

Human Rights and Undocumented Immigrants in the United States

I. Introduction

Human rights were constructed within a system of nation states and were contemporary with the decline of colonialism, during a time in which national sovereignty and the right to development were considered indicators that a nation of former colonial holdings had become self sufficient. The Universal Declaration of Human Rights (UDHR) was written under the assumption of national sovereignty, a democratic political system, and a capitalist economy. These three systems are embedded in the common understanding of human rights. As long as an individual falls inside these systems, human rights is a useful tool for guarding against the dangers of these systems. However, when individuals or groups fall outside of these systems, human rights is no longer a useful or appropriate tool for protecting their rights. This paper focuses on one such group of people - undocumented immigrants in the United States.

Western ideas of national sovereignty, democracy, and capitalism are ingrained in the UDHR. Take, for example, Article 21 which describes the system of governance that is required by this understanding of human rights: the “will of the people shall be the basis of the authority of the government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures”¹. Article 29 states that limitations on an individual’s rights and freedoms can only be due to “morality, public order, and the general welfare in a democratic society” - the mention of democracy is further proof of the democratic framework that the UDHR was built within. Article 17 (guaranteeing the right to own property) and Article 23 (guaranteeing the right to work and, if necessary, supplementation by “other means of social production,”) both confirm that the UDHR is anchored in the realm of western capitalism and its associated social welfare programs.

¹ The Universal Declaration of Human Rights. Paris, 10 December 1948

Undocumented immigrants are hardly the only people who fall outside of the above-mentioned systems of nationalism, capitalism and democracy. Indigenous people of the America are vulnerable to human rights violations because they do not fit within these frameworks. Indigenous peoples have higher unemployment rates than the national average, and higher poverty rates as well². Citizenship was not granted to indigenous people until the early 1900's, when 90 million acres of indigenous peoples' land was traded for 154,674 citizenships³; the right to vote was not granted until the 1960's⁴. Indigenous communities organize around the cause of increased autonomy and self-sovereignty, a notion which is staunchly opposed by the U.S. government because it would infringe on the United States's national sovereignty.

Another vulnerable group are incarcerated persons. Some states permanently disenfranchise people convicted of felonies, which prevents them from taking part in democratic elections. Jailed persons are allowed to vote by law, but bureaucrats in local jails can be ignorant of, or purposefully ignore, this fact. This effectively strips jailed persons of their voting rights. Incarcerated persons are used as a cheap labor force, as the minimum wage is so low in some prisons as to be effectively nonexistent⁵. Trade unions are banned inside prisons, a right which is specifically protected by the UDHR in Article 23. The job search after incarceration is negatively affected by a criminal record, even controlling for the fact that individuals who commit crimes are less likely to work⁶.

² Austin, Algernon. "Native Americans and Jobs: The Challenge and the Promise." December 13, 2013. <http://www.epi.org/publication/bp370-native-americans-jobs/>.

³ Rollings, Willard. "Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830-1965." Nevada Law Journal 5, no. 126 (2004). pg 134

⁴ *ibid.*

⁵ "Section III: The Prison Economy." The Prison Policy Initiative. <http://www.prisonpolicy.org/prisonindex/prisonlabor.html>.

⁶ Schmitt, John, and Kris Warner. "Ex-Offenders And The Labor Market." WorkingUSA, 2010, 87-109.

People whose nation ceases to exist, or whose nation is taken over and conquered, are also vulnerable to human rights violations because they fall outside the international system of nation-states that, between them, are supposed to account for all individuals in the world. Examples include Palestinians, whose territory has been occupied by Israel since 1967, and the recently displaced refugees from Syria. Their situation complicates Article 13 of the UDHR, which states that everyone has the right “to return to his country” - does this human right apply when your country is taken over or when you have no place to return to? These problems are supposed to be remedied by Article 15, which states that “everyone has the right to a nationality,” but it is obvious that this is not a practical solution for the Palestinian and Syrian conflicts.

Clearly, the problem of individuals and groups falling outside the systems of nationalism, capitalism and democracy are widespread. This paper studies this phenomenon through the lens of undocumented immigrants in the United States. Undocumented immigrants cannot enjoy the full benefits of nationalism, capitalism and democracy because of their immigration status. They are also not protected from the drawbacks of these systems.

This paper is divided into three sections. Section II deals with the history of self-determination and national sovereignty in former colonies during the time that the UDHR was being written. It explores the effects of national sovereignty in the United States, including the idea of closed borders and controlled immigration; social programs that are available to all citizens in exchange for payment of taxes and obedience to the law; and civil rights that guard against the state violating its citizens’ human rights. Section III discusses the limitations on undocumented immigrants when it comes to the economic opportunities available in the United States, and their exclusion from social programs that correct for wealth inequality and poverty. Section IV examines the exclusion of undocumented immigrants from the democratic political

process and the dangers of the majority rule when it comes to immigration laws. Section V offers analysis and conclusions.

II. National Sovereignty and Self-Determination

The rise of nationalism and self-determination was a powerful shaping force for the United Nations and the idea of human rights. Specifically, human rights took a back seat to national sovereignty - the Bandung Conference in 1955 made the statement that the “right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights”⁷. This effectively limited the scope of human rights to be subservient to the system of nation-states in possession of strong self-determination powers.

The right to self-determination has traditionally included the right to closed borders and control over the entry of immigrants. These sovereign rights of the nation supersede the human rights of an immigrant in the United States. A specific example is the case of Alexis Barrera-Echavarria, a Cuban national who was one of 124,000 undocumented Cuban immigrants that entered the United States in 1980 in the Mariel Boatlift⁸. Barrera had been jailed in Cuba on a theft charge; so when he arrived in the U.S. he was released on immigration parole a few months after arriving⁹. However, in 1985, Barrera was denied formal admission to the U.S. and was ordered to be deported. The problem was that Cuba refused to readmit those who had left the country during the Mariel Boatlift, and no third country would take him. Therefore, Barrera could not be deported; however, the U.S. decided to keep him indefinitely detained in spite of the fact that there was no realistic way that Barrera could be deported. His limited work history, lack of marketable skills, “poor work record,” several theft incidents

⁷ Final Communiqué of the Asian-African conference of Bandung. 24 April 1955. Section C.1

⁸ "Mariel Boatlift." Global Security. May 7, 2011. <http://www.globalsecurity.org/military/ops/mariel-boatlift.htm>.

⁹ Barrera Echavarria v. Rison, 44F.3d 1441 (9th Cir. 1995)

between 1981 and 1982, and an armed robbery with a firearm conviction in 1983 were held against him in the court hearing that upheld his indefinite detention status in 1995. The court found that “the Attorney General has authority to detain aliens who are subject to exclusion proceedings or who have been ordered excluded,” in spite of the fact that it is unclear in 8 U.S. Code § 1227a(1) whether prolonged detentions of deportable aliens are allowed, since there is no chance of deportation in the future. This case illustrates the difficulties that come when undocumented immigrants are not accepted by current country of residence, where they are attempting to build a life, or their home country, where they were unable to build a life; each nation refused responsibility for Barrera, and so his right to not be held in indefinite detention was violated.

Protection against indefinite detention is just one of the many basic rights that citizens of the United States possess. Further rights include a fair judicial process and protection of political engagement. Undocumented immigrants are disadvantaged in these areas of judicial fairness and political engagement; they cannot serve as jurors, which means that undocumented people are never judged by their peers. Indigenous peoples face a similar problem of being judged by a culture in which they choose not participate. In the case of undocumented immigrants, they are being judged by a culture in which they are not allowed to participate. They are subject to deportation for engaging in activities in which citizens can engage. For example, undocumented immigrants have been targeted for deportation because of their involvement in politically unpopular groups such as the Popular Front for the Liberation of Palestine¹⁰ or the Communist Party^{11,12}. This was authorized under the notion that “the power to deport aliens is inherent in every sovereign state”¹³.

¹⁰ *Reno v. American-Arab Anti-Discrimination Committee*, (97-1252) 525 U.S. 471 (1999).

¹¹ *Galvan v. Press*, 347 U.S. 522, 74 S. Ct. 737, 98 L. Ed. 911 (1954)

¹² *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952)

¹³ *ibid.* Syllabus - 1.a.1

Citizens of a nation also have a right to public services that are designed to alleviate poverty and hunger, as well as financial aid for universities. These public services are part of an implicit deal between citizens and their nation - in exchange for taxes and obeying the laws of the nation, citizens are entitled to certain public goods which are designed to uphold human rights standards and quality of life. Undocumented immigrants pay into state and local taxes through income taxes¹⁴. They pay into Social Security¹⁵, but don't collect the benefits, as only lawfully present immigrants can collect social security¹⁶. Most food stamp programs, including those in Massachusetts, require proof of legal presence in the United States¹⁷. Medicaid and welfare are also not available to undocumented immigrants¹⁸. Federal financial aid is not available to illegal immigrants, and only recently have universities opened the possibility to undocumented students to obtain in-state tuition or private scholarships¹⁹. All of these public services were created to give vulnerable populations access to public services, and all are being funded by, and denied to, undocumented immigrants on the basis of their citizenship.

The main purpose of human rights when it operates within a framework of the sovereign nation state is to guard against the power of the state. The above cases are examples of this concept. The right to a trial, to being charged for something and not being held in indefinite detainment, to a jury of your peers, to political free speech without repercussions, to the right to vote, are all mechanisms to ensure that the power of the state does not silence dissident voices and target vulnerable minorities. One often-used tool for silencing such voices is the use of

¹⁴"Undocumented Immigrants' State & Local Tax Contributions | ITEP Reports." ITEP. April 15, 2015. http://itep.org/itep_reports/2015/04/undocumented-immigrants-state-local-tax-contributions.php#.Vm4VZ1WrSV M.

¹⁵ Goss, Stephen. "Effects of Unauthorized Immigration on the Actuarial Status of the Social Security Trust Funds." Actuarial Note, no. 151 (2013).

¹⁶Boyle, Matthew. "Exclusive - Report: Obama's Executive Amnesty Will Give Illegal Aliens Public Benefits - Breitbart." Breitbart News. November 17, 2014.

¹⁷ "9 Myths and Facts about SNAP Benefits and Immigrants." MassLegalHelp. November 1, 2013.

¹⁸ Santana, Maria. "5 Immigration Myths Debunked." CNN|Money, November 20, 2014.

¹⁹ "I Am an Undocumented Immigrant | NerdScholar FAFSA Guide." FAFSA.

police forces to target minorities and other undesirable populations. In his book, *The Ethics of Immigration*, Joseph Carens pitches the idea of a firewall between state actors (such as the police) who are responsible for keeping the peace and fostering stability, and with those who uphold human rights²⁰. The problem is that the police in the U.S. are supposed to uphold human rights, but they are also mandated to report immigration violations. This limits the likelihood that undocumented immigrants would go to the police when their human rights are being violated because of this fear of deportation. Therefore, the police, whose purpose is to ensure that there are no human rights violations occurring in their communities, are cut off as a resource for undocumented immigrants.

This problem can be logically extended to other areas outside of the police. Undocumented immigrants may feel that they cannot speak with teachers and school administrators, doctors and hospital officials, rape crisis counselors or social services, because of a fear of deportation. Many of these institutions and the services that they provide were created to uphold human rights for all citizens; fear of deportation and the lack of a “firewall” prevents these human rights from being supported for undocumented immigrants.

III. Capitalism and the Threat of Deportation

Undocumented immigrants are often left out of the system of capitalism implemented in the United States. Capitalism is based on the assumption that workers can take their labor elsewhere if working conditions, pay, and other environmental factors are unsatisfactory to them. These assumptions are invalid when considering undocumented immigrants, because their freedom to move jobs is severely limited by their immigration status.

²⁰ Carens, Joseph H. *The Ethics of Immigration*. New York, NY: Oxford University Press, 2013. pg 133

Undocumented immigrants are particularly vulnerable in this matter because of the difficulty in enforcing the minimum wage for the labor of undocumented immigrants. Companies who employ legal residents and American citizens can be reported to the relevant government authorities if they are not being paid minimum wage as mandated by federal and state laws. However, undocumented immigrants are often supporting relatives in their country of origin (if they are economic migrants) and do not have social programs as safety nets to fall back on. This means that they have higher risks if they lose their job, and less leverage because their employer could report them to INS and have them deported. For the same reasons, undocumented immigrants can also be pressured by their employers to not form trade unions, which is a right protected directly by the UDHR.

Human Rights Watch reports that the agriculture industry, whose employees are 50% undocumented immigrants, is a dangerous trade for women because of high rates of sexual harassment and rape²¹. Supervisors of field workers often rape undocumented women, knowing that these women will feel pressure to accept this violence because they cannot afford to lose their job, or because the supervisor is confident that he can block his victim from obtaining work on other farms²². Agricultural workers in general are not protected under the usual U.S. labor laws in terms of guaranteeing overtime pay or the right to collective bargaining, making the agricultural industry particularly susceptible to human rights violations already.

Aside from direct disadvantages in terms of minimum wage violations and a lack of collective bargaining rights, undocumented immigrants are also blocked from taking advantage of social programs that offset wealth and income inequality in the U.S. The dangers of rampant capitalism are supposedly corrected by social programs such as Medicare, Medicaid,

²¹ "Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment." Human Rights Watch. May 15, 2012.

²² *ibid.*

unemployment assistance, the Affordable Care Act, the minimum wage, and others. This wealth inequality can be boiled down to the idea that the rich get richer, especially in the United States, where wealth and income inequality has been growing for the last few decades and stands out among OECD countries²³. Citizens who live in poverty and are able to take advantage of these programs still have trouble scraping together enough money to support themselves; undocumented immigrants, who are not covered under these programs and who face lower wages and unsafe, unhealthy, and sometimes violent working conditions are even more vulnerable than poor U.S. citizens.

IV. Democracy and the Tyranny of the Majority

In the traditional understanding of human rights, democracy guards against dictatorships and ensures that the government remains accountable to the people of a nation. In his treatise on human rights and Marxism, Harold Laski describes democracy and human rights as both fundamentally opposed to capitalism. He finds it hard “to believe either that the institutions of political democracy are permanently safe, or that human rights essentially to the life of a free man will be assured of respect” if the society that these institutions exist in are divided between a class that owns the means of production, and a class that labors on such instruments²⁴. Democratic institutions, to Laski, are “intended to safeguard” human rights, and “function within the limits of a framework imposed upon them” by capitalism²⁵. Democracy is an institution that works against capitalism as a great equalizer, an institution that erases the

²³Ingraham, Christopher. "If you thought income inequality was bad, get a load of wealth inequality." *The Washington Post*, May 21, 2015.

²⁴Laski, Harold. "Towards a Universal Declaration of Human Rights." In *Human Rights: Comments and Interpretations*, 78-92. New York: Columbia University Press, 1949. pg 87

²⁵ *ibid* pg 87

differences in power created by the wealth divide. The idea is that democracy makes human rights possible in a framework of capitalism.

This view assumes that democracy erases discrimination and the targeting of minorities by the state. Marxism would divide the world only along wealth lines - those who have wealth, and those who labor for the rich; other dividing identities, such as race, religion, or gender, would be erased in a Marxist world. However, democracy, though it does have many positive effects such as public accountability and a decrease in corruption, can also have negative effects. Tocqueville's theory of the tyranny of the majority is a valid concern for vulnerable minorities in a democracy such as the United States²⁶. However, the tyranny is not of the elective body over other divisions of power (such as the Courts and the executive branch in the United States), and it does not involve the harassment and silencing of opposition political parties. Instead, the tyranny of the majority is over vulnerable minority groups that are defined by their religion, race, or socioeconomic class. Democracy and representative government has many benefits that have been extolled by western democracies as bringing freedom, peace, and prosperity to their respective countries, but it also can allow a majority to create laws that disenfranchise or discriminate against certain groups of people who are deemed by society to be undesirable. The United States abounds in examples of this, from the discriminatory policies of the military concerning gay service members, to the repeal of the Voting Rights Act that prevented disenfranchisement policies being implemented in the southern states, to the current question of limiting the rights of Muslims in the U.S. as a response to fundamentalist Muslims launching terrorist attacks on U.S. soil.

These policies are rampant in immigration law. Arizona's law, "Support Our Law Enforcement and Safe Neighborhoods Act," allows law enforcement to check the immigration

²⁶ Tocqueville, Alexis De. *Democracy in America*. 1835.

status of anyone they have a “reasonable suspicion of being in the U.S. illegally”²⁷, which, in Arizona where the majority of undocumented immigrants are Latino, implies racially profiling individuals. Similar versions have been implemented in Alabama, Georgia, Indiana, South Carolina, and Utah²⁸. The Supreme Court upheld the provision that required law enforcement officials to check the immigration status of people who they detained and suspected of being illegal immigrants; it rejected the part that made it a misdemeanor for immigrants to not carry registration documents and the criminalization an illegal immigrant attempting to seek employment. Justice Scalia explicitly refers to the sovereignty of the state of Arizona in his dissent against the rejection of these provisions, stating that “Arizona has moved to protect its sovereignty” in a way in which is compatible with federal law”²⁹. Sovereignty in this context is used as a shield for racism and border control.

These laws are examples of legislation that targets a vulnerable group - undocumented immigrants. Though key provisions were struck down by the Supreme Court, the core of the law was upheld. Caren’s firewall idea is violated explicitly in this law, as law enforcement officers, whose purpose is to protect and serve their communities, are transformed into undocumented immigrant seekers. Their purpose in dealing with undocumented immigrants is not to protect their human rights, but to inquire into their immigration status and, if appropriate, start the deportation process. If, for example, an undocumented Latina woman went to the police to report a sexual assault, domestic violence, or workplace health and safety violations, and the police she spoke to suspected that she was an illegal immigrant, her deportation process could be triggered by this action.

²⁷ "Arizona's SB 1070." American Civil Liberties Union. <https://www.aclu.org/feature/arizonas-sb-1070>.

²⁸ "What's At Stake: SB 1070 at the Supreme Court." American Civil Liberties Union. <https://www.aclu.org/whats-stake-sb-1070-supreme-court>.

²⁹Barnes, Robert. "Supreme Court Upholds Key Part of Arizona Law for Now, Strikes Down Other Provisions." The Washington Post, June 25, 2012, Politics sec.

Similar immigration laws are manifestations of the idea that the majority in the United States gets to decide who will be accepted into their nation as citizens, beyond the basic limitation set down by the natural born citizen law which grants citizenship to individuals born on U.S. soil. Immigration law, decided indirectly through the United States's system of representative democracy, discriminates against undocumented immigrants and denies them the human rights that they deserve as contributors to U.S. society.

V. Analysis and Conclusions

The question can then be asked: what circumstances are necessary for a nation to extend human rights protections to an individual? Is citizenship necessary? Are certain human rights only protected by a nation if the individual is a citizen in that particular nation? This is the question that Carens focuses on in his book. His answer is that belonging to a society and to a nation is defined by more than just one's citizenship. His argument is that social ties and length of residence in a country qualifies individuals for citizenship and all of its associated rights and protections. His theory of social membership rejects the idea of national sovereignty where a nation decides when an outsider who is not a citizen is allowed to become a citizen. Carens' theory would remove the power of approval of citizenship from the nation. This theory is therefore unrealistic because it ignores the founding principle of our modern system of international order which supersedes human rights - national sovereignty.

Wendy Brown grapples with this tension between the theory of human rights and the systems that formed this theory. She recognizes that human rights are a way of counteracting the imbalance of power that occurs naturally within a liberal western society, but that human rights "vanquish neither the regime nor its mechanism of reproduction"³⁰. Human rights can

³⁰ Brown, Wendy. "Suffering Rights as Paradoxes." *Constellations* 7, no. 2 (2002). pg 422

work only within the frameworks imposed by nationalism, capitalism and democracy as they attempt to counteract the effects of these three systems. They can do nothing to change these systems intrinsically. “Rights function to articulate a need, a condition of lack or injury, that cannot be fully redressed or transformed by rights, yet within existing political discourse can be signified in no other way”³¹. Human rights cannot ever fully end the discrimination and injuries that undocumented immigrants receive at the hands of U.S. society.

An alternative to individual human rights has often been proposed, especially in connection with indigenous rights: group rights could provide an alternative narrative that works outside the currently instituted frameworks of western society. Group rights can be seen as a system that is fundamentally in opposition to the sovereignty of nations, as indigenous groups seek to increase their autonomy and live outside the systems of western society. However, this opposition implies that group rights cannot be effectively defined using a framework of democracy, capitalism and nationalism. Karen Engle’s arguments concerning group human rights supports Wendy Brown’s conclusions by noting that indigenous cultural and collective rights “are ultimately defined by a human rights framework that is based on some of the very premises that they are meant to challenge”³². Though Engle’s arguments were centered around indigenous peoples, they are applicable to undocumented immigrants in the United States as well. Undocumented immigrants fall outside of the same systems that indigenous peoples in the United States do, and so individual human rights do not reach as far as they are intended to with both groups. Collective rights might provide a more appropriate or useful framework for viewing undocumented immigrants rights, because they do not automatically use

³¹ *ibid.* pg 431

³² Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, pg 149

nationality to define which of an individual's human rights are allowed to be violated by a nation.

Will Kymlicka attempts to do just what Engle warns against by defining collective rights using existing human rights frameworks. His argument draws an arbitrary line between "internal restrictions" on "the claim of an indigenous group against its own members" and "external protections" which involve "the claim of an indigenous group against the larger society"³³. He argues that external protections are to be enforced, as these are the indigenous peoples' group rights, but that internal restrictions cannot be intruded upon³⁴. Internal restrictions have the potential to violate the human rights of group members; however, because Kymlicka compares indigenous groups to other nations in promoting their self-determinism, these internal restrictions have to be respected under the assumption of sovereignty. In this argument, human rights are again demoted in favor of sovereign, nationalist rights. This contradiction indicates the impossibility of reconciling such an understanding of group rights with current systems of national sovereignty. Such an argument would increase the nationalist autonomy of the vulnerable group (indigenous populations), but would not increase the strength of their human rights protections.

Unfortunately, the reality of our world is that the nationalist, democratic and capitalist frameworks are near impossible to upend, especially in the United States. Concrete steps to improve the condition of undocumented immigrants can be taken by business owners and by legislative bodies, but these changes will always be subject to reversal because of the systems in the U.S. Classifying undocumented immigrants as a suspect class may improve the situation as well, but the Supreme Court decided in 1982 in *Plyer vs. Doe* that "undocumented aliens cannot be treated as a suspect class, because their presence in this country in violation of federal law is

³³ Kymlicka, William. "The Good, the Bad, and the Intolerable: Minority Group Rights." pg 23

³⁴ *ibid.* pg 26

not a “constitutional irrelevancy” and because “entry into this class [undocumented immigrants], by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime”³⁵. As long as these systems of western society remain dominant, the human rights of undocumented immigrants are subject to abuse by the state, the tyranny of the majority, and the dangers of rampant capitalism.

³⁵ Plyler v. Doe, 457 U.S. 202 (1982)

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