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De-Territorializing Labor Law

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Abstract

Labor law was traditionally a domestic project, defined on the basis of a geographic territory or a synthetic community; its norms were determined by the state and applied to employers and workers who resided within the state. Commonly, labor law is administered on a territorial basis, applies to incoming workers, and stops at the borders in respect of other states' sovereignty when capital migrates. Globalization affects the background in which labor law operates, including the increased interdependence of markets, the constitution of communities that transcend national borders, and the development of institutions outside and within the nation-state, which displace the locus of regulation from the traditional state level. De-territoriality claims that territory and sovereignty should be understated within the dominion of labor law in order to correct a deep structural imbalance in labor markets. This imbalance was not created by globalization, and as long as it appeared in a consistent yet bounded manner in each and every state, labor law's project was rendered possible by territorial arrangements. With the process of globalization, the territorial solutions previously created within labor law are no longer adequate. When territoriality is adhered to, migrating workers receive partial protection, while migrating capital can easily choose its most convenient forum as a means, *inter alia*, of undermining labor law's protection to workers. De-territorialization seeks to restore the original intent of labor law's project, which is to level off the distinct strategies that are available to labor and capital in a globalized labor market.

KEYWORDS: labor law, territoriality, de-territorialization, globalization

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De-Territorializing Labor Law

INTRODUCTION: THE DIALECTIC NATURE OF TERRITORIALIZATION

Labor law was traditionally a domestic project, defined on the basis of a geographic territory or a synthetic community.¹ It was a body of norms that were determined by the state (with the participation of all three branches), and was applied to employers and workers who resided within the state. Labor law is known to be polycentric: Some of its norms are prescribed by agents outside the common legislative circle, most notably the agents of collective bargaining. Collective bargaining was territorialized just like labor law in two senses. *First* it was embedded in a legal pattern established by the state. *Second*, the agreement's coverage is usually limited to employers and workers within the territory's borders.

How has globalization affected the project of labor law? Generally globalization includes the intensification of movement across state borders, including the movement of commodities, capital, workers, information, and culture. While intensified movement does not undermine the significance of states and borders, globalization also includes the increased interdependence of markets, the constitution of communities that transcend national borders, and the development of institutions outside and within the nation-state, which displace the locus of regulation from the traditional state level. To assess the effects of globalization on labor law—two distinct movements, not sufficiently viewed as parts of the whole, need to be observed—the movement of people and the movement of capital.² With regard to the former, globalization includes the movement of people across borders,

¹ This Article relies on the distinction between organic and synthetic communities and jurisdictions, as described by Richard Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999). While the organic jurisdiction is a natural outgrowth of circumstances, conditions and principles that, morally, pre-exist the state, the synthetic jurisdiction is “created by some institution in order to serve its purposes. They do not define a prepolitical social group, but are instead imposed on groups of people from ‘outside’ or ‘above.’” (*Id.* at 859-61).

² The separation of these two fields is partial. Neoclassical explanations in both sociology and economics treat both as production factors that are moved by “push and pull” forces that shape supply and demand in both sending and receiving states. Institutional explanations tend to diverge in their treatment of these two movements because the social factors and social institutions in which these movements take place are different.

From an institutional view point some intersections can be found such as GATS' treatment of movement of services that can be in the form of capital's movement to buy services across the border, but also the movement of service providers (i.e., workers). *See, e.g.*, General Agreement on Trade in Services, art. I2, Apr. 10, 1947, 1869 U.N.T.S. 183 [hereinafter GATS].

However, GATS' exception highlights the rule and also underscores it. GATS emphasizes that the movement of service providers should *not* be viewed as the movement of workers. The difference is notably in the fact that GATS distinguishes service providers from job-seekers.

sometimes to open new economic and professional opportunities, other times as a result of undue hardship in the state of origin, and sometimes as a result of coerced movements (trafficking, but also asylum seekers, stateless people, and the like).³ Broadly defined, the movement of people is regulated by immigration law. The task of labor law is to ensure the application of territorial law to those admitted to the state and to create exceptions to its application when deemed necessary by the state. In most countries, the default norm is that territorial presence entails the application of labor norms and is justified on two distinct grounds: 1) work in the territory is a partial admission to the sphere of social citizenship;⁴ or 2) lower wages and remuneration to migrants could undercut domestic wages and eventually harm the local workforce of the territorial community (the “insiders”). In the first instance migrants are deserving of their own rights, and in the second they are instrumental to the rights of others.

A second component of globalization is movement of capital, which is always treated as asymmetric in relationship to that of labor. While capital is generally courted by all states, the movement of people is often considered a threat.⁵ The

³ These conditions are not distinct, but rather points along a continuum. *See, e.g.,* Audrey Macklin, *Who is the Citizen's Other? Considering the Heft of Citizenship*, 8(2) *THEORETICAL INQ. L.* 333-36 (2007).

⁴ For this argument various types of rights and different groupings of migrant workers need to be identified. For example, the case of undocumented (illegal) workers is more difficult than that of documented (legal) workers. It is therefore clear that undocumented workers would have no right to work, but would, however, enjoy in most states, contractual rights of employment even if the employment contract is deemed illegal or contravening public policy. Undocumented workers may be entitled to a contractual wage, even if not to a wage determined by statute.

The assumption that labor rights are applied territorially to documented workers is merely an empirical default, and there are various exceptions and derogations to the rule. However, the common practice is to specify that a statute does *not* apply to migrant workers; implying that territorial application is the default situation. This is also the statement of international law, *see, e.g.,* International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 25, Dec. 18, 1990, 2220 U.N.T.S. 93; Convention on the Elimination of All Forms of Discrimination against Women, art. 11, Dec. 18, 1979, 1249 U.N.T.S. 13; Migration for Employment Convention (Revised), art. 6, (ILO No. 97), 120 U.N.T.S. 70; Migrant Workers (Supplementary Provisions) Convention (No. 143), arts. 1, 10, 12, 1975; The principle also follows from the universal applicability of several human rights documents such as the International Covenant on Economic, Social and Cultural Rights, art. 11, Dec. 19, 1966, 993 U.N.T.S. 3; International Convention on the Elimination of All Forms of Racial Discrimination, art. 5, 660 U.N.T.S. 195; *see also* Vienna Declaration, World Conference on Human Rights, part II, paras. 24, 33, & 34, U.N. Doc. A/CONF.157/24 (1993).

⁵ Rarely are political statements made objecting to the entry of *more* capital, but this is not the case with human power, which even if accepted, and needed to an extent, public policy commonly delineates limits or quotas.

De-Territorializing Labor Law

main bodies of law that regulate movement of capital are corporate law, investments law, and trade law. Labor law is tasked with lifting labor standards across borders as well as ensuring compliance with prevailing standards. As was the case with the movement of workers, this task is based on two premises. *First*, workers in other countries are entitled to fair wages and decent (or better, dignified) working conditions. *Second*, low wages abroad threaten jobs and working conditions in other countries. The first justification views workers abroad as deserving subjects of a global concern and the second justification views working conditions of workers abroad as instrumental to the guarantee of other workers' rights. There is further similarity between the concern of labor law with the movement of capital and the movement of labor. While the aim of ensuring migrant workers' rights has a territorial component—ensuring the equal application of territorial law—the goal of ensuring workers' rights abroad is persistently concerned with respecting the territoriality of the other state's labor law. Thus in the instances labor law frames the movement of capital, it is mindful to respect the sovereignty of the country and not impose foreign legal standards.⁶

Territoriality is therefore a fundamental principle of labor law, which has ostensibly not been affected by the intensification of globalization. It is based on the assumption that labor law is community-based, that the relevant communities are nested or overlap with the state, and that the fundamental operation of labor law, which is the establishment of markets and the intervention in their mode of operation, requires communal decision making (preferably a democratic one; although not necessarily so).⁷

This is of course a simplification of the reality. On the one hand, some migrant workers are courted by many states, mostly those who bring with them unique skills (nursing), extraordinary talents (programmers and football players), or capital investment (self employed and entrepreneurs). On the other hand, not all capital is unequivocally courted (the concern of money laundering) and not in all economic spheres (in infrastructure, utilities and telecom).

⁶ Like labor law's assumption with regard to movement of labor, some exceptions can be identified, although they remain the exception rather than the rule. These examples are indicated in Section I, *infra*.

⁷ Non-democratic regimes also have labor legislation. As long as democracy is identified merely as a procedural method of rule making then no difference should be applied between democratic and non-democratic regimes. From a substantive democracy point of view, the non-democratic nature of these regimes can distort the principle of territoriality in a twofold manner. For migrant workers, the absence of substantive democracy removes the assumption that migrants are entitled to rights associated with social citizenship. For employers situated in non-democratic regimes, this can exculpate infringing on the assumption of territoriality and sovereignty, as was well demonstrated in the debates regarding Myanmar (in this issue *see, e.g.* Alan Hyde, *The International Labor Organization in the Stag Hunt for Global Labor Rights*, 3 (2) L. ETHICS HUM. RTS. 154 (2009)).

If territoriality remains a fundamental principle, why is there a sense that labor law is losing ground in the era of globalization? There are several interrelated reasons for this: some question the “morality of territoriality” and others raise doubt regarding the efficacy of territorial law. *First*, labor law’s territoriality and the dismantling territoriality of production and even now, the provision of services, are incongruent. It may appear that the more relevant bodies of law are those that regulate dynamic movement: immigration law, commercial or trade law, while labor law is associated with anti-modernist stagnation. *Second*, in the past territoriality was an inclusive premise, constituting communal solidarity and public responsibility. It integrated labor rights with other aspects of citizenship. At present, territoriality is creating borders of synthetic communities, which neither match those of economic communities (capital migration) nor those of societal communities (people’s migration). Consequently, territoriality can be inclusive or exclusive. While the dialectical nature of territorialization has always been present, exacerbated processes of globalization magnify these effects. *Third*, the erosion of state power to control the market and society has challenged the democratic legitimacy of labor law, but in alternative norm-making venues, such as at the sector level or in multinational companies, no alternative democratic fora have been established.

How then must labor law address the matter of territoriality? If territoriality remains a virtue, then law must persistently adhere to it. The fundamental assumption is: *Equalize work conditions within the territory; do not infringe upon other states’ sovereignty and labor law’s territorial applicability within the other territory.* Yet the discussion thus far indicates that this assumption is potentially dubitable.⁸ As noted, justification for territoriality can be protective, to provide an “anchor”⁹ of stability in a dynamic world; it can also be protectionist, treating some workers as instrumental to others. While labor law fosters a sense of citizenship it also determines who remains outside the sphere of citizenship and hence excludes some in the interest of maintaining privilege for others. The democratic justification for exclusionary norms can be contested due to the discord between territoriality and

⁸ See Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8(2) THEORETICAL INQ. L. 389 (2007) (discussing a similar quibble with the truism associated with territoriality and which triggered many of the questions raised here).

⁹ While de-territorialization is a rather hazy concept, which may likely remain in the conceptual sphere, there are demonstrations of it in reality. These demonstrations are “anchors” in a sense of some familiar state-based institution through which de-territorialization can be considered. They may be a state court, an international convention, or simply a domestic law that is extended beyond the territory. None of these applications or developments is identical to de-territorialization, but each application presents an opportunity to anchor this loose idea into a real course of action.

De-Territorializing Labor Law

social-economic spheres, and hence between those who affect the making of norms and those who are affected by them.

The simple alternative, i.e., doing away with territoriality, is equally problematic. Infringing upon others states' sovereignty (e.g., requiring developing countries to lift labor standards to the level that prevails in developed countries) and addressing the needs of migrants by means that deviate from the territorial standards (e.g., *sui generis* labor standards) can be an instrument of exclusion just as well. In the absence of new democratic venues, state-based norms remain the closest proxy for democratic authoring of norms.

Hence, in both patterns of movement, capital and people, the effects of territoriality are ambiguous. The arguments for the migration of people and capital simply mirror one another. For migrants preserving territoriality usually guarantees equality of rights but also permits the state's instrumental use of the law to deny rights, prevent enforcement, accommodate employers' rights at the expense of workers, and the like. For workers in other states: territoriality guarantees the comparative advantage of the state and the employers. At the same time, it shields states and employers from foreign norms that require raising labor standards or denies effective fora for litigation and other means of rights' fulfillment.

Can there be an alternative to territorialization? Because of dialectics embedded in territoriality, both the territorial status quo and alternatives must be critically assessed. A key to such critical assessment is in the need to "unpack territoriality." The question is not about changing borders or even acknowledging new borders; many attempts at constituting a new body of global labor law actually keep the assumption of territoriality intact. The NAFTA side agreement on labor cooperation (NAALC) upholds the states' labor laws,¹⁰ and the European Union is an organic entity that is not merely the sum of its member states, but it should be noted that it is still a territorial entity. Territoriality is not necessarily identical to the state as such; ILO conventions depend on member states' ratification¹¹ and in many states also on internal procedures of incorporation into the local body of law. Similarly, principles of subsidiarity or decentralization may lead to more power at the local and municipal levels, but these again are territorially based.¹² Unlike the abovementioned alternatives to state-based territoriality, the question posed

¹⁰ North American Agreement on Labor Cooperation (NAALC), art. 2, Sept. 14, 1993, American Can.-Mex.-U.S., 32 I.L.M. 1499, 1500.

¹¹ ILO Constitution, art.19.

¹² This is not to contest the fact that principles of citizenship are different at the different regional levels: local, national, regional or global. See Yishai Blank, *Spheres of Citizenship*, 8 (2) THEORETICAL INQ. L. 411 (2007).

here is whether de-territorialization is a conceivable form for alternative notions of jurisdiction that are not territoriality based.¹³

This Article sketches the ingredients for identifying the potential meaning of de-territorialization. Its first objective is to identify the ambivalence we should have with regard to the assumption of territoriality, as well as to its displacement. Section I demonstrates the limitations and arbitrariness territoriality imposes when we seek to recognize chains of migration and production. Section II builds on the previous examples to argue that territoriality actually indicates various types of links between law and the state, not all of which should be treated uniformly. Breaking territoriality into its several dimensions can aid in identifying what are the ingredients of territoriality that are necessary and cannot be dispensed with, and which should be reconsidered and perhaps discarded. Section III outlines examples of how de-territorializing labor law can affect some of the controversies on the application of labor law in a global environment, and also indicate places territorialization is more likely to occur. These examples do not amount to a simple manual for de-territorialization. The Article provides a conceptual analysis that speculates on the significance of de-territorialization to both current dilemmas and to our capacity to re-imagine familiar building blocks altogether. At its core, the Article claims that one of the most solid blocks that constitutes modern labor law should be shifted.

I. GLOBAL CHAINS AND THE NEED FOR PARTIAL DE-TERRITORIALIZATION

Three major points were noted vis-à-vis labor law's territoriality: (a) the mismatch between labor law's territory and between de-territorialization of markets; (b) labor law's concurrent impact of inclusion and exclusion, granting rights, and prescribing duties; and (c) the dull repertoire of democratic means to mediate these two tendencies in light of the territory-market mismatch. The key to unfolding the problem of labor law's territoriality is therefore rooted in understanding the effects of the first factor. Labor law's distributive impact and tendencies of inclusion/exclusion are intrinsic to labor law's project and are not the result of globalization.¹⁴

¹³ This question is similar to the distinction between *decentralization* and *decentering* in the study of local governments *see* Gerald Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993).

¹⁴ GUY MUNDLAK, *FADING CORPORATISM: ISRAEL'S LABOR LAW AND INDUSTRIAL RELATIONS IN TRANSITION* ch. 8 (2007) (demonstrating how labor law's functions are fixed, but translated into different objectives and institutions in different legal regimes. The three fundamental functions of labor law are identified as (a) determining at what level the norms governing the labor market are determined, (b) distribution of power between labor and capital, and (c) the distribution of power and resources among the workers themselves (the insiders/outside function)).

De-Territorializing Labor Law

However, as long as the labor problem is localized in a given state then democratic measures grant legitimacy to mediate conflicting political, social, and economic interests. When labor markets extend beyond state borders, a democratic deficit emerges.

Other legal fields have performed better in overcoming borders. This is particularly true of private and commercial law in which harmonization is the key factor to accommodate transnational activity. However, even among the regulatory fields, some areas, such as environmental law, may have taken a bigger step toward cross-border integration and may be the result of heightened awareness to the externality of associated environmental issues, for example water quality, global warming, preservation of natural commons, and the like. In both the commercial and environmental contexts the incongruity between the scope of state-based jurisdiction and the locus of activities and their associated impact has already been acknowledged. A similar conceptual understanding within labor law has not yet occurred and there is an urgent need to understand that the territorial nature of labor law cannot respond to global chains. These are global chains of production, of care, or more generally—economic and social phenomena that cannot be sufficiently regulated when regulation is constrained by territoriality. Several examples may be useful.

A. MIGRATION OF WORKERS

Migrant workers who cross borders are allegedly covered by territorial labor law once they begin working. Even assuming full equality, their rights are guaranteed from the time of entry until the moment of exit. Fringe benefits such as pension rights are therefore often not easily applicable. Moreover, the employment relationship cannot be treated as a discrete event that lasts from the time of entry to the time of exit. The employment relationship within the territory is often part of a broader process of movement and relocation. With that in mind, particularly problematic is the situation in which migrant workers must pay high sums of money to migrate. Thus when labor law goes into effect only as the immigrant crosses the border the effects of the initial debt are not taken into account. The implications are that what seems as a voluntary exchange from within the community in which labor law resides, is in fact closer to debt servitude.

This problem has been, for example, one of the major obstacles to the realization of territorial labor law's protection for labor migrants in Israel.¹⁵ Migrants

¹⁵These sums are tracked and documented by the Workers' Hotline (www.kavlaoved.org.il) and are also confirmed by government officials. *Cf.* The Knesset's Committee on Foreign Workers—Protocols of Meeting from Aug. 30, 2005; THE STATE COMPTROLLER REPORT 53B 649-66 (2003); Jer. D.C. Adm. Aff. 420/02 Deng Lin v. The Minister of Interior Affairs [2002] (unpublished).

wishing to work in Israel are required to pay work agencies—acting as brokers between the migrant and the employer in Israel—large sums of money. Israeli law prohibits such payments and thus the money is not collected by or for the state. Rather the funds are collected in the migrant’s country of origin, beyond the reach (*de-jure* or *de-facto*) of the Israeli enforcement agencies. These workers commit themselves to an effectively irrevocable employment relationship. Consequences of this arrangement were even graver when Israeli law tied the permit to work—given for employment with one specific employer— with the entry visa to Israel. Any attempt by the workers to use their market power and move from one employer to another rendered the worker an illegal alien in Israel. This was the epitome of rendering the territorial application of labor law immaterial. However despite the Supreme Court’s holding that the “binding arrangement” was unconstitutional the migrant’s inability to claim territorial rights continues, to a large extent, because of the large debts they incurred in their country of origin in order to enter an employment relationship in Israel.¹⁶

The alleged equality in applying territorial labor law is inadequate in addressing the movement of workers across borders and is not a unique phenomenon of the Israeli labor market. Jennifer Gordon describes a very similar problem regarding migrant workers in the United States.¹⁷ Also studies of migration in Europe pinpoint the same, mainly upon entrance into the Schengen region, but also in the movement between EU Member States.¹⁸ The problem of territoriality as it pertains to migrants is rooted in the linkage of employment rights and citizenship matters, in the vulnerability of individuals who cross borders and receive equal treatment, *qua* workers, but receive unequal treatment, *qua* aliens. It also occurs because while their work is temporary, their social risks are not, and that territoriality does not extend prior to and following their stint as a migrant worker. What seems to be privilege of territoriality is also limited equality of the administration of labor norms, which does not capture the complexity of migrants’ experiences crossing borders.

When considering migration not as a discrete and insular episode, but as part of a general scheme of life-transitions, akin to more general changes that have taken

¹⁶ HCJ 4542/02 Worker’s Hotline et al. v. The State of Israel [Mar. 30, 2006] (unpublished). See The Workers’ Hotline and the Hotline for Migrant Workers (Aug. 2007) http://www.hotline.org.il/english/pdf/Corporations_Report_072507_Eng.pdf (discussing the aftermath of the H CJ’s decision).

¹⁷ Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 564-65 (2007).

¹⁸ Cf. Stephen Castles, *Guestworkers in Europe: A Resurrection?*, 40(4) INT’L MIG. REV. 741 (2006); NILIM BARUAH & RYSZARD CHOLEWINSKI, HANDBOOK ON ESTABLISHING EFFECTIVE LABOUR MIGRATION POLICIES, MEDITERRANEAN EDITION (2007).

De-Territorializing Labor Law

place in the move beyond Fordism, it is clear that geographical moves are merely a trumpeted version of intra-territorial moves. In the same manner that Post-Fordism requires a shift from job-security to employment-security, from seniority in one workplace to labor market experience, from workplace-specific benefits to portable benefits, the challenge of migration requires stretching labor law beyond borders.¹⁹ For a migrant the entry and exit into a state may be no more significant than taking an odd job during breaks between routine seasonal jobs. As migration policy starts to develop circular migration patterns that emphasize recurring episodes of short-term movement across borders as part of a global version of employment (rather than job) security, the exchange of labor law regimes across borders is potentially no longer effective.²⁰

What extra-territorial options are then available? In the Israeli example, the most recent solution was to forge inter-state agreements with the cooperation of the International Organization for Migration (IOM) to guarantee that recruitment of workers abroad will be detached from informal middlemen and temp agencies,²¹ and the process is supervised before and after the actual employment relationship exists. This is of course a limited solution; it provides protection at a crucial time of border crossing, but does not provide general social protection to people who may migrate to more than one country over time, and who may need to accumulate social insurance (pensions or even protection for work-related diseases that do not emerge at the time of work) given spatial transitions. It does however suggest that there can be international organizations, akin to national employment bureaus and placement centers, which will aid in devising a better ordered and more protective employment regime.

¹⁹ For the post-Fordist adaptation of labor markets and labor law, cf. KATHERINE VAN-WEZEL STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR A CHANGING WORKPLACE* (2004); ALAIN SUPIOT, *BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOR LAW IN EUROPE* (2001); *THE DYNAMICS OF FULL EMPLOYMENT—SOCIAL INTEGRATION THROUGH TRANSITIONAL LABOUR MARKET* (Gunther Schmid & Bernard Gazier eds., 2002); GUY STANDING, *GLOBAL LABOUR FLEXIBILITY* (1999).

²⁰ Commission of the European Communities (2007). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Circular Migration and Mobility Partnerships between the European Union and Third countries, Brussels, COM (2007), at 11 248 final (May 16, 2007); U.N. Econ. & Soc. Affairs, International Symposium on International Migration and Development, *Policies and Best Practices for Managing Temporary Migration* UN/POP/MIG/SYMP/2006/03, (June 9, 2006) (prepared by Manolo Abella) available at http://www.un.org/esa/population/migration/turin/Symposium_Turin_files/P03_SYMP_Abella.pdf.

²¹ HCJ 2405/06 *The Workers' Hotline v. The Administration of Migrant Workers in the Ministry of Industry, Commerce and Employment* (filed Mar. 14, 2006 still pending).

Gordon provides a more far-reaching suggestion, according to which the employment permit will be tied to non-territorial (industrial) citizenship; that is—to membership in a trade union.²² Falling short of this radical alternative, Gordon lists more compromising yet tangible options that in fact mirror some of the institutions that have developed with regard to the migration of capital: bilateral state arrangements, transnational trade union activity in which trade unions across borders take part in continuously and jointly representing the worker, and cross-borders legal advocacy which matches current attempts and future prospects for claiming rights in venues other than the site of work.²³ Other proposals in this vein seek to draw the contours of an international labor migration regime in which migration policy is not determined solely by the state.²⁴ Along this line of thought, if entrance to the state is de-nationalized, at least to an extent, so can be the determination of employment rights, which arguably are less significant to the state's interest in preserving sovereignty and autonomy.

B. MOVEMENT OF CAPITAL

When considering movement of capital, limitations of territoriality are more visible. While territoriality is desirable, albeit insufficient, in directing the movement of workers, territoriality is considered to be obstructive vis-à-vis the mobility of capital. The problems caused by territoriality are numerous and span over many situations in which businesses engage in the offshoring of production and services. Territoriality develops complicated chains of production and dissolves the notion of territorially-situated business altogether. For example, labor law better controls issues within a territorial regime but to a much lesser extent in situations of offshoring.²⁵ While many states regulate the sub-contracting of work within their territorial regime,²⁶ once the sub-contractor is situated overseas, borders, which

²² Gordon, *supra* note 17, at 567.

²³ JENNIFER GORDON, TOWARDS TRANSNATIONAL LABOR CITIZENSHIP: RESTRUCTURING LABOR MIGRATION TO REINFORCE WORKERS' RIGHTS (A Preliminary Report on Emerging Experiments) (Jan 2009), available at <http://law2.fordham.edu/documents/fac-recLabor.pdf>.

²⁴ GLOBALIZING MIGRATION REGIMES: NEW CHALLENGES TO TRANSNATIONAL COOPERATION (Kristof Tamas & Joakim Palme eds., 2006); Tomer Broude, *The WTO/GATS Mode 4, International Labour Regimes and Global Justice*, The Hebrew University International Law Research Paper No. 7-07 (May 18, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987315.

²⁵ Cf. the discussion of the Transfer of Undertaking Directive and its jurisdictional scope in BOB HEPPLER, LABOUR LAWS AND GLOBAL TRADE 172-77 (2005).

²⁶ BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK (Guy Davidov & Brian Langille ed., 2006).

De-Territorializing Labor Law

separate legal jurisdictions are perceived as precluding recognition of employment relationship with the remote contracting company. Although the prime-contractor (the “user”) may control everything from the type of product, its quality, its price, and working schedules, and while many sub-contractors produce for one main producer, the territorial barrier aids in erecting a legal barrier between the prime and the sub-contractor. These managerial “advantages” of outsourcing across borders are indicative of the arbitrariness imposed by geographical borders.

Workers for companies that are chained, yet dispersed around the globe, have little leverage to advance their working conditions. At the corporate level, traditional methods of collective bargaining are more difficult to exercise when the employer has the opportunity to contract work out to another country. Economic incentives are provided to subcontractors who move away from countries in which the workers attempt to organize. The sub-contractor can be compensated by the firms higher up in the production chain if they decide to move production away from companies in which the workers try to organize. Capital is easily diversified, liquidated, and can react to such changes, but workers are likely to remain unemployed. At the macro-level, the influence of migrating capital makes political mobilization of workers more difficult as states are often more eager to respond to the needs of capital than to the needs of workers. Consequently, labor’s bargaining leverage, the capacity of civil society to affect working conditions and of political parties to impose regulatory standards, is significantly diminished. Transnational collective labor strategies exist but are generally difficult to carry out because the rules of collective labor law are better suited to social institutions that are territorially based. Hence, practices of collective labor law considered inclusive in the past have become an obstacle to transnational activities.²⁷

There are three common patterns that attempt to stretch labor law beyond its territorial premises.²⁸ The *first* is to establish a core of international labor standards through the ILO considered binding to all ILO member states regardless if they were signatories of the specific ILO conventions.²⁹ These standards have been

²⁷ James Atleson, *The Voyage of the Neptune Jade: Transitional Labour Solidarity and the Obstacles of Domestic Law*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION* 379-93 (Joanne Conaghan, Michael Fischl, & Karl Klare eds., 2001); Nathan Lillie & Miguel Martinez Lucio, *International Trade Union Revitalization: The Role of National Union Approaches*, in *VARIETIES OF UNIONISM—STRATEGIES FOR UNION REVITALIZATION IN A GLOBALIZING ECONOMY* 159 (C. Frege & J. Kelley eds. 2005).

²⁸ Patrick Macklem, *Labour Law beyond Borders*, 5(3) *J. INT’L ECONOMIC L.* 605 (2002).

²⁹ ILO, *DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK* (1998), available at <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE>; Philip Alston, *Core Labour Standards and the Transformation of the International Labour Rights Regime*, 15 *EUR. J. INT’L L.* 457 (2004); Brian Langille, *The True Story (Reply to Alston)*, 16 *EUR. J. INT’L L.* 409 (2005).

adopted by other international institutions such as the Organisation for Economic Co-operation and Development (OECD) and the UN, but have yet received the standing of customary international law.³⁰ Moreover, the broad principles of these core labor standards provide much leeway for differential implementation across states.³¹ Finally, the narrow list of core labor standards provides a limited substitute to the breadth and depth of territorial labor law.³²

The *second* avenue integrates labor law into trade law.³³ On the one hand, some claim that this approach is riddled by protectionism, designed to preserve labor standards and employment opportunities for workers in developed countries at the price of denying employment expansion in developing countries. On the other hand, it is criticized for bestowing too much weight on the sovereignty of other countries, despite the trade effects that render territoriality exceptionally synthetic. Consequently, mechanisms can be supplemented that are more intrusive on a state's sovereignty, such as unilateral application of labor standards and the conditional use of foreign aid, trade agreements, and the development of general system of preferences (GSP) as a system of imposing standards on other countries.³⁴

The *third* mode develops non-territorial regulation of labor standards in organic economic communities through non-justiciable (i.e., not legally binding) codes of conduct established at the sectorial level (e.g., the manufacturing of specific goods) or corporate level (particularly large multinationals).³⁵ A similar legal standing is accorded to multinational collective agreements between international

³⁰ UNITED NATIONS, GLOBAL COMPACT, available at <http://www.unglobalcompact.org>, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, available at <http://www.oecd.org/daf/investment/guidelines>.

³¹ See, e.g., Patrick Macklem, *The Right to Bargain Collectively at International Law: Workers' Right, Human Right, International Right?*, in LABOUR RIGHTS AS HUMAN RIGHTS 61 (Philip Alston ed., 2005) (discussing freedom of association).

³² Guy Mundlak, *Changing Welfare Regimes*, in THE WELFARE STATE, GLOBALIZATION AND INTERNATIONAL LAW 231 (Eyal Benvenisti & Georg Nolte eds., 2004).

³³ The integration of protecting labor standards in international trade law is still political and theoretical debatable and has yet been put to practice. Despite much controversy, strong objection to integrating labor rights into the free trade framework exists. See, e.g., ROBERT HOWSE & MICHAEL TREBILCOCK, THE REGULATION OF INTERNATIONAL TRADE 447-66 (2005) (discussing the debate).

³⁴ For an overview of unilateral application of labor standards, see HEPPLE, *supra* note 25, at 89-106.

³⁵ Cf. CHARLES SABEL, DARA O'ROURKE, & ARCHON FUNG, RATCHETING LABOR STANDARDS: REGULATIONS FOR CONTINUOUS IMPROVEMENT IN THE GLOBAL WORKPLACE (2000) (offering a favorable view on codes of conduct); Ronen Shamir, *Between Self Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 (4) L. & SOC'Y REV. 635-63 (2004) (presenting a more nuanced view of the codes).

De-Territorializing Labor Law

unions and multinational firms.³⁶ This path is also weighted with compromises: The code's scope is intermittent, assessing compliance is imperfect, and by its nature the questionable efficacy of "soft law" measures is encountered.³⁷ Does "soft law" provide a renewed form of self governance that takes traditional labor law to new horizons or is it a compromise that evades labor law altogether.³⁸

The three avenues for developing international labor law are mostly concerned with imposing labor standards beyond a state's borders. These options, despite their shortcomings, are more developed than institutions purported to raising employment standards for migrant workers regardless of their conjunctural presence in one territory or another. Yet in both contexts it is important to highlight the crucial role of non-territorial players: trade unions and NGOs operating in a global civil society. Thus, while the ILO and WTO adhere to territoriality, it is the non-territorial codes of conduct and practice that have the potential to disconnect migration from state-based citizenship as suggested by Gordon. A common denominator to the legal experiments in both contexts is the attempt to regulate the substantive employment relationship regardless of territorial presence in one state or another.

C. JOINT MOVEMENT OF CAPITAL AND LABOR: THE VIKING & LAVAL CASES

Thus so far I have indicated the need to consider options that extend labor law's premise of territoriality when either migrant workers or migrant capital is involved. It is interesting to note that while these two spheres of movement have been usually discussed by materials located on different shelves of the law library, they share common premises. Moreover, solutions to limitations of territoriality also have common themes. Most notably the solutions in both spheres seek to dislocate the establishment of labor law and the enforcement of norms from the particular region in which work is carried out.

³⁶ Stephen Moldof, *Union Responses to the Challenges of an Increasingly Globalized Economy*, 5 RICHMOND J. GLOBAL L. & BUSINESS 119 (2005).

³⁷ Cf. Jill Murray, *The Sound of One Hand Clapping? The 'Ratcheting Labour Standards' Proposal and International Labour Law*, 14 (3) AUS. J. LABOUR L. 306-32 (2001) (submitting a more critical view of the efficacy of soft law); Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEG. STUD. 401 (2001). Of particular importance is the empirical question of soft law's impact on the practices of sub-contractors, see Richard Locke, Thomas Kochan, Monica Romis, Fei Qin *Beyond Corporate Codes of Conduct: Work Organization and Labour Standards at Nike's Suppliers*, 146 (1-2) INT'L LABOUR REV. 21 (2007).

³⁸ I use a broad definition of "soft law," which can also mean enforceable but highly discretionary norms, or prescribe methods for overriding state-authored law, for example by means of collective agreements.

It is also important to consider *joint* movement of capital and labor as demonstrated by the European Court of Justice (ECJ) *Viking* and *Laval* cases.³⁹ The problems underlying both cases further challenge the assumption of territoriality because they cannot be neatly classified into the category of labor migration (local application within the territory) or capital migration (non-intervention in the employer's choice of law). If territoriality designates the location the work was performed, then the former should apply, but if it designates the employer's venue, the latter applies.

In the *Viking* case, a ship traveling from Helsinki to Estonia, bearing the Finnish flag aimed to reflag under Estonia, consequently lowering labor costs by binding itself to Estonian labor norms, including collective labor relations. The Finnish trade union sought industrial action to pressure Viking from reflagging. For the purpose of this Article it is important to note that the Finnish seafarers trade union is a member of the International Federation of Transport Workers (ITF) that promotes an [anti] "flag of convenience" policy (FOC), according to which "only unions established in the *State of beneficial ownership* have the right to conclude collective agreements covering the vessel concerned."⁴⁰ Assuming that such a policy is upheld, the advantage gained by reflagging, i.e., lower labor costs, will be eliminated. The issue brought before the ECJ was whether such industrial action infringes upon freedom of movement within the EU as guaranteed by Article 43 of the Treaty establishing the European Community.⁴¹ The ECJ held that it does, but permitted national courts to uphold such action only if "justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective."⁴² The ECJ's position is ambiguous vis-à-vis issues of territoriality and now that the ECJ has issued its judgment and remanded the case, implementation should be tested in the national courts. However, while the ECJ did not rule whether the FOC complied with this caveat, its holding provides a

³⁹ Case C-438/05, *The International Transport Workers' Federation v. Viking Line ABP* 2007 E.C.R. I-0779 [hereinafter *Viking*]; Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnad sarbetareförbundet* 2005 E.C.R. [hereinafter *Laval*].

⁴⁰ *Viking*, *supra* note 39, section 8. On the ITF's policy regarding the flag of convenience, see ITF's Flag-of-Convenience Campaign, available at <http://www.itfglobal.org/flags-convenience/index.cfm>.

⁴¹ Treaty establishing the European Community (Consolidated Version), Dec. 24, 2002, 2002 O.J. (C 325) at 33.

⁴² *Viking*, *supra* note 39, at operative part, section 3.

De-Territorializing Labor Law

relatively narrow exception to the rule of territoriality and clearly seeks to confine the development of a broad extraterritorial logic of “beneficial ownership.”

The outcomes were less ambiguous in the *Laval* case, in which a Latvian Contractor—transported and employed—Latvian workers in a construction site located in Sweden. Swedish trade unions initiated industrial action to force the contractor into a collective agreement with the Swedish trade union. Similar to the *Viking* case, the legal concern focused on the attempt to foster free movement of capital and people within the EU and the concern that such an endeavor will create ex-territorial enclaves within the Swedish national territory. Hence, ex-territoriality is not just viewed as a limitation on the reach of labor law, but also a threat to domestic institutions. While free export trade zones are formal entities that seek to construct synthetic territories serving as an ex-territorial haven from the regulation of labor law, the *Laval* and *Viking* cases challenge the necessity to continue to draw the borders of these zones. Since as these cases determined, the territorial application of labor law can be unilaterally imposed by employers using a foreign workforce and a foreign set of labor norms.

The ECJ decided that the industrial action brought about by the Swedish union violated the principle of free movement. It is notable that the Directive for Posting Workers in the European Union Member States⁴³ ensures the application of certain labor standards that are grounded in law or are in universally applicable collective agreements (e.g., by means of extension orders) to posted workers, but it does not permit taking action that imposes other labor standards not recognized by the Directive. While the case is rooted in peculiarities of the Swedish system of industrial relations, in which measures such as minimum wage are not legislated and collective agreements are not universally extended, the decision has a more general application. It prioritizes the freedom of movement over localized industrial relations. This judgment deviated from the opinion of the Advocate General on this matter, who carved a broader legitimate domain for industrial action and collective labor law.⁴⁴ The general precedence given in the judgment, together with that of the *Viking* case, to the freedom of movement, raised concerns in other member states as well.⁴⁵

⁴³ Directive 96/71/EC of the European Parliament and of the Council Dec. 16, 1996 concerning the posting of workers in the framework of the provision of services.

⁴⁴ Opinion of Paolo Mengozzi, Advocate General at the Court of Justice of the EC, in the case *Laval un Partneri, Ltd/Svenska Byggnadsarbetareförbundet* (C-341/05) on freedom to provide services, Mar. 25, 2007, available at <http://ec.europa.eu/avservices/services/showShotlist.do?out=PDF&lg=En&id=75435>.

⁴⁵ See, e.g., *Swedish Case Referred to ECJ has Major Importance for Danish Model*, available at <http://www.eurofound.europa.eu/eiro/2005/11/feature/dk0511102f.htm> (last visited Apr. 19, 2009) (discussing the potential implications for Denmark).

D. FROM TERRITORIALITY TO BENEFICIAL OWNERSHIP

The *Viking* and *Laval* cases display the merits of territoriality as an organizing principle. Arguably, even the polemics in the two cases can be sorted out by competing notions of territoriality. That is, a choice must be between the general default rule of human migration (the territory where the work takes place—Sweden or Finland) and the rules that applies to the movement of capital (where the employer resides—Estonia or Latvia). However, the fact that territoriality can lead both ways suggests that what is at stake is not merely a matter of identifying the most appropriate geographical territory. Territoriality in fact conceals the more fundamental relational characteristic. As noted in the ITF’s policy—the subject of the *Viking* case—the real question to be asked is: “in which state can beneficial ownership be identified.” That is, the state that significantly benefits from the services should apply its laws to the employer, regardless of the employer’s flag (or site of registration).

Does it matter whether the issue is addressed as territorial or as a matter of “who benefits from the employer’s services?” The difference between the two options can be demonstrated by yet another case, this time from the Israeli-Palestinian context. Its admittedly idiosyncratic facts can aid in clarifying the difference between the territorial logic and that of seeking beneficial ownership or stakeholding. The Israeli High Court of Justice (HCJ) decided that Jewish employers employing Palestinians in the occupied territories must apply Israeli labor law (as opposed to Jordanian labor law).⁴⁶ Applying principles of private international law, the HCJ held that the state of occupation requires equalizing the working conditions of all employees in the occupied territories. Thus if Jewish workers in the occupied territories enjoy Israeli standards, so must Palestinian workers.

Although the decision was clearly intended to raise working conditions of Palestinian workers employed by Israeli in the territories, it has attracted much critique from Palestinians themselves who claimed that the decision was based on principles of territoriality and therefore a part of the crawling annexation of the territories by Israel. However, at least in the written judgment, the Court seeks to provide an alternative justification for the application of Israel’s labor law. The justification resonates with the logic underlying the ITF’s policy—i.e., that Israel (state, employers, economy, and public) benefits from the activities of the Israeli employers in the territories, despite the fact that these territories are not part of Israel itself. The substantive question therefore is not geographical, where the workers work, but rather a matter of assessing the hierarchical economic situation in which

⁴⁶ H CJ 5666/03 Kav La-Oved v. The National Labor Court [Oct. 10, 2007] (unpublished).

De-Territorializing Labor Law

employers (or consumers, communities, and other stakeholders) of territory X rely on the workers of territory Y.

Looking for the substantive economic beneficiary indicates that the challenge of determining the applicable law is a matter of matching the appropriate legal system with the identification of economic reliance (or subordination). This line of inquiry is in fact rather common in traditional labor law, in situations of multiple employers (temp work agencies, subcontracting, and the like). In these situations, many legal systems prefer to assign the legal responsibility to the substantive employer, rather than follow the contractual arrangement.⁴⁷ Fictitiously establishing a contractor to avoid the application of labor law, collective agreements, or legal responsibility should be ignored in favor of assigning rights and responsibilities between the employees and the “beneficial ownership.” This analogy reveals that territoriality is merely another system of disjoining substantive and significant employment relations.

The strategies of outsourcing and the movement across borders complement each other, although each can be used as a standalone device. That is, subcontracting with offshoring is more likely to be acceptable from a legal perspective than merely subcontracting and leaving the production mechanism intact. The geographical distance and the crossing of territorial borders underscores that the separation is real. The alternative to territoriality must therefore bracket the formal question of territoriality, “where is the work performed,” and replace it with the search for the underlying substantive social, economic and political relationship.

It is important to emphasize that most measures do not do away with territory altogether. For example, the cases described in this Article do not replace state (territorial) law with ex-territorial (e.g., sector) measures. Ex-territoriality can provide measures that disconnect the law from any particular territory, but can also target lesser measures that prescribe meta-state rules for the choice of law. In these proposals, the ex-territorial dimension is based on the fact that the choice of law is not dependent solely on the location the work is performed, but on the venue the beneficiaries of the employment relationship are located. Absent a comprehensive global labor code or a comprehensive set of non-state codes that cover all industries, state law remains an important institution, but ex-territoriality is identified in the capacity to apply the most appropriate legal regime, which may not be the territorial regime in which the work is executed.

⁴⁷ Cf. Judy Fudge, *The Legal Boundaries of the Employer, Precarious Work and Labour Protection*, in *BOUNDARIES AND FRONTIERS OF LABOUR LAW*, *supra* note 26, at 295-316; Mark R. Freedland, *From the Contract of Employment to the Personal Work Nexus*, 35(1) *IND. L. J.* 1 (2006).

II. ASSESSING THE JUSTIFICATIONS FOR TERRITORIALITY

Situating the movement of labor and capital side-by-side assists in understanding the nature of territoriality and its effects in a broader context. The assumptions underlying territorialization are embedded in an uneven process of globalization: workers, even when moving, remain in an organic community, holding a flag of necessity and capital moves between synthetic communities choosing a flag of convenience.

Consider workers employed in a call center located in India whose task is to answer calls and take phone orders for an American retailer. If these workers were employed in the US to what the extent does the sub-contracting of their work raise a barrier to recognizing a substantial employment relationship between the workers and the company that actually benefits from their services? The fact that they are situated in a foreign state defies the traditional tests developed for such scrutiny. The retailer's choice of "flagging" the sub-contractor in India, hence escaping substantive tests of reliance in American employment law, symbolizes the asymmetry between the workers' flag of necessity and capital's flag of convenience. Yet there is nothing natural about this asymmetry, and in fact it is the traditional *telos* of labor law to correct it. To remedy this tilt, three alternative legal premises can be reconsidered: (a) labor law's territoriality; (b) the closure of borders for migration; (c) the employers' almost unfettered opportunities for forum shopping.

For example, if restrictions on immigration are lifted, as anarchic-libertarians endorse, movement of workers in an expanding labor market will be facilitated. It would then be more justified to have different labor jurisdictions (national, domestic, regional, and non-territorial) but with workers having the choice to migrate freely and choose their desired forum, just as capital does today. In practical terms, this means that any Indian worker can decide whether to remain in India and seek employment opportunities there, or to search for similar employment in the US. Lifting immigration hurdles can aid in creating a de-facto global labor market. While economically such an option can be desirable for some workers, for many social theorists such a scenario is unappealing.⁴⁸ Moreover, like

⁴⁸ It is obviously unappealing for those who seek to preserve organic communities and shield their community from uncontrolled entry. Yet it can also be unappealing for potential migrants. Removing borders can lead to a growing commodification of communities. Such commodification can be expected to eventually improve the position of those who are economically able, and not of those who are economically in need. I do not need to resolve these issues here. For the debates on the desirability of an open borders regime *cf.* Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987); Robert Goodin, *If People Were in Money, in FREE MOVEMENT, ETHICAL ISSUES IN THE TRANSNATIONAL MOVEMENT OF PEOPLE AND MONEY* 6 (Barry & Goodin eds., 1992); SIMON CANEY, *JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY* (2005).

De-Territorializing Labor Law

the other components, changing the rules of immigration will not put labor and capital on par, as the mobility of capital will always remain cheaper, by nature, than the movement of people.

Alternatively, one can limit the movement of capital, and require that capital be located only where its beneficiaries are; hence the territorial application of labor law would be more justified. Like the first option, this track for reform is removed from current politics—domestic and international alike. Moreover, this option faces difficult obstacles of identifying relevant beneficiaries. Many multinational companies have costumers and consumers world-wide. In this context as well, the attachment of capital to one locality is, by nature, considerably more commodified than that of labor.

The remaining option is to reconsider labor law's territoriality. It should be said at the outset that the option of de-territorialization does not resolve all the problems associated with the first two alternatives. Pragmatically there are signs that such an option is feasible, yet in its infancy. Moreover, this option may have consequences that may not be rewarding to some workers. Finally, it does not resolve the problem of identifying the relevant beneficiaries. Nevertheless, it still merits consideration because it is more feasible than lifting immigration controls world-wide or reversing the free movement of capital. Most importantly, it is necessary to consider justifications for labor law's territoriality because the three abovementioned components are interrelated. If the compilation of the three creates arbitrary and unjust solutions, then adjusting one of the three may create an opportunity to begin remedying such outcomes.

In questioning the justification for territoriality it is important to consider plausible arguments that absolve it. As noted at the outset, territoriality can be a vice or a virtue, and it is often a mixture of both with distributive impacts: Some workers enjoy its benefits while others pay its price. This is true of most labor law's arrangements within and across territories. The question therefore should not be reduced to a simplified search for *pareto optimality* or the like. Instead, qualitative arguments that justify territoriality as such need to be considered. The *a-priori* assumption that territoriality is the decisive factor in the choice of law to be applied must be reconsidered.

Viewed as a whole, the examples thus far merit skepticism toward territoriality. Why does territory really matter that much, and why is it taken for granted? The *real-politik* answer would be that states are still the dominant players, the legitimacy of international bodies or a transnational regime is still not strong enough, and that the clear examples of de-territorial arrangements (multinational and sector codes of practice or international collective agreements) are only soft-law. Therefore, no change should be expected in the assumption of territoriality. While not disputing this kind of response, it is useful to decompose the assumption

of territoriality into several distinct premises. Once its various layers are taken apart its moral force (unlike its “political stickiness”) erodes. Consider three fundamental premises underlying territoriality:

First, territoriality is important because the labor market is territorial.⁴⁹ The overlap between territory and labor law is twofold. On the one hand, territoriality is associated with closure; in situations where there is no exit from the territory labor law’s role is to provide voice instead. On the other hand, labor law seeks to impose closure making regulatory options effective. For labor law to be effective it must encompass the territory (or the relevant labor market) as a whole.⁵⁰

Second, territoriality is important because labor law fosters and assumes social structures of solidarity. Geographical proximity accommodates closely knit communities of cooperation. Local territoriality maybe stronger than state-based territoriality, but broader, regional or global, structures of territoriality are weaker since solidarity is difficult to foster when workers are distant one from the other.

Third, territoriality is important because the theory of democracy as well as positivistic jurisprudence hold that law should be derived from the nation-state.⁵¹ Because all states are territorial in nature, labor law must remain territorial itself. A more instrumental variation of the previous premise is that territoriality is necessary because adjudication or implementation of norms requires a court, embedded in a territorial, state or regional, regime. Even if international norms are developed, workers need to anchor their claims for labor rights (or even interests disputes) in some kind of a territorial legal institution.

These three premises that underlie territoriality do not uphold the warranted conclusion that territoriality is of the highest significance. Clearly, the first premise is erroneous. The effects of globalization are precisely that the labor market can no longer be treated as a territorial construct. States recruit workers or permit the entry of migrant workers recruited by employers and temp agencies from other countries. Not only is the labor market no longer confined to the receiving state, but it is also not exclusively based on the merging of distinct separate labor markets.

⁴⁹ Usually it is assumed that the labor market is national, although in the EU, directives are geared at capturing the regional labor market, and in fact expanding it from the national to the regional. European (or other regional) arrangements are therefore justified as a derivative of a broader attempt to forge a larger market.

⁵⁰ This is equally true for autonomous labor law *see* M. Reder & L. Ulman *Unionism and Unification, in LABOR AND AN INTEGRATED EUROPE*. (L. Ulman, B. Eichengreen, & W.T. Dickens eds., 1993).

⁵¹ Here as well, territoriality may also be based on local government when standards are local in nature, as is the case with fair wage rules, or regional, when a democratic structure of democratic rule-making exists, as in the case of the European Union.

De-Territorializing Labor Law

Difficulties in recruiting from one country lead to recruiting workers from another. Hence, construction work can be carried out by domestic workers or even by workers originating from many countries who compete for work permits and visas. Moreover, migration of workers from one country can adversely affect the labor market of the originating country. For example, “brain-drain” underlies concern of those who seek to promote coordinated migration policies. Labor markets are interconnected and merge one into the other. It is also useful to think of labor markets divided into sectors (such as construction) rather than divided into territorial regions. For some workers the possibility of moving from one sector to another is more difficult compared to the movement from one territory to another.

Similarly, production chains, offshoring, and multinationals designate a clear deviation from the assumption that production is nested within a single territorial regime. Whether a business is located to the south or to the north of the Mexico-U.S. borders, or east and west of the Israel-Palestine-Jordan borders is not based on split labor markets and clearly not because the capital or commodities markets are split along the border. To the extent it matters on which side of the border the plant opens, the decision relies on segmentation *caused by* labor law (or other areas of law as well). The concept that labor law artificially segments markets cannot justify confining the law within its borders.

By contrast, the second premise that ties territoriality with organic communities in which people interact and engage in joint activities is less vulnerable. Joint action, sense of solidarity, and communal life is still strongly related to joint presence. Territoriality in this respect may appear to be stronger at the local level, and already weakening at the state or regional level. However, to the extent that such relationships are desirable, the creation of de-territorial communities is feasible. For example, ex-territorial cooperation among members of trade unions exists, and in situations they are effective the absence of physical presence is offset by other joint characteristics that draw members to the community. One case in point are the dock workers who have used their ex-territorial power to obstruct the movement of ships around the world.⁵² The ITF has demonstrated the formation of solidarity among maritime workers that cuts across borders.⁵³ Similarly, the European Works Councils (EWC)⁵⁴ brings together representatives from countries in which different

⁵² James Atleson, *The Voyage of the Neptune Jade: Transitional Labour Solidarity and the Obstacles of Domestic Law*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION; TRANSFORMATIVE PRACTICES AND POSSIBILITIES* 379 (Joanne Conaghan, Michael Fischl, & Karl Klare eds., 2002); Noel Castree, *Geographic Scale and Grassroots Internationalism: The Liverpool Dock Dispute 1995-1998*, 76(3) *ECO. GEO.* 272 (2000).

⁵³ *Supra* Part I.

⁵⁴ 94/45/EC Directive on the Establishment of a European Works Council (Sept. 22, 1994).

languages are spoken. Despite the practical problems of translation, representatives meet and bring back to their peers in the different countries data and policy recommendations evolving from these gatherings, which promote and strengthen ties between workers in different states and aid in creating a parallel identity of industrial (or corporate) citizenship.⁵⁵ Currently there are preliminary attempts to foster broader international solidarity, beyond weak confederations of national trade unions. Actual mergers of large trade unions in Europe and North America may designate a partial advance in fogging labor's borders.⁵⁶

Bringing together workers employed by multinationals or providing migrant workers membership in trade unions in host-countries that continue after these migrants leave the country can aid in establishing new levels of solidarity and cooperation. At the same time, recognizing that territoriality is a derivative of solidarity and the making of a local labor community reveals that many practices that separate and divide workers within the territory are unwarranted. Trade unions that deny membership to migrant workers, or limit trade union activities toward employers and workers temporarily posted within the territory (as occurred in the *Viking/Laval* cases), are problems that should raise labor law's concerns. This is not because territoriality should be cherished, but because solidarity and collective action are seriously undermined.

The major dilemma in linking territoriality and labor law is found in the third premise. Its two components concern the problem of a democratic deficit with regard to the authoring of substantive norms ("labor rights and standards") and their implementation (by means of adjudication or alternative forms of dispute resolution). In the absence of a democratic authority that can establish non-territorial norms and adjudicate their violations there is no alternative to territoriality. Similarly, without anchors for implementation, stretching standards beyond the territory remains a potentially unfulfilled promise. As noted earlier, the assumption is that only sovereignty justifies the restrictive measures imposed by labor law. However, it is important to bear in mind the telos of labor law. While the employment relationship is considered to be a private relationship, due to the particular nature of the labor

⁵⁵ Wolfgang Streeck, *Industrial Citizenship under Regime Competition: The Case of European Works Councils*, 4 J. EUR. PUB. POL. 643 (1997); EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, EUROPEAN WORKS COUNCILS AND TRANSNATIONAL RESTRUCTURING (2006), available at <http://www.eurofound.europa.eu/pubdocs/2006/83/en/1/ef0683en.pdf>.

⁵⁶ In 2008 a merger that has been designated as revolutionary in its scope was achieved between the U.K.-based Unite union and the U.S. Steelworkers Union, see Steven Greenhouse, *Steelworkers Merge with British Union*, N.Y. TIMES, July 3, 2008; see also in EIROOnline, *First Steps in the Creation of a Transatlantic Superunion*, available at <http://www.eurofound.europa.eu/eiro/2007/06/articles/uk0706039i.htm> (last visited May 12, 2009).

De-Territorializing Labor Law

exchange, the state intervenes to redistribute the power among workers and capital, correct market failures, and protect the human rights of workers. Labor law is generally applied equally to all the workers in the territory who are affected by the nature of the labor market within which the state intervenes. Yet, to the same extent if a state is held responsible for workers employed by companies physically located within its territory, it should arguably be held responsible if the company is registered in the territory and production is carried out elsewhere or if the workers are employed through subcontracting and offshoring companies. In essence, why should labor law be any different if a European multinational company employs domestic workers or migrant workers in Europe? Or for that matter, if Turkish workers are employed in a plant opened by the same multinational corporation (MNC) in Turkey? Or Turkish workers are employed by a subcontractor working solely for that MNC while holding its operations in Turkey? If the state is responsible to protect workers affected by capital within the territory, it is not a matter of truism that its responsibility is dismissed once the same employment relationship extends beyond the state's borders. If the application of labor law within the territory is merited by considerations of equality, then stopping at the state's border is intrinsically unequal.

The second variation of the arguments holds that in the absence of a democratic authority, which can establish non-territorial norms and adjudicate their violations, there is no alternative to territoriality. Lacking anchors for implementation (such as state courts in which lawsuits can be filed), stretching standards beyond the territory remains a potentially unfulfilled promise. In this instrumental variation, there is nothing intrinsically important about sovereignty. It's only that sovereignty hasn't been replaced thus far. Territoriality as a derivative of sovereignty is clearly a practical matter that helps in sorting out concrete rights and obligations. However, private international law, for example, aids in identifying that practical matters, requiring adjustment do have a legal solution. The first component (which raises problems in the domain of the choice of law) and the second component (which raises problems of potentially *forum non conveniens*) require addressing the moral scope of responsibility of public entities for private action (the employment relationship). Territoriality is one type of response, but by no means a matter of truism. If the state allows a corporation to register itself in its territory, it can also provide the organizational shell for dispute resolution in the territory of registration. If commercial torts claims can be submitted on the basis of the *lex delicti*, in the country where the tortfeasor resides, there is no reason to deny jurisdiction on all employment matters.⁵⁷

⁵⁷ Cf. *Lubbe and Others v. Cape Plc*, [2000] 4 All ER 268 (HL) whereby the House of Lords emphasized the importance of litigating claims in the UK where the parent company resides,

Customary international labor law or developing a clear notion of the “law of nations,” coupled by international legal forums, provides the easiest solution to the practical problems. Its purpose is to develop uniform labor law that renders the choice of law and forum for claims-making less important. As noted earlier, there are seeds of such developments that can be identified in the development of core labor standards and the various forums that somehow address violation of international standards, such as the Committee of Experts at the ILO, reported upon at the Commission on Economic, Social and Cultural Rights at the United Nations, litigated at the European Court of Justice, or processed through the procedures prescribed by the NAFTA’s side-agreement. These remain weak exceptions to the rule. A more far-reaching response questions why de-territorial labor law should suffice with the bare minimum (in substance and in claims making) that is required by the process of identifying universal standards. There are many sets of norms and standards as well as forums for adjudication that can be viewed morally applicable to situations in which there are cross-borders “beneficial ownership and reliance.”

To conclude, the three premises outlined disperse concepts of territoriality and indicate that the arguments in favor of territoriality do not morally justify territorial application. The scope of labor markets already exceeds geographic territories. Organic solidarity also does not overlap with territory. Sovereignty does not imply substantive application of labor law only to the territory, or denial of jurisdiction in employment disputes. Thus, the question remains—why should it matter *where* a worker conducts her work?

III. WHAT CAN BE THE MEANING OF DE-TERRITORIALIZING LABOR LAW?

Consider and generalize the policy against raising the “flag of convenience” that was advanced by the ITF. The alternative to territoriality it suggests is to identify the real beneficiaries of the production and services, rather than their territorial situation. Regulation of the labor market should be associated with the de-facto employment relationship, as viewed in terms of social and economic reliance.⁵⁸ In other contexts, if labor law seeks to correct market failures, it should encompass the entire market where the failure takes place, and not the territory. If labor law seeks

on matters pertaining to the responsibility of the parent company to the actions of its overseas subsidiaries.

⁵⁸ For a similar attempt to highlight a relationship of an economic beneficiary and reliance, see the discussion of the case in the matter of *Labor Union of Pico Korea Ltd. v. Pico Products Inc.* 968, F2d 191 (2nd Cir. 1992); Frank Deale, *The Pico Case: Testing International Labor Rights in US Courts*, in *HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE* 251 (Lance Compa & Stephen Diamond eds., 2003); see also *Lubbe and Others v. Cape Plc*, *supra* note 57.

De-Territorializing Labor Law

to foster solidarity, accommodate voice, and provide the necessary conditions for collective action, it should reach all the relevant workers to whom collective action is meaningful, regardless of the territory in which they reside. That is, territorial considerations are justified only as a derivative of substantive concerns. However, when territoriality is used as inadequate proxy or worse—when it obstructs legitimate concerns—it should be avoided.

The proposed trajectory of de-territorialization does not provide a single prescription for labor law's malaise, but it can suggest global utopias, such as Jennifer Gordon's linking of work to industrial citizenship instead of state-citizenship. While these utopist solutions are not incorrect, they are remote from the current institutional context.⁵⁹ De-territorialization can also strengthen one side or another in familiar debates, for example, the legitimacy of a state's unilateral application of its laws to other states (e.g., through GSP). Within such debates the shift from considering questions of territory toward identification of economic beneficiaries may be marginal because the broader institutional context remains intact. However, whether seeking utopian solutions or the adjustment of particular rules, the bottom-line is not that territory is unimportant. Rather, territory is less significant, but still a useful proxy for solidarity and community and thus its significance should not be overlooked. Territory is important as long as it is relieved of the erroneous premises on the one hand, and tailored to labor law's objectives on the other hand. It may also be assumed that de-territorialization may be a virtue for some objectives and a vice for others.

Consider, for example, the debate over the unilateral application of one country's labor standards to others, by means of imposing trade barriers or a system of general trade preferences. Arguing that such an application infringes on the sovereignty of other countries that have the sole jurisdiction and moral or legal authority over the territory, is a weak argument. The initial premise is that there is nothing intrinsically wrong (or right) in securing rights of workers employed abroad. What matters is not sovereignty per-se but the substantive questions underlying this debate. If such a policy is argued within a context that seeks to lift standards as an instrumental policy to aid the regulating state in advancing its position in the global competition, then unilateralism is should be regarded with consternation. However, if it provides a role for foreign NGOs, INGOs, and workers to claim unilateral rights against subcontractors in their country as well as against the MNCs that benefit from their service and concedes to opening the imposing state's territorial jurisdiction to

⁵⁹ The categorization of Gordon's analysis under the headline of utopias is not derogatory. Utopias are inspiring: They provide paths for alternative thought and for questioning assumptions that are too often taken for granted. Moreover, Gordon also prescribes to reaching lesser goals which are useful to draw upon in practice and which can assist in attaining other goals.

such claims, then the policy should be regarded positively. In the same manner that domestic regulation may have ambiguous or multiple and conflicting aims, de-territorialization neither resolves ambiguity nor does it provide unequivocal answers as to what is right and wrong.⁶⁰ What matters in these situations is who argues, who resolves competing claims, and what is the context in which arguments are being made.

The potential differences in unilateral application of standards point at yet another application of de-territorialization. If employees of a subcontractor for a MNC are considered sufficiently related and dependent on the prime-contractor to justify legal responsibility on the prime-contractor as an employer when production takes place *within* the prime-contractor's territory, then greater justification exists for applying the prime-contractor's standards to the subcontractor regardless of its territorial presence. This could be applied for example to both call-centers or to offshore production. If Indian migrant workers could be employed in the U.S. to answer telephone calls for a local retailer, they should benefit from the same set of rights and not be "penalized" by inferior ones just because they perform the same job outside the U.S. Distinctions can be made between wages that are localized and qualitative standards that can be applied uniformly. However, ex-territorial application of labor standards should not be conditional to the limited list of labor rights that have been accepted as universal human rights, but rather on the application of a company's standards to all of its workers. This is the *raison d'être* of labor law when applied within the territory.

In addition to setting standards, their implementation also has an important dimension. Migrant workers who returned to their home country should not be required to litigate in the country where they worked in order to enjoy territorial rights. Workers in offshore enterprises should not be removed from the courts in the land/s where the enterprise that enjoys their services is located. The ability to claim rights should be openly allowed wherever the beneficiary of production or services is located. The state that provides the institutional setting for addressing wrongs in private law to its territorial insiders, should open its dispute resolution processes to all those who assert substantive claims of its labor market, regardless of where production or the provision of services takes place.

Identifying territorial anchors for transnational chains of production and services has particular relevance for international collective agreements and codes of practice. The debate on the merit of these as an alternative method of regulation is currently at the forefront of international labor law. While some view it as a useful

⁶⁰ On the ambiguity of labor regulation generally see Guy Mundlak, *The Right to Work: Linking Human Rights and Employment Policy*, 146 INT'L LABOR REV. 189 (2007).

De-Territorializing Labor Law

method of instigating a race to the top, others view it as a weak alternative which is mostly beneficial to the corporation as a marketing device of social responsibility. The answer that is gradually emerging distinguishes between different agreements, codes and soft-law methods of international governance. They may be used to bracket and substitute hard-law methods, but with proper drafting and enforcement they can generate a transnational collaborative effort between workers, labor activists, enforcement agencies and consumers worldwide. They enable a focal point that transcends the artificial boundaries of the state.⁶¹

Some argue that these instruments can only be useful if non-justiciable, because the depth and strength of self-regulation is contingent on removing courts.⁶² If this is the case, then non-justiciability has nothing to do with territoriality, and in fact, similar arguments are made with regard to domestic soft law self-governance alternatives. However, if the argument is that these instruments act regardless of distinct territory and therefore cannot be anchored in one particular territory, then the concern of territorialization should simply be removed. It should be made possible to anchor such codes and agreements in any forum in which owners or other stakeholders benefit from such codes. Hence, workers for a subcontractor, which is obligated by the MNC's code of conduct, should be able to claim their rights in the state they worked but also in any state where the MNC benefits from their productive activity.

The principle seeking substantive reliance between an establishment and workers who provide production and services should also be applied to collective labor relations.⁶³ For example, whenever collective labor law allows workers to act collectively against an employer's policy within the territory, they should be

⁶¹ Cf. Mark Barenberg, *Towards a Democratic Model of Transnational Labour Monitoring*, in *REGULATING LABOUR IN THE WAKE OF GLOBALISATION—NEW CHALLENGES, NEW INSTITUTIONS* 37 (B. Bercusson & C. Estlund eds., 2008); Lance Compa, *Corporate Social Responsibility and Workers' Rights*, 30 *COMP. LABOR L. & POLICY J.* 1 (2008).

⁶² There are generally two variations of the argument against enforcement. The stronger one suggests that legal enforcement is harmful because employers will therefore prefer not having a self-imposed code at all, leaving a complete void in the field of workers' rights. The weaker one suggests that enforcement is possible, but that legal enforcement has been found to be rather inadequate and that non-legal techniques (such as public shaming) are more effective. Cf. Lance Compa, *Pursuing International labor Rights in US Courts—New Uses for Old Tools*, 57 *RELATIONS INDUSTRIELLES (INDUSTRIAL RELATIONS)* 48 (2002).

⁶³ See *Labor Union of Pico Korea Ltd. v. Pico Products Inc.*, *supra* note 58. It should be noted that some European agreements may be enforceable and the problems they raise are of a different type, when compared, for example, to International Framework Agreements (IFAs). Cf. Dagmar Schiek, *Autonomous Collective Agreements as a Regulatory Device in European Labour Law: How to Read Article 139EC*, 34(1) *IND. L. J.* 23 (2005).

allowed to act collectively even if the workers are dispersed. Trade unions striking against a multinational in Europe, with regard to the working conditions of workers employed by subcontractors outside the EU, should be deemed to be engaging in a legitimate industrial practice. Trade unions may also resist the unfettered entry of employers into the territory because it undercuts their attempt to foster solidarity within the territory. The substantive question is: in what manner a particular arrangement affects labor's need to constitute a community? Territoriality per-se should not matter.

None of these proposals lend themselves to simple implementation and questions of practice and ethics remain. As noted, these proposals cannot be easily implemented because the sum of the ingredients of the overall asymmetric regime still remains intact (the relatively limited movement of labor and relatively free movement of capital).⁶⁴

In practical terms, implementing tests that remove territory such as "who is the substantive economic beneficiary" can be more easily applied when such a beneficiary is well defined. This was true in both the *Viking/Laval* cases and the Israeli judgment concerning the law to be applied to Palestinians working in the Occupied Palestinian Territories.⁶⁵ Similarly, when a sub-contractor in a developing country works exclusively to the benefit of a local company in another developed country, then the choice is between two easily identifiable regimes of labor law. When a migrant worker remains in one receiving country and then returns to her country of citizenship, the integration of two discrete legal systems remains challenging but conceivably manageable. In other cases any search for a system of labor law other than the territorial system of the sub-contractor (or the migrant worker) may seem to be an insurmountable obstacle: for example, rethinking territoriality with regard to a call-center for an international chain of hotels or a call-center that answers calls for numerous companies in different time-zones. A migrant worker who moves every season from one country to another may also not have sufficient time to develop an identifiable economic relationship with any one particular employer, community, or legal regime. For the benefit of such workers it is particularly important to develop non-territorial agencies that aid these workers claim rights and establishing security from social and economic risks.

Moreover, if we are seeking a substantial economic relationship from which to derive the relevant legal regime(s), then the constituency question emerges. Should workers be simply viewed as a constituency of an entity that

⁶⁴ This is merely another component in the overall asymmetry that is embedded in the labor market. See generally CLAUS OFFE, *DISORGANIZED CAPITALISM* (1986).

⁶⁵ *Kav La-Oved v. The National Labor Court*, *supra* note 46.

De-Territorializing Labor Law

is designated an “employer,” or should the economic enterprise be viewed as a web of contracts that brings together multiple stakeholders among which there are also independent horizontal relationships. Otherwise stated, a simple search for the economic beneficiary assumes that only an employer can benefit. A more elaborate search speculates that consumers, suppliers, debtors, and communities can be beneficiaries. The simple search may stretch the legal order of the multinational’s headquarters, while the multi-stakeholders search may also apply the legal regimes in the countries the consumers reside. The former option may prove to be useful in a limited number of situations, while the latter may lead to what has been designated as “internationalism,” plausibly workers may claim numerous rights from diverse legal regimes.⁶⁶ The danger attributed to internationalism is the waiver of any particular state’s responsibility, forgoing the state as an important arena for change. Flexible jurisdictional claims may in fact downplay recognized methods of social transformation.⁶⁷ In an embellished fashion, one could claim that any violation of labor standards made anywhere in the world can be tried anywhere and can result in obstructing a clear assignment of responsibility. Yet, de-territorialization need not impede state action completely nor exchange state responsibility for labor forum-shopping.

De-territorialization must also be sensitive to differences between types of rights. While minimal core labor rights are gradually being relegated into a global regime that advances the claim of de-territorialization, many labor standards have not been included in this minimal set of rights. A narrow agenda of de-territorialization may seek to extend protection to specifications of the core labor rights, as was the case with regard to the freedom of association and the right to take industrial action in the *Viking* case. Similarly, the potential for developing Alien Tort Claims Act (ACTA)⁶⁸ claims in the United States is for the most part in situations of grave harm to a very narrow agenda of a universal “law of nations.”⁶⁹ Other qualitative issues, such as the right to privacy and dignity, rights against harassment at work, and some aspects of occupational health and safety are easier to stretch across borders. Quantitative issues, such as the rate of pay for overtime, number of days-off for annual vacation, and level of wages are more difficult to manage.

Common tests that are used in territorial labor regimes can also be applied in the attempt to carve a balance between a chaotic competition for the most desirable

⁶⁶ Patrick Macklem, *Corporate Accountability under International Law: The Misguided Quest for Universal Jurisdiction*, 7 INT’L L. FORUM 281 (2005).

⁶⁷ *Id.*

⁶⁸ 28 U.S.C. § 1350.

⁶⁹ This is implied by some of the leading cases, *see, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

legal regime and a workable process of de-territorialization. Labor law often distinguishes between authentic sub-contracting and a fictitious one, whereas in the latter complete economic reliance remains between the contracting company and the sub-contractor's workers. Labor law also provides tests for sorting out multiple norms governing a single employment relationship, providing for example a rule of thumb whereby the more beneficial norm to the employee applies. In administering such tests courts should ask how the test would be applied if the chain of production was wholly within the same territory. That is, an attempt should be to remove the effect of borders when seeking to prescribe the choice of law and jurisdiction. This is also the key for thinking about cross-borders regulatory arrangements for migrant workers. To the same extent labor law currently seeks to foster smoother transitions between spells of employment within the territory, similar arrangements need to be carved for cross-borders migration. Borders as limits and limitations should be removed.

Other than the practical problems associated with the idea of de-territorialization, there are also moral concerns as well. For example, if de-territorialization may improve the rights and rewards of workers in developing states, then the incentive to move production and services to these states maybe attenuated. This is a valid concern, but it should be noted that it is a fundamental consideration that underlies labor law's project as a whole. Such concerns are at the core of market-oriented objections to the regulation of the labor market: minimum wage may cause unemployment; limiting the length of employment through temporary work agencies may lead to dismissals of temp workers who are in need of the job; extending accommodation mandates to disadvantaged groups in the labor market (women, people with disabilities, minorities) may lead to avoidance techniques that will keep these groups out of the labor market altogether; and so on. A response to these concerns extends the current framework of analysis.⁷⁰ These concerns are not unique to the problem of territoriality, and therefore de-territorialization does not introduce them nor can it resolve them.

IV. CONCLUSION

De-territoriality claims that territory and sovereignty should be understated within the dominion of labor law in order to correct a deep structural imbalance in labor markets. This imbalance was not created by globalization, and as long as it appeared in a consistent yet bounded manner in each and every state, labor law's project was rendered possible by territorial arrangements. With the process of globalization the

⁷⁰ See generally Mundlak, *The Right to Work*, *supra* note 60.

De-Territorializing Labor Law

territorial solutions previously created within labor law are no longer adequate. Labor law's project should therefore be de-territorialized, although this is not a monolithic prescription.

First, de-territorialization suggests the development of strategies that seek to render national borders less important. Some of the examples provided throughout the Article do not amount to a solid demonstration of de-territorialization. For example, the development of regional standards does not overcome territorialization but merely carves new borders for authoring norms. Similarly, international covenants rely on states ratification, just as inter-state agreements maintain and rely on the separate sovereignty of each state. Other examples raise the problem of extraterritorial application, an important question in itself.⁷¹ However, extraterritoriality similarly preserves the importance of territory for the authoring of norms. Imagining the true meaning of de-territorialization is still far off. However, presenting new and overlapping territories for authoring and litigating rights, adjusting territorial law to accommodate cross-borders strategies and extraterritorial application can aid in inserting a positive confusion. These prescriptions disrupt the use of the traditional strategies used by trade unions and advocates of labor rights, but also create new possibilities. Moreover, it was noted that at present, anchors are needed to advance de-territoriality. Multinational's code of practice, cross-borders litigation, and the development of labor standards as customary international law, or the "law of nations" serve as such anchors.

Moreover, the course de-territorialization takes sways between imagining utopias and identifying practical strategies to advancing workers' rights. Many examples given here are concerned with litigation. This is where some of the problems are most easily demonstrated and accentuated. However the proposed trajectory of de-territorialization does not hold that litigation is the most important or effective means to aid in advancing workers rights. Devising institutions of solidarity, cross-national legislation to secure against social risks, developing new means for labor through integrating labor rights into fields of law that are more de-territorialized to begin with (corporate law, pension schemes, trade law), relying on extra-legal strategies altogether—may all be just as, or even more beneficial than de-territorializing traditional labor strategies. Downplaying sovereignty and spatial borders in these alternative contexts is just as important.

The easy objection to these various (admittedly sketchy) proposals would be that it is rather insane to stretch labor law across territories, disregarding the

⁷¹ See also William Dodge, *Understanding the Presumption Against Extraterritoriality* 16 BERKELEY J. INT'L L. 85 (1998); see also Jonathan Turley, "When in Rome": *Multinational Misconduct and the Presumption against Extraterritoriality*, 84 NW. U. L. REV. 598 (1990).

many differences in the economic and social conditions that prevail in different states and regions. As I note, some of these proposals maybe far removed, while others can be rather easily implemented. Yet the fundamental concern suggested here warrants several concluding replies.

Reaching out beyond the territory is no longer considered to be irrational. The incremental and polycentric evolution of international labor law should actually be used to question territoriality itself. As noted in Section I, with regard to movement of labor and capital, some practices and proposals for de-territoriality already exists. Moreover, in various fields of law, extra-territoriality is more acceptable. The ATCA procedure enables filing torts suits for acts committed outside the territory. With that said, there is an overlap between some labor law and torts claims. An example of this is a company that enjoys consumers' confidence on the basis of its display of corporate-social-responsibility while conducting slack enforcement should be held liable for fraud or deceit and responsible to the workers who shoulder the gap between the social façade and the darker reality.⁷² Yet even without translating regulatory claims into private law, environmental issues have already been integrated into the trade system, while labor law still lags behind.⁷³ None of these examples can be held to be uncontroversial anchors that unequivocally endorse an expansion of de-territorialization, but they clearly suggest that this is a legitimate alternative to consider.

A second argument raised is that corporations can unilaterally assign the choice of law and territory for implementation. The fact that corporations can engage in forum-shopping is well established but not altogether part of a natural order. It is a construct of corporate law that allows fragmenting the corporation, allowing its

⁷² A less far-reaching attempt of such an argument can be seen for example in the litigation that took place with regard to the working conditions of workers in the Northern Marianas Islands, where plaintiffs argued that the label "made in the USA" was deceiving consumers who thought that U.S. labor standards applied to these workers. For the various de/territorial strategies in this case, which spanned over several separate lawsuits, see Deborah Karet, *Privatizing Law on the Commonwealth of the Northern Marian Islands: Is Litigation the Best Channel for Reforming the Garment Industry?*, 48 BUFFALO L. REV. 1047 (2000). A more territorial claim of fraud that sought to achieve globalized benefits for workers can be found in the case of *Kasky v Nike*, 24 CAL 4TH 939 (2002)

⁷³ See, e.g., the WTO's treatment of environmental exceptions in the Shrimp-Turtle case, reprinted in 38 I.L.M. 118 (1999), with its reluctance to extend similar exceptions in the area of labor. See especially Robert Howse, *Back to Court after Shrimp/Turtle? Almost but not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences*, 18 AM. U. INT'L L. REV. 1333 (2003); Chantal Thomas, *Should the WTO Incorporate Labor and Environmental Standards?*, 61 (4) WASH. & LEE L. REV. 347 (2004).

De-Territorializing Labor Law

registration in a territory that has nothing to do with the production or the provision of services. Why then should labor law not open a similar alternative to workers, as a way of leveling the contractual playing field? Admittedly, the contractual nature of the employment relationship allows the employer and employee to choose their most desirable legal system as well as the most convenient forum for dispute resolution. Yet labor law intervenes precisely where it is assumed that the players' position is systematically unequal. Whether to act as a countervailing power to capital's power or as a method of correcting market failure (e.g., incomplete information regarding the nature of the many applicable labor laws), the many tentacles of labor law can be imposed on the parties as a way of tracking the footsteps of capital's forum shopping.

A third justification for de-territorial application addresses the concerns that wages, as well as labor costs more generally (e.g., affected by shift work, overtime arrangements, days off, severance pay and the like) are determined by local markets. However, the territorial nature of markets only makes sense if the movement of capital is severed from that of labor. Viewed together it is clear that local markets are artificially determined by receiving states to limit the scope of labor migration and to advance economic and cultural closure. In addition to the law of migration, a host of labor market institutions that are established territorially aid in splitting labor markets across borders. Borders are a political construct and the decision what permeates the borders (capital more easily) and what remains outside (more often labor) cannot be used as a justification to territoriality. If Indian workers were admitted to work in call centers located in the U.S. territoriality, it indicates they would receive prevailing U.S. wages and benefit from U.S. recognized labor conditions. If they are denied entry to the U.S., then the territorial argument that they cannot enjoy American standards merely suggests that territoriality serves to isolate the Indian labor market, in the same manner that immigration law isolates the movement of workers. Wage differentials can be justified, for reasons of differences in productivity or cost of living. Yet for the same reason that the corporate veil can be lifted to apply a parent-company's collective agreement to a fictitious daughter-company within the territory, then the veil can be lifted in cross-border instances as well.

Finally, expanding labor law beyond its territorial jurisdiction may create disparate working conditions whereby the conditions of workers in Indian call-centers may be adjusted to those of call-centers in other territories, distinct from those of call centers that operate for other remote companies, and also distinct from those that operate within India. Clearly, erratic patterns may develop. They are however less erratic or arbitrary than those that are established on the basis of territoriality. Global standardization provides limited solutions to address these disparities. The way to correct undesirable consequences maybe by forging clearer

international codes, collective agreements, and bi/multi-lateral agreements between states, trade unions, and international organizations as harmonizing anchors to a process of de-territorialization.