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RACE DISCOURSE AND PROPOSITION 187

*John SW Park**

California voters approved Proposition 187 in November 1994. This measure denies public education and all non-emergency care to undocumented aliens. The provision also requires citizens to report those suspected of being undocumented aliens to the Immigration Naturalization Service. This Note discusses the fact that proponents and opponents of Proposition 187, including those using a civil rights discourse, spoke of undocumented aliens as objects or assets to be used or removed, and not as persons with basic human rights. Only citizens were considered as having constitutional protection of their rights. This Note argues that human rights and civil rights advocates must go beyond the use of contemporary civil rights discourse to a discourse of basic human rights, in order to treat all persons as human beings, deserving of protection of certain basic rights irrespective of their citizenship status.

INTRODUCTION

On November 8, 1994, a majority of California voters approved Proposition 187.¹ Under the more controversial provisions of the new law, the estimated 1.6 million undocumented aliens in California are denied public education and all non-emergency medical care.² In addition, all social service and health care facilities are required to report to the state Attorney General and to the Immigration and Naturalization Service (INS) those "suspected of being present in the United States in violation of federal immigration laws."³ Presumably, the INS would then initiate deportation proceedings for those found to be present illegally.⁴ Not surprisingly, Proposition 187 inspired a visceral public discourse.

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1. See Daniel Weintraub, *Crime, Immigration Help Wilson, Poll Finds*, L.A. TIMES, Nov. 9, 1994, at A1.

2. See CAL. HEALTH & SAFETY CODE § 130(c)(3) (West 1996); CAL. WELF. & INST. CODE § 10001.5(c)(3) (West 1996).

3. § 130(c)(3); § 10001.5(c)(3).

4. § 130(c)(3); § 10001.5(c)(3).

Proponents and opponents of the measure discussed several themes important to contemporary political theory, particularly themes related to sovereignty and civil rights.

This Note shows how participants in that debate—including people of color—spoke of “rights” in a way that denied the possibility for undocumented aliens to have rights. When *citizens* spoke, they did so in a way that implicitly linked rights to citizenship; in other words, they assumed that without citizenship, persons were not entitled to rights or rights-based claims. Ironically, the debate about Proposition 187 pointed to the achievements of a “civil rights” vision, even as that debate reduced undocumented aliens to “non-persons,” without rights and without a legitimate place in society. California citizens talked, instead, about how useless or useful undocumented aliens were and about how society should best manage them as a resource. The debate raised serious questions about the limits of a civil rights discourse, and about its potential to divide people of color against themselves.

This Note is divided into three parts: Part I outlines the arguments for and against Proposition 187 as they appeared in the media; Part II discusses the more recent history of “civil rights talk,” and how citizens, conspired to treat persons without citizenship as persons without rights. This Part also explores the disturbing implications of these developments. Part III suggests ways to rephrase this rights discourse, so that rights may be viewed independent of sovereignty.

I. ARGUMENTS FOR AND AGAINST PROPOSITION 187

A. Arguments for Proposition 187

In the early months of 1994, Governor Pete Wilson prepared a series of lawsuits against the federal government to obtain reimbursement for “educating illegal immigrants in California public schools,” and “for the cost of providing health services and incarcerating undocumented immigrants.”⁵ In speeches that helped shape the debate around Proposition 187, Wilson argued that California was forced to pay for the “net cost” of undocumented aliens—which he estimated at some \$2.3 billion per year—because the federal government failed to secure the nation’s borders.⁶ Wilson demanded \$10

5. Robert B. Gunnison, *Wilson Sues Again on Immigration*, S.F. CHRON., Sept. 23, 1994, at A23.

6. See *Illegal Immigrants*, ECONOMIST, Sept. 3, 1994, at 35; Robert B. Jackson, *Think Tank Supports Wilson on Immigrant Cost*, S.F. CHRON., Sept. 23, 1994, at A4; Nancy Gibbs, *Keep Out, You Tired, You Poor . . .*, TIME, Oct. 3, 1994, at 46; Gunnison, *supra* note 5, at A23. See generally MILTON MORRIS & ALBERT MAYIO, CURBING ILLEGAL

billion from federal government to defend against “an invasion . . . [a] massive and unlawful migration of foreign nationals,” many of whom arrived in California specifically to take advantage of social services and public education.⁷

When Wilson came out in support of Proposition 187, he claimed that even if undocumented aliens did not come to benefit from state programs, the provision of services to undocumented aliens constituted a significant cost to legal residents of California. In either case, by cutting benefits to undocumented aliens, Californians could eliminate an incentive to migrate, and retrieve scarce resources at a time when the state was fiscally vulnerable.⁸ In a speech in Orange County, Governor Wilson said: “We are unable to provide services to our own legal residents. . . . Now that is terribly unfair, and I say we should end those services to illegal immigrants. We are rewarding people for violating US law.”⁹

IMMIGRATION (1982); FRANCISCO RIVERA-BATIZ ET AL., U.S. IMMIGRATION POLICY REFORM IN THE 1980S (1991) (discussing findings that although social science research on illegal immigrants generally suffers from the fact that illegals are hard to study as a population, most studies show that illegals either benefit the economy as a whole by contributing cheap labor, or if they do drain the economy, that they do so negligibly).

7. See Gunnison, *supra* note 5, at A23; see also Barry Edmonston et al., *Perceptions and Estimates of Undocumented Migration to the United States*, in UNDOCUMENTED MIGRATION TO THE UNITED STATES 27 (Frank D. Bean et al. eds., 1990) (conveying the results of a joint Rand Corporation-Urban Institute study that shows a recent decrease in the number of illegal immigrants to the United States); Frank Bean et al., *Post-IRCA Changes in the Volume and Composition of Undocumented Migration to the United States*, in UNDOCUMENTED MIGRATION TO THE UNITED STATES, *supra*, at 153 (noting that although the Rand Corporation-Urban Institute study shows an overall decrease in illegal immigration, the number of illegal border crossings by women, children and non-Mexicans appears to be increasing).

8. See Louis Freedberg, *Wilson Defends Stance on Illegals*, S.F. CHRON., June 23, 1994, at A2; Julie Marquis, *Wilson Blames Ills on Illegal Immigrants*, L.A. TIMES, Oct. 17, 1994, at B1; see also *Indecent Proposition in California*, N.Y. TIMES, Oct. 25, 1994, at A20 (noting that although some supporters of Proposition 187 acknowledged that some undocumented aliens migrate to benefit from public services, the primary pull for undocumented aliens is the hope for employment); ELIZABETH HULL, WITHOUT JUSTICE FOR ALL 112 (1985) (stating that the primary pull for undocumented aliens is the hope for employment); Linda Bozniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 988 (stating that “the overwhelming majority of undocumented immigrants come to this country to work”); Note, *The Birthright Citizenship Amendment: A Threat to Equality*, 107 HARV. L. REV. 1026, 1038 (1994) (stating that the dominant cause of illegal immigration is the hope of obtaining employment); Patrick J. McDonnell, *Prop. 187 Turns Up Heat in U.S. Immigration Debate*, L.A. TIMES, Aug. 10, 1994, at A1 (stating that jobs are “widely considered by scholars and other authorities to be the principal lure for immigrants”).

9. Marquis, *supra* note 8, at B1. See also Brown, *Wilson Clash on Crime, Immigration, Taxes*, L.A. TIMES, Oct. 16, 1994, at A1; Gebe Martinez, *Illegal Immigrants' Tab for Emergency Care: \$61 Million*, L.A. TIMES, Nov. 2, 1994, at B7.

Many also feared that undocumented workers would take jobs from legal residents.¹⁰ Although some economists agreed that undocumented aliens *do not* compete with legal residents in the labor market, and even though some organized proponents of the measure did not argue to that effect, proponents often cited the fear of competition for jobs in supporting Proposition 187.¹¹ Among people of color, the resentment toward undocumented immigrants was especially acute. Kevin Ross, an Inglewood deputy district attorney and political action chairman of the NAACP chapter in Los Angeles, noted that “[f]orty percent of African American youth are unemployed. When the assertion is made that illegal immigrants do the jobs others wouldn’t do in the first place, the black community is offended.”¹²

For some supporters of Proposition 187, the issue of whether undocumented immigrants use or take resources seemed irrelevant. Many simply saw the issue as one of law enforcement, or lack thereof. The very presence of undocumented aliens indicated the failure of government to control borders. For example, Michael Huffington, a California Republican candidate for United States Senate, supported Proposition 187 because it was “time to send a message to illegal immigrants who disregard our laws.” Huffington called the initiative a “first step toward finally enforcing our immigration laws.”¹³ Building upon these themes, proponents of Proposition 187 described how the measure would be used as a tool to regain control over the system.¹⁴ Citizens responded to that argument; a Mexican American woman in Los Angeles said, “I’m against all those girls coming over here [to have children] so they can get a check, free [food] stamps, medical and everything.”¹⁵ Another Mexican American woman resented the fact that there were cars bearing Mexican license plates at her community college.¹⁶

Proponents claimed that some of the unfairness could be traced to the federal government, which caused the problem through lax enforcement of immigration laws, court decisions that mandated state spending on undocumented aliens, and general neglect of

10. See Karen Brandon, *Illegal Immigration: A Drain or an Asset?*, CHI. TRIB., Oct. 18, 1994, at 14.

11. Evelyn C. White, *Immigration a Tough Call for Blacks: Proposition 187 Debate Has Stirred Deep Feelings*, S.F. CHRON., Oct. 10, 1994, at A1.

12. See *id.*

13. John Wildermuth, *Huffington Endorses Proposition 187*, S.F. CHRON., Oct. 21, 1994, at A3.

14. See Rich Connell, *Proposition 187’s Support Shows No Boundaries*, L.A. TIMES, Sept. 25, 1994, at A1.

15. *Id.*

16. See *id.*

California's illegal alien problems.¹⁷ Whatever the merits of Proposition 187 proponents agreed that a vote in favor of it would "send a message that even the White House will understand."¹⁸ Thus, Proposition 187 was an occasion for the electorate to "send a visceral 'we're fed up' message to the [federal] government about the need to tighten both the border and the public's spending on undocumented immigrants."¹⁹ Ultimately, though some proponents saw Proposition 187 as divisive, contrary to federal statutes, and flatly unconstitutional, they favored the measure solely because it was "California's wake-up call."²⁰ Commentators like George Will took the measure's unconstitutionality as a major strength: Proposition 187 would "force the Supreme Court to rethink" *Plyler v. Doe*,²¹ under which public school districts were not allowed to deny undocumented children a public education.²²

Finally, proponents spoke of Proposition 187 as though it were a vent for deep-seated hostility toward undocumented aliens and their foreign cultures.²³ This was apparent in the responses to the mass demonstration held in opposition to Proposition 187 in Los Angeles three weeks before the election. The display of foreign flags, the speeches delivered in Spanish, and the enormous size of the crowd made some feel that "American values are being overrun by an uncontrolled influx of Third World citizens . . ."²⁴ "[T]o proponents of Proposition 187 . . . the march was an outrageous display of Mexican nationalism that bolsters the case for reducing immigration. 'Any time they're flying Mexican flags, it helps us.'"²⁵ However, with almost sixty percent of voters supporting the measure on election day, Proposition 187 did not need much help.

B. Arguments Against Proposition 187

Proposition 187 engendered what appeared to be a formidable opposition. Major newspapers, including *The Los Angeles Times*, *The San Francisco Chronicle*, *The Christian Science Monitor*, *The Chicago*

17. *Proposition 187*, CAL. J. WKLY., Sept. 26, 1994.

18. Harold Ezell, *Enough Is More Than Enough*, L.A. TIMES, Oct. 23, 1994, at M5.

19. See Brad Hayward, *Foes Sharpen Strategies on Immigration Measure*, SACRAMENTO BEE, Sept. 4, 1994, at A1.

20. *Proposition 187*, supra note 17.

21. 457 U.S. 202 (1982).

22. See George Will, *Reclaiming the Right of Self-Determination*, WASH. POST, Oct. 30, 1994, at C7.

23. See Alicia Doyle & Antonio Olivo, *Proposition 187's Impact on Race Relations*, L.A. TIMES, Nov. 4, 1994, at B2.

24. See *id.*

25. Patrick J. McDonnell & Robert J. Lopez, *Some See New Activism in Huge March*, L.A. TIMES, Oct. 18, 1994, at B1 (quoting Alan Nelson, co-author of Proposition 187).

Tribune, and *The New York Times*, published editorials against it.²⁶ Two groups, Taxpayers Against Proposition 187 and Californians United Against Proposition 187, emerged and organized grass-roots opposition to the measure.²⁷ Both groups obtained support from a long list of organizations, including the California Medical Association, the League of Women Voters and the California Catholic Conference.²⁸ Although early on in the debate opponents conceded that illegal immigration was a problem for California, they nonetheless opposed the measure primarily on policy grounds, because “the measure is a poorly drafted solution to the problem” and because “it will neither save money nor stop illegal immigration but will introduce other problems that will affect everybody, not just undocumented immigrants.”²⁹

Opponents said the Proposition would be ineffective. They emphasized that the initiative would not stop illegal aliens from either coming to California or voluntarily leaving. Economist Deborah Cobb-Clark said, “If you compare the opportunities in the United States and the opportunities in their home countries, the U.S. is still going to be a better deal.”³⁰ And “no matter how harsh benefit policies become, the lure of California’s jobs and wages are likely to keep attracting Mexicans, Central Americans, and others over the border and keep most of the 1.5 million illegal aliens now estimated to be in the state from voluntarily returning home.”³¹

Opponents claimed that Proposition 187 would not reduce California’s immediate financial burdens for two reasons: (1) it would be too costly to implement and (2) it would jeopardize federal money slated for California. The Legislative Analysts Office estimated “hidden” administrative costs of up to \$100 million in the first year alone because Proposition 187 required virtually all local agencies to somehow discover and report undocumented aliens.³² Editorials warned that the measure would create “considerable administrative

26. *SOS Initiative—Costly, Mean and Wrong*, S.F. CHRON., Oct. 16, 1994, at Sunday Punch 1; Karen Brandon, *Illegal Immigration: A Drain or an Asset?*, CHI. TRIB., Oct. 18, 1994, at 1; *Why Californians Should Vote 'No' on Proposition 187*, L.A. TIMES, Nov. 2, 1994, at B6; *Punishing Immigrants*, CHRISTIAN SCI. MONITOR, Nov. 3, 1994, at 18; *Indecent Proposition in California*, *supra* note 8, at A20.

27. See Hayward, *supra* note 19, at A1.

28. See *id.*

29. *Id.*

30. Stuart Silverstein, *Domestics: Hiring the Illegal Hits Home*, L.A. TIMES, Oct. 28, 1994, at A1; see also *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1436-37 (1983) (reviewing statistics on undocumented aliens and finding that they “accept wages and working conditions that are below the acceptable minimums established by United States law but vastly superior to what is available in their home countries”).

31. *Indecent Proposition in California*, *supra* note 8, at A20.

32. See SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET 92 (1994).

disarray,” and that it “would add to the state’s already nightmarish bureaucracy.”³³ Because at least one aspect of Proposition 187 was unconstitutional, and because its reporting requirements constituted a prima facie violation of federal law, opponents warned that California schools would lose federal money if it passed.³⁴ President Clinton’s Chief of Staff, Leon Panetta, predicted that “[Proposition 187] will produce chaos. School districts [and hospitals] will not know how much they will receive from the federal government.”³⁵

Critics warned of additional, long-term costs. For example, Howard Chang, an Asian American law professor at the University of Southern California, wrote: “[Proposition 187] would create an underclass of illiterate and impoverished residents . . . that would create new risks to public health and new breeding grounds for crime, and thereby threaten the welfare of all Californians.”³⁶ On the issue of health care, for instance, the California Medical Association predicted that “undocumented patients with tuberculosis would tend to delay seeking care for more than two months, infecting an average of ten people each.”³⁷

On the educational front, Robert Dornan, a former congressman from Orange County, California, and a firm supporter of Proposition 187, expressed some concern about the effect of the law on undocumented children. Noting that “idle hands are the devil’s workshop” he asked, “What do you accomplish by putting kids on the street where they can get into mischief?”³⁸ One politically progressive group warned that

the damage to innocent children will be incalculable in its profound harm to them and to this state’s economic and social future. . . . Without public education for immigrant

33. *Why Californians Should Vote ‘No’ on Proposition 187*, supra note 26, at B6; *SOS Initiative—Costly, Mean and Wrong*, supra note 26, at Sunday Punch 1.

34. See *Plyler v. Doe*, 457 U.S. 202 (1982); Family Educational Rights and Privacy Act, 20 U.S.C.A. § 1232(g) (West 1996); Louis Freedberg, *Immigration Measure Would Cost Schools*, S.F. CHRON., Aug. 13, 1994, at A1.

35. Marc Sandalow & Louis Freedberg, *Panetta Warns State of Prop. 187 ‘Chaos,’* S.F. CHRON., Oct. 27, 1994, at A2.

36. Howard F. Chang, *Shame on Them, Picking on Children*, L.A. TIMES, Sept. 6, 1994, at B5; see *Plyler*, 457 U.S. at 241 (Powell, J., concurring) (“[I]t can be hardly argued rationally that anyone benefits from the creation within our borders of a subclass of illiterate persons many of whom will remain in the State, adding to the problems and costs of both State and National Governments attendant upon unemployment, welfare, and crime.”).

37. Pamela Burdman, *Many Doctors Would Ignore Prop. 187*, S.F. CHRON., Oct. 19, 1994, at A2. *But see* Hayward, supra note 19, at A1 (countering that “Proposition 187’s reduction in the undocumented population of our state should itself reduce the state’s tuberculosis rate”).

38. Gebe Martinez, *Kemp Draws Criticism for Voicing Opposition*, L.A. TIMES, Oct. 20, 1994, at B1.

children and adults, high rates of illiteracy in English will prevent their full participation in the community and fuller participation in the work force.³⁹

Opponents further suggested that even if undocumented aliens could be eliminated from American society, the goal would be undesirable because it would entail the loss of a politically and economically important group. Politically, Latinos represent the fastest growing group of voters in California.⁴⁰ Recalling how Republicans lost “the last generation of immigrants from Italy, Ireland, and Central Europe,” and noting that “the vast majority of immigrants hold principles which the Republican Party warmly embraces,” former Education Secretary William Bennett and former United States Representative Jack Kemp asked, “can anyone calculate the political cost of again turning away immigrants this time . . . Asians, Hispanics, and others?”⁴¹ Similarly, critics underscored the economic importance of undocumented aliens. It is estimated that there are over one million immigrants with some form of false identity documentation currently employed in California.⁴² Thus, Proposition 187 turns “hundreds of thousands of our hard-working, tax-paying, minimum-wage gardeners and nannies into prison inmates at a cost of tens of billions of dollars [and] hardly seems a sensible means of solving our state’s budget problems.”⁴³ Undocumented aliens are also important in areas other than domestic labor.⁴⁴ As one Latino community activist warned, “Just imagine what would happen to the garment industry. . . . It’s sweat labor. Who would take those jobs?”⁴⁵ Harry Kubo, the president of the Nisei Farm League, estimated that “year-round, 50 percent [of

39. *A Response to Anti-Immigrant Proposals*, CAL. TOMORROW, Nov. 1993, at 3.

40. See Henry P. Pachon, *A Flirtation with the GOP Turns Cold*, L.A. TIMES, Nov. 6, 1994, at M5.

41. See Pamela Burdman & Edward Epstein, *Wilson Goes After Kemp and Bennett*, S.F. CHRON., Oct. 20, 1994, at A1; *Kemp, Bennett Talk Sense*, S.F. CHRON., Oct. 21, 1994, at B5; William Buckley, *Immigrant Backlash Could Hurt GOP*, HOUSTON CHRON., Oct. 25, 1994, at B10.

42. See Ron K. Unz, *Scaling the Heights of Irrationality*, L.A. TIMES, Oct. 3, 1994, at B7.

43. *Id.*

44. See generally MORRIS & MAYIO, *supra* note 6 (discussing the occupations of undocumented aliens); J. Edward Taylor & Thomas Espenshade, *Seasonality and the Changing Role of Undocumented Immigrants in the California Farm Labor Market*, in RIVERA-BATIZ ET AL., *supra* note 6 (discussing the role of undocumented aliens as farm laborers).

45. Efrain Hernandez, *Point of Impact: Before It Has Even Come to a Vote, Proposition 187 Has Sent Shock Waves Through Central Los Angeles’ Vast Immigrant Population and the Institutions that Provide for It*, L.A. TIMES, Nov. 6, 1994, at 14.

Fresno County's farm laborers] are illegals."⁴⁶ Manuel Cunha, the Farm League's Executive Director queried, "who is going to pick the fruit in the fields?"⁴⁷ Another farmer chastised Governor Wilson for supporting Proposition 187, stating that "the work force that's being targeted is our work force. And we'd be crazy to come out against our work force."⁴⁸ Many farmers simply declared that they would ignore Proposition 187 once it passed.⁴⁹

Moreover, some opponents feared that Proposition 187 would politically and economically alienate Mexico, which is becoming an increasingly important trading partner since the passage of the North America Free Trade Agreement (NAFTA).⁵⁰ A Mexican official in the Foreign Minister's office commented that "it's confusing to people that the US is building iron fences after so much talk of us becoming partners."⁵¹ Protesters in Mexico were less diplomatic. Some urged boycotts, some protested along the United States-Mexico border, others trashed a McDonald's, widely considered an American symbol.⁵² In light of these incidents, business persons worried that with the passage of Proposition 187, California would lose trade with Mexico to less hostile states like Texas or Arizona.⁵³

Critics cited a number of ethical considerations in opposing Proposition 187. Regarding education, opponents claimed that Proposition 187 "[makes] kids victims because adults haven't enforced existing laws."⁵⁴ Undocumented children who came to the United States with their parents did not come of their own volition. In *Plyler v. Doe*, the Supreme Court struck down a Texas law restricting undocumented children from public education, in part because

46. Ed Mendel, *Growers Fear Labor Shortage if Voters End Social Services*, SAN DIEGO UNION-TRIB., Oct. 17, 1994, at A3.

47. *Id.*; see Brandon, *supra* note 26, at 1.

48. Susan Ferriss, *Prop. 187: A Clash of Rhetoric, Reality*, S.F. EXAMINER, Oct. 30, 1994, at A1.

49. See *id.*; Bozniak, *supra* note 8, at 988. See generally Taylor & Espenshade, *supra* note 44 (discussing studies demonstrating that in most sectors of the economy employers enforce illegal immigration laws only when it is in their interests to do so).

50. See Louis Freedberg, *Mexico Slowly Getting Tougher on Illegals*, S.F. CHRON., Aug. 12, 1994, at A1; North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 296.

51. Howard LaFranchi, *Proposal Against Illegals in California Irks Mexicans*, CHRISTIAN SCI. MONITOR, Nov. 3, 1994, at 3.

52. See Patrick Lee, *Prop. 187 Threatens to Disrupt Ties with Mexico*, L.A. TIMES, Nov. 10, 1994, at D1; *McDonald's in Mexico City Vandalized by Prop. 187 Foes*, L.A. TIMES, Nov. 9, 1994, at A26.

53. See Lee, *supra* note 52, at D1.

54. Susan Ferriss, *Immigrant Ballot Issue Imperils Kids*, S.F. EXAMINER, Oct. 9, 1994, at C1.

“[it] imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control.”⁵⁵

Critics commented that the enforcement of Proposition 187 might lead to discrimination against citizens, particularly people of color, and thereby cause an increase in racial tensions among Americans. Proposition 187 orders public officials to report those “reasonably suspected” of being undocumented to the INS, and “because ‘reasonably suspect’ is not defined, anyone who is foreign looking and speaks with an accent could be affected.”⁵⁶ William Bennett and Jack Kemp argued that “[Proposition 187] is also a mandate for ethnic discrimination. Does anyone seriously doubt that Latino children named Rodriguez would be more likely to ‘appear’ to be illegal than Anglo children named, say, Jones?”⁵⁷ Latino commentators charged that “the racism underlying the measure targets Latinos,” that Proposition 187 was “a direct attack on everyone of Latino heritage,” and that this was especially dangerous in a society “already racially divided.”⁵⁸ Prominent African American figures warned that Proposition 187 threatened to “Balkaniz[e] . . . the already polarized arena of racial politics.”⁵⁹

Opponents of Proposition 187 also claimed that the law required citizens to act as law enforcement officials, and thus engendered “Big Brotherism run amok.”⁶⁰ Attorney General Janet Reno complained that “[i]t does not make sense to turn schoolteachers and nurses into Border Patrol agents.”⁶¹ For people of color, such

55. 457 U.S. 202, 220 (1982).

56. Leslie Berestein, *Asian Groups Unite to Educate Residents on Impact of Prop. 187*, L.A. TIMES, Sept. 25, 1994, at 3. The Asian American community has therefore, responded to Proposition 187 with concern and organized opposition to the measure. See Pamela Burdman, *A Push to Get Immigrants to Vote*, S.F. CHRON., Sept. 24, 1994, at A3; Samuel Cacas, *Prop. 187 Continues Stirring the Senses*, ASIAN WK., Oct. 21, 1994, at 3; Connie Kang, *Asian American Groups Organize to Fight Measure*, KOREA TIMES, Nov. 2, 1994, at 1; Milton Marks, *The Posing Dangers of Proposition 187*, ASIAN WK., Oct. 21, 1994, at 1; Tina Nguyen, *Chinatown: Coalition of Groups Denounce Prop. 187*, L.A. TIMES, Oct. 30, 1994, at 3.

57. Pamela Burdman & Edward Epstein, *Wilson Goes After Kemp and Bennett*, S.F. CHRON., Oct. 20, 1994, at 1; see Edward Epstein, *Brown Quotes Wilson Against Wilson on Immigration Issue*, S.F. CHRON., Oct. 26, 1994, at A8 (noting that when Wilson was Mayor of San Diego he opposed employer sanctions for hiring illegal immigrants on the theory that the sanctions “would very likely produce the kind of discrimination that a number of minority groups, civil rights groups, are concerned about”).

58. See Doyle & Olivo, *supra* note 23, at B2; Antonio Rodriguez & Carlos Chavez, *Latinos Unite in Self-Defense on Prop. 187*, L.A. TIMES, Oct. 21, 1994, at B7.

59. Joe R. Hicks & Constance L. Rice, *Pioneers of the Civil Rights Movement Would Find Common Cause with Latinos in Today's California*, L.A. TIMES, Nov. 4, 1994, at B7; see *Punishing Immigrants*, *supra* note 26, at 18 (noting that Proposition 187 has an “unmistakable undertone of bigotry” and would aggravate racial tensions).

60. McDonnell, *supra* note 8, at A12.

61. Louis Freedberg, *Reno Blasts Prop. 187—Questions Legality*, S.F. CHRON., Oct. 28, 1994, at A4.

discretion appeared especially prone to abuse: “[O]ne does not need a crystal ball to see how distinctions would be made. . . . The power to determine who is suspect is put in the hands of any person at a school or health facility.”⁶² For these reasons, many pledged not to comply with the reporting requirements; even some supporters said they would not report people suspected of being illegal.⁶³ Local police organizations hinted that they would not comply because “police departments around the country . . . recognized that undocumented immigrants often [would] fail to report criminal activity to the police and refuse to serve as witnesses for fear of coming to the attention of the INS.”⁶⁴ Physicians’ and teachers’ groups insisted that they too “would not be used as agents for the INS.”⁶⁵

Despite these arguments, Proposition 187 passed.⁶⁶ In exit polls voters cited illegal immigration as the most important issue in that election. “Proposition 187 . . . polarized the electorate along racial lines, winning big among white voters while losing in every other ethnic group.”⁶⁷ Having won the race for re-election, Governor Wilson wrote a letter to President Clinton asking for his “full cooperation and assistance” in implementing the initiative, and Republicans in Washington, D.C. announced plans for a federal bill to eliminate benefits to all non-citizens, including *legal* residents.⁶⁸ Republicans noted that although Latinos in California rejected Proposition 187 as a group, twenty-two percent of Latinos still supported it, as did almost half of all Asian American and African American voters.⁶⁹ Indeed, the issue not only divided Californians along racial lines, it also divided people of color against themselves. The remainder of this Note attempts to explain these developments by providing an account of contemporary United States rights discourse.

62. John W. Mack, *Is Black-Latino Friction a Voting Booth Issue? No*, L.A. TIMES, Oct. 24, 1994, at B5.

63. See Doreen Carvajal, *Prop. 187 Has Even Backers a Bit Uneasy*, L.A. TIMES, Oct. 31, 1994, at A1.

64. Bozniak, *supra* note 8, at 1003; see also David Ferrell & Robert Lopez, *State Waits to See What Prop. 187 Will Really Mean*, L.A. TIMES, Nov. 10, 1994 at A1 (quoting an LAPD officer stating “It’s not our job to ask people where they are from. . . . We aren’t the INS. We have more important things to do.”).

65. Burdman, *supra* note 37, at A2; Pamela Burdman, *Opposition to Prop. 187 Is Growing*, S.F. CHRON., Aug. 18, 1994, at C16.

66. See, e.g., Weintraub, *supra* note 1, at A1.

67. *Id.*

68. See Paul Feldman, *Wilson Acts to Enforce Parts of Prop. 187*, L.A. TIMES, Nov. 10, 1994, at A1; Elizabeth Shogren, *Plans to Cut Safety Net Leave Legal Immigrants Dangling*, L.A. TIMES, Nov. 21, 1994, at A1.

69. See Weintraub, *supra* note 1, at A1.

II. TRIUMPH OF CIVIL RIGHTS DISCOURSE

A. *Legacy of the Civil Rights Movement*

For many Americans, especially African Americans, the Civil Rights Movement of the 1960s marked a major turning point in American history. Inextricably a part of the United States, African Americans vied for full membership in American society through the Civil Rights Movement. In 1963, Dr. Martin Luther King, Jr., wrote:

Abused and scorned though we may be, our destiny is tied up with the destiny of America. . . . For more than two centuries our foreparents labored in this country without wages; they made cotton king; and they built the homes of their masters in the midst of brutal injustice and shameful humiliation—and yet out of a bottomless vitality they continued to thrive and develop. If the inexpressible cruelties of slavery could not stop us, the opposition we now face will surely fail. We will win our freedom because the sacred heritage of our nation and the eternal will of God are embodied in our echoing demands.⁷⁰

Although their claims were sometimes phrased as general claims of human beings seeking dignity, many African Americans strengthened their demands during the Civil Rights Movement largely by emphasizing that they were *Americans* seeking justice under *American* law.⁷¹ African Americans struggled for fundamental rights denied them since the birth of this nation. In his “I Have a Dream” speech, Dr. King said:

When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which *every American* was to fall heir. This note was the promise that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.⁷²

70. DR. MARTIN LUTHER KING, JR., *Letter from Birmingham City Jail*, reprinted in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 301 (James M. Washington ed., 1986).

71. See DERRICK A. BELL, JR. RACE, RACISM, AND AMERICAN LAW 7 (2d ed. 1980).

72. DR. MARTIN LUTHER KING, JR., *I Have a Dream*, reprinted in A TESTAMENT OF HOPE, *supra* note 70, at 217 (emphasis added).

At one of the high points of the Movement, Dr. King phrased the struggle as one where American *citizens* were making legitimate claims for a fulfillment of *American* promises: “[We]’ve come to . . . cash [this] check.”⁷³

Subsequently, leading commentators on the Civil Rights Movement interpret it as one where African *Americans* demanded their civil rights and their fair share of this nation’s resources based on their historic link and service to this country. Professor Derrick Bell writes:

[A]mericans, black and white, view the civil rights crusade as a long, slow, but always upward pull that must, given the basic precepts of this country and the commitment of its people to equality and liberty, eventually end in the full enjoyment by blacks of *all rights and privileges of citizenship* enjoyed by whites.⁷⁴

Professor Kenneth Karst argues that the Civil Rights Movement was essentially about “equal citizenship for all Americans,” and that the transformations that the Movement engendered were more than legal:

Ultimately, equal citizenship would have to find a foundation in the sense of whites and blacks that they were part of the same community. . . . Segregation would not end with the elimination of segregation laws; it would end when blacks and whites came to think nothing of sitting side by side at lunch counters, on buses, and in theaters.⁷⁵

For Karst, those who participated in that struggle deserve credit for “formally re-defining our national community.”⁷⁶

In light of American constitutional history, it is not surprising that the leaders of the Civil Rights Movement phrased their claims as citizens. Although there have been instances where the Supreme Court offered constitutional protections to persons “outside” the national community or extended some human rights guarantees to nonresident aliens, it has reserved most protections for citizens, often treating the Constitution as though it was applicable exclusively to United States citizens.⁷⁷ Over the course of a century

73. *Id.*

74. BELL, *supra* note 71, at 7 (emphasis added).

75. KENNETH KARST, *BELONGING TO AMERICA* 74 (1989).

76. *See id.* at 80.

77. *See, e.g.,* *Wong v. United States*, 163 U.S. 228 (1896) (extending unanimously Fifth and Sixth Amendment due process protections to illegal aliens facing deportation; *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (unanimously ruling that “[t]he Fourteenth Amendment of the Constitution is not confined to the protection of

the boundaries of citizenship have changed to include ever more categories of persons: freed male slaves, then women, then Asians, all once considered “aliens ineligible for citizenship.”⁷⁸ Perhaps because many of these dramatic changes have been effected through constitutional means, the Supreme Court demonstrated a recent reluctance to extend constitutional protections to those not legal citizens.⁷⁹ In *United States v. Verdugo-Urquidez*,⁸⁰ the Court held that Fourth Amendment protections only extended to those people who have “substantial connections” with the United States.⁸¹ Justice Rehnquist, relying heavily on social contract theory, suggested that because undocumented aliens in particular were not privy to the contract between citizens and the United States government embodied in the Constitution, they were not entitled to the protections of that Constitution.⁸²

Given this background, people of color have understandably availed themselves of a civil rights discourse to articulate claims for justice, marking their position as members of the national community rather than as outsiders to that community. For example, when Japanese Americans sought redress, they spoke the language of civil rights. The injury to this group of Americans occurred during World War II, when an estimated 120,000 Japanese Americans in California, Washington, and Oregon were sent to internment camps on the grounds of “military necessity.”⁸³ In 1988, the Japanese Americans sent to the camps won a victory based primarily on the argument that the United States government questioned Japanese American loyalty, then unfairly imprisoned them in squalid camps, thereby depriving them of their constitutional rights. In August of 1988, when President Ronald Reagan signed a bill that provided a monetary payment to each survivor of the camps, he admitted that the government had committed a wrong against its own people who had remained “utterly loyal” to the United States.⁸⁴ President Reagan underscored the devotion of Japanese Americans to America—the bravery of Japanese American troops in Europe, their status back

citizens,” but is to be applied “to all persons within the territorial jurisdictions without regard to any difference of race, or color, or nationality”). See generally Gerald Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991) (discussing applicability of the protections of the Constitution to non-citizens).

78. See *Ozawa v. United States*, 260 U.S. 178 (1922).

79. See Victor C. Romero, *Whatever Happened to the Fourth Amendment?: Undocumented Immigrants' Rights After INS v. Lopez-Mendoza and United States v. Verdugo-Urquidez*, 65 S. CAL. L. REV. 999, 1002-03 (1992) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 258, 271 (1990)).

80. 494 U.S. 258 (1990).

81. See *id.* at 265-66.

82. *Id.*

83. See RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* 379 (1989).

84. See *id.* at 485.

home as Americans, and their exemplary behavior in the camps despite the injustice of American law.⁸⁵ Japanese Americans won redress, not on the grounds that the United States government violated their rights as human beings, but rather on the grounds that the government violated the civil rights of American citizens. This achievement of Japanese Americans was taken not as a victory for human rights, but rather as a victory for “[e]qual citizenship for cultural minorities.”⁸⁶

Even those who acknowledge the limits of the civil rights discourse nonetheless affirm the usefulness of its public rhetoric: its core bid for equal citizenship and inclusion phrased in the language of rights. Although Professor Kimberlé Williams Crenshaw claimed that “antidiscrimination discourse is fundamentally ambiguous,” she affirmed its persuasive influence in contemporary politics. Crenshaw commented:

One wonders . . . whether a demand for shelter that does not employ rights rhetoric is likely to succeed in America today. . . . Rights are a way of saying that a society is what it is, or that it ought to live up to its deepest commitments. This is essentially what all groups of dispossessed people say when they use rights rhetoric.⁸⁷

Professor Crenshaw suggested that in order to be mindful of what works in American politics, advocates must rely on rights discourse as an effective way “to extract from others that which others are not predisposed to give.”⁸⁸ Furthermore, although speaking the language of rights might well be “an inevitably co-optive process,” it may also be one of the only effective means that advocates have— “[t]he struggle of Blacks . . . is a struggle for inclusion, [it] is a struggle to create a new status quo through the ideological and political tools that are available.”⁸⁹

In the United States, rights discourse has been described as a tool invested with elements of magic. In much of her work, Professor Patricia J. Williams recognizes the “spell” of rights and criticizes those who see only its limits.

“Rights” feels so deliciously new in the mouths of most black people. It is still so deliciously empowering to say. It is the magic wand of visibility and invisibility, of inclusion

85. *Id.* at 484-86.

86. KARST, *supra* note 75, at 92.

87. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1335 (1988).

88. *Id.*

89. *Id.* at 1386.

and exclusion, of power and no-power. The concept of rights, both positive and negative, is the marker of our *citizenship*, our participatoriness, our relation to others.⁹⁰

Critical Legal Studies may deconstruct rights discourse to reveal nothing in its foundations, but for people who seek racial justice, “this failure of rights discourse . . . does not necessarily mean that informal systems will lead to better outcomes.”⁹¹ Williams argues that rather than discard civil rights discourse and all its magic, advocates might recognize that “the mask [has] to be donned by the acquiring Shaman, and put to good ends.”⁹² For Professor Williams, the mask has been, and continues to be, a powerful force in the lives of citizens claiming their place as full members of this civil society.

Within this backdrop, it is not clear where undocumented aliens should “fit.” Ever since the Civil Rights Movement, advocates for change relied on the language of rights to rearrange relationships among citizens and to make this nation presumably more inclusive.⁹³ Under a certain understanding of the Constitution and the scope of its protections, they claimed for themselves membership in the national community. Subsequently, African Americans, Latinos, and Asian Americans employed the language of rights with some success. One of the most disturbing aspects of the most recent debate in California was that for undocumented aliens—those who have no “legal” standing, no *citizenship* or formal membership—the language of *civil* rights appeared to pose only a threat, with no “magic.” The discussion concerning undocumented aliens in California proceeded as though undocumented aliens had no right to speak, no right to privacy, and no legitimate “entitlements” to public assistance. Citizens spoke of such “rights” as if they belonged only to them. In addition citizens, including people of color, conspired to treat undocumented aliens as if they were literally “illegal,” outside the pale of American law, and therefore rightless.

B. Rightless Status of Undocumented Aliens

One of the most striking features of the debate around Proposition 187 was the almost total absence of undocumented aliens who spoke for themselves. Undocumented aliens did not write editorials or appear in public, either in support of or in opposition to the

90. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 431 (1987) (emphasis added).

91. *Id.* at 423.

92. *Id.* at 431-32.

93. See KARST, *supra* note 75, at 147 (discussing the Civil Rights Movement’s emphasis on racial neutrality).

measure. If they spoke at all, they usually remained anonymous, nameless, and untraceable. Moreover, there were no organizations that represented undocumented aliens directly. Although some organizations purported to speak for them, no organization spoke *as* them. Because their mere presence “by definition is breaking the law,”⁹⁴ revealing any presence was an occasion for detention, or eventually, deportation. Thus, undocumented aliens were, in this discussion and in society generally, without a right to speak, without a right to assemble. Unlike those formally accused of wrongdoing, undocumented aliens do not so much “have a right to remain silent”;⁹⁵ rather they *must* remain silent in order to remain at all. Ironically, “the more visible [undocumented aliens] became, the more difficult it [was] to beat [Proposition 187].”⁹⁶

Undocumented aliens also had no right to privacy. The details of Proposition 187 make this clear. The measure requires local agencies to report undocumented aliens however they are discovered. Under Proposition 187, local agencies must report any information that could reveal illegal status, regardless of whether such information directly pertained to immigration. On its face, Proposition 187 violates both the spirit and letter of the Family Educational Records and Privacy Act.⁹⁷ But rather than claim that Proposition 187 infringed upon the privacy rights of undocumented aliens, opponents focused on how Proposition 187 would violate the privacy of *citizens*. In the enforcement of Proposition 187 and similar laws “[a] police-state mentality will be created in which *everyone* carries citizenship papers and anyone who can’t prove his or her citizen status is in jeopardy of being reported.”⁹⁸ One voter remarked “I would be extremely offended to have to give proof of my legal residence in this country”; another stated, “It’s an unnecessary invasion of our personal privacy.”⁹⁹ Although Proposition 187 explicitly denies privacy rights to the undocumented, opponents spoke as if only citizens had such rights anyway, stating that Proposition 187 would primarily entail “invasions” of citizens’ privacy. If undocumented

94. Connell, *supra* note 14, at A1.

95. See *Miranda v. Arizona*, 384 U.S. 436 (1965) (delineating the right to remain silent in interactions with police officers).

96. McDonnell & Lopez, *supra* note 25, at B1.

97. 20 U.S.C.A. § 1232(g) (West 1996) (stating that “[n]o funds shall be made available under any applicable program to any educational agency or institution which has a practice of permitting the release of education records (or personally identifiable information other than directory information) of students without the written consent of their parents to any individual agency or organization, other than to (education officials or the US Comptroller General)”); see Freedberg, *supra* note 34, at A1.

98. Hayward, *supra* note 19, at A1 (emphasis added).

99. Kenneth J. Garcia, *Wilson’s ID Card Idea Draws Scorn*, S.F. CHRON., Oct. 28, 1994, at A4.

aliens had rights to privacy, opponents of Proposition 187 were oblivious to this fact.

Proponents and opponents alike spoke of access to health care and public education as claims “to society’s resources,” not as rights-based claims. Proponents took advantage of the fact that in this democracy, public education and health care may or may not be rights to which all persons are entitled.¹⁰⁰ In *Plyler v. Doe*, the Supreme Court did *not* defend the “rights” of undocumented children to receive a public education.¹⁰¹ Rather, the Court described education as being more important than “merely some governmental ‘benefit.’”¹⁰² The Supreme Court has been contradictory in this realm. In *Brown v. Board of Education*, where the Court confronted access to public education for African American children, the Court stated that “such an opportunity [as public education], where the state has undertaken to provide it, is a *right* which must be available to all on equal terms.”¹⁰³ But in *San Antonio Independent School District v. Rodriguez*, the Court upheld the notion that education is not a fundamental right deserving equal protection.¹⁰⁴

If education was a “right” in 1954 for American citizens, it clearly was not a “right” for undocumented children in 1982. Indeed, following *Plyler*, if a state like California could prove “some substantial state interest” in denying California’s undocumented aliens a public education, the Court would presumably hold such denial constitutional. Because undocumented children *can make no rights claims* under *Plyler*, their “interests” could well be sacrificed to the interests of a state or its citizens.

100. Note that scholars still debate whether health care rights, education rights, or subsistence rights should be considered as fundamental as the right to speak or the right to privacy. See generally HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY* (1980). The Supreme Court has been reluctant to view government benefits as “rights” to which citizens are entitled, and yet the Court often treats entitlements as rights. Compare, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1969) (treating welfare entitlements like property rights protected under the Due Process Clause of the Fourteenth Amendment), with *DeShaney v. Winnebago County*, 489 U.S. 189 (1989) (holding that a social services department specifically set up to protect children may not be held liable under the Fourteenth Amendment for harm to a child, even though it knew that the child was in danger of harm; in effect, the child had no “right” to protection under a state program charged with protecting children).

101. See 457 U.S. 202 (1982); see also Marianne Constable, *Sovereignty and Governmentality in Modern American Immigration Law*, 13 *STUD. L., POL., & SOC’Y* 249, 261 (1993).

102. *Plyler*, 457 U.S. at 221.

103. 347 U.S. 483, 493 (1954).

104. 411 U.S. 1 (1973); see also *Plyler*, 457 U.S. at 221 (stating that, although education is not “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation,” it is not a “right” guaranteed to individuals by the Constitution).

Opponents of Proposition 187 predicted civil strife in the wake of its passage. Because the enforcement of Proposition 187 would mean reporting those “suspected” of being undocumented, opponents stressed the spill-over effects of the law to people of color. A Korean American newspaper editorial stated, “Prop. 187 will lead to discrimination against Asian Pacific Americans and other groups who look or sound foreign.”¹⁰⁵ Two African American commentators wrote that Proposition 187 would “subject Latinos and Asians—but not Europeans—to suspicion and stigmas.”¹⁰⁶ These commentators suggested that opponents of Proposition 187 emphasized the potential discrimination that *citizens* might suffer, primarily because distinguishing between “real” undocumented aliens and those who only look like undocumented aliens is not an easy task. Opponents argued that “[t]he most dangerous and racist implications of Proposition 187 are that all Latinos will be targets and considered suspects just because of how they look. [Moreover], [i]t doesn’t outline carefully how a person will be identified.”¹⁰⁷ The arguments concerning health care were no different. One editorial spoke of how “illegal immigrants with diseases such as tuberculosis and AIDS, even chicken pox and smallpox, would not qualify for medical treatment, endangering *every California resident* by subjecting them to a new wave of communicable diseases.”¹⁰⁸

Although opponents of Proposition 187 expressed concern that the measure would inflame racial tensions among citizens, lead to discrimination against Latinos, or cause an increase in disease among citizens, they remained silent about the discrimination, ostracism, and sickness undocumented aliens would endure if Proposition 187 was enacted. They opposed Proposition 187 not on the grounds that it would violate the “rights” of undocumented aliens, engender discrimination against them, or make them more vulnerable to disease. Rather, they spoke as though such matters were irrelevant issues, or at least not as relevant as the constitutional rights of *citizens* of color, the discrimination that *citizens* faced, or the awful diseases that *citizens* could contract.¹⁰⁹

105. *Asian Pacific Americans Opposed to Proposition 187*, KOREA TIMES, Sept. 7, 1994, at 5.

106. Hicks & Rice, *supra* note 59, at B7.

107. Doyle & Olivo, *supra* note 23, at B2.

108. *SOS Initiative—Costly, Mean and Wrong*, *supra* note 26, at Sunday Punch 1.

109. See Paul Feldman & Rich Connell, *Wilson Acts to Enforce Parts of Prop. 187*, L.A. TIMES, Nov. 10, 1994, at A1 (noting that after enactment of Proposition 187, Governor Wilson responded to these concerns by ordering that all precautions be taken “to deal with any threat of communicable disease, whether through immunization or quarantine or other measures,” and also ordering state agencies to protect “the rights of all legal residents” and to ensure that “the provisions of Proposition

Strangely, in the context of Proposition 187 and immigration law generally, the only way for undocumented aliens to be treated like legal residents would be through commitment of a crime. For example, undocumented aliens who were imprisoned would receive preventative medical care: “Even the worst thugs housed in our prisons get vaccinations.”¹¹⁰ Throughout the criminal justice system, undocumented aliens would have the same rights as legal residents who had committed similar crimes.¹¹¹ Undocumented aliens could also acquire legal rights if they remained undetected—“outside the pale of law”—long enough to become eligible for naturalization. In 1986, the Immigration Reform and Control Act (IRCA) ordered the INS to legalize “eligible undocumented aliens”—those who resided in this country for five or more years.¹¹² Between 1987 and 1989, some 1.7 million people (960,000 of whom were from California) applied for legal status.¹¹³ What is odd about the IRCA’s legalization provisions is that they seem to “reward law-breaking”; the undocumented aliens who are eligible for legalization are, after all, those most successful in evading immigration laws.¹¹⁴ “The entire hierarchy of values which is present in civilized countries was reversed” for undocumented aliens—those who broke the immigration laws or could manage to avoid the effects of such laws for longer periods had the best chance of eventually enjoying the protection of naturalization.¹¹⁵

If opponents of Proposition 187 ever admitted that law-abiding, undocumented aliens have rights, they did so only in the context of discussing how the undocumented could become *potential* citizens. William Bennett and Jack Kemp emphasized that undocumented aliens could be an important group of potential voters;¹¹⁶ Howard Chang discussed ways in which immigrant children could be

187 [be] implemented in a manner that avoids discrimination on the basis of national origin”).

110. Brian O’Leary Bennett, *An Initiative Even Conservatives Can Hate*, L.A. TIMES, Oct. 7, 1994, at B7.

111. See *Developments in the Law—Immigration Policy and the Rights of Aliens*, *supra* note 30; see also HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 286 (1951) (stating that “[s]ince [the stateless person] was an anomaly for whom the general law did not provide, it was better for him to become an anomaly for which it did provide, that of the criminal. . . . The best criterion by which to decide whether someone has been forced outside the pale of the law is to ask if he would benefit by committing a crime.”).

112. See Michael Hoefler, *Background of U.S. Immigration Policy Reform*, in RIVERA-BATIZ ET AL., *supra* note 6, at 30-31; SUSAN GONZALEZ BAKER, *THE CAUTIOUS WELCOME* (1990).

113. See Hoefler, *supra* note 112, at 30-31.

114. See BAKER, *supra* note 112, at 16.

115. See ARENDT, *supra* note 111, at 286.

116. See Burdman & Epstein, *supra* note 57, at A1.

integrated into our society and our work force as future citizens.¹¹⁷ But for the purposes of Proposition 187, non-criminal undocumented aliens apparently had no rights worth mentioning. Only citizens “could enjoy the full protection of legal institutions,” and unless undocumented aliens were somehow “completely assimilated and divorced from their origins,” they had neither rights claims nor claims to society’s resources.¹¹⁸ Citizens spoke as though undocumented aliens, having no substantial connection to this nation and without a legitimate place in American society, were owed nothing, not even the most minimal provisions.¹¹⁹ In the face of being considered “rightless persons,” undocumented aliens confronted a perilous fate.

C. Managing Human Resources

Although proponents and opponents both spoke as if undocumented aliens had no rights in society—at least not *as* undocumented aliens—they did not agree about what to do with undocumented aliens. There were several options: do nothing; engineer a mass deportation or voluntary out-migration of illegals; eliminate social services and other “costs” associated with having illegals within the state’s borders; or assimilate undocumented aliens into American society. In choosing among these options, undocumented aliens had no right to speak, no right to an education, no right to privacy, and no right to any social resources. If a “right is something that can be demanded or insisted upon without embarrassment or shame,” undocumented aliens had none that commanded the attention of citizens.¹²⁰ Perhaps because they were treated as though they had no rights, Proposition 187’s proponents and opponents alike often discussed undocumented aliens as resources to be managed. Aliens were either to be expelled because they were useless, retained because they were useful, or improved because they could be useful. The debate around Proposition 187 became, in many respects, a discussion *among* citizens about the present and future utility of undocumented aliens *to* citizens.

Some proponents of Proposition 187 claimed that undocumented aliens were a net drain on society. Undocumented aliens were hired while “[p]eople who were born here can’t find jobs.”¹²¹ Ron Prince, Chairman of Save Our State, argued “[p]resently we are

117. See Chang, *supra* note 36, at B5.

118. See ARENDT, *supra* note 111, at 286.

119. See Romero, *supra* note 79, at 1002-03.

120. SHUE, *supra* note 100, at 15.

121. *Immigration a Tough Call for Blacks*, *supra* note 11, at A1.

denigrating the quality of services” because of undocumented aliens.¹²² Harold Ezell, a co-author of Proposition 187 and former commissioner of the INS, asked, “How many illegals can we educate, medicate, compensate, and incarcerate before California goes bankrupt?”¹²³ Some proponents were more blunt. One voter wrote: “For the past couple of decades, people have been pouring into this nation . . . to have their babies and overpopulate and overburden our state and federal services. We really need Proposition 187 to stop the flaunting of our laws and overburdening of our systems.”¹²⁴ Still another voter said that undocumented aliens “contributed nothing” to society.¹²⁵ Because undocumented aliens were useless, even harmful, to legal residents, they needed to be expelled, or at least excluded from social services, as was the intent of Proposition 187. After passage of Proposition 187 Governor Wilson moved quickly to begin implementation of the measure by issuing an executive order to discontinue public benefits to undocumented aliens.¹²⁶

Some Californians, however, preferred the present system. A Korean American businessman urged other Korean Americans to remember that Korean businesses—from sweat shops to supermarkets—relied heavily on undocumented aliens for cheap labor.¹²⁷ Former GOP gubernatorial candidate Ron Unz championed their skills as gardeners and nannies.¹²⁸ Both California candidates for the United States Senate employed at least one undocumented alien as a housekeeper or child care provider.¹²⁹ Arianna Huffington, the wife of United States Senate candidate Michael Huffington, praised the qualities of her undocumented nanny, commenting: “She was a magical Mary Poppins, and I feel the children have been privileged to know her. . . . It’s not easy to find someone who loves your children. You can find people to take care of them, but not to love them.”¹³⁰ Undocumented aliens also picked fruit and vegetables so well that even Governor Pete Wilson himself once thought them an indispensable asset. When Wilson was a United States Senator in 1986, during the passage of the IRCA, he said: “I deplore the

122. Hernandez, *supra* note 45, at 14.

123. Harold Ezell, *Enough Is More than Enough: We Can't Afford Illegal Immigration*, L.A. TIMES, Oct. 23, 1994, at M5.

124. *A Panoply of Emotions over Proposition 187*, S.D. UNION-TRIB., Oct. 22, 1994, at 7.

125. *See id.*

126. *See* Feldman, *supra* note 109, at A1.

127. *See Newshour* (Korean Broadcasting Service news broadcast, Oct. 28, 1994).

128. John Jacobs, *For Huddled Masses Yearning to Be Free, Prop. 187?*, S.F. EXAMINER, Oct. 31, 1994, at A21.

129. *See* Susan Yoachum, *Huffington Hired Illegal Immigrant*, S.F. CHRON., Oct. 27, 1994, at A1; *INS Says Feinstein Maid Illegal*, S.F. CHRON., Nov. 5, 1994, at C3.

130. John Wildermuth, *Mrs. Huffington Talks About Secret Nanny*, S.F. CHRON., Nov. 1, 1994, at A1.

[Immigration and Naturalization Service] raids on farms in [California] in the roundup of illegal aliens. Our economy needs such workers."¹³¹ Although Wilson changed his mind, many farmers did not. Asian American farm groups silently opposed the measure. One Asian American farmer said, "Let's hope 187 is tied up in the courts for a long time, because if they stop [undocumented aliens] from coming over, you can kiss this valley good-bye."¹³² Although most employers of farm workers formally remained neutral on Proposition 187, many did so because they believed the law was irrelevant or unenforceable.¹³³ "Agricultural employers are inclined to follow [immigration laws], but not if it means losing their crops."¹³⁴

To William Bennett, Jack Kemp, and William Buckley, undocumented aliens could become tremendous assets to the Republican Party. Opponents of Proposition 187 spoke against the measure because it would alienate, eliminate, degrade, or underdevelop the political asset of undocumented aliens.¹³⁵ Latinos quickly underscored an argument that Republican support of Proposition 187 would hurt the GOP: "Throughout the next decade, well over 1 million new Latino voters will enter the California electorate. . . . Political memories are long lasting in ethnic communities."¹³⁶ Latinos reminded Republicans that undocumented aliens were a type of resource, a potential threat or potential asset to the GOP.

Similarly, leaving undocumented aliens without social services or public education would hurt citizens and undocumented aliens alike. Both proponents and opponents of Proposition 187 worried that undocumented aliens would "imperil the health of Californians."¹³⁷ Undocumented children would "learn the lessons of the streets—gangbanging, violence, and crime."¹³⁸ By failing to educate these children, legal residents would miss an opportunity: "High rates of illiteracy in English will prevent their full participation in the community and fuller participation in the work force."¹³⁹ Additionally, "Education provides the basic tools by which individuals might lead socially productive lives *to the benefit of us*

131. James Bornemeier, *Charting Wilson's Transformation on Immigration*, L.A. TIMES, Nov. 2, 1994, at A3.

132. Ferrell & Lopez, *supra* note 64, at A1.

133. *See id.*

134. Bozniak, *supra* note 8, at 992.

135. *See* Burdman & Epstein, *supra* note 57, at 1.

136. Henry Pachon, *A Flirtation With the GOP Turns Cold*, L.A. TIMES, Nov. 6, 1994, at M5.

137. *See* SOS Initiative—Costly, Mean and Wrong, *supra* note 26, at Sunday Punch 1.

138. Mack, *supra* note 62, at B5.

139. *A Response to Anti-Immigrant Proposals*, *supra* note 39, at 3.

all."¹⁴⁰ By keeping undocumented aliens healthy and educated, society could make them more productive units of labor. Proposition 187 represented, in this way, a deliberate *squandering* of potential resources, the loss of opportunities.

Other opponents—some farmers, business owners, and senators—did not seem to care much for improvements in the population of undocumented aliens. They feared simply that undocumented immigrants would be unavailable to work, to cut grass, and to love their children.¹⁴¹

Even as citizens talked of ways to use undocumented aliens, they themselves insisted on not being used. Teachers and physicians, even policemen, did not want to be used as INS agents.¹⁴² Fearful of losing federal money, citizens did not want to be used as political hostages if Proposition 187 passed. Some taxpayers did not want their money used to pay for undocumented aliens, and so they supported Proposition 187.¹⁴³ Others did not want their money used to pay for a sicker, more criminal undocumented alien population if Proposition 187 passed, so they opposed it.¹⁴⁴ No one who spoke in this debate wanted to be used in the same way undocumented aliens were.

Unable to defend the “rights” of undocumented aliens, citizens debated the aliens’ usefulness. Proponents of Proposition 187 often denied that undocumented aliens had any positive value to society—saying that undocumented aliens were about as valuable to society as a plague. Opponents countered that under the provisions of Proposition 187, undocumented aliens would become just that harmful. Either way, a major part of the debate around Proposition 187 concerned the questions of the net costs of undocumented aliens to society and the best way to eliminate or to reduce such costs. Both sides treated undocumented aliens not as “ends in themselves,” as persons with rights, with an intrinsic “worth” independent of their usefulness in a market economy, but rather as the ultimate “human resource,” to be expelled, retained, or improved, depending upon how the community of citizens—including citizens of color—felt about their present or future “utility.”¹⁴⁵ The question of undocumented aliens, as it arose in the debate around Proposition 187, was

140. See *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (emphasis added).

141. See Unz, *supra* note 42, at B7; Wildermuth, *supra* note 130, at A1.

142. See Gail D. Cox, *Calif. Law on Aliens Spurs Disobedience*, NAT’L L.J., Dec. 12, 1994, at A6.

143. See Hernandez, *supra* note 45, at 14.

144. See *187: It’s a Risky Proposition; Hazards of Immigration Measure Dwarf Potential Benefits*, L.A. TIMES, Oct. 16, 1994, at B18.

145. See generally THE MORAL LAW: KANT’S GROUNDWORK OF THE METAPHYSIC OF MORALS ch. II (H.J. Paton trans., Barnes & Noble, Inc. 1967).

to a large extent a question of how best to manage human resources. In a way, the use of a civil rights discourse implicitly entailed the utter disregard of those who were not *de jure* members of civil society.

III. SOCIAL CONTRACT THEORY, LIBERALISM, AND RIGHTS TALK

The debate about Proposition 187 exposed the major weaknesses of a civil rights discourse. Perhaps accustomed to speaking of a language of *civil* rights, participants in the debate either forgot about, or could not account for, the dignity or worth of undocumented aliens. Rather than treating them as persons worthy of respect—and rights—citizens assumed that without citizenship, undocumented aliens had no legitimate rights-based claims in society. If undocumented aliens had worth it was only because they could become future citizens. Their status was the status of things or resources, not persons. In the wake of Proposition 187, those who use rights discourse should reevaluate its political impact, and move away from a language of rights that emphasizes *civil* rights. Rights discourse has not always proceeded as though rights were linked to sovereignty.

In many ways, rights discourse emerged to protect persons *from* sovereignty. Since the Enlightenment, European and American legal systems have relied heavily on a conception of individual rights to protect citizens from the state and from one another.¹⁴⁶ Historically, however, the most prevalent view of rights—at least in the United States and Western Europe—was that a person had rights simply by virtue of being a human being: “[Men] are endowed by their Creator with certain inalienable Rights.”¹⁴⁷ Moreover, “the Rights of Man . . . had been defined as ‘inalienable’ because they were supposed to be independent of all governments”;¹⁴⁸ “[g]overnments are instituted among men . . . to secure these rights,” not to create any new “inalienable” rights.¹⁴⁹ The movement from a state of nature to civil society was understood as a movement toward “settled standing rules, indifferent and the same to all parties,” rules that accorded with the laws of nature.¹⁵⁰ In much of classic social contract theory,

146. See JEREMY WALDRON, *Liberal Rights: Two Sides of the Coin*, in LIBERAL RIGHTS COLLECTED PAPERS 1-35 (1993).

147. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

148. *Id.*

149. ARENDT, *supra* note 111, at 291-92.

150. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 163 (Thomas Cook ed., 1947). *But see* THOMAS HOBBES, LEVIATHAN ch. XVIII (Michael Oakeshott ed., 1991)

natural rights come *prior* to rights under sovereignty, and sovereignty that is destructive of persons' natural rights is a sovereignty that has no right to exist: "it is the Right of the people to alter or abolish it."¹⁵¹

The social contract theory espoused by Locke, or that imbedded in Jefferson's Declaration of Independence, is one that treats sovereignty as a mechanism to protect natural rights, not as a vehicle for the creation of new rights. If, as Locke maintained, civil society is not permitted to deny its own citizens the rights which are naturally theirs, it must follow that the same civil society may not deny the natural rights of those who, for whatever reason, do not legally belong to it. No sovereign should infringe upon the natural rights of any person, regardless of her legal status.

Following social contract theory, liberal political theory—especially in the work of Immanuel Kant—also drew an image of the person as having an intrinsic "worth," worthy of respect by virtue of being a human agent, *not* by virtue of being a member of a particular political community. Kant claimed that "rational nature exists as an end in itself," and that as rational beings, persons ought to be treated as ends in themselves. The form of his categorical imperative implied a strong commitment to the special dignity of persons: "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end."¹⁵² According to Kant, persons are not to be treated as "things—something to be used merely as a means"—that have a "market price."¹⁵³

Kant notes that where one is born "is no deed of him who is born."¹⁵⁴ Birth within a territory is arbitrary, and the intrinsic worth of a person should not be diminished by a circumstance over which he has no control. Kant also suggested that "no one had more right than another to a particular part of the earth."¹⁵⁵ As persons, we share the earth in common. Kant argued that as the world grew smaller, as the distance between nations diminished, the arbitrary aspects of national citizenship ought to disappear:

(discussing a competing view of sovereignty, in which sovereignty is understood as absolute).

151. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776); see LOCKE, *supra* note 150, at 186-87.

152. THE MORAL LAW, *supra* note 145, at 91.

153. *Id.* at 91-92, 96.

154. IMMANUEL KANT, *Theory and Practice*, reprinted in THE PHILOSOPHY OF KANT 418 (Carl Friedrich ed., 1949); see generally R. George Wright, *Federal Immigration Law and the Case for Open Entry*, 27 LOY. L.A. L. REV. 1265, 1294 (1994) (discussing the moral arbitrariness of immigration law).

155. IMMANUEL KANT, *Perpetual Peace*, in IMMANUEL KANT: PHILOSOPHICAL WRITINGS 284 (Ernst Behler & Rene Wellek eds., 1986).

[T]he human race can gradually be brought closer and closer to a constitution establishing world citizenship. . . . [T]he narrower or wider community of the peoples of the earth has developed so far that a violation of rights in one place is felt throughout the world, [and] the idea of a law of world citizenship is no high-flown or exaggerated notion.¹⁵⁶

Kant argued that while nation states exist, even those who are not members of a civil society nonetheless deserve hospitality. Kant saw in this “the right of a stranger not to be treated as an enemy when he arrives in the land of another.”¹⁵⁷

In contemporary political theory, John Rawls presented an elegant argument about justice in society that combined strands of social contract theory and deontological liberalism. The basic idea of Rawls’ work was that members in society might arrive at two principles of justice to govern society through a carefully constructed hypothetical situation, “the original position,” which “corresponds to the state of nature in the traditional theory of the social contract.”¹⁵⁸ The original position is a place where parties discover principles of justice behind a *veil of ignorance*: “the parties do not know certain kinds of particular facts. . . . [N]o one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like.”¹⁵⁹ Persons in the original position know “general facts about human society,” but they know nothing specifically about their physical, biological, or intellectual aspects—or the *types* of persons they will be—until the “veil” is lifted, and they find themselves in civil society.¹⁶⁰

Rawls argued that from this initial situation, parties would choose two principles: in the first, each party would agree to the most extensive set of liberties compatible with an equal liberty for all; in the second, each party would agree to an unequal distribution of social values only if such values could be acquired through offices open to all, and only if the unequal distribution would make everyone better off.¹⁶¹ In settling on these principles, the standards which are to govern life prospects, the parties in the original position thus discover principles under which the few who happen to have favorable

156. *Id.* at 286.

157. *Id.* at 284.

158. JOHN RAWLS, *A THEORY OF JUSTICE* 12 (1971).

159. *Id.* at 137; see also MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 132 (1982) (arguing that principles of justice are “discovered,” not “chosen,” by the parties in the original position).

160. See RAWLS, *supra* note 158, at 137.

161. See *id.* at 62.

natural characteristics are not permitted to benefit unduly from “contingencies that are arbitrary from a moral point of view.”¹⁶² The image of a Rawlsian society is one where all are committed to a basic sense of equality, where inequality is permitted only if it benefits everyone in society. Rawls attempted to compensate for the “arbitrariness of the world” by structuring a process through which “persons [can] express their nature as free and equal rational beings subject to the general conditions of human life.”¹⁶³ Rawls stated that “the principles of justice manifest in the basic structure of society men’s desire to treat one another not as means only but as ends in themselves.”¹⁶⁴ Rawls’ hypothetical exercise of stepping behind the veil of ignorance is intended as a way of exploring our own deeply held convictions about justice.

Although Rawls himself did not address issues of nationality, his basic ideas suggest that citizenship ought to be treated like any other “morally arbitrary” characteristic in the original position.¹⁶⁵ Like the color of one’s eyes, the shape of one’s body, the particular aspects of one’s intellectual or artistic traits, citizenship is something we are born with, but hardly anything any of us “deserves.” That one child is born in Mexico, another in Korea, and another in the United States tells us something about their nationality and their citizenship, but from a moral point of view, these children are equivalent—none “deserved” the citizenship that is hers, and none can claim that she “consented” to be a citizen of the nation she occupies. It would seem rather odd from a moral or legal viewpoint to say that one child is worth more than another simply by virtue of her citizenship. To say such a thing would be as problematic as to say that blue-eyed babies are worth more than brown-eyed babies, that more intelligent babies are worth more than less intelligent babies, or that legal Americans are worth more than undocumented Mexicans. All are worth the same, by virtue of being human persons. All deserve respect, a sense of dignity, and protection as “persons,” not “things,” as ends in themselves, not as means for other ends. As in social contract theory, if rights are to exist in our discourse to protect the integrity of persons, then it follows that all persons deserve

162. *Id.* at 511.

163. *Id.* at 141, 252-53.

164. *Id.* at 179. Rawls argued that parties in the original position would *not* choose any form of utilitarianism to govern the basic structure of society because utilitarianism permits net increases in utility at the expense of the liberty or equality of some human beings. *See id.* at 26.

165. *See* Wright, *supra* note 154, at 1296; *see also* THOMAS W. POGGE, *REALIZING RAWLS* 247 (1989) (stating that “[n]ationality is just one further deep contingency like genetic endowment, race, gender, and social class—one more potential basis of institutional inequalities that are inescapable and present from birth”).

protection of the same fundamental rights, and rights should not be contingent on something as morally arbitrary as citizenship.

CONCLUSION

Whether drawing from social contract theory, Kantian theory, or the works of John Rawls, several strands of rights discourse explicitly acknowledge the arbitrary nature of citizenship. Natural rights belong to all persons, not just persons who happen to be born in a particular territory. This categorical imperative is a principle applicable to all persons, not just to citizens of one's own nation state. If California citizens could empathize with undocumented aliens, it is doubtful that undocumented aliens would be treated with the disrespect demonstrated by passage of Proposition 187. Although neither social contract theory nor classical liberalism requires nation states to commit themselves to universal human rights, they suggest that *personhood* ought to be the basis for rights, not citizenship. These theories imply that societies ought to be committed to the dignity and autonomy of persons generally, not just to the dignity and autonomy of their own citizens.

If the debate around Proposition 187 proved anything, it was that the citizens of this society reified the arbitrary characteristic of citizenship. They spoke as *citizens* uncommitted to a broader understanding of universal human rights. By structuring a debate in which undocumented aliens had no right to speak, no right to privacy, and no rights to social resources, citizens tacitly employed a civil rights discourse, simultaneously foreclosing the possibility of rights independent of citizenship. Citizens reduced non-citizens to things. People of color discussed the utility, not the intrinsic worth, of other people of color.

The strategy among racial minorities since the Civil Rights Movement—since the Civil War—has been to underscore their historic connections to this nation, to stress formal membership as a means of securing a sense of dignity, worth, and respect. But this same strategy proved extremely harmful to undocumented aliens, those who did not “fit” the theory upon which people of color marked their progress. For those who continue to express faith in a civil rights discourse, in its ability to unite people of color and promote their inclusion, Proposition 187 should serve as an occasion for worry. The Constitution protects citizens more than it does non-citizens, it always has. The Constitution outlines the basis of a specific national government, not a world system. “The distinction between being inside and outside the borders of the United States is not a constitutional irrelevancy. The Constitution is an artifact of an

era of territorial nation-states, and that era is not yet over.”¹⁶⁶ The civil rights discourse that once unified people of color under constitutional principles now divides them, at the expense of people who are at once members of society and “outlaws” within it, arguably the most vulnerable people of color among us. Undocumented aliens are treated as enemies, not as persons we sit next to at lunch counters, on buses, or in theaters. Many of us want the Constitution to protect “us,” but at the same time to be largely irrelevant to “them.” To avoid such stark contradictions, advocates and scholars need to go beyond the legacy of contemporary civil rights discourse, to remind themselves of the intrinsic worth of persons regardless of their nationality. This is by no means an impossible task. The intellectual tools to do that work are within our grasp—they are imbedded in our political culture, and they are embodied in the spirit, if not the letter, of the American Constitution.

166. Neuman, *supra* note 77, at 979.