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ARTICLE

WHY INTERNATIONAL LAW FAVORS EMIGRATION OVER IMMIGRATION

BY THOMAS KLEVEN*

I.	Introduction	70
II.	International Law Regarding Freedom of Movement	70
III.	Freedom of Movement and Liberal Idealism	74
IV.	An Historical-Materialist Analysis of International Practice	83
V.	The Freedom of Movement Under Socialism	93
VI.	Conclusion: Where to From Here	98

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I. INTRODUCTION

The norms of international law currently support the right of people to freely emigrate from their home country more than the right to freely immigrate to a country where they prefer to live. This paper examines the reasons and justification for this divergence.

The question is first addressed from the vantage point of liberal idealism, which now dominates international law, and then from a historical-materialist perspective. It turns out that it is hard to reconcile the existing regime with liberal principles and that historical-materialism better explains what is going on, namely, that the existing regime favors the interests of the richer and more powerful capitalist nations that now dominate the world and contributes to the growing inequalities among the nations and people of the world.

The primary opposition to the existing regime, in particular to the principle of free emigration, came from the Soviet bloc. That effort was unsuccessful, and with the collapse of the Soviet Union the existing regime of free emigration and controlled immigration has become entrenched. If, however, the trend of increasing worldwide inequality should persist, a more democratic form of socialism may well emerge as a viable alternative to the current world order. Accordingly, the last two sections of the paper speculate briefly on how freedom of movement might be handled under democratic socialism, and on the possibility of reforming the existing regime and of moving in a socialist direction.

II. INTERNATIONAL LAW REGARDING FREEDOM OF MOVEMENT

A fundamental ideal underlying liberalism is that of self-determination.¹ Self-determination operates on two levels: an individual level where each person has the right to pursue one's own destiny within a sphere of personal autonomy; and a collective level where groups of people, ranging in size from small communities to nation-states to perhaps one day a world government, have the right to govern themselves democratically.² Since individual and collective self-determination overlap, neither can be

1. *See generally* NORBERTO BOBBIO, *LIBERALISM & DEMOCRACY* 5-9, 15-19, 37-44 (Verso 1990); ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 83-118 (Yale University Press 1989).

2. *Id.*

absolute and liberal societies must strive somehow to strike a proper balance between the two.³

The impact of liberal ideology on international law can be seen in its approach to the question of freedom of movement. With regard to immigration, collective self-determination prevails. The right of nations to regulate immigration is implicit in the United Nations Charter, which acknowledges the sovereign right of all nations to self-determination with regard to domestic matters.⁴ Only when a country does things that threaten the peace or other nations may the international community intervene in its internal affairs.⁵

In theory this qualification on the right of sovereignty might justify substantial international control over nations' immigration policies. In practice, nations are substantially free to regulate immigration as they see fit with two major exceptions. One is the requirement in the International Covenant on Civil and Political Rights ("International Covenant") of some due process of law before a country may expel a lawfully admitted alien.⁶ Second, the Universal Declaration of Human Rights ("Universal Declaration") provides that everyone has the right to seek and enjoy asylum from persecution in other countries.⁷

The Universal Declaration could be interpreted to require countries to admit persecuted people as lawful immigrants. Thus far, international practice, as set forth in the U.N. Convention Relating to the Status of Refugees, has been to grant refugees not the right to be lawfully admitted anywhere, but only the right if one can get to another country not to be expelled or returned to where one's life or freedom would be threatened.⁸

With regard to emigration, on the other hand, individual self-determination prevails. Both the Universal Declaration and the International Covenant, the most basic statements of international norms regarding individual rights, expressly declare everyone's right to freedom of movement within their countries as well

3. *Id.*

4. U.N. CHARTER art. 2, para. 1,7.

5. *Id.* at para. 3,4.

6. International Covenant on Civil and Political Rights, art. 13, G.A. Res. 2000A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

7. Universal Declaration of Human Rights, art. 14, G.A. Res. 217A (III), U.N. GAOR 3d Sess., U.N. Doc. A/810 (1948) [hereinafter UDHR].

8. U.N. Convention, Articles 31-33, Relating to the Status of Refugees, adopted on July 28, 1951 and entered into force on April 25, 1954.

as the right to leave and return to their countries.⁹ Both documents do countenance some, although limited, collective restrictions on the right to leave. A general provision of the Universal Declaration allows limitations on the rights it sets forth only in order to protect "the rights and freedoms of others" and in the interest of "morality, public order and the general welfare in a democratic society."¹⁰ And the International Covenant expressly prohibits restrictions on the right to leave except "when necessary to protect national security, public order/ordre public, public health or morals or the rights and freedoms of others."¹¹

These terms are susceptible to both expansive and narrow readings, and have been the subject of some debate particularly during the 1970's and 1980's.¹² The dominant view now, greatly influenced by Western participants in the debate, is that they are to be strictly construed and that the freedom to leave is to be treated as a preferred right not to be too readily or overly

9. UDHR, *supra* note 7, at art. 13; ICCPR, *supra* note 6, at art. 12(1)&(2). The United States ratified the ICCPR in 1992, and 144 of the world's 190 or so nations have now ratified it. On the liberal underpinnings of the UDHR and ICCPR, both of which drew heavily on the Declaration of Independence, the U.S. Constitution, the Declaration of the Rights of Man and of the Citizen, and on Western liberal philosophy generally, see *THE INTERNATIONAL BILL OF RIGHTS - THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 1-31 (Louis Henkin ed., Columbia University Press 1981). Whether standing alone the UDHR has the force of law is a complex question that depends on what it takes for something to acquire the status of international law. The UDHR states that it is "a common standard of achievement for all peoples and all nations," and does not expressly require states to observe it. *Id.* at 9; UDHR, *supra* note 7, at Preamble. The operative law, which does so require of its signatories, is the ICCPR. Several subsequent international agreements adopted between the mid-1960s and early 1980s also incorporate the right to leave: the International Convention on the Elimination of All Forms of Racial Discrimination, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, the African Charter on Human and People's Rights. For a history, see HURST HANNUM, *THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE* 3-16 (Martinus Nijhoff Publishers 1987).

10. UDHR, *supra* note 7, at art. 29.

11. ICCPR, *supra* note 6, at art. 12.3.

12. See HANNUM, *supra* note 9, at 19-46; Alexander Charles Kiss, *Permissible Limitations on Rights*, as printed in *THE INTERNATIONAL BILL OF RIGHTS - THE COVENANT ON CIVIL AND POLITICAL RIGHTS*, *supra* note 9, at 290. Under U.S. law the term "general welfare," which is used in the UDHR, has a very broad meaning that might allow the freedom to leave to be restricted for a wide variety of reasons pursuant to a rational basis test according it no special protection. Perhaps for this reason a general welfare exception was expressly rejected in drafting the ICCPR, the operative law, in favor of the "public order/ordre public" terminology, which has somewhat narrower overtones in English (akin perhaps to prevention of disorder) than in French where it invokes not only the welfare of the public but also the protection of individual human rights that "cannot be lightly sacrificed even for the good of the majority or the common good of all." *Id.* at 302.

infringed.¹³ And, in fact, emigration does tend in practice to be far freer than immigration, which is highly controlled by most countries,¹⁴ and most countries in the world now have relatively free emigration policies and practices.¹⁵

In sum, international law favors the right to emigrate over

13. See THE INTERNATIONAL BILL OF RIGHTS - THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 9, at 26 (stating that "[a]nother general principle, particularly relevant to the Covenant, is that 'limitations clauses' - provisions permitting derogation on rights - shall be strictly and narrowly construed."); Stig Jagerskiöld, *The Freedom of Movement*, as printed in THE INTERNATIONAL BILL OF RIGHTS - THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 9, at 166,178 (arguing that "[t]here must be a clear threat to a vital state interest in order to justify restricting this right [i.e., the freedom to leave]."); Upsala (Sweden) Colloquium, *Declaration on the Right to Leave and the Right to Return* (1972) (declaring that "[a] person's right to leave a country shall be subject only to such reasonable limitations as are necessary to prevent a clear and present danger to the national security or public order."); American Association for the International Commission of Jurists, *The Siracusa Principles on Limitation and Derogation Provisions* (1984) (declaring that "[a]ll limitation clauses shall be interpreted strictly and in favor of the rights at issue").

14. See International Migration Policies and Programmes: A World Survey (U.N., 1982)(on file with author).

15. See ALAN DOWTY, *CLOSED BORDERS - THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT* (Yale University Press 1987) (regarding a history of nations' emigration practices). See also Hannum, *supra* note 9, at 71-117. As of the late 1980s Dowty concluded that "never before have states so effectively controlled the right of their citizens to leave or stay". ALAN DOWTY, *CLOSED BORDERS - THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT*, at 3. While Dowty detailed widespread restrictions on emigration, he overstated his case somewhat, particularly relative to restraints on immigration. Perhaps this is because he views the right to emigrate, which he refers to as "the last refuge of liberty," *id.* at 7, as more important than the right to immigrate, which regard to which he argues that "surely a state may regulate the entry of newcomers." *Id.* at 5. As the next section of this paper shows, this distinction is highly questionable from a theoretical perspective. Dowty identified fifty-seven nations that restricted emigration in varying degrees (twenty-one tightly, fourteen partially, and twenty-two occasionally). *Id.* at 185-87. The United States is curiously absent from the list despite the travel ban to Cuba. This means that almost two-thirds of the 150 or so nations then existing had relatively free emigration practices, unlike immigration which was almost universally restricted. Thus Hannum, writing at the same time, concluded that "[a]lthough the right to leave and return is violated in many parts of the world . . . this should not obscure the fact that a majority of countries *do* respect the right in a meaningful way. . . ." HANNUM, *supra* note 9, at 124-125. According to Hannum, the right to leave was "essentially unhindered" in the entire Western Hemisphere, Western Europe, many African states, and in most of the developed and many of the smallest developing countries in Asia and the Pacific. *Id.* And even more so now, especially as a result of the collapse of the Soviet Union and the Soviet bloc, which were among the most restrictive countries. Of the twenty-one nations Dowty identified as tightly restricting emigration, eight now allow substantially free emigration and several others have substantially reduced their restrictions. See U.S. Dep't. of State, 1999 Country Rpts. on Hum. Rts. Prac. (A perusal of the Country Reports shows that most countries now allow relatively free emigration).

the right to immigrate. The freedom to emigrate is treated as an individual right of high priority, a right that nations are not to override without good reason. On the other hand, with the limited exceptions noted, the ability to immigrate is subject to nations' discretion, pursuant to their sovereign right of self-determination, to admit to their territories only those that they see fit. But does this dichotomy square with the liberal ideology underlying international law?

III. FREEDOM OF MOVEMENT AND LIBERAL IDEALISM

From the vantage point of liberal idealism, the issue of freedom of movement poses a conflict between notions of individual rights and of community. As an individual right, the right to travel, to freely move about, to settle where one pleases, would seem as fundamental to self-determination as many other individual rights such as free speech and freedom of religion.¹⁶ While liberal thinkers may differ as to the exact source of these rights, they are widely accepted in philosophies that view individual rights as morally required.¹⁷

Individual rights, however, are rarely viewed as absolute. Reasonable limitations are deemed acceptable in order to prevent the exercise of individual rights from injuring others or the collective welfare of society as a whole. Regarding free speech, for example, such reasoning underlies libel laws or restraints against

16. Within the United States, for example, the right to travel has long been recognized as a fundamental constitutional right, embracing people's individual freedom to leave, enter and settle in the various states and their right not to be treated in ways that undermine the right to travel. See *Edwards v. California*, 314 U.S. 160 (1941) (invalidating statute prohibiting the transport of indigents into the state); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (invalidating statutes denying welfare assistance to residents of less than one year); *Saenz v. Roe*, 119 S.Ct. 1518 (1999) (invalidating statute limiting welfare benefits during first year of residency). But see *infra*, note 83. And as noted above, international law also protects people's right to freedom of movement within their countries, although not the freedom to enter other countries. See *cites at note 9, supra*, and accompanying text.

17. For other philosophical discussions of the freedom of movement, see Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. OF POL. 251 (1987); Timothy King, *Immigration From Developing Countries: Some Philosophical Issues*, 93 ETHICS 525 (1983); JUSTICE IN IMMIGRATION (Warren F. Schwartz, ed., Cambridge University Press 1995); Michael Walzer, *The Distribution of Membership*, printed in BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS at 1 (Peter G. Brown & Henry Shue, eds., Rowman and Littlefield 1981); Frederick G. Whelan, *Citizenship and Freedom of Movement: An Open Admission Policy?*, as printed in OPEN BORDERS? CLOSED SOCIETIES?: THE ETHICAL AND POLITICAL ISSUES 1 (Mark Gibney, ed., Greenwood Press 1988); R. George Wright, *Federal Immigration Law and the Case for Open Entry*, 27 LOY. L.A. L. REV. 1265 (1994).

divulging state secrets.¹⁸ And regarding free exercise of religion such reasoning underlies punishing religious acts that constitute child abuse or contribute to social problems such as drug abuse.¹⁹

Similar reasoning has justified restraints on the individual freedom of movement.²⁰ As regards immigration the principle of sovereignty now grants nations substantial, indeed almost complete, discretion to control who may enter their territories and obtain the benefits of citizenship. Sovereignty derives from the right of people to collective self-determination. But the individual claim to be able to freely immigrate also entails an assertion of the right of self-determination. This begs the question of why the right of collective self-determination should outweigh that of individual self-determination in the immigration context.²¹

On the other hand, international norms now support the right to freely emigrate in the name of individual self-determination. Nevertheless, it could be asserted that the right of collective self-determination and the principle of sovereignty justify a nation's discretion to control emigration to the same extent as immigration. This begs the questions of why the right of individual self-determination should outweigh that of collective self-determination regarding emigration and of why the two contexts, immigration and emigration, should be treated differently with respect to

18. See *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (holding First Amendment does not protect magazine's publication of false report regarding non-public figure); *United States v. The Progressive, Inc.*, 467 F.Supp. 990 (W.D.Wis. 1979) (enjoining publication of article explaining technical process of designing and operating thermonuclear weapons on grounds of likely endangerment of national security).

19. See *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944) (holding child labor laws override parental prerogatives); *Employment Division v. Smith*, 496 U.S. 913 (1990) (holding free exercise clause does not protect ceremonial use of peyote by Native Americans from application of drug laws).

20. For example, protecting national security has been recognized, even by supporters of the right of free movement, as justifying reasonable restrictions on emigration or foreign travel in appropriate circumstances. See *Jagerskiold*, *supra* note 13, at 178 (justifying restraints on emigration and travel in the case of military personnel on active duty, persons subject to not yet completed mandatory national service, or strong reason to believe someone will engage in activities harmful to country).

21. Many of the same considerations that underlie the right to freely move about within a country, as protected both by international and domestic law, see sources cited *supra* notes 9 & 16, could be advanced in support of an international right to immigrate. This begs the question of why sovereignty overrides individual self-determination in the latter context, while collective self-determination is subordinate domestically to the right to travel. Is it because the two situations really differ from an ethical perspective, or is the explanation more one of power politics in that nation-states are unwilling to compromise this aspect of their sovereignty for reasons of self-interest?

the balance as between individual and collective self-determination.

As for immigration, collective self-determination might arguably outweigh individual self-determination on the ground that uncontrolled immigration could threaten the well-being of a nation's people. Uncontrolled immigration might, for example, impoverish a nation with insufficient resources to support the newcomers. But it is hard to justify an unfettered right to control immigration through such a utilitarian argument, since the well-being of those excluded from entering a nation is also relevant to a utilitarian calculation and may at times outweigh the impact on a nation's current residents.²² Suppose, for example, that impoverished people want to move from a poor to a rich country in order to improve their economic circumstances.²³ Surely the benefits to the immigrants would often outweigh whatever detriments might result to the receiving country. Yet current international norms grant nations total discretion regarding immigration in such instances and do not require of them a utilitarian calculation.²⁴

Conversely, it is hard to justify on utilitarian grounds an absolute freedom to emigrate. At times the benefits to those who leave a country may outweigh the detriments of their leaving to those who remain. But uncontrolled emigration could also threaten the well-being of a nation, and such harms might at times outweigh the interests of those wanting to leave. Suppose, for example, that relatively well-educated and highly skilled people want to leave underdeveloped countries that have provided them training and need their services in order to prosper. Surely,

22. This may help explain the limited protection international law accords someone who flees another country to escape persecution. From a utilitarian vantage point it might be thought that persecution so undermines a person's well-being that the impact of not being able to deport someone, or even of having to lawfully admit them, would rarely if ever be more detrimental to a nation's well-being than the benefits to the persecuted.

23. I shall assume here that economic circumstances do not constitute persecution, although the point could be debated and the contention becomes quite strong under conditions of extreme economic hardship.

24. Nor would it suffice to mandate such because a nation's decision-makers, who may favor the interests of insiders for reasons of affinity or political accountability, are not in a position to fairly weigh the interests of outsiders. If a utilitarian calculation is to govern the right of nations to exclude, then considerations of procedural fairness would seem to require that the decision be made more democratically: either by disinterested parties, or in some forum where the interests of both insiders and outsiders are fairly represented, or at least subject to the oversight of an international body with the power to override a nation's initial decision to exclude someone.

a utilitarian calculation would often support some collective restraints on emigration in such instances. Yet current international norms elevate the right to emigrate to a preferred status that protects it to a great degree from such utilitarian trade-offs.²⁵ This treatment is much like the way in which a bill of rights insulates protected rights from politics by requiring a compelling state interest in order to regulate them.

This analysis suggests that the international norms protecting both the individual freedom to emigrate and nations' discretion to control immigration derive from other than a utilitarian rationale.²⁶ And that for some reason in the emigration context, the individual right to freely move about trumps the sovereign right of national self-determination as a matter of principle, and vice versa as regards immigration. It is difficult, however, to fathom what those reasons might be.

Certainly, it seems far from clear that egalitarian approaches such as Rawls' would resolve the immigration and emigration issues in this manner.²⁷ What would hypothetical rational people operating behind a veil of ignorance and knowing that they might turn out to be one of the several billion impoverished people at the beginning of the 21st century agree to? Rawls posits that they would agree that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others" (the liberty principle), and that "social and economic inequalities are to be arranged so that they are . . . to the greatest benefit of the least advantaged" (the difference principle).²⁸

At this point in history, granting nations the blanket right to exclude others except in the case of persecution seems incompatible with these principles. It may be that one of the liberties encompassed within the liberty principle is the right of people to control a certain territory within which to autonomously pursue cultural identity and economic opportunity, and even to restrict the entry of others in order to protect that right. But if so, then the liberty principle would also seem to require that sufficient comparable territory be available to afford others that same right.

The United States, for example, has a disproportionate per

25. See sources cited at notes 9-13, *supra*, and accompanying text.

26. *Id.*

27. See JOHN RAWLS, A THEORY OF JUSTICE (Belknap Press of Harvard University Press 1971).

28. *Id.* at 60,83.

capita share of the world's wealth and resources;²⁹ and there is ample room in the United States for others who lack comparable opportunities elsewhere to pursue their destinies in at least a relatively autonomous manner, either within an overarching nation state or by splitting up the country into smaller nations. In this context, the sovereign right of the United States to totally exclude outsiders would privilege its self-determination over others, thereby contravening the requirement of equal liberty. Only if the self-determination claims of outsiders who want admission into the United States were to threaten to overwhelm the self-determination of those already occupying that territory would the assertion of sovereignty be compatible with the liberty principle.

Now in fact the United States does permit substantial numbers of people to immigrate.³⁰ Hence, it might be argued that the United States does not use its sovereign right to exclude in violation of the liberty principle, but rather that it is controlling the pace of immigration in order to fairly balance the liberty interests of insiders and outsiders. As discussed below, however, the United States' immigration policy would seem hard to rationalize as fairly balanced. Notable, for example, are the past and arguably continuing preference accorded to whites over non-whites,³¹ as well as the preferences currently accorded to the well-educated and highly skilled over the less well off.³² Such preferences seem incompatible with the equality of rights that the liberty principle requires. Instead, these preferences would seem to exacerbate the social and economic inequalities that already exist in the world,³³ thereby violating the difference principle as well.

29. As of 1997 the per capita Gross Domestic Product in the United States was about six times that of that world as a whole, up from closer to five times world GDP twenty years earlier. *Human Development Report 1999* 151-54 publication of the U.N. Dev. Prog. available at <http://www.undp.org/hdro/report.html#stats>. (last visited Jan. 14, 2002). The United States, which has about four and a half percent of the world's population, has about six percent of the total land area and twelve percent of the arable land, consumes about twenty-five percent of the world's energy (coal, petroleum, natural gas and electricity), and produces about twenty percent of the world's grain (wheat, corn and rice). *THE TIME ALMANAC 2000* 53, 329, 571-73 (Time, Inc); 1998 INFORMATION PLEASE ALMANAC 187 (Houghton Mifflin).

30. See *infra* notes 50-51, and accompanying text.

31. See *infra* note 58, and accompanying text.

32. See *infra* notes 62-63, and accompanying text.

33. On the growing disparities between richer and poorer nations, see Giovanni Arrighi, *World Income Inequalities and the Future of Socialism*, 189 *NEW LEFT REV.* 39 (1991); *Human Development Report 1999*, *supra* note 29, at 2-3 (reporting that a fifth of the world's population living in the richest countries had 86% of the world GDP as against 1% for the bottom fifth, and that the income gap between the top and bottom fifths rose from 30 to 1 in 1960 to 74 to 1 in 1997).

Nor would the liberty and difference principles seem to require as extensive a freedom to emigrate as under current international norms. As noted below, most emigration is from the less developed to the richer capitalist nations. Much of this emigration drains from the less developed societies the people most able to contribute to their development, again exacerbating the tremendous inequalities that exist in the world.³⁴

Moreover, much emigration results from actions on the part of the richer nations that undercut the ability of people elsewhere to freely pursue their destinies. For example, many immigrants to the United States come from countries devastated by U.S. military and political intervention.³⁵ Also much emigration is a by-product of colonialism, a clear-cut violation of the liberty and difference principles, which persisted over a period of several centuries and arguably continues today in altered form.³⁶

34. There is ample evidence of substantial brain drain of highly skilled people from developing countries and of an increase in this phenomenon since the mid-1960s, especially to the United States, Europe, Australia, and Canada. See, e.g., THE IMPACT OF INTERNATIONAL MIGRATION ON DEVELOPING COUNTRIES 19-36 (Reginald Appleyard, ed., Development Centre of the Organization for Economic Development Co-operation and Development 1989); Chen Chin Long, *The Immigration Policies of Developed Countries and the "Brain Drain" from Developing Countries*, as printed in THE IMPACT OF INTERNATIONAL MIGRATION ON DEVELOPING COUNTRIES at 213; DOWTY, *supra* note 15, at 147-53, 157-58. This fact does not disturb those economists who advocate a free market in labor as a means to optimize the value of labor. Yet not only may an unregulated labor market produce undesirable social costs, it may also contribute to the enrichment of the richer countries at the expense of the poor. How much brain drain actually hurts developing countries is a complex question that depends on a comparison of harms (e.g., loss of productivity, family disruption) versus benefits (e.g., reduced public service needs, remittances from workers abroad), many of which are difficult to identify and quantify, and the answer may differ depending on the circumstances. See Charles W. Stahl, *Overview: Economic Perspectives*, as printed in THE IMPACT OF INTERNATIONAL MIGRATION ON DEVELOPING COUNTRIES at 361. Many believe the harm to be substantial, and the growing disparities between developed and developing countries seem to bear that out. See e.g., D. Chongo Mundende, *The Brain Drain and Developing Countries*, as printed in THE IMPACT OF INTERNATIONAL MIGRATION ON DEVELOPING COUNTRIES at 183; STANISLAV SIMANOVSKY, MARGARITA P. STREPETOVA & YURIY G. NAIDO, "BRAIN DRAIN" FROM RUSSIA: PROBLEMS, PROSPECTS, WAYS OF REGULATION (Nova Science Publishers 1996); POPULATION MIGRATION AND THE CHANGING WORLD ORDER at 115-125 (W.T.S. Gould & A.M. Findlay, eds., John Wiley & Sons 1994).

35. See *infra* note 49, regarding the large number of immigrants to the United States from countries where it has intervened.

36. On the impact and distorting influence of colonialism and globalization on the normal development of underdeveloped countries, see generally FERNANDO ENRIQUE CARDOSO & ENZO FALETTI, *DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA* (University of California Press 1979); Andre Gunder Frank, *CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA* (Monthly Review Press 1967); Edward Goldsmith, *Development as Colonialism*, printed in THE CASE AGAINST THE GLOBAL

Consequently, egalitarian principles would seem to require that the richer nations rectify past injustices, and that they refrain from immigration practices and other actions likely to increase the inequalities among nations and to induce people to emigrate from underdeveloped countries where they would otherwise choose to remain and contribute. Until that happens, some restraints on emigration from those underdeveloped countries might benefit the least advantaged in the world and might be necessary to counteract the distortions of the past and present injustices that influence a person's decision to stay or leave.³⁷ As with utilitarianism, then, international norms overly protect the right to emigrate and under protect the right to immigrate relative to liberal egalitarian principles.

Similar problems plague libertarian approaches such as Nozick's.³⁸ The starting point for a libertarian analysis is people's freedom to choose with whom to associate. At first blush, this might seem to comport with the prevailing international standard of free emigration and controlled immigration, in that the right not to associate supports people's right to leave an association of which they no longer wish to be a member as well as people's right to deny admission to someone they do not want as a member of their association. But the matter is more complex than that.

The right to freely leave works best when people have voluntarily entered an association with the understanding that all have

ECONOMY at 253 (Jerry Mander & Edward Goldsmith eds., Sierra Club Books 1996); WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (Howard University Press 1981).

37. However, the extent to which restraints on emigration in the interest of protecting a country's economic well-being are permissible under current international norms is questionable. During the struggle for international recognition of the right to leave, only the former Soviet bloc and other Communist countries strongly asserted nations' sovereign right to impose restraints on emigration for such reasons. DOWTY, *supra* note 15, at 113, 152-53. However, the far more restrictive view supported by the West, which at best allows for restrictions only upon a strong showing of justification and requires that any restrictions be very narrowly drawn, has prevailed. See HANNUM, *supra* note 9, at 37 (quoting the opinion of José Inglés, a well-known jurist who authored a United Nations' commissioned study that strongly supports the right to leave and that contributed greatly to the international recognition of the right, that "some restrictions on movement may, in narrow circumstances, be justified in order to prevent serious and demonstrable 'brain drain' in developing countries"); Jagerskiold, *supra* note 13, at 178-79 (arguing that restrictions to prevent brain drain are "probably not permissible" and that prohibiting all emigration due to labor shortage would be "totally contrary to the Covenant").

38. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (Basic Books 1974). For several articles on the libertarian approach to freedom of movement, see *Immigration Symposium*, 13(2) J. OF LIBERTARIAN STUD. (1998).

the right to opt out when they so choose. But if people have the right to agree on the freedom to opt out, they should also be free to agree that an association, once formed, may not be unilaterally severed. For example, the reliance and opportunity costs of entering into a particular association could be so great that people might be unwilling to proceed without a guaranty of non-severability. Even absent an express agreement, such factors may at times make it appropriate to imply that people may not unilaterally terminate an association.³⁹

This analogy is imperfect in the nation-state context because most people do not freely enter but are born into their societies. However, even here, a society might plausibly contend, on the

39. It might be illuminating in this regard to compare the freedom to leave one's country with other instances of unilateral termination of relationships. One is divorce. Currently in the United States the right of one party to a marriage to unilaterally end it is widely regarded as an important individual prerogative. However, for much of U.S. history, the grounds for divorce were quite narrow, thereby making it more difficult to divorce without a mutual agreement between the parties. Moreover, the law today often imposes waiting periods and substantial financial and other obligations on individuals seeking unilateral divorce. Not only are reliance and opportunity cost factors as between the parties to a marriage at stake here, but also the interest of society as a whole in promoting social stability — the very factors that underlie the issue of regulating the freedom to leave one's country. A second comparison is secession. The issue of the South's right to unilaterally secede led to the U.S. Civil War; and it is still unclear whether a state has that right under the Constitution, although most commentators conclude not. See MARK E. BRANDON, *FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE* 167-99 (Princeton University Press 1998) (discussing circumstances under which secession might be justified); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1451-62 (1987). Amar states that "the plain import of [the Constitution]. . . is flatly inconsistent with the states' rights theory of popular sovereignty that underlies the claimed right of secession." *Id.* at n.162. In the international context the split-up of the Soviet Union and the independence movement in Quebec have generated recent scholarly commentary from a variety of perspectives, although again the prevailing view seems to be that there is no general moral or legal right to secede. See Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991) (arguing for right to secede when territory illegally annexed but not on grounds of nationality or group cohesiveness alone); Alan Buchanan, *Federalism, Secession, and the Morality of Inclusion*, 37 ARIZ. L. REV. 53 (1995) (arguing for right to secede of groups suffering severe injustices at the hands of the state but otherwise no general right to secede); Robert W. McGee, *The Theory of Secession and Emerging Democracies: A Constitutional Solution*, 28 STAN. J. INT'L L. 451 (1992) (arguing for a right to secede); Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633 (1991) (identifying moral arguments supporting secession but opposing an explicit constitutional right to secede as overly destabilizing). And again the same factors are at play as in the divorce and freedom to leave contexts. These comparisons show that the freedom to leave one's country, while certainly implicating important individual rights concerns, also implicates important concerns of others affected thereby and of society as a whole, such that treating it as a substantially unlimited unilateral right seems overbroad.

basis of willing acceptance or on social contract grounds, that the benefits the society has conferred on people justify restraining their withdrawal, at least until they have somehow compensated the society for the benefits received.⁴⁰

The right to exclude others from an association also has its problems. Under libertarianism people may not exercise their freedoms so as to undermine the freedom of others.⁴¹ In the associational context this poses an irreconcilable clash of liberty interests when one party wants an association that another does not. To recognize the right to impose an association interferes with the liberty of the party who does not want it, whereas to recognize the right to refuse an association impedes the liberty of the party who wants it. Libertarianism cannot resolve this clash in the abstract, since whichever move is made privileges the liberty interest of one party over the other. Consequently, conferring on a nation the unfettered discretion to control immigration cannot be reconciled with libertarian principles, since it overly favors the liberty interests of insiders as against outsiders.

Libertarianism requires a more balanced approach that examines the liberty interests at stake in context. If someone has a number of roughly comparable associations to choose from, that one rejects the person may not warrant overriding the association's liberty interest. However, were all to ostracize the person, then the person's interest in having some association to belong to might be paramount; as, for example, the Universal Declaration of Human Rights' requirement that everyone has a right to a nationality.⁴²

40. Only a few countries currently impose such restrictions. Cuba, for example, requires three to five years of service for recently graduated professionals (especially doctors) in order to obtain an exit permit. See U.S. Dep't. of State, 1999 Country Reports on Human Rights Practices. (on file with author). Unfortunately, countries that restrain emigration and travel often do so for political reasons that seem clearly impermissible under international norms. The United States too has frequently tried to restrict travel for political reasons. Some of these restrictions have been overthrown as violating the right to travel while others have been upheld on national security or foreign policy grounds. See *Aptheker v. Sec'y of State*, 378 U.S. 500 (1964) (overthrowing Subversive Activities Control Act provision making it a felony for member of Communist organization to apply for, use or attempt to use a passport); *Zemel v. Rusk*, 381 U.S. 1 (1965) (upholding refusal to validate passports for travel to Cuba); *Haig v. Agee*, 453 U.S. 280 (1981) (upholding revocation of passport for activities abroad determined to cause damage to national security and foreign policy); *Regan v. Wald*, 468 U.S. 222 (1984) (upholding restrictions on travel to Cuba).

41. As succinctly put by Nozick, *supra* note 38, at ix: "Individuals have rights, and there are things no person or group may do to them (without violating their rights)." See also *id.* at 10-12, 33-35.

42. UDHR, *supra* note 7, at art. 15.

In the international context a country with ample resources would seem to have a weaker claim to reject immigrants, particularly if the immigrants lack viable opportunities elsewhere, than an impoverished one that would have difficulty supporting newcomers. It would certainly violate libertarian principles for a group of people to appropriate for themselves a lion's share of the available resources, to form a nation-state to protect those resources, and then to deny entry to others on grounds of freedom of association.⁴³ Consequently, since the United States does control a disproportionate share of the world's resources, it might strongly be argued that libertarian principles require the United States to allow substantial immigration and even more so than at present given the hardships facing people elsewhere.

To sum up, so far the analysis suggests that it is hard to reconcile with any of the major ideological underpinnings of liberalism the favored treatment international law accords the freedom to emigrate over the right to immigrate, the preferred status it accords the freedom to emigrate, and the substantially unfettered discretion it accords nations to control immigration. It is difficult to say precisely what approach would satisfy liberal ideals, although it does seem fair to say that all would require substantial, though not unrestricted, freedom of movement in both the emigration and immigration contexts, subject however to a balancing process that would also give substantial weight to the interests of others affected thereby and of society as a whole.

IV. AN HISTORICAL-MATERIALIST ANALYSIS OF INTERNATIONAL PRACTICE

Given the disconnect between liberal ideology and international practice, I want now to turn to a historical-materialist analysis as a way to help explain the practice. This entails examining international standards regarding emigration and immigration

43. See NOZICK, *supra* note 38, at 174-82. Under Nozick's libertarianism individuals and groups acting in concert have the right to appropriate goods from the commons, i.e., previously unowned goods, subject to a principle of just acquisition that requires that they do not thereby worsen the position of others or that they compensate others. There are nice questions about what constitutes a worsening of others' positions or adequate compensation: Did the United States violate the rights of Native Americans by seizing previously owned property? Did Native Americans have an obligation to share the territory with others despite their prior appropriation of it? Has the position of Native Americans been worsened by the settlement of the country and has the United States adequately compensated them for the resulting harms? Is the United States today, through its immigration policies and other practices, violating the principle of just acquisition?

not in the abstract as liberal ideology tends to do, but in the real-world context of an increasingly globalized world economy dominated by the richer capitalist nations, and especially by the United States. In this context, the right of people to freely emigrate coupled with the sovereign right of nations to control immigration favors the richer capitalist nations and disadvantages the poorer and less developed ones.

In a world as at present of great inequality, people have an incentive to move from areas of lesser to areas of greater opportunity in order to better their own and their families' circumstances.⁴⁴ At times, emigration may benefit poorer nations by easing the burden of maintaining a population for whom there is not enough to go around. But emigration may also hurt poorer nations by draining off people who are needed to develop their societies. In that situation one would expect to find nations attempting to prevent emigration, as in fact some do.⁴⁵

Successfully preventing emigration can be problematic, however. If not allowed to leave, people who want out may be a disruptive influence impeding a country's stability and development. Moreover, people are frequently able to find ways to leave despite legal obstacles, whereas poorer countries may be hard-pressed to afford preventive measures.⁴⁶

44. For discussions of the factors likely to enter into people's decisions whether to migrate, see *THE HANDBOOK OF INTERNATIONAL MIGRATION: The American Experience* 21-135 (Charles Hirschman, Philip Kasinitz & Josh DeWind eds., Russell Sage Foundation 1999); Everett S. Lee, *A Theory of Migration*, 3 *DEMOGRAPHY* 47 (1966).

45. Restraints on emigration are of several types. Rarely do countries impose wholesale bans, perhaps in response to the international norm favoring free emigration. A primary control measure has been to deny (often for discretionary reasons) or to delay (often for years) the issuance of a passport or other governmental approval required to leave. Other measures include charging fees beyond people's means, prohibiting departees from taking assets with them, and requiring an agreement to return or to perform public service. See Dowty, *supra* note 15, at 63-85, 113-26; HANNUM, *supra* note 9, at 71-117. On the world-wide use of the passport system developed during and after World War I as the main method nations employ to prevent people from leaving, see Lesley Higgins & Marie-Christine Leps, *Rethinking the Exercise of Power: The Case of The Passport v. Mobility Rights*, 11(4) *RETHINKING MARXISM*, 113 (Winter 1999); JOHN TORPEY, *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP, AND THE STATE* 111-57 (Cambridge University Press 2000).

46. See generally DOWTY, *supra* note 15, at 154-57; *THE IMPACT OF INTERNATIONAL MIGRATION ON DEVELOPING COUNTRIES*, *supra* note 34, at 34 (noting that "(b)y and large, developing countries have been unable, and largely unwilling, to prevent the emigration of their professional and skilled workers to developed countries on a permanent basis"). The difficulty countries have in preventing emigration is well illustrated by the millions of undocumented immigrants crossing the border between Mexico and the United States, see *infra* note 65 and accompanying text; as well as by

And when richer countries want to encourage emigration for their own advantage, there are ways to do so. That the poorer nations are tied to a global economy and in need of money to finance development enables the richer nations to encourage permissive emigration through strings attached to trade and aid,⁴⁷ and to ignore efforts of developing nations to negotiate solutions to the brain drain problem.⁴⁸ Military and political intervention can and has induced many people to leave, as with U.S. intervention in Central America and Southeast Asia.⁴⁹ And being part of an increasingly interdependent world order with an international norm favoring the right to emigrate is a further inducement to allow people to leave.

Certainly the United States, which has less than five percent of the world's population, but almost twenty percent of the migrant population, has wanted to encourage permissive emigration.⁵⁰ Throughout U.S. history, emigrants from other countries

the many people who come to the United States as refugees and asylees, more than 900,000 having been so admitted between 1991-1998. Immigration and Naturalization Service, *1998 Statistical Yearbook*, Table 4 (on file with author).

47. See DOWTY, *supra* note 15, at 210-21, 232-34 (noting the use of international pressure and trade and aid negotiations as inducing countries to liberalize emigration, and citing in particular the success of the United States in threatening to withhold trade privileges from nations restricting free emigration pursuant to the Trade Reform Act of 1974).

48. See J. d'Oliviera e Sousa, *The Brain Drain Issue in International Negotiations*, as printed in *THE IMPACT OF INTERNATIONAL MIGRATION ON DEVELOPING COUNTRIES*, *supra* note 34, at 197 (discussing the unsuccessful attempts of developing nations during the 1970s and early 1980s to get various international bodies to address proposals for compensation for brain drain due to the reservations of the developed nations benefiting therefrom).

49. Since 1960 more than 750,000 Cubans have come to the United States; since 1970 more than 700,000 Vietnamese have come; between 1981-94 some 330,000 came from El Salvador as legal immigrants and more than 300,000 came illegally. In addition, several hundred thousand legal and undocumented immigrants have come from Nicaragua and Guatemala. In all of these countries, U.S. intervention has contributed to great internal disruption and hardship. Moreover, the United States has encouraged and facilitated this movement through laws according immigrants from these countries favorable treatment. See Immigration and Naturalization Service, *1998 Statistical Yearbook*, Tables 2 & 3; I.N.S., *1997 Statistical Yearbook*, Appendix 1; I.N.S., *Illegal Alien Resident Population*. (All on file with author).

50. PHILIP MARTIN & JONAS WIDGREN, *INTERNATIONAL MIGRATION: A GLOBAL CHALLENGE* (1996) (a publication of the Population Reference Bureau) (on file with *The University of Miami Inter-American Law Review*). As of the mid-1990's the world's migrant population totaled about 125 million people, of whom 23 million were in the United States. Other capitalist nations, as well, have benefited from permissive emigration. Seven of the world's richest countries (the United States, Germany, France, the United Kingdom, Italy, Japan and Canada), with less than one-eighth of the world's population, had about one-third of the migrant population. The developed nations as a whole had about 46% of the total migrant population. On the

have been a major source of the people needed to settle its expanding territory and develop its economy. Without immigration the United States would not be the great capitalist empire it has become. And immigration is still an important factor in the maintenance of U.S. hegemony.

The past two decades have seen the largest number of immigrants for any comparable period in U.S. history, with more than sixteen million legal and some five to six million undocumented immigrants.⁵¹ And this trend is expected to continue with a projected increase in the population of the United States of more than 100 million people over the next half-century, two-thirds of the increase being attributable to immigration.⁵²

For there to be immigrants for the United States to receive, people must be able to emigrate from elsewhere. The international standard of permissive emigration, along with the other incentives discussed above, help produce the needed flow. But not all comers are wanted, only those who serve U.S. interests. Thus the need for an international regime that recognizes the sovereign right to control immigration, without which the number of immigrants to the United States would be far greater and their socioeconomic characteristics far different than at present.

Substantial numbers of immigrants have come to the United States throughout its history.⁵³ The United States had an essentially open-door policy, accepting all comers, until the late 1800's when the Chinese Exclusion Laws and laws prohibiting the entry

receptivity of the United States and other developed nations to immigration, *see also supra* note 34. *See generally* STEPHEN CASTLES & MARK J. MILLER, *THE AGE OF MIGRATION: INTERNATIONAL POPULATION MOVEMENTS IN THE MODERN WORLD* (Macmillan Press 1998 2d. ed.); *CONTROLLING IMMIGRATION - A GLOBAL PERSPECTIVE* (Wayne A. Cornelius, Philip L. Martin, & James F. Hollifield, eds., Stanford University Press 1994).

51. *See generally* Immigration and Naturalization Service's Statistical Yearbooks, *supra* note 49; Michael Fix & Jeffrey Passel, *Immigration and Immigrants, Setting the Record Straight* 19-27 (May 1994), a publication of The Urban Institute available at <http://www.urban.org/pubs/immig/immig.htm> (last visited Jan. 14, 2002).

52. Fix & Passel, *supra* note 51, at 38-40; *Immigration Comes Alive in Newest U.S. Population Projections*, POPULATION TODAY: FEBRUARY/MARCH 2000, a publication of the Population Reference Bureau available at http://www.prb.org/Content/NavigationMenu/PT_articles/January-March_2000/Immigration_Comes_Alive_in_Newest_U_S_Population_Projections.htm (last visited Jan. 14, 2002).

53. On the history of U.S. immigration law and practice, *see* Fix & Passel, *supra* note 51, at 9-16; CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, *IMMIGRATION LAW AND PROCEDURE*, §§. 2.02-2.04 (1996); U.S. Commission on Civil Rights, *THE TARNISHED GOLDEN DOOR*, 7-19 (Sept. 1980)(on file with author).

of so-called undesirable immigrants were enacted.⁵⁴ From the 1840's through the 1920's, a great wave of immigration brought some 37 million people to the country, mostly from northern and western Europe until the end of the century and thereafter largely from southern and central Europe.⁵⁵ These immigrants, moved to go to the United States by poverty and upheaval at home and the hope of a better life abroad, helped settle the country and provided much of the labor force needed for the U.S.'s rapidly industrializing economy.⁵⁶

In the 1920's, having consolidated its territory and established itself as a world power, the United States began to limit the number of immigrants, and adopted a highly ethnocentric national origin quota system greatly favoring Europeans and among Europeans the most numerous nationalities already in the country.⁵⁷ These limitations, along with the Great Depression and World War II, reduced immigration to a relative trickle during the 1930's through the 1950's. The quota system was abolished in 1965 and a more permissive and less ethnocentric system adopted.⁵⁸

54. Meanwhile, the United States in its early years had an ambivalent attitude toward emigration. On the one hand, there was an impetus to champion free movement in response to European restraints on emigration that might impede the population of the rapidly expanding country. This led Congress to declare in 1868 that "the right of expatriation is a natural and inherent right of all people." DOWTY, *supra* note 15, at 49. On the other hand, due to the country's great need for people there was a reluctance to recognize the right of U.S. citizens to change their citizenship, which did not happen until the early 1900's. However, the interests of Europe and the United States converged during the 19th century as liberalized emigration practices helped European countries with domestic problems, while the great influx of Europeans to the United States, facilitated by unrestricted immigration, enabled it to grow and reduced the need to discourage emigration. As a result, there was substantially free movement between Europe and the United States over the second half of the 19th century. Additionally, in much of the rest of the world, movement was relatively free or subjected to decreasing restraint. This interlude was brief, however, as the first half of the 20th century saw a resurgence of restraints on both immigration and emigration, followed by the movement for the international recognition of a fundamental right to leave, resulting today in substantially unrestrained freedom to emigrate throughout much of the world. On these points, *see* DOWTY, *supra* note 15, at 42-94; HANNUM, *supra* note 9, at 71-117.

55. *See* Fix & Passel, *supra* note 51, at 19-20.

56. *See* PAUL A. BARAN & PAUL M. SWEETZ, *MONOPOLY CAPITAL: AN ESSAY ON THE AMERICAN ECONOMIC AND SOCIAL ORDER* 253-55 (Monthly Review Press 1966).

57. *The Tarnished Golden Door*, *supra* note 53, at 9-10.

58. The system is still arguably racist, however. *See* Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 *HOW. L.J.* 237, 237-44, 253-61 (1994) (arguing immigration laws disfavor Africans because their primary emphasis is on family reunification, which favors those already in the country; and per increased emphasis on skills, relatively low number of refugee visas, and

Since that time immigration has increased sharply, and as noted above the United States is in the midst of the greatest wave of immigration in its history.⁵⁹ Most of the newcomers have been non-European. As late as the 1950's, more than half of legal immigrants were from Europe. By the 1980's and 1990's, about 80% of legal immigrants were from Latin America and Asia.⁶⁰ Including the great expansion of illegal immigration, mostly from Central America, that began in the mid-1960's as a consequence of ceilings imposed for the first time on immigration from the Western Hemisphere, some 85% of all immigrants came from these areas.

Due to the relatively high quality of life at home, Europeans have not wanted to come to the United States in sufficient numbers to fulfill the need for the continued growth of the U.S. population and economy. Relative to Latin America and Asia, however, the United States' standard of living is significantly higher and has become increasingly so over the past thirty years.⁶¹ The globalization of the world economy, its domination by the advanced capitalist nations, and an increasing wealth disparity between richer and poorer nations have all contributed to the impetus of Latinos and Asians to come to the United States and to

difficulty of qualifying for nonimmigrant visas); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness*, 73 IND. L.J. 1111 (1998) (discussing continuing racism per impact of 20,000 per country limit which hurts countries with large numbers of ethnic minorities, motivation underlying Refugee Act of 1980 to limit number of Vietnamese refugees, disproportionate impact on minorities of exclusion of persons likely to become public charges, the diversity program which favors nations populated largely by whites, an asylum policy favoring Cubans over Haitians, and the war against undocumented immigrants which is directed mainly against Mexicans); Jan C. Ting, "Other Than a Chinaman": How U.S. Immigration Policy Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration, 4 TEMP. POL. & CIV. RTS. L. REV. 301 (1995) (discussing continuing anti-Asian bias through per country limits, the diversity program, and the selective enforcement of the refugee laws). But see Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996) (purpose of 1965 Act to make it easier for Asians to immigrate per racial egalitarian motivation).

59. However, the recent wave of immigrants, though greater in gross numbers than in any prior comparable time period, represents less of a percentage than earlier waves of the country's entire population. Between 1870 and 1910, at the height of the late 19th/early 20th century influx, the foreign born population of the United States approached 15% of the total population. It then declined to about 5% of the total in 1970, and as result of the recent wave of immigrants is now approaching 10% of the total population. See Fix & Passel, *supra* note 51, at 20-21.

60. *Id.* at 25-27.

61. See sources cited *supra* at note 33.

the United States' ability to grow and to expand its power as rapidly as it has.

However, although less ethnocentric, U.S. immigration policy has become more classist through controls over the socio-economic characteristics of the new immigrants that have increasingly favored highly-skilled people.⁶² This is reflected in the fact that, excluding Latin America and refugees, legal immigrants to the United States from elsewhere, comprising about half of all recent legal immigrants, tend to be as or better educated than native-born people.⁶³

These controls reflect the changing nature of the global economy. Accompanying and to a great extent driving globalization has been the development of high technology, largely dominated by the United States.⁶⁴ This has increased the need for skilled workers. United States immigration policy has thus enhanced its competitive position in the world economy by draining better educated people from underdeveloped nations, thereby avoiding the cost of training more of its own people and making it more difficult for the poorer nations to develop and compete.

It is still necessary to account for the large number of immigrants who don't fit this class profile. More than half of all immigrants, both legal and undocumented, during the 1980's and 1990's came from Latin America, and about half of these were from Mexico.⁶⁵ These immigrants, especially the undocumented ones, were far less well educated than native-born people.⁶⁶ Here a contributing factor is the continuing need for low-wage workers in segments of the U.S. economy such as farming and domestic

62. See Hing, *supra* note 58, at 35-45. Likewise, immigration practices in other developed countries have increasingly favored skilled people. See THE IMPACT OF INTERNATIONAL MIGRATION ON DEVELOPING COUNTRIES, *supra* note 34, at 22-23; Chen Chin Long, *supra* note 34.

63. On the educational level of immigrants as compared with native-born people, see Julian R. Betts & Magnus Lofstrom, *The Educational Attainment of Immigrants: Trends and Implications* 3-15 (National Bureau of Economic Research Working Paper 6757, Oct. 1998); Fix & Passel, *supra* note 51, at 30-34; Guillermina Jasso, Mark R. Rosenzweig & James P. Smith, *The Changing Skills of New Immigrants to the United States: Recent Trends and their Determinants* (National Bureau of Economic Research Working Paper 6764, Oct. 1998) (on file with author).

64. See generally *Human Development Report 1999*, *supra* note 29, at 57-76; Fredrick Jameson, *Globalization and Political Strategy*, 4 NEW LEFT REVIEW 49 (July/August 2000); Leo Panitch, *The New Imperial State*, 2 NEW LEFT REVIEW 5 (March/April 2000).

65. See Fix & Passel, *supra* note 51, at 25-26; Immigration and Naturalization Service, 1998 *Statistical Yearbook*, Tables 1 & 2; I.N.S., 1997 *Statistical Yearbook* 199-200.

66. See sources cited *supra* at note 63.

service. Another factor is that the ability of impoverished Latinos to enter the United States, support themselves here, and send money to families at home helps quell potential social upheaval in those countries.

Maintaining its economic domination of Latin America, and preventing the spread of socialism and communism there, was a prime concern of U.S. foreign policy in the post-World War II period until the fall of the Soviet Union in the late 1980's.⁶⁷ At times this led the United States to support repressive dictatorships, and at times to promote social upheaval against leftist regimes. These practices induced people to flee to the United States, as legal refugees in the case of countries such as Cuba and Nicaragua where the United States sought to topple disfavored regimes and as undocumented immigrants the United States was unwilling to admit as refugees in the case of friendly repressive regimes such as El Salvador and Guatemala.

Currently, the United States promotes forms of democratic capitalism as a stabilizing mechanism and a means of promoting its economic interests in Latin America.⁶⁸ Yet the great amount of poverty in those countries and the widening disparity in their standards of living relative to the United States still threaten upheaval and induce people to leave. Mexico, whose standard of living has stagnated in recent years⁶⁹ and where social upheaval

67. See generally Thomas Carothers, *The Reagan Years: The 1980s*, printed in EXPORTING DEMOCRACY: THE UNITED STATES AND LATIN AMERICA at 90 (Abraham F. Lowenthal, ed., Johns Hopkins University Press 1991); Jorge I. Domínguez, *US-Latin American Relations During the Cold War and Its Aftermath*, printed in THE UNITED STATES AND LATIN AMERICA: THE NEW AGENDA at 33 (Victor Balmer-Thomas & James Dunkerley, eds., Harvard University Press 1999); Lester D. Langley, AMERICA AND THE AMERICAS: THE UNITED STATES IN THE WESTERN HEMISPHERE 161-227, 237-50 (The University of Georgia Press 1989); Tony Smith, *The Alliance for Progress: The 1960s*, printed in EXPORTING DEMOCRACY: THE UNITED STATES AND LATIN AMERICA at 71.

68. See generally EXPORTING DEMOCRACY: THE UNITED STATES AND LATIN AMERICA, *supra* note 67; MICHAEL J. KRYZANEK, U.S.-LATIN AMERICAN RELATIONS 103-17, 207-65 (Praeger 1996); James Petras, *Global Transformations and the Future of Socialism in Latin America*, 18/19 NEW POLITICAL SCIENCE 181, 188-91 (Fall/Winter 1990).

69. Between 1980 and 1998 Mexico's per capita GDP rose less than 10% in real dollars. During this same period the GDP of the United States, which in 1980 was already about five times greater than Mexico's, rose by almost 40% and by 1998 was almost seven times greater than Mexico's. See Human Development Indicators, Table 7, in *Human Development Report 2000*, a publication of the U.N. Dev. Prog. available at <http://www.undp.org/hdr2000/english/HDR2000.html> (last visited Jan. 14 2002). See also Carlos Heredia & Mary Purcell, *Structural Adjustment and the Polarization of Mexican Society*, printed in THE CASE AGAINST THE GLOBAL ECONOMY, *supra* note 36, at 273 (detailing the increasing income and wealth disparities in Mexico and the decreasing quality of life of Mexico's poor between the early 1980s and mid-1990s due

would be particularly threatening due to its proximity to the United States, is the prime example. Hence, substantial immigration from Latin America, and especially Mexico, is likely to continue and to function as a needed safety valve.

But if stability and the need for low-wage workers are factors, then why doesn't the United States admit more legal immigrants from Latin America, and why doesn't it provide more foreign aid to those countries so as to promote stability through economic development?⁷⁰ Or if it is not necessary to allow immigration for these reasons, then why doesn't the United States more vigorously prevent illegal immigration?

Here domestic political considerations may be factors. One is the practical difficulty and great cost of controlling the borders and rooting out undocumented immigrants once there.⁷¹ Moreover, there is a risk of alienating voters who view the control measures as heavy-handed or who sympathize with the plight of undocumented immigrants. Many eligible voters in the United States have family members who are undocumented immigrants, or come from countries that undocumented immigrants have left for similar reasons.⁷²

to structural economic adjustments and the resulting peso crisis); *Economic Survey of Mexico, July 2000* (report of the Organization for Economic Cooperation and Development) available at <http://www1.oecd.org/publications/e-book/1000401e.pdf> (last visited Jan. 14, 2002) (noting a recent improvement in Mexico's economic performance and relatively favorable prospects for continued improvement, but also noting that standards of living have improved only marginally in the past decade).

70. U.S. foreign aid reached its height in 1985, but with the collapse of the Soviet Union and the end of the Cold War has declined to less than half of that level in real dollars. In 1997, U.S. developmental aid was less than 1% of the federal budget, and the lowest as a percentage of GNP of all member states of the Organization for Economic Cooperation and Development. See *Foreign Aid Languishes in an Age of Indifference*, 57 CQ WEEKLY 1627 (July 3, 1999). Historically, the lion's share of U.S. foreign aid has been for military assistance. Economic assistance has been more geared to geopolitical than developmental ends, with most of the aid going to a relatively few countries that have served U.S. strategic interests and with only a small share benefiting the poorest countries. See Jan Nijman, *United States Foreign Aid Crisis? What Crisis?* printed in *THE GLOBAL CRISIS IN FOREIGN AID* 29 at (Richard Grant & Jan Nijman eds., Syracuse University Press 1998).

71. On the success or failure of measures to prevent illegal immigration, and the reasons therefor, see Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White Collar Crime*, 24 LAW AND SOC'Y REV. 1041 (1990); Cecilia M. Espinoza, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIG. L.J. 343 (1994); Peter H. Schuck, *Law and the Study of Migration*, Program for Studies in Law, Economics, and Public Policy, Working Paper #226, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=191409 (last visited Jan. 14, 2002).

72. U.S. immigration law favors persons closely related to U.S. citizens or legal permanent residents, and such persons constitute the majority of all legal

Then there is the class aspect. As the globalization of the economy has brought about widening wealth disparities between richer and poorer nations, it has also contributed to widening disparities between the well off and the less well off within the United States and other developed nations.⁷³ Many workers in the United States feel threatened by the export abroad of jobs and by the influx of low-wage workers, both of which are perceived to and may actually drive down wages for some lower-skilled native-born people, even as they benefit the economy generally.⁷⁴

In the long run it may be that globalization will produce greater solidarity among workers world-wide as they come to recognize that capitalism only allows a limited amount of the wealth

immigrants. Immigration and Naturalization Service, *1998 Statistical Yearbook* 13-18, Table 4 (on file with author).

73. Regarding the United States, see Bureau of the Census, *Income Inequality Tables*, available at <http://www.census.gov/hhes/income/histinc/ie4.html> (last visited Jan. 14, 2002); BACK TO SHARED PROSPERITY: THE GROWING INEQUALITY OF WEALTH AND INCOME IN AMERICA (Ray Marshall ed., M.E. Sharpe 2000); ISAAC SHAPIRO & ROBERT GREENSTEIN, *THE WIDENING INCOME GULF* (1999), a (publication of the Center on Budget and Policy Priorities) available at <http://www.cbpp.org/9-4-99tax-rep.htm> (last visited Jan. 14, 2002); DANIEL H. WEINBERG, *A BRIEF LOOK AT POSTWAR U.S. INCOME INEQUALITY* (June 1996), a publication of the Bureau of the Census, available at <http://www.census.gov/hhes/www/img/p60-191.pdf> (last visited Jan 14, 2002). As of 1995 the wealthiest one percent of U.S. households owned thirty-nine percent of the nation's wealth, and the top twenty percent owned eighty-four percent. Wealth and income disparities have steadily increased over the past generation. Wealth and income in the United States are more concentrated at the top now than at any time since the Great Depression. Regarding the increasing wealth disparities within other developed nations, see U.N. Dev. Prog., *Human Development Report 1998* (on file with author).

74. The economic impact of immigration is highly complicated and debated. Fix & Passel, *supra* note 51, at 34-39, 47-72, conclude that immigrant incomes are roughly proportional to their share of the population and higher than the incomes of native-born people for long-term immigrants; that there is no aggregate effect on the labor market, with small negative effects on low-skilled workers in stagnant economies with high concentrations of immigrants but with immigration increasing opportunities for low-skilled workers in growing economies; and that immigrants pay more in taxes than the cost of governmental services received and except for refugees receive public assistance at significantly lower rates than native-born people. However, Passel & Clark conclude that undocumented immigrants generate a net deficit re taxes paid versus services received. Jeffrey S. Passel & Rebecca L. Clark, *How Much Do Immigrants Really Cost?* (The Urban Institute Feb. 1994)(on file with author). For another study reaching generally positive conclusions, see JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* (University of Michigan Press 1999, 2d ed.). For studies reaching generally negative conclusions, see GEORGE J. BORJAS, *FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRANTS ON THE U.S. ECONOMY* 79-196 (Basic Books 1990); Donald Huddle, *The Costs of Immigration* (Carrying Capacity Network 1996)(on file with author). For a study reaching mixed conclusions, see *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration* 173-296 (James P. Smith & Barry Edmonston, eds., National Academy Press 1977).

they create to trickle down to them. And they may conclude that their interests would be better served by banding together to change the system, instead of fighting amongst themselves over a piece of a pie not big enough to provide a decent life for all because so much is appropriated by the ruling elite. In the short run it may be harder to see this, thereby giving rise to nativist and protectionist sentiments that the ruling elite has an incentive to exploit so as to impede the development of worker solidarity.

This helps to explain the largely unsuccessful recent efforts to block free-trade agreements,⁷⁵ and the somewhat more successful effort to enact laws depriving both legal and undocumented immigrants of the benefits available to native-born people.⁷⁶ In the main, the capitalist class as a whole can be expected to and has successfully thwarted opposition to free trade, which is so essential to a global economy. However, there is less reason to thwart legal distinctions between native-born people and immigrants, which can serve the interests of the ruling elite by helping to divide the working class and to induce immigrants to assimilate more rapidly into the society. Meanwhile, undocumented immigrants can be made scapegoats, further dividing the working class, through laws purporting to crack down on illegal immigration, while the less visible process of a pretended though less than vigorous enforcement allows millions to enter the country as low-wage workers or for safety-valve purposes.

V. THE FREEDOM OF MOVEMENT UNDER SOCIALISM

The purpose of the foregoing discussion has been to show through a historical-materialist analysis that international standards and practices regarding emigration and immigration do not comport with the liberal ideology that underlies international law,

75. See David Bacon, *Globalization: Two Faces, Both Ugly*, DOLLARS AND SENSE 18 (Mar. 1, 2000) (detailing labor concerns about and opposition to free trade); JOHN R. MACARTHUR, *THE SELLING OF "FREE TRADE": NAFTA, WASHINGTON, AND THE SUBVERSION OF AMERICAN DEMOCRACY* (Hill and Wang 2000) (detailing the intense lobbying efforts in support of NAFTA by the White House and business interests).

76. For a history and analysis of these efforts, see Richard A. Boswell, *Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L.REV. 1475 (1995). Most recently, The Public Responsibility and Work Opportunity Reconciliation Act of 1996 barred undocumented immigrants from most public benefits at all levels of government and barred or limited the access of legal immigrants to means-tested public assistance such as food stamps and Supplemental Social Security ("SSI"). Some of the limitations applicable to legal immigrants have since been softened or repealed. I.N.S., *1997 Statistical Yearbook*, Appendix 1 (on file with author).

but rather serve the interests of the capitalist class which dominates the global economy. Now I would like to consider briefly how freedom of movement might be handled under democratic socialism.⁷⁷

Since there has been little if any experience with democratic socialism on a national level,⁷⁸ and certainly nothing approaching a democratic-socialist world community, these thoughts are necessarily speculative and idealistic. The question is what might be possible under democratic socialism, recognizing that as practiced it will no doubt fall short of its ideals and require a historical-materialist analysis to understand the practice.

Capitalist domination of the world economy has been accompanied and made possible by the decline of actually existing socialism, caused in part perhaps by the power of capital and in

77. By democratic socialism, I mean a society in which decision-making about the production and distribution of all the goods of social life is ultimately socialized and democratized, i.e., subject to public control pursuant to processes in which everyone has the opportunity to participate on relatively equal terms. This does not necessarily require the abolition of all private spheres of social life, including even private property and markets. But it does require that society be structured so as to equitably meet the needs of everyone, and accordingly that the public and private spheres of social life be subordinate to that end. This, in turn, requires a relatively equal distribution of the goods of social life, without which the needs of all would not be equitably met and participation in decision-making regarding the production and distribution of those goods could not be on equal terms. See THOMAS KLEVEN, *Private Property and Democratic Socialism*, XXI THE LEGAL STUDIES FORUM 1 (1997). For other discussions of democratic socialism, see generally SAMUEL BOWLES & HERBERT GINTIS, *DEMOCRACY AND CAPITALISM: PROPERTY, COMMUNITY, AND THE CONTRADICTIONS OF MODERN SOCIAL THOUGHT* (Basic Books 1987); NORBERTO BOBBIO, *WHICH SOCIALISM?: MARXISM, SOCIALISM, AND DEMOCRACY* (Roger Griffin, trans., Richard Bellamy, ed., University of Minnesota Press 1987); TOM BOTTOMORE, *THE SOCIALIST ECONOMY: THEORY AND PRACTICE* (Guilford Press 1990); FRANK CUNNINGHAM, *DEMOCRATIC THEORY AND SOCIALISM* (Cambridge University Press 1987); CAROL GOULD, *RETHINKING DEMOCRACY* (Cambridge University Press 1988); Ralph Miliband, *The Plausibility of Socialism*, 206 NEW LEFT REV. 3 (1994); MARKET SOCIALISM: THE CURRENT DEBATE (John E. Roemer & Parnab K. Bardhan, eds., Oxford University Press 1993).

78. Perhaps the now defunct or at least declining social democracies in some Western European countries are the closest examples, although the prevalence there of the capitalist mode of production makes them more capitalist than socialist and has contributed to their inability to sustain the welfare-state measures that represent their more socialistic aspects. See Andrew Glen, *Social Democracy and Full Employment*, 211 NEW LEFT REV. 33 (1995); Rianne Mahon & Rudolph Meidner, "System-Shift"; or *What is the Future of Swedish Social Democracy?* 23(4) SOCIALIST REV. 57 (1994); Jonathan W. Moses, *Abdication from National Policy Autonomy: What's Left to Leave?* 22(2) POL. AND SOC'Y 125 (1994); Ton Notermans, *Social Democracy in Open Economies: A Reply to Jonathan Moses*, 22(2) POL. AND SOC'Y 149 (1994). See generally ADAM PRZEWORSKI, *CAPITALISM AND SOCIAL DEMOCRACY* (Cambridge University Press 1985).

part perhaps by the failure of the socialist regimes to democratize.⁷⁹ If, however, the inequalities of the new world order should persist or deepen, or if some economic crisis or other catastrophe should strike, it is conceivable that a revitalized and more democratic socialism might emerge.⁸⁰ Perhaps capitalism must dominate the entire world and expend itself before a transition will be possible from capitalism and the nation-state system that supports it to a worldwide democratic socialism.⁸¹

Such a process, if it ever occurs, will likely not happen overnight, however, and in the transition socialist societies would have to contend with the continued existence of powerful capitalist nations. Like capitalist societies, socialist societies too might need people in order to develop and to defend themselves as well. And, since socialism strives to reduce the inequalities resulting from the distinction between manual and mental labor,⁸² they might be especially vulnerable to having their more highly skilled people drained off by the richer capitalist nations. So some socialist societies might well encourage immigration and discourage emigration.

On the other hand, socialist societies would not necessarily

79. On the reasons for the collapse of actually existing socialism, see Michael Burawoy, *Marxism Is Dead, Long Live Marxism!* 20(2) *SOCIALIST REV.* 7 (1990); Hans Heinz Holt, *The Downfall and Future of Socialism*, 5(3) *NATURE, SOC'Y, & THOUGHT* 17, 101-18 (1992); Ralph Miliband, *Reflections on the Crisis of Communist Regimes*, 177 *NEW LEFT REV.* 27 (1989).

80. See generally DANIEL SINGER, *WHOSE MILLENNIUM? THEIRS OR OURS?* (Monthly Review Press 1999).

81. Marx believed that socialism would come about only after capitalism advanced society's productive forces to a level of being able to create abundance and would occur first in the advanced capitalist societies as a result of the immiseration of the working class. See G.A. COHEN, *KARL MARX'S THEORY OF HISTORY: A DEFENSE* 197-215 (Princeton University Press 1978); JOHN ELSTER, *MAKING SENSE OF MARX* 295-98, 303-09 (Cambridge University Press 1985). Although Marx seems to have thought the changeover from capitalism to socialism was imminent, perhaps capitalism's ability to continue its expansion first through colonialism, see generally V.I. LENIN, *IMPERIALISM - THE HIGHEST STAGE OF CAPITALISM* (International Publishers 1939), and now through its economic domination of the New World Order, has enabled it to sustain itself and grow even more powerful. However, as the absence of potential new markets and environmental constraints limit capitalism's ability to continue expanding, perhaps its internal contradictions, and in particular its inability to meet the needs of all, will finally lead to its downfall. See William Pencak, *Socialism: An Idea Whose Time Has Not Yet Come?* 5(1) *NATURE, SOC'Y, & THOUGHT* 97 (1992).

82. See, e.g., HARRY BRAVERMAN, *LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY* 124-37, 315-26 (Monthly Review Press 1974) (discussing the increasing concentration under capitalism of mental labor in the hands of a relative few and the dehumanizing impact of the division of labor on those relegated to manual labor).

open their borders to all comers, since they might have to contend with issues of resource availability and the capacity to increase the provision of goods and services for the newcomers. In fact, since planning is central to socialism, one would expect to find substantial regulation of people's freedom to move from one country to another as well as within countries.

Even a totally socialized world society without national borders would likely manage people's movement, sometimes preventing or discouraging it and other times promoting and facilitating it as social and economic conditions warrant. All of which happens in various ways under capitalism as well.⁸³ However, the driving force behind the management of growth and movement would differ under anything worthy of being called socialism, with the welfare of people rather than profit being the prime value and with decisions being made more democratically than is possible under capitalism due to the political imbalance resulting from great wealth disparity.

Under socialism, helping the less-well-off and equalizing people's quality of life throughout the world would be a major consideration underlying emigration and immigration policy. Indeed, it is possible under socialism that many more people, most of them impoverished, would be admitted into the United States than at present and even aided in their adjustment to life there. It is also likely under socialism that far more aid would be provided than at present to underdeveloped parts of the world, geared not to exploitation and profit but to enhancing people's welfare and reducing inequality, thereby also reducing people's desire to emigrate.

83. Although the right to travel is constitutionally protected in the United States, see, e.g., *Edwards*, *supra* note 16, people's ability to move where they want is actually subject to significant indirect control on the local level. Many suburban communities effectively prevent lower income people from moving there through growth controls and exclusionary zoning, thereby relegating the less-well-off to depressed urban areas with inferior educational and job opportunities, and the Supreme Court and many states courts and legislatures have declined to intervene. See Richard Briffault, *Our Localism: Part I-The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 18-72 (1990); *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (rejecting class-based equal protection challenge to Texas' public school financing scheme yielding substantial inequality between richer and poorer districts in revenue raising capacity and educational expenditures on grounds that wealth is not suspect class and that fostering local control rationally justifies the scheme); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (rejecting race-based equal protection challenge to denial of rezoning for low cost housing by suburb of Chicago with over 64,000 residents of whom only 27 were black absent showing of discriminatory intent or purpose).

In the short run under a developing worldwide socialism, due to the grotesque inequalities at the start,⁸⁴ the impetus to immigrate to the developed parts of the world might make it difficult to allow unrestricted freedom of movement. In the longer run, as the distortion of the choice to stay or leave resulting from inequality and the need to survive declines, it might be possible to practice freedom of movement. And it would be desirable to do so, as well, in furtherance of people's human right to pursue their own destinies, a right that liberalism touts but cannot deliver due to its ties to capitalism. Because capitalism produces an increasingly inegalitarian world, freedom of movement will likely never exist under it and the impetus to control movement will likely only increase over time.

Many aspects of liberal idealism are compatible with socialism and many aspects of socialism are present in liberal idealism, in particular their democratic and egalitarian aspects.⁸⁵ But liberalism's tie to capitalism makes it impossible to achieve egalitarian ideals because capitalism produces ever-greater inequality. To be sure, there are many examples of serious inequities in societies practicing forms of socialism.⁸⁶ But socialism's rejection of the capitalist mode of production at least offers the possibility of a more egalitarian world. There is irony here. For just as capitalism has developed society's productive forces to a level that makes it possible through the socialization of production to meet the needs of all people, so liberalism has helped advance the idea of individual worth and dignity so that socialism can complete that unfinished project too.

84. See sources cited *supra* at note 33.

85. See generally JOHN BAKER, *ARGUING FOR EQUALITY* 6 (Verso 1987) (arguing that "(a)rguments for equality are . . . prior to decisions about particular social institutions, such as the choice between capitalism and socialism"); BOBBIO, *supra* note 77, at 85-102 (University of Minnesota Press 1987) (arguing for the importance of democracy under socialism); SAMUEL BOWLES & HERBERT GINTIS, *DEMOCRACY AND CAPITALISM* 178 (Basic Books 1986) (arguing that "(p)ostliberal democracy may be considered a synthesis of the Jeffersonian and Marxian visions"); Kleven, *supra* note 77, at 27-39 (arguing that the differences between capitalism and socialism are matters of emphasis and degree rather than bright line distinctions).

86. See generally CHEN ERJIN, *CHINA: CROSSROADS SOCIALISM* 71-119 (Verso 1984) (arguing that a new form of exploitation has arisen in China where the bureaucratic class has in effect appropriated state property as its own); Stephen Resnick & Stephen Wolff, *Between State and Private Capitalism: What Was Soviet "Socialism"?* 7(1) *RETHINKING MARXISM* 9 (1990) (arguing that state officials in the Soviet Union dominated and exploited the working class).

VI. CONCLUSION: WHERE TO FROM HERE

International law and practice regarding freedom of movement are aspects of the overall movement of history. Several developments in the post-World War II era seem most significant here.

First, as exemplified by the end of colonialism and the adoption of the United Nations Charter, is the solidification of the largely autonomous nation-state with the sovereign right to control its internal affairs as the major repository of governmental power.⁸⁷ Controlling entry into the country is one such internal affair, most countries do intensely regulate immigration, and there are minimal international standards limiting the content of those regulations. Countries are largely free to act at their discretion regarding immigration.

Second, is the international movement for the recognition and implementation by the community of nation-states of certain fundamental human rights.⁸⁸ One of these rights, which after an intense campaign now has the status of international law and is in fact practiced by most countries, is the largely unimpeded right to leave one's country.

Third, with the collapse of the Soviet Union and the decline of socialism as an available alternative, is the globalization of the world economy and its domination by the richer capitalist nations.⁸⁹ This domination has produced growing inequalities between those nations and the rest of the world. One among many factors contributing to the growing inequality, facilitated by permissive emigration practices and immigration laws increasingly favoring them, is the movement of relatively well-educated

87. As recognized in the United Nations Charter, which is based on the principle of the "sovereign equality of all its Members," U.N. CHARTER art. 2, para. 1, and states that among the U.N.'s purposes is "(t)o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." U.N. CHARTER art. 1, para. 2. See generally WOLFGANG FRIEDMAN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 31-37, 365-66 (Columbia University Press 1964); JOHN G. STOESENGER, *THE MIGHT OF NATIONS* (Random House 1979).

88. See generally *THE INTERNATIONAL BILL OF RIGHTS*, supra note 9; HANNUM, supra note 9.

89. See generally PAUL HIRST & GRAHAME THOMPSON, *GLOBALIZATION IN QUESTION* (Polity Press 1999) (discussing the domination of the world economy by the United States, the European Union and Japan, although preferring to characterize it as more of an "inter-national" than a "globalized" economy in that the world economy and the emerging multi-national corporations are still dependent on the support of nation-states as the dominant force in the international arena). See also sources cited supra at note 64.

and highly-skilled people from developing countries to the richer capitalist nations.

Unfortunately, solutions do not seem easy to come by. The richer capitalist nations do not seem inclined to change their immigration practices either to draw off fewer highly-skilled people or to admit more impoverished people from developing countries, nor to aid those countries more in their development. The developing countries seem unprepared to address the problem, due perhaps to the practical difficulty of preventing people from leaving, or to a fear that the consequences of the effort may be even worse than the problem, or to their lack of bargaining power in dealing with the developed nations. And due to the developed nations' domination of the global economy, underdeveloped countries seem hard-pressed to develop as a way to induce the highly skilled not to leave or to return. As a result, the world is becoming increasingly polarized: at the top, a relatively few nations where most live decently and some in lavishness; and at the bottom, a large group of nations where hundreds of millions of people live in abject poverty.

This is a disquieting and ominous trend. Disquieting because of the unpleasantness of living in a world with so much preventable misery; and because so contrary to the aspiration, as expressed in the preamble of the United Nations Charter, of an international community dedicated to "the promotion of the economic and social advancement of all people." Ominous because if the trend continues it will likely result in catastrophes, like the AIDS plague or mass starvation, whose effects may spread worldwide. And because if the trend continues indefinitely, it may well result in devastating worldwide conflict.

Perhaps an economic crisis within the richer capitalist nations, as some think is in the offing, will change the equation: by creating domestic opposition to and decreasing the demand for the importation of skilled labor; by enabling people to understand that a world order in which a few benefit and many suffer is neither a desirable nor viable state of affairs. The risk is that as in the past an economic crisis will lead to war as the richer capitalist nations resort to force as a means of maintaining their dominance and fight among themselves over the spoils. The task of those of us who see this as a real possibility is to try to enlighten others about all the undesirable aspects of the new world order and the possibility of a better way.

Although no crisis economic
Nor threat of war atomic
May now confront the nation,
It might make sense to gaze ahead
Before pronouncing socialism dead.
The bear may only be in hibernation.⁹⁰

90. This poem was written by the author in the summer of 2000, prior to the recent stock market decline and the attack on the World Trade Center.