

BOOK ANNOTATIONS

DAVID JACOBSON, *RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP*. BALTIMORE: JOHNS HOPKINS UNIVERSITY PRESS, 1996, 1997. Pp. xii + 181. \$14.95 (PAPERBACK).

In *Rights Across Borders*, David Jacobson, who teaches in the Department of Sociology at Arizona State University, awakens us to the changing meanings of citizenship in this age of transnational migration. In modern Western history, citizenship has been the core concept linking individuals to the state. Jacobsen quotes Jürgen Habermas: "The social borders of a political community do not just have a functional meaning. They regulate rather one's belonging to a distinct historical community linked by a common fate and a political life form that constitutes the identity of its citizens" (p. 6). In Jacobson's interpretation, this classic democratic conception is giving way to a different political perspective brought about by the ceaseless movement of people across national boundaries: while the notion of 'citizen' is increasingly restricted to notions of choice and utility, social solidarities are being anchored in feelings of homeland and "diasporas" (p. 17).

Jacobson dedicates the preponderance of his book to the emerging reality of this global socio-legal order. Eschewing examples of cross-border migrations in nations in Africa, Asia, and South America, he focuses on three Western states that have been leading actors in the creation and enforcement of international human rights law: France, Germany, and the United States. According to Jacobson, each of these three countries has quite different histories of nationality, citizenship, and statehood. America's traditions have been defined essentially in terms of liberal constitutionalism (pp. 42-52). France's are rooted in the Revolution of 1789, which celebrated the universal rationality of the state above the provincialism of the French nation, and Germany's are based in a story about an imagined people, united by language, literature, and blood, trying to create a state for themselves (pp. 18-26). In all fairness, it should be said that Jacobson is deploying a typology, so his historical representations are simple. Nonetheless, the reader may properly expect a more careful treatment than he has provided. For instance, his argument that American citizenship is essentially tied to its liberal constitutional tradition is outdated. As most recently discussed by Rogers Smith in *Civic Ideals* (1997), American political culture has been principally constituted by exclusion and difference, rather than inclusion and equality. The same could be said for France and Germany.

Although his historical account of the rise of nationalism is simple, Jacobson describes in detail how these three countries have spent the last fifty years tentatively recognizing the ideals of international human rights law. In the case of France, "The traditionally autonomous approach of the French judiciary softened with a 1980 decision that gave an international treaty . . . priority over a municipal law" (p. 86). And in Germany, "a 1987 decision dramatically increased the authority of the [European Convention on Human Rights] when the Federal Constitutional court held that the basic law of the German Constitution, had to be interpreted in the framework of" the Convention (p. 86). As for the United States, while government rhetoric has supported human rights, the practical incorporation of international law into constitutional law has been relatively lacking. Jacobson claims that the Universal Declaration of Human Rights has been cited in the United States seventy-six times in federal cases since 1948, more than half of which concerned immigrants and refugees (p. 97), but courts have been reluctant to turn these citations into hard statements of law.

As Jacobson surveys these developments, he observes that the impetus for change has come principally from judges, rather than from legislators. In the 21st Century then, the state, particularly the judiciary, will become the mediating institution through which individuals advance political claims using the language of international human rights law: "the state is now a forum where transnational laws and norms are administered, mediated, and enforced" (p. 106).

Jacobson needs to develop his conclusions further, but he predicts that both salutary and troubling consequences will follow if current trends continue. On the one hand, international human rights law will become more useful to immigrants who lack any claim to citizenship and so are most vulnerable to the exercise of state power. Jacobson also tantalizingly suggests that, if people come to recognize their membership in groups without reference to territorial frameworks, they may create new civic identities that do not conform to current practices of democratic statecraft (p. 135). Jacobson does not explore this provocative point: being civic minded in the future may become sharply distinct from exercising the power to vote for state officials who are armed with the power to police national borders.

At the same time, the very separation of identity from citizenship—and of democratic political culture from the franchise—worries Jacobson, who asks "what does the stress of 'rights' bode for democracy and the legislative process" (p. 138). He sees that, in the coming world order, political struggles will become "adjudicated on the basis of the merits of the case, as defined by international human rights codes, and not on the basis of 'national interest'" (p. 119). Surely Jacobson's observations are exaggerated, since arguments about the "national interest" and territorial nationalism itself will continue to exist well into the next century. Nonetheless, one might be concerned about the future of redistributive policies if legislative

bodies cannot mobilize the sense of "common fate" that Habermas attributed to the nation-state.

Jacobson concludes *Rights Across Borders* by playfully endorsing a kind of post-modern vision of the coming global order. He quotes Mircea Eliade: "Properly speaking, there is no longer any world . . . [only] an amorphous mass consisting of an infinite number of more or less neutral places in which man moves, governed by the obligations of an existence incorporated into an industrial society" (p. 132). In other words, borrowed in part from Benedict Anderson, Jacobson observes that "the imagined community will cease to be shared and homogeneous" (134). These concluding thoughts are unsatisfying because they contradict a central argument of the book, namely that ideas about community are changing, not disappearing. There simply can be no "imagined community" if it lapses into an "amorphous mass" of an "infinite number of . . . neutral places." If our social lives become so confused, there can be no "diaspora," and no civic life.

On the whole, Jacobson's short, well-written book cogently depicts the ongoing devaluation of citizenship at the turn of the millennium. Its arguments are perhaps most applicable to the European Union, less so the United States. Of course, other scholars will have to supplement his research with studies of migrations on other continents. Most critically though, future scholars need to challenge the conceptualization of Jacobson's book. To understand what Eliade described as "the obligations of an existence incorporated into an industrial society," one must analyze the transnational trade in labor in the context of the transnational trade in goods and capital.

On this point, readers of Jacobson's work will want to consult Saskia Sassen's new book, *Globalization and Its Discontents* (1998). Sassen explains how the resurgence of transnational migration is part of a broader concentration of power and wealth into global cities, resulting in what she styles the "unbundling of sovereignty" of the nation-state. In his foreword to Sassen's book, K. Anthony Appiah hints at the complexity of the social matrix of this transformation: "there are globalizing forms of elite culture (like accounting and financial practice) that are nevertheless quite everyday; and [there are] migrants (accountants, international lawyers, and bankers) who are far from the experience of marginality" (p. xv). In this light, Jacobson's observations about law's empire seem thin: does the proliferation of enforceable human rights law reflect the workings of partially-visible, and always incomplete, networks of international lawyers and businessmen predisposed to support political arrangements that resemble ones with which they are familiar in their own professional fields? By addressing the material forces which support the formation of international institutions, other scholars building on Jacobson's book can offer a needed

critical perspective on the promises of the practice of tomorrow's universalist legal culture.

Louis Anthes

WILLIAM SCHABAS, *THE DEATH PENALTY IN INTERNATIONAL LAW* (CAMBRIDGE, UK: CAMBRIDGE UNIVERSITY PRESS, 2D ED.1997). Pp. xli + 403. \$90 (HARDCOVER).

William Schabas dedicates his study of the death penalty in international law to some of its most famous victims, from Socrates to the Rosenbergs, observing that "[w]hat is remarkable about such a list is how it permits history to be measured by executions" (p. 308). In this work, updated from the 1993 edition to take account of further progress in "the international abolition of the death penalty" (p. xv), Schabas seeks to demonstrate that, since the advent of the international movement advocating limitation or abolition of the death penalty in 1948, "there has been a clear and measurable progress towards that goal" (p. 20). He contends that there now exists a norm that effectively restricts the application and scope of the death penalty (p. 21). Schabas organizes his study around four discrete legal systems: the United Nations (the "U.N."), international humanitarian law, and the regional systems of Europe and the Americas. Schabas thus presents his discussion of the abolitionist movement in international law according to regional and treaty-based legal regimes rather than according to chronology.

Schabas begins with a lengthy examination of the development of the idea of a "right to life" in U.N. documents. He notes that the drafters of the 1948 Universal Declaration of Human Rights refused to recognize the death penalty as an exception to the right to life (p. 42). According to Eleanor Roosevelt, the drafters were aware of a growing movement in many states at the time to abolish the death penalty and did not wish to discourage abolition by condoning capital punishment in human rights law (pp. 42-43). The evolution of Article 6 of the International Covenant on Civil and Political Rights ("the Covenant"), which protects the right to life, mirrors the trend toward limitation of the death penalty. In its first draft in 1947, Article 6 recognized the death penalty as an exception to the right to life. Yet in its final form in 1966, Article 6 incorporates numerous anti-death penalty provisions, such as a ban on the use of capital punishment against juveniles and pregnant women and a narrowing of the application of the death penalty to only "serious crimes" (p. 49). Furthermore, Article 7 of the Covenant, which prohibits cruel, inhuman, and degrading treatment, has been used to challenge conditions on death row and methods of execution (pp. 126-42). In this context, Schabas provides an interesting discussion of the tension between the need for extensive appellate review of

capital cases and the humanitarian impulse to limit the length of confinement on death row (pp. 127-35). The crowning achievement, however, of the anti-death penalty movement in the U.N. is the 1989 Second Optional Protocol to the Covenant ("Second Optional Protocol") (p. 181). Ratified by 29 states as of January 1996 (p. 176), the Second Optional Protocol binds its signatories to the abolition of the death penalty except in times of war. (pp. 178-80).

Schabas next examines how the death penalty has been restricted in international humanitarian law. The 1949 Geneva Convention Relative to the Treatment of Prisoners of War bars an occupying power from imposing the death penalty if the occupied nation's penal laws do not permit it (p. 298). Moreover, the 1977 Protocols Additional I and II to the 1949 Geneva Convention prohibit the execution of juveniles, pregnant women, and mothers with dependent children during international and civil wars (pp. 209, 217).

Schabas completes his survey of international human rights instruments by examining regional agreements in Europe and the Americas. Both regions have recently created instruments that, like the U.N.'s Second Optional Protocol, commit their signatories to the abolition of the death penalty except in times of war (p. 300). Over 20 nations have ratified the European agreement (p. 246). As of January 1996, 25 states had ratified the inter-American treaty (pp. 280-81).

If Schabas' study has an unofficial villain, it is the United States. He declares the reservations of the United States to Articles 6 and 7 of the U.N. Covenant to be incompatible with the current U.N. human rights regime (pp. 83-85). He also takes the United States to task for ignoring international norms against the use of capital punishment for juveniles (pp. 84, 304-305). Furthermore, he believes that "the imposing shadow of the United States is the decisive factor" hindering the spread of abolition in the Americas (p. 294).

Yet the issue of United States intransigence raises a more troubling question not sufficiently answered in Schabas' book: is the international abolitionist regime merely a paper tiger? While many states in Latin America and Europe have abolished the death penalty, the United States, the world's lone superpower has not, nor has China, the world's most populous nation, and the Islamic world has been strongly pro-death penalty. Although Schabas expresses hope that the Islamic world will "evolve" towards abolition (p. 18), he acknowledges that, until it does, "it is difficult to envisage a truly universal abolition of the death penalty" (p. 308). Has Schabas documented anything more than the fact that abolitionist states (whose ranks have certainly increased since the Second World War) have agreed amongst themselves that the death penalty is wrong?

Furthermore, Schabas does not explain how international agreements operate to restrict the actions of federal states like the United States.

While a treaty has force as federal law, does it restrict the activity of Texas in drafting its penal legislation? The federal government has a separate penal law from that of the states, and this dualism has allowed several states to be abolitionist. However, the extent of the federal government's power to encroach upon states' autonomy in the area of criminal law remains unclear.

Readers should be forewarned that this book is often quite dense and detailed. Schabas dwells at length on the deliberations of drafters of international instruments. His book contains all of the minutiae of the changes of wording in the course of different drafts that responded to the objections of various countries. At times the reader may become lost in the bureaucratic maze of working groups and drafting committees. Still, Schabas' study, which documents the growth of an international abolitionist trend, is useful as a weapon in the fight against the death penalty.

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