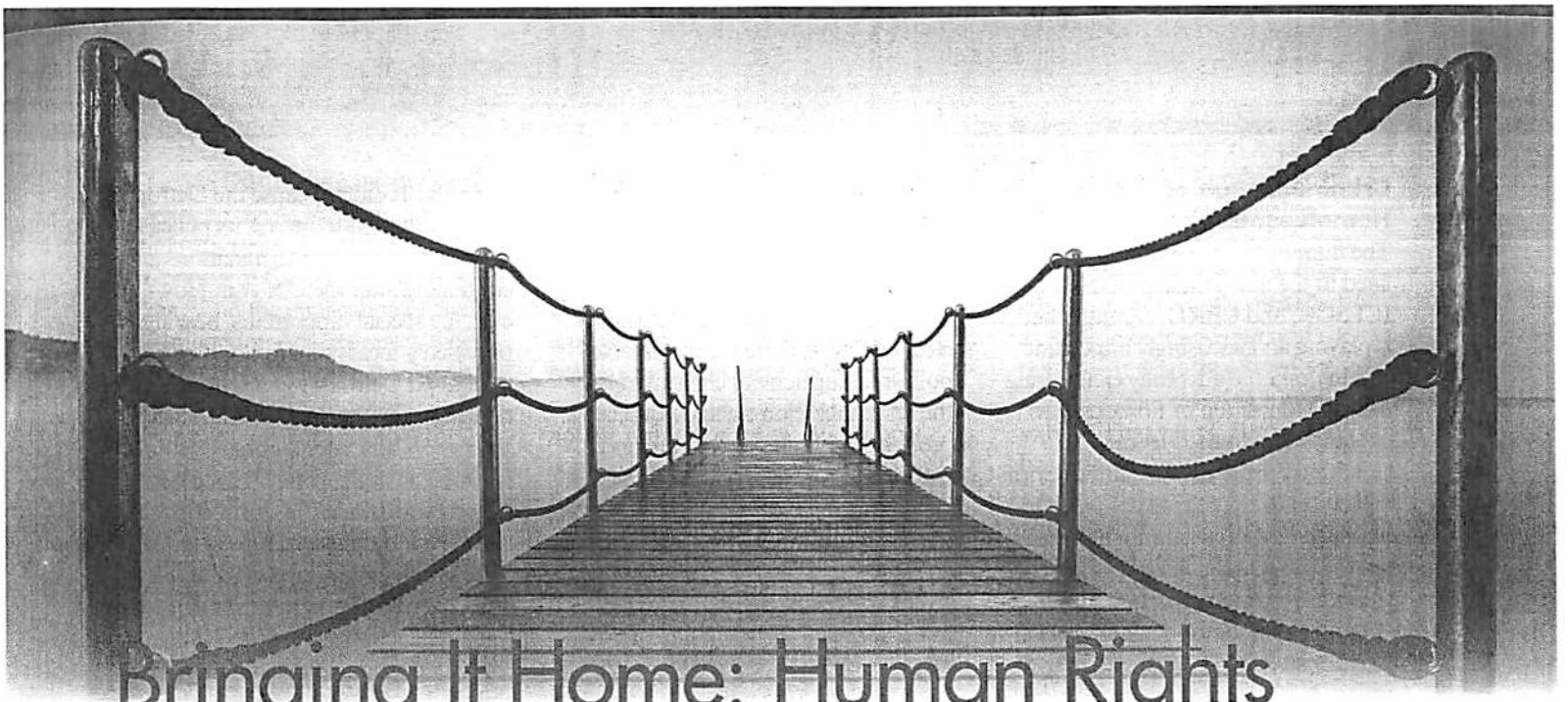

Bringing It Home: Human Rights Treaties and Economic, Social, and Cultural Rights in the United States

By Martha F. Davis

In the late 1940s, American Bar Association leader Frank Holman confronted the supporters of the emerging post–World War II human rights regime. Many nations, including the United States, were busy drafting a series of documents known as the International Bill of Human Rights, eventually broken into two major treaties—the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—and the non-binding Universal Declaration of Human Rights (UDHR). Holman, however, opposed these measures, particularly the ICESCR. As he saw it, not only would they illicitly supersede U.S. domestic law, but they also would "promote state socialism, if not communism, throughout the world."

History has proved Frank Holman both wrong and right. The U.S. ratification of human rights treaties such as the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) has not led to socialism, nor has it usurped domestic legal authority. Still, Holman was right that treaties matter and that increased U.S. engagement in the international human rights treaty regime—as contemplated by the text of the Supremacy Clause—makes demands on the domestic legal system.

Legal scholars continue to debate whether the demands of international human rights law in the area of economic and social (ESC) rights comport with the intentions of the U.S. Constitution's framers. Reflecting those concerns, the United States has never ratified the ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), or the Convention on the Rights of the Child (CRC). But while this academic debate simmers, many in the advocacy community already recognize the roles that human rights norms are playing in domestic law and policymaking in the United States. In that spirit, this article reviews some of the practical ways in which human rights treaties and norms are shaping ESC rights on the local, state, and federal levels in three overlapping areas of advocacy: litigation, legislation, and policymaking.

Human Rights Treaties in ESC Rights Policymaking

Human rights treaties are particularly powerful tools in the process of ESC rights policymaking. Leaders at all government levels have much to learn from the mistakes and successes of those in the international community dealing with similar issues. And though few domestic courts or legislatures mandate adoption of human rights standards, as Holman feared they might, policymakers may still craft solutions to persistent social issues in the shadow of human rights. Below are two examples of how human rights treaty norms play a particularly important role in shaping policy debates.

Criminalization of Homelessness

The human right to housing, articulated in the non-binding UDHR, the ICESCR, and CERD, among others, is playing an increasingly important role in domestic advocacy challenging the criminalization of homelessness.

According to the National Coalition for the Homeless, the "criminalization of homelessness" refers to measures that attach criminal penalties to "life-sustaining activities such as sleeping/camping, eating, sitting, and/or asking for money/resources in public spaces." These policies are pervasive. A 2014 report by the National Law Center on Homelessness & Poverty, titled *No Safe Place*, reported that 53 percent of cities surveyed prohibited sitting or lying down in public places, and 43 percent prohibited sleeping in vehicles. A 2015 study conducted by students at Seattle University School of Law found that in the past 15 years, Washington State communities have enacted over 288 new laws that criminalize the homeless and other visibly poor people.

These studies show the striking rise in criminalization measures across the country. But at the same time, human rights norms and treaties are increasingly being invoked to counter this trend, and to urge domestic policymakers to seek alternative, constructive solutions to chronic homelessness. And there are some encouraging signs that this advocacy is having positive effects.

Internationally focused advocacy has kept the issue in the limelight, with both the UN Human Rights Committee and the CERD Committee condemning these laws in the course of monitoring U.S. compliance with its treaty obligations. The U.S. Interagency Council on Homelessness, which coordinates the federal government's response to homelessness, explicitly adopted a human rights framework for its work and actively promotes alternatives to criminalization. Utah's successful "Housing First" program, which has nearly eliminated chronic homelessness in the state, begins with recognition of the human need for housing, a framework that many have interpreted as based on human rights principles. Though major legislative successes remain elusive, there is considerable policymaking activity challenging the criminalization trend, with recent proposals in Indiana, Oregon, and California. At least some of these counter-trends are fueled by the potent idea that housing is a human right.

Detroit Water Shutoffs

In the spring of 2014, the city of Detroit, Michigan, decided to crack down on over $115 million in unpaid water bills by cutting off water service to delinquent accounts. The city was embroiled in the largest federal bankruptcy in history, and funds were needed to finance Detroit's recovery. As the city's water costs rose in recent years, both low-income residents and commercial entities fell further and further behind on payments.

Alarmed about the impacts of mass water terminations on individuals and families, local activist groups reached out to UN special rapporteurs with relevant expertise on water and housing. In October 2014, two special rapporteurs traveled to Detroit for a series of formal hearings. Over the course of three days, they met with dozens of Detroit residents, including teachers, water department employees, and parents, to learn about the impacts of the Detroit shutoff policy. At the end of their fact-finding visit, the special rapporteurs issued a public letter decrying the city's water terminations. "Denial of access to sufficient quantity of water threatens the rights to adequate housing, life, health, adequate food, integrity of the family," they wrote, citing the CERD and ICCPR treaties ratified by the United States. "It exacerbates inequalities, stigmatizes people and renders the most vulnerable even more helpless. . . . Water and sanitation does not have to be free. It must rather be affordable for all."

The special rapporteurs' intervention could be characterized as symbolic. It did not cause the Detroit city government to reverse its policies, and residential water terminations are continuing after the UN visit. However, the special rapporteurs' hearings provided a focal point for local activists and raised Detroit's water termination issues on the international stage. Wider UN and international attention followed, including critical statements issued by other nations during the Universal Periodic Review of the United States' human rights record. Detroit residents were encouraged in May 2015 when the Detroit City Council voted to consider a long-overdue water affordability plan, but no plan is reported out yet. While many factors are in play, the human rights norms highlighted by the UN special rapporteurs are certainly part of the local policy mix as events unfold and the struggle for affordable water continues in Detroit.

Human Rights Treaties and Norms in Litigation

Human rights treaties are also often invoked in domestic litigation. The U.S. Supreme Court cites international human rights norms as persuasive authority. Examples include *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Graham v. Florida*, 560 U.S. 48 (2010). Following the Supreme Court's lead, some federal and state judges also find persuasive value in the language of human rights treaties. As described in the below discussion of the Affordable Care Act (ACA) litigation, relevant human rights authorities are often presented to courts in amicus briefs to illuminate the human rights context of specific issues before the court. Still, as illustrated by the Iowa education case discussed below, though many judges welcome—and even encourage—submissions detailing relevant human rights law, citations to human rights norms are still contested in some quarters.

Federal Health Care Litigation

In many ways, the issues before the Supreme Court in *National Federation of Independent Business v. Sebelius*, 132

S. Ct. 2566 (2012), the constitutional challenge to the ACA, were quintessentially domestic, i.e., the scope of the Commerce Clause, the meaning of "tax," and the application of the Anti-Injunction Act. However, the consolidated challenge to the ACA's Medicaid expansion provisions had clear implications for U.S. compliance with its treaty obligations under CERD.

Identifying these under-the-radar treaty issues, the Leadership Conference on Civil and Human Rights and other civil and human rights organizations submitted an amicus brief to the Supreme Court addressing the ways in which a decision striking the ACA's Medicaid expansion provision would implicate human rights norms concerning racial equality. As noted in the brief, for which I served as counsel of record, many international bodies and UN special experts have criticized the United States for the extreme inequalities of its health care system, with particular focus on the dramatic racial disparities in health care access and outcomes. In the time following the ACA's enactment in 2010, the U.S. government repeatedly responded to these criticisms on the international stage and before UN monitoring bodies by asserting that the ACA would "help our nation reduce disparities and discrimination in access to care that have contributed to poor health." The Leadership Conference's amicus brief further argued that Congress was fully aware that the Medicaid expansion legislation would contribute toward reducing race-based health care disparities, a step toward fulfilling the United States' international obligations.

In the end, the Supreme Court struck down significant aspects of the Medicaid expansion legislation as coercive. However, at the same time, the Court crafted a remedy allowing the federal government to proceed with the Medicaid expansion program on a more piecemeal basis by offering significant carrots to states to encourage acceptance of the expansion. Though the amicus brief was not cited in the Court's opinion, the international human rights arguments concerning racial disparities in health care were powerfully positioned before the Court. Did it make a difference? There is no way to be sure, but we know from both social science data and judges' own accounts that citations alone are not the only gauge of whether a brief contributes to the outcome of the case.

The Right to Education in Iowa

In 2012, the Iowa Supreme Court heard *King v. State*, 818 N.W.2d 1 (Iowa 2012), a case claiming that Iowa violated its state constitution by failing to make adequate provision for public education achievement in the state. The majority of the court dismissed the claims, concluding that the state constitution's education clause did not mandate any affirmative policymaking by the state and that its provisions regarding education were nonjusticiable.

In a remarkable dissent joined by one other member of the court, Justice Brent Appel advocated for a different outcome. The justice explicitly linked democracy and personal liberty with the concept of human dignity. Citing the UDHR, Justice Appel opined that education is essential to the development of an autonomous individual—the essence of human dignity. His opinion then thoroughly reviewed the relevant provisions and history of the Iowa Constitution in light of this fundamental principle.

Responding to the majority's criticism that the UDHR had no place in a decision of the Iowa Supreme Court, Justice Appel defended his reference:

> I recognize that the Declaration was designed to be nonbinding—indeed, the decision to use the term "Declaration" was modeled on the United States Declaration of Independence. Of course, I do not suggest that the participants in the Iowa constitutional conventions relied on the Declaration, which was approved a hundred years later. I do suggest, however, that the Declaration reinforces the widely accepted view that education is broadly regarded as a basic human right and that it is integrally related to the development of the individual. That point, it seems, has not been assailed.

King, 818 N.W.2d at 60 n.34 (Appel, J., dissenting). This Iowa opinion, though a dissent, is not alone. State court judges in Connecticut, California, Maryland, Oregon, Wisconsin, and elsewhere similarly have used international human rights law, including treaty law, as a persuasive touchstone for state constitutional interpretation.

Human Rights Treaties in Legislation

Human rights norms and treaty provisions are also often cited in legislative initiatives and resolutions at the local, state, and national levels.

Local Human Rights Resolutions

Localities are increasingly adopting resolutions that explicitly embrace human rights norms. Many of these resolutions are aspirational, but some include budget lines, standards, and reporting requirements that increase government compliance and accountability.

The "Human Rights Cities" movement has been one vehicle for local engagement with human rights treaty provisions. Boston, Washington, D.C., Pittsburgh, Chapel Hill, and several other cities around the country have adopted the Human Rights City designation, joining with other municipalities worldwide. In some U.S. cities, this designation has led to specialized human rights training for city employees, or a re-examination of policies in areas such as housing and sexual orientation. In others, the designation seems to have had little direct impact on city policy, but has served as a vehicle for local organizing.

While it has not officially called itself a human rights city, Eugene, Oregon, provides a good example of the potential for the Human Rights City designation. Led by the city's Human Rights Commission, Eugene developed a "triple bottom line" standard for evaluating city initiatives, incorporating a human rights assessment into city decision making along with evaluations of sustainability and economic impact.

Beyond the Human Rights Cities model, more than 26 U.S. local governments have adopted resolutions that proclaim a human right to be free of gender-based violence. Many of these are aspirational, but a number incorporate specific directives and reporting requirements. For example, the resolution adopted by Austin, Texas, includes a mandate "that the Austin/Travis County Family Violence Task Force identify the gaps and barriers in the City's service delivery to survivors of domestic violence." The Austin task force is further required to provide biennial reports on a list of violence-related issues for the six years following the resolution's adoption.

Finally, some cities have attached budget lines to their human rights–related resolutions. For example, when Madison, Wisconsin, enacted a 2011 resolution declaring housing a human right, it allocated funds to hire a housing policy strategist. Similarly, when San Francisco adopted the CEDAW language as its municipal law in 1998, it designated funding to support an initial analysis of city department policies that might contribute to gender inequality.

Legislation to Bar Shackling of Incarcerated Women during Childbirth

Human rights treaty obligations have been important components of the nationwide campaign to end the practice of shackling incarcerated women during labor and childbirth. UN human rights monitors repeatedly cite the practice as a violation of U.S. obligations under the Convention against Torture and the ICCPR. Many in the United States also condemn shackling. In 2008, the Federal Bureau of Prisons barred the use of restraints in federal prisons with exceptions for extreme situations. In 2010, the ABA House of Delegates unanimously approved Standard 23-6.9 of the ABA Standards for Criminal Justice, Third Edition, Treatment of Prisoners, which addresses shackling of pregnant women, stating that "[a] prisoner should not be restrained while she is in labor, including during transport, except in extraordinary circumstances." Still, the vast majority of U.S. female prisoners, incarcerated in state facilities, are subject to the practice. Shackling during childbirth is still permitted in 29 states, and enforcement is often lacking in those states that already bar it.

The periodic UN reviews of the U.S. human rights practices keep the issue in the news and provide momentum for advocates in states that have yet to ban shackling during labor and delivery. As in other areas, the results of these advocacy efforts then contribute to the state-by-state campaigns to ban the practice legislatively, through administrative action, or in court. Again, human rights treaties and norms are clearly part of the advocacy mix.

Conclusion

In sum, human rights treaties and norms are very much a part of the domestic landscape. While there has been no revolution on the order predicted by Frank Holman in the 1940s, advocates and activists regularly use these tools to expand individual rights and highlight domestic human rights abuses. And as these examples indicate, many policymakers, judges, and legislative bodies at all levels are receptive and engaged in considering how human rights treaties can inform and enhance their work—all within the context of our own dynamic domestic legal system.

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