

3-1998

# Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform"

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## Recommended Citation

Berta Esperanza Hernández-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare 'Reform'*, 71 S. Cal. L. Rev. 547 (1998)

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# GLOBAL RIGHTS, LOCAL WRONGS, AND LEGAL FIXES: AN INTERNATIONAL HUMAN RIGHTS CRITIQUE OF IMMIGRATION AND WELFARE “REFORM”

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\*\* J.D., 1997, St. John’s University School of Law; B.A., 1994, Johns Hopkins University. All of my thanks and respect to Berta Hernández for teaching, inspiring, and encouraging me as well as giving me the incredible opportunity to work with her.

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“Give me your tired, your poor,  
Your huddled masses, yearning to breathe free,  
The wretched refuse of your teeming shore.  
Send these, the homeless, tempest-tost to me,  
I lift my lamp beside the golden door.”

Emma Lazarus  
*The New Colossus*

Wide open and unguarded stand our gates,  
And through them presses a wild motley throng—

...

Featureless figures of the Hoang-Ho,  
Malayan, Scythian, Teuton, Kelt, and Slav,  
Flying the Old World's poverty and scorn;  
These bringing with them unknown gods and rites,  
Those, tiger passions, here to stretch their claws.  
In street and alley what strange tongues are loud,  
Accents of menace alien to our air,  
Voices that once the Tower of Babel knew!

O Liberty, white Goddess! is it well  
To leave the gates unguarded?

Thomas Bailey Aldrich  
*Unguarded Gates*

## I. INTRODUCTION

The United States enjoys a lofty reputation worldwide as the land of opportunity and dreams, the welcoming home to all who want to be free, the brave new world that embraces huddled masses and offers them limitless possibilities to find freedom, liberty, and happiness. In marked juxtaposition to this welcomeness narrative is the counter-narrative of historic exclusion<sup>1</sup> evidenced by the harsh description of these “huddled masses, yearning to breathe free” as “wretched refuse.”<sup>2</sup> Indeed, to describe some immigrants as “wretched refuse” manifests that Lady Liberty’s welcome is, at best, highly selective and, at worst, patently discriminatory. The irony, of course, lies in the basic truth of both narratives—anecdotes imbued with tension throughout the history of this country with respect to who truly belongs within our borders and who is, and always will be, an “outsider.”

The exclusionary narrative mainly aims its sentiments of *unwelcome*ness at “others”—newcomers or potential newcomers who often look different, sound different, and worship differently from “real” Americans.<sup>3</sup> The most recent example of the exclusionary unwelcomeness narrative is

1. See *Chae Chan Ping v. United States*, 130 U.S. 581, 603-06 (1889) (known as the Chinese Exclusion Case)

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all of the considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or *from vast hordes of its people crowding in upon us*.

*Id.* (emphasis added).

2. Joe R. Feagin, *Old Poison in New Bottles: The Deep Roots of Modern Nativism*, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 13, 39 (Juan F. Perea ed., 1997) [hereinafter IMMIGRANTS OUT!] (quoting Emma Lazarus, *The New Colossus*). See T. Alexander Aleinikoff, *The Tightening Circle of Membership*, in IMMIGRANTS OUT!, *supra*, at 324.

3. Significantly, in 1790 Congress limited naturalization to “white person[s].” Act of Mar. 26, 1790, ch. 3, §1, 1 Stat. 103 (repealed 1795). See also THOMAS BAILEY ALDRICH, THE POEMS OF THOMAS BAILEY ALDRICH 71-72 (1907), *excerpted in* IMMIGRANTS OUT!, *supra* note 2, at 50-51 (“These bringing with them unknown gods and rites, / . . . / In street and alley what strange tongues are loud, / Accents of menace alien to our air . . .”); Feagin, *supra* note 2, at 21.

Races can not be cross-bred without mongrelization, any more than breeds of dogs can be cross-bred without mongrelization. The American nation was founded and developed by the Nordic race, but if a few more million members of the Alpine, Mediterranean, and Semitic races are poured among us, the result must inevitably be a hybrid race of people as worthless and futile as the good-for-nothing mongrels of Central America and southeastern Europe.

*Id.* (quoting journalist Kenneth L. Roberts). See generally Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, in CRITICAL RACE THEORY 322 (Richard Delgado ed., 1995); Ian Haney-Lopez, *White By Law*, in CRITICAL RACE THEORY, *supra*, at 542.

the welfare<sup>4</sup> and immigration<sup>5</sup> reform legislation enacted in 1996. This new "reform" legislation severely restricts social benefits to noncitizens, legally and illegally present alike. The laws evidence a resurgence and revitalization of anti-immigrant sentiments. These sentiments are rooted in a history of fear and distrust of "others," who are deemed to be different, and of "freeloaders," who simply want to benefit from our generosity and deplete our rich resources. These measures are the culmination of over a decade of a progressively and increasingly unkind, ungenerous, and corrosive isolationist mentality wholly at odds with the vision of an utopic America—a land of opportunity for *all*, a nation that extends an open-arms welcome to immigrants from every corner of the world.<sup>6</sup> This evolution in public perception, and its consequent transmogrification of immigrants from valuable contributors to society into uninvited interlopers, from welcome future citizens to undesirable outsiders, from hard-working peoples to criminally prone leeches, is plainly reflected in nativistic state measures such as California's now infamous Proposition 187.<sup>7</sup> New federal measures, created not only to impede illegal immigration but also to regulate immigrants and restrict benefits to which immigrants are entitled, achieve a new, unprecedented level of extremism in immigrant regulation by denying even those legally present within the United States basic health and education benefits. Such draconian measures have inspired immigrant advocates to evaluate the bases upon which anti-immigrant legislative enactments may be challenged, invalidated, and changed before the country feels the repercussions of these so-called reforms.

Given existing precedent supporting denial of the extension of domestic constitutional rights to noncitizens,<sup>8</sup> constitutionally based chal-

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4. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996). Although the welfare legislation also reaches citizens, curtailing their right to receive welfare payments, this writing will focus only on the effects of the legislation on noncitizens.

5. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (This reform act was part of the 1997 Omnibus Consolidated Appropriations Act.).

6. See Berta Esperanza Hernández-Truyol, *Reconciling Rights in Collision: An International Human Rights Strategy* [hereinafter Hernández, *Reconciling Rights in Collision*], in IMMIGRANTS OUT!, *supra* note 2, at 254, 254-55; Berta Esperanza Hernández-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 23 *FORDHAM URB. L.J.* 1075-1087-94 (1996) [hereinafter Hernández, *Natives, Newcomers and Nativism*].

7. 1994 Cal. Legis. Serv. Prop. 187 (West). See generally Hernández, *Reconciling Rights in Collision*, *supra* note 6 (arguing that Proposition 187 violates international human rights law); Hernández, *Natives, Newcomers and Nativism*, *supra* note 6 (discussing Proposition 187 as another example of America's nativistic tradition).

8. Noncitizen immigrants do not enjoy all the protections afforded to citizens, such as those contained in the United States and state citizenship clauses. See, e.g., U.S. CONST. amend. XIV, § 1

lenges might prove unsuccessful. Significantly, however, United States law, including the Constitution's grant of domestic rights, is not the only legal recourse pursuant to which protection from such nativistic legislative efforts may be sought. International human rights law guarantees everyone—citizens and noncitizens alike—certain basic and fundamental rights. As international law is part of U.S. law,<sup>9</sup> it provides additional bases upon which to couch challenges against these recent welfare and immigration reforms. This Article analyzes possible international human rights violations effected by the new legislation and considers the most effective means of enforcing and addressing such violations.

Part II of this work shows that, contrary to the perceived welcomeness narrative, this country's immigration laws and policies historically have been racially and ethnically exclusionary. Part III presents the existing international legal norms that provide recourse against a State's intrusion into protected rights of individuals. Part IV specifically enumerates and analyzes the potential international human rights violations effected by the so-called immigration and welfare reforms. After exposing the myriad rights trammled by the nativistic legislation, in Part V this Article reviews the enforcement mechanisms available, both in domestic courts and in international fora, to rule the reforms invalid and thus secure respect for such rights.

The Article concludes that, in light of the recent legislation's violation of the spirit, if not the letter, of well-settled international human rights and humanitarian norms, U.S. courts and international fora alike have am-

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("No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States . . ."); U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). Neither a foreigner nor even a naturalized citizen can serve in the office of president or vice president. *See* U.S. CONST. art. II, § 1, cl. 5 ("No person except a natural born Citizen or a Citizen, of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . ."); U.S. CONST. amend. XII ("[N]o person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."). Also, noncitizens cannot be members of either house of Congress. *See* U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States . . ."); U.S. CONST. art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States . . ."). Noncitizens are precluded from service on grand and petit juries, *see* 28 U.S.C. § 1861 (1994), from commissioned appointments to the armed services, *see* 10 U.S.C. § 532 (1994), or the merchant marine, *see* 46 U.S.C. § 8103 (1994), from obtaining a communications license, *see* 47 U.S.C. § 310 (1994), and from service as national bank director, *see* 12 U.S.C. § 72 (1994).

9. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ."); *The Paquete Habana*, 175 U.S. 677 (1900) (holding that customary international law is part of U.S. domestic law).

ple bases upon which to invalidate the nativistic regulations. These bodies should embrace the formidable task presented by human rights-based challenges to the legislation and, in the wake of the twentieth century, take the first necessary and brave steps to develop, expand, and transform the content, meaning, and reach of human rights norms.

A reformulation and reconstruction of international standards requires a reconsideration of outdated notions of unfettered State sovereignty. State sovereignty—the notion that a State has ultimate, limitless power to dictate norms within its territorial borders and with respect to all persons within its jurisdiction—is the very foundation of, and controlling pretext for, the State's right to exclude persons from entering its borders. Thus sovereignty has become the very shield behind which the United States historically has justified laws that effect the exclusion of persons from its shores. This conceptualization of sovereignty as unfettered State power presently justifies enactment of laws, such as the last round of immigration and welfare reforms that exclude some from benefits attendant to membership in "American" society. A refashioning of notions of State sovereignty as subordinate to international human rights norms will facilitate the use of existing domestic and international laws, policies, and enforcement mechanisms to seek redress against human rights violations and provide effective relief to individuals whose rights have been violated.

## II. IMMIGRATION IN THE UNITED STATES

The United States has a well-known, highly respected, and in some regards, properly earned reputation as a haven for immigrants from around the world who seek to escape religious or political persecution, or who simply want to make a better life for themselves and their families in the land of opportunity.<sup>10</sup>

In stark contrast to this fabled reputation of welcomeness, an analysis of U.S. legal history also chronicles a pattern of anti-immigrant sentiments and a practice of selective exclusion. Today in particular, with the proliferation of nativistic legislation, the torch of the Statue of Liberty is no longer a welcoming beacon. Rather, the torch has become a spotlight to identify undesirable intruders on our settled shores. It acts as a floodlight to safeguard our national borders against those who the State wishes to keep out.

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10. See ELIZABETH BOGEN, *IMMIGRATION IN NEW YORK* 17 (1990) (discussing contributions of immigrants to the United States).

Contrary to the alleged and acclaimed open invitation for all to become members of this country's melting pot, the United States, even from its early days, has excluded many from the privilege of entering this nation's borders on ill-advised grounds such as race, ethnicity, and national origin. Three examples expose the nation's basic concerns about, mistrust of, and exclusionary attitude towards "others" and "freeloaders" penetrating our borders. In 1882, in an attempt to stave off the arrival of those perceived as economically parasitic, the United States implemented an exclusion of "any person unable to take care of himself or herself without becoming a public charge . . . ."<sup>11</sup> This provision clearly reveals the unfounded fear, sometimes rising to the level of paranoia, that "outsiders"<sup>12</sup> will come to this country to exploit it, to take away its wealth,<sup>13</sup> and to drain national resources simply because of an inability to take care of themselves.<sup>14</sup>

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11. Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214, 214. This concept of self-sufficiency is central to the new "reform" legislation. Section 400 of the recent welfare reform, entitled "Statements of National Policy Concerning Welfare and Immigration," reflects this approach. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2260 (1996). It provides the following:

The Congress makes the following statements concerning national policy with respect to welfare and immigration;

(1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigrations statutes.

(2) It continues to be the immigration policy of the United States that—

(A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and

(B) the availability of public benefits not constitute an incentive for immigration to the United States.

(3) Despite the principle of self-sufficiency, aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates.

(4) Current eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable of assuring that individual aliens not burden the public benefits system.

(5) It is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy.

(6) It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.

*Id.* See also 1994 Cal. Legis. Serv. Prop. 187, §1 (West) ("[The People of California find and declare] [t]hat they have suffered and are suffering economic hardship caused by the presence of illegal aliens in this state.").

12. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323-26 (1989) (using the term "outsider" to refer to persons of color).

13. *But see* JULIAN L. SIMON, IMMIGRATION: THE DEMOGRAPHIC AND ECONOMIC FACTS 19-24 (1995) (concluding that immigrants do not increase native unemployment).

14. See *Full Committee Markup: Immigration Overhaul: Hearings Before the House Judiciary Comm.*, 104th Cong. (1995), available in LEXIS, Legis Library, Cngtst File (testimony of Lamar Smith, Texas congressman) ("They [your next-door neighbor, your constituent down the street] are the ones who will bear the brunt if we don't fix a broken immigration system. . . . They [people surveyed



The enactment of the Chinese Exclusion Act<sup>15</sup> constitutes another early manifestation of the nativism and fear of others that imbues our immigration history. After the United States encouraged Chinese workers to come to this country to build the railroad system, the Chinese Exclusion Act imposed restrictions on Chinese immigration and required registration of all Chinese workers.<sup>16</sup> In validating the legislative desire to exclude the now-unwanted Chinese from crossing into our borders, the Supreme Court even upheld the right of Congress to exclude a foreigner who not only had been admitted but who also had been promised that he would enjoy the right to return.<sup>17</sup> This example clearly reflects a xenophobic, racist attitude making up the backbone of U.S. immigration history.<sup>18</sup>

Finally, the Johnson-Reed Act of 1924<sup>19</sup> is another prime example of nativistic animus codified as national law. This law, which established a national origins quota, is undeniably and patently racist in its goal of maintaining the white population's statistical dominance in the United States. The goal of retaining the racial and ethnic status quo was achieved by allotting immigrant visas to national groups based on their preexisting presence in the United States.<sup>20</sup>

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in polls] know they face job displacement and depressed wages because of increased competition from new arrivals, illegal and legal."); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1519-28 (1995) [hereinafter Johnson, *Public Benefits and Immigration*] (describing the history of fear in the United States of immigrants' access to public benefits). To be sure, the fear that immigrants constitute a drain on resources appears to be misplaced as recent literature supports the contrary notion that immigrants contribute more to the economy than they take in the form of benefits. See Hernández, *Reconciling Rights in Collision*, *supra* note 6, at 264; American Immigration Lawyers Association, Fact Sheets: Four Common Myths About Legal Immigrants, at 2 (visited Jan. 5, 1998) <<http://alia.org/fact.htm#myths>>.

15. Act of May 6, 1882, ch. 126, 22 Stat. 58.

16. See *id.* at 59.

17. See *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (known as the Chinese Exclusion Case).

18. See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 859 (1987) ("The Chinese Exclusion doctrine and its extensions have permitted, and perhaps encouraged, paranoia, xenophobia, and racism, particularly during periods of international tension."). Certainly, the recent reform legislation is a thinly veiled targeting of Mexicans and other Latinos for exclusion. See generally Hernández, *Reconciling Rights in Collision*, *supra* note 6 (demonstrating the racist intent behind and nature of Proposition 187); Hernández, *Natives, Newcomers and Nativism*, *supra* note 6 (examining America's history of discrimination against immigrants, with a focus on racist immigration policies); Johnson, *Public Benefits and Immigration*, *supra* note 14 (tracing the historical influence of race in the formulation of U.S. immigration policy).

19. Act of May 26, 1924, ch. 190, 43 Stat. 153 (also known as the Permanent National Origins Quota Act).

20. See BOGEN, *supra* note 10, at 18-19 (noting that Great Britain received 42% of the visas; Ireland, Germany, and Scandinavia combined received 30%; the southern and eastern European

These three examples expose the true restrictive nature of U.S. immigration laws and policies, and serve to focus attention on historical pretexts propelling the United States to exclude outsiders from its shores. These restrictions, however, by no means represent the full extent to which systematic regulations have been implemented to proscribe immigration. This country has restricted, limited, or prohibited immigration by prostitutes, criminals, persons with physical or mental disorders, individuals considered immoral, people with contagious diseases, or anyone whose entry would result in exceeding any established national quotas.<sup>21</sup> In addition to these official limitations on immigrants, animus and hatred directed towards foreigners, often motivated by prejudice and racism, have made being an immigrant very difficult throughout history.<sup>22</sup>

This brief overview of American immigration laws' historic restrictions tells of policies and concerns that even today steer national immigration policy. Public resentment against immigrants has reached a new level

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countries received 15%; and there was a near outright ban on almost all Asians); DAN LACEY, *THE ESSENTIAL IMMIGRANT* 73 (1990) (noting that Adolf Hitler wrote admiringly of the U.S. use of immigration restrictions to guide the gene pool). The national quota system was eventually abolished. See Hart-Cellar Act of 1965, Pub. L. No. 89-236, §202, 79 Stat. 911, 911-12 (amending the Immigration and Nationality Act, 8 U.S.C. § 1151 (1994)). The current diversity program still allows more immigrants from predominantly white countries in Europe (24,549), than immigrants from "minority" nations in Africa (20,200), Asia (6,837), or Latin America (2,589), thus reinforcing this notion of discrimination. See IMMIGRATION: PROCESS AND POLICY 130-31 (Thomas Alexander Aleinikoff, David A. Martin & Hiroshi Motomura eds., 3d ed. 1995). Additionally, people from the Dominican Republic, El Salvador, Jamaica, and Mexico are disqualified from entering under the diversity program. See *id.* at 130.

21. See, e.g., Immigration and Nationality Act § 1182 (excluding the mentally retarded and insane, sexual deviants, drug addicts and alcoholics, those affected by certain diseases and disabilities, paupers, beggars and vagrants, illiterates, anarchists, Communists, criminals, polygamists, and those coming to engage in "any immoral sexual act" or likely to become public charges); RICHARD PLENDER, *INTERNATIONAL MIGRATION LAW* 68, 74, 83 (revised 2d ed. 1988) (tracing the history of permanent immigration controls).

22. See Hernández, *Natives, Newcomers and Nativism*, *supra* note 6, at 1088-92. Those who have felt the brunt of these antiforeign sentiments include the following: Italians, Irish, Jews, Germans, and Japanese. See, e.g., PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* 10 (1995) ("[T]he American nation has always had a specific ethnic core. And that core has been white."); JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925*, at 87-96 (2d ed. 1988); Hernández, *Natives, Newcomers and Nativism*, *supra* note 6, at 1090 ("Certainly, there have always been and continue to be ethnic, religious, cultural and economic aspects of nationalistic and nativist ideology and anti-foreigner/anti-immigrant mentality."); Theo Lippman, Jr., Editorial, *BALT. SUN*, Dec. 11, 1991, at 14A (quoting Patrick Buchanan as saying, "If we had to take a million immigrants in, say Zulus, next year, or Englishmen, and put them in Virginia, what group would be easier to assimilate and would cause less problems?"). It is noteworthy that Brimelow's remark, *supra*, wholly disregards certain historical realities such as the fact of the earlier presence of American Indians in what is presently the United States as well as the fact that much of the territory that presently constitutes the Southwestern United States was originally part of Mexico.

of extremism, despite the significant fact that the total number of immigrants now entering the United States is less than the number at the turn of the century, when the United States population was half its current size.<sup>23</sup> Congress, under the guise of safeguarding the country's wealth, preserving jobs for real "Americans," and keeping out undeserving, dangerous others who do not look, sound, or act like "us," not only has reinforced but also has validated such prevalent nativistic feelings through its enactment of recent legislation on immigration and welfare.<sup>24</sup>

Recent federal legislation aimed at reforming both the welfare system and immigration guidelines<sup>25</sup> embodies current public resentment against immigrants. This backlash has gone far beyond so-called "illegal immigrants" and has ramifications not only for immigrants who have legally entered, legally remained, and legally reside in this country, but even for citizens who, because of their race or ethnicity, are perceived as being foreign, that is, not real Americans.<sup>26</sup> Indeed, the new welfare and immigration reform targets (although in different ways) all classes of immi-

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23. See SIMON, *supra* note 13, at 3.

24. See Chang, *supra* note 3, at 325-26 (noting that those who do not look like the normative "us," even U.S. citizens, suffer repercussions from nativism). See also Sheilagh Mylott & Catherine M. Pino, *Occupational Segregation and Demographic Determinants of Labor Force Participation Among Puerto Rican Women in New York City* (report presented to Puerto Rican Legal Defense and Education Fund), Apr. 29, 1993, at 45 (on file with author) (presenting the case of a Puerto Rican woman rejected from employment because she could not produce a green card despite the U.S. citizenship rights granted to Puerto Ricans).

25. But see THE TOMÁS RIVERA CENTER, WHY THEY COUNT: IMMIGRANT CONTRIBUTIONS TO THE GOLDEN STATE 11 (Justin Rood ed., 1996) [hereinafter WHY THEY COUNT] ("[I]mmigrants are no more likely than natives to utilize the state's welfare programs."); Berta Esperanza Hernández-Truyol, *Las Olvidadas I—Gendered in Justice/Gendered Injustice: Latinas, Fronteras, and the Law*, 1 J. GENDER, RACE & JUST. (forthcoming 1997) [hereinafter Hernández, *Las Olvidadas*] (noting that some even question seeking benefits to which they are entitled for fear of deportation).

26. See Mylott & Pino, *supra* note 24, at 44-45 (recounting an incident where a Puerto Rican man, a U.S. citizen by birth, was denied employment for lack of a green card); Jim Walsh, *Chandler Roundup Spurs Suit, Will Seek \$35 Million From Police*, ARIZ. REPUBLIC, Aug. 18, 1997, at A1 (discussing a five-day police roundup of "illegal immigrants," in which the police demanded that Hispanics, including legal residents and even native-born citizens, prove their citizenship simply because they looked Mexican). See generally Chang, *supra* note 3 (explaining that foreign-looking citizens suffer repercussions of nativistic immigration initiatives). Recently, aggressive border patrol policies led to the death of Ezequiel Hernández, an American teenager, while he was herding his goats in a sleepy border town. The youth was shot and killed by U.S. Marines on border patrol near Redford, Texas. See *The Mexican Border: Shots in the Wilderness*, ECONOMIST, Aug. 23, 1997, at 20 (reporting on the ongoing federal and military investigations into the incident following a grand jury's decision exonerating the Marine involved). See also Elvia Arriola, *Latcrit Theory, International Human Rights, Popular Culture, and the Faces of Despair in INS Raids*, 28 U. MIAMI INTER-AM. L. REV. 245 (1996-97) (discussing the roundup of citizens during INS raids because they look Mexican).

grants—so-called “illegal aliens”<sup>27</sup> (undocumented foreign nationals) as well as “legal aliens”<sup>28</sup> (documented foreign nationals).

While the legislation targets both documented and undocumented immigrants, in apparent recognition of differential levels of entitlement to public services based on status, the legislation’s effect is much more severe with respect to the undocumented. While mounting pressure from immigrant groups<sup>29</sup> and local government officials<sup>30</sup> successfully moved the 105th Congress to restore partial benefits to documented immigrants, the plight of undocumented immigrants remained unaffected. The provisions of the recent legislation are not the first to differentiate between these two classes, however. Even prior to the 1996 congressional enactments, undocumented persons were not entitled to certain public benefits,

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27. See Johnson, *Public Benefits and Immigration*, supra note 14, at 1545 (suggesting that the term “illegal alien” simply replaced the term “wetback” and is meant to refer to Mexicans); Hernández, *Reconciling Rights in Collision*, supra note 6, at 255 (“The choice of labeling certain immigrants as ‘illegal’ and ‘alien’ itself facially exposes the animus against the persons at whom it is aimed[;] the persons themselves are neither illegal as there is no such thing as an illegal person (although their presence within the U.S. borders may well be) nor extraterrestrial.”). See also Kevin R. Johnson, ‘Aliens’ and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263 (1996-97) (analyzing the use of the term “alien” in immigration law to refer to noncitizens, particularly those of color, and analyzing how terminology serves to legitimate the denial of rights and benefits); Peter L. Reich, *Jurisprudential Tradition and Undocumented Alien Entitlements*, 6 GEO. IMMIGR. L.J. 1, 1 n.1 (1992) (defining an “unauthorized alien” as a “foreign national who entered the United States without authorization, or whose temporary visa has expired”).

28. “Legal aliens” can be subdivided into nonresident foreign nationals who possess temporary visas and permanent resident foreign nationals who live in the United States under the auspices of the Immigration and Nationality Act. See Janet M. Calvo, *Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs*, 16 N.Y.U. REV. L. & SOC. CHANGE 395, 397 (1987-88). In addition to these two main classes of legally present foreign nationals there are also foreign nationals residing in the United States, including foreign nationals with long residency, foreign nationals fleeing persecution, foreign nationals admitted for humanitarian reasons, foreign nationals with relatives in the United States, and foreign nationals with special employment. See *id.* at 398-401. See also Reich, supra note 27, at 1 n.1 (describing a “permanent resident alien” as a “foreign national who intends to live permanently in the United States, and eventually to apply for citizenship”).

29. See, e.g., Rollie Lal, *New Nationalism in U.S. Fans Antiforeigner Flames*, DAILY YOMIURI, Oct. 4, 1995, at 5 (describing a news conference held jointly by Asian, Latino, and Jewish groups and calling the welfare reform act “meanspirited legislation”); Robert Pear, *Senate Takes A First Step to Restoring Aid for Aliens*, N.Y. TIMES, Apr. 15, 1997, at A17 (noting that a rally organized by Russian and Ukrainian groups calling for restoration of benefits to documented immigrants was unusual because these groups do not normally lobby on welfare law).

30. See Ted Rohrlich, *L.A. Officials Join Protest of Cuts in Immigrants’ Aid*, L.A. TIMES, June 11, 1997, at B3 (noting that Los Angeles officials made up the largest contingent at the two-day conference on immigration at Ellis Island); *Inside Politics: Mayors Gather for Immigration Conference* (CNN television broadcast, Jun. 10, 1997) (interview by Judy Woodruff with Mayor Rudy Giuliani of New York City). Mayor Giuliani commented that pressure from mayors around the country helped convince Congress to restore benefits to documented immigrants. See *id.*

such as Aid to Families With Dependent Children ("AFDC"),<sup>31</sup> food stamps,<sup>32</sup> or Medicaid.<sup>33</sup> The denial of certain benefits to undocumented persons underscores the extent of their perceived subordinated membership in U.S. society. In fact, undocumented foreigners were only eligible for limited emergency medical care.<sup>34</sup> Consequently, the brunt of the new legislative provisions against undocumented immigrants does not wholly consist of the removal of public benefits, although it does include and even expands the removal of such benefits. Instead, in an effort to keep undocumented immigrants from entering the country and to make it easier to remove such persons from the country,<sup>35</sup> the legislation also focuses on increasing enforcement and restricting and constricting procedural legal rights concerning entry and removal—the latter being an action of questionable constitutional validity.<sup>36</sup>

In keeping with this checkered exclusionary immigration policy, on September 30, 1996, President Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,<sup>37</sup> the touted thrust of which is to impede undocumented immigration. The legislation, allegedly aimed at curbing illegal immigration and its nefarious consequences, increases border patrols to make entering the country more difficult, espe-

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31. 42 U.S.C. § 606(b) (1994). In general, AFDC consists of cash payments to deprived and dependent children who lack parental support for reasons of death, absence, disability, or unemployment of one or both parents. See Brendan Maturen, *The U.S. and Them: Cutting Federal Benefits to Legal Immigrants*, 48 WASH. U. J. URB. & CONTEMP. L. 319, 323-25 (1995). AFDC is what most people recognize as "welfare." *Id.* at 323.

32. Food stamps were created by the Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (codified as amended at 7 U.S.C. §§ 2011-30 (1994)). Significant amendments were made to the Food Stamp Act in 1971 and 1977. See Pub. L. No. 91-671, 84 Stat. 2048 (1971); Pub. L. No. 95-113, 91 Stat. 958 (1977). Food stamps allow households to supplement and increase their food purchasing power. Eligibility for food stamps is based on family size and income. See Maturen, *supra* note 31, at 325-26.

33. Medicaid provides medical care for those eligible for AFDC or Social Security income. Payments for medical services are made directly to the health care provider. See Maturen, *supra* note 31, at 326-27. Additional persons are entitled to Medicaid under state requirements. See Sana Loue, *Access to Health Care and the Undocumented Alien*, 13 J. LEGAL MED. 271, 288 (1992).

34. See Reich, *supra* note 27, at 1; Maturen, *supra*, note 31, at 330 n.74 (noting that illegal "aliens," under federal law, were able to obtain only emergency medical services, some limited food assistance for school lunches and breakfasts, and nutritional supplements for pregnant women).

35. See Illegal Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 101-371, 110 Stat 3009-546, 553-645 (improving border control, enhancing enforcement, detention, adjudication, and removal procedures, and enforcing restrictions on employment).

36. See Letter from Janet Reno, attorney general of the United States, to Newt Gingrich, speaker of the House of Representatives (1997) (undated version on file with author) [hereinafter Reno Letter] (informing Speaker Gingrich of intent to review the recent decision of the Board of Immigration Appeals in *In re N-J-B, I & N* Dec. No. 3309 (Feb. 20, 1997) (interim decision) (concerning suspension of deportation proceedings under the new law).

37. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

cially from countries south of the border.<sup>38</sup> Moreover under the new norms, upon reaching the country's gate, persons seeking refuge will face tougher new standards to establish the requisite "persecution" to be eligible for asylum status.<sup>39</sup>

Attorney General Janet Reno's recent action of vacating and taking under review a Board of Immigration Appeals decision concerning the appropriate procedures for suspension of deportation, noting that she wants "[t]o ensure fair treatment of transitional cases under the new immigration law," reflects the difficult nature and questionable procedural validity of the law.<sup>40</sup> In her letter to Newt Gingrich, speaker of the House of Repre-

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38. See *id.* §§ 101-125. Significantly, such illegal entry only accounts for approximately half of the illegal presence in this country. The other half is attributable to legal entrants who illegally overstay their visas and whose sole requirement for legal entry is the purchase of a round-trip ticket. See Johnson, *Public Benefits and Immigration*, *supra* note 14, at 1546. It is intriguing that the so-called reform overlooked enhancing enforcement efforts to remedy these violators from visa waiver states such as Italy and Ireland to the same degree as Southern border restrictions. See Hernández, *Reconciling Rights in Collision*, *supra* note 6, at 265-66; *infra* notes 106-10 and accompanying text.

39. See Illegal Immigration Reform and Immigrant Responsibility Act § 235(b)(1)(B)(v) ("'[C]redible fear of persecution' means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility . . .").

40. Reno Letter, *supra* note 36.

This decision prevented many aliens who were in immigration proceeding before April 1, 1997, from having their applications for suspension of deportation considered. It interpreted a provision of the new law as requiring these existing cases to meet one of the tighter standards for relief from deportation which requires a suspension applicant to have accumulated a requisite amount of time in the U.S. by the time they are served with a charging document (the "stop-time" rule). Though the new law clearly makes this stop-time rule applicable to cases filed after April 1, I believe that the legal question of its application to pre-April 1 cases deserves my careful review. If the decision is reversed, many who were in proceedings as of April 1 will simply be afforded the opportunity to apply for suspension, but reversal will not require that any affected cases be granted. While the case is under review, I will take immediate steps to protect against deportation persons who might have been able to claim suspension but for the N-J-B decision.

*Id.*

Additionally, Attorney General Reno outlined two proposals which have since been forwarded to Congress by the Administration. *Id.* The first proposal attempts to afford "those whose cases were already in the pipeline the opportunity to seek suspension [of deportation] under the standards that applied before the 1996 immigration reform law took effect . . ." *Id.* See also Presidential Notice to Congress on Immigration Reform Transition Act, Jul. 26, 1997, available in 1997 WL 416163, at \*1. The second proposal directly addresses "the special circumstance of the persons covered by the Bush Administration's settlement of the ABC litigation in 1991 and the Reagan Administration's Nicaraguan Review Program" by applying the pre-April 1 standards in such cases. Reno Letter, *supra* note 36. See also Presidential Notice to Congress on Immigration Reform Transition Act, Jul. 26, 1997, available in 1997 WL 416163, at \*1. Both proposals have been included in the Immigration Reform Transition Act of 1997, which the Clinton Administration submitted to Congress for consideration on July 24, 1997. See 143 CONG. REC. D818-01 (1997) (referring the Presidential Message, including proposed Immigration Reform Transition Act of 1997, to the House Committee on the Judiciary); 143 CONG. REC. D813-02 (1997) (referring proposed reform legislation to the Senate Committee on the Judiciary).

sentatives, Attorney General Reno expressed her concerns regarding Nicaraguans and other immigrants who might be adversely affected by the new immigration law, despite living in the United States for many years: "In particular, I am concerned about ensuring a fair transition to the new tighter rules applicable to the relief from deportation formerly known as suspension of deportation."<sup>41</sup>

As if the formidable barriers erected by the Immigration Reform Act were not sufficient to discourage undocumented immigration,<sup>42</sup> the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,<sup>43</sup> signed by President Clinton on August 22, 1996, compounds these deterrents by eliminating access of both undocumented and documented immigrants to public financial supports.<sup>44</sup> By effecting such restrictions, the goal of this legislation is not new, but rather a replay of the historically recurrent theme of safeguarding national resources from alien freeloaders and preserving them for *real*, deserving members of "American" society.<sup>45</sup> The measures taken under such protectionist guise are draconian. Included

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41. Reno Letter, *supra* note 36.

42. Some criticize these reforms as ineffectual in curbing illegal immigration. These reforms, while imposing punishment and tougher barriers to illegal immigration, do not touch the main incentive that brings undocumented immigrants to this country, namely employment. See Johnson, *Public Benefits and Immigration*, *supra* note 14, at 1513 (suggesting that illegal aliens enter the United States in order to seek employment and be with family members, not for public benefits); *New Law Raises Stakes on Illegal Employment*, 2 IMMIGR. ADVISOR (Nov. 1996), available in LEXIS, News Library, Curmws File (suggesting that employers will have to deal with employment eligibility verification). Illegal immigration will continue despite this reform legislation. See *Non-Yankees Go Home*, NEWSDAY, Oct. 2, 1996, at A36 ("As long as the jobs remain open the illegal pipeline will keep flowing.").

43. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

44. Federal public benefits lost include "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States." Personal Responsibility and Work Opportunity Reconciliation Act § 401(c)(1)(B).

45. The severity of these reforms was not tempered by the fact that many documented and undocumented immigrants, who would be punished by these reforms, have contributed significantly to this nation. Arguably, undocumented immigrants pay more in taxes than they receive in social services. See Reich, *supra* note 27, at 2, 4 (describing three major studies showing that illegal aliens contribute more than they receive); WHY THEY COUNT, *supra* note 25, at 11 ("[N]oncitizens . . . are no more likely to participate in means-tested social safety net programs than citizens." (emphasis omitted)). But see Cynthia Webb Brooks, *Health Care Reform, Immigration Laws, and Federally Mandated Medical Services: Impact of Illegal Immigration*, 17 HOUS. J. INT'L L. 141, 149 (1994) (claiming that illegal aliens will cost the country \$45 billion during the next decade even when counting their tax contributions). Historically, immigrants have contributed to the very creation of this nation through their hard work. See Hernández, *Natives, Newcomers and Nativism*, *supra* note 6, at 1095. To be sure, the welfare reforms even take aim at those historically viewed as the most deserving recipients of public financial supports: citizens. However, a review of those measures is beyond the purview of this work.

among the resources to which undocumented foreigners no longer have access are the following: medical assistance, including family planning services and immunizations; school lunch programs and other supplemental food programs; housing assistance; education assistance; job training; and unemployment benefits.<sup>46</sup>

Additionally, this legislation represents the first attempt by the federal government to restrict severely the access to public benefits<sup>47</sup> by *documented* immigrants who, under the auspices of this legislation, lost critical public benefits such as AFDC, food stamps, Medicaid, and Social Security.<sup>48</sup> To be sure, some enumerated exceptions exist to protect the entitlement to certain benefits for those outsiders who have shown they are more worthy of being considered true members of the U.S. community.<sup>49</sup> This federal legislation also transfers some decisionmaking authority regarding the allocation of public support to the states, thereby giving states the option to cut such undocumented immigrants from even Medicaid and welfare support.<sup>50</sup> Originally, this legislation went so far as to call for the

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46. See Personal Responsibility and Work Opportunity Reconciliation Act §§ 401-451.

47. See *id.*; Statement on Signing the Personal Responsibility and Work Opportunity Act of 1996, 32 WEEKLY COMP. PRES. DOC. 1487 (Aug. 22, 1996) ("I am deeply disappointed that this legislation would deny Federal assistance to legal immigrants and their children, and give States the option of doing the same."). In California alone, 258,000 noncitizen legal immigrants will lose Supplemental Security Income ("SSI") benefits. See Nancy Weaver Teichert, *Fear, Uncertainty as Immigrants Face Cuts*, SACRAMENTO BEE, Sept. 30, 1996, at A1.

48. See Personal Responsibility and Work Opportunity Reconciliation Act § 402 (making "qualified aliens" ineligible for SSI, Medicaid, food stamps, and social services block grant benefits); 42 U.S.C. §§ 601-687 (1994) (AFDC); 7 U.S.C. §§ 2011-2030 (1994) (food stamp program); 42 U.S.C. §§ 1396-1396u (1994) (Medicaid); Calvo, *supra* note 28, at 407-21 (describing eligibility of aliens for various federal assistance programs depending upon alien status); Maturen, *supra* note 31, at 328-30 ("Except for deeming restrictions and the limitations in specific benefit programs, aliens admitted for permanent residence, admitted as refugees, or granted asylum can usually obtain federal benefits."). See also Personal Responsibility and Work Opportunity Reconciliation Act § 423 (distinguishing between qualified aliens already present in the United States and those who enter after the enactment of the law, and making the latter ineligible for federal public benefits for five years from date of entry).

49. See Personal Responsibility and Work Opportunity Reconciliation Act § 402(a)(2), (b)(2), (c)(i), (c)(ii) (including exceptions for permanent resident aliens who are honorably discharged veterans or on active military duty). But see George Rodrigue, *Legal Immigrants' Fear of Losing Aid Grows as Deadline Close In* [sic]; *Some in GOP Rethink Cutting Benefits to Elderly, Disabled*, DALLAS MORNING NEWS, Apr. 23, 1997, at 1A (recounting the story of Chue Tue Vang, a 91-year-old veteran of the CIA's Special Guerrilla Unit in Laos, who committed suicide after receiving notice that his disability checks would end due to a new five-year limit on such benefits for documented immigrants).

50. See Personal Responsibility and Work Opportunity Reconciliation Act § 412 ("[A] State is authorized to determine the eligibility for any State public benefits of an alien . . .").



deportation of documented legal immigrants who used benefits for more than twelve months.<sup>51</sup>

Reaction to the reform act's revocation of public benefits for documented immigrants came quickly. Protests from government officials and immigrant groups called the measures "un-American"<sup>52</sup> and "a death sentence" for elderly documented immigrants.<sup>53</sup> The grave concerns expressed about the potential were not hyperbolic. As elderly immigrants received cut-off notices from the Social Security Administration, desperation drove some to suicide.<sup>54</sup> In response to the tragic events and mean-spiritedness of the law, state and local governments, many of which would suffer financially as documented immigrants without public benefits became homeless and destitute, brought legal actions to enjoin enforcement of some of the federal measures.<sup>55</sup>

Finally, the 105th Congress, under immense political pressure, reconsidered the revocation of certain public support, such as Social Security benefits to elderly and disabled documented immigrants.<sup>56</sup> As a result, Congress agreed to restore Social Security benefits to elderly and disabled documented immigrants residing in this country and receiving benefits be-

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51. See *Punishing Legal Immigrants*, WASH. POST, Sept. 27, 1996, at A24.

52. Robert Pear, *Senate Takes a First Step to Restoring Aid for Aliens*, N.Y. TIMES, Apr. 15, 1997, at A17 (quoting Representative Jerrold Nadler who called the reform act "un-American and disgusting, cruel, mean-spirited, unjust").

53. *Id.* (quoting Sabina Pello who described benefits cut-off notices as "a death sentence for many people in their 80's and 90's.").

54. See Dana Milbank, *Suicide Shows Why Welfare Fight Persists*, WALL ST. J., Apr. 22, 1997, at A2 (telling the story of Ignacio Muñoz, a 76-year-old documented immigrant who committed suicide after receiving a notice that his benefits might end under the new law); Rodrigue, *supra* note 49, at 1A (reporting on suicides committed by elderly documented immigrants nationwide).

55. See, e.g., James Barron, *The Mayor Is Rebuffed on Welfare*, N.Y. TIMES, July 25, 1997, at B3 (reporting on a decision of Judge Lewis A. Kaplan of the Southern District of New York, in a case brought by the City of New York, upholding the constitutionality of the provisions of the Personal Responsibility and Work Opportunity Reconciliation Act which end benefits to legal immigrants); Diane Hirth, *Florida Will Try to Save Welfare With Suit*, ORLANDO SENTINEL, April 23, 1997, at A5 (reporting on an announcement by Governor Lawton Chiles that Florida would bring suit in a state court challenging the federal law ending welfare benefits to legal immigrants).

56. See H.R. 2015, 105th Cong. § 5301 (1997); Robert Pear, *Legal Immigrants to Benefit Under New Budget Accord*, N.Y. TIMES, July 30, 1997, at A17 ("Lawmakers have felt growing political pressure to help these noncitizens."). The political pressure grew so intense that some in Congress backed away from previous support of the measures ending SSI benefits to elderly and disabled documented immigrants. See, e.g., Rodrigue, *supra* note 49, at 1A ("Rep. Clay Shaw . . . said that before the welfare overhaul bill, generous benefits threatened to make the United States 'the nursing home for the world.'"). But see Celia W. Dugger, *New Alliances and Attitudes on Aid*, N.Y. TIMES, Aug. 1, 1997, at A23 ("'You know, Republicans have a heart, too,' said Representative E. Clay Shaw Jr., a Republican from South Florida who was instrumental in cutting off Supplemental Security Income, to legal immigrants last year . . .").

fore August 22, 1996.<sup>57</sup> Taxpaying, documented immigrants,<sup>58</sup> however, remain ineligible for food stamps and, if they do not meet the strict guidelines, social security benefits.<sup>59</sup>

This new immigration and welfare reform legislation is quite popular domestically, especially in large, politically influential border states such as California and Texas—locales that disproportionately experience the undocumented's presence by way of persons simply wading across the Rio Grande.<sup>60</sup> Citizens' economic fears about employment shortages and subsidizing the costs of the housing, feeding, medical care, and education of people who are not citizens of this country, and therefore not deemed to belong in this country, propelled enthusiasm for the law. On the other hand, opposition to the legislation emerged primarily among those without a political voice: undocumented and documented immigrants without access to the ballot box and, consequently, without political power to challenge these far-reaching, nativistic measures.<sup>61</sup> However, while immigrants may not have the political power to oppose the enactment of this legislation, as the following Section details, they may have the weight of international law on their side to seek to invalidate it.

### III. HUMAN RIGHTS LAW

International law protects States' sovereign rights, including the broad right to decide whether to admit foreigners into their jurisdiction. This

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57. See H.R. 2015, 105th Cong. § 5301 (1997); Peter T. Kilborn, *In Budget Bill, President Wins Welfare Battle*, N.Y. TIMES, Aug. 1, 1997, at A1 (detailing changes to the original welfare reform concerning documented immigrants).

58. Over 85% of noncitizens living in the United States file taxes, while 87.5% of the native-born American citizens file taxes. See Representative Luis V. Gutierrez, News Conference to Urge the Restoration of Funds for Legal Immigrants in the Budget Reconciliation Bill, Address at News Conference (June 24, 1997), available in LEXIS, News Library, Poltrn File (arguing that so long as the IRS treats citizens and noncitizens the same, so too should the INS).

59. It appears clear that Congress has not yet faced the political pressure needed to extend Social Security benefits to those arriving after the August 22, 1996, deadline. See Rohrlich, *supra* note 30, at B3 (quoting Representative Clay Shaw who said legal immigrants who are disabled in the future "can go home if they don't like what we have here").

60. See *id.* (stating that a large percentage of affected immigrants reside in Texas, California, New York, and Florida).

61. See Shawn Foster, *Latino Leader Says Immigrants Are Scapegoats for U.S. Problems*, SALT LAKE TRIB., Oct. 16, 1996, at A8 ("They're trying to find someone to blame. And who do you make a scapegoat? The people who are the most vulnerable. Immigrants who cannot vote." (quoting Raul Yzaguirre, president of the National Council of La Raza based in Washington D.C.)); Bill Minutaglio & George Rodrigue, *Aid Restoration Is Relief to Immigrants*, DALLAS MORNING NEWS, May 7, 1997, at 42A ("These are people who often don't speak English; they don't vote . . . . You can just cut them off, and you don't have to deal with them." (quoting Karen Fleshman of the United Network for Immigrant and Refugee Rights)).

sovereign right to exclude foreign nationals by systematic measures, while a relatively new world concept,<sup>62</sup> is well settled in the international realm.<sup>63</sup> For example, a State may decide to admit anyone to its jurisdiction, and it has the right to decide who may enter its borders.<sup>64</sup> The U.S. Supreme Court has acknowledged, consistent with this international norm, that inherent to sovereignty is the right to exclude non-nationals from the country or to admit foreigners only pursuant to conditions the sovereign unilaterally promulgates.<sup>65</sup>

However, recent literature urges that this general right of the sovereign to exclude foreigners is not unfettered. Rather, such "right" is tempered and limited by human rights norms that regulate the way a sovereign may treat such foreigners.<sup>66</sup> Indeed, it is well settled that international human rights norms limit the way sovereigns treat individuals—not only foreigners, but also their own citizens.<sup>67</sup>

To be sure, domestic norms also dictate the parameters of the sovereign's right to exclude foreigners from enjoyment of all the rights to which its full members are entitled. For example, while the U.S. Constitution embodies rights that guarantee certain freedoms to all individuals,<sup>68</sup> it also enumerates rights that are enjoyed by citizens and not necessarily by noncitizens.<sup>69</sup> Case law reveals that there exists no explicit delineation of what constitutional rights are guaranteed to noncitizens.<sup>70</sup> Nonetheless,

62. See PLENDER, *supra* note 21, at 62.

63. See Hernández, *Natives, Newcomers and Nativism*, *supra* note 6, at 1114. One main reason for this sovereign right to exclude foreigners is to ensure self-preservation. See Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 204 (1994).

64. See MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 87 (5th ed. 1984).

65. See Motomura, *supra* note 63, at 204 (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892)).

66. See generally LOUIS HENKIN, THE RIGHTS OF MAN TODAY (1968); Hernández, *Natives, Newcomers and Nativism*, *supra* note 6, at 1115.

67. See *The Nurnberg Trial*, 6 F.R.D. 69 (1946).

68. See U.S. CONST. amend. I-X, XIII-XV. See also WORLD JUSTICE? U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS 110 (Mark Gibney ed., 1991) [hereinafter WORLD JUSTICE] (listing the rights to life, liberty, and security; freedoms of thought, religion, expression, and assembly; and freedoms from cruel and unusual punishment and slavery, as human rights in the U.S. Constitution).

69. See *Mathews v. Diaz*, 426 U.S. 67, 78 (1976) ("The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship . . ."); Hernández, *Natives, Newcomers and Nativism*, *supra* note 6, at 1101 ("[T]he provisions of the United States Constitution that pronounce the rights of persons, such as the Bill of Rights, protect citizens and non-citizens alike. However foreigners will not enjoy protections afforded only to 'citizens' . . .") (emphasis in original); *supra* note 8 and accompanying text (noting constitutional provisions focusing on "citizens").

70. See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (noncitizens are not entitled to hold certain employment); *Mathews v. Diaz*, 426 U.S. 67 (1976) (noncitizens are not entitled to Medicare

several trends with respect to a noncitizen's entitlement to rights are apparent and prevalent. First, distinctions based on citizenship status promulgated by the federal government are more likely to be upheld than similar state legislation.<sup>71</sup> Second, noncitizens are more likely to be granted procedural rights rather than substantive rights.<sup>72</sup>

These trends, unfortunately, indicate that it is highly unlikely that there will be successful recourse in U.S. courts under domestic constitutional guarantees to challenge the validity of the provisions of the welfare and immigration reform acts for two basic reasons.<sup>73</sup> First, the federal legislation automatically has presumptive validity in any constitutional review.<sup>74</sup> Second, the main thrust of the reform focuses on substantive,<sup>75</sup>

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benefits); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (noncitizens are entitled to due process in criminal proceeding); *In re Griffiths*, 413 U.S. 717 (1973) (noncitizens are entitled to admission to the bar); *Bridges v. Wixon*, 326 U.S. 135 (1945) (noncitizens are entitled to freedom of speech and press). See also Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1087-88 (1994).

71. See *Graham v. Richardson*, 403 U.S. 365, 378 (1971) ("State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government."); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) ("State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with [the] constitutionally derived federal power to regulate immigration . . ."). See also Bosniak, *supra* note 70, at 1088; Motomura, *supra* note 63, at 206-11 (describing differences in state and federal alienage classification case law).

72. All foreigners receive procedural rights. See *Mathews*, 426 U.S. at 78 ("All persons, aliens and citizens alike, are protected by the Due Process Clause . . ."). See, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (Fourth Amendment); *Wong Wing v. United States*, 163 U.S. 228 (1896) (Fifth and Sixth Amendments). However, substantive rights are more likely to be validly withheld based on an alienage classification. See *Ambach v. Norwick*, 441 U.S. 68 (1979) (allowing alien to be excluded from job as a public school teacher); *Mathews v. Diaz*, 426 U.S. 67 (1976) (denying Medicare benefits to a lawful permanent resident alien). The upholding of substantive rights is unlikely when the foreigner is deemed not to have "entered" the country. See *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986) (holding that unadmitted aliens do not have a right to parole revocation hearings under the Due Process Clause).

73. While the success of constitutional arguments is questionable, this is not to suggest that constitutional arguments should be abandoned. Such arguments are, however, beyond the purview of this Article. For a relevant discussion of constitutional theory to support the invalidation of these reforms, see Jeffrey A. Needelman, Note, *Attacking Federal Restrictions on Noncitizens' Access to Public Benefits on Constitutional Grounds: A Survey of Relevant Doctrines*, 11 GEO. IMMIGR. L.J. 349 (1997) (attacking the revocation of benefits to noncitizens under the Equal Protection Clause, Due Process Irrebuttable Presumption Doctrine, and Nondelegation Doctrine).

74. See, e.g., *Turner Broad. Sys. v. FCC*, 507 U.S. 1301, 1302 (1993) (citing the general principle that acts of Congress are presumptively constitutional); *Schweiker v. McClure*, 452 U.S. 1301, 1303 (1981) ("Given the presumption of constitutionality granted to all Acts of Congress . . .").

75. Substantive rights based on equal protection and privacy are strongly implicated by the provisions of the welfare and immigration reform.

rather than procedural,<sup>76</sup> rights. Consequently, recent welfare and immigration reforms will likely be upheld as not violative of noncitizens' substantive constitutional rights, although intrusions into procedural validity may well succeed, as Attorney General Reno's recent comments suggest.<sup>77</sup> In light of such well-settled precedent, rather than revisit the validity of claims under U.S. constitutional domestic analysis, this paper will focus on the legislation's derogation of rights accorded under international human rights law<sup>78</sup> and the possible available fora in which to challenge violations of such human rights.

While no one definition is fully adequate or sufficiently comprehensive, international human rights are generally regarded as "fundamental and inalienable rights which are essential for life as a human being."<sup>79</sup> International human rights pertain to the moral, social, and political lives

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76. Procedural deficiencies may render unconstitutional a provision governing one officer's asylum determination without the right to administrative review. See Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, § 235(b)(1)(A)(i), 110 Stat. 3009-546, 3009-579; Stanley Mailman, *Cutting Back on Hearings, Judicial Review*, N.Y. L.J., Oct. 28, 1996, at 3. However, because foreigners have yet to "enter" the United States, their claims to constitutional rights, even procedural ones, are limited. See *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (stating that the United States has the inherent power "to admit [foreigners] only in such cases and upon such conditions as [the United States] may see fit to prescribe"). See also *supra* notes 40-41 and accompanying text (discussing Attorney General Reno's concern regarding the new immigration law's procedures and noting that granting procedural safeguards should not be deemed to be a comment on the merits).

77. See Reno Letter, *supra* note 36.

78. International human rights are typically recognized as comprising two different "sets" of rights. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 256 (1996). First, there exists the traditionally accepted civil and political rights that were the initial rights widely recognized. See *id.* See also Berta Esperanza Hernández-Truyol, *Human Rights Through a Gendered Lens: Emergence, Evolution, Revolution*, in *WOMEN'S INTERNATIONAL HUMAN RIGHTS: A REFERENCE GUIDE* (Kelly Askin & Dorean Koenig eds., forthcoming 1998) [hereinafter Hernández, *Human Rights*] (describing civil and political rights as negative rights that prohibit governmental interference into an individual's conduct, such as opinion, religion, assembly, and movement). Second, a more recent and more controversial notion of international human rights has been referred to as economic, social, and cultural rights. See ANTHONY D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 262 (1995) ("[T]he so-called human rights require positive acts by others in order to be actualized."); STEINER & ALSTON, *supra*, at 256; Hernández, *Human Rights, supra* (describing economic, social, and cultural rights as those rights requiring the State to provide a level of subsistence to the general public). Some consider economic, social, and cultural rights, the so-called second generation of rights, the most important of all rights; while others feel that they do not even constitute rights at all. See STEINER & ALSTON, *supra*, at 75; Hernández, *Human Rights, supra*. Significantly, the United States has been publicly reluctant in the international community to embrace and endorse economic, social, and cultural rights. See Hernández, *Human Rights, supra*. But see President Franklin Delano Roosevelt, Annual State of the Nation Address to Congress, 87-1 CONG. REC. 44, 46-47 (1941), reprinted in FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS* 50 (1996) [hereinafter Four Freedoms Speech] (Roosevelt enumerated "four essential human freedoms": freedom of speech and expression, freedom of religion, freedom from want, and freedom from fear).

79. REBECCA M.M. WALLACE, *INTERNATIONAL LAW* 175 (1986).

of people<sup>80</sup> and thus serve to limit the ways sovereigns may treat a person—citizen and noncitizen alike.<sup>81</sup> Despite commentary questioning whether international law, particularly international human rights law, is merely a set of aspirational goals,<sup>82</sup> the history of the Nuremberg Trial's condemnation of atrocities places human rights violations at the forefront and center of international law.<sup>83</sup> This philosophy is reiterated in and reinforced by the international community's current condemnation, apprehension, and trial of persons who have violated human rights and humanitarian norms in Bosnia and Rwanda.<sup>84</sup>

Of the many existing international human rights instruments, the United States currently has signed and ratified only the United Nations Charter<sup>85</sup> ("U.N. Charter"), Charter of the Organization of American States<sup>86</sup> ("OAS Charter"), International Covenant on Civil and Political Rights<sup>87</sup> ("ICCPR"), Protocol Relating to the Status of Refugees<sup>88</sup> ("Refugee Protocol"), and International Convention on the Elimination of All Forms of Racial Discrimination<sup>89</sup> ("Race Convention"). In addition, the United States has signed, but has not ratified, the International Covenant on Economic, Social and Cultural Rights<sup>90</sup> ("Economic Covenant"),

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80. See Hernández, *Reconciling Rights in Collision*, *supra* note 6, at 256.

81. See WORLD JUSTICE, *supra* note 68, at 109.

82. See BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 8-28 (2d ed. 1995) (presenting views on the effect of international law on countries' conduct); D'AMATO, *supra* note 78, at 1-26; LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 10-26 (3d ed. 1993) (presenting a debate over the enforceability and legitimacy of international law).

83. See D'AMATO, *supra* note 78, at 146; NEWMAN & WEISSBRODT, *supra* note 78, at 278-79; Hernández, *Reconciling Rights in Collision*, *supra* note 6, at 256-57. See also Nuremberg Trial, 6 F.R.D. 69, 110 (1946).

84. See Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259 (1997) (citing the establishment of the International Tribunals for Yugoslavia and Rwanda as contemporary extensions of the Nuremberg legacy).

85. U.N. CHARTER (entered into force Oct. 24, 1945).

86. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 [hereinafter OAS Charter] (entered into force Dec. 13, 1951, for the United States); Protocol of Amendment to the Charter of the Organization of American States, Feb. 27, 1967, 21 U.S.T. 607, 721 U.N.T.S. 324 (entered into force Feb. 27, 1970).

87. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR] (entered into force Mar. 23, 1976).

88. Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol] (entered into force Oct. 1967).

89. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 352 [hereinafter Race Convention] (entered into force Jan. 4, 1969, and ratified by the United States June 24, 1994).

90. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 [hereinafter Economic Covenant] (entered into force Jan. 3, 1976).

Convention on the Rights of the Child<sup>91</sup> ("Children's Convention"), and Convention on the Elimination of All Forms of Discrimination Against Women<sup>92</sup> ("Women's Convention"). Beyond its obligations pursuant to these treaties, the United States has approved two documents that are significant in pronouncing accepted human rights concepts: the Universal Declaration of Human Rights<sup>93</sup> ("Universal Declaration") and the American Declaration of the Rights and Duties of Man<sup>94</sup> ("American Declaration"). Finally, there are other international documents to which the United States is not a party, which also may provide a source of customary international human rights law,<sup>95</sup> such as the American Convention on Human Rights<sup>96</sup> ("American Convention"). These various instruments, as well as other established norms of international human rights law, form the foundation for both conventional and customary international rights. In addition, they articulate and formulate international human rights and standards. To the degree the articulated rights are enforceable domestically and internationally in or against the United States, the new welfare and immigration reform legislation potentially violates a number of these rights.

#### IV. INTERNATIONAL HUMAN RIGHTS VIOLATIONS

The welfare and immigration legislation contains many provisions that are likely to transgress the recognized, settled, and acknowledged human rights of documented and undocumented immigrants. Analysis of specific sections of this new legislative enactment and their import exposes the extent to which these "reforms" implicate, disparage, and derogate from the international human rights of the affected persons. This Section reviews the overall effects of the conditions, requirements, and limitations of the so-called reform laws in light of international human rights norms.

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91. Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 28 I.L.M. 1448 [hereinafter Children's Convention].

92. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 [hereinafter Women's Convention] (entered into force Sept. 3, 1981).

93. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., pt.1, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

94. American Declaration of the Rights and Duties of Man, May 2, 1948, Res. XXX, O.A.S. Off. Rec. OEA/ser. L/V/II.23, doc. 21 rev. 6 (1979), *reprinted in* 43 AM. J. INT'L L. SUPP. 133 (1949) [hereinafter American Declaration].

95. "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986).

96. American Convention on Human Rights, *done* Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 [hereinafter American Convention] (entered into force July 18, 1978).

As the discussion below details, the welfare and immigration reform laws, in contravention of human rights standards, have a severe, deleterious impact on certain classes of persons: ethnic and racial groups, women, and children. The reform laws also deleteriously affect certain specifically articulated rights, including the rights to process and asylum, health, privacy, and work.

The U.N. Charter states that its purpose is to ensure equality without discrimination based on "race, sex, language, or religion."<sup>97</sup> The intent to prevent all of these forms of discrimination is repeated and expanded in other international human rights documents to include prevention of discrimination based on political or other opinion, national or social origin, property, and birth or other status.<sup>98</sup> In addition, the repeated use of the term "persons" in international human rights instruments emphasizes the goal of eliminating discrimination based upon such characteristics with respect to all persons, citizens and noncitizens alike.<sup>99</sup> This overarching principle of nondiscrimination circumscribes and limits the reasons and bases pursuant to which States may distinguish between citizens and non-citizens in an attempt to legislate and govern, even in immigration-related matters.<sup>100</sup> In international law, therefore, every person, regardless of race, sex, or ethnicity, is entitled to enjoyment of all the rights and protections afforded by human rights norms.

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97. U.N. CHARTER art. 1.

98. See Hernández, *Reconciling Rights in Collision*, *supra* note 6, at 263, 274 n.70 (enumerating the ICCPR, Economic Covenant, European Convention, American Convention, Race Convention, and OAS Charter as containing similar nondiscriminatory provisions).

99. See, e.g., ICCPR, *supra* note 87, arts. 2(1)-26, 999 U.N.T.S. at 173-79, 6 I.L.M. at 369-76; American Declaration, *supra* note 94, art. 1. The term "persons," as opposed to the narrower term "citizen," is used repeatedly in the explanation of various rights including the rights to an adequate standard of living, health, and education. This wording was deliberate and intended to broaden, rather than to circumscribe, the reach of the nondiscrimination norms. See U.N. GAOR 3d Comm., 16th Sess. 1103 mtg. at 215, U.N. Doc. A/C.3/SR.1103 (1961). During the drafting of article 27 of the ICCPR, India proposed an amendment to substitute the word "citizen" for the word "persons." See Hernández, *Reconciling Rights in Collision*, *supra* note 6, at 263, 274 n.73. This proposal was ultimately rejected. The Comments of the ICCPR's Human Rights Committee plainly provide that "the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness . . . This guarantee applies to aliens and citizens alike." U.N. GAOR, Hum. Rts. Comm., 27th Sess., ¶ 2 (1986), U.N. Doc. HRI/GEN/1/Rev.1 at 18 (1994).

100. See Louis Henkin, *An Agenda for the Next Century: The Myth and Mantra of State Sovereignty*, 35 VA. J. INT'L L. 115, 116, 118 (1994) ("The international community should reject by its refugee law . . . the notion that states maintain exclusive power over entry and presence in their territory as the very essence of their national sovereignty."). See also Hernández, *Reconciling Rights in Collision*, *supra* note 6, at 263 (urging the same regarding immigration controls).



International human rights documents that extend protection to "persons" rather than only to "citizens"<sup>101</sup> entitle noncitizens to receive the same basic human rights as citizens of a country.<sup>102</sup> In fact, the *travaux préparatoires*, as well as the texts of various international human rights documents, indicate that the protection of the rights of "persons" was an intentional and conscious choice.<sup>103</sup> Thus, in the arena of international human rights, all persons, regardless of citizenship status, are entitled to the same protections of certain basic and fundamental rights. Consequently, even if U.S. domestic law were to allow for or directly cause differential treatment with respect to citizens and noncitizens, international human rights law does not allow the United States to deprive noncitizens of their basic fundamental rights. However, it may allow the United States to limit only to its citizens extending additional benefits<sup>104</sup> beyond fundamental human rights. The two subsections below detail how the recent legislative enactments fly in the face of international norms prohibiting certain status-based discrimination as well as derogate from several specifically enumerated rights.

#### A. NONDISCRIMINATION PROTECTIONS UNDER INTERNATIONAL HUMAN RIGHTS NORMS

##### 1. *Classifications Based on Race, Ethnicity, or National Origin*

The general provisions of the recent welfare and immigration legislation disparately affect certain ethnic and racial minorities in derogation of globally accepted human rights norms. Indeed, it could easily be argued that the very immutable characteristics upon which international human rights norms prohibit the making of distinctions are the *raison d'être* for some of the new legislation's provisions and restrictions. To be sure, the

101. See, e.g., Children's Convention, *supra* note 91, arts. 2, 26, 28 I.L.M. at 1459, 1466-67 ("each child" and "every child"); American Convention, *supra* note 96, art. 1, 1144 U.N.T.S. at 145, 9 I.L.M. at 675; ICCPR, *supra* note 87, arts. 2(1)-26, 999 U.N.T.S. 26 at 173-79, 6 I.L.M. at 369-76; Universal Declaration, *supra* note 93, arts. 15, 25, 26 ("everyone"); American Declaration, *supra* note 94, *passim* ("every person"); Hernández, *Reconciling Rights in Collision*, *supra* note 6, at 263.

102. *But see* Race Convention, *supra* note 89, art. 1(2), 660 U.N.T.S. at 216, 5 I.L.M. at 353 ("This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.").

103. See Hernández, *Reconciling Rights in Collision*, *supra* note 6, at 263. See also Universal Declaration, *supra* note 93, art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration . . ." (emphasis added)); U.N. GAOR, Hum. Rts. Comm., 27th Sess., ¶ 1 (1986), U.N. Doc. HRI/GEN/1/Rev.1 at 18 (1994).

104. See *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) ("[T]he fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for all aliens." (emphasis added)).

underlying sentiment driving the new immigration and welfare reform reflects a bias against Latinas and Latinos demonstrated by the fact that the legislation effectively targets, in particular, immigrants from Latin America, especially Mexico.<sup>105</sup>

Many provisions of the Illegal Immigration Reform and Immigrant Responsibility Act promote increasing border patrol personnel and equipment in order to make illegal entry from the Mexico-U.S. border more difficult.<sup>106</sup> This focuses on enhanced enforcement efforts to prevent undocumented foreigners from entering the country by crossing the border with Mexico, effectively targeting Latinas and Latinos for exclusion from the United States rather than targeting the *real* overall problem of the *presence* of undocumented immigrants within U.S. borders.<sup>107</sup> The legislation imposes no such enhanced level of scrutiny upon those who enter legally and overstay their visas illegally.<sup>108</sup> Significantly, those who become "undocumented" due to visa overstays, or who overstay a visit that did not even require a visa at the outset,<sup>109</sup> typically come from European countries. Thus, the United States extends more effort and invests more resources in preventing entry of Latinas and Latinos than it does excluding other groups also present without proper documentation. This is true even though each group represents a roughly equivalent portion of the undocumented population within the United States. Interestingly, those undocumented as a result of a visa overstay or an abuse of visa-waiver privileges constitute slightly *more* than half of those illegally present in this country.<sup>110</sup> This disparity in legislative targeting and enforcement emphasis

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105. See Johnson, *Public Benefits and Immigration*, *supra* note 14, at 1516.

106. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 101-122, 110 Stat. 3009-546, 3009-553 to -560. These provisions increase border patrol agents and personnel, improve barriers (specifically addressing fencing and road improvements at the border patrol area near San Diego, California), improve border technology (including requiring a machine-readable biometric identifier), and impose penalties for illegal entry and flight from checkpoints.

107. In 1994, of the total illegal immigrant population in the United States, 1,909,000 entered illegally and 2,070,000 entered legally but stayed illegally. See Ashley Dunn, *Greeted at Nation's Front Door, Many Visitors Stay On Illegally*, N.Y. TIMES, Jan. 3, 1995, at A1. See generally Hernández, *Reconciling Rights in Collision*, *supra* note 6, at 265.

108. See Illegal Immigration Reform and Immigrant Responsibility Act § 101(a) (authorizing an annual increase of border patrol agents by at least 1,000 in 1997, 1998, 1999, 2000, and 2001); § 101(b) (authorizing an increase of border patrol support personnel by 300 in each of those five years); § 132 (authorizing an increase in the number of investigators of visa overstays by 300 in 1997).

109. See Immigration and Nationality Act § 217, 8 U.S.C. § 1151 (1994).

110. See SIMON, *supra* note 13, at 3 ("More than half of illegal aliens *enter legally and overstay their visas and permits*." (emphasis in original)). "Only 4 out of 10 undocumented aliens cross the border illegally or enter without inspection. Six out of 10 undocumented aliens enter legally—as

suggests, if not establishes, the racially and ethnically discriminatory aims and impact of the recent immigration reform law.

Another element of the new immigration reform legislation that demonstrates an inherently discriminatory distinction is the procedure by which immigrants may seek an admission proceeding in order to gain lawful entry to the United States. If an immigration officer determines that an immigrant is not "clearly and beyond a doubt entitled to be admitted" the officer is entitled to detain the immigrant within U.S. borders until the immigrant's admission proceeding takes place.<sup>111</sup> However, any such immigrant from a contiguous territory who arrived by land may be returned to that territory pending the admission proceeding.<sup>112</sup> In effect, this means that Latinas and Latinos entering from or through Mexico, unlike those from noncontiguous states, will be forced to leave the United States and return to their home country while they await their admission hearing.

Significantly, the return or eviction to the contiguous territory of the immigrant is not based upon any level of proof of admissibility or of persecution. Rather, the sole determinative factor is the foreigner's place of origin. Basing return on this factor is a thinly veiled targeting of Latinas and Latinos, mostly Mexicans and Central Americans, who attempt to enter the United States via its southern border. The result creates an inherent disparity in the treatment of otherwise similarly situated undocumented foreigners. In addition, the provision also endangers the lives of immigrants fleeing persecution who serendipitously happen to enter by land from a contiguous territory. This difference in treatment based on country of origin patently constitutes an impermissible violation of the international human right to freedom from discrimination based on race, ethnicity, and national origin.<sup>113</sup>

## 2. *Classifications Based on Sex*

Since its early days, the international human rights community has provided that women, as a group, are entitled to equality based on sex.<sup>114</sup> Notwithstanding this basic legal mandate of sex equality, it is universally

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visitors, students, or temporary employees—and become illegal by failing to leave when their visas expire." *Id.* at 9.

111. Illegal Immigration Reform and Immigrant Responsibility Act § 235(b)(2)(A).

112. *See id.* § 235(b)(2)(C).

113. *See Race Convention, supra* note 89, art. 2(1)(a), 660 U.N.T.S. at 218, 5 I.L.M. at 354; Universal Declaration, *supra* note 93, art. 2.

114. *See Women's Convention, supra* note 92, art. 1, 1249 U.N.T.S. at 16, 19 I.L.M. at 36; Economic Covenant, *supra* note 90, art. 2(2), 993 U.N.T.S. at 5, 6 I.L.M. at 361; Universal Declaration *supra* note 93, art. 2; U.N. CHARTER art. 1(3).

status to which they are entitled as a matter of law.<sup>115</sup> Although the movement toward worldwide recognition and enforcement of women's rights is a recent occurrence, it has been relatively successful in some areas.<sup>116</sup> In particular, the call for women's equality has focused on rights of freedom from violence,<sup>117</sup> increased political power and participation,<sup>118</sup> reproductive rights,<sup>119</sup> and freedom from discrimination based on gender in all aspects of life.<sup>120</sup> These international human rights of women recognize that all societies historically have treated women as less qualified and less productive in the public sphere. Proponents of women's human rights show that historically, and across cultures, women have been relegated to the private sphere—home and family—where they have been precluded from the protections of public laws. Consequently, women's human rights advocates have urged that changes be effected so that women become full citizens with rights to protection from violence wherever perpetrated—from the bedroom to the boardroom—and rights to participation in all spheres of public and private life.<sup>121</sup> Significantly, international documents recognize and accept the real needs of women, especially in the

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115. See UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1995, at 29 ("In no society today do women enjoy the same opportunities as men."). See also Berta Esperanza Hernández-Truyol, *Women's Rights as Human Rights—Rules, Realities and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT'L L. 605 (1996).

116. See Hernández, *Human Rights*, *supra* note 78. See also Elisabeth Friedman, *Women's Human Rights: The Emergence of a Movement*, in WOMEN'S RIGHTS, HUMAN RIGHTS 18-35 (Julie Peters & Andrea Wolper eds., 1995).

117. See Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., at 1050, U.N. Doc. A/Res/48/104 (1994).

118. See Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135 (entered into force July 7, 1954, and for the United States, July 7, 1976); Inter-American Convention on the Granting of Political Rights to Women, *opened for signature* May 2, 1948, 27 U.S.T. 3301, T.I.A.S. No. 8365 (entered into force Mar. 17, 1949, and for the United States, May 24, 1976).

119. See *Report of International Conference on Population and Development*, U.N. Doc. A/CONF.171/13 (1994) [hereinafter *Cairo Conference*] (reproductive rights and reproductive health); Women's Convention, *supra* note 92, art. 14(2)(b), 1249 U.N.T.S. at 19, 19 I.L.M. at 40 ("To have access to . . . information, counseling and services in family planning."); *id.* art. 16(1)(e), 1249 U.N.T.S. at 20, 19 I.L.M. at 41 (according women the right to "decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights"); *Beijing Declaration and Platform for Action, Report of the Fourth World Conference on Women*, U.N. Doc. A/CONF. 177/20 (1995), princ. 96 [hereinafter *Beijing Declaration*].

120. See Women's Convention, *supra* note 92, *passim*.

121. See Berta Esperanza Hernández-Truyol, *Sex, Culture, and Rights: A Reconceptualization of Violence for the Twenty-First Century*, 60 ALBANY L. REV. 607 (1997) [hereinafter Hernández, *Sex, Culture, and Rights*]; Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in HUMAN RIGHTS OF WOMEN 85 (Rebecca J. Cook ed., 1994).

realm of reproduction,<sup>122</sup> as well as the need to transcend the private/public dichotomy in order effectively to afford women protection against all forms of violence—physical, psychological, and economic.<sup>123</sup>

Notwithstanding women's international rights to sex equality, the immigration and welfare reform laws have a disproportionately harsh impact on women in violation of such established international norms.<sup>124</sup> In fact, the restrictions of benefits to documented and undocumented foreigners present special problems for women. For example, the restriction of medical care to emergency services dramatically impairs the reproductive rights of women. This restriction not only denies women actual medical service but deters undocumented immigrants, in particular, from attempting to make use of information centers regarding family planning due to fears of deportation.<sup>125</sup>

More specifically, limiting access to health care solely to medical emergency services means that women will neither seek nor obtain the necessary prenatal care specifically addressed in human rights documents.<sup>126</sup> The lack of available prenatal services presents an increased risk

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122. See *Beijing Declaration*, *supra* note 119, princs. 96-98; *Cairo Conference*, *supra* note 119, at ch. VII. See also REBECCA J. COOK, WOMEN'S HEALTH AND HUMAN RIGHTS 10-11 (1994) (describing reproductive health concerns of women).

123. See generally Hernández, *Sex, Culture, and Rights*, *supra* note 121 (reexamining the concepts of violence towards women in order to promote full gender equality under international human rights law); Romany, *supra* note 121, at 86 (arguing that the "public/private distinction obstruct[s] women's attainment of liberal values").

124. See Johnson, *Public Benefits and Immigration*, *supra* note 14, at 1517.

125. CHRIS HOGELAND & KAREN ROSEN, DREAMS LOST, DREAMS FOUND: UNDOCUMENTED WOMEN IN THE LAND OF OPPORTUNITY 17, 19, 20 (1991) (reporting that 64% of Latinas report fear of deportation as a barrier to seeking social services).

126. See *Beijing Declaration*, *supra* note 119, princ. 94 (describing "appropriate health-care services" as those "that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant"); Children's Convention, *supra* note 91, art. 24, 28 I.L.M. at 1465-66 ("To ensure appropriate pre-natal and post-natal health care for mothers . . ."); Women's Convention, *supra* note 92, art. 12, 1249 U.N.T.S. at 19, 19 I.L.M. at 40 ("State Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."); Economic Covenant, *supra* note 90, art. 12, 993 U.N.T.S. at 8, 6 I.L.M. at 363-64 ("[T]he provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child . . ."); American Declaration, *supra* note 94, art. 7 ("All women during pregnancy and the nursing period, and all children have the right to special protection, care and aid."); Universal Declaration, *supra* note 93, art. 25 ("Motherhood and childhood are entitled to special care and assistance."); *Cairo Conference*, *supra* note 119, § 7.6 (calling for "prenatal care, safe delivery, and post-natal care especially breast-feeding, infant and women's health care"). See also Loue, *supra* note 33, at 276 (citing a study of undocumented Mexican women who were three times as likely as other women to have either delayed or no prenatal care); Johnson, *Public Benefits and Immigration*, *supra* note 14, at 1517-18.

to maternal health and maternal and infant mortality.<sup>127</sup> Not insignificantly, the denial of prenatal services to immigrant women ultimately proves more costly to the United States.<sup>128</sup> The denial of nonemergency medical services to undocumented women affected by the so-called reforms, therefore, impermissibly creates hardships on women.

The Women's Convention, as well as the Cairo and Beijing Programmes of Action, expressly require States to make available access to family planning information and services.<sup>129</sup> Additionally, women are entitled to determine the number and spacing of their children<sup>130</sup> and are entitled to obtain the information<sup>131</sup> necessary to exercise such a right. The denial of nonemergency medical services to documented and undocumented immigrant women alike, interferes with their ability to secure family planning services.<sup>132</sup> This, in turn, prevents women from exercising their right to reproductive freedom or controlling family size,<sup>133</sup> in derogation of established human rights norms.

127. See Rebecca J. Cook, *International Human Rights and Women's Reproductive Health*, in WOMEN'S RIGHTS, HUMAN RIGHTS, *supra* note 117, at 256, 258 ("Epidemiological and related data show how reproductive health services can reduce maternal mortality and morbidity and contribute significantly to women's reproductive health."); Hernández, *Reconciling Rights in Collision*, *supra* note 6, at 267.

128. See Johnson, *Public Benefits and Immigration*, *supra* note 14, at 1569-70 n.291 (citing *Lewis v. Grinker*, 965 F.2d 1206, 1219 (2d Cir. 1992)) ("Studies have shown that every dollar spent on prenatal care saves between two and ten dollars in future medical care costs." (citation omitted)).

129. See *Beijing Declaration*, *supra* note 119, princ. 93 (requiring "[c]ounseling [sic] and access to sexual and reproductive health information and services"); *Cairo Conference*, *supra* note 119, § 7.6 (requiring reproductive health care including "family-planning counseling, information, education, communication and services"); Women's Convention, *supra* note 92, art. 14(2)(b), 1249 U.N.T.S. at 19, 19 I.L.M. at 40. While the United States has not ratified the Women's Convention, it did sign on to the Cairo and Beijing consensus documents, thus recognizing the existence of such State's obligations as a matter of progressive development. See, e.g., HENKIN ET AL., *supra* note 82, at 97-101 (discussing progressive development through multilateral treaty-making).

130. See Women's Convention, *supra* note 92, art. 16(1)(e), 1249 U.N.T.S. at 20, 19 I.L.M. at 41. See also Mahmoud F. Fathalla, *The Impact of Reproductive Subordination on Women's Health: Family Planning Services*, 44 AM. U. L. REV. 1179 (1995) (promoting empowerment of women through control over their own fertility).

131. See generally Sandra Coliver, *The Right to Information Necessary for Reproductive Health and Choice Under International Law*, 44 AM. U. L. REV. 1279 (1995) (analyzing varying obligations placed on governments based on the right to information as defined within international law).

132. See Richard Seybert, *Population, Immigration and Growth in California*, 31 SAN DIEGO L. REV. 945, 1010-11 (1994) (suggesting that the impact of immigration on this country could be reduced if family planning services were available to immigrants).

133. See Carlota Bustelo, *Reproductive Health and CEDAW*, 44 AM. U. L. REV. 1145, 1149-50 (1995); Aart Hendriks, *Promotion and Protection of Women's Right to Sexual and Reproductive Health Under International Law: The Economic Covenant and the Women's Convention*, 44 AM. U. L. REV. 1123, 1142-43 (1995); Berta E. Hernández, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT'L L. 309, 341 (1991). But see *Harris v. McRae*,

By denying women access to nonemergency medical services, including reproductive services, the recent legislation will have consequences that go beyond the medical and physical consequences of unwanted pregnancies and births and increased risks of infant and maternal mortality. These restrictive legislative provisions also have economic and social repercussions. For example, women will be faced with families larger than desired,<sup>134</sup> which ultimately results in more financial difficulty for the family. It also results in a greater restriction of women's participation in society because of their traditional role as the primary child care provider. This role does not allow the woman the choice of expending her energy in the home raising children or pursuing a career or education. Increased family responsibilities, particularly the undesired ones, preempt women's choices with respect to public life and relegate women to an inferior position in society. Therefore, the end result of the new reform legislation is to undermine the whole articulated, developing anti-sex-subordination structure and to impede women's participation in society to the fullest extent possible.

### 3. *The Status of Children in International Law*

International human rights norms recognize that children are the foundation of tomorrow's society and that they are particularly vulnerable to physical and emotional abuse or neglect by the family or the State. Consequently, numerous international human rights documents afford children special protection and rights.<sup>135</sup> These include the right to education,<sup>136</sup> nationality,<sup>137</sup> health,<sup>138</sup> and adequate food, clothing, and hous-

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448 U.S. 297, 316 (1980) (holding that a woman's constitutional right to abortion services does not include "a constitutional entitlement" to have the state finance abortions).

134. Human rights documents recognize the right to determine family size and spacing of children. See *Beijing Declaration*, *supra* note 119, princ. 96 (acknowledging women's right "to decide freely and responsibly the number, spacing and timing of their children"); *Women's Convention*, *supra* note 92, art. 16(1)(e), 1249 U.N.T.S. at 20, 19 I.L.M. at 41; *Cairo Conference*, *supra* note 119, § 7.12 (acknowledging women's right "to decide freely and responsibly the number and spacing of their children").

135. See, e.g., *Children's Convention*, *supra* note 91, arts. 2, 24, 26-28, 28 I.L.M. at 1459, 1465-68; *American Convention*, *supra* note 96, arts. 19, 20, 1144 U.N.T.S. at 150, 9 I.L.M. at 681; *Economic Covenant*, *supra* note 90, arts. 10(3), 13, 993 U.N.T.S. at 7, 8, 6 I.L.M. at 363, 364; *ICCPR*, *supra* note 87, art. 24, 999 U.N.T.S. at 179, 6 I.L.M. at 375; *American Declaration*, *supra* note 94, arts. 7, 11, 12, 19; *Universal Declaration*, *supra* note 93, arts. 15, 25, 26.

136. See, e.g., *Children's Convention*, *supra* note 91, art. 28, 28 I.L.M. at 1467; *Race Convention*, *supra* note 89, art. 5(e)(v), 660 U.N.T.S. at 222, 5 I.L.M. at 357; *Economic Covenant*, *supra* note 90, art. 13, 993 U.N.T.S. at 8, 6 I.L.M. at 364; *American Declaration*, *supra* note 94, art. 12; *Universal Declaration*, *supra* note 93, art. 26.

137. See, e.g., *Children's Convention*, *supra* note 91, art. 7, 28 I.L.M. at 1460; *American Declaration*, *supra* note 94, art. 19; *ICCPR*, *supra* note 87, art. 24, 999 U.N.T.S. at 179, 6 I.L.M. at 375;

ing.<sup>139</sup> The international human rights documents specifically guarantee that such protections shall not be withheld based on "discrimination for reasons of parentage."<sup>140</sup>

Contrary to those basic international human rights principles, the new immigration and welfare reforms neither recognize nor protect children's special needs. Rather, children of documented and undocumented immigrants alike will feel the negative effects of the new welfare and immigration reform. As the discussion that follows illustrates, the immigration and welfare reforms violate children's rights the international community has safeguarded, as detailed in the Children's Convention<sup>141</sup> and other international human rights documents.<sup>142</sup>

The prohibitions and restrictions aimed at all documented or undocumented immigrants affect adults and children alike. In all instances in which such actions constitute violations of human rights of adults, they similarly constitute violations of the human rights of children. For example, children will suffer the same as adults through the withholding of health services and other benefits that contribute to the well-being of a person.

At times, however, the denial of rights to adults will itself effect the denial of rights to children. For instance, the denial of nonemergency medical services to adults results in the denial of access to prenatal care to expectant mothers. This, in turn, means that children will be born to women who have received little or no prenatal care,<sup>143</sup> the lack of which indisputably increases medical problems for the newborn child.<sup>144</sup> The

Universal Declaration, *supra* note 93, art. 15; American Convention, *supra* note 96, art. 20, 1144 U.N.T.S. at 150, 9 I.L.M. at 681.

138. See, e.g., Children's Convention, *supra* note 91, art. 24, 28 I.L.M. at 1465-66; Economic Covenant, *supra* note 90, art. 12, 993 U.N.T.S. at 8, 6 I.L.M. at 363-64; American Declaration, *supra* note 94, art. 11; Universal Declaration, *supra* note 93, art. 25.

139. See, e.g., Children's Convention, *supra* note 91, art. 27, 28 I.L.M. at 1467; Economic Covenant, *supra* note 90, art. 11, 993 U.N.T.S. at 7, 6 I.L.M. at 363; American Declaration, *supra* note 94, art. 11; Universal Declaration, *supra* note 93, art. 25.

140. Economic Covenant, *supra* note 90, art. 10, 993 U.N.T.S. at 7, 6 I.L.M. at 363.

141. See generally Children's Convention, *supra* note 90, 28 I.L.M. 1448 (codifying international rights of children, including the rights to life, expression, privacy, medical treatment, social security, and education, and other rights).

142. See, e.g., American Convention, *supra* note 96, arts. 19, 20, 1144 U.N.T.S. at 150, 9 I.L.M. at 681; ICCPR, *supra* note 87, art. 24, 999 U.N.T.S. at 179, 6 I.L.M. at 375; Economic Covenant, *supra* note 90, arts. 10, 13, 993 U.N.T.S. at 7, 8, 6 I.L.M. at 363, 364; American Declaration, *supra* note 94, arts. 7, 11, 12, 19; Universal Declaration, *supra* note 93, arts. 15, 25, 26.

143. See *supra* notes 128-29 and accompanying text.

144. Children born within the U.S. territory are entitled to benefits as U.S. citizens. This privilege, however, has been challenged and may be altered by a constitutional amendment. See *infra* note



denial of medical services also prevents children from receiving necessary immunizations that could ward off preventable diseases.<sup>145</sup>

In addition, children will suffer as a result of the denial of public assistance, such as the denial of food stamps or AFDC, to documented and undocumented immigrants. The lack of supplemental assistance may directly affect children if it results in lack of access to adequate nutrition, and indirectly if the denial of benefits forces children to work at an early age as families seek ways to survive financially. Early entry into the workforce also would mean that many children may not attend school (assuming they are allowed to attend), thus negatively affecting their right to receive an education; the lack of education, in turn, will keep such children from ever achieving more than a low-paying, low-skill job, possibly perpetuating a cycle of poverty and illiteracy<sup>146</sup> and entrenching them as less than fully contributing members of society.

If children are denied these benefits simply because of their birth and not because of any actions that could possibly be imputed to them, such denial of benefits is impermissible pursuant to the Economic Covenant's mandate that benefits cannot be denied because of "discrimination for reasons of parentage."<sup>147</sup> Additionally, all international human rights documents forbid the denial of equal treatment or rights because of "birth"<sup>148</sup>— here birth to undocumented parents. Thus children who fail to enjoy these fundamental rights may claim that denial of services constitutes a violation of international human rights norms.

Two other potential reforms ultimately not enacted, but initially proposed with the recent welfare and immigration acts, also impermissibly targeted children in the areas of education and nationality. One of these reforms, the House version of the Immigration Reform Act, sought to deny

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150 (discussing proposed legislation that removes the automatic privilege of citizenship by virtue of birth in the United States, known as the law of the soil).

145. See H.R. REP. NO. 99-682(IV), at 6-7 (1986), reprinted in 1986 U.S.C.C.A.N. 5817-18 ("To the extent that they have not been properly immunized, poor aliens, and particularly poor alien children, are vulnerable to the spread of contagious disease.").

146. See *Plyler v. Doe*, 457 U.S. 202, 223 (1981) ("The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.").

147. Economic Covenant, *supra* note 90, art. 10, 993 U.N.T.S. at 7, 6 I.L.M. at 363 ("Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage . . .").

148. See, e.g., ICCPR, *supra* note 87, art. 2, 999 U.N.T.S. at 173, 6 I.L.M. at 369; Economic Covenant, *supra* note 90, art. 2, 993 U.N.T.S. at 5, 6 I.L.M. at 361; American Convention, *supra* note 96, art. 1; Universal Declaration, *supra* note 93, art. 2.

undocumented immigrants access to all public education, presumably including elementary education.<sup>149</sup> An additional and more draconian measure proposed by Congress sought to deny U.S. citizenship to children born in the United States unless one parent is, or both parents are, legally present in the country.<sup>150</sup>

If these proposed provisions of the new legislation dealing with education and nationality were implemented, they would signal possible human rights violations. Depriving children of free elementary education simply because of their status as undocumented immigrants runs counter to a number of international human rights documents that expressly provide for the right to an education.<sup>151</sup>

Similarly, the deprivation of U.S. nationality to children despite their birth in this country could constitute an international human rights violation. Moreover, such a measure would require a constitutional amendment because our Constitution follows the law of the soil: Someone born on U.S. soil is a U.S. citizen.<sup>152</sup> Considering the international human rights violations of such a provision, it is noteworthy that the American Convention, Universal Declaration, and American Declaration recognize that everyone has a right to a nationality "to which he is entitled by law."<sup>153</sup> A provision limiting citizenship to someone born within the jurisdiction would thus raise international human rights questions involving the extent to which, and the reasons for which, a State may promulgate laws restricting the granting of nationality. However, withholding nationality from a child born within the country simply due to the status of one or both of the

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149. See H.R. 1377, 104th Cong. § 501 (1995) (attempting to authorize states to deny public education to illegal aliens); *Plyler*, 457 U.S. at 220 (striking down a state law that prohibited children of illegal aliens from receiving an education). "[L]egislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice." *Id.* "Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent." *Id.* (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) (footnote omitted)).

150. See H.R. 705, 140th Cong. § 1 (1995) (attempting to limit citizenship at birth to persons who are born to "a mother who is a citizen or legal resident of the United States"); H.R. 1363, 104th Cong. § 3 (1995) (attempting to limit citizenship to a child born in wedlock to a parent who is either a citizen or permanent resident alien or to a child born out of wedlock to a mother who is either a citizen or a permanent resident alien).

151. See *supra* note 136 and accompanying text. See generally Stephen Knight, *Proposition 187 and International Human Rights Law: Illegal Discrimination in the Right to Education*, 19 HASTINGS INT'L & COMP. L. REV. 183 (1995) (specifying that denial of elementary education violates U.S. international obligations under the ICCPR). Such a provision also appears to violate domestic law. See *Plyler*, 457 U.S. at 230.

152. See U.S. CONST. amend. XIV, § 1.

153. American Declaration, *supra* note 94, art. 19. See American Convention, *supra* note 96, art. 20, 1144 U.N.T.S. at 150, 9 I.L.M. at 681; Universal Declaration, *supra* note 93, art. 15.

parents is facially based upon an impermissible discrimination, as international human rights documents forbid denial of rights based on parentage<sup>154</sup> or "birth or other status."<sup>155</sup>

## B. SPECIFICALLY ENUMERATED INTERNATIONAL HUMAN RIGHTS

### 1. *The Right to Process and Asylum*

International norms recognize that everyone "has the right to seek and to enjoy in other countries asylum from persecution."<sup>156</sup> The international community considers as a refugee<sup>157</sup> a person who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion [who] is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."<sup>158</sup> Article 33 of the Convention Relating to the Status of Refugees ("Refugee Convention"), which was incorporated in the Refugee Protocol, provides that a State shall not "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."<sup>159</sup> Additionally, the Refugee Convention requires that State parties grant refugees free access to the courts of the State and that their treatment with respect to such access be the same as for nationals of the State.<sup>160</sup>

In addition to such substantive provisions, international norms also guarantee procedural rights that are applicable to "everyone,"<sup>161</sup> thus including refugees. One such procedural right is the general right of all per-

154. See, e.g., Economic Covenant, *supra* note 90, art. 10, 993 U.N.T.S. at 7, 6 I.L.M. at 363.

155. See *supra* note 148 and accompanying text.

156. Universal Declaration, *supra* note 93, art. 14. See American Declaration, *supra* note 94, art. 27.

157. See Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101 (1994) (defining refugee); Refugee Protocol, *supra* note 88, art. 1(2), 19 U.S.T. at 6225, 606 U.N.T.S. at 268 (incorporating definition of "refugee" in Refugee Convention); Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, art.1, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 152 [hereinafter Refugee Convention] (entered into force Apr. 22, 1954) (defining "refugee").

158. Refugee Convention, *supra* note 157, art. 1, 19 U.S.T. at 6261, 189 U.N.T.S. at 152. See Refugee Protocol, *supra* note 88, art. 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268 (removing the requirement of becoming a refugee "[a]s a result of events occurring before 1 January 1951").

159. Refugee Convention, *supra* note 157, art. 33, 19 U.S.T. at 6276, 189 U.N.T.S. at 176. See Refugee Protocol, *supra* note 88, art. 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268.

160. See Refugee Convention, *supra* note 157, art. 16, 19 U.S.T. at 6268, 189 U.N.T.S. at 164.

161. See, e.g., Universal Declaration, *supra* note 93, art. 10.

sons to a "fair and public hearing by an independent and impartial tribunal"<sup>162</sup> to determine rights, duties, and criminal charges. The ICCPR specifically guarantees the right of a noncitizen to "have his case reviewed by . . . the competent authority or a person or persons especially designated by the competent authority" before the noncitizen may be expelled.<sup>163</sup>

The Immigration Reform Act's revamped procedures pursuant to which foreigners may seek to gain admission to the United States derogate from the accepted international principles enumerated above. The new, stricter procedures for gaining asylum in the United States increase the burden of a person to show entitlement to receive asylum. Under international human rights norms, asylum shall be granted if a person has a "well-founded fear of being persecuted."<sup>164</sup> Under the new immigration reform, those who seek to enter the country must convince an immigration officer that they are either admissible or have a "credible fear of persecution" to warrant asylum.<sup>165</sup> If an officer cannot determine that an immigrant is "clearly beyond a doubt entitled to be admitted," the new law mandates that an admission proceeding be held.<sup>166</sup> If the officer independently determines that the immigrant does not qualify as having a credible fear of persecution, the immigrant is summarily removed from the United States. Therefore, someone who seeks asylum with a well-founded fear of persecution but cannot convince an immigration officer clearly beyond a doubt concerning that fear can be turned away by the United States; this possibility represents the potential for a violation of the international human right to asylum. This scenario, which will disproportionately affect Mexicans and Central or South Americans,<sup>167</sup> is compounded by asylum grant figures, which show a discriminatory preference for those who are not from Latin American countries.<sup>168</sup>

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162. *Id.*

163. ICCPR, *supra* note 87, art. 13, 999 U.N.T.S. at 176, 6 I.L.M. at 372.

164. Refugee Convention, *supra* note 157, art. 1, 19 U.S.T. at 6261, 189 U.N.T.S. at 152. *See* Refugee Protocol, *supra* note 88, art. 1., 19 U.S.T. at 6225, 606 U.N.T.S. at 268.

165. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 235 (b)(1)(A)(i), 110 Stat. 3009-546, 3009-580 ("[T]he officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution.").

166. *Id.*

167. *See supra* note 113 and accompanying text.

168. *See* Arthur C. Helton, *Refugees: An Agenda for Reform*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 56-57 (Louis Henkin & John Lawrence Hargrove eds., 1994). The overall percentage at which asylum is approved is 25%. *See id.* The approval level for China, the Soviet Union, or Eastern Europe is 50-90%, while the approval levels for Latin American countries such as Guatemala, Haiti, and El Salvador are 1-3%. *See id.*

Another tightening of the admission process, also in derogation of established international norms, is the absence of a judicial review of the immigration officer's determination of admission.<sup>169</sup> If the single immigration officer determines that an immigrant is *not* entitled to admission to this country, the immigrant is returned to the home country without review,<sup>170</sup> which is patently contrary to the ICCPR's guarantee of a right to review by competent authority. The impending danger of this procedure is that immigrants, some of whom are fleeing persecution, will be returned to their native land, where possibly death might occur, on the decision of one officer without an opportunity for review. Such denial of judicial review by the United States patently violates a refugee's international human right to have access to the courts.<sup>171</sup>

## 2. *The Right to Health*

Whether the right to health care exists at all, and if so, the defined parameters of the content and meaning of such a right, has been a source of recent debate in the United States domestic political arena.<sup>172</sup> However, the international view of the right to health<sup>173</sup> seems more settled. Numerous international human rights documents recognize the right of everyone to "the highest attainable standard of physical and mental health."<sup>174</sup> In

169. See Illegal Immigration Reform and Immigrant Responsibility Act § 235 (b)(1)(C) ("[A] removal order . . . is not subject to administrative appeal, except that the Attorney General shall provide by regulation for prompt review . . . an alien who claims under oath . . . to have been lawfully admitted for permanent residence, to have been admitted as a refugee . . . , or to have been granted asylum . . .").

170. See *id.* § 235(b)(1)(B)(iii) ("[I]f the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review.").

171. See ICCPR, *supra* note 87, art. 13, 999 U.N.T.S. at 176, 6 I.L.M. at 372.

172. See Daniel Wikler, *Privatization and Human Rights in Health Care: Notes From the American Experience*, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 495-501 (Kathleen E. Mahoney & Paul Mahoney eds., 1993) (discussing the status of health care as a right in the United States). See also 1994 Cal. Legis. Serv. Prop. 187 (West) (having as a central premise to deny all but emergency health care to undocumented foreigners).

173. See Women's Convention, *supra* note 92, art. 12, 1249 U.N.T.S. at 19, 19 I.L.M. at 40; Children's Convention, *supra* note 91, art. 24, 28 I.L.M. at 1465-66; American Declaration, *supra* note 94, art. 11; Economic Covenant, *supra* note 90, art. 12, 993 U.N.T.S. at 8, 6 I.L.M. at 363-64. See also Virginia A. Leary, *Implications of a Right to Health*, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY, *supra* note 172, at 481 (comparing the "right to health" versus the "right to health care"). As explained by Professor Leary, the "right to health" is a far more ambitious and ambiguous right than the "right to health care." See Leary, *supra*, at 484. The "right to health care" is understood to mean the right to medical services, whereas the "right to health" is defined by the World Health Organization Constitution as "the highest attainable standard of health." *Id.* at 485.

174. *Cairo Conference*, *supra* note 119, princ. 8. See *Beijing Declaration*, *supra* note 119, princ. 92; Children's Convention, *supra* note 91, art. 24, 28 I.L.M. at 1465-66; ICCPR, *supra* note 87, art. 12, 19, 999 U.N.T.S. at 176, 178, 6 I.L.M. at 372.

addition, these human rights documents recognize that a right without a remedy is, at best, illusory, and thus also call for services to provide for adequate "health and well-being" of all persons.<sup>175</sup> Specific health care rights also are embodied in various provisions that require the supplying of prenatal and postnatal care.<sup>176</sup> These international human rights documents solidify the notion in the international human rights context that health is a right that logically includes more than just emergency medical care. In addition, this right goes beyond an individual's right to personal health. The right to health also encompasses a community's health, as preventable communicable diseases will go unchecked and will affect the community as a whole if people are denied immunization and medical care.<sup>177</sup>

The provisions of the recent welfare and immigration reforms plainly violate this internationally recognized right to health in various ways. By denying medical care to all undocumented immigrants and some documented immigrants, with the exception of emergency medical care, the law is preventing such persons from attaining the "the highest attainable standard of physical and mental health" as mandated by various international documents.<sup>178</sup> Both documented and undocumented immigrants could enjoy a much improved standard of health care quite easily through the provision of preventive medical care.

The restriction on access to health care for undocumented immigrants potentially has severe consequences. Undocumented immigrants may suffer serious health problems because of the challenging conditions in which they live and the high-risk jobs they perform.<sup>179</sup> For example, due to high

175. See Race Convention, *supra* note 89, art. 5(e)(iv), 660 U.N.T.S. at 222, 5 I.L.M. at 357; American Declaration, *supra* note 94, art. 11; Universal Declaration, *supra* note 93, art. 25. See also COOK, *supra* note 122, at 5 ("The elements that condition a population's health go beyond physiological factors to include gross national product, wealth distribution and access to income-earning capacity and opportunities, [and] availability of and access to educational resources . . .").

176. See *Beijing Declaration*, *supra* note 119, princ. 96; *Cairo Conference*, *supra* note 119, § 7.6; Children's Convention, *supra* note 91, art. 24, 28 I.L.M. at 1465-66; Women's Convention, *supra* note 92, art. 12, 1249 U.N.T.S. at 19, 19 I.L.M. at 40; Economic Covenant, *supra* note 90, art. 12(2)(a), 993 U.N.T.S. at 8, 6 I.L.M. at 363; American Declaration, *supra* note 94, art. 7; Universal Declaration, *supra* note 93, art. 25.

177. See *Report of World Summit for Social Development*, U.N. Doc. A/CONF.166/9 (1995), princ. 22 [hereinafter *World Social Summit*] ("Communicable disease constitute a serious health problem in all countries . . . The prevention, treatment and control of these diseases . . . must be given the highest priority.").

178. See *supra* note 174 and accompanying text.

179. See Loue, *supra* note 33, at 275; Guadalupe T. Luna, 'Agricultural Underdogs' and *International Agreements: The Legal Context of Agricultural Workers Within the Rural Economy*, 26 N.M. L. REV. 9, 27 n.102 (1996) (noting that the agricultural industry is one of the most hazardous due to occupational injuries and to acute illnesses from pesticide exposure); Reich, *supra* note 27, at 3.

concentrations of undocumented immigrants among the migrant farm-worker population, undocumented immigrants suffer more respiratory, infectious, and digestive disorders.<sup>180</sup> Even before the new draconian legislation, the fear of deportation resulted in undocumented immigrants not seeking medical care or preventive medicine.<sup>181</sup> In addition to knowing that benefits are expressly denied based on status, undocumented immigrants also should have a heightened fear of deportation when seeking medical assistance because new legislative requirements mandate that personnel report known undocumented immigrants.<sup>182</sup>

The denial of medical care results in grave consequences not only for the undocumented immigrants but for society as a whole. Undocumented immigrants typically do not seek medical assistance until their condition has degenerated to the level of an emergency, thus potentially costing more in medical expenses than preventive measures.<sup>183</sup> In addition, the lack of health care services available to undocumented immigrants has been blamed for the rise in communicable diseases.<sup>184</sup>

The recent welfare reform legislation, which restricts even documented immigrants' access to public benefits such as medical care, has similar medical and financial consequences.<sup>185</sup> Documented immigrants, including some who have paid taxes in this country for long periods of time but who lack medical care coverage such as Medicaid, will not seek assistance for a health problem until it rises to the level of an emergency, again costing more than preventive measures would.<sup>186</sup>

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180. See Loue, *supra* note 33, at 275; Reich, *supra* note 27, at 3.

181. See Brooks, *supra* note 45, at 164; Loue, *supra* note 33, at 275; Reich, *supra* note 27, at 4.

182. For example, although the new welfare reform legislation makes an exception for immunizations and for the treatment of communicable diseases to be provided as medical care, see Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 401(b)(1)(C), 110 Stat. 2105, 2261, undocumented immigrants may not be aware of the exception and thus not seek medical care. The fear of deportation may keep undocumented immigrants from seeking this limited health care that is available to them.

183. See Johnson, *Public Benefits and Immigration*, *supra* note 14, at 1569-70. See also Lewis v. Grinker, 965 F.2d 1206, 1219 (2d Cir. 1992) ("Studies have shown that every dollar spent on prenatal care saves between two and ten dollars in future medical care costs.").

184. See Brooks, *supra* note 45, at 144 (suggesting that health care problems increase through the spread of preventable diseases when undocumented aliens are not provided any health care assistance); Loue, *supra* note 33, at 275.

185. See Personal Responsibility and Work Opportunity Act of 1996 §§ 401-51. See also *supra* note 146.

186. See *Clinton to Support Legal Immigrant Rights to Medicaid*, BUS. WIRE, Sept. 27, 1996, available in LEXIS, News Library, Cumwvs File ("[This provision of the Act] could result in removing a large portion of the legal immigrant population from the Medicaid program for non-emergency services, forcing them to go without necessary health care or to wait until their conditions worsen and

In addition to violating general international health provisions, the restriction of access to medical services violates the specific international provisions requiring that special care be given to pregnant women and newborns.<sup>187</sup> The lack of medical care services such as prenatal and postnatal care will certainly have a negative impact on expectant mothers as well as infants.<sup>188</sup> Therefore, the denial of prenatal and postnatal care to undocumented and some documented immigrants violates human rights norms.

Additionally, these new so-called legislative reforms foreshadows a deterioration of the overall "health and well-being"<sup>189</sup> of persons. Not only are medical care provisions restricted to emergency care, but the elimination of access to other benefits such as food stamps and welfare benefits also affect a person's health and well-being. To be sure, without nutritional supplements and cash assistance to meet daily needs such as housing, people will be more likely to live in substandard conditions, face declining nutritional values in their diets, and experience generally poor living conditions. Therefore, the so-called reform legislation violates the spirit, if not the letter, of provisions requiring the protection and preservation of health and well-being found in the American Declaration, Universal Declaration, and Race Convention.<sup>190</sup>

### 3. *The Right to Privacy*

The right to freedom from interference with privacy is a right reiterated and confirmed in myriad human rights documents.<sup>191</sup> These protections from arbitrary invasions into one's private life apply to the enumerated areas of family, home, honor, and reputation.<sup>192</sup>

The recent immigration and welfare reform legislation greatly restricts, if not flagrantly violates, this universal right of privacy. These two new acts require that the government compile information about immi-

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then to go to emergency rooms, thereby increasing the level of uncompensated care provided by hospitals and health systems.").

187. See *supra* note 126 (enumerating international provisions specifically requiring prenatal and postnatal care).

188. See, e.g., Cook, *supra* note 127, at 256 (noting that "[m]any women die or are chronically disabled from pregnancy-related causes because of neglect of women's reproductive health.").

189. See *supra* note 175 and accompanying text.

190. See Race Convention, *supra* note 89, art. 5(e)(iv), 660 U.N.T.S. at 222, 5 I.L.M. at 357; American Declaration, *supra* note 94, art. 11; Universal Declaration, *supra* note 93, art. 25.

191. See American Convention, *supra* note 96, art. 11; ICCPR, *supra* note 87, art. 17, 999 U.N.T.S. at 177, 9 I.L.M. at 373; American Declaration, *supra* note 94, art. 5; Universal Declaration, *supra* note 93, art. 12.

192. See *supra* note 191.



grants<sup>193</sup> as well as verify the status of such immigrants.<sup>194</sup> The information required includes a collection of records coordinating departures and arrivals;<sup>195</sup> verification of eligibility for benefits;<sup>196</sup> disclosure of paternity;<sup>197</sup> verification of legal status to obtain employment, which requires reporting of known undocumented immigrants;<sup>198</sup> and a biometric identifier document, which includes either a fingerprint or handprint.<sup>199</sup> Without providing this information, immigrants either will not be admitted to the country or they will lose public assistance benefits to which they otherwise would still be entitled.

Thus, the requirements of the welfare and immigration legislation effect an immense intrusion into and violation of the internationally recognized right to privacy. In order to receive benefits or to obtain employment, immigrants must verify their eligibility by providing personal information such as birth date, birthplace, and residence.<sup>200</sup> Additionally, certain benefits require the disclosure of paternity,<sup>201</sup> thus raising the specter of governmental interference with privacy regarding the family and intimate relations. Information also will be collected under the immigration reform legislation to determine and coordinate arrivals and departures from the country.<sup>202</sup> The government will thus know where and when a

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193. See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, § 404(a)(1), 110 Stat. 3009-546, 3009-664 (requiring confirmation system which would house information regarding whether an individual is authorized to be employed).

194. See *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Pub. L. No. 104-193, § 432, 110 Stat. 2105, 2274-275 (authorizing system requiring verification of status for person applying for federal benefits).

195. See *Illegal Immigration Reform and Immigrant Responsibility Act* § 110 (“[T]he Attorney General shall develop an automated entry and exit control system that will . . . collect a record of departure for every alien departing the United States and match the records of departure with the record of the alien’s arrival in the United States . . .”).

196. See *Personal Responsibility and Work Opportunity Reconciliation Act* § 432 (“[R]egulations requir[e] verification that a person applying for a Federal public benefit . . . is a qualified alien and is eligible to receive such benefit.”).

197. See *id.* § 333 (requiring an individual to appear at interviews, hearings, and legal proceedings and submit to genetic tests in efforts to determine paternity before allowing benefits).

198. See *id.* § 404(d) (“[Each State] . . . shall . . . furnish the [Immigration and Naturalization Service] with the name and address of, and other identifying information on, any individual who the [State] knows is unlawfully in the United States . . .”).

199. See *Illegal Immigration Reform and Immigrant Responsibility Act* § 104 (“[A]n alien presenting a border crossing identification card is not permitted to cross over the border into the United States unless the biometric identifier contained on the card matches the appropriate biometric characteristic of the alien.”).

200. See *id.*

201. See *Personal Responsibility and Work Opportunity Reconciliation Act* § 333 (requiring an individual to appear at interviews and legal proceedings as well as submit to genetic tests regarding paternity in order to obtain certain benefits).

202. See *Illegal Immigration and Immigrant Responsibility Act* § 110.

person travels from the country. Further, installation of biometric identifiers such as fingerprints or handprints<sup>203</sup> not only gather personal information but also make providing such immutable biometric identification a prerequisite to being allowed to travel in and out of the country.

Beyond merely requesting this information, the new legislation requires that this information be collected and maintained in a computer database.<sup>204</sup> With continuing concerns about computer access security, the collection of this personal information may facilitate abusive use of this data, thus opening the personal lives of such persons to anyone who could access the security systems. Congress itself realized that these measures could violate the right to privacy.<sup>205</sup>

These encroachments into the realm of private information, including biological identification, are grave intrusions into a person's right to privacy. The international recognition that such transgressions should not be made into anyone's privacy indicates a violation of this international human right.

#### 4. *The Right to Work*

The international community has recognized the right and duty of people to work.<sup>206</sup> The right to work embodies both a right to fair work conditions and remuneration, as well as protection from unemployment.<sup>207</sup> The ability to work and to earn a salary is essential to the economic survival of persons because it enables them to purchase the essentials of life such as food and shelter. Additionally, the right to work and to earn a salary is essential to a person's dignity<sup>208</sup> and feeling of self-worth.

203. *See id.* § 104.

204. *See id.* §§ 109-10.

205. *See* Holly Idelson, *Bill Heads to Conference After Senate Passage*, 54 CONG. Q. WKLY REC. 1221, 1222 (1996).

206. *See* Race Convention, *supra* note 89, art. 5(e)(i), 660 U.N.T.S. at 222, 5 I.L.M. at 357; Economic Covenant, *supra* note 90, art. 6, 993 U.N.T.S. at 6, 6 I.L.M. at 361-62; OAS Charter, *supra* note 86, art. 29(b), 2 U.S.T. at 2422, 119 U.N.T.S. at 62; American Declaration, *supra* note 94, art. 14; Universal Declaration, *supra* note 93, art. 23. Although the United States has not recognized such a right, the spirit of such right is reflected throughout this country's history, ranging from Franklin Delano Roosevelt's Four Freedoms Speech, *supra* note 78, to the current discourse about moving persons from welfare to work.

207. *See supra* note 206.

208. *See* Universal Declaration, *supra* note 93, art. 23 ("Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection."); OAS Charter, *supra* note 86, art. 29(b), 2 U.S.T. at 2422, 119 U.N.T.S. at 62 ("Work is a right and a social duty . . . it demands respect for the dignity of the worker; and it is to be performed under conditions that ensure life, health and a decent standard of living . . .").

However, the immigration reform provisions requiring verification of employment eligibility run counter to this internationally recognized right to work. The new immigration legislation attempts to detect undocumented immigrants through the implementation of a status verification system which employers must use before they may legally hire an employee.<sup>209</sup> One would be unable to secure employment without complying with this verification process, which requires providing personal information and the collection of this data in a central computer system.<sup>210</sup> Because undocumented immigrants would not be able to prove eligibility for employment, they would be precluded from legally obtaining employment in the United States.

Furthermore, documented immigrants who are eligible for lawful employment may also face difficulties in seeking employment. The verification system for employment has inherent problems due to the collection and maintenance of private information and the potentially discriminatory basis upon which it will be initiated. For example, a Puerto Rican woman, a U.S. citizen by birth, was denied employment because she was unable to produce a green card.<sup>211</sup> Because she, as a Puerto Rican, was *perceived* as an "alien," the employer demanded documentation that she, as a Puerto Rican and U.S. citizen, could never have.

Beyond these inherent infirmities and subjectivities of the system lies the potential for error. There are no safeguards to ensure that the untested, computer-based verification system will be able to differentiate effectively and accurately who is legally eligible for employment and who is not.<sup>212</sup> A simple problem of a computer glitch or data incorrectly entered into the system has the potential of prohibiting people who are lawfully in this country from obtaining employment and a salary.

The implementation of this verification system also violates the work-related rights to fair work conditions and remuneration. Immigrants deemed ineligible for employment by the verification system will be unable to obtain employment with honest employers who follow the law and use the verification system. Consequently, immigrants who need employment to make enough money to survive might be forced to seek employ-

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209. See *Illegal Immigration Reform and Immigrant Responsibility Act* §§ 401-421. There are three different voluntary pilot employment verification programs: an automated confirmation of employment eligibility, "citizen attestation," and machine-readable documents. See *New Law Raises Stakes on Illegal Employment*, *supra* note 42.

210. See *supra* note 209 and accompanying text.

211. See Mylott & Pino, *supra* note 24, at 45.

212. See Idelson, *supra* note 205, at 1222 (paraphrasing Senator Spencer Abraham of Michigan) ("Workers' jobs could be jeopardized . . . by inevitable system errors.").

ment with less moral employers willing to bypass the verification process. These employers may be more likely to use their power<sup>213</sup> to exploit immigrant workers by not paying them a fair wage, if they pay them at all, or by providing unsafe or unhealthy working conditions. Additionally, the verification system may force people in many situations to endanger their lives or accept drastically, and illegally, low wages.<sup>214</sup> These consequences ultimately deprive a person of the essential economic necessities of life as well as personal dignity. When entering the workforce, one can hardly maintain personal dignity while trying to prove eligibility for employment under such conditions.

In sum, this Section has revealed the plethora of human rights trampled by the so-called reform legislation. Simply having these substantive rights, however, is a hollow victory without a venue in which to enforce them.

## V. ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS VIOLATIONS

Recognizing that the new welfare and immigration reforms violate international human rights is only the first step toward the eradication of these injustices. One also must determine an appropriate avenue for redress. A primary method of enforcement of international human rights relies on the voluntary compliance of States who fear the exercise of moral or political force by other States.<sup>215</sup> However, the United States has distinguished itself by flagrantly ignoring international pronouncements as to its express breaches of norms.<sup>216</sup> Thus, voluntary compliance is not a comfortable source upon which to rely to urge the United States to remedy the human rights violations caused by the immigration and welfare reforms. Consequently, in order to ascertain an effective remedy for these human rights violations, it is important to study and evaluate the various

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213. See *Non-Yankees Go Home*, NEWSDAY, Oct. 2, 1996, at A36.

214. See generally Hernández, *Las Olvidadas*, *supra* note 25. Undocumented women are often forced to take jobs in the underground economy such as housecleaning, child care, and the garment industry. See HOGELAND & ROSEN, *supra* note 125, at 6. They receive lower pay and are more vulnerable to exploitation in these jobs. See PIERRETTE HONDAGNEU-SOTELO, *GENDERED TRANSITIONS: MEXICAN EXPERIENCES OF IMMIGRATION* 200 (1994).

215. See Robert B. Bilder, *An Overview of International Human Rights Law*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 3-17 (Hurst Hannum ed., 1984), reprinted in CARTER & TRIMBLE, *supra* note 82, at 894, 899, 900.

216. See *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)* 1984 I.C.J. 392 (Nov. 26); John H. Jackson, *Helms-Burton, the U.S., and the WTO*, ASIL INSIGHT (Mar. 1997) (Internet document, on file with author).

domestic and international methods<sup>217</sup> of enforcement of international human rights.

#### A. ENFORCEMENT OF INTERNATIONAL LAW IN DOMESTIC (U.S.) COURTS

There are two primary means for international human rights norms, as part of the general field of international law, to become part of U.S. law: as treaties<sup>218</sup> (and other international agreements<sup>219</sup>) and as customary law. Thus, international human rights norms can be enforced in the U.S. domestic legal system to the extent that the rules and standards are recognized as U.S. law. As the following Section will demonstrate, international human rights laws are also enforceable in international fora.

The first means to have international law become U.S. law is by the adoption of a treaty which, through constitutional designation,<sup>220</sup> is the supreme law of the land.<sup>221</sup> Ratification is a significant factor in domestic enforcement of international obligations. While the United States becomes internationally accountable for its obligations simply by signing an agreement, the rights contained in such a document only become domestically enforceable upon ratification.<sup>222</sup> Moreover, even those international

217. Successful enforcement in the international community is rather difficult. *See* Bilder, *supra* note 215, at 900 ("Implementation is a key problem in making the system of international protection of human rights effective, and it has proved a difficult and troublesome one.").

218. Treaties are "international agreement[s] concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(a), 1155 U.N.T.S. 331, 333, 8 I.L.M. 679, 681.

219. Other international agreements that the United States enters into which do not meet the "advice and consent" rule of Article II of the U. S. Constitution are not treated as the "supreme Law of the Land" unless they are manifestations of customary law. *See* U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. VI; CARTER & TRIMBLE, *supra* note 82, at 153; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmts. f, j (1986). These international agreements include congressional-executive agreements and presidential or sole executive agreements. Congressional-executive agreements are executive agreements entered into based on authority of a statute or by delegation of Congress. Presidential or sole executive agreements are agreements entered into based on the authority of just the President. *See* CARTER & TRIMBLE, *supra* note 82, at 201.

220. *See* U.S. CONST. art. II, § 2, cl. 2 ("He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

221. *See* U.S. CONST. art. VI, § 2, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .").

222. Consequently, the United States is internationally but not domestically accountable with respect to documents it has signed, including the Economic Covenant, Children's Convention, and Women's Convention.

agreements that the United States ratifies, if non-self-executing,<sup>223</sup> will not be domestically enforceable until Congress passes the requisite enabling legislation. To be sure, if the specific obligations at issue are construed as customary international law,<sup>224</sup> then they will be binding notwithstanding ratification or the self-executing nature of the agreement.

Even when these conditions are met and obligations are enforceable as treaties, the United States may limit the extent to which it can be held accountable to the provisions of an international agreement by taking reservation to some of the document's mandates.<sup>225</sup> Moreover, U.S. domestic accountability for breaches of international law is limited by the requirement that the construction of international obligations be consistent with federal statutes.<sup>226</sup> If a conflict arises between a federal statute and an international obligation, whichever is later in time is controlling.<sup>227</sup> Therefore, the United States could undermine the domestic enforceability of international agreements by subsequently enacting conflicting federal legislation. The following paragraphs will explore the enforceability in U.S. courts of international provisions that could invalidate the reform legislation's draconian measures.

Because the United States has signed and ratified the U.N. Charter, OAS Charter, ICCPR, Refugee Protocol, and Race Convention,<sup>228</sup> violations of rights contained in these documents are enforceable in U.S. courts if these documents are either self-executing or have corresponding enabling legislation. However, the United States has made it clear that it does not intend these treaties, which it has expressly declared to be non-self-

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223. See *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (2d Cir. 1976) ("It is only when a treaty is self-executing when it prescribes rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights."). See, e.g., *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 188-89 (1833) (treaty self-executing); *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 314, 315 (1829) (treaty nonself-executing); *Hitai v. Immigration and Naturalization Serv.*, 343 F.2d 466, 468 (2d Cir. 1965) (holding U.N. Charter not self-executing and thus unable to invalidate immigration law provision).

224. See generally *The Paquete Habana*, 175 U.S. 677 (1900) (stating that customary international law is a part of U.S. customary domestic law); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980); *infra* notes 235-51 and accompanying text.

225. A reservation is a "unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Vienna Convention on the Law of Treaties, *supra* note 218, art. 2, 1155 U.N.T.S. at 333, 8 I.L.M. at 680-81. However, such a reservation may not violate the "object and purpose of the treaty." *Id.* art. 19, at 687.

226. See *WORLD JUSTICE*, *supra* note 68, at 114-15.

227. See *CARTER & TRIMBLE*, *supra* note 82, at 245.

228. See *supra* notes 85-96 and accompanying text.

executing,<sup>229</sup> to be enforceable domestically without such enabling legislation.<sup>230</sup> The result of this stance is that violations of the global rights within international treaties, signed and ratified, are still not enforceable in U.S. courts as local wrongs. More disheartening is the fact that even if these treaties were incorporated into domestic law, the United States could argue that conflicting domestic welfare and immigration reform provisions which cannot be reconciled with human rights norms through statutory construction, supersede (as later in time) and thus trump the enforceability of such international rights.<sup>231</sup> Ultimately, therefore, the United States might not be held accountable in domestic courts for violations of international human rights contained in treaties it has even signed and ratified.

The second source of international law that the U.S. Supreme Court has recognized as binding upon the United States<sup>232</sup> is customary international law.<sup>233</sup> Customary international human rights can be evidenced through signed and ratified treaties, other international agreements, and practices of States that are not even embodied in treaties the United States has adopted.<sup>234</sup> This is significant because if the rights within documents signed and ratified by the U.S. but labeled as non-self-executing are deemed customary international law, they will be enforceable in U.S. courts.

However, the rules pertaining to the enforceability of customary law in U.S. courts remain less settled than those of international treaties. While there is no question that customary law is a part of U.S. domestic

229. See e.g., Letter of Submittal from Warren Christopher to Jimmy Carter (Dec. 17, 1977) (on file with author). "The United States declares that the provisions of Articles 1 through 27 of the [ICCPR] are not self-executing." *Id.* "The United States declares that the provisions of Articles 1 through 7 of [the Race Convention] are not self-executing." *Id.*

230. See Hernández, *Reconciling Rights in Collision*, *supra* note 6, at 259.

231. See CARTER & TRIMBLE, *supra* note 82, at 245.

232. See *The Paquete Habana*, 175 U.S. 677 (1900) (stating for first time that customary international law was part of U.S. domestic law).

233. See Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, 3 Bevans 1179, 1187 (listing "international custom, as evidence of a general practice accepted as law" as a source of international law); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820) ("[Custom] may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."); WALLACE, *supra* note 79, at 9 ("Custom in international law is a practice followed by those concerned because they feel legally obliged to behave in such a way.").

234. See D'AMATO, *supra* note 78, at 126-40 ("What makes the content of a treaty count as an element of custom is the fact that the parties to the treaty have entered into a binding commitment to act in accordance with its terms. . . . The commitment itself, then, is the 'state practice' component of custom.").

law,<sup>235</sup> there is no settled rule regarding the effects of inconsistent federal legislation or the president's exercise of his foreign affairs power.<sup>236</sup> Additionally, it is quite unclear what the U.S. courts would consider as customary international law.<sup>237</sup> However, there are noteworthy cases in which U.S. courts have recognized customary international law and enforced it domestically.

Almost one hundred years ago, in *The Paquete Habana*, a case involving the internationally recognized exemption of fresh fish boats from capture as a prize of war, the United States recognized customary international law as part of domestic law for the first time.<sup>238</sup> More recently, in the area of international human rights, U.S. courts found that official torture violated a customary international norm that was incorporated into the law of nations and enforceable in the United States.<sup>239</sup>

In 1980, in *Filartiga v. Peña-Irala*, the court cited to *The Paquete Habana* and emphasized that to be considered customary international law "[t]he requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one."<sup>240</sup> The court then used international documents such as the U.N. Charter, Declaration on the Protection of All Persons From Being Subjected to Torture,<sup>241</sup> American Convention, ICCPR, and European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>242</sup> as evidence of an international customary norm prohibiting torture accepted by civilized nations, even if committed by private individuals.<sup>243</sup> In 1996, in *Kadic v. Karadzic*, the Second Circuit followed the *Filartiga* precedent and simi-

235. See *The Paquete Habana*, 175 U.S. at 700; *Kadic v. Karadzic*, 70 F.3d 232, 239-40 (2d Cir. 1995); *Filartiga v. Peña-Irala*, 630 F.2d 876, 880-81 (2d Cir. 1980).

236. See CARTER & TRIMBLE, *supra* note 82, at 245.

237. See *Kadic*, 70 F.3d at 238-39; *Filartiga*, 630 F.2d at 880-82. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1986).

238. The U.S. Supreme Court traced the history of this exemption to Henry IV and the early 1400s. See *The Paquete Habana*, 175 U.S. at 686-700. This practice, some 500 years old at the time the Court analyzed it, had a long-standing past in order to warrant recognition as international customary law. The Court stated as follows:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .

*Id.* at 700.

239. See *Kadic*, 70 F.3d at 232; *Filartiga*, 630 F.2d at 884.

240. *Filartiga*, 630 F.2d at 881.

241. G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/10034 (1976).

242. European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

243. See *Filartiga*, 630 F.2d at 881.



larly concluded that war crimes and torture violated accepted international customary norms.<sup>244</sup>

While these cases provide precedent that violations of customary norms are enforceable in U.S. courts, they also illustrate the great burden one must overcome to prove that the international human rights implicated by the new immigration and welfare reform actually constitute actionable breaches of customary international law. Women's and children's rights to freedom from discrimination and other special protections<sup>245</sup> and the rights to asylum, health, privacy, and work are relatively recently recognized rights.<sup>246</sup> Therefore, under *The Paquete Habana*, these international human rights might fail to meet the longevity standard to be considered customary international law.<sup>247</sup> However, under the more recent *Filartiga* and *Kadic* cases, the relevant international human rights could be considered customary international law if accepted by civilized nations though the rights lack old historical roots. The status of such rights as customary laws might depend on the significance imputed to the United States' reluctance to ratify the covenants containing these rights, the existence of U.S. laws expressly articulating that limitation on some rights,<sup>248</sup> and on the Supreme Court's readiness to find that these international human rights are accepted by civilized nations. Indeed, the U.S. enactment of the welfare and immigration reforms, particularly the many provisions ostensibly in derogation of, or at a minimum in tension with, these international human rights may be strong evidence that the United States has not accepted these human rights as binding international obligations.

Finally, the "later in time" doctrine applied to resolving conflicts between substantive provisions of treaties and federal law arguably could be extended to apply in the case of customary international legal princi-

244. *Kadic*, 70 F.3d at 243.

245. See, e.g., Children's Convention, *supra* note 91, art. 2, 28 I.L.M. at 1459 (stating that each state "shall respect and ensure the rights set forth in the . . . Convention to each child . . . irrespective of the child's . . . race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status"); Women's Convention, *supra* note 92, art. 1, 1249 U.N.T.S. at 16, 19 I.L.M. at 36 (defining "discrimination against women" as including "any distinction, exclusion or restriction made on the basis of sex . . . irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field").

246. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1986).

247. *But see id.* § 102 cmt. b ("The practice necessary to create customary law may be of comparatively short duration . . .").

248. See Louis Henkin, *Economic-Social Rights as "Right": A United States Perspective*, 2 HUMAN RTS. L.J. 223, 230 (1981).

ples.<sup>249</sup> If the "later in time" doctrine were applied and the immigration and welfare reforms could not be reconciled with international mandates, the domestic enactment would supersede the international customary law. Of course, these tensions could be alleviated by the mandate that, as much as possible, the rules at issue be reconciled and construed as not in conflict with each other.<sup>250</sup>

Therefore, the international human rights implicated by the new welfare and immigration reforms might not be enforceable in U.S. courts by either treaty or customary international law. Fortunately, the domestic courts are not the only avenue available to pursue claims against this new legislation as violative of international human rights.

## B. ENFORCEMENT OF HUMAN RIGHTS IN INTERNATIONAL FORA

### 1. *Informal Diplomacy*

The first avenue of international redress for violations of international human rights is informal diplomacy.<sup>251</sup> By exercising diplomatic pressure one State can influence the actions of other States. In order to be successful, informal diplomacy would have to cause the repeal of those provisions of the immigration and welfare reforms that violate international human rights. However, before one can determine whether such a result can be achieved, the process of this informal diplomacy must be examined. First, there must be a State or States that take the lead in advocating against the welfare and immigration legislation of the United States. Second, the advocate State must use diplomatic relations and pressure to effectuate the desired goal of repeal of these offending statutes.

Because the impact of the provisions fall hardest on Latino and Latina immigrants, particularly those from Mexico, that State would be the natural choice to spearhead the diplomatic campaign. In fact, after passage of Proposition 187 in California, both the Mexican President and Mexican Ambassador to the United States made strong statements in condemnation of the state legislation.<sup>252</sup> Similarly, Mexico could voice strong objection to, and offense with respect to, the new legislation vis-à-vis its impact on

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249. See CARTER & TRIMBLE, *supra* note 82, at 245.

250. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1986).

251. Informal diplomacy must be distinguished from general diplomacy and secret diplomacy. See WILLIAM R. SLOMANSON, *FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW* 285-86 (2d ed. 1995).

252. See Hernández, *Reconciling Rights in Collision*, *supra* note 6, at 255.

Mexican nationals. Mexico need not be alone in the battle and may certainly want to enlist the assistance of other States whose nationals are affected, such as various Central American states. It may also seek support from nongovernmental organizations like Amnesty International to aid in applying diplomatic pressure to the United States. However, while Mexico is certainly able to vocalize its displeasure with and concerns about the welfare and immigration legislation, neither one State alone, nor various States together are likely to be able to influence the United States to abandon this regulation.<sup>253</sup> Despite its position as a substantial trading partner to the United States, Mexico has neither the economic nor political resources to influence the United States, as a powerful and dominant international force. Therefore, while informal diplomacy may bring publicity to the negative effects of the welfare and immigration reform, the State of Mexico alone, or together with its Central American neighbors, lacks the power to force the United States to alter its recent legislation.

## 2. *International Court of Justice*

Another international forum in which to challenge the validity of the immigration and welfare reform legislation is the International Court of Justice ("ICJ"), a body created by the U.N. Charter and designed to be the principal judicial organ of the United Nations.<sup>254</sup> All member States of the United Nations are parties to the Statute of the International Court of Justice.<sup>255</sup>

Article 38 of the Statute of the International Court of Justice recognizes both international agreements and international custom as primary

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253. The appearance that the United States is unmoved by such pressure is evidenced by its reaction (or lack thereof) to the consistent, continued condemnation by the global community of the U.S. embargo on Cuba. This climate is presently evident in the joint efforts of the European Union, Mexico, and Canada in the World Trade Organization action against the strengthened embargo under the name of the Helms-Burton Act. See generally David S. De Falco, Comment, *The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996: Is the United States Reaching Too Far?*, 3 J. INT'L LEGAL STUD. 125 (1997) (reviewing arguments by Canada and European nations that provisions of the U.S. embargo against Cuba violate international law); Brian J. Welke, Comment, *GATT and NAFTA v. The Helms-Burton Act: Has the United States Violated Multilateral Agreements?*, 4 TULSA J. COMP. & INT'L L. 361 (1997) (analyzing arguments by Canada and Mexico that the provisions of the U.S. embargo of Cuba violate NAFTA).

254. See Statute of the International Court of Justice, *supra* note 233, art. 1, 59 Stat. at 1055, 3 Bevans at 1179 (identifying "[t]he International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations").

255. U.N. CHARTER art. 93, para. 1. See generally Statute of the International Court of Justice, *supra* note 233, 59 Stat. 1055, 3 Bevans 1179. The ICJ is composed of 15 judges who are competent, of high morals, and not of the same State. See *id.* arts. 2, 3, 59 Stat. at 1055, 3 Bevans at 1179.

sources of international law.<sup>256</sup> Therefore, the ICJ could find violations of any human rights that are contained in agreements which the United States has signed or which have the force of international custom.

Despite high aspirations, however, the effectiveness of the ICJ is hampered by various fundamental principles, which affect its ability to consider whether the so-called reform legislation is violative of international human rights norms. First, the limitation that only States may be parties to cases before the ICJ<sup>257</sup> restricts who may bring disputes concerning the immigration legislation before the ICJ. Individuals who are victims of international human rights violations, unable on their own to bring such violations to the attention of the ICJ, must rely on their state of nationality to bring the matter before the court. Unfortunately, documented or undocumented immigrants living in the United States or trying to live in the United States are unlikely to have the support of a nation that would be willing to take the United States to task by taking this matter to the ICJ on their behalf, especially because the United States is likely to be unmoved—as in the past—even by a decision of that honorable body.<sup>258</sup> Finally, for refugees whose presence in this country is based upon flight from a repressive regime,<sup>259</sup> the State from which they fled (and from which they want to remain estranged) is an unlikely candidate to represent them as an international body in a challenge to the laws of the State that provided them refuge. However, even if a State were to undertake the obligation to present these possible human rights violations to the ICJ, the structure of the ICJ would further hinder any achievement of a successful resolution to the problem.

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256. See Statute of the International Court of Justice, *supra* note 233, art. 38, 59 Stat. at 1060, 3 Bevens at 1187. Two other listed sources, general principles of law as recognized by civilized nations and judicial decisions and the writings of prominent legal thinkers, are considered secondary sources.

257. See *id.* arts. 3, 4, 59 Stat. at 1059, 3 Bevens at 1179 (“Only states may be parties in cases before the Court . . .”). However, the United Nations can ask the ICJ for advisory opinions. See *id.* art. 65, 59 Stat. at 1063, 3 Bevens at 1191.

258. See generally *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (detailing the United States’ decision not to appear before the ICJ following a decision against the United States concerning jurisdiction and admissibility).

259. See generally *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (detailing a settlement agreement that created de novo asylum adjudication for Salvadorans in the United States as of Sept. 19, 1990, and Guatemalans in the United States as of Oct. 1, 1990); Reno Letter, *supra* note 36 (describing the Nicaraguan Review Program that provided temporary protection from deportation and special legal treatment for Nicaraguans and other Central Americans fleeing their countries during a civil war).

The next stumbling block to a challenge to the immigration and welfare legislation is that jurisdiction of the ICJ is based upon consent.<sup>260</sup> This consent may be given on an ad hoc basis, specified in treaties, or based upon a State's declaration of its recognition of the ICJ's jurisdiction for all matters until such time that it cancels such declaration.<sup>261</sup> Therefore under the new reform legislation, in order to bring the United States before the ICJ for its possible human rights violations, the United States first would have to consent to the jurisdiction of the ICJ. It is quite unlikely that the United States would consent voluntarily to the jurisdiction of the ICJ for the purpose of resolving violations it may have committed. Moreover, while the United States, through President Truman, accepted the compulsory jurisdiction of the ICJ for resolution of disputes arising out of international law breaches and obligations,<sup>262</sup> the country revoked this recognition of jurisdiction as to any disputes with Central American countries.<sup>263</sup> Although the ICJ held the revocation ineffectual, the United States refused to accept the court's jurisdiction to adjudicate the merits of that dispute and, having lost on the procedural aspects of the case, refused to appear and litigate the merits. Therefore, the United States cannot be forced to accept the jurisdiction of the ICJ to resolve these allegations of human rights violations if brought to the ICJ by Mexico or another South or Central American state, and it is not likely that the United States will recognize the ICJ's compulsory jurisdiction.

### 3. *Inter-American Regional System*

The inter-American regional system, organized by the Organization of American States,<sup>264</sup> which consists of Latin American nations, the United States, and Canada, is yet another possible forum for the adjudication of human rights violations effected by the recent legislation. The two main bodies concerned with human rights violations in this regional sys-

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260. See Statute of International Court of Justice, *supra* note 233, art. 36(1), 59 Stat. at 1060, 3 Bevans at 1186.

261. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 903 (1986).

262. See CARTER & TRIMBLE, *supra* note 82, at 305-06.

263. See *id.* at 306. The United States withdrew its acceptance of compulsory jurisdiction in reaction to a case brought by Nicaragua against it. See *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U. S.)*, 1984 I.C.J. 392 (Nov. 26).

264. See OAS Charter, *supra* note 86, art. 1, 2 U.S.T. at 2417, 119 U.N.T.S. at 50 ("The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity and their independence.").

tem are the Inter-American Commission on Human Rights<sup>265</sup> and the Inter-American Court on Human Rights.<sup>266</sup>

The Inter-American Court was created under the American Convention, to which the United States is not a party.<sup>267</sup> Significantly, the regional human rights documents do not provide expressly that the Inter-American Court can only resolve disputes with the express consent of the member States.<sup>268</sup> In fact, recently the Inter-American Court found that it had the authority to issue advisory opinions regarding violations of the American Declaration,<sup>269</sup> to which the United States is a party. However, the United States strongly rejected the Inter-American Court's ruling and stated that the court could not interpret the American Declaration because it was not a treaty.<sup>270</sup> Therefore, the United States is not likely to submit to the jurisdiction of the Inter-American Court for two reasons. First, the United States is not a party to the American Convention that created the Court. Second, the United States has rejected the authority of the Inter-American Court to adjudicate claims based on any violation of the American Declaration.

The second structure in the inter-American system that addresses international human rights violations is the Inter-American Commission on Human Rights<sup>271</sup> ("Inter-American Commission"). The Inter-American Commission conducts studies on State compliance with human rights goals and makes recommendations to member States with respect to the same.<sup>272</sup> The three primary functions of the Inter-American Commission are to process individual complaints concerning violations,<sup>273</sup> to prepare country reports on violations, and to propose remedial measures regarding human rights violations.<sup>274</sup> Significantly, individuals may petition the Inter-American Commission with allegations of human rights violations based upon the American Declaration.<sup>275</sup> Upon the making of such petition, the Inter-American Commission is empowered to solicit information from the

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265. See American Convention, *supra* note 96, arts. 34-40, 1144 U.N.T.S. at 153-54, 9 I.L.M. at 685-86.

266. See *id.* arts. 52-69, 1144 U.N.T.S. at 157-60, 9 I.L.M. at 690-91.

267. See *id.*

268. See *id.* See also SLOMANSON, *supra* note 251, at 512.

269. See SLOMANSON, *supra* note 251, at 512-16.

270. See *id.* at 512.

271. See American Convention, *supra* note 96, arts. 34-40, 1144 U.N.T.S. at 153-53, 9 I.L.M. at 685-86.

272. See SLOMANSON, *supra* note 251, at 511.

273. See *id.* Individuals typically must seek remedies for violations in the accused State first.

274. See NEWMAN & WEISSBRODT, *supra* note 78, at 281.

275. See *id.*; STEINER & ALSTON, *supra* note 78, at 645.

violating State or gather information through its own investigation.<sup>276</sup> Ultimately, the Inter-American Commission may accept resolutions condemning the State's behavior and make recommendations to the State to correct its actions.<sup>277</sup>

Therefore, the Inter-American Commission does seem to provide individuals with an avenue to bring their complaints<sup>278</sup> against the United States based on the human rights violations caused by the immigration and welfare reforms. The authority of the Inter-American Commission's determination, however, would be limited to violation of human rights enumerated in the American Declaration. Under the American Declaration, the Inter-American Commission could find that particular provisions of the immigration and welfare reform laws violate the international human rights to freedom from discrimination on the grounds of race and ethnicity,<sup>279</sup> language,<sup>280</sup> and gender.<sup>281</sup> The Inter-American Commission also could find that the new reform legislation violates the rights of children to education<sup>282</sup> and nationality,<sup>283</sup> right to asylum,<sup>284</sup> right to due process,<sup>285</sup> right to health and well-being,<sup>286</sup> right to privacy,<sup>287</sup> and right to work.<sup>288</sup>

Should the Inter-American Commission conclude that the welfare and immigration legislation provisions are violative of the human rights norms contained in the American Declaration, it could then issue a resolution condemning such violations. Despite such possible findings and action, the impact of the Inter-American Commission's condemnation would most likely be ineffective to bring about change. The ideal result would be that the violating State takes measures to address the violations, "at least theoretically."<sup>289</sup> Unfortunately, in reality, the Inter-American Commission's

276. See NEWMAN & WEISSBRODT, *supra* note 78, at 281.

277. See *id.* at 288.

278. See *id.* at 283. "[M]ost individual petitions filed with the Commission allege conduct that applicable instruments clearly prohibit, such as torture or arbitrary arrest and imprisonment. In the typical case, the main issue is whether the alleged ill-treatment actually took place." *Id.*

279. See American Declaration, *supra* note 94, arts. 2, 13, 19; *supra* notes 105-06 and accompanying text.

280. See American Declaration, *supra* note 94, art. 2.

281. See American Declaration, *supra* note 94, art. 2, 7; *supra* Part IV.A.2.

282. See American Declaration, *supra* note 94, art. 12; *supra* note 136.

283. See American Declaration, *supra* note 94, art. 19; *supra* note 153.

284. See American Declaration, *supra* note 94, art. 27; *supra* notes 156-60.

285. See American Declaration, *supra* note 94, art. 26. See also *supra* note 163.

286. See American Declaration, *supra* note 94, art. 11; *supra* notes 174-76.

287. See American Declaration, *supra* note 94, art. 5; *supra* notes 191-92.

288. See American Declaration, *supra* note 94, art. 14; *supra* notes 206-08.

289. STEINER & ALSTON, *supra* note 78, at 645; CARTER & TRIMBLE, *supra* note 82, at 962 ("[T]he Inter-American Commission and Court cannot point to . . . significant successes . . .").

finding would have no meaningful impact upon the U.S. legislation because the Inter-American Commission has no mechanism to enforce compliance.<sup>290</sup>

#### 4. *Charter-Based Organs*

The next fora that may entertain a complaint that the immigration and welfare reform legislation violates recognized international human rights are the Charter-defined organs.<sup>291</sup> The primary, and most important, Charter-based organ for the enforcement of human rights violations is the Commission on Human Rights ("U.N. Commission"). The U.N. Commission, operating under the Economic and Social Council, has two primary procedures to adjudicate alleged human rights violations. Under one, the 1503 procedure, individuals may allege gross human rights violations through a private process.<sup>292</sup> Under the other, the 1235 procedure, public debate is held regarding complaints presented by governments and non-governmental organizations about gross human rights violations.<sup>293</sup>

The U.N. Commission, under either a 1235 or 1503 procedure, could address human rights violations based upon the Universal Declaration, ICCPR, or Economic Covenant.<sup>294</sup> Therefore, pursuant to these procedures the U.N. Commission could hear complaints for any violations of the Universal Declaration such as breaches of the right to freedom from discrimination,<sup>295</sup> right to health care,<sup>296</sup> right to work,<sup>297</sup> right to privacy,<sup>298</sup> rights of children to education<sup>299</sup> and nationality,<sup>300</sup> and right of women to

290. See Thomas Buergenthal, *The Inter-American System for the Protection of Human Rights*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 487-88 (Theodore Meron ed., 1984) (stating that the effectiveness of the inter-American system is dependent upon the involvement of the United States as a proponent of the system).

291. Enforcement by international organizations falls primarily upon Charter-based organs, those created by the United Nations Charter, or treaty-based organs, those created by human rights treaties. See STEINER & ALSTON, *supra* note 78, at 349-50. Included among the Charter-based organs are the General Assembly, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, and Commission on the Status of Women. See *id.* at 349.

292. See E.S.C. Res. 1503, U.N. ESCOR, 48th Sess., Supp. No. 1A, at 8, U.N. Doc. E/4832/Add.1 (1970).

293. See E.S.C. Res. 1235, U.N. ESCOR, 42nd Sess., Supp. No. 1, at 17, U.N. Doc. E/4393 (1967).

294. See STEINER & ALSTON, *supra* note 78, at 349.

295. See Universal Declaration, *supra* note 93, art. 2; *supra* notes 98-99.

296. See Universal Declaration, *supra* note 93, art. 25; *supra* notes 173-75.

297. See Universal Declaration, *supra* note 93, art. 23; *supra* notes 206-08.

298. See Universal Declaration, *supra* note 93, art. 12; *supra* notes 191-92.

299. See Universal Declaration, *supra* note 93, art. 26; *supra* note 136.

300. See Universal Declaration, *supra* note 93, art. 15; *supra* note 153.



special care for maternity needs.<sup>301</sup> Similarly, pursuant to the ICCPR, affected individuals may claim violations of the right to freedom from discrimination,<sup>302</sup> right to privacy,<sup>303</sup> and rights of children.<sup>304</sup> Finally, claims brought under the Economic Covenant can include allegations of violations of the right to freedom from discrimination,<sup>305</sup> right to work,<sup>306</sup> rights of children,<sup>307</sup> and right to health.<sup>308</sup>

The scope of a 1503 procedure is rather ill-defined but does require a claim that the alleged violations are both sufficiently serious and sufficiently lengthy in duration.<sup>309</sup> Under this procedure, communications presenting allegations of human rights violations may be made by individuals or groups who are victims or who have direct and reliable knowledge of the alleged violations.<sup>310</sup> Of the thousands of communications sent to the U.N. Commission each year, only about ten to twenty ever reach the U.N. Commission for consideration.<sup>311</sup> This initial hurdle means that any claims that the U.S. legislation violates human rights may not even receive the attention of the U.N. Commission.

The Sub-Commission<sup>312</sup> initially reviews communications regarding the allegations privately; then the recommendations of the Sub-Commission are presented to the U.N. Commission.<sup>313</sup> The Commission could drop the case, keep the case under review, send an envoy to obtain more information, appoint an ad hoc committee to conduct a confidential investigation that can make observations and suggestions, or transfer to a

301. See Universal Declaration, *supra* note 93, art. 25; *supra* note 126.

302. See ICCPR, *supra* note 87, arts. 2, 26, 999 U.N.T.S. at 173, 179, 6 I.L.M. at 369, 375; *supra* notes 98-99.

303. See ICCPR, *supra* note 87, art. 17, 999 U.N.T.S. at 177, 6 I.L.M. at 373; *supra* notes 191-92.

304. See ICCPR, *supra* note 87, art. 24, 999 U.N.T.S. at 179, 6 I.L.M. at 375.

305. See Economic Covenant, *supra* note 90, art. 2, 993 U.N.T.S. at 5, 6 I.L.M. at 361; *supra* notes 98-99.

306. See Economic Covenant, *supra* note 90, art. 7, 993 U.N.T.S. at 6, 6 I.L.M. at 362; *supra* notes 206-08.

307. See Economic Covenant, *supra* note 90, arts. 10, 13, 993 U.N.T.S. at 7, 8, 6 I.L.M. at 363, 364.

308. See Economic Covenant, *supra* note 90, art. 12, 993 U.N.T.S. at 8, 6 I.L.M. at 363-64.

309. See Dinah L. Shelton, *Individual Complaint Machinery Under the United Nations 1503 Procedure and the Optional Protocol to the International Covenant on Civil and Political Rights*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* (Hurst Hannum ed., 1983), excerpted in CARTER & TRIMBLE, *supra* note 82, at 964.

310. See Sub-Commission Resolution 1 (XXIV) (1971), excerpted in STEINER & ALSTON, *supra* note 78, at 378.

311. See CARTER & TRIMBLE, *supra* note 82, at 966.

312. The Sub-Commission is a five-member working group that convenes prior to each August session. See *id.*

313. See *id.* at 967.

1235 procedure and go public.<sup>314</sup> However, "the 1503 process is painfully slow, complex, secret, and vulnerable to political influence at many junctures."<sup>315</sup>

The effectiveness and value of the 1503 procedure is to pressure governments engaged in human rights violations to cease and desist from the offensive conduct.<sup>316</sup> The effectiveness of this process is highly questionable with respect to "governments that do not respond to incremental pressure."<sup>317</sup> The United States, as the sole remaining superpower following the end of the Cold War, remains staunchly impervious to outside pressure to change its ways.<sup>318</sup> Consequently, any complaints based on violations of human rights sent to the U.N. Commission under a 1503 procedure would most likely be ineffective in pressuring the United States to alter or repeal its violative legislation.

Under a 1235 procedure, the U.N. Commission holds public debates to receive allegations of human rights violations from governments and nongovernmental organizations.<sup>319</sup> Because this procedure does not allow the Commission to accept allegations of violations from individuals, those adversely affected by the welfare and immigration reform must find a government or nongovernmental organization<sup>320</sup> to champion their cause.<sup>321</sup> Once allegations are presented, the U.N. Commission selects from the articulated complaints those that should be investigated further.<sup>322</sup> Therefore, the human rights violations caused by the welfare and immigration

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314. See Philip Alston, *The Commission on Human Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 126, 146 (Philip Alston ed., 1992), *excerpted in* STEINER & ALSTON, *supra* note 78, at 380-81.

315. NEWMAN & WEISSBRODT, *supra* note 78, at 123.

316. *See id.*

317. *Id.*

318. For example, the international community has strongly condemned the United States position toward Cuba. However, despite this condemnation the United States has not altered its conduct toward Cuba.

319. See STEINER & ALSTON, *supra* note 78, at 390; NEWMAN & WEISSBRODT, *supra* note 78, at 112-13, 125.

320. See David Weissbrodt, *The Contribution of International Nongovernmental Organizations to the Protection of Human Rights*, in *2 HUMAN RIGHTS IN INTERNATIONAL LAW*, *supra* note 290, at 408-38 (describing the function and contribution of nongovernmental organizations to international human rights).

321. See *supra* notes 257-63 accompanying text (explaining the difficulties which arise when those alleging violations of international law must rely on a national sponsor in order to bring suit in the ICJ).

322. See STEINER & ALSTON, *supra* note 78, at 390.

laws could avoid being subjected to the U.N. Commission's investigation.<sup>323</sup>

The most serious and effective means of enforcement available under a 1235 procedure includes adoption of a resolution condemning the government's actions, calling for corrective measures, and bringing the matter to the Security Council for the adoption of punitive sanctions.<sup>324</sup> However, these enforcement measures would prove inadequate to force the United States to alter its course of action against documented and undocumented immigrants. The United States, with its position and strength as a world leader and with its veto power in the Security Council,<sup>325</sup> seems impervious to the effects of international condemnation.<sup>326</sup> The impact of any measures taken by the U.N. Commission is dependent upon the nature of the violation, the influence of domestic pressure groups, the U.N. Commission's support for the measure, the country's concern with external influences, the country's vulnerability to economic pressure, and the influence of allies and neighbors upon the country.<sup>327</sup> Unfortunately, due to the size, economic strength, and political influence of the United States, any measures taken by the U.N. Commission seem doomed to be ineffective.<sup>328</sup>

### 5. *Treaty-Based Organs*

A final venue in which a claim may be lodged for potential U.S. violations of human rights norms is within the U.N.'s structure for treaty-based concerns. The U.N. structure contains six organs that correspond to six human rights treaties: the Economic Covenant; ICCPR; Race Conven-

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323. See Alston, *supra* note 314, at 402.

Although an enormous number of country situations have been discussed by the Commission under the 1235 procedure, only 23 special procedures . . . were set up between 1979 and 1994. In relation to those countries that have been targeted, a number of imbalances exist. Eastern Europe was only subject to two investigations prior to 1992, remarkably few African countries have been identified and, in the Middle East, only Israel and Iraq have been singled out. Western Europe has not been targeted at all.

*Id.* Given these imbalances it seems unlikely that the United States would be selected by the Commission for further investigation.

324. See STEINER & ALSTON, *supra* note 78, at 391.

325. See U.N. CHARTER art. 27 (detailing voting power within the Security Council).

326. See NEWMAN & WEISSBRODT, *supra* note 78, at 184 (noting that a resolution introduced endorsing the appointment of a Special Rapporteur on racism and xenophobia in the United States was rejected by a wide margin leaving only three countries voting in favor of the resolution).

327. See STEINER & ALSTON, *supra* note 78, at 391.

328. See Christian Strohal, *The United Nations Responses to Human Rights Violations, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY*, *supra* note 172, at 352 ("Some of the more striking shortcomings of the Commission on Human Rights include the lack of immediate and effective sanctions vis-à-vis violators of human rights, other than the weapon of international public opinion.").

tion; Women's Convention; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>329</sup> ("Torture Convention"); and Children's Convention.<sup>330</sup> Each treaty body is concerned only with the specific treaty under which it was established and is effective exclusively over parties to that particular treaty.

Therefore, the United States can only be held to violations contained in those treaties to which it is a contracting State, including the ICCPR, Race Convention, Economic Covenant, Children's Convention, and Women's Convention.<sup>331</sup> Although there are differences between these treaty organs, the general functions and procedures of these bodies are quite similar.<sup>332</sup> The primary function of the treaty committees is to evaluate States' reports required pursuant to the particular treaty.<sup>333</sup> The effectiveness of States' reports in protecting human rights contained in these treaties has been questioned. Committees frequently are faced with late reports, inadequate reports, uninformed State representatives, a failure to respond to examinations, and a failure to disseminate results of the reports, among other problems.<sup>334</sup> Additionally, States feel overburdened by having to comply with the reporting requirements of all of the individual treaty committees.<sup>335</sup>

Pursuant to these procedures, various committees could find violations of treaty obligations. For example, the ICCPR committee may find that the reform legislation violates the right to freedom from discrimination,<sup>336</sup> the right to privacy,<sup>337</sup> and the rights of children.<sup>338</sup> The Race Convention committee may find that the reform legislation violates the right to freedom from discrimination,<sup>339</sup> the right to work,<sup>340</sup> the rights of children to a nationality<sup>341</sup> and education,<sup>342</sup> and the right to health.<sup>343</sup> The

329. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc.A/39/51 (1984) [hereinafter *Torture Convention*] (entered into force June 26, 1987).

330. See NEWMAN & WEISSBRODT, *supra* note 78, at 15.

331. It is noteworthy, however, that because the U.S. has signed but not ratified the Economic Convention, Children's Convention, and Women's Convention, it only submits reports on its compliance with the ICCPR and the Race Convention.

332. See STEINER & ALSTON, *supra* note 78, at 557.

333. See *id.*

334. See *id.* at 559.

335. See *id.*

336. See ICCPR, *supra* note 87, arts. 2, 26, 999 U.N.T.S. at 172, 179, 6 I.L.M. at 369, 375.

337. See *id.* art. 17, 999 U.N.T.S. at 177, 6 I.L.M. at 373.

338. See *id.* art. 24, 999 U.N.T.S. at 179, 6 I.L.M. at 373.

339. See Race Convention, *supra* note 89, art. 1, 660 U.N.T.S. at 216, 5 I.L.M. at 353-54.

340. See *id.* art. 5(e)(i), 660 U.N.T.S. at 222, 5 I.L.M. at 356.

341. See *id.* art. 5(d)(iii), 660 U.N.T.S. at 220, 5 I.L.M. at 356.

Economic Covenant committee may find that the reform legislation violates the right to freedom from discrimination,<sup>344</sup> the right to work,<sup>345</sup> the rights of children,<sup>346</sup> and the right to health.<sup>347</sup> The Children's Convention committee may find that the reform legislation violates the rights of children to freedom from discrimination,<sup>348</sup> the right to health,<sup>349</sup> the right to asylum,<sup>350</sup> and the right to education.<sup>351</sup> The Women's Convention committee may find that the reform legislation violates the rights of women to special health care.<sup>352</sup>

The outcome of the committees' review of States' reports, regrettably, is a generally ineffective tool to enforce human rights violations. The stance of the committees on the reports is not "binding in law and cannot be enforced."<sup>353</sup> Therefore, the examination of State reports would appear meaningless in redressing or correcting human rights violations, particularly in regards to the United States in light of its position of power in the global community. However, as the events surrounding the United States' first report rendered to the international community reveals, even the sole superpower feels the effects of collective criticism and reproach, which provides some grounds for optimism at the possibility of change.<sup>354</sup> This could provide a source of hope for complaints concerning human rights violations effected by the so-called reform legislation.

342. *See id.* art. 5(e)(v), 660 U.N.T.S. at 222, 5 I.L.M. at 357.

343. *See id.* art. 5(e)(iv), 660 U.N.T.S. at 222, 5 I.L.M. at 357.

344. *See* Economic Covenant, *supra* note 90, art. 2, 993 U.N.T.S. at 5, 6 I.L.M. at 361.

345. *See id.* art. 6, 993 U.N.T.S. at 6, 6 I.L.M. at 361-62.

346. *See id.* arts. 10, 13, 993 U.N.T.S. at 7, 8, 6 I.L.M. at 363, 364.

347. *See id.* art. 12, 993 U.N.T.S. at 8, 6 I.L.M. at 363-64.

348. *See* Children's Convention, *supra* note 91, art. 2, 28 I.L.M. at 1459.

349. *See id.* arts. 23, 24, 28 I.L.M. at 1465-66.

350. *See id.* art. 22, 28 I.L.M. at 1464.

351. *See id.* art. 28, 28 I.L.M. at 1467.

352. *See* Women's Convention, *supra* note 92, art. 11, 1249 U.N.T.S. at 18-19, 19 I.L.M. at 39.

353. Torkel Opsahl, *The Human Rights Committee*, in STEINER & ALSTON, *supra* note 78, at 537.

354. *See* C. Gerald Fraser, *Human Rights Report on the U.S.*, Earth Times News Service, Apr. 6, 1995 (on file with author). The United States did not sign the ICCPR until 1992 and submitted its initial written report, due in 1993, in August 1994. *See id.* Prior to the first meeting of the Human Rights Committee to review the initial report, nongovernmental groups, such as Amnesty International, sharply criticized the U.S. record on human rights. *See* Amnesty International, *USA: Amnesty International Criticizes Human Rights Violations on the Eve of United Nations Scrutiny*, Mar. 28, 1995 (on file with author). Although critics argue that, given the number of reservations taken, the ICCPR is a dead letter in the United States, the American delegation to the Human Rights Committee vigorously defended its human rights record, presenting a "Constitution-centric" view and arguing that "[c]ivil and political rights . . . will always be a work in progress." Fraser, *supra* (quoting Assistant Secretary of State for Democracy John Shattuck, a member of the American delegation).

A second function of some of the committees is an interstate complaint procedure, whereby one State party may bring a human rights violation complaint against another State party.<sup>355</sup> These complaint procedures, unfortunately, are ineffective in correcting or remedying human rights violations because of the limited acceptance of such procedures by State parties.<sup>356</sup> For example, no State party has utilized the ICCPR interstate complaint procedure.<sup>357</sup>

Furthermore, the individual complaint process available under the Race Convention, ICCPR, and Torture Convention generally has proven to be equally ineffective due to the extremely small number of complaints brought.<sup>358</sup> Significantly, this individual complaint process is not cumbersome as the individuals' complaints need only claim a violation of a right set forth in the controlling document and the complainant need not show that the violation is systematic in nature.<sup>359</sup>

With respect to the ICCPR, in order to invoke the individual complaint process, States must have signed the separate Optional Protocol to the ICCPR.<sup>360</sup> The United States has not signed the Optional Protocol to that treaty and therefore cannot be subject to the individual complaint process.<sup>361</sup> However, even if this procedure were invoked, there is no means to force compliance or rectify the human rights violations.

This realistic evaluation of the ostensible inefficacy of the presently existing, generous global rights construct to proscribe, prevent, and punish local wrongs—either in international or domestic fora—should not be taken either as an indication of weakness in the system or failure of its aspirations. The human rights discipline is a young and evolving one, and the realizations of the apparent narrowness of its margins and boundaries are cause to suggest, propose, and promote the directions its progressive development should take.

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355. See STEINER & ALSTON, *supra* note 78, at 560.

356. See *id.*

357. See *id.* at 536.

358. See *id.* at 560.

359. See *id.* at 536. Otherwise these committees function in ways similar to the charter-based organs in the investigation of allegations of human rights violations.

360. See *id.* at 501; Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 302, 6 I.L.M. 383 [hereinafter *Optional Protocol*] (entered into force Mar. 23, 1976).

361. See *Optional Protocol, supra* note 360, art. 1, 999 U.N.T.S. at 302, 6 I.L.M. at 383.

A State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.

## VI. CONCLUSION

The new welfare and immigration reforms plainly violate the spirit, if not the letter, of international human rights norms. The legislative provisions violate the rights of freedom from discrimination, rights of women and children, and rights to health, work, process, privacy, and asylum. These are only a few of the rights embodied in the principal human rights documents that form the basis of internationally protected human rights. However, despite the patent violations of widely accepted norms effected by the welfare and immigration reform, absent a reconstruction and revision of justice that uses international norms to develop, expand, and transform the content and meaning of rights integral to attainment of the highest level of human dignity, these human rights violations will continue without any effective action on the part of the international community.

The international community has voiced its concern over the preservation of human rights through numerous, elaborate, and comprehensive international documents.<sup>362</sup> Despite these popular and globally embraced promulgations, the "carapace of sovereignty"<sup>363</sup> has hindered both the domestic adjudication of local laws as violative of international norms and the international community's ability to prevent, correct, and punish human rights violations, particularly those carried out by economically and politically powerful and influential States such as the United States.<sup>364</sup>

In the domestic context, at this juncture of the development of international human rights law, with the globalization of the community of nations, it is not only appropriate but advisable to re-evaluate the role of the State<sup>365</sup> and to transmogrify the content and meaning of the "carapace of

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362. See Jan Martenson, *The United Nations and Human Rights Today and Tomorrow*, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY, *supra* note 172, at 927-28.

Faced with the gap between international human rights norms and the actual conditions of life of many of our fellow human beings we cannot but conclude that the challenge to the international community to promote and ensure respect for human rights is no less essential today than it was in 1945, nor is it any less relevant to the preservation of peace, rather to the contrary.

*Id.*

363. Thomas J. Farer, *Human Rights in Law's Empire: The Jurisprudence War*, 85 AM. J. INT'L L. 117, 127 (1991).

364. See M. CHERIF BASSIOUNI, THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE 335 (1994) ("Standard-setting alone will not guarantee the observance of human rights."); Louis B. Sohn, *Human Rights: Their Implementation and Supervision by the United Nations*, in 2 HUMAN RIGHTS IN THE INTERNATIONAL LAW, *supra* note 290, at 369 ("But standards are not enough.").

365. See, e.g., W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990) (suggesting that the content of the term "sovereignty" is changing); J.D. van der Vyver, *Statehood in International Law*, 5 EMORY INT'L L. REV. 9 (1991).

national sovereignty.” It is indeed behind this shield of sovereignty that the United States hides to avoid both domestic and international efforts to enforce human rights norms that the United States was instrumental in creating in the first place.

However, a crucial, central development in the human rights discipline shows that State sovereignty is not, and can never be, an unbending concept. In the wake of the atrocities of the Holocaust, the Nuremberg tribunal ruled that “crimes are committed by men”<sup>366</sup> and, consequently, those men, and not only the inanimate “State,” are responsible—and thus can be punished—for their reprehensible acts, notwithstanding any apparent State mandate to engage in the odious conduct. This decision establishes that internationally recognized human rights are supra-sovereign and pierce States’ territorial borders. Thus, the shield of sovereignty is rendered nothing more than a silhouette that must vanish vis-à-vis the individual and her internationally protected rights. Currently, accepted norms dictate that a State will be liable to persons within its jurisdiction, nationals and non-nationals alike, for human rights violations. In this context, the claim of a sovereign right to pass laws is not unfettered if those laws run counter to international human rights mandates.

A reconceptualization of sovereignty that is consonant with the evolved notions of human rights and humanitarian law would reject attempts by States to find refuge in an expansive sovereignty construct that is substantively, and in spirit, at odds with human rights norms. Consequently, nativistic “reform” laws cannot, and should not, under the guise of unfettered sovereignty, provide absolution for the trammeling upon equality and nondiscriminatory principles. Nor should they provide a basis for trammeling upon substantive rights, such as the rights to health, education, work, and human dignity that are at the heart of human rights norms.

Therefore, it is implausible to accept that the United States’ implementation of the immigration and welfare reform is just another chapter in history where there is no recourse against human rights violations for lack of an enforcement mechanism that can pierce the sovereignty veil. Allowing these legislative actions to prevail for lack of a forum that can effectively condemn them erodes the worldwide progression towards recognizing and embracing the global supremacy and inviolability of human rights.<sup>367</sup> If the United States does not recognize the corrosive and dele-

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366. The Nurnberg Trial, 6 F.R.D. 69 (1946).

367. See Theo Van Boven, *Prevention of Human Rights Violations*, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY, *supra* note 172, at 937-49 (stressing importance of prevention to cure human rights violations).



rious nature of these so-called reforms, it will be setting the stage for continuing patterns of blatant human rights violations throughout the international community.<sup>368</sup> There are two locations in which to fashion, promote, and enforce respect for and adherence to basic and fundamental human rights—the domestic and international spheres. Within each of these spaces, there are various fashions in which international human rights norms can be interpreted, developed, and applied to invalidate the so-called reform legislation.

First, within the United States a powerful and successful step in the local protection of human rights will result if the judiciary consistently follows the lead of the *Filartiga* and *Kadic* rulings on the strength of customary norms. For example, domestic courts might conclude that discrimination on the basis of sex and nationality, like discrimination on the basis of race, are prohibited based upon customary international norms. Such a position finds support in myriad documents such as the U.N. Charter, Race Convention, ICCPR, Economic Covenant, and Women's Convention. A domestic court could determine that the United States, as a signatory to all of these documents (even if not all have been ratified), is bound by the principle of nondiscrimination on the basis of sex<sup>369</sup> or nationality—a concept further buttressed and supported by the Universal Declaration. Thus, these fundamental rights would be enforceable in domestic courts as binding custom even if not enforceable as conventional norms. Such a conclusion is significant because the right to nondiscrimination on the basis of sex includes protection of reproductive freedoms,<sup>370</sup> health,<sup>371</sup> and family structure<sup>372</sup> that the recent reforms plainly disregard, if not outright violate. Similarly, a norm proscribing discrimination on the basis of national origin would provide the needed support necessary to invalidate the reform laws that target persons from Mexico, Central America, and South America.

Moreover, because of the thinly veiled targeting of Mexicans and Central and South Americans who enter the United States through Mexico, the so-called reforms also could be challenged in U.S. courts as systematic

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368. See Martenson, *supra* note 362, at 932 ("Important though international standard-setting and implementation are, in the final analysis it is on the national and local levels that human rights are enjoyed.").

369. See U.S. CONST. amend. XIV, § 1; *United States v. Virginia*, 116 S. Ct. 2264 (1996) (holding that the state-funded Virginia Military Institute's males-only admissions policy violates the Equal Protection Clause of the Fourteenth Amendment).

370. See *supra* note 119 and accompanying text.

371. See *supra* notes 174-76 and accompanying text.

372. See *supra* notes 130-32 and accompanying text.

racial discrimination. The prohibition against racial discrimination, pursuant to the terms of the Race Convention, includes a proscription against discrimination on the basis of ethnicity and nationality<sup>373</sup>—a well-settled customary<sup>374</sup> and conventional international norm. Interestingly, U.S. precedential case law would support such interpretation that racial discrimination includes discrimination against persons of Mexican national origin.<sup>375</sup> This approach affords a challenge to the reform laws' terms as racially discriminatory because of the status of the persons they target.

Finally, while establishing a right to health, education, and work might present greater obstacles,<sup>376</sup> the argument that these rights have emerged as customary obligations is plausible. Certainly, these rights were articulated early in the Universal Declaration<sup>377</sup> and later in the Economic Covenant.<sup>378</sup> That these rights form the core of *our* government's philosophy is reflected in Franklin Delano Roosevelt's famous four freedoms speech, in which he enumerates:

The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation; The right to earn enough to provide adequate food and clothing and recreation; . . . The right of every family to a decent home; The right to adequate medical care and the opportunity to achieve and enjoy good health; The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; The right to a good education.<sup>379</sup>

Thus, in this context, and considering the recent consensus documents that reiterate a commitment to matters of education, health, and employ-

373. See Race Convention, *supra* note 89, art. 1(1), 660 U.N.T.S. at 216, 5 I.L.M. at 353.

374. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702 (1986). Of course, a prohibition against racial discrimination also exists in domestic law, but challenges to statutory provisions with disparate impact on racial groups have been unsuccessful. See *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting the argument that Georgia's death penalty statute disparately impacts minorities); *Washington v. Davis*, 426 U.S. 229 (1976) (holding that a law requiring all police officer candidates to take a written test does not violate the Due Process Clause if evidence of violation is solely the disproportionate impact on a racial minority).

375. See, e.g., *Hernandez v. Texas*, 347 U.S. 475, 478-79 (1954) (noting that whether persons of Mexican descent are in fact a separate class from whites is a question of fact).

376. See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980) (holding that there is no constitutional right to funding for medically necessary abortions); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (upholding mandatory retirement for state police officer because there is no constitutional right to work); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding the right to education is not protected by the Constitution).

377. Universal Declaration, *supra* note 93, arts. 23, 25, 26.

378. Economic Covenant, *supra* note 90, arts. 6, 12, 13, 993 U.N.T.S. at 6, 8, 6 I.L.M. at 361-62, 363-64.

379. "Four Freedoms" speech, *supra* note 78, at 362-63.

ment,<sup>380</sup> it is only the next reasonable step to urge that such rights, based on progressive development, are customary norms enforceable by U.S. courts. Indeed, the United States' own workfare policy, espousing a person's obligation to work, rather than depend on the government's assistance, must be deemed to carry at least the correlative right to do so, lest both the obligation as well as the right be rendered illusory. Similarly, immigration regulations that allow the exclusion of those likely to become public charges infer that those who can work have a right to do so in order to attain the highest possible level of productive participation in society.

The arguments for the recognition of the right to an education were plainly articulated in the *Plyler*<sup>381</sup> decision, blending both the intrinsic value and benefits of an education, and the societal responsibility for and obligations towards all children. Finally, the arguments proposing the endemic benefits to a right to health parallel those for education and work and, probably even more than those rights, are imperative for individuals to attain their full potential as a participating member of society. In all events, as a matter of development of human rights principles, the rights to health, education, and employment ought to be promoted as intrinsic to the attainment and realization of human dignity. With this perspective, such international principles should be urged in U.S. courts as complementing and supplementing domestic laws.

The second geography for the creation of a system to ensure compliance with established human rights norms is the international fora, where it is critical to develop and implement an efficacious enforcement mechanism. The international community's greatest enforcement successes are with respect to violations that can be characterized as systematic abuses. Certainly, a state's passage of legislation which, in myriad ways violates established human rights of individuals, can be characterized as a systematic breach of settled norms. Thus, the international system ought not present grave obstacles to challenging such legislation.

While Nuremberg is an excellent example of an international enforcement success in view of systematic breaches, the recent International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda show how lack of cooperation by local governments and the interposition of sovereignty as a shield from outside intervention or review can make such enforcement efforts appear to be farcical failures. In all events, this one area of success, while a springboard for the

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380. See generally World Social Summit, *supra* note 177.

381. 457 U.S. 202 (1981).

development of enhanced enforcement efforts, alone is insufficient to safeguard the protection against violations of human rights that cannot be characterized as equally heinous atrocities.

Human rights violations, as long as they do not amount to war crimes, genocide, or widespread torture, will continue to occur with impunity absent an effective enforcement mechanism. Without such enforcement, the safety net created by the existence of doctrine is rendered illusory. The acceptance of human rights norms only as "virtual reality" effectively constitutes a concession that the international community is incapable of living up to its announced ideals and that it is willing to accept the continuation of human rights violations. Such a result is patently unacceptable.

As made plain by the discussion in Part V, and by current events ranging from ongoing terrorism in the Middle East to the recent genocidal tragedies in the Balkans and Africa, enforcement (both domestic and international) remains the weak link in the human rights construct. Rather than use such schism to prognosticate the inevitable failure of any attempt to enforce international human rights norms, it should serve as a challenge, an opportunity to search for solutions not yet formulated. One possibility is a global commitment to strengthening the existing domestic and international procedures. Certainly, even economically and politically powerful states such as the United States are not impervious or immune to significant, broad-based chastisement concerning human rights violations. This was demonstrated during the United States' first report to the Human Rights Committee pursuant to ICCPR requirements, when the world community's condemnation of the U.S. practice of imposing the death penalty on minors resulted in a U.S. representative conceding that such position should be revisited.<sup>382</sup>

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382. The United States faced sharp criticism from both members of the U.N. Committee and other nongovernmental human rights groups. See, e.g., United Nations Information Centre, *Human Rights Committee Begins Considering Initial Report of United States*, Mar. 29, 1995 (on file with author) (reporting statements made by Cecilia Medina Quiroga, a member of the U.N. Human Rights Committee who expressed concern that the United States refused to follow the treaty's provisions limiting application of the death penalty to adults, particularly since 15 states allow minors to be tried for murder under the death penalty); Amnesty International, *supra* note 354 (noting that U.S. policy of sentencing juvenile offenders to die is a clear violation of the international standards and the ICCPR). Representatives of the United States before the U.N. Human Rights Committee, while noting that the Supreme Court ruled that application of the death penalty to minors was constitutionally permitted, noted that the policy is under dispute and the subject of democratic debate. See United Nations Information Centre, *supra* (citing statements by Conrad K. Harper, legal advisor for the U.S. State Department, noting that the application of the death penalty to minor offenders was in dispute, and restating the U.S. position that the United States "would keep under review the implementation of its

The international community has much to learn from its limited success with the enforcement mechanism of the criminal war tribunals. The creation of a permanent body, to which individuals have access, with jurisdiction to adjudicate and punish human rights violations could constitute the first stage in a process that could potentially resolve the enforcement problem.<sup>383</sup> This body might be part of either the International Court of Justice or the proposed permanent criminal court,<sup>384</sup> or both, depending upon a range of factors including, but not limited to, identity of the actor charged with the violation, the nature of the breach, the nature of the right breached, and the efficacy and availability of local tribunals and remedies. Of course, a separate and distinct specialized International Court of Human Rights to which individuals have access is another possible solution to petition redress against human rights violations.

States, their individual leaders, parliamentary representatives, and Courts all would be more careful with respect to actions of States in the realm of human rights if an adjudicative body could effectively impose punishments for human rights violations. However, the effectiveness of such a permanent body depends upon the international community's agreement and commitment to a reconstruction and reconceptualization of sovereignty as a principle that holds human rights as sacrosanct and behind which violators will not be offered umbrage. Therefore, the international community itself must focus on the creation and promotion of effective mechanisms, both domestically and globally, that will prohibit States from continuing to hinder the promotion of international human rights.

With an effective enforcement method, be it via domestic incorporation and acceptance of international human rights norms or via the creation of an effective international approach, documented and undocumented foreigners alike will be ensured that the actions of any State, including the United States, which violate their human rights will be condemned. Absent an effective legal remedy, simply knowing that one has global rights

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responsibilities, as well as the need for maintaining its reservations . . . in the light of future developments").

383. See M. Cherif Bassiouni, *Enforcing Human Rights through International Criminal Law and through an International Criminal Tribunal*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY, *supra* note 168, at 347-82 (supporting the establishment of a permanent international criminal court to handle violations of international crimes). Bassiouni enumerates 24 categories of international crimes. See *id.* at 352-54. However, the international crimes enumerated do not encompass all international human rights. See *id.* at 351. The inclusion of all international human rights for enforcement by a permanent criminal court is essential to ensure the successful protection of international human rights.

384. See Van Schaack, *supra* note 84, at 2259-60 (noting recent activity by the United Nations to finalize plans for a permanent International Criminal Court).

does not ease the pain and suffering caused by local wrongs masked as sweeping immigration and welfare reforms.