

The Struggle Continues

Human Rights and Immigrant Workers



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“For people of good will around the world, that document (UDHR) is more than just words: It’s a global testament of humanity, a standard by which any humble person on Earth can stand in judgment of any government on Earth.” —Former U.S. President Ronald Reagan (March 1989, U.S. Department of State Bulletin)

“This Declaration (UDHR) is one of the most important documents of the 20th century, indeed of human history, for it represents the first time men and women sought to articulate the core aspirations of all the world’s people.” —Former U.S. President Bill Clinton (An Electronic Journal of the U.S. Information Agency Volume 3, Number 3, October 1998)

The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly on December 10, 1948. Since that time, American presidents from Reagan, to Clinton, to George W. Bush, have lauded the document, and various fundamental rights guaranteed in the UDHR are now considered by many legal scholars to be part of “customary international law” and therefore binding on all nations. Article 1 of the UDHR guarantees that “[a]ll human beings are born free and equal in dignity and rights.” Article 2 provides that these rights should be granted to all persons “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 7 prohibits discrimination based upon citizenship or immigration status, as “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.” Moreover, the UDHR states that all people are entitled to the rights protected in the Declaration including, Article 20(1), “the right to freedom of peaceful assembly and association and ...the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment(.).”, Article 23(2) which provides for “the right to equal pay for equal work,” and Article 23(4) which guarantees “the right to form and to join trade unions...”

In addition to the UDHR, the founding document of the United Nations, the U.N. Charter, promotes universal respect for, and adherence to, the human rights and fundamental freedoms of all people, without distinction as to race, sex, language or religion. The U.N. Charter and the UDHR, as well as subsequent human rights treaties including the International Covenant on Civil and Political Rights (ICCPR), Inter-

national Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC), all firmly establish the principle that no human being can be outside the projection of the law or “illegal.”

Despite the clearly established principle that discrimination and abuse based upon immigration status is a violation of human rights, and notwithstanding the rhetoric of Presidents’ Reagan and Clinton, currently, the U.S.

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government’s policies sanction human rights violations against low-wage immigrant workers based upon their immigration or employment status. Abuse of immigrant workers is not a new phenomenon, as immigrant workers have been mistreated throughout American history, from Chinese railroad workers to Mexican “*braceros*.” However, recent groups of immigrants are uniquely vulnerable because of the heated contemporary debate over immigration, the post-9/11 climate of fear and suspicion of immigrants, and the overall scapegoating of immigrant communities for a host of societal ills in a nation with a suffering economy. More explicitly, within the contemporary context, there are three discrete groups of immigrant workers who are most vulnerable to racism, xenophobia, and clearly defined human rights abuses: *guestworkers*, undocumented workers, and domestic and agricultural workers.

Throughout history, both in the United States and around the world, “*guestworker*” or temporary worker programs have proven to be exploitative and harmful to immigrant workers, creating a permanent underclass of disposable and vulnerable labor. This pattern continues in the present day. Most *guestworkers* have paid exorbitant amounts of money in their countries of origin to “recruiters” contracted by American companies to “import” immigrant workers into the United States. The recruiting process is fraught with fraud and exploitation,

leaving the workers extremely susceptible to abuse from the moment that they arrive in this country. Entering the workforce with mountains of debt and with their circumstances frequently obscured from societal scrutiny because of social, linguistic and geographic isolation, the *guestworkers*’ vulnerability is then compounded by workplace mistreatment. As a group, *guestworkers* are systemically underpaid, deprived of fundamental workplace protections, and subjected to racial discrimination and (on top of these abuses) some workers are subjected to forced labor and physical violence.

Frequently the workers have no capacity to challenge their mistreatment as employers control the workers’ very ability to remain legally in this country. Moreover, unlike most other workers (both immigrant and non-immigrant), *guestworkers* do not enjoy the security of an equitable labor market. They cannot leave an abusive

employer and take a job with another American employer who might pay better wages and offer better working conditions. Instead, the U.S. guest-worker program treats the workers as though they are the exclusive property of the employer who brings them in. If the worker decides they want to leave an employer, or if they complain about abuse or mistreatment, they face deportation back to their countries of origin. The threat of deportation is particularly severe, as the guestworkers will face staggering debt upon return to their home country and the workers are aware that the recruiters, loan

One American employer described his use of guestworkers brought from India in the following manner:

You bring them in, pay them two or three dollars an hour, give them a little food, give them a place to stay. That's cheap labor. And they're the hardest-working sons of bitches you'll find—harder than any white man you can find around here.¹

Recently, the ACLU joined a class action lawsuit brought on behalf of over 500 guestworkers from India.² The lawsuit charges that these men were

brought to work in shipyards in the wake of Hurricane Katrina, they were misleadingly recruited, exploited and mistreated as the recruiting agents held the workers' passports and visas and coerced them into paying extraordinary fees for recruitment, immigration processing, and travel. Upon their arrival in the U.S., the lawsuit alleges that the workers were forced to live in squalid living conditions in guarded, overcrowded labor camps, subjected to fraudulent payment practices, and faced psychological abuse, and threats of serious legal and physical harm if they did not work under the employer-restricted guestworker visa.

The litigation arose out of a broader organizing campaign spearheaded by the Alliance of Guestworkers for Dignity, a project of the New Orleans Workers' Center for Racial Justice. In addition to the federal court litigation, in partnership with the ACLU, the workers have testified before the U.N. Special Rapporteur on the Human Rights of Migrants, the U.N. Special Rapporteur on Contemporary forms of Racism, Racial Discrimination, Xenophobia and

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sharks, and other bad actors who take part in this process can, and do, perpetrate various sorts of violence, as well as physical and economic retaliation.

trafficked into the U.S. through the federal government's H-2B guestworker program with dishonest assurances of becoming lawful permanent U.S. resi-



Agricultural workers are among the most exploited and vulnerable. Photos courtesy of the Farmworker Association of Florida (www.floridafarmworkers.org)

Related Intolerance, and senior staff at the UN Office of the High Commissioner for Human Rights.

While the right to equal protection of the law is a fundamental human right, sadly, in the United States, undocumented workers do not enjoy equal protection of the law and suffer from both *de jure* and *de facto* discrimination based on immigration status. Recent jurisprudential decisions have undermined equal protection beginning with *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), where the U.S. Supreme Court held that the National Labor Relations Board (NLRB) lacked the authority to compensate an undocumented worker for the wages he or she would have received had they not been subjected to an unfair labor practice, and unlawfully terminated before finding new employment.

The *Hoffman* decision has led to an erosion of rights protection for undocumented workers as the Court reasoned that the workers' "unlawful status" made them ineligible for relief. Unsurprisingly, since that time, employer defendants have cited *Hoffman* in contending that undocumented workers are not entitled to fundamental workplace remedies under labor or employment-related statutes, including Title VII, the Fair Labor Standards Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the state law equivalents of federal anti-discrimination and workplace wage and hour protections. Some courts have exported the *Hoffman* rationale into other contexts, restricting both undocumented workers' access to courts and entitlement to various rights and remedies. Undocumented workers have lost safeguards in the areas of accessible remedies when injured or killed on the job, overtime pay, workers' compensation, fam-

ily and medical leave, and other areas. Low-wage South Asian and Muslim workers are particularly vulnerable, as they face intersectional forms of anti-immigrant hostility, employment abuse, and post-9/11-related discrimination.

In the wake of *Hoffman*, and with the reality that in some states, employment and labor protections under state law have been either eliminated or severely limited for undocumented workers (including basic workplace protec-

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tions such as freedom from workplace discrimination and entitlement to hold an employer responsible for a workplace injury), the ACLU, along with the National Employment Law Project and the Transnational Legal Clinic at the University of Pennsylvania School of Law, filed a petition urging the Inter-American Commission on Human Rights to find the United States in violation of its universal human rights obligations by failing to protect millions of undocumented workers from exploitation and discrimination in the workplace. The petition was submitted to the commission on behalf of the United Mine Workers of America, AFL-CIO, Interfaith Justice Network, and six immigrant workers who are representative of the millions of undocumented workers in the United States labor force. The ACLU and our partners filed this groundbreaking petition to assert the fundamental human rights of all workers (irrespective of their immigration status) and to ensure that the U.S. complies with international human rights law, which requires all nations

to apply their workplace protections equally and without discrimination based on immigration status.

The ACLU, along with collaborating organizations, have also raised the *Hoffman* issue before the U.N. Human Rights Committee which monitors compliance with the ICCPR, and the Committee on the Elimination of Racial Discrimination which oversees compliance with ICERD. This advocacy has resulted in the CERD Committee issuing a Concluding Observation rec-

ommending that the United States “... take effective measures—including the enactment of legislation, such as the proposed Civil Rights Act of 2008—to ensure the right of workers belonging to racial, ethnic and national minorities, including undocumented migrant workers, to obtain effective protection and remedies in case of violation of their human rights by their employer.”

Domestic workers and agricultural workers are specifically barred from particular protections defined in the National Labor Relations Act, the federal Fair Labor Standards Act, and the Occupational Health and Safety Act. By virtue of being excluded from minimum wage and overtime pay, minimum worker health and safety protections, and the right to organize and bargain collectively, these groups of workers are among the most exploited and vulnerable of any population of workers. According to the Coalition of Immokalee Workers, currently, farmworkers in Florida have to pick two tons of tomatoes to make \$50 in

one day. Domestic workers frequently suffer gross human rights violations, including being victimized by physical, emotional, and sexual abuse. They also face systemic labor violations, often being asked to provide work up to 19 hours per day and to be perpetually available and “on call.” Many domestic workers are not given days off and their promised wages are often reduced or withheld completely.

There is an explicit racialized history to the exclusion of both domestic workers and agricultural workers from fundamental protections. In the 1930’s when the National Labor Relations Act and Fair Labor Standards Act were passed, agricultural workers and domestic workers were predominantly African American men and women. Under pressure from the growers’ lobby, Southern senators were able to negotiate exemptions for these two categories of labor, thereby disproportionately harming African American workers in the South. The disparate impact of this racially discriminatory exclusion continues, as in the contemporary context, domestic workers are mostly immigrants from South Asian, Caribbean, and Latin American countries, and agricultural workers are predominantly immigrants from Latin America and the Caribbean, in addition to smaller populations of African American workers.

The ACLU has brought several lawsuits on behalf of immigrant women domestic workers who have been traf-

ficked into the United States by abusive employers, including some cases on behalf of domestic workers employed by diplomats. We have argued that no form of immunity should protect diplomats who abuse and exploit their employees, and that all workers are entitled to fundamental human rights including the right to effective remedy.

To address the egregious violations outlined in this article, and to begin the process of coming into compliance with its human rights obligations, the Obama administration should apply workplace protections equally, and without discrimination based upon race, citizenship, or immigration status. Congress can play a significant role in addressing some of these problems by passing the Civil Rights Act of 2008, or similar legislation; and must seek to ensure that minority and immigrant workers, including undocumented migrant workers, are afforded effective protection and remedies when they suffer employer-inflicted human rights violations. Congress can also remove the discriminatory barriers faced by domestic and agricultural workers to obtaining protections contained in the National Labor Relations Act, the federal Fair Labor Standards Act, and the Occupational Health and Safety Act. Finally, Congress can either eliminate the H-2B guestworker program, or modify the program to ensure that workers have the freedom to move from one employer to another; that

employers bear all costs incurred in transporting and recruiting the guestworkers to come to the United States; and that the guestworkers have the opportunity, at the conclusion of their visa, to apply for lawful permanent residency.

Another American president, John F. Kennedy, remarked, “[W]e shall be judged more by what we do at home than what we preach abroad.” Following President Kennedy’s admonition, we must cast a global spotlight on the U.S. government’s human rights record—particularly its glaring failure to protect low-wage immigrant workers from discrimination and abuse—and we must make real our commitment to the fundamental principle that no human being can be “illegal.”

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¹ John Bowe, *Nobodies: Modern American Slave Labor and the Dark Side of the New Global Economy* (New York: Random House, 2007), p. 93.

² The ACLU is co-counsel with Dewey & LeBoeuf LLP, the Southern Poverty Law Center, the Asian American Legal Defense and Education Fund, the Louisiana Justice Institute and the New Orleans Workers’ Center for Racial Justice.