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Building Bridges: Bringing International Human Rights Home

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This commentary on "Building Bridges" was prepared in connection with a panel presentation addressing the same theme by Latina/o law professors during the 1995 Hispanic National Bar Association's annual meeting in San Juan, Puerto Rico. It urges that we globalize our domestic legal practice by integrating international human rights norms as a means of developing, expanding and transforming the content and meaning of our human/civil rights jurisprudence. This piece contends that we have a wealth of human rights laws to which we have denied ourselves access in the past and of which we should make greater and better use in the future. To be sure, the current political-social climate favors isolationism and Congress has loudly articulated its misdirected "stay within the lines" (*i.e.*, borders) policy which is not likely to comport with the perspective of this piece. Nonetheless, the benefits to be reaped from the incorporation of accepted human rights principles into our domestic rights discourse merits careful attention.

The aim of this bridge-building proposal is to provide a blueprint for co-existence in this diverse world of ours, comprised of myriad boiling, not melting pots. Although a diversity perspective certainly informs that there are many bridges to build, this essay concentrates on joining philosophical and international forces to build one grand structure—a bridge that can transport all individuals regardless of sex, race, national or social origin, class, religion, sexuality, color or political beliefs comfortably into the twenty-first century.

The first portion of the bridge that requires attention is our *comunidad latina.* Before this community can participate in building coalitions with other so-called "outsider" communities and groups, we must build bridges within our own peoples. This internal coalescing compels first and foremost a recognition of the diversity of our own Latina/o community.

In legal academic circles, many of us were friends as we commenced our professional journey and we could be counted on as two sets of hands. Imagine, when I started teaching in 1982 there were merely twenty-two Latinas/os in full-time, tenure-track positions in only fifteen of the approximately one hundred and seventy U.S. law schools—only two of us were Latinas.

Our numbers have grown, we total over one hundred now, but there

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are still more law schools than we would like to admit without a single Latina/o on their faculties, including many schools in urban centers with large and diverse Latina/o communities. Our small numbers have allowed us to get to know each other and create an academic legal community generous with its time and support. We find each other with ease and excitement when we meet in San Francisco, San Antonio, New York, Washington, Miami, Provo, Albuquerque, Chicago, Vienna, Cairo, Copenhagen, Ciudad Méjico, Beijing, Rio and San Juan. Our origins can be traced to all of those sites and many more which is why we must celebrate the complexity and diversity of our Latina/o roots.

My personal experience is not unlike that of many Latinas/os. I was born in Cuba and grew up in Puerto Rico. Unbeknownst to me until quite recently, the environment in which I lived my formative years has made a dramatic difference in my life and how I see the world. If you contemplate a global mélange you might have a glimpse of the diversity with which I lived every day of my life until I went to college in the states. We were big and small, brown-eyed and blue-eyed, blondes and brunettes, but one significant factor we shared was that we were all *de Borinquen.* Sure, we were a diverse peoples, but we were all united—we were all *boricua.* Little did I know that being *boricua* makes you somehow "*diferente*"—an outsider—in the U.S. Being "*diferente*," however does not, and should not mean we cannot be unified; indeed we all were as *boricua.*

The second piece of the bridge I would like to suggest we build is one that will at least start to address the alleged "great racial divide," meaning black-white, that exists in this country. In order to have the solid bridge I envision, the divide needs to be exposed and healed. For one, the racial divide must be recognized as having a lot more that two color components. Essayist Richard Rodriguez's October 3, 1995 commentary during the McNeil-Lehrer News Hour eloquently unmasked the fallacy of underinclusiveness endemic to contemporary race discourse. His observations concerned the O.J. Simpson trial on the heels of the announcement of the jury's verdict. Mr. Rodriguez pondered, as he followed the trial and the opinion polls that inevitably accompanied it, why he never saw himself or his opinions reflected or acknowledged. Where, he asked, were the opinions of Latinas/os and Asians in all those telling polls which, according to their own terms, were based on race and gender? That simple question underscores the Shakespearean flaw heralded as infallible truth in our society, including the law: everything appears to be based upon a black/white dichotomy, or what the media portrays as a black/white divide, which, by its nature excludes entire segments of this country's population.

There is a lot more to being American than being black or white or brown. Recognition of the multidimensionality of all peoples should be acknowledged as a way to describe, though not define, the citizens and residents of the United States. Certainly for Latinas/os and Asians to be excluded from (and therefore rendered invisible by) polling in Los Angeles defies credibility. On the other hand, if these groups were in fact included in the polling, collapsing them into the black/white dichotomy, it would deny their separate identities and silence their possibly different voices thus revealing the imperfection of a binary classification scheme.

Such a black/white dichotomy might have been (and may still be) an appropriate focus in our justice system when addressing the institution of slavery and its hideous, long-lasting legacy—although even in this respect there are historical issues concerning Chinese exclusion, Japanese internment, American Indian massacre and Mexican peonage. In all events, modern reality presents a dramatically different and much more complex demography. Significantly (and sadly) history is replete with examples of how differences are used to divide rather than to learn and conquer challenges. Thus, we must build bridges that allow all people to adjust to the realities of the present world and facilitate our communications across whatever racial barriers exist—not only to bring the barriers down but also to seek solutions to our all-too-common problems such as housing, crime, education and welfare, to name a few.

Moreover, any view of the world as a simple race/ethnicity dichotomy is tragically flawed at other levels as there is much more than race that defines each and every one of us as precious, unique individuals. For example, we are male and female; we are gay and lesbian and non-gay and non-lesbian; we enjoy different levels of education; we span a broad range of social and economic classifications and of mental and physical abilities; we speak many tongues; and we are Catholic, Protestant, Santera/o, Buddhist, Muslim, Hindu and Jew. Thus in looking at the world and in building bridges to traverse it, we have to look at the people, not some singular characteristic that can be isolated and manipulated to effect a myth of insurmountable racial or ethnic or sex-based or sexuality-based or religious-based divisions.

This multidimensional perspective leads to the last part of the bridge: the segment connecting our domestic practice to International Law. This essay develops this proposal[1] by establishing that International Human Rights Law is U.S. law and describing some of the rights protected by International Human Rights Law that when incorporated into our jurisprudence can develop, expand and transform our domestic concept of civil rights. This piece then focuses on three particular issues that are of critical importance to us as diverse peoples of color—Penalties (as in death), Privacy (as in personal), and Indecent Propositions (as in 187)[2] to provide concrete examples of how international norms can protect fundamental human rights.

THE RELEVANT INTERNATIONAL HUMAN RIGHTS NORMS

There can be no question that international human rights norms are legally enforceable rights, not merely aspirational statements of moral goals. To be sure, one of the problems in accepting this conclusion is that the acknowledgement of the existence of legally enforceable human rights results in the concession that there exist limitations on the power of

1. Some of the ideas presented here will appear in greater detail in Berta Esperanza Hernández-Truyol, *Reconciling Rights in Collision: An International Human Rights Strategy, in* IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES, (Juan Perea ed., forthcoming 1996).

2. 1994 Cal. Legis. Serv. Prop. 187 (West).

governments, *i.e.*, the obligation of States to respect inalienable human rights is a limitation on States' sovereignty—supposedly a "supreme, absolute power [of an] independent State to govern."[3] Thus, recognition of legally enforceable international human rights makes States accountable to individuals and to other States for any violation of recognized rights, even those of a State's own citizens. This, of course, is the lesson learned by the international community of nations from the Trials at Nuremberg, a tragedy in world history that effectively placed the protections of individuals and their rights as human beings at the heart of international law.

That international norms are legally binding is consonant with U.S. domestic law which itself recognizes the existence of international law. For example, Article I, §8, clause 10 of the Constitution, gives Congress the power to "define and punish . . . [o]ffenses against the Law of Nations." Moreover, Article VI clause 6, defines the relationship between international law and domestic law by designating treaties as "the supreme law of the land." In addition, case law recognizes that customary international law—law that emerges from practices of States that is deemed to be obligatory—is U.S. law.[4] Thus, adopted treaties or recognized customary principles are binding domestic law.

The concept of reservations—unilateral statements by States that can limit their international obligations—is particularly relevant when contained in human rights treaties. Although the notion of reservations is accepted in international law, the Vienna Convention on the Law of Treaties prohibits reservations that are "incompatible with the object and purpose of the treaty."[5] Moreover, reservations designed to excuse parties from commitments made with respect to non-derogable rights will fail and the reserving state will be bound to such obligations. In all events, a reservation designed to enable a state to suspend a non-derogable fundamental right will most likely be deemed incompatible with the object and purpose of the treaty. Consequently, prohibitions against racial discrimination and genocide, and perhaps even sex discrimination, will be invalid.

Binding international human rights norms provide significant protections beyond our "domestic" civil rights laws. For example, Article 2 of the International Covenant on Civil and Political Rights[6] (hereinafter, "ICCPR") and Article 2 of the Universal Declaration of Human Rights[7] (hereinafter, "Universal Declaration") protect individuals from discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Other protected rights pertinent to the issues in this essay are the rights to privacy, education, health, life, impart and receive

3. BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

4. *See* The Paquete Habana, 175 U.S. 677, 700 (1899).

5. Vienna Convention on the Law of Treaties, U.N. DOC. A/CONF. 39/27, art. 19 (1969).

6. International Covenant on Civil and Political Rights, Dec. 19, 1949, art. 2, 999 U.N.T.S. 171 [hereinafter ICCPR].

7. *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3rd Sess., pt. 1 [hereinafter *Universal Declaration*].

information and association, to name a few.

While the international legal system affords many opportunities to expand the reach of domestic protections of individual rights, it is not perfect. One weakness of the system is the immense gap between women's legal status as equal to men and their real world/life status as not.[8] Significantly both the U.N. and the U.S. Dept. of State, neither a bastion of gender equality, have recognized that women's true position around the world is one of *In*equality. Consequently, although this essay advocates bringing human rights home, it also exhorts transforming the system that gives life to those rights so that some are not more equal than others. With these considerations in mind, this essay scrutinizes the possible impact of an international human rights analysis on three specific matters of concern to communities of color.

THE DEATH PENALTY, PERSONAL PRIVACY AND PROPOSITION 187

The U.S. is the only industrial state that still imposes the death penalty and, it appears, not without causing legal professionals, including Supreme Court Justices, much alarm. A jarring example of such trepidation surfaced recently when Supreme Court Justice Blackmun, a Nixon appointee who is not to be mistaken for a liberal in criminal cases, stepped down with the public pronouncement that, after years of voting to sustain capital sentences, he had concluded that the death penalty is unconstitutional. Just prior to stepping down, Justice Blackmun, in his dissent in *Callins v. Collins*,[9] recognized the disparate application of the death penalty:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, and, despite the effort of the states and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.[10]

Justice Blackmun's words are chilling in light of the facts:

- Between 1973 and 1992, a total of 4,704 convicted murderers were sentenced to death, but only 188 of them, or 4 percent, were executed;

- 1,815 of those death row prisoners, or 39 percent, succeeded in having their death sentences lifted by judicial review or executive clemency;

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8. For a full discussion of the schism between the rules concerning sex equality and the reality of sex inequality worldwide, *see* Berta Esperanza Hernández-Truyol, *Women's Rights Are Human Rights—Rules, Realities and the Role of Culture: A Formula for Reform*, 21 BROOKLYN J. INT'L L. 605 (1996).

9. Callins v. Collins, 114 S. Ct. 1127, 1128-38 (1994) (Blackmun, J., dissenting).

10. *Id.* at 1130.

• 451 of those sentenced to die—nearly 10 percent—had their underlying convictions overturned on appeal.[11]

One U.S. death penalty case, *Stanford v. Kentucky*,[12] is particularly pertinent to this essay as it declares the constitutionality of the imposition of the death penalty on a minor. In this light, the U.S. finds itself in notable (if not noteworthy) company. Aside from the embarrassing fact that the U.S. leads the world in the execution of juveniles, there are only six other countries worldwide known to have executed juveniles in the last decade: Barbados (which has since raised the age to 18), Iran, Iraq, Nigeria, Pakistan and Bangladesh.

In contrast to U.S. law, Article 6.5 of the ICCPR prohibits the imposition of the death penalty on juveniles and on pregnant women.[13] It is historically germane to note that when President Carter first submitted the ICCPR to Congress for its constitutionally mandated advice and consent, the executive transmittal of the treaty included a blanket reservation against Article 6.5. Effectively, the reservation as submitted by President Carter provided that the U.S. retained its sovereign right to execute persons under 18 as well as pregnant women.

However, when President Bush resubmitted the ICCPR to Congress in 1991, the reservation against the prohibition of imposition of the death penalty applied only to the execution of minors, not to the execution of pregnant women. This U.S. acceptance of the ICCPR's prohibition against the imposition of the death penalty on pregnant women raises an intriguing question about the relationship of the international norm to U.S. domestic law. Has the U.S., by ratifying this human rights treaty constitutionally prohibited the imposition of the death penalty on a certain class of persons, to wit, pregnant women (or as it is a constitutional question one should say, per Justice Rhenquist, pregnant persons)?[14] It seems that the answer is a clear yes: the United States, by treaty, has agreed to limit its sovereign right to impose the death penalty in certain cases. This creates an interesting constitutional analytical construct because that prohibition would *not* be based upon Eighth Amendment jurisprudence—the basis for the U.S. death penalty jurisprudence. Rather, the prohibition would be constitutionally mandated by the Supremacy Clause.

Although the withdrawal of the reservation with respect to pregnant women was more likely than not the result of the Reagan/Bush Administrations' "choice" politics, the rationale is of no moment. The significance of the action lies in the prohibition of a domestic remedy by virtue of the application of international treaty law, the supreme law of the land. This consequence is concrete evidence of the possible domestic impact of international human rights norms: the expansion, development and transformation of U.S. rights jurisprudence.

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11. David O. Stewart, *Dealing with Death*, 80 NOV. A.B.A.J. 50, 50 (1994).

12. Stanford v. Kentucky, 492 U.S. 361 (1989).

13. ICCPR, *supra* note 6, art. 6.5.

14. Geduldig v. Aiello, 417 U.S. 484, 494-497 (1974).

Such analysis raises an interesting question with respect to the U.S. reservation against the prohibition on the execution of minors based upon the Supreme Court's *Stanford* decision. Could an international tribunal deem a reservation whereby a party seeks to retain the right to execute minors to be against the object and purpose of the ICCPR and, consequently, render it invalid—particularly in light of that treaty's Article 24 mandate that the State, among others, protect minors? In this respect it is significant that in March of 1995 the U.S. made its first ever appearance before the U.N. Human Rights Committee (hereinafter, "UNHRC"), following its 1992 ratification of the ICCPR, marking the first time in history that the U.S. government had to answer to an international body about its civil and political rights. Not surprisingly, the U.S. was grilled by 6 of the 18 committee members on this country's continuing policy of allowing the imposition of the death penalty on children who commit crimes when they are under the age of 18. The UNHRC asked the U.S. to explain its juvenile death penalty reservations, especially as the convention considers the ban on juvenile death sentences so important that countries can not violate it even during national emergencies. Under severe criticism, Conrad Harper, legal advisor for the U.S. State Department said "[w]e recognize that very deep and very powerful arguments have been heard about the juvenile death penalty . . . This is under review, and we do not exclude the possibility of a change."[15]

Similarly, various other questions arise. What if the U.S. had reserved against the prohibition of imposing the death penalty on pregnant women? Could such a reservation nonetheless have been construed as incompatible with the object and purpose of the treaty and thus, in all events, be deemed invalid? In addition, if the reservation regarding minors is deemed to be invalid as against the object and purpose of the treaty, are there any viable international or domestic fora available to prevent the U.S. from carrying out such executions?

Likewise, in light of ICCPR's Article 2 and Article 26 prohibitions against racial discrimination, if it is established that the United States' imposition of the death penalty disproportionately affects a protected racial group, does the imposition of such penalty place the U.S. in violation of its international obligations not to discriminate on the basis of race?[16] It is important in this context to note that introducing the U.S.'s initial report to the UNHRC, John Shattuck, Assistant U.S. Secretary of State for Democracy, Human Rights and Labor acknowledged "that the United States[']' history of racism, slavery and racial segregation had among other factors posed obstacles to the full and optimal enjoyment by all Americans of the rights reflected in the Covenant. . . ."[17] Significantly,

15. *Human Rights—U.S. : Washington Pledges Improvements to U.N. Group,* Inter Press Service, March 31, 1995.

16. This question, of course, needs to be contextualized: as of October 1994 the total number of death row inmates (known to LDF) was 2,948 with 1,446 (49.05%) being white, 1,180 (40.03%) being black, 205 (6.95%) Latina/o, 49 (1.66%) Native American, 22 (.75%) Asian, 46 (1.56%) unknown. 2,907 were men; only 41 were women. Of the 253 executions one was a woman; the rest were men. Of those executed, 140 (55.33%) were white; 97 (38.34%) black; 15 (5.93%) Latina/o; 1 (.39%) Native American. *NAACP Legal Defense and Education Fund, Inc., Death Row U.S.A.* 1-3 (Fall 1994).

17. *Human Rights Committee Begins Considering Initial Report of the United States,* Human Rights Committee, HR/CT/400, 53rd Sess., 1401st mtg. (1995).

nearly 40% of those executed since 1976 have been black, although blacks constitute only 12% of the population.[18]

This same question needs to be underscored with regard to execution of juveniles as existing data shows that 69% of all juveniles executed since 1600 whose race is known have been black; after 1900 75% of all executed juveniles have been black.[19] And, in spite of criticism on the practice of executing juveniles, Human Rights Watch indicated to the UNHRC that four of the nine juveniles executed in the U.S. since 1973 were killed in 1993.[20]

Privacy and Proposition 187 are two other excellent examples of ways international human rights norms can expand, develop and transform U.S. law. In addition to the non-discrimination protections, international law, unlike our own constitution, expressly protects individuals' right to privacy. Article 17 of the ICCPR states that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."[21] Not only does the U.S. constitution *not* expressly protect privacy rights, although such rights have been found to exist in the "penumbra" of articulated rights, the penumbra does not protect all U.S. citizens alike. In *Bowers v. Hardwick* the United States Supreme Court concluded that adult, consensual homosexual conduct in the privacy of an individual's home was not to be afforded the same privacy protections that adult, consensual heterosexual conduct was granted.[22] In sharp contrast, the ICCPR's Article 17 privacy provision has been interpreted to include protection of sexual conduct between consenting adults—homosexual and heterosexual conduct alike.[23] Thus, contrary to the U.S. trend of demonizing or alienating gays and lesbians as a class, and in contrast to one court's holding that it is illegal even to legislate against discrimination against gays and lesbians—as Coloradans know—other members of the international community are going in the opposite direction. Indeed, discrimination against gays and lesbians has been the topic of discussion at numerous international conferences with measures being taken in the Economic and Social Committee of the U.N. and within the framework of

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18. 140 CONG. REC. S5340 (daily ed. May 2, 1994).

19. NAACP LEGAL DEFENSE FUND, Paper on the death penalty and juveniles (on file with LA RAZA LAW JOURNAL).

20. *Human Rights Watch Deplores U.S. Unwillingness to Address Shortcomings in U.S. Human Rights Practices*, HUMAN RIGHTS WATCH, (Oct. 4, 1995) (press release, on file with the *La Raza Law Journal*)

21. ICCPR, *supra* note 6, art. 17.

22. Bowers v. Hardwick, 478 U.S. 186 (1986).

23. *Toonen v. Australia*, U.N. Doc. CCPR/C/50/d/488/1992 (1994) (reviewing a communication under the Optional Protocol to the ICCPR, held that "it is undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy'..."). Two European Court of Human Rights cases are in accord with *Toonen*. In *Norris v. Ireland* 13 Eur. Ct. H.R. (ser. A) at 186 (1991) and *Dudgeon v. United Kingdom*, 4 Eur. Ct. H.R. (ser. A) at 149 (1982), the European Court, based on a similar privacy provision contained in Article 8.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221, decided that adult homosexual consensual conduct enjoyed privacy protection. These decisions are diametrically opposed to the U.S. Supreme Court's conclusion in *Bowers*.

the Conference on Security and Cooperation in Europe and the Council of Europe to help eliminate discrimination against gays and lesbians in the areas of health care, education, work, housing, stigmatization of youth, criminal laws, and freedom of movement, to name a few. To this end, the European Parliament passed a resolution on equal rights for homosexuals and lesbians in the European Community.

So clearly, it is not quite accurate to say, as the U.S. did in its report to the UNHRC, that no new protections come from the ICCPR and thus the U.S. has no need to pass enabling legislation that would make the treaty enforceable in domestic courts.[24] Perhaps what the U.S. government means is that it does not *want* to afford certain of its citizens myriad protections to which they are entitled under international human rights norms. And, as this essay proceeds to review certain laws such as the so-called "Save Our State" California proposition, it is evident that international human rights laws, such as the ICCPR, grant individuals access to substantial protections not available under U.S. domestic jurisprudence.

Various international human rights provisions afford grounds upon which to challenge the legality of Proposition 187 and its clone legislation. By agreeing to be bound to the non-discrimination provisions of ICCPR Article 2, every State party "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[25] Thus, Article 2 alone provides six bases of protection on equality grounds with four—language, social origin, birth or "other status"—not being part of the U.S.' Equal Protection safety net. Further, the ICCPR protects against "arbitrary or unlawful interference with . . . privacy, family, home or correspondence, [and] unlawful attacks on . . . honour and reputation;"[26] and provides that "[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society, and the State."[27] Moreover, additional provisions protect

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24. The U.S. declared the ICCPR to be a non-self-executing treaty, making it necessary for Congress to pass enabling legislation for the covenant to become domestically enforceable U.S. law. 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992). Of course, some of the provisions may be domestically enforceable notwithstanding the absence of enabling legislation if the same provisions are contained in the Universal Declaration which could then be considered customary law.

25. ICCPR, *supra* note 6, art. 2. *See also* Article 26 which provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *Id.* art. 26.

26. *Id.* art. 17.

27. *Id.* art. 24.

28. *Id.* art. 6.1

the rights to life,[28] health,[29] education,[30] right to receive and impart information,[31] and of association.[32]

With these international norms in mind, it is instructive to review Proposition 187. Its purpose is clearly articulated in its findings and declaration that the people of California have suffered and are suffering personal injury, damages and economic hardship because of the presence of "illegal aliens" in the state. It is significant, that there is no empirical substantiation for the very *raison d'être* of the legislative initiative.

Certainly, the choice of language itself is deeply troubling. Contrary to the sense created by the words—"*illegal alien*"—used to define the objects at whom the law is aimed, the legislation is not intended to reach unlawful, extra-terrestrial beings. Rather, its design is to identify a discrete group: immigrants, real people, whose nefarious criminality is simply their entry into the territorial jurisdiction of the U.S. without proper documentation. In fact, these people, who more often than not come to work to be able to support and provide for their families—an exemplary showing of family values—fill low-skilled, low-cost jobs that U.S. citizens will not contemplate accepting.

An initial focus on the concept of equality/non-discrimination, reveals that the Proposition's very definition of who *is* eligible to receive the social benefits addressed by the law—public education, health care, welfare benefits or social services—is disheartening, if not perverted. Certainly, two of the three eligibility classifications—those stating that U.S. citizens and aliens lawfully admitted as permanent residents are eligible to receive the specific benefits addressed—are plainly acceptable. The third category, however, is troubling. It provides for the grant of benefits to an alien lawfully admitted for a temporary period of time without regard to that alien's status at the time benefits are sought. By focusing on time of entry rather than when the application for benefits is made, such provision may be discriminatory. For example, Proposition 187 does not limit eligibility to receive benefits based upon a person's *illegal presence* in the jurisdiction. Rather, the provision simply bases eligibility on a person's legal entry. In this regard, it is significant to underscore the undisputed fact that over 50% of the illegal *presence* of foreigners in this country is comprised of persons who overstay their visa, *i.e.*, who enter legally but whose continued presence is illegal, or those who are from visa waiver states who only need a round trip ticket to enter the jurisdiction, but then do not return and thus also may be illegally present. Significantly, the demographics of those who overstay—Western and Eastern Europeans and other Non-Latina/o Whites—are such that they might not be identified as "*diferente*" and thus not given the dubious label "illegal aliens."

To be sure, the ICCPR's non-discrimination framework, and even our own narrower laws, suggest a grave equal protection problem. If indeed the concern is for the scarcity of economic resources, should we not be

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29. *Universal Declaration*, *supra* note 8, art. 25(1).

30. *Id.* art. 26.

31. ICCPR, *supra* note 6, art. 19.

32. *Id.* art. 22.

concerned about illegal *presence* as well as *entry*? In this regard it is noteworthy that all the enhanced enforcement efforts currently afoot are aimed at border crossings, as evidenced by border patrol increases, whereas enforcement efforts to curb the other illegal presence are virtually non-existent.

There are also myriad human rights problems with the investigatory techniques set out in Proposition 187. The law mandates untrained administrative personnel, such as teachers and welfare or hospital intake clerks, to report persons whom they "suspect" are "illegal aliens" seeking to obtain the covered services. Human rights issues arise, among other places, in the information or "data" such administrators must use to establish their "suspicion": the person's appearance, meaning complexion, hair color and texture, and manner of dress—thinly veiled substitutes for national or social origin, color, race and ethnicity—all classifications protected under the ICCPR. A separate basis for suspicion can be a person's manner of talking, such as speaking "foreign-accented" or "broken" English, or speaking Spanish—all matters falling within the ICCPR's language protection.

Moreover, the refusal to provide primary and secondary education, even higher education, directly interferes with the right to an education and violates the right of association and the right to impart and receive information. In this regard, the persons whose rights are hindered are not only the children (and parents of the children) being denied access to schools, but also those children (and parents of those children) who are allowed to stay in school but whose instruction is going forward without the presence or participation of those excluded.

Similarly, the denial of medical services effects a denial not only of the right to health but also of other protected rights. For example, if one considers maternal and infant health issues, Proposition 187 interferes with women's right to equality on the basis of sex. The related concerns of maternal and infant mortality effect a possible denial of the protected right to life both of the mothers who die while pregnant, in childbirth or thereafter from complications and of the infants who die in childbirth or during infancy because of the denial of services.

These examples of the intersection of domestic and international human rights norms serve to underscore the thesis of this essay: a wealth of international human rights norms exist that can and will serve to develop, expand and transform our domestic rights jurisprudence. By bringing such norms home and using them diligently in our courts, we can bring their protection a little closer to being a reality. At the very least we can engage in discourse that will facilitate our bridge-building to a better place in the new century.