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# CHILDREN AND IMMIGRATION: INTERNATIONAL, LOCAL, AND SOCIAL RESPONSIBILITIES

BERTA HERNÁNDEZ-TRUYOL\* AND JUSTIN LUNA\*\*

## I. INTRODUCTION

This essay focuses on the human rights of immigrant children, regardless of the legality of their presence within U.S. borders, especially with respect to health, education, and welfare. In that context, the work explores, as the title suggests, the international, local, and social/cultural normative standards that structure the responsibilities—individually and collectively, that proverbial village—with respect to children’s well-being. We develop these ideas in three parts. First, we address the foundations of the human rights idea and specifically enumerate the particular normative notions, including international treaties that govern children’s lives. Next, we discuss immigration in the United States, with particular attention to the lives of immigrant children. We conclude by suggesting that the idea of a reformed social contract—one grounded on a reconstructed and inclusive human rights idea and free from its colonial, heterosexist, racialized, militaristic, and western bias—supports a global charge to provide health, education, and welfare protections to all children, regardless of their national status or that of their parents.

## II. THE HUMAN RIGHTS IDEA

### *A. General Background*

Human rights are those rights vital to individuals’ existence; they are fundamental, inviolable, interdependent, indivisible, and inalienable rights which are predicates to life as human beings. Human rights are moral, social, religious, legal, and political rights that concern the respect and dignity associated with personhood,

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with a human being's identity.<sup>1</sup> The origin of human rights can be traced to religion, "natural law [and] contemporary moral values."<sup>2</sup> The concept of human rights is a relatively recent idea that some suggest is universally applicable, at least in principle.<sup>3</sup>

Even before the birth of the human rights discipline, early writers recognized the importance of individuals to the Law of Nations as it is natural persons who comprise "the personal basis of every State."<sup>4</sup> Consequently, international law needs to "provide certain rules regarding individuals."<sup>5</sup> Historically, however, individuals were objects, not subjects, of the Law of Nations.<sup>6</sup> Thus, while international laws were applicable to individuals, individuals lacked standing to enforce infractions; states of nationality had to undertake their nationals' cases. Even today, only states can bring cases before the International Court of Justice<sup>7</sup> although numerous human rights treaties—both international and regional—allow individuals access to other legal processes.<sup>8</sup>

Oppenheim, an early philosopher of international law, identified certain "rights of mankind," pursuant to the Law of Nations, to which all individuals had a right and that must be respected not only by the state of nationality but also by foreign sovereign states.<sup>9</sup> Specifically, he identified the following, all of which are recognized today in modern instruments: "right of existence, the right to protection of honor, life, health, liberty, and property, the right of practicing any religion one likes, the right of emigration and the like."<sup>10</sup> He noted, however, that those rights could not be guaranteed to individuals by the Law of Nations because, as a legal

<sup>1</sup> See generally Berta E. Hernández-Truyol, *Human Rights Through a Gendered Lens: Emergence, Evolution, Revolution*, in *WOMEN'S INTERNATIONAL HUMAN RIGHTS: A REFERENCE GUIDE* (Kelly Askin & Dorean Koenig, eds., 1999); see also REBECCA M. WALLACE, *INTERNATIONAL LAW* 175 (1986) ("Human Rights . . . are regarded as those fundamental and inalienable rights which are essential for life as a human being.").

<sup>2</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 cmt. b (1987).

<sup>3</sup> See Hernández-Truyol, *supra* note 1, at nn. 168-73 and accompanying text for a discussion of the universality versus relativity debate.

<sup>4</sup> 1 *WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW*, 10-14 (Kelly D. Askin & Dorean M. Koenig, eds. 1999) (citing I. L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* § 288, at 362-69 (2d ed. 1912)).

<sup>5</sup> OPPENHEIM, *supra* note 4, at 362-69.

<sup>6</sup> *Id.*, at § 290.

<sup>7</sup> Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993 (effective June 26, 1945).

<sup>8</sup> See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR 21st Sess. Supp. No. 16, at 59, U.N. Doc. A/6316, Dec. 16, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976); American Convention on Human Rights, Nov. 22, 1969, O.A.S. T.S. No. 36, 114 U.N.T.S. 123 (entered into force July 18, 1978).

<sup>9</sup> OPPENHEIM, *supra* note 5, at § 292.

<sup>10</sup> *Id.*

discipline, the Law of Nations was limited to relations between states.<sup>11</sup> Yet, Oppenheim also acknowledged what could be viewed as the supra-sovereign nature of those “human” rights:

[T]here is no doubt that, should a State venture to treat its own subjects or a part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the Powers to exercise intervention for the purpose of compelling such State to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilisation.<sup>12</sup>

This concept of a legally valid limitation on a state’s unfettered ability to act vis à vis human beings, including its own citizens—effectively a limitation on state sovereignty—forecast developments that would come in the human rights field. After the Second World War, the victorious Allied Powers established an international tribunal to punish those responsible for war crimes, crimes against peace, and crimes against humanity.<sup>13</sup> The tribunal imposed liability on German Nazis for committing atrocities against millions of innocent civilians, including German Jews, homosexuals, and other disfavored and targeted groups.<sup>14</sup> These tribunals demonstrated the extent to which international law could protect nationals from abuse by their own state.<sup>15</sup> Such events, for the first time, marked an unprecedented internationalization of individual rights, a normative shift that gave rise to the modern International Human Rights Law discipline.

Before focusing specifically on the human rights of children, it is important to note that the human rights discipline is not without its critics who have challenged its western, colonial, heterosexist bend and its hegemonic origins. The relativism/universalism debate, feminist/eastern philosophy, and third world critiques, among others, challenge the structural substantive and procedural biases of the system. A re-imagined and reconstructed system that incorporates these critiques and

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* The evolution of the role of the individual in international law can clearly be seen in Lauterpacht’s revision of Oppenheim’s work. See OPPENHEIM, *supra* note 5, at 632-42 (H. Lauterpacht, 8th ed. 1955). For example, in revising § 289, Lauterpacht concluded that “[s]tates may, and occasionally do, confer upon individuals’ . . . international rights stricto sensu, i.e., rights which they acquire without the intervention of municipal legislation and which they can enforce in their own name before international tribunals.” *Id.* at § 289.

<sup>13</sup> See generally TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 14 NOVEMBER 1945–1 OCTOBER 1946 (1947), available at <http://elsinore.cis.yale.edu/lawweb/avalon/imt/imt.htm>.

<sup>14</sup> See generally WHITNEY R. HARRIS, TYRANNY ON TRIAL, THE EVIDENCE AT NUREMBERG (1954); WERNER MASER, NUREMBERG, A NATION ON TRIAL (1979); BRADLEY F. SMITH, THE ROAD TO NUREMBERG (1981); TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, A PERSONAL MEMOIR (1992).

<sup>15</sup> See generally HARRIS, *supra* note 14; MASER, *supra* note 14; SMITH, *supra* note 14; TAYLOR, *supra* note 14.

incorporates an inclusive and equitable approach to personhood is foundational to this work's human rights ideas.

### *B. Children and Human Rights*

The global community, through its international proclamations, has acknowledged the special and precarious status of children and families and has taken measures to protect them. One of the ways the international legal system protects children is by recognizing the family as the "natural and fundamental group unit of society [that is] entitled to protection by society and the State"<sup>16</sup> in numerous and diverse human rights instruments. There is uniformity in the protection of family across the broad spectrum of human rights documents that safeguard the various categories of rights. For example, the documents that protect civil and political rights, such as the right to vote, free speech, and fair trials,<sup>17</sup> define family in the same way as the documents that protect social, economic, and cultural rights such as the right to health, work, education, and cultural expression.<sup>18</sup>

The protection of families is such an important value that some documents even focus on the special vulnerabilities of some families. Article 9 of the Declaration on Race and Racial Prejudice recognizes that "[p]opulation groups of foreign origin, particularly migrant workers and their families"<sup>19</sup> may be at particular risk of harm. Consequently, the Declaration proposes that they "should benefit from appropriate measures designed to afford them security and respect for their dignity and cultural values."<sup>20</sup>

Aside from the protections children receive in the family context, general human rights documents as well as the Convention on the Rights of the Child (CRC) single out children (defined as persons under the age of eighteen) for security, shelter, and safeguard by families, civil society and the state.<sup>21</sup> For example, Article 24 of the International Covenant on Civil and Political Rights (ICCPR) expressly provides that every child shall have, without discrimination, the "right to such measures of protection as are required by his [or her] status as a minor, on the part of his

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<sup>16</sup> See generally Universal Declaration of Human Rights, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc A/810 at 71, Dec. 10, 1948; International Covenant on Civil and Political Rights, art. 23, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, art. 10, G.A. Res. 2200A (XXI), 21 U.N. GAOR 21st Sess. Supp. No. 16, at 49, U.N. Doc. A/6316, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]; American Convention on Human Rights, *supra* note 8, at art. 17.

<sup>17</sup> See, e.g., ICCPR, *supra* note 16.

<sup>18</sup> See, e.g., ICESCR, *supra* note 16.

<sup>19</sup> Declaration on Race and Racial Prejudice, E/CN.4/Sub.2/1982/2/Add.1, annex V, art. 9(3) (1982) (adopted Nov. 27, 1978).

<sup>20</sup> *Id.*

<sup>21</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

[or her] family, society and the State."<sup>22</sup> It further provides that every child shall be registered, have a name, and have a right to nationality.<sup>23</sup> In Article 10, the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes that the family "is responsible for the care and education of dependent children"<sup>24</sup> and prohibits discrimination against children for reasons of parentage or other conditions.<sup>25</sup> The Article also maintains that states should set minimum age labor standards.<sup>26</sup>

Anti-trafficking,<sup>27</sup> anti-slavery,<sup>28</sup> and anti-organized crime<sup>29</sup> conventions also specifically mention the protection of children. These protections create broad-based obligations on family, civil society, and governments to safeguard the well-being of the child. We suggest that such recognition of children's vulnerabilities and needs effectively creates a social contract that renders the family, civil society, and the state responsible for the child's human development.

The most commonly discussed international documents concerning children's rights are the Declaration of the Rights of the Child<sup>30</sup> and the CRC.<sup>31</sup> The Declaration's preamble recognizes that children have special needs.<sup>32</sup> It provides, in pertinent part, that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth, . . . [and that] mankind owes to the child the best it has to give."<sup>33</sup> In Principle 2, the Declaration further details the aspirations of well-being for all children, specifically stating that

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically,

<sup>22</sup> ICCPR, *supra* note 16, at art. 24(1).

<sup>23</sup> *Id.*, at art. 24(2)-(3).

<sup>24</sup> ICESCR, *supra* note 16, at art. 10(1).

<sup>25</sup> *Id.*, at art. 10(3).

<sup>26</sup> *Id.*

<sup>27</sup> Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271.

<sup>28</sup> Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, Sept. 25, 1926, 60 L.N.T.S. 253 (entered into force Mar. 9, 1927); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art. 1, Apr. 30, 1957, 226 U.N.T.S. 3.

<sup>29</sup> United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, annex I, 55th Sess. Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (May 31, 2001) (not in force); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime, G.A. Res. 25, Annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001) (entered into force Sept. 9, 2003).

<sup>30</sup> Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), at 19, 14 U.N. GAOR Supp. No. 16, U.N. Doc. A/4354 (Nov. 20, 1959).

<sup>31</sup> CRC, *supra* note 21.

<sup>32</sup> Declaration of the Rights of the Child, *supra* note 30, at preamble.

<sup>33</sup> *Id.*

mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, *the best interests of the child* shall be the paramount consideration.<sup>34</sup>

The CRC's adoption of the Declaration's "best interests of the child" language establishes the international legally binding standard for evaluating whether particular norms or actions are effecting the requisite protection of children.<sup>35</sup> The CRC, ostensibly actualizing the social contract idea we posit, also creates a hierarchy of legal responsibility for children. Article 18 of the CRC provides that parents have "the primary responsibility for the upbringing and development of the child."<sup>36</sup> Based upon this primary responsibility, the child's best interest is the parents' "basic concern."<sup>37</sup> Beyond upbringing and development, Article 27 recognizes that the realization of social, cultural, and economic rights is crucial for children's well-being. This Article establishes "the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."<sup>38</sup> While parents have the primary responsibility for living conditions that will allow for the development of the child, the state also has responsibility for the child's well-being. Thus, states "in accordance with national conditions and within their means" have the obligation "to assist parents" and to create programs and provide assistance "particularly with regard to nutrition, clothing and housing."<sup>39</sup>

The CRC is a testament to the indivisibility paradigm. It specifically guarantees children rights that are categorized as "negative" civil and political rights,<sup>40</sup> such as the right to life. The CRC also protects "positive" social and economic rights that the state has an obligation to accommodate and/or facilitate, including the "highest attainable standard of health"<sup>41</sup> and free education.<sup>42</sup> Articles 24 through 27 detail specific goals of the health care protections, including diminishing birth mortality rates, primary health care assistance, preventative healthcare, and prohibiting any traditional practice prejudicial to the health of a child.<sup>43</sup> These provisions obligate

<sup>34</sup> *Id.* at principle 2 (emphasis added)

<sup>35</sup> CRC, *supra* note 21, at art. 1.

<sup>36</sup> *Id.* at art. 18(1).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at art. 27(1).

<sup>39</sup> *Id.* at art. 27(2)-(3).

<sup>40</sup> *Id.* at art. 27(3). Negative rights are rights of persons to be free from governmental interference. For example, the 1<sup>st</sup> Amendment to the U.S. Constitution provides for freedom of persons from undue government interference with respect to speech. U.S. Const., amend. I.

<sup>41</sup> CRC, *supra* note 21, at art. 24(1). Positive rights are those rights requiring affirmative action by government. For example, the ICESCR creates duties on government to provide health care and education to its citizens. ICESCR, *supra* note 16, at arts. 12 & 13.

<sup>42</sup> CRC, *supra* note 21, at art. 27.

<sup>43</sup> *Id.* at arts. 24-27.

the state to provide children with human status, and with an opportunity to thrive as whole people.

Several organizations participate in the realization of the rights encompassed in the CRC. The United Nations International Children's Emergency Fund (UNICEF) is one such entity. UNICEF Executive Director Carol Bellamy observed that "A century that began with children having virtually no rights is ending with children having the most powerful legal instrument that not only recognizes but protects their human rights."<sup>44</sup> The United Nations created UNICEF in December 1946 to provide food, clothing and health care to European children facing famine and disease in the aftermath of World War II.<sup>45</sup> Its mandate is to advocate for the protection of children's rights, to help meet their basic needs and to expand their opportunities to reach their full potential.<sup>46</sup> Currently, UNICEF serves as the official UN-sponsored organization providing assistance with the implementation of the policies and goals of the CRC. UNICEF's activities include providing women's education, immunizations, HIV/AIDS care, and gathering research on how state party conditions comply with CRC mandates.<sup>47</sup>

UNICEF's activities have had a direct impact on the lives of children around the world. For example, in the Former Yugoslavia, after years of bloodshed, many women have become heads of households and now face the responsibility of leading the families in providing for and protecting their children.<sup>48</sup> These women have been left in charge of all household activities, such as bill-paying, work, and interaction with the marketplace to buy goods for their family. Many of the women were not prepared to perform these duties because they were often illiterate.<sup>49</sup> This

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<sup>44</sup> UNICEF, *United Nations Special Session on Children* (statement of Carol Bellamy, UNICEF Executive Director, speaking at the 1990 World Summit for Children), <http://www.unicef.org/specialsession/rights/path.htm> (last visited May 11, 2006).

<sup>45</sup> See UNICEF, <http://www.unicef.org> (follow "About UNICEF" hyperlink; then follow "Who we are" hyperlink; then follow "Our history" hyperlink) (last visited May 11, 2006).

<sup>46</sup> See *id.* (follow "About UNICEF" hyperlink, then follow "Who we are" hyperlink).

<sup>47</sup> See generally *id.*

<sup>48</sup> Corey Levine, *Gender and Transitional Justice: A Case Study of East Timor* (Sept. 2004), available at [http://www.humansecurity.info/sites/cchs/files/pdfs/Fellow%20Papers/levine\\_corey\\_paper.pdf](http://www.humansecurity.info/sites/cchs/files/pdfs/Fellow%20Papers/levine_corey_paper.pdf).

<sup>49</sup> *Id.* UNICEF Skopje Education Officer Elena Misik said about the situation in Macedonia: "They can't pay the bills because they don't understand them, they can't help their children with homework. . . they are on their own because most of the husbands work in other countries and return infrequently." UNICEF, *Mothers in TFYR Macedonia Battle the Cycle of Poverty with Reading, Writing and Arithmetic*, [http://www.unicef.org/infobycountry/TFYRMacedonia\\_1015.html](http://www.unicef.org/infobycountry/TFYRMacedonia_1015.html) (last visited May 11, 2006) (statement of Elena Misik, Skopje Education Officer) [hereinafter *Mothers in TFYR Macedonia*].

resulted in difficulties navigating the public sphere of the market and rendered them unable to optimally care for the families.<sup>50</sup>

In order to remedy these injustices and to enable the family effectively to deploy its “primary responsibility for caring for children” as set out in the CRC,<sup>51</sup> UNICEF established and deployed task forces to help educate women. UNICEF established this program after examining why many mothers throughout the country were not using critical information on improving the care and development of young children that had been distributed to families as part of the Lifestart Community Early Childhood Project, a nationwide initiative under the CRC.<sup>52</sup> As a result of this initiative, many women will be able to better care for their children and families.

The CRC has been successful in generating the global programs to better the lives of families and children. Consequently, it is not surprising that there are only two countries in the world that have not ratified the CRC. However, the identity of those states may well surprise some readers: Somalia, which does not have an officially recognized government, and the United States.<sup>53</sup> Although the United States signed the treaty in 1995, it has no intention of ratifying it.<sup>54</sup> Given this stance, it is not surprising that the United States seeks to downplay the benefits of the CRC. In February 2001, during negotiations for the Special Session, Deputy Assistant Secretary of State Michael Southwick stated that

it is misleading and inappropriate to use the Convention as a litmus test to measure a nation’s commitment to children. As a non-party to the Convention, the United States does not accept obligations based on it, nor do we accept that it is the best or only framework for developing programs and policies to benefit children.<sup>55</sup>

Interestingly, the CRC’s centerpiece—the “best interests of the child paradigm”—is based upon U.S. family law.<sup>56</sup>

The United States has proffered several reasons for not ratifying the CRC. One explanation is the concern that the CRC interferes with parents’ rights to raise their children as they see fit.<sup>57</sup> Another rationale is that the rights supported under the

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> CRC, *supra* note 21.

<sup>54</sup> *See infra* notes 57-58.

<sup>55</sup> Canadian’s Children’s Rights Council, *The United States and the United Nations Convention on the Rights of the Child*, [http://www.canadiancrc.com/UN\\_CRC\\_webpage/US\\_Convention.htm](http://www.canadiancrc.com/UN_CRC_webpage/US_Convention.htm) (last visited May 11, 2006) (statement of Michael Southwick).

<sup>56</sup> The phrase “best interests of the child” is used in and is the focus of the CRC. See *supra* note 21, and compare with the same focus on the language used in United States Family Law, exemplified by the Elian Gonzalez case, available at <http://www.scu.edu/ethics/publications/iie/v11n1/custody.html> (last visited May 11, 2006).

<sup>57</sup> *See, e.g.*, Risho Kosei-kai, *Fundraising for UNICEF and Support for United Na-*

Convention are reserved to the individual states of the federation, and based on principles of federalism, the implementation would violate the U.S. Constitution.<sup>58</sup> However, the reasons given by the United States against ratification appear not to be well-founded. Contrary to the U.S. argument that the CRC might effect an usurpation of parental responsibility, the CRC expressly acknowledges the rights of parents, and stresses the importance of the parent-child relationship.<sup>59</sup> Moreover, any issues of federalism can be avoided by interposing a reservation, declaration, or understanding about the distribution of powers regarding the regulation of, for example, education within the United States.<sup>60</sup>

Interestingly, a real and serious tension between U.S. law and CRC provisions—the CRC’s prohibition against the imposition of the death penalty on minors—no longer exists. The CRC plainly proscribes the imposition of the death penalty for offenses committed before the age of eighteen.<sup>61</sup> Until recently, twenty U.S. states allowed the execution of juvenile offenders, with seventy-two juvenile offenders being on death row.<sup>62</sup> However, in the 2005 *Roper v. Simmons*<sup>63</sup> decision, the Supreme Court ruled that the imposition of the death penalty on a juvenile was unconstitutional under the Eighth Amendment. In its decision, the Court even noted that the execution of juveniles violated several international treaties, including the CRC and the ICCPR.<sup>64</sup> The Court also observed that the overwhelming weight of international opinion against the juvenile death penalty supported the Court’s own conclusion that the death penalty is a disproportional punishment for offenders under the age of eighteen.<sup>65</sup>

In evaluating international legal standards concerning the care and protection of children one runs squarely into the heart of the relativism/universalism debate. Given worldwide cultural diversity and complexity, the meaning of best interests cannot be absolute. Rather, there must be cultural flexibility. Yet there also exists the need to recognize that the shield of “culture” with respect to some practices is neither necessary nor proper. For example, the African Charter on the Rights and Welfare of the Child recognizes cultural fallibility and outright prohibits traditional

tions (2006), <http://www.rk-world.org/peace/un.html>. See also UNICEF website, *supra* note 45.

<sup>58</sup> UNICEF website, *supra* note 45; *Mothers in TFYR Macedonia*, *supra* note 49.

<sup>59</sup> UNICEF website, *supra* note 45; *Mothers in TFYR Macedonia*, *supra* note 49.

<sup>60</sup> Vienna Convention on the Law of Treaties, art. 2(d), May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (stating that “‘reservation’ means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”).

<sup>61</sup> CRC, *supra* note 21, at art. 37(a).

<sup>62</sup> Death Penalty Information Center, *U.S. Supreme Court: Roper v. Simmons*, <http://www.deathpenaltyinfo.org> (search “Search DPIC” for “Roper v. Simmons”).

<sup>63</sup> 543 U.S. 551 (2005).

<sup>64</sup> *Id.* at 577.

<sup>65</sup> *Id.*

practices that are harmful to girls.<sup>66</sup> Similarly, recognizing that traditional cultural practices can be harmful with respect to the girl child and to women, the Convention on the Elimination of All Forms of Discrimination against Women<sup>67</sup> provides that states must “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”<sup>68</sup> In effect, these agreements assert that tradition and culture are not grounds upon which to take actions that are harmful to the child.

In matters of concern to children, particularly with respect to the meaning of the “best interests of the child,” culture should not be used as an imperial sword by majority (western) cultures to impose their views on child care and development or the appropriate location of children in society on other cultures; nor should tradition or culture be used by any cultural group as a shield against protection of children from abuse or deprivation of their needs, be they health care, education, welfare, shelter, or nutrition. Practices and policies adopted in the best interests of the child can differ between or among cultures and nonetheless benefit the child. Norms need not, indeed should not, be identical; identical norms applied across borderlands of culture could lead to dramatically different results. Yet, either different norms with children’s best interests in mind or identical norms applied differently in light of cultural or traditional differences can still be compatible with the international desire to protect the best interests of a child.

As we talk about our children, it is informative to take a look at just who are the world’s children whose best interests we are seeking to protect. Using 2004 figures as a reference point, if all the children born at that time were reduced proportionately to a cohort of one hundred children, fifty-three would have been born in Asia including nineteen in India and sixteen in China; nine children would have come from Latin America and the Caribbean; seven from the Middle East and North Africa; sixteen from sub-Saharan Africa; five from the Central and Eastern Europe/Commonwealth of Independent States and Baltic States; and ten from industrialized countries.<sup>69</sup> The conditions that many of these one hundred children will face are deplorable. The birth of thirty-six of these children would have gone unregistered, resulting in children with no official existence, no recognition of nationality.<sup>70</sup> Of these one hundred children, approximately twenty-six would suffer from malnutrition before the age of five and forty-nine would not be immunized

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<sup>66</sup> African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999).

<sup>67</sup> Convention on the Elimination of All Forms of Discrimination against Women, art. 2(f), G.A. res. 34/180, 34 U.N. GAOR Supp. No. 46, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981). The United States has not ratified this convention.

<sup>68</sup> *Id.*, at art. 2(f).

<sup>69</sup> UNICEF, *The State of the World’s Children 2006: Excluded and Invisible*, at 118-21 (2006), available at [http://www.unicef.org/publications/files/SOWC\\_2006\\_English\\_Report\\_rev.pdf](http://www.unicef.org/publications/files/SOWC_2006_English_Report_rev.pdf).

<sup>70</sup> *Id.* at 36.

against diseases.<sup>71</sup> Nine of the one hundred children would die before age five.<sup>72</sup> Of the remaining children, twenty-one would not attend school, of whom twelve would be girls.<sup>73</sup> Seventeen of the children would have no access to safe drinking water and forty-two would live without sanitation.<sup>74</sup>

These unacceptable and shameful conditions plainly fail to satisfy any “best interest of the child standard. If indeed a global best interests standard exists, given the existing reality, it is appropriate to pursue a critical approach to local norms that pertain to all children, including immigrant children, that will further children’s best interests. For example, failure to consider the interests of the child when dealing with a social system that acknowledges that families and children have economic rights as well as civil and political rights—rights that are acknowledged to be indivisible, interdependent, and inalienable—may have quite deleterious adverse consequences that could be avoided by following the social contract.

### III. IMMIGRANT CHILDREN IN THE UNITED STATES

The United States has an uncomfortable, inconsistent, and somewhat schizophrenic history with immigration.<sup>75</sup> For being a “country of immigrants,” the United States surely is not very welcoming of many, as the current immigration debate on illegality and amnesty evidence.<sup>76</sup> Indeed, even Lady Liberty’s “welcome” is not embracing of all, a reality consistent with the U.S. historic controlled flow of “othered” persons into its borders. During the early and mid 1800s, over 32 million people immigrated to the United States seeking religious, racial, or ethnic freedom which their place of origin failed to provide.<sup>77</sup> Many of these immigrants were from Ireland and Germany, but many more were from Asia, the Middle East, and Africa.<sup>78</sup> All the immigrants, regardless of origin, had one thing in common: all sought a new life that promised freedoms denied in their homeland.

Many, if not most immigrants, came to their new home with their family and children. In fact, by the end of the 19<sup>th</sup> century, there were over five million immigrant children living within the United States.<sup>79</sup> In many cases, children of immi-

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<sup>71</sup> *Id.* at 13.

<sup>72</sup> *Id.* at 101.

<sup>73</sup> *Id.* at 118-21.

<sup>74</sup> *Id.* at 109.

<sup>75</sup> Berta E. 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 254 (Juan Perea, ed., 1997).

<sup>76</sup> Elizabeth Bunuller, *Bush Offers Limited Support for Stalled Senate Immigration Bill*, INT’L HERALD TRIBUNE, Apr. 25, 2006, at Americas section.

<sup>77</sup> NW Regional Educational Laboratory, Introduction to Immigration in the United States, <http://www.nwrel.org/cnorse/booklets/immigration/2.html> (last visited May 11, 2006).

<sup>78</sup> *Id.*

<sup>79</sup> Statistics on Immigrant and Numbers can be found at <http://www.afsc.org/immigrants-rights/learn/in-us.htm>. Specifically, 1 out of 5 immi-

grants grew up to become large contributors in the fields of art, politics, and science. Examples of successful immigrants include former Secretary of State Henry Kissinger, former Surgeon General Antonia Novello, astronaut Ellen Ochoa, ballet dancer Mikail Baryshnikov, film director Alfred Hitchcock, social scientist Kurt Lewin, writer Amy Tan, and educator Jaime Escalante to name a notable few.<sup>80</sup> These influential and important immigrants all benefited from the opportunities afforded by the United States and the United States benefited from their contributions to society.

Today, immigrants and their children, regardless of status, who come to the United States seeking a new life often perform work that not many citizens will agree to do as well as pay taxes and contribute to their immigrant communities and to society at large. Immigrant children coming to the United States, however, do not have a voice concerning their status; they simply arrive with their parents or guardians who are seeking a better life for themselves and their families.

Despite immigrants' notable as well as everyday contributions to U.S. society, the presence of large numbers of immigrants (including children) within the United States has become a concern for many lawmakers. The number of immigrant children in the United States has only increased in recent years. Based on a 1997 Census survey, there are over 15 million immigrant children in the United States, making up approximately 20% of all children in this country.<sup>81</sup> Given these large and rising numbers of immigrant children, lawmakers are engaging in serious discussions about the propriety of spending money on programs for their benefit, regardless of the legality of their status. Thus, it is not surprising that even with immigrant children there are tensions regarding rights and entitlements.

Many U.S. politicians contend that the influx of immigration is due to the open public health care and education systems in the United States.<sup>82</sup> In an effort to curb immigration, members of Congress are proposing a variety of bills that limit federal health care and educational benefits to undocumented immigrants and their children.<sup>83</sup> The passage and implementation of such legislation will effectively shut many of the doors that were open to undocumented immigrants in the past and deprive immigrants access to programs such as public education that are part of developing into productive members of any society. We posit that measures depriving immigrants of crucial public benefits are anathema to the social contract.

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grants are children, and at the turn of the century, there were more than 75 million immigrants living in the United States, which actually breaks down to much more than the number cited above.

<sup>80</sup> *Id.*

<sup>81</sup> RUBÉN RAMBAUT, TRANSFORMATION: THE POST-IMMIGRATION GENERATION IN AN AGE OF DIVERSITY, REPORT NO. 30 (1999), <http://www.jsri.msu.edu/RandS/research/irr/rr30abs.html>.

<sup>82</sup> Richard Sybert, *Population, Immigration and Growth in California*, 31 SAN DIEGO L. REV. 945, 947 (1994).

<sup>83</sup> See DREAM Act, *infra* notes 133-137 & accompanying text.

The concept of a social contract is founded on the idea that persons willingly give up a certain degree of individual autonomy in order to be afforded benefits that society, as a collective, is able to provide. Rousseau's philosophy posits that a contract exists between the individual and the state whereby the individual foregoes a claim to autonomy so that the state may provide certain benefits such as security, health care, social welfare, and education.<sup>84</sup> Rousseau states,

we must also consider the private persons who make up the public, apart from the public personified, who each have a life and liberty independent of it. It is very necessary for us to distinguish between the respective rights of the citizens and the sovereign and between the duties which men must fulfill in their role as subjects from the natural rights they should enjoy in their role as men.<sup>85</sup>

Thus, per Rousseau, the idea that a social contract exists between a person, state, and community is rooted in natural law. The following language suggests that the U.S. Declaration of Independence embraces the social contract idea: "to secure these rights [of life, liberty and the pursuit of happiness], governments are instituted among men, deriving their just powers from the consent of the governed."<sup>86</sup>

The international community, in an approach compatible with the principal idea of a social contract (that is, providing collective benefits to members of society), has recognized that all children, regardless of their status, require special protection by the family, civil society, and the state because they are not able to fend for themselves. In the United States, federal and state legislation and judicial decisions show that there are diverse and divergent views as to the extent of the rights that should be afforded to immigrant children, especially those who are undocumented. There is no dispute that, in certain respects, a state need not treat foreigners the same way as it treats its citizens. For example, it is common that only citizens have the right to vote. Thus, it is not unexpected that states take this approach with children as well as adults.

As this voting example shows, citizenship status matters vis à vis rights. Therefore, it is appropriate to briefly examine the law of acquiring citizenship by birth in the United States. The 14<sup>th</sup> Amendment to the U.S. Constitution includes the birthright clause, which provides that any person born in the United States is a U.S. citizen.<sup>87</sup> Today almost one out of every 10 children born in the United States—nearly 10%—is born to an undocumented mother.<sup>88</sup> The increasingly fervent disapprobation of the influx and presence of undocumented foreigners has fueled a move to pass laws that would change the birthright provision and to deny

<sup>84</sup> JEAN -JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Penguin Books 1968) (1762).

<sup>85</sup> *Id.*

<sup>86</sup> The Declaration of Independence para. 2 (U.S. 1776).

<sup>87</sup> U.S. Const. amend. XIV, §1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.")

<sup>88</sup> Ruth Larson, *Citizenship May Be Denied to Children of Illegal Aliens; House Bill Aims to Curb Influx of Illegals*, WASH. TIMES, June 26, 1997, at A5.

citizenship to children born within U.S. territories to undocumented parents.<sup>89</sup> Persons seeking such change to the birthright provision argue that the Constitution did not intend for children of undocumented parents whose presence within U.S. borders is illegal—and increasingly criminalized—to obtain the benefits of citizenship.<sup>90</sup> They claim that there is general agreement in this country that children of lawbreakers should not be rewarded with precious citizenship.<sup>91</sup> Some federal lawmakers are contemplating passing a federal law to limit the right to birthright citizenship only to those born of parents who are legally present.<sup>92</sup> Supporters of limited birthright citizenship, in language that invokes the social contract idea—that status is founded on consent of the existing community members embracing new members of society<sup>93</sup>—also claim that there is general agreement among citizens for such contraction. Yet they do not generally comment on the 14<sup>th</sup> Amendment pre-emption issues the proposed legislation raises.

The argument that the existing community has a say with respect to who is entitled to be a citizen misconstrues the idea of the social contract. The social contract does not envision members of society dictating who is and who is not part of society; rather, it is a larger idea in which the people give consent to be subjected to a governance structure that can more effectively provide certain services—such as security—than individuals acting alone can provide for themselves. Citizenship is on a different order. In the country's early documents<sup>94</sup> the U.S. founders expressly indicated that any person born in the United States is a citizen.

Notwithstanding the views on affording birthright citizenship to children of undocumented foreigners, legal developments in this country seem to reinforce the premise of this essay: that there is a societal obligation to provide certain services to assure basic human needs regardless of the legality of the documented status of a person. To be sure, the United States affords certain rights to undocumented children not only through the Constitution, but also through federal statutes and the common law.<sup>95</sup> The rights provided by federal law include the rights to health care as well as education.<sup>96</sup> In addition, the U.S. Congress is considering other legislation to extend educational and health care protections to all. One example of federal action protecting access to some health care for all persons is the Emergency Medi-

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<sup>89</sup> *Id.*

<sup>90</sup> Stephen Dinan, *GOP Mulls Ending Birthright Citizenship*, WASH. TIMES, Nov. 4, 2005, at A01 (quoting Representative Tom Tancredo as saying “citizenship in this country should not be bestowed on people who are children of folks who come into this country illegally.”).

<sup>91</sup> *Id.*

<sup>92</sup> Sarah Adams, *The Basic Right of Citizenship*, CENTER FOR IMMIGRATION STUDIES, (1993), available at <http://www.cis.org/articles/1993/back793.html>.

<sup>93</sup> Adam Abrahms, *Closing the Immigration Loophole: The 14<sup>th</sup> Amendment's Jurisdiction Requirement*, 12 GEO. IMMIGR. L.J. 569, 476 (1998).

<sup>94</sup> ROUSSEAU, *supra*, note 84.

<sup>95</sup> *Infra* notes 99-100.

<sup>96</sup> *Infra* note 130.

cal Treatment and Active Labor Act (EMTALA)<sup>97</sup> which prevents hospitals from, among other things, “patient dumping,” refusing to treat patients facing an emergent medical condition based on the legality of their status, or refusing to treat patients who are unable to pay.<sup>98</sup>

Under EMTALA, when any person regardless of wealth or status goes to a hospital and is in actual physical distress, hospitals with emergency departments have an affirmative duty to provide services. If an individual arrives at a hospital emergency department and requests an examination or treatment for a medical condition, the law requires the hospital to provide an appropriate medical screening that is within the capabilities of the hospital’s own emergency department and includes those ancillary services routinely available to the emergency department when determining if a medical condition exists.<sup>99</sup> Under EMTALA, an emergency medical condition is one that manifests itself by acute symptoms of sufficient severity, even severe pain, which without immediate medical attention, could reasonably be expected to result in any or all of the following:

1. jeopardizing the health of an individual (including an unborn child);
2. serious impairment to bodily functions; or
3. serious dysfunction of any bodily organ or part.<sup>100</sup>

In the case of a pregnant woman having contractions, an emergency medical condition means there is not enough time for a safe transfer to another hospital before delivery, or that the transfer may pose a threat to the health or safety of the woman or the unborn child.<sup>101</sup> In order to stabilize an individual with a medical condition, the hospital must provide “such medical treatment of the condition as may be necessary to assure within reasonable medical probability that no material deterioration of the condition is likely to result from or occur during the transfer.”<sup>102</sup>

This detailed legislation shows that the Congress does not distinguish between the wealthy and the poor, or documented and undocumented persons. In fact, the language plainly states that no emergency medical personnel can refuse treatment to anyone. Congress designed this legislation to provide all persons within U.S. boundaries with appropriate medical care and for their well being. The legislation makes no distinction as to children or adults, and especially to undocumented or documented status.

However, there is state to state variation in what health care is accessible to undocumented children. For example, entitlement to Medicaid benefits depends upon criteria established by each state.<sup>103</sup> Some states have successfully barred public

<sup>97</sup> 42 U.S.C. § 1395dd(a) (2000).

<sup>98</sup> *Marshall v. East Carroll Parish Hosp. Service Dist.*, 134 F.3d 319, 322 (5th Cir. 1998).

<sup>99</sup> 42 U.S.C. § 1395dd(a).

<sup>100</sup> *Id.* at § 1395dd(e)(1)(A).

<sup>101</sup> *Id.* at § 1395dd(e)(1)(B).

<sup>102</sup> *Id.* at § 1395dd(e)(3)(A).

<sup>103</sup> Richard Wolf, *Evacuee Benefits Differ by State*, USA TODAY, Oct. 10, 2005, at 1A.

health care to undocumented children. In Colorado, a federal court held that a state statute that removed the optional Medicaid coverage for documented and undocumented foreigners did not violate the Equal Protection clause.<sup>104</sup> The Arizona Supreme Court upheld a program that denies benefits to foreigners who have not been legal residents for at least five years.<sup>105</sup> In both instances, the courts used the rational basis standard of review.

In contrast, other courts have concluded that state statutes that limit or bar public health care to indigent foreigners, regardless of the legality of their status, are illegal. One Arizona lower court had ruled that a state statute that denied foreigners non-emergency public health care violated the Equal Protection Clause.<sup>106</sup> A federal district court in California ruled that the Proposition 187 provisions denying social and health services to “aliens in the United States in violation of federal law” were invalid.<sup>107</sup> Moreover, Florida and Texas have extended health care and medical treatment for prenatal care, with Florida extending EMTALA protections to undocumented mothers and their unborn.<sup>108</sup> In addition, the state statute imposes additional requirements on hospitals. For example, hospitals are required to:

1. inform the Agency for Health Care Administration (“AHCA”) of their service capabilities;
2. post a sign in the emergency room clearly stating patients’ rights to emergency treatment; and
3. report any known violation of the statute within thirty (30) days of its occurrence.<sup>109</sup>

The AHCA oversees the enforcement of Florida law and it may deny, revoke, or suspend a license or impose an administrative fine, not to exceed \$10,000 per violation, for any violation of the statute.<sup>110</sup> In addition to these administrative sanctions, the statute permits criminal penalties and private lawsuits.<sup>111</sup> Texas has similar provisions that allow screening and treatment for chronic and debilitating illness.<sup>112</sup> Most hospitals in the state have routinely provided this type of care for undocumented persons and their children.<sup>113</sup>

Human rights ideals are the foundation for establishing state health care as a fundamental right. One commentator has argued that “understanding that undocu-

<sup>104</sup> *Soskin v. Reinertson*, 353 F.3d 1242 (10th Cir. 2004).

<sup>105</sup> *Avila v. Biedess*, 85 P.3d 474 (Ariz. 2004).

<sup>106</sup> *Kurti v. Maricopa County*, 33 P.3d 499 (Ariz. Ct. App. 2001).

<sup>107</sup> *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244 (D. Cal. 1997).

<sup>108</sup> FLA. STAT. § 395.002(9)(b)(3) (2002).

<sup>109</sup> *See id.* § 395.1041 for additional requirements.

<sup>110</sup> *Id.* at § 395.1041(5).

<sup>111</sup> *Id.*

<sup>112</sup> *See* TEX. HEALTH & SAFETY CODE ANN. § 61.052 (2005) (asserting that all health care districts shall provide health care assistance to indigents).

<sup>113</sup> Alexander Neill, *Human Rights Don't Stop at the Border: Why Texas Should Provide Preventative Health Care For Undocumented Immigrants*, 4 SCHOLAR 405 (2002). *See also* Jim Yardley, *Immigrants' Medical Care Is Focus of Texas Dispute*, N.Y. TIMES, Aug. 12, 2001, at A18.

mented immigrants are human beings makes it easier to see that providing them basic preventative medicine and health care is not a right based on citizenship, but a right based on being a human being."<sup>114</sup> The United States Supreme Court reaffirmed this notion in *Memorial Hospital v. Maricopa County* when it held that denial of preventative health care is a denial of a basic necessity.<sup>115</sup> Thus, it is logical as well as humane for public policy to support offering the pre-natal care required by EMTALA. To be sure, such pre-natal care matters become intertwined with the politics of abortion and anti-abortion activism, but regardless of intent, a recognition of a human entitlement to health care is positive.

Education, like health care, is a right vital to children's development into productive and engaged members of their various and varied societies. Yet, the Constitution does not expressly mention education nor is it guaranteed to children.<sup>116</sup> Once a state provides for education, however, the state cannot discriminate with respect to whom it is offered.<sup>117</sup> This essay has posited that pursuant to the social contract idea states owe certain protections to children. The *Plyler v. Doe*<sup>118</sup> decision in which the Supreme Court invalidated, on 14<sup>th</sup> Amendment grounds, a Texas statute that denied enrollment in public schools to undocumented children, fully supports our thesis. The Court expressly ruled that access to education could not be denied on the basis of the legality of a child's status unless the denial furthers a substantial state interest, which interest cannot include the desire that state resources be used to benefit only those who will remain in the state.<sup>119</sup>

Citizen-based initiatives that have sought to circumvent the *Plyler* decision have not been successful. For example, after California voters passed Proposition 187<sup>120</sup> (seeking to deny, among other things, public education for undocumented children), the Ninth Circuit's holding in *Gregorio T. by and through Jose T. v. Wilson*<sup>121</sup> affirmed an injunction against the proposition's implementation as contrary to federal law.

However, there are a variety of educational benefits to immigrant children (sometimes regardless of status) that states may deny. For example, the U.S. School Lunch Program mandated the submission of Social Security Numbers (SSN) in order for children to be eligible for school lunch programs as well as after school and summer programs.<sup>122</sup> Children of immigrants challenged the SSN submission re-

<sup>114</sup> Neill, *supra* note 113, at 425.

<sup>115</sup> 415 U.S. 250 (1977) (stating medical care is a basic necessity of human life).

<sup>116</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>117</sup> Sonja Diaz-Granados, *How Can We Take Away a Right That We Have Never Protected: Public Education and Immigrant Children*, 9 GEO. IMMIGR. L.J. 827 (1995)

<sup>118</sup> 457 U.S. 202 (1982).

<sup>119</sup> *Id.* at 230.

<sup>120</sup> CAL. PROP. 187 (1994).

<sup>121</sup> 59 F.3d 1009 (5th Cir. 1995).

<sup>122</sup> 42 U.S.C. § 1758 (2000). The Federal law states that to be eligible, the applicant, must "furnish the social security account number of the parent or guardian who is the primary wage earner responsible for the care of the child for whom the application is

quirement, arguing that it violated their 5<sup>th</sup> Amendment privilege against self-incrimination as well as their equal protection rights under the 14<sup>th</sup> Amendment.<sup>123</sup> However, the Ninth Circuit held that the statutory SSN collection requirement did not violate undocumented foreigners' right against self incrimination because there was no legal compulsion to disclose a SSN; rather, it was a voluntary disclosure.<sup>124</sup> In addition, the court concluded that the legislature did not intend to deny benefits to undocumented children and that the statute was reasonably related to the state's legitimate interest in the prevention of fraud.<sup>125</sup>

Interestingly, a modification pending on this federal law that would allow parents of undocumented children who are serving in the military to get around the SSN requirement<sup>126</sup> calls into question the true intent of the statute. The U.S. School Lunch Program's SSN requirement, and its potential to prevent some students from obtaining free lunch, exemplifies Congress's incoherent approach to managing undocumented children in public schools. It appears, at best, inconsistent and, at worst, cruel for the government to provide free education to but not feed the hungry school child. Studies show that nutrition is a vital ingredient to being able to learn, to fully participate and understand work in class.<sup>127</sup> Because a hungry child cannot effectively learn, the denial to undocumented children of participation in programs such as the school lunch program renders the *Plyler* decision meaningless.

To be sure, federal law forbids deliberate segregation, geographic school assignment, or failure to correct language barriers as means to deny "educational opportunity . . . on account of his or her race, color, sex or national origin."<sup>128</sup> Thus, the code provides undocumented children opportunities to attend the closest public school, receive equal treatment in school, and receive diligent training to overcome barriers that might have resulted from their foreign status such as lack of ability in the English language.<sup>129</sup> Moreover, educational interests of undocumented children are specifically addressed in the U.S. Code, which provides for education of children of migrant workers.<sup>130</sup>

These limited federal educational protections, however, end with the completion of primary and secondary education, as post-secondary education is the exclusive responsibility of states.<sup>131</sup> Over 750,000 undocumented children live in states that

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made. . . ." *Id.*

<sup>123</sup> *Alvarez v. Block*, 476 F.2d 593 (9th Cir. 1984).

<sup>124</sup> *Id.* at 603.

<sup>125</sup> *Id.* at 605.

<sup>126</sup> H.R. 844, 109th Cong. (2005).

<sup>127</sup> *Child Nutrition Programs: Hearing Before the H. Subcomm. on Early Childhood, Youth and Families*, 105th Cong. 81 (1998) (statement of Rep. Martinez).

<sup>128</sup> 20 U.S.C.S. §§ 1701 & 1703 (LexisNexis 1997 & Supp. 2004).

<sup>129</sup> 20 U.S.C.S. § 1703 (LexisNexis 1997 & Supp. 2004).

<sup>130</sup> 20 U.S.C.A. § 6399 (LexisNexis 2002).

<sup>131</sup> National Conference of State Legislatures Website, <http://www.ncsl.org/statedfed/educate.htm> (last visited May 11, 2006).

do not allow undocumented students into state schools without proper documentation.<sup>132</sup> These undocumented students are effectively in a post-*Plyler* void. The Development, Relief, and Education for Alien Minors (DREAM) Act,<sup>133</sup> which enjoys bipartisan sponsorship,<sup>134</sup> seeks to pick up where *Plyler* ends. The DREAM Act provides that upon high school graduation, individuals who have grown up in the United States may apply for six years of conditional legal immigration status to be made permanent if they continue on to college or serve in the military.<sup>135</sup> Opponents of the DREAM Act are concerned that the law would reward undocumented children for breaking the law.<sup>136</sup> More humanistic lawmakers simply note that “kids have nothing to do with the breaking of the law” and underscore the drain of talent not passing the bill would effect.<sup>137</sup>

One telling story on the value of immigrants is the 2004 event in which four undocumented students shocked members of the U.S. Armed Forces by besting a team from the Massachusetts Institute of Technology for the design and implementation of a new underwater robot.<sup>138</sup> In fact, the judges were so impressed they gave the four-member team a special award for outstanding achievement.<sup>139</sup> However, currently these students will not be allowed to refine their skills and provide services to their adopted country because, as undocumented students, they cannot attend a U.S. university or legally be employed within the United States.<sup>140</sup> Critics of extending educational benefits dismiss as superfluous the reality that these bril-

<sup>132</sup> Margaret D. Stock, *The DREAM Act: Tapping an Overlooked Pool of Home-Grown Talent to Meet Military Enlistment Needs*, ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY'S PRACTICE GROUPS, Oct. 2005, at 99.

<sup>133</sup> Development, Relief, and Education for Alien Minors Act of 2003, S. 1545, 108th Cong. § 5 (2003). The Act applies to undocumented students who grew up in the United States. High school graduates may convert their immigration status under the Act from conditional to permanent if they continue on to college or serve in the military. *Id.*

<sup>134</sup> Josh Bernstein, *DREAM Act Reintroduced in Senate*, NATIONAL IMMIGRATION LAW CENTER (Nov. 21, 2005), <http://www.nilc.org/immlawpolicy/DREAM/Dream002.htm>.

The bipartisan sponsors of the DREAM Act of 2005 are Richard Durbin (D-IL), Republican cosponsors are Chuck Hagel (R-NE) and Richard Lugar (R-IN). The other original cosponsors are Norm Coleman (R-MN), Larry Craig (R-ID), Mike Crapo (R-ID), Mike DeWine (R-OH), Russ Feingold (D-WI), Edward Kennedy (D-MA), Patrick Leahy (D-VT), Joseph Lieberman (D-CT), John McCain (R-AZ), and Barack Obama (D-IL).

*Id.*

<sup>135</sup> Development, Relief, and Education for Alien Minors Act of 2003, S. 1545, 108th Cong. § 5 (2003).

<sup>136</sup> Stock, *supra* note 132.

<sup>137</sup> *Id.* at 99.

<sup>138</sup> *Id.* at 105.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

liant and hard-working undocumented students have learned all their current skills under the high school ROTC program.

At the local level, states have differed in their approaches to offering educational opportunities to undocumented children. It appears, however, that where the size of the undocumented population is large, states tend to extend educational benefits. For example, California, Florida, Kansas, Illinois, New York, and Texas, states with a combined undocumented foreign population of over 3.5 million, of which nearly one million are children or minors, have the most progressive educational benefits for the undocumented.<sup>141</sup> Eight states—California, Illinois, Kansas, New Mexico, New York, Oklahoma, Texas, and Utah—have passed in-state residency laws allowing undocumented students to receive in-state tuition.<sup>142</sup> In *Day v. Sebelius*,<sup>143</sup> a federal statutory challenge<sup>144</sup> by legal residents and their student-children to the Kansas statute allowing in-state tuition for undocumented children, failed for lack of standing. New Mexico, New York, and Texas have recently passed statutes modifying their state residency requirements to provide undocumented students easier access to higher education in-state tuition.<sup>145</sup> Indeed, the Texas Educational Code now states that a student may be considered a “resident” for purposes of in-state tuition if s/he is a member of a professional organization, registers a car there, maintains a checking or deposit box account in the state, or even stipulates in a will that s/he is a resident of the state.<sup>146</sup> The Texas Code is silent about verifying the validity of these statements.<sup>147</sup> As the population of undocumented students continues to grow, we wonder if other states will follow these leading states’ examples. We must also contemplate why any state is not following such progressive thinking to accommodate the residents within its boundaries.

#### IV. HUMAN RIGHTS, THE SOCIAL CONTRACT, AND IMMIGRANT CHILDREN

These examples of education and health care provide the foundation for the recognition of international, local, and societal obligations to the child. This is an idea rooted in human rights—generally the right of non-discrimination; the right to travel; and specifically the rights to an education and health care. But more importantly, they are rooted in the human rights ideal—the notion that there are rights that we have simply because we are humans.

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<sup>141</sup> SPIROS PROTOPSALTIS, THE BELL POLICY CENTER, UNDOCUMENTED IMMIGRANT STUDENTS AND ACCESS TO HIGHER EDUCATION: AN OVERVIEW OF FEDERAL AND STATE POLICY 7-8 (2005), <http://www.thebell.org/pdf/UndocumentedStudents-HigherEd.pdf>.

<sup>142</sup> *Id.*

<sup>143</sup> 376 F.Supp.2d 1022 (2005).

<sup>144</sup> Referring to 8 U.S.C. §§ 1623(a) & 1621(d).

<sup>145</sup> See generally N.Y. COMP. CODES R. & REGS. tit. 8, § 302.1(a)(6) (2001); H.R. 582, 47th Leg., Reg. Sess. (N.M. 2005); TEX. EDUC. CODE ANN. § 54.001 (Vernon 2005).

<sup>146</sup> TEX. EDUC. CODE ANN. § 54.001.

<sup>147</sup> *Id.*

Children possess rights because the various layers of society—from the global to the local, from the family to civil society—have an obligation, a legal and moral responsibility, to ensure, provide, facilitate, and enable children's well-being. Accepting and recognizing that immigrants—documented and undocumented alike—are human beings makes it easier to embrace the idea of providing basic rights including health care and education. By allowing, indeed, ensuring, human beings, including children, fundamental human rights, social spaces are doing what they are intended to do: they are fulfilling the social contract.

Children are the future of the world. If there is a viable notion of the social contract that can then be translated to humanity as a whole, it has to be one that demands that children be afforded not only protection but also the basic *habiliments* of a human existence that will allow them to thrive. At its rawest and simplest core, it must include those trappings that will enable children to have the ability to become productive adults in society. That can be no less than health care, education, nutrition, and housing, and it certainly should not and, we dare say, cannot be grounded upon their documented status.

