who have to be factored into policy considerations. Indeed, many countries have at least as much influence on U.S. policy through their national identity residents in the United States as they have through normal diplomatic channels.

Labor market immigration processes also tend to follow certain patterns that, to be effective, policy proposals must consider. The patterns usually start with single or married workers without their families, followed by families and supporting religious, culinary, and entertainment workers. Labor market immigrants also tend to network in certain places, occupations, and industries. These networks are perpetuated by powerful push forces in sending countries, especially limited work or income opportunities, and pull factors in the receiving countries, mainly the desire for a steady supply of lower-cost labor. Once the networks become institutionalized, they are very difficult to regulate through direct means. This is especially true if regulations have never been very effective, as is the case with U.S. labor market immigration policies. Since World War II, the interests perpetuating the undocumented immigration streams have almost always been stronger politically than those that want to control these flows. The consequences for labor market immigration have been what one federal judge called an “amiable fiction” that we have a policy. There have always been ways to avoid the regulations or cause them to be ineffective, and the ineffectiveness is directly related to the point in the immigration process that the interventions occur. Interventions before the processes become institutionalized have a greater chance of success, as do interventions that assume that some part of the stream will be permanent compared with typical “guest-worker” assumptions that these flows will be temporary, which they never are. Nations that do not assume and prepare for permanent settling of guest workers in their boundaries create serious long-range problems for themselves. Almost all receiving countries have many people who are not fully integrated into their societies, which always causes political and social conflict. Similarly, sending countries always make unrealistic assumptions that temporary workers’ remittances will not only strengthen balance of payments, but that these workers will return with human capital that will promote economic development. Often, however, the returning immigrants use their earnings to import consumer and not capital goods and have not acquired appropriate human capital. These developments therefore exacerbate balance of payments problems in the long run and do very little to support sustainable development.

India could be an example of a country that made appropriate long-range plans in the 1950s to repatriate highly educated people who had acquired skills in the United States that would boost the Indian economy in the twenty-first century. Some economists have argued that it was not wise for India to educate more workers than its economy could absorb. Now, however, India is benefiting not only from world-class education institutions, but the return of many workers who have honed their entrepreneurial and technical skills in the United States. Mexico, by contrast, exemplifies a country that did not make such plans, attracting industry based primarily on cheap labor instead of high-value-added manufacturing. Mexico will lose labor-cost-oriented industries to other countries. A U.S. concern must be that an unregulated flow of undocumented workers will enable Mexico to avoid job-creating economic development and perpetuate marginal, low-wage U.S. industries that would be better done in other countries where these would be considered relatively high-wage jobs. If Mexico and other sending countries do not have adequate job growth to absorb their workforce growth, there will be a strong natural tendency for people to come to the United States seeking employment. Given the economic and political realities and the strength of the trends, there is not much this country will be able to do to

halt the flow of undocumented workers. Mexico's foreign minister, Jorge Casteñada, Sr., told us in the 1970s that whatever formal immigration policy the United States adopted, we would absorb a large part of Mexican population growth. I believe this pronouncement more now than I did when he made it.

It is not, of course, that we could not regulate the flow of immigrant workers, but that we probably will not. We have adopted laws to regulate workforce immigration but because of the trends and forces noted above, we are unlikely to adopt measures that will minimize the flow. We could, for example, greatly reduce illegal workforce immigration if we adopted enforceable measures to make it illegal for employers to hire undocumented workers, which would require as secure an identification process as the credit card companies have. When I had responsibility for workforce immigration for the Carter administration, we proposed such a system but could never get it adopted. An identifier was vigorously opposed by civil libertarians and the business community opposed both the identifier and making it unlawful to hire undocumented workers. Congress consequently adopted multiple, insecure identification processes in 1986 that invited fraud, as anyone with even a modest knowledge of immigration trends and forces could have predicted.

I favored—and still do—a larger legal immigration program and very restrictive temporary-worker programs, including no increase in the number of temporary workers until we granted amnesty to people who had been working in the United States for a period of years. Amnesty would automatically increase the supply of legal immigrant workers and perhaps obviate the need for more temporary workers. The problem with amnesty is that to be effective it can only be done as part of a stricter legalized immigration program and must have serious penalties for those who do not come forward and accept amnesty. Otherwise, expectations of continued periodic amnesties accelerate the flow of undocumented workers. We did not develop secure amnesty or immigration control programs in the 1980s, so we now have much more daunting regulatory challenges.

There are major problems with guest-worker programs that make them less desirable than larger flows of legal immigrants. It is never a good idea in a democracy to have large numbers of people without full legal and political rights. It is, moreover, almost impossible to prevent temporary workers from adversely affecting the most vulnerable U.S. workers. This is a hard proposition to test because employers often prefer the foreign workers, who are a much more select group than they could recruit in the United States at comparable wages. Equally important, these select workers have limited bargaining power relative to their employers and therefore are more easily exploited. One fiction about temporary and undocumented workers is that they only take jobs legal residents would not accept. Like what? There is no occupation in the United States where a majority of the occupants are either undocumented or temporary foreign workers. Hiring undocumented workers is not the employers' only option: they could raise wages, improve working conditions, mechanize, or relocate. Unfortunately, because we do not have proper economic and social policies, many legal residents are trapped in low-wage jobs—which are perpetuated in part by steady flows of foreign workers.

If employers prefer foreign workers, it is very hard to enforce an adverse-effect wage and employment policy. Processes to test adverse effects not only are difficult to construct, but usually have an employer bias. The U.S. Employment Service, for example, is not a proper enforcement agency because it depends heavily on employers for its main labor-exchange functions. Moreover, employers have the ability to define job qualifications so as to exclude most available U.S. workers, thus making it a self-fulfilling prophecy that there are no available domestic workers. In addition, employers who want to hire foreign workers have much more political power than the impacted U.S. workers and their

advocates. My experiences in the United States and Europe cause me to be very skeptical of such programs.

Perhaps the most effective way to protect U.S. and foreign workers is to make it very difficult for employers to get workers who are easily exploited. We could do this by rigorously enforcing labor laws where we know undocumented workers are being employed. We did this in the Carter administration within the limits of our enforcement resources. Indeed, we had an “employers of undocumented workers” demonstration project and found widespread violation of protective labor laws and collected back pay for some foreign workers, many of whom had returned to their home countries. Employers have a legitimate interest in a supply of workers who meet reasonable qualifications, but they do not have a legitimate interest in having only workers who are easily exploited. Nor can the standard for adverse effect be to find domestic workers who can do the work as well as select (usually prime working-age male) foreign workers.

My experience and study of both outsourcing and immigration lead me to the following conclusions:

- (1) We should not try to stop outsourcing, but we should not subsidize it through the tax system either. We do, however, need much more and better data and analyses of outsourcing and its impacts.
- (2) We should adopt and encourage other countries to adopt high-value-added economic policies. We should try to get international economic institutions to adopt high-value-added strategies and discourage the wage-suppressing option through enforceable international labor standards, social safety nets, and a positive adjustment program. This does not mean, of course, establishing uniform international minimum wages. But it does mean that countries should not be allowed to suppress wages in order to develop. Having low wages does not violate international labor standards; suppressing wages does. Such a strategy would require making the ILO’s core labor standards enforceable parts of the rules of international transactions.

As is done in the EU, enforceable labor standards should be complemented by international transfers to encourage low-wage countries to develop labor protection, social safety nets, and human resource development as a part of their high-value-added strategies.

A labor market immigration policy to support a high-value-added strategy would have the following components:

- (1) An amnesty program that would be as final as we could make it, with serious penalties for those who did not come forward. Opponents argue that amnesty rewards criminals, but who is responsible for these violations? Our immigration employment laws have been an “amiable fiction,” which everyone knew would not be enforceable. We therefore encouraged foreign workers to continue to evade the flimsy enforcement processes at great personal danger to themselves. Immigrants also had reason to believe that the real immigration norms in the United States were supported by powerful interests or they could not continue. In short, the United States is not without culpability for the acceleration of illegal immigration;
- (2) A very restrictive temporary worker regime, with an independent committee of experts to verify labor shortages and develop measures to protect foreign and domestic workers;

- (3) A more generous immigration policy that paid greater attention to the needs of a high-value-added economic policy. This means restricting the entry of relatively uneducated and unskilled workers and admitting those in labor scarcity areas as determined by independent experts, not mainly by employers.

We need a more generous labor market immigration policy because we will not have enough skilled workers to meet our needs for at least the next twenty-five years. All of the net increase in prime working-age people (twenty-five to fifty-five years of age) during this time will come from immigrant workers, who will be supplemented by the retention of older domestic workers who are less likely to retire at the same rate as the Depression and World War II generation. The question is not whether we should have a steady flow of immigrants, but under what conditions. We will not need larger supplies of unskilled workers and should do everything we can to promote the education, training, and upgrading of domestic workers, including immigrants and their children. But, if we remove the “amiable fiction,” there will be no justification for illegal immigration.

### **David Kennedy:**

Thank you very much. A terrific overview of a wide range of issues. I think one of the things that has been interesting over the course of the day has been seeing how once you touch one of these issues, it pushes out in a wide variety of other directions, into other fields of regulation, and into other areas of global policy. Trying to figure out how that works in relationship to what Ray has called the “naturally occurring flows” is exactly the kind of question we need to be focusing on.

One of the very hopeful aspects of this conference as an inauguration of the Rapoport Center is the way in which it has encouraged a habit of mind in thinking about political issues from a humanist, or a progressive, or a liberal point of view in their transnational context.

Sometimes in the course of the day, we have seen a real fumbling around with what that habit of mind ought to be. Should we be thinking about this as, “I’m an American citizen and a progressive liberal humanist kind of guy.” That means one thing. Or, “I’m a citizen of the world and I am a progressive, liberal humanist kind of guy.” Sometimes those line up, but sometimes they do not. Sometimes what is a progressive policy or might be an imaginable progressive policy in one country can have difficult and not so progressive impacts elsewhere. That is nowhere more true than in the fields of immigration and dealing with the perceived threat of outsourcing.

And so I think we have tried to develop, it seems over the course of the day, some possible habits of mind for transnational progressives as we look ahead to this kind of issue. Let me say a couple of things about the habits of mind I saw in play.

I would urge us to think about our political and ethical commitments as transnational citizens. One habit of mind would be to treat the job, the dignity, the wage, and our concerns about the living conditions for people in Mexico, or China, or Oklahoma, or New Zealand similarly. Not to imagine that people in Montana have a greater moral claim on our affections than people who live in Chiapas. But to develop the habit of mind of weighing indignities against one another with the idea that all people are equal in their dignity. And that a job loss anyplace is a job loss for a *person* and the same kind of a person that would be living here in the United States.

A second habit of mind that I saw, and it seemed very helpful over the course of the day, was acknowledging the footprint of what we do here in the United States and abroad.



Not just the official footprint but also the sociological impact. We will need an interdisciplinary approach to help shed light on that. What kind of impact does our outsourcing have on the types of jobs there are in Bangalore? Or, what effects do our regulations have on the incentives in different sectors in the Mexican economy? Thinking about these effects and taking responsibility for them seems to me to be part of what it would mean to think transnationally in a political sense.

To have a better description of what the immigration law or the outsourcing law regime really looks like transnationally, we will need to aggregate all those effects and all those concerns for all those people in all those different places into one description of the regime. It is very difficult to figure out how to do that because the international or transnational regime is a disaggregated amalgam of policy efforts developed for different reasons in different places that bump into one another in all sorts of surprising ways. And just getting a description of it can be very difficult, especially when the regime is permissive, rather than overtly regulatory.

My own sense is we *do* have an international labor standards regime. Absolutely. It is very permissive. It permits the passive, extraterritorial impact of low wage strategies outside their territory. It allows a strong extraterritorial impact for wage laws. If you like, the international regime permits national low-wage protection regimes to have a large impact abroad. So it is not a matter that we could start regulating something we are not already regulating; we just have to figure out what the shape of the existing regime is, and then where and in what way it might be altered.

It was very helpful to look at insourcing and outsourcing together—and I want to thank the organizers for doing this. It was very helpful because these are two issues that often do not engage those habits of mind when we contemplate them separately. Each is imagined to be owned by a specific discipline: migration law, corporate law, employment law. And we imagine them inside one country.

So in migration law, it is a problem of U.S. policy. Well, yes. U.S. policy is very important in migration law, but exactly as Ray was saying, the flows are a function of a transnational economic situation that is generated by economic and development conditions in Mexico as much as by the pull of our own economy. And thinking about them in relation to one another sets, I think, the Rapoport Center off with a useful format for thinking about other issues in the future.

The last thing I would say is it seems to me we have never considered insourcing and outsourcing policy on a spectrum from technical issues of adjustments to real opportunities for a kind of revolutionary, political, and ethical encounter with our broader global political situation. I think they are both, but my bias is toward thinking about them in the second light. That is, it is important to imagine and to address the technical issues of adjustment raised by globalization and to conduct policy in that way. But what would it mean to think about these two issues as opportunities to think more broadly about what was politically possible and what kinds of social identities were desirable over the next years.

I would like to say a couple of things about that before opening it up to the panel. I take issue a little bit here, James, with what you were saying earlier. I hope you are right but I fear that you are not when you suggest that the situation for the Left is one in which by and large we know what to do, it is just that this administration is not doing it. And that by the application of a series of measures that are relatively well understood in our own intellectual circles, we could go such a long way toward solving the problem that the challenges we face could be put off for quite a long time.

Now, normally I am actually enthusiastic about that sort of anti-panic approach, and I think there is a great deal in what you say. But my sense is that whether it is over the long

run or over the short run, the industrialized West in Europe and the United States, do face three challenges that we do not really have very good ideas about how to respond to.

One is the challenge of our own demographics internally, and Ray mentioned this. In Europe, it is a much more dramatic problem than it is in the United States, the aging of the population, the intense need for new workers.

The second is the challenge posed, we might say, by the success in the third world under conditions of globalization. The threat posed by the several hundred million Chinese or Indian workers who have been lifted out of poverty by development over the last decade. I mean, there are these amazing statistics.

My favorite one is that there are more people in India living at or above the American median wage than there are in the United States. Now, there are also a lot of other people living in India. But if we are thinking of the size of this economic phenomenon, the number of people who have been brought out of poverty, that is a success. It is an astonishing success. It could have been done differently. It has had distortive effects that one could address it in all sorts of ways. It has been accompanied in many places by politics that are really questionable and I would want to change many things, but it is remarkable for the progress of economic emancipation.

But that also puts an enormous pressure on us under conditions of globalization. Broad swaths of the globe, to put it bluntly, will have whatever Social Security system they decide to have in China in thirty years. The regulatory regime and the approach to social questions that is adopted in these new markets is going to have a spread effect back on us—it need not be that dramatic—but it is a threat that we need to be thinking about, it seems to me, over time.

And then there is the twin challenge from failures in the third world: the revolution of rising frustrations among the hundreds of millions of people in Pakistan, Egypt, and so forth who have been educated but who have not managed to be pulled out of poverty by the development over the last twenty or thirty years. That is a security challenge. It is an economic challenge. It is a challenge to our idea about whom we can include and whom we can exclude.

We might say these are the challenges of dualism in the third world. If you look at Latin America, you see leading and lagging sectors, placing these challenges right on our doorstep. My own sense is that our transnational political regime is just not up to the task of thinking collectively and transnationally about how to address those issues. And the issues of insourcing and outsourcing demonstrates something about how. Someone said this morning that everybody is now born in a particular place and assigned a particular passport as citizenship. We conduct politics primarily on a national basis where people are citizens of nations. We have to remember this was an emancipatory project of 150-years duration that is not completed yet by any means.

That was an amazing thing, if you look back. It was a project of the nineteenth century and through decolonization and to this century to bring women into the franchise, to bring slaves into freedom, and to the extent that has been possible, to enfranchise. So getting people citizenship in a state was no small matter—it was a political reorganization of the world. That was the emancipatory project of the nineteenth century, completed through decolonization.

For the twentieth century, the emancipatory project was, throw a network of humanist rules over those sovereigns. I think that the emancipatory project for the next century is to develop a transnational, political, public capacity that actually could decide things in a

broader way than at the national level. That “rules plus national citizenship” just is not enough.

So if you think about insourcing and outsourcing, what would be a utopian scheme? Some people have said, well, the EU is a utopian scheme. There they managed to fragment sovereignty and fragment identity and have free movement of capital and labor in some mix with a lot of transfer payments. It is very promising, I think, the way the Europeans have responded to the opening to the East and I would like to see EU membership for Palestine, for Morocco, for Egypt. I mean, if you wanted a regime change in the Middle East, I would have done it the European way rather than the American way: by inclusion, by law, by membership, by a promise of political inclusion.

I am critical of the Brussels administration, having worked in it. But this political inclusiveness is an advantage. The disadvantage is that Europe wants to stop it at their borders and treat the global world differently from the internal European world. Another utopian model would be a kind of global citizenship. Imagine a hundred years from now, everybody would be born in a state, with national citizenship *and* a five-year, once-in-a-lifetime residence visa for any other country. Well, that would be a different way of organizing it. It would be temporary. You would have to go home. It would be better for America if we had no temporary workers and everybody was a full citizen right away. But it might be better for the world if we had much more circulation of people and much more political membership in a wide variety of different places.

Or imagine if everybody a hundred years from now has three votes that can be cast in any election around the world they were interested in. Now you could regulate it. You could say only so many nonterritorial votes would be counted in the first ten years or whatever, but the idea would be to give people a stake in the decision making they think most affects their life. The whole problem, it seems to me, is to enfranchise politically, as quickly and as immediately as possible, people who have an economic stake in what is going on here in our political culture and extending it beyond our borders.

So those are the kinds of things that occurred to me as I was thinking about insourcing and outsourcing. That for outsourcing, yes, adjustment assistance. Yes, use law to slowdown the process. But wouldn't it be possible also to think more broadly about the extraterritorial reach of rules, about trying to link communities together in some kind of development strategy both for the United States and for Mexico?

I was struck in the last session by the notion that we should do extraterritorial rules for labor only through the soft machinery of NGOs. I am all for the soft machinery of NGOs, but there is no other area of economic or political life that we are willing to consign to soft law so readily—or to consumer sovereignty. We do not do accounting rules that way. We do not do banking rules that way. We do not do antiterrorism rules that way. We do not do antitrust rules that way. Sarbanes-Oxley is being applied to all companies that want to be listed here. The idea that antidiscrimination law and labor law should not be based on an idea about cultural fit. Well, there is a problem of cultural fit for Sarbanes-Oxley too. Just talk to any European and they say, “That is not even slightly how we do business.” So it seems to me it is a question of political will, rather than culture versus economy.

For insourcing, yes, easy movement, remittances, regularization, the technical side. But why not also think about it in ways that would move toward a broader political responsibility for development, a promise of political inclusion, the opportunity for linking communities across borders. Here I was quite struck by the choice between making people go back and circulate and reinvest their earnings and encouraging that, rather than encouraging inclusion here on a break with earlier roots. I think it is better for America to encourage people to come here and stay as soon as possible. But I think it may well be

better for the world to encourage more movement and more transnational investment and more opportunities for a linking of our systems of social security and social protection.

Ray and I were going to give general remarks. Now what we are going to do is play “what do the teams think?” How can we link these two issues? We thought we would ask Harley and Sharmila first to say how the issues brought together look. I am going to actually stand up and play. We are going to get really serious here. We are going to do a Phil Donahue-type engagement with the audience.

But first, Harley and Sharmila, why don't you start us off? Harley, you were willing to go first, so you get a free “go.”

### **Harley Shaiken:**

I too would once again like to thank the organizers of the conference. I think it has really been a wonderful experience in part because it is the first conference I know that has explicitly brought together the issues of immigration and outsourcing. I think they really are the flipside of the same coin in many ways.

The incisive overview that Ray Marshall laid out and the term that David Kennedy coined—“habits of mind”—fit together well. It struck me that by bringing immigration and outsourcing together, this fusion underscores that the key issues of work, citizenship, and community must be considered in a larger, transnational context.

That said, I would like to tell a brief story and then make a larger observation.

The story concerns two young women I met last year who worked in a state-of-the-art electronics plant. They were upset. They were fearful. They were angry. They had been told by their manager that their relatively new plant employing about 500 workers was being shut down and moved to China. Despite the fact the plant's workers had been very productive, they were informed that they had priced themselves out of the market in terms of their wages and their benefits. Not an unfamiliar story; certainly in southern Illinois, in northern California, in other areas of the United States.

What made this different is that these two women lived in Tijuana. They worked in the *maquiladoras* and the wages and benefits that had priced them out of the global market hovered around a \$1.25 an hour combined. Who is impacted by the shutdown? It is certainly more than the three women who were laid off. In fact, it is far more than the 500 workers in the plant. All the workers in that community, even that industry, feel the results.

The observation I want to make is there is a new reality to the global economy that is very different than what existed twenty or thirty years ago, and it has been something we have been slow to come to terms with. At the heart of globalization is the ability to produce sophisticated products at high rates of productivity and quality in very low-wage areas of the world. We are not simply talking about shoes or toys; we are talking about computers, and jet aircraft, and increasingly more sophisticated research and development, and computer programming. This new approach relies on three technological advances: the ability to produce complex products in modules, low-cost shipping, and information technology to coordinate far-flung production networks.<sup>133</sup>

This new production system provides important opportunities for development. But, it also poses a real danger both for workers in low-wage countries and for workers in the higher-wage economies of the world.

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133. HARLEY SHAIKEN, WORK, DEVELOPMENT AND GLOBALIZATION 7–27 (Ctr. Latin Am. Stud., U.C. Berkeley, Working Paper No. 7, 2004), available at <http://repositories.cdlib.org/clas/wp/7> (last visited May 19, 2005).

The question is, do we develop social policies that move in the direction of development and broadly shared prosperity? Or do we wind up with a system that results in what one might call “high productivity-poverty.” The current trajectory in the global economy seems to be moving in the direction of high productivity-poverty for many millions of workers, both in low-wage and in high-wage areas.

Let me remove two straw men at the outset. First, the debate over globalization is not an issue of being for or against globalization. That train left the station a long time ago. Globalization is a reality although its character is very much open for debate.

Second, the issue is not outsourcing. Companies have outsourced for a long time both domestically and increasingly internationally. It is really an issue of the basis under which outsourcing takes place. If the issue is outsourcing based on innovation, education, superior product, and better technology the result may be a tough competitive environment, but a healthy one. If it is outsourcing based on low wages, that too can bring benefits for workers in low-wage countries and avoid harming workers in high-wage countries if a social safety net is in place.

What we are looking at today, however, is not simply low wages. In many countries, the issue is *suppressed* wages. Many economists are fond of pointing out that low wages simply reflect some natural set of economic factors in a low-wage country. In particular, the argument is frequently made that low wages reflect low productivity. In Mexico, I have done research showing that in the export sector, productivity and quality are comparable to those indicators found in industrial economies but that wages have been largely decoupled from productivity. In other words, productivity often goes up while real wages go down.<sup>134</sup> In China, low wages require a massive state structure and a development strategy that seeks to develop based on holding wages low.<sup>135</sup> That is not the only strategy for development; it is far from the most desirable strategy for development.

In this context, outsourcing represents a more serious problem than we have been talking about so far. It is important not to be alarmist in this area but rather realistic. At this point, there are few reliable estimates on the size and possible growth of outsourcing. The number that has been used a lot, the Forrester Consulting group calculation of 3.3 million jobs moving offshore by 2015, is a reasonable number, but really a back of the envelope calculation.<sup>136</sup>

A recent study at Berkeley indicates that those 3.3 million jobs are within a context of about fourteen million jobs that could be outsourced, not necessarily that will be outsourced.<sup>137</sup> When you have a potential pool that large, you create the fear factor, and that has an impact on wages and conditions even when jobs are not outsourced. A credible threat to move work can have a chilling effect on wages and conditions of work in an industry.

We also have to combine manufacturing in this calculation. If we look at one measure of that, the share of foreign goods in manufacturing inputs has almost doubled from 12% in 1987 to 22% in the year 2002.

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134. Harley Shaiken, *The New Global Economy: Trade and Production under NAFTA*, XVII/3 J. FÜR ENTWICKLUNGSPOLITIK 241, 242–43 (2001).

135. See John J. Sweeney & Richard L. Trumka, Section 301 Petition of American Federation of Labor and Congress of Industrial Organizations (submitted to the Office of the U.S. Trade Representative), at [http://www.aflcio.org/issuespolitics/globaleconomy/upload/china\\_petition.pdf](http://www.aflcio.org/issuespolitics/globaleconomy/upload/china_petition.pdf) (last visited Apr. 17, 2005).

136. John C. McCarthy et al., *3.3 Million U.S. Services to Go Offshore*, Forrester, Nov. 11, 2002, at <http://www.forrester.com/ER/Research/Brief/Excerpt/0,1317,15900,FF.html> (last visited Apr. 15, 2005).

137. See ASHOK D. BARDHAN & CYNTHIA KRÖLL, *THE NEW WAVE OF OUTSOURCING* (Fisher Ctr. Real Estate & Urban Econ., U.C. Berkeley, Paper No. 1103, 2003), available at <http://repositories.cdlib.org/iber/fcreue/reports/1103>.

Finally, unionized jobs appear to be disproportionately impacted. Since a lot of outsourcing is in manufacturing, a highly unionized sector, one study done by Kate Bronfenbrenner at Cornell last year indicates that 29% of outsourced jobs have been unionized jobs compared to an 8% unionization rate in the private sector.<sup>138</sup>

How can we move globalization in a more progressive direction? Core labor standards are a modest, though important, step in the right direction. Symbolically, they point to a fuller role for those most directly impacted by the process of globalization itself: workers in the export sector. Core labor standards are a far more flexible approach than superimposing U.S. labor standards on another country. In fact, many of us would not want to impose U.S. standards—as they exist today—on the United States. But rather, the basic right to organize and bargain collectively in a free way is an important ingredient to human rights to be sure, to democratic processes to be sure, but also to broadly shared prosperity and development.

Workers who have rights, as the history of this economy has shown, can bargain for wages that result in increased consumer purchasing power and broader and more equitably shared development.

In this regard, core labor standards become part of a development strategy as well as part of a strategy to govern globalization in a more effective way. We can have habits of mind that include an internationalist vision that emphasizes human rights, that stresses democracy, and that begins a set of transitions that insure that globalization does result in more equitable and more beneficial outcomes.

**Kennedy:**

Great. Thanks very much. Sharmila.

**Sharmila Rudrappa:**

Thank you. I am not going to talk for long, so we will have more time to discuss here. I wanted to start off with a personal story regarding this whole issue of so-called insourcing and so-called outsourcing.

I have a graduate degree in sociology and very often in the mid-1990s when I was still in graduate school, my father would often scratch his head and say, “Sociology? Why not computer engineering?” It used to be a very frustrating question but it made sense in the context in which he asked that question. Almost every middle-class to upper-middle-class family that lived on my parents’ street was sending their children over to the U.S. to study in computer engineering programs across the country. It was not just these middle-class families on this one street, but it was a phenomenon that you were seeing across Bangalore.

Very quickly, you had the downturn in the economy and my dad scratches his head again and says, “Maybe it is good you’re not a computer engineer.” And then he starts seeing jobs going back to India and he scratches his head again and says, “Well, if you were a computer engineer, you could come back, couldn’t you?”

I raise this story mainly to make a point regarding the emergence of a global labor market in Indian information technology workers, which you could also draw parallels to in terms of Mexican workers in the U.S.

The thing is, Indian computer programmers and engineers were so crucial to the growth of American information technology that India claimed that its best export to the

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138. Bronfenbrenner & Luce, *supra* note 106, at 43.

United States was its IT workers. If you look at it by the middle of the 1990s up to 1998 and 1999, 47.5% of the H-1B visas were given to Indians. This is not a racially targeted visa program, yet a large percent of these work visas went to these Indian software workers.

I call these “men”—and I say men specifically because a huge percentage of them have been men—I call them *techno-braceros*. I say that with one particular point in mind and that is to tie the H-1B visa situation to the H-1A situation, which targets low-wage agricultural workers.

I also want to think about *techno-braceros*, not just in the U.S. but *techno-braceros* in India because by the end of the 1990s what you have is the outsourcing of jobs to India so much so that America’s best export to India is its jobs. A lot of people actually make this causal connection saying it is precisely because you are letting these immigrants come in, these jobs are going out. It can be a very xenophobic way of tying insourcing and outsourcing together. Instead, I think it is far more interesting to think about the ways in which global labor markets emerge, which causes Indian workers to come to the United States and attracts jobs to India as well. When I am talking about global labor markets, I am not just talking about the kinds of changes that are happening in India, such as, why are so many people going into these computer programming situations? But lets also think about the kinds of changes that are happening in the United States, not just with the economy but also the ways in which the government organizes itself. One of the things we are seeing is that the state itself outsources. For example, airport security is outsourced. Interrogation of prisoners in Abu Ghraib was outsourced. What I mean by outsourcing is not offshore outsourcing, but this kind of work is actually subcontracted out to other companies.

So we need to think about the ways in which the state itself has these kinds of processes going on. And then you turn to the state to say, “Well, maybe we need to have legislation not to outsource.” It means changing state practices as well in the way business gets done.

I am wondering whether we can also think about the ways in which the nature of work itself has changed that Harley was pointing to. What we used to think of as high-tech jobs are not high tech anymore. There is a particular kind of “taylorization” of jobs that has gone on. The more complicated tasks have taken and broken down into simpler components, and then you can figure out which components of these jobs you can send out and which components you can keep here. You can actually think about it as a sort of a global assembly line in terms of IT work. We need to think critically—what has allowed for the taylorization of high-tech jobs? There is a certain loss of worker control over the work process itself.

Also, we need to think about the ways in which the IT industry itself is structured. Product lifecycles are so short. There is a pressure to constantly innovate. What does that mean in terms of training workers? Do individual firms have any kind of incentive to train workers? And given that the state itself is withdrawing so heavily from the social rights to citizenship, who is going to be doing the retraining of these workers?

So far on this panel we have been talking about habits of the mind. I am wondering whether we could also talk about changing habits of the heart, not in the ways in which Robert Beller, etc. have talked about it, but just in terms of thinking about labor and transnational labor rights.

*Discussion***Kennedy:**

Thanks very much. So we have everything on the table. It is a very full table.

But I think it is particularly interesting to get the sociological point of view because I do not think we have a very good description of the global legal regime. We talk about flows and forces, but then when you break it down and actually have a description of who is moving and under what conditions, it turns out to be a function of many, many regimes: technological regimes, institutional regimes, and national development policies, and so on.

And then we come back to Harley's point. We have a set of conflicts among the development regimes being put in place in various places, where countries have choices about how they are going to structure the regimes and the ways that will affect these flows. And if China is adopting a low wage as opposed to a unionized workforce development policy, that has an impact in Mexico; it does not just have an impact here.

So there are people affected by that policy. Understanding these flows, and understanding the points of influence and contestation. Of course, the United States can affect China's development policy in some ways but not in all ways. So the IMF affects people's development policies, the World Bank affects people's development policies, corporations affect nation's development policies, all the time we are having an impact.

But can we *multiply* our ideas about how we might have an impact on those development policies. Maybe it is only because my field is public international law that I worry we are not up to it. I hope that there are going to be some other mechanisms that will turn out to be available once we have figured out what the intersections of the immigration, the employment, and so forth, regimes in one country are with those in another.

With that said, let's open it up now to folks from, first, the panels. Ladies and gentlemen of the jury, what did you think? Looking at these two issues together, do you have any reflections on the conversation so far you want to share at this point? Did I see a hand?

**Chantal Thomas:**

Just a comment about soft law machinery and NGOs. I was thinking about that comment, how we sort of seem to be exceptionalists in that we expect a lot of soft law in the area of these redistributive kinds of norms, and then we have our really hard law regulations elsewhere.

But I think that what we might not be seeing there is that with the sort of market regulation—antitrust securities, trade, things like that—the elaboration, enforcement, and implementation of those norms has been driven by a very powerful NGO sector, and that is the corporate sector. Corporations are also NGOs. They are collections of individuals that are organized for the purpose of generating profit. And they are very efficient in providing information to government actors that will help fuel, not only the elaboration but the real implementation of those norms.

I think that what we are beginning to get now in the sort of public-interested world of NGOs is the elaboration of that intermediate activity where we have not only the top layer of norms but the monitoring, enforcement, and implementation of it.



If we look at the GATT (General Agreement on Tariffs and Trade), for example, and the United Nations, they started out from the same place. The GATT turned into the WTO, which is this fairly powerful, multilateral enforcement mechanism. The United Nations is a different story, and the ILO is a different story. What makes the difference there? I think we do have to start thinking about how to get organizational mechanisms and the interstices that are as efficient as the sort of profit-oriented NGOs have been, which is my comment about so-called soft law machinery.

### **James Galbraith:**

With respect to something you said earlier about my comments, just because I do think that I understand these issues, it does not mean that I either suspect or accuse anybody else of sharing my opinions about them. But I do not want to get into a discussion about the so-called crisis of aging. I fundamentally believe that aging is much more of an opportunity than a crisis. And the so-called crisis is something which is being ginned up for transparent political purposes by certain elements in our society.

I do want to raise a point of clarity in terms of what we understand when we refer to a country like China as a low-wage country. Just because the U.S. dollar value of the hourly wage paid to a Chinese worker is low compared to the same U.S. dollar value of the hourly wage paid to an American worker for a similar task does not mean that the Chinese worker is living on the purchasing power of that dollar in the United States.

The Chinese worker in the export sector in Guangdong Province is very well paid by all geographic and historical standards in China. She is much better paid than the Chinese peasant today or than any resident of China twenty-five years ago. Food is very cheap in China. Rent is basically nonexistent in China. Clothing is very cheap in China. There has been a massive rise of living standards of which these particular workers are substantially in the forefront; not in every case, but substantially in the forefront. Lagging behind are the old industries of northern China where, incidentally, the largest losses in manufacturing jobs in the world have occurred. China has lost more manufacturing jobs—20 million in the last decade or so—than we have, and this is because of the decline in the manufacturing sectors in parts of the country that are not prominent on our radar screen because they do not produce goods for the international market.

The bottom line that I would draw here, first of all, is this. Imagine that China decided to become a higher wage country according to our way of measuring. For example, suppose there were a quadrupling in the value of Chinese currency. Would we benefit from that? No. We would not benefit from that because jobs, which are currently being shipped to China, would start going to other countries that did not also change their exchange rates relative to the dollar.

Now suppose instead that every country quadrupled its exchange rate, made its goods much more expensive relative to ours. Would we benefit from that? The answer again is no. At that point, the living standard of the American family would decline precipitously as a result of the enormously increased expense of purchasing goods from overseas.

So the two conclusions I would draw are these. First, there is really no meaningful sense in which the success of China or India represents a threat to the United States. These are the things we should be in favor of and we should celebrate. We can ask for and hope for other favorable developments in the areas of political and civil rights, particularly in China. But in terms of economic development, there is no loss to us from the increase in agricultural productivity which drove the Chinese boom.

Second, the loss of jobs in the United States is our problem to solve. The real issue for us is creating jobs, distributing purchasing power, thinking of things for people to do

that meet the needs that we have here at home. We really can use more sociology professors, frankly. It is a wonderful thing for people to be. I am sure you would agree with me wholeheartedly that if we had many more sociologists, the world, and particularly the United States, would be a better place, and we could have more conferences like this. And that is the kind of job that, it seems to me, that we all agree is what we should want. I mean after all, we spend our careers trying to get into them. We should at least open them up and have a few more for other people to enjoy as well.

**Kennedy:**

Not to mention international lawyers.

**Marshall:**

Yes, I think it is very important to be clear. What the international labor standard is, and Harley mentioned this, is not that you have wages that are compatible with your level of economic development. The international standard is, are you suppressing wages in order to promote development?

Now it hurts us in the United States if the Chinese workers cannot buy our products because their wages are suppressed. They would buy more from us if they had a bigger middle class, if they were developing—and of course, that is what the standard contemplates, that it is not against the rule to have low wages but it is against the rules if you are holding wages down in order to gain international business and therefore suppressing wages.

There are two parts to the theory. One is that an injury to one is an injury to all, and I think it is important. It is very hard to have labor standards if some countries do not enforce them. I had Texas companies tell me that if I enforce the cancer standard, they would go to Mexico. And my response was, I am no more interested in seeing Mexican workers get cancer than I am U.S. workers because I know if you can go there and give it to them, American workers will risk cancer in order to keep their jobs. That is the thinking behind the standard.

**Galbraith:**

Yes, but you have to think about where standards would apply in China. The conditions are infinitely worse in the sectors that sell to the Chinese market than they are in the sectors that sell to the external market.

**Marshall:**

That is right.

**Galbraith:**

And overall, I do not think you can accuse China of pursuing a strictly mercantilist policy of exporting to us and not buying from us in return. The internal airline market is an example. One in seven Boeing jets in recent years have been sold to China. China also buys enormous amounts of food and other things—not necessarily from us, but from Australia and other places.

So it is a trading country. It does not run a large current account surplus simply for the sake of piling up reserves. So I am not sure that the criticism you are making in principle applies in this particular case.

**Marshall:**

And of course, the beauty of the ILO is that we have a mechanism within the ILO to answer that question. They have committees of experts that go and see if what China is doing is justified, and therefore, if they can justify it, then it is perfectly all right for them to do that.

But I also do not want to be misunderstood. I do not believe labor standards are 20% of the answer. You have to do all these other developmental things. I think what labor standards do for you, though, that I think is terribly important, is the point that David made about habits of mind. It focuses your mind on who is benefiting from development and who is developing a democratic system. I believe that if you have an undemocratic system that succeeds, you create a bias against democracy.

**Shaiken:**

James, I think you raise a critical point. The development of China and India does not threaten the United States. In fact, it is essential for the United States. But the basis of that development is critical for China and for the United States as well. And here, it is not simply a question of wages being low or high, it is the basis on which wages are determined.

If there is no ability to have independent organization and independent bargaining, then you have a very distorted pattern of development. And it isn't simply a question of living standards. Let me give one example: health and safety. In the year 2000, 10,000 people died in industrial accidents in China.<sup>139</sup>

**Galbraith:**

Yes. But that is not in the exporting sectors in the South. Excuse me, but what you have in China—and this is a country I know very well, and I served as an advisor to the government there for a number of years—is an enormous increase in the wealth of those regions which are exporter regions. And there has not been nearly the same progress in the northeast and in the southwest. Those industrial accidents, those are in coal mines, they are in firecracker factories, they are in all kinds of operations which sell to the Chinese, not to the West, by and large.

So if you are thinking about what would be the right social strategy for China, the answer is a social welfare system at the national level that raises the income of those who sell to the interior and protects them better, compared to the incomes of those who sell to us. So it is not a question of raising the wages of workers per se who are selling to the external market. What I am talking about would have no effect on the competitiveness of the American worker threatened by a loss of jobs.

**Marshall:**

But standards do not justify the effect

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139. Joseph Kahn, *Workplace Deaths Rise in China Despite New Safety Legislation*, N.Y. TIMES, Oct. 24, 2003, at A6.

**Kennedy:**

The thing bleeds quickly into development policy but there are a bunch of people that maybe wanted to take it in a different direction. Alvaro.

**Alvaro Santos:**

One of the important contributions of this conference is that it has enabled a sustained discussion concerning the relationship between insourcing and outsourcing that has also occurred outside of this room. My comments in this roundtable first occurred to me over the course of conversations with Willy, David, and Linda.

When thinking of economic development, it is not clear a priori whether a strategy of insourcing or outsourcing should be favored. These strategies acquire a different meaning depending on which country's perspective we are looking from. From the point of view of a developing country, like Mexico, the relationship between outsourcing and insourcing can be explored more concretely when we compare working in a manufacturing plant in California or in a *maquiladora* in Juarez as development strategies. We could then ask, from the point of view of development, which policy brings more gains? It is quite typical to think only of the *maquiladora*, conceived as insourcing of capital, as a development strategy. But a policy of outsourcing labor could be equally as effective, and once we acknowledge this possibility, the point would be to assess and quantify the different linkages of each strategy with other economic sectors in the country in question.

Maybe it makes sense to promote insourcing in some sectors and outsourcing in others, depending on the country's current or sought-after comparative advantage. It seems that once we consider the relation between insourcing and outsourcing in this light, more options become visible and the policy choices can no longer rely on default positions of what a development strategy should look like. Rather, choosing between these policy alternatives would depend on a calculation of what the possible effects would be.

Just as we heard today how local governments entice multinational companies like Dell to come and invest by offering them tax exemptions and all kinds of benefits, governments could pursue aggressive strategies to outsource jobs in a way that is viable, equally appealing, and greatly beneficial.

**Kennedy:**

So the idea would be that for Mexico, it would be better to send a worker to California and get the remittance sent back than to have a *maquiladora* cut off from the rest of the economy, vulnerable to competition from China and unable to rejiggle its investments? Is that the idea?

**Santos:**

Yes, precisely. And my other comment is that I have a resistance to thinking of immigration as primarily a matter of membership, which seems to be the prevailing position in this last discussion.

I am skeptical of the idea that once we give immigrants "membership" and allow them to participate in the political process as citizens, their problems will be solved. I see two main pitfalls with this position. First, it equates membership with citizenship and, in so doing, it diverts our attention away from devising mechanisms to tackle a variety of

immediate problems by expecting that they will be solved once immigrants become part of the political community. So, it suspends pressing questions to an unknown future that may not arrive.

Second, this position places too much faith in the representative political process. Yet we are aware of how campaigns are run and we know how representative democracy can be incredibly ineffective at addressing quite fundamental socioeconomic inequalities. Moreover, “membership” understood as citizenship has not necessarily translated into social and economic integration for various immigrant communities in the U.S. So perhaps instead of rejecting the idea of membership, which I admit is very powerful, we should reconceptualize it and take advantage not only of its material but also of its symbolic but also of its full material potential. We should measure membership not in terms of whether immigrants have achieved certain status, i.e., a particular visa status, or full citizenship, or the ultimate test of whether they can vote. Rather, we should envisage a list of the bundle of substantive rights, privileges, immunities, duties, and so forth, which would qualify any person for membership. And then think of the ways in which we can help immigrants get them, through the different channels available. I would be more concerned about whether immigrant workers have access to remedies that can guarantee them equal wages, access to social security, a privilege to not be physically threatened or harmed because of their country of origin, or the power of leading their lives without fear that they will be arrested and deported than whether they would be able to vote.

Thus, in my view, the task would be to continue this checklist of what constitutes “membership” and to think of legal and institutional mechanisms that can make these different goals a reality. As a small example, think of the difference that making employment visas portable, that is, independent of particular employers, would make for immigrant workers. If this portability were coupled with standing before federal courts, immigrants would be able to change employers if they were subject to abuse without fear of being deported. That would have a tremendous effect on immigrants’ bargaining power and on their wages. It would also give immigrant workers greater voice and participation in the labor movement.

I would avoid thinking of membership as a solution allocated somehow in the political process in Congress. Thinking of membership as comprised of this bundle of rights, adopting and old American legal realist insight, will perhaps be a more effective strategy.

### **Kennedy:**

If I were the Democratic Party, it would be in my interest to have everybody who comes in as an immigrant be a voter. But if I was the worker coming in, I might be more interested in other kinds of contestative possibilities inside the labor relationship, whether it be unionization possibilities or whatever.

### **Marshall:**

Yes. The truth is that in Europe, for example, where workers cannot vote, the union is a main way that a lot of the immigrants have an impact on policy.

### **Santos:**

The EU has been mentioned here several times and it is a good example. It would be hard to think of the success of the EU in incorporating waves of immigrant workers in their workforce, leveling wages in its different countries, and dramatically raising workers’

living standards merely because workers had or obtained European citizenship. Rather, there has been a whole set of employment and labor policies that have had an effect on access to jobs, wages, legal remedies and that have made a difference in immigrant workers' living standards.

**Kennedy:**

There is a whole stack now of folks wanting to get in. Professor Bosniak.

**Linda Bosniak:**

Thank you. My comment does not follow directly on any of these. I was struck by some parallels in some of the comments that people just made. Ray Marshall just said, "The question is not whether we take immigrants in but how we incorporate them." The question is not whether immigrants are going to come, but what their status is. Harley said, "The issue is not whether there will be outsourcing but how it will be done."

It seems to me that there has been some degree of consensus despite the rest of our differences that, as you say, the train left the station quite a long time ago on globalization. The facts are that we have got these various kinds of flows and the question is how they are going to be regulated.

I just wanted to throw out that at least in the immigration debate—and I think also in the outsourcing of capital debate—there remains a very strong fantasy that those facts are not the case. That is, that national insularity is possible. I mean, so much of the time in our debates over immigration we are engaged on that initial factual premise. You know, here we are talking about how it is we are going to organize the fact that the flows are going to occur, but lots of my energy in these debates goes to making that initial point, which is that national insularity is a fantasy at a factual level. We can also talk about the normative question, but the normative question follows from what we take to be the baseline factual set of conditions, which I think we tend to converge on here in this room. But in lots of the conversations that we have in our professional lives, I do not think that is the case.

**Marshall:**

Yes. You remind me that in 1978, Jorge Castañeda, Sr., who was then foreign minister of Mexico told me, "Whatever you do, you will absorb a large part of the growth of the Mexican population." I was twenty-seven years younger then, and I am going to contest that, and I will have to say Jorge was right. We have absorbed. Of course, we did not do what I thought.

But what he meant by that was not that we could not erect a barrier but that we would not do it. And that is the reason I say to look at these natural processes that are going on, the demand for those workers in the United States, the networking that takes place, and we have absorbed.

Now what I think we need to think about policywise is, is that the best way to do it? And I do not think so. I think it would be better to have had people who could protect themselves better than those workers did. Too many have died. Too many are easily exploited. And that is a serious problem, it seems to me, and they are not necessarily coming in to the United States in the place that would be best for Mexico or the United States: the *maquiladoras* and the flux in U.S. policy, not Mexican policy.

Now of course, part of what we keep stressing with the labor standards, the ideal in my perspective is for Mexican workers to have a voice in the formulation of Mexican policy. Would that make a difference? I think it would. One of the reasons we fight for these labor standards is to let more people participate in making policy. When you exclude a lot of people from the policy process, you do not get good policy. I wrote a whole book about that.<sup>140</sup>

### **Kennedy:**

We are now running off the clock. In fact, we have overrun the clock but before thanking the panelists, let me give our fearless leader, the Director of the Rapoport Center, the last word, the last substantive word.

### **Karen Engle:**

I will be brief, but I want to say something about some global directions this conference took, perhaps unwittingly.

It happened that the immigration discussion was mostly about the South and about the North's relationship to it, and it was also largely about migrant and low-wage labor. There were some attempts to get away from that focus this afternoon, but it was the primary one in the morning roundtable. It also happened that, for the most part, the outsourcing discussion was about high-tech work and about South Asia. The conversation went east in the second roundtable, despite that the cartoon we used for publicity showed both the insourcing and outsourcing between Mexico and the United States, with the Mexicans swimming north and the jobs going south. This last panel and discussion has done a great job of shifting those geographical emphases. But it is still telling, I think, that the two topics often correspond to two different images about workers that are seen to perform "American jobs" and the work they are thought to do.

So I just want to suggest, in the mode of breaking habits of mind, a thought experiment. What if we imagine the immigration discussion to be about high-tech workers coming to the United States from South Asia and the outsourcing discussion to be about jobs like the *maquiladoras*? How would it affect the different policies that people are imagining? I think that many of Sharmila's and Harley's comments on this final roundtable have begun to push us to engage in this thought experiment.

At first I was thinking that the southern focus in the immigration discussion and the eastern focus in the outsourcing roundtable resulted from a flaw in the way we had organized the conference. But in retrospect I am glad that the roundtables developed that way because in fact they demonstrated how those geographical assumptions underlie much of the dominant discourse about immigration and outsourcing, as exemplified by the various legislative and policy proposals we examined. I am also glad that this attempt to connect the two conversations began to break down those assumptions. We really couldn't have asked for a better concluding discussion.

So I commend everyone here for moving the conversation in that and many other directions. Thanks to you all!

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140. THE FUTURE OF LABOR UNIONS: ORGANIZED LABOR IN THE 21ST CENTURY (Julius G. Getman & Ray Marshall eds., 2004).

**Kennedy:**

Great. I want to add my word of thanks to the organizers and thanks particularly to Karen for having brought us all together and kept us for a whole day sitting inside. It helped that it was raining but it was terrific. I want to thank all three of the panelists who joined us here at the end and all of you for being a part of it. And I want to particularly thank the students who have been angels to all of us.

And I now, in the name of the Rapoport Center, declare the proceedings closed.



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