The Institute on Framing Economic, Social, and Cultural Rights for Mobilization and Advocacy: Towards a Strategic Agenda in the United States

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Towards a Strategic Agenda in the United States

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Editors’ Introduction

This issue of the Journal marks a critical juncture in both the history of our publication and our law school. It is our last edition under the leadership of Dean Emily Spieler, one of our earliest supporters. The Journal was born nearly five years ago as the result of countless meetings and discussions with Dean Spieler and the Law School faculty. Throughout the process she was an ardent supporter who focused and aligned our goals with the school’s social justice mission. She gave us the tools and resources and inspired us to build the Journal. We dedicate this issue to her. Her decade of service to our school has transformed an already revolutionary approach to learning, researching, and teaching law and has allowed our organization to prosper in this invigorating environment.

Dean Spieler’s dedication and trust in the Journal leadership have driven years of hard work on boundary-expanding and controversial issues. Our challenge has been to build a viable organization to address them amidst the flux of one of the most rigorous law school programs.

As students, we are required not only to spend as much time as other schools studying complex legal theories and skills in the classroom, but also to work for a total of one year in full-time legal positions—all in the standard three year law school framework. Unlike traditional law schools, we work through summer and winter.

Students at Northeastern are required to seamlessly transfer between full-time legal work and academic study roughly every 12 weeks. One benefit is that we have more intimate class settings, with half of our upper-level students working outside of school in legal jobs, but consequently we are left with a smaller staff of editors for our publication.

The implications for the Journal are that we work year-round and must transfer responsibility for the Journal’s operations every three months as we move in and out of our courses. We have built processes to collaborate on big issues and our annual symposium, but we then operate autonomously during the editing process while in school. Our senior and staff editors do this work for no academic credit.
This summer we have doubled our publication schedule and made our processes even more efficient. We also redesigned our print edition and our website. Our goal is not only to publish more scholarship, but to make it accessible to a broader audience with a cleaner layout and better readability, on screen and in print.

For the first time, we also collaborated with an outside organization: the Program on Human Rights and the Global Economy (PHRGE) at the School of Law. This edition of the Journal is a compilation of articles and notes from their 2011 institute on framing economic, social, and cultural rights in the United States, along with the Program’s 2011 award-winning student piece.

A full introduction by Professor Martha F. Davis to the articles from The Institute on Framing Economic, Social, & Cultural Rights for Mobilization and Advocacy: Towards a Strategic Agenda in the United States follows. The Journal is also proud to present Legal Services Fraud in Immigrant Communities and the U Visa’s Potential to HelpVictimized Communities Help Themselves, the winning piece from the 2011 Human Rights Student Writing Competition. Written by recent Pace Law School graduate Margaret Serrano, the note addresses how the U Visa—which provides a path to citizenship for individuals who bring crimes to the attention of authorities—can help to end scams that take money from immigrants trying to integrate into the U.S. legal system.

We would also be remiss to not thank the members of the 2011–12 Editorial Board for their tireless work on this issue. They set a goal to publish two issues in one year and laid a solid foundation for this year’s leadership to make it happen, allowing us to publish not one, but three issues. We hope that you will enjoy reading this edition and we look forward to the conversations that will follow on this important topic.

We wish Dean Emily Spieler all the best as she steps into her future. Thank you, Dean Spieler. We also welcome Dean Jeremy Paul, who succeeded her in August. The future of the Journal and of the Northeastern University School of Law is as promising as ever as our students, faculty, and alumni/ae continue to advocate for social justice and the public interest.
Introduction:
Framing Economic, Social, and Cultural Rights

Martha F. Davis*

In many forms of art, transgression of the frame is a means of calling attention to and questioning boundaries. Actors leap off the stage and into the audience. Musicians improvise. Visual artists ignore the limits of the canvas or paint in forbidden places. Each of these acts invites the audience to abandon the physical and temporal limitations imposed by a frame, a score, or a stage and to re-envision the artistic project. However, as subversive as this artistic technique is, it also reinforces the role of frames as determinants of what is “in”—that which is accepted, controlled, and sanctioned—and what is “out”—that which is untamed, challenging, and impermissible.1

On a practical level, the example of artistic frames appears far afield from the issues of framing that lawyers face in developing advocacy and litigation strategies. Lawyers frame ideas and arguments, not art. But on a conceptual level, thinking about the creative framing of legal arguments in ordered and tangible terms, like the painting in a picture frame or the notes on a musical score, can help illuminate some of the challenges and opportunities of the legal framing process.

Lawyers are framers by trade. Presented with raw facts, they work with clients to identify the relevant legal frame through which to apprehend the facts—perhaps tort, contract, criminal, constitutional, or human rights law. The frame influences the relative power of the parties and, importantly, determines the available remedies. Choosing the right frame or frames is a critical strategic decision that sets the future course of the advocacy, whether litigation or less formal policy advocacy.

Very often, the relevant legal frame is obvious and largely beyond dispute. However, facts are often messy and there may be sever-

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* Martha F. Davis is Professor of Law at Northeastern University School of Law and Co-Director of the Program on Human Rights and the Global Economy.

1 On transgression in visual art, see Anthony Julius, Transgressions: The Offences of Art (2003), and Kieran Cashell, Aftershock: The Ethics of Contemporary Transgressive Art (2009).
al possible frames that must be considered and prioritized. In the hardest cases, the facts simply fall outside of an existing legal frame, and lawyers may develop sophisticated strategies to promote the incremental expansion of existing frames. For example, the 1970s campaign to recognize sexual harassment as a form of sex discrimination was built on existing civil rights law but moved beyond the limits of the longstanding frame for claiming employment discrimination. The phenomenon of “sexual harassment” was transformed from a troubling and recurring, but legally insignificant, fact of women’s employment to a federal civil rights violation. At the same time, the boundaries of the statutory term “sex discrimination” were shifted to encompass the phenomenon of sexual harassment.²

Professor Charles Reich’s reframing of social welfare programs as property provides another instructive example. In his article The New Property, Reich drew on existing law to expand the definition of constitutionally protected property rights to encompass government programs such as cash welfare benefits that had previously been viewed as purely discretionary charity or largesse.³ The jurisprudential shift that Reich’s work triggered drew on known facts and existing law, but reframed the understanding of those facts to argue, with some success, for a shift in boundaries and greater constitutional protection of welfare rights.

The status of economic, social, and cultural rights (ESC rights) under U.S. law qualifies as a hard case and presents a similar challenge. United States federal law recognizes few of these rights, and although state constitutions often specify rights to education or welfare, few state courts have connected those provisions with the larger international jurisprudence of ESC rights.⁴ Challenges to the justicia-

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² On the effort to attain legal recognition of sexual harassment, see Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979); Reva B. Siegel, Introduction: A Short History of Sexual Harassment, in Directions in Sexual Harassment Law 1 (Catharine MacKinnon & Reva Siegel eds., 2004).


bility of ESC rights and the acceptance of a bright line dividing ESC rights (out) from civil and political rights (in) raise additional framing issues.\(^5\)

These challenges arise because ESC rights transgress the familiar frames of U.S. law. On the one hand, this transgression illuminates the significance of what is happening outside of the narrow legal frame that encompasses only civil and political rights. As with visual art, the transgression calls into question our familiar and accepted boundaries. In fact, it is this very act of underscoring the out-ness of ESC rights that generates and organizes community-based power to claim such rights. Economic and social rights have proven to be effective organizing constructs for communities precisely because they transgress the prevailing frame and challenge a status quo that has left many communities and individuals on the margins of society.

At the same time, as lawyers we are trained to expand the legal frame, not to abandon it. Economic and social rights, we are predisposed to argue, should be frame-able as rights within the U.S. legal system—perhaps as part of a constitutional right to live or an underlying natural law that predates and transcends the Constitution.\(^6\)

We tend to proceed incrementally and strategically and to build out from existing, accepted frames. Because of the difficulty of finding a universal frame under domestic law that encompasses the full range of ESC rights, we may focus on specific issues such as housing or food, or on specific population sectors such as children or veterans or the disabled, to begin the reframing task. With these incremental

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moves, however, the question remains: is such reframing even possible within our domestic legal constructs, and if it is, does it run the risk of undermining the truly radical movement-building power of ESC rights in the United States? The articles in this symposium issue grapple fully with these tensions and their practical implications for lawyers and social movements.

Katharine G. Young begins, in an elegant and insightful article titled *Redemptive and Rejectionist Frames: Framing Economic, Social, and Cultural Rights for Advocacy and Mobilization in the United States*, by noting that the ESC rights frame is “neither fixed nor uniform.” Implicit in her discussion is the fact that the legal frame against which ESC rights transgresses—in this case, the federal Constitution—is also neither fixed nor constant, but is subject to interpretation and even wholesale change. The widely various possibilities for such shifts are identified in the redemptive/rejectionist dichotomy of Young’s title. On the one hand, ESC rights movements may gain short-term momentum and perhaps some long-term gains from constitutional rejection. On the other hand, through integration, ESC rights also hold the potential to redeem and transform a U.S. constitutional jurisprudence that has largely resisted the incorporation and enforcement of substantive norms. Ultimately, Young posits that redemption is the more pertinent frame for the United States in the long term, but argues that the redemptive frame should draw on some of the power of the rejectionist frame by settling for nothing less than transformative changes in law, targeting “root causes and deep structures underlying poverty and inequality.”

Dorothy Thomas explores similar themes in her evocative essay *The 99% Solution: Human Rights and Economic Justice in the United States*. Drawing on her experiences as a human rights activist in the United States and the United Kingdom, Thomas probes (and lances) the notion of human rights exceptionalism in the United States. She catalogs examples of human rights rejection by government and individuals that are overt, repeated, and real. Yet in the shadow of Occupy Wall Street, Thomas embraces a redemptive frame, calling on activ-

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8 Id. at 345.
ists to begin by acknowledging the universality of human rights and then work to realize such rights in the United States rather than simply to recognize them.

Two articles, one by Gillian MacNaughton and Mariah McGill and one by Risa Kaufman, also adopt a redemptive posture, chronicling the extensive and successful implementation of ESC rights in the United States even in the absence of formal ratification of relevant human rights treaties. In Economic and Social Rights in the United States: Implementation Without Ratification, McNaughton and McGill challenge the accepted wisdom that the United States has little to show in terms of ESC rights implementation. In doing so, they also critique the historic dichotomy between ESC rights and civil and political rights. As the authors note, ESC rights have been accepted, in some contexts and at some times, by governments at all levels in the United States. The U.S.-focused activities of the United Nation’s Special Procedures, U.S. participation in the Universal Periodic Review process, and U.S. statements in connection with the treaty monitoring processes all indicate a degree of formal national engagement with ESC rights. On the subnational level, evidence of ESC rights implementation is even more compelling, with concrete examples from Vermont to Eugene, Oregon—the latter, a self-proclaimed “human rights city.” In this account, it is the U.S. Senate that is sorely out of step, while many other government bodies at all levels move ahead to implement an ESC rights agenda.

Kaufman’s article, Framing Economic, Social, and Cultural Rights at the U.N., also explores the extent to which activists have succeeded in expanding the United States’ ESC rights commitments in the absence of treaty ratification. Kaufman particularly stresses the ways in which U.N.-based advocacy has become a locus of activity for grassroots activists. For example, she observes that in 2008, four hundred grassroots and national social justice organizations participated in development of a U.S. shadow report to the U.N. Committee on the Elimination of Racial Discrimination, with 125 of the activists traveling to Geneva to deliver their concerns to the Committee and the U.S. government in person. Kaufman suggests that this strategic pressure from new and unexpected quarters, outside of established domestic

boundaries—perhaps the legal equivalent of blowing in the wrong end of your oboe—has gotten the attention of the U.S. government in part because it stretches the traditional frameworks of domestic advocacy. The next step, she notes, is “to translate [ ] advocacy efforts and successes into a more robust understanding and precise articulation of the U.S. government’s obligations to protect and promote ESC rights domestically.”12 This integrative task is aided immensely by the organizing that occurred around the U.N. activities.

The final two articles in this collection continue to drill down on the questions of framing and strategic advocacy by examining specific sectors through a human rights lens. In The Champagne of Housing Rights: France’s Enforceable Right to Housing and Lessons for U.S. Advocates, authors Eric S. Tars, Julia Lum, and E. Kieran Paul provide a detailed comparative look at implementation of a right to housing in France.13 Interestingly, the policy changes that secured this shift were directly tied to a powerful and confrontational grassroots movement of “homeless individuals, housing advocacy organizations, celebrities, students, and other French residents.”14 Protests were combined with squatting takeovers and international legal pressure. The resulting policy framework provides for continuing participation of community organizations in nearly every aspect of the housing law’s implementation on the local level—a clear example of embedding mechanisms for review and revision directly into policy implementation, perhaps straddling the rejection/redemption divide. The authors conclude that France’s approach serves as a model, ensuring that U.S. “government officials cannot claim that creating an enforceable right to housing in the United States is impracticable.”15

This symposium issue closes with an article on human rights and education by Alexandra Bonazoli titled Human Rights Frames in Grassroots Organizing: CADRE and the Effort to Stop School Pushout.16 In this piece, Bonazoli works through a detailed case study of CADRE’s grassroots work among parents and students in Los Angeles challenging school discipline procedures and the school-to-prison

12 Id. at 426.
14 Id. at 445.
15 Id. at 482.
pipeline on human rights grounds. Drawing on the sociological literature on framing theory, the article examines in concrete terms the work done by the human rights frame in CADRE’s grassroots mobilization work. Most important, the author concludes, are the ways in which procedural principles of human rights—transparency, inclusion, and participation—were incorporated both into processes and outcomes in CADRE’s work in ways that responded to and engaged the grassroots activists for the long term.

In conclusion, perhaps it is no accident that both of the legal framing examples noted at the beginning of this introduction—sexual harassment and the new property—are examples of legal shapeshifting spurred by a social movement. The articles in this symposium issue repeatedly note the role of ESC rights frames in movement building, as well as the role of movements in shaping ESC rights claims. This juxtaposition makes clear the fluidity of frames and their role in the movement as a way to impart solidarity, direction, and vision.

Lawyers will be comfortable with this fluidity. As Katherine Young observes, frames are not fixed. Because of this, strategic decisions must be made again and again, based on specific contexts and goals. Like artists, activists can choose to be bound by frames or can reject and transgress them. The nature of the ESC rights movement’s relationship to the prevailing frame, and even to the human rights frame itself, is a deliberate choice with consequences for movement building as well as advocacy.

Having said that, the essays in this collection reveal an unusual consistency in their choice of integrative, or redemptive, approaches to domestic implementation of ESC rights. To be sure, challenging the status quo is a critical component of the process, as the works of Dorothy Thomas and Eric Tars et al. particularly note. But as we choose among frames for ESC rights advocacy in the United States, the weight of the collective wisdom expressed in this collection argues for approaches designed to expand the domestic frame, to bend it toward real change, rather than to subvert it.
I. Introduction

“Rights talk” can combine with “law talk” in a myriad of ways, just as advocacy and mobilization strategies can adopt a multitude of attitudes towards law. Within the United States, and across the world, the economic, social, and cultural rights frame is neither fixed nor uniform. This article examines how framing claims to material interests as rights—such as the rights to access food, water, health care, housing, and education—can coexist with multiple stances towards law and towards the state. Applying the constitutional theory of Robert Cover to current legal arrangements, it describes two such orientations: the “redemptive” frame and what I term its “rejectionist” alternative.¹

Redemptive frames can be understood as those that seek to reinterpret or change laws to emphasize incipient constitutional, statutory, common law, and international protections of economic, social, and cultural rights. Rejectionist frames, on the other hand, expose the lack of legal protections under current constitutional, statutory, common law, or internationally binding arrangements. The first frame proposes a way forward within current legal institutions, but may be vulnerable to co-optation by the very institutions in which change is sought. The second frame opposes the current structures of law and the state yet may be no less immune from co-optation. Like the notions of accommodation versus resistance, or of amelioration versus opposition, these concepts serve as heuristics to facilitate our

understanding of the assumptions that undergird particular strategies of mobilization or advocacy, each sharing features of its apparent counterpart.

The alternative frames of redemption and rejection may be observed in comparative and international advocacy around economic, social, and cultural rights. This article examines their applicability in the United States. Part I describes the common features of the economic, social, and cultural rights frame and demonstrates the normative openness that remains in the use of rights discourse. Part II provides a summary of the elements of redemption and rejection that may accompany claims of economic, social, and cultural rights, extending Cover’s constitutional theory to sub-constitutional and international legal domains. Part III applies the redemptive/rejectionist distinction to current movements within the United States, including the Occupy Wall Street movement. It reveals the tensions between the agendas of redemption and rejection and the potential challenges of each for advocacy and mobilization around economic, social, and cultural rights.

II. Frames Within A Frame

The concept of framing, drawn from sociology, is useful to the study of economic, social, and cultural rights and law.\(^2\) A frame acts as an interpretive lens, which guides people to see the world differently and compels them to act according to that new understanding.\(^3\) The act of framing also helps social actors communicate their interests to others.\(^4\) A frame can thus unite actors, discredit opponents, persuade bystanders, and change minds. Frames may also be determinative. As lawyers know well, the choice of frame often determines the answer to a dispute. In U.S. constitutional law, for example, a complaint about discrimination in the provision of a public education benefit


\(^3\) David A. Snow, Framing Processes, Ideology, and Discursive Fields, in The Blackwell Companion to Social Movements 380, 390, 393 (David A. Snow et al. eds., 2004).

\(^4\) See id. at 404.
may succeed, as it did in *Plyler v. Doe*, while a claim to a “fundamental right” to education may fail, as it did in *San Antonio Independent School District v. Rodriguez*. This is despite the importance of education to the underlying facts in both cases.7

Moreover, a frame can outline an entire theory and practice of social and legal change—precluding certain options, inviting others, and translating ideologies into expectations and visions of social reality, and the changeability of that reality. In particular, the “rights” frame accompanies a certain, if unfixed, conception of human dignity or worth, which justifies an individual’s claims against her or his political community.8 As I have suggested elsewhere, the success of the rights frame lies in the way in which it presents a universalized language to claims for material protections and ensures that these claims are based on obligations rather than entreaties.9 First, the reliance on human dignity, freedom, or equality as the basis for economic, social, and cultural rights appeals to universal values that all people may share, even if their particular formulations differ considerably across individuals and groups. The inclusiveness of this language can unite previously diverse actors (apparently separated by religion, race, or other characteristic) under single claims, which can constitute a significant defense against the often-polarizing nature of distributive politics.10 Indeed, some have suggested that distributive politics has a latent anti-solidaristic and fragmenting
structure, which the rights frame may be able to overcome.\textsuperscript{11} In this setting, the inclusiveness of the rights discourse operates precisely against the characteristics that may otherwise divide claimants.

The language of rights also points to the correlative language of duties, and therefore raises an agent-duty-holder relationship.\textsuperscript{12} Unlike development goals, or philanthropy, the claimant demands action from others for the responsibility they bear—most often, from the state.\textsuperscript{13} As with civil and political rights, the duties correlated to economic, social, and cultural rights may take positive, as well as negative, forms.\textsuperscript{14} Thus, applying the frame of rights to a condition such as hunger, illiteracy, homelessness, or easily preventable or curable ill-health may help to foreground the social-structural causes of the problem (or, in normative terms, disclose an entrenched injustice) and suggest different objects of recourse and remedy.\textsuperscript{15}

By invoking the material objects of their concern—health, health care, education, food, water, housing, work—economic, social, and cultural rights offer a frame that appeals to the long-standing interests that are familiar to us. These interests form the basis of advocacy and mobilization for many diverse social actors. Labor unions contest remuneration policies and workplace conditions. Patient support

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\item \textsuperscript{11} Günter Frankenburg, \textit{Why Care?—The Trouble with Social Rights}, 17 \textit{Cardozo L. Rev.} 1365, 1377 (1996) (describing the rivalries between disenfranchised groups and “vested groups” and between disenfranchised groups and other disenfranchised groups that are created by a market society).
\item \textsuperscript{12} For a robust conceptualization of claim rights and their correlative duties, see Wesley Newcomb Hohfeld, \textit{Some Fundamental Legal Conceptions as Applied in Judicial Reasoning}, 23 \textit{Yale L.J.} 16, 31–32 (1913). Oftentimes, however, the discourse of rights is looser than Hohfeld’s tight analytical structure, see, for example, David Engel and Frank Munger, \textit{Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities} (2003) (proposing a recursive theory of rights and identity).
\item \textsuperscript{15} Young, \textit{Frame and Law}, supra note 2, at 192.
\end{itemize}
groups and environmental justice organizations oppose the pricing of medicines and the health impacts of pollution. Welfare rights groups and food security groups challenge nutritional services and food production conditions. Parental associations and civil rights organizations advocate for the entitlements of children to adequate education. And anti-poverty and legal aid lawyers seek to change the impact that poverty and inequality have on the aims of justice in the legal system. Anti-globalization and anti-capitalist movements also challenge the current forms of accountability in the state and in the market, in terms that raise all of these interests. When these social movements and associations adopt “rights talk” they belong within our study of the economic, social, and cultural rights frame.  

Sometimes such interests are expressed as raising parallel rights, such as the right to information which links farmers and patients in disputes around agricultural and medicinal intellectual property protections, or other civil and political rights campaigns that impact economic, social, and cultural concerns. To reject the relevance of such movements to the economic, social, and cultural rights frame is to ignore the indivisibility of such rights and to maintain problematic divisions and hierarchies that should be dispelled. Nonetheless, the form and substance of this rights talk is not uniform or singular. A commonly understood genealogy of the rights to food, health, housing, education, social security, and work emphasizes international struggles for the recognition of material interests—struggles won in the formation of the United Nations after the upheavals of World War II, in the terms of the Universal Declaration of Human Rights of 1948, and later in the International

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16 For further discussion, see Katharine G. Young, Constituting Economic and Social Rights (forthcoming 2012) (manuscript at chs. 8–9) (on file with author) [hereinafter Young, Constituting Economic and Social Rights] (documenting current-day social movements utilizing economic and social rights).


Covenant on Economic, Social and Cultural Rights. These are pivotal sources for the development of the legal language of economic, social, and cultural rights. Yet one could trace this genealogy back further, or locate the sources of economic, social, and cultural rights elsewhere. Indeed, the economic, social, and cultural rights frame may not necessarily privilege international human rights law, but instead reflect the contributions of political philosophy, European social democracy, the “four freedoms” of the New Deal in the United States, or later constitutions that have outlined explicit social protections for citizens and others. There is much diversity in the


23 E.g., India Const. pt. IV (protection of economic, social, and cultural rights as fundamental rights or as directive principles of state policy); S. Afr. Const., 1996, art. 26–29, 35 (including protection of rights to access food, water, health care, housing, education, children’s rights, and rights in detention); Rep. of Ghana Const., 1992, ch. 6 (protection of economic and social rights as directive principles of state policy); Constitución Política de Colombia [C.P.] ch. 2 (protection of economic, social, and cultural rights).
potential use of this frame. Like the interior and exterior circles of a Venn diagram, there are many normative frames within the economic, social, and cultural rights frame.

III. Redemptive and Rejectionist Frames

Multiple sub-frames of interpretation, mobilization, and understanding can operate within the economic, social, and cultural rights frame. Two such frames may be demarcated by their redemptive and rejectionist stances towards law and the state. These I adapt from the work of Robert Cover, whose influential contributions to U.S. constitutional theory invite a reflection on the narratives and the normative frames that have attached and reattached to the U.S. Constitution over time.24

Although Cover applied these labels to the constitutionalist movements of the 19th and 20th centuries—movements which were therefore agitating against a obdurate stock of laws in very different historical contexts—his prescriptions nevertheless offer an insight into present-day movements for economic, social, and cultural rights. While both redemptive and rejectionist movements refuse to acquiesce to current legal arrangements, this refusal takes on a different form in each. Below, I demarcate the two frames and analyze how they may illuminate the current practice around economic, social, and cultural rights in the United States and elsewhere.

A. Redeeming Law with Economic, Social, and Cultural Rights

A redemptive frame seeks to reinterpret laws in ways that may redeem their implications for justice.26 If we consider redemption to be one of the sub-frames of economic, social, and cultural rights claims, we might say that social movements and advocates seek to introduce or reintroduce ideologies of distributive justice, based on a human rights reading of constitutional or other legal texts. Because

See also Young, Constituting Economic and Social Rights, supra note 16, at chs. 5–7 (documenting the enforcement of such rights in these jurisdictions).

24 Cover, supra note 1.
25 Some of which, like the right-to-life movement and women’s rights movement, continue today.
26 See Cover, supra note 1, at 33–35.
these ideologies, to be effectively recognized, cannot be contained within the social movement itself, they must be transformed into the surrounding social and legal world.\textsuperscript{27} For Cover, a redemptive frame offers a way to “change the law or the understanding of the law.”\textsuperscript{28}

Cover offers four examples of redemptive politics in the United States—the antislavery movement, the civil rights movement, the women’s rights movement, and the right-to-life movement—all of which “set out to liberate persons and the law” by challenging accepted constitutional interpretations.\textsuperscript{29} His first example is instructive. In challenging the legality of slavery, abolitionist leader Frederick Douglass refuted the orthodox interpretation of the U.S. Constitution that held that its terms permitted slavery. He and other anti-slavery constitutionalists engaged in an immense effort to redeem the very U.S. constitutional laws that permitted slavery. As Cover notes:

They worked out a constitutional attack upon slavery from the general structure of the Constitution; they evolved a literalist attack from the language of the due process clause and from the jury and grand jury provisions of the fifth and sixth amendments; they studied interpretive methodologies and self-consciously employed the one most favorable to their ends; they developed arguments for extending the range of constitutional sources to include at least the Declaration of Independence. Their pamphlets, arguments, columns, and books constitute an important part of the legal literature on slavery . . . \textsuperscript{30}

While this approach was a short-term failure and failed to convince others of Douglass’ new interpretive vision, Cover suggests that it set in motion the “creative pulse” for new legal principles and justifications over the long term.\textsuperscript{31} This was in stark contrast to the strategies of other abolitionists, who accepted the interpretation of the Constitution that permitted slavery, consistent with the professional opinion of the day.\textsuperscript{32} For these other abolitionists, a constitution that

\begin{itemize}
  \item \textsuperscript{27} \textit{Id.} at 34.
  \item \textsuperscript{28} \textit{Id.}
  \item \textsuperscript{29} \textit{Id.} at 35.
  \item \textsuperscript{30} \textit{Id.} at 39.
  \item \textsuperscript{31} \textit{Id.} at 38–39.
  \item \textsuperscript{32} \textit{Id.} at 36.
\end{itemize}
permitted slavery became the ground for rejecting any obligation arising under it—a rejectionist position detailed below.\textsuperscript{33}

Despite the enormous changes in law and in normative attitudes in the intervening years, parallels exist in these modes of arguments for economic, social, and cultural rights claims in the United States. As advocates know well, there are tactical and substantive implications in seeking to redeem the law. I suggest that these differ at the constitutional level, the statutory or common law (or “subconstitutional”) level, and in the domain of international law. Below, I offer a brief (non-exhaustive and certainly not yet conclusive) sketch of the parameters of each.

1. **Possibilities of the Redemptive Frame**

   A redemptive constitutional frame in the United States would seek a reinterpretation of the Constitution that has long been considered unorthodox. This frame might suggest that the Equal Protection Clause does, indeed, provide the sort of equal protection that requires a minimum standard of living for all,\textsuperscript{34} or that the Due Process Clause calls for an affirmative requirement of government aid.\textsuperscript{35} Both interpretations are at odds with current Supreme Court precedent and professional legal interpretations.\textsuperscript{36} In the United States, a redemptive strategy may integrate a cultural and political strategy to promote a new long-term constitutional vision,\textsuperscript{37} or an

\begin{itemize}
  \item See discussion infra Part II.B.
  \item See David P. Currie, \textit{Positive and Negative Constitutional Rights}, \textit{53 U. Chi. L. Rev.} 861, 864 (1986) (challenging the view that the U.S. Constitution contains no positive rights, and hinting at the potential of due process claims to set in place positive obligations).
  \item E.g., Lindsey v. Normet, 405 U.S. 56 (1972) (denying a fundamental right to housing); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (denying a fundamental right to education); Harris v. McRae, 448 U.S. 297 (1980) (rejecting a claim for equal Medicaid funding for childbirth and abortion by declaring that the government has no obligation to provide any medical funding at all); DeShaney v. Winnebago Cnty. Dep’t of Soc. Serv., 489 U.S. 189 (1989) (refusing to accept an affirmative duty on government institutions to prevent child abuse by custodial parent).
\end{itemize}
appointments strategy to change the composition of unsympathetic
courts, or a public interest litigation strategy to craft targeted and
careful litigation in particular courts.

Given the current constitutional law in the United States, these
strategies hardly promise short-term success. A different mode of
countering the orthodox anti-economic, social, and cultural rights
interpretations of the U.S. Constitution is to argue that such
interpretations should not be given credence as the final say on
constitutional meaning. For the latter strategy, modes of “decentering”
the Supreme Court, and of suggesting the mutual authority of
legislative or of pluralist constitutional interpretations, are available.

Issues of justiciability and enforcement, which have long presented
obstacles in economic, social, and cultural rights recognition in the
United States, would be sidelined in this strategy, as courts (or the
Constitution’s formal amendment provisions) would no longer be
viewed as the locus of constitutional change.

Alternatively, redemption may focus on forms of legal protection
offered by state constitutions, such as for interests in welfare,
education, or health care. Litigation at this level to secure the promise
of textual protections of economic, social, and cultural rights has met

38 For the legal realist acknowledgement of the role of the composition of the
court on the acceptability of economic and social rights, see Cass R. Sunstein,
*Why Does the American Constitution Lack Social and Economic Guarantees?*, 56
*Syracuse L. Rev.* 1, 23 (2005).

39 Despite the success of structural impact litigation in other campaigns, see, e.g.,
Richard Kluger, *Simple Justice: The History of Brown v. Board of
Education and Black America’s Struggle for Equality* (1977),
such a strategy would appear, at the present time, misguided, see, e.g., Liu, *supra*
ote 20, at 206 (conceding that “no prudent advocate would bring this type of
claim before the politically conservative Court now sitting”).

40 For a conception of constitutional law that rejects the final authority of the
court, developed against the background theories of democracy-based con-
stitutionalism, see Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative

41 *Id.*; see also Robert Post & Reva Siegel, *Popular Constitutionalism, Departmental-

42 Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal
provisions protective of welfare in N.Y. Const. art. XVII, § 1; Mich. Const.
art. IV, § 51; Mo. Const. art. IV, § 37; N.C. Const. art. XI, § 4; Ala. Const.
art. IV, § 88; Kan. Const. art. VII, § 4; Mont. Const. art. XII, § 3; Wyo.
Const. art. VII, § 20; Cal. Const. art. XVI, § 1).
with some success. New York’s constitution contains a number of protections aimed at welfare, education, and health care and provides a particularly fertile example. In *Campaign for Fiscal Equity, Inc. v. State*, litigants were successful in securing state constitutional rights to education. The New York Court of Appeals ordered that the state provide “minimally adequate” physical facilities and “adequately trained” teachers based on the judicial evaluation of both “input” (teaching, facilities, and library resources) and “output” (test results, graduation, and dropout rates) factors. Campaigns to amend state constitutions have also sought to introduce economic, social, and cultural guarantees. In the context of health care, a constitutional convention in Massachusetts sought to introduce a right to health care for all citizens, drawing on the earlier experience of the right

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43 N.Y. Const. art. XI, § 1 (“The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”); see also N.Y. Const. art. XVII, § 1 (“The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.”); see also N.Y. Const. art. XVII, § 3 (“The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefore shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.”).

44 *Campaign for Fiscal Equity, Inc. v. State (CFE I)*, 655 N.E.2d 661, 666 (N.Y. 1995) (declaring the right to education, which the state must provide to some measure); *Campaign for Fiscal Equity, Inc. v. State (CFE II)*, 801 N.E.2d 326, 348 (N.Y. 2003) (holding that the the court can direct the legislature to find the funds to provide a “sound basic education” and enact such reforms); *Campaign for Fiscal Equity, Inc. v. State (CFE III)*, 814 N.Y.S.2d 1 (N.Y. App. Div.), aff’d as modified, 8 N.Y.3d 14 (N.Y. 2006) (directing the state to implement the remedy in *CFE II* by funding N.Y.C. schools).

45 *CFE II*, 801 N.E.2d at 331–40.
to education in that state.\textsuperscript{46} State constitutions may be a promising backdrop to the redemptive constitutional frame.\textsuperscript{47}

At the federal level, a redemptive sub-constitutional frame could point to the long-standing Medicaid, social security, and other federal legislative protections in the United States and could mount a normative claim of their natural extension to broader individuals and groups, as well as their privileged status over short-term legislative programs or retrenchments.\textsuperscript{48} This strategy is also constitutionalist in that it argues that “constitutive commitments,” of which constitutional rights are a subset, have formed within the citizenry to create certain economic, social, and cultural rights as stable and inviolable duties on government.\textsuperscript{49} These constitute “a concrete account of the nation’s understanding of what citizens [are] entitled to expect”\textsuperscript{50} such that their violation would “amount to a kind of breach—a violation of a trust.”\textsuperscript{51} Similarly, a methodology of sorting “super-statutes” from ordinary statutes is one that relies on

\begin{footnotesize}
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  \item Borrowing from the Supreme Judicial Court’s interpretation of education protections, the proposed amendment would have required the enactment and implementation of laws to ensure “no Massachusetts resident lacks comprehensive, affordable and equitably financed health insurance coverage for all medically necessary preventive, acute and chronic health care and mental health care services, prescription drugs and devices.” \textit{The Health Care Amendment, HEALTH CARE FOR MASS. CAMPAIGN, http://www.healthcareformass.org/about/amendment.shtml} (last visited July 13, 2012). This was presented as a collective enforceable right, but not an individual entitlement to specific health services, treatments, or coverage. The amendment was not put to voters, due to lack of legislative support. \textit{The Health Care Constitutional Amendment, ConCon Denies the Health Care Amendment a Final Vote on its Merits, HEALTH CARE FOR MASS. CAMPAIGN, http://www.healthcareformass.org/index.shtml} (last visited July 20, 2012). For an analysis of other states, see Elizabeth Weeks Leonard, \textit{State Constitutionalism and the Right to Health Care}, 12 U. Pa. J. CONST. L. 1325, 1348–68 (2010) (describing protections in Michigan, New York, North Carolina, Mississippi, South Carolina, Montana, and New Jersey).
  \item This strategy draws guidance from Cass R. Sunstein, \textit{The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need It More Than Ever} 62–64 (2004) (stating that social security, although not granted by the Constitution, has become generally accepted as a “constitutive commitment” in the United States).
  \item \textit{Id.}
  \item \textit{Id.} at 64.
  \item \textit{Id.} at 62.
\end{itemize}
\end{footnotesize}
their longevity and import to claim a quasi-constitutional status.\textsuperscript{52} This viewpoint argues for a type of quasi-constitutional entrenchment for legislation that has advanced access to particular social goods, such as health care legislation.\textsuperscript{53} Such a view is controversial given that no Congress is able to bind its successors; yet it is the acceptance of the people, rather than Congress, which creates this heightened status.

Alternatively, the sub-constitutional frame redeems what is most promising about current statutory arrangements, as well as the role of Congress to bring them about. This frame invokes a strategy of lobbying for new protections, or for safeguarding the old, in health care, housing, or welfare programs.\textsuperscript{54} Instead of seeking a legislative strategy of introduction or amendment, this strategy could focus on simply reinterpreting current legislation in line with economic, social, and cultural rights. Again, the sub-constitutional frame does not rely on courts as its singular mechanism and can encourage popular or cultural avenues of change to create the normative support for a social safety net or other protections.\textsuperscript{55} Another sub-constitutional frame would advance economic, social, and cultural rights by changing interpretations of particular common law or private law arrangements, such as contract, tort, or property.\textsuperscript{56}

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54 E.g., \textit{Id.}, at 347 n. 3 (describing 50 years of efforts by the federal government to entrench legislation supporting health security); see also Maria Foscarinis, \textit{The Growth of a Movement for a Human Right to Housing in the United States}, 20 \textit{Harv. Hum. Rts. J.} 35, 37 (2007) (describing the McKinney-Vento Act as the first major federal legislation to address homelessness).
55 Sunstein refers to these deep-seated norms as “constitutive commitments.” Sunstein, \textit{supra} note 48, at 61–65. Eskridge and Ferejohn refer to “the polity’s larger commitments,” which are contained outside of the Constitution’s text or Supreme Court doctrine. Eskridge \& Ferejohn, \textit{supra} note 52, at 15.
Finally, a redemptive international frame in the United States seeks to reinterpret the role of international law in domestic law. This process encompasses several steps, as well as several alternatives, of which three are discussed below. The first, a positivist form of redemption, argues that developments in international custom have changed U.S. law to create obligations to respect economic, social, and cultural rights. This argument relies on two grounds: first, that the United States, following a monist approach, allows for international law to be binding within its domestic legal system;\(^5\) and second, that particular economic, social, and cultural rights (such as those, perhaps, of the Universal Declaration of Human Rights) have become binding on all states.\(^6\) Both grounds are highly controversial: monism is disputed in U.S. law, and, even if it were accepted, sufficient consensus on economic, social, and cultural rights is probably lacking at the international level.\(^7\)

The second form of internationalist redemption is also positivist. This agenda would stress the economic, social, and cultural obligations that rest on the United States as a signatory, if not a party, to the International Covenant on Economic, Social and Cultural Rights (ICESCR).\(^8\) Unlike the obligations on parties, the obligations on signatories require the United States and other countries “to refrain from acts which would defeat the object and purpose of a treaty.”\(^9\) The argument, however, is only as strong as the obligatory structure for signatories—that is, substantively weak. A more straightforward

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\(^5\) The Paquete Habana, 175 U.S. 677, 700 (1900).


\(^7\) For an examination of both grounds, see Young, Frame and Law, supra note 2, at 198–201.

\(^8\) ICESCR, supra note 19. The United States became a signatory in 1979. Although there are presently no signs of a shift towards this Covenant, some support can be gleaned from the Obama administration. See, e.g., Michael H. Posner, Assistant Sec’y, Bureau of Democracy, Human Rights, & Labor, Address to the American Society of International Law: The Four Freedoms Turn 70 (Mar. 24, 2011), available at http://www.state.gov/j/drl/rls/rm/2011/159195.htm (emphasizing this as the “time to move forward” for the United States to embrace economic, social, cultural, civil, and political rights).

reformist strategy is to concede the lack of current obligations on the United States, and to lobby for ratification of the ICESCR, or of other conventions, such as the Convention on the Rights of the Child, which recognize particular economic, social, and cultural rights. Similarly, an internationalist redemptive argument is available that the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, contains economic, social, and cultural rights protections through its safeguarding of other rights, such as the right to equal protection of the laws. The advocacy strategy that draws attention to (and hence “names” and “shames”) the United States in relation to present protections (or lack thereof) of economic, social, and cultural rights is already in place under the scrutiny procedures of the Human Rights Committee, as well as under the Human Rights Council’s Universal Periodic Review, which examines the economic, social, and cultural rights of the Universal Declaration of Human Rights.

64 Int’l Covenant on Civil and Political Rights, art. 2 § 1, art. 26, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].
The third redemptive internationalist frame posits the relevance of international law in the interpretation of U.S. constitutional, statutory, and common law. Because this frame relies only on persuasive authority, how binding international commitments, based on whether treaties have been ratified or customs formed, is beside the point.\(^{67}\) This position has been highly controversial among U.S. courts, even when expressly mounted as involving only relevant, rather than binding, authority.\(^{68}\) Yet there are judges who do look to international law as a relevant set of norms, commitments, and practices when interpreting domestic law.\(^{69}\) U.S. Supreme Court Justices have considered the way in which international law might elucidate economic, social, and cultural rights in the United States. Justice Marshall considered whether the “rights” framework of Article 25 of the Universal Declaration of Human Rights would assist in equal protection analysis.\(^{70}\) He was, however, writing in a dissenting opinion in a different Supreme Court, in a very different time in U.S. jurisprudential history.


2. Potential Drawbacks of the Redemptive Frame

Although these constitutional, sub-constitutional, and international frames of legal redemption are currently viewed as unorthodox in the United States, they have been applied with respect to economic, social, and cultural rights in other countries. Redemptive constitutionalism has seen, for example, rights to health, food, education, and housing enforced in India, through an expansive interpretation of the right to life; advocacy that in turn has helped spur a constitutional amendment to explicitly entrench the right to education as a fundamental right. Redemptive common law interpretations guide courts in India and in South Africa. A redemptive internationalist frame has also been applied in Colombia, as a means by which a constitutional right to health care is enforced.


72 These are described in Young, Constituting Economic and Social Rights, supra note 16 (documenting litigation and other advocacy campaigns in South Africa, Ghana, India, Colombia, and the United Kingdom).


76 Katharine G. Young & Julieta Lemaitre, Follow the Money, Follow the Courts? What We Can Learn from the Comparative Fortunes of the Right to Health, 26 Harv. Hum. Rts. J. (forthcoming 2013) (manuscript at 6–14) (on file with author) (discussing Corte Constitucional [C.C.] [Constitutional Court], julio 31, 2008,
An internationalist frame is also available as a matter of law to every constitutional interpretation in South Africa, where international law must be considered in ongoing constitutional interpretation.\(^{77}\)

This short comparative survey of several states reveals the contingency of the success of the redemptive frame. The position of courts, and of the content and finality of court-based interpretations, is distinct in different constitutional systems, as are the legal relevance of international law and the cultural resonance of rights. All courts act in their own legal, political, and cultural context.\(^{78}\) In the United States, just as elsewhere, the doctrines, forms of reasoning, and jurisdictional arguments that courts make are inevitably informed by state policies, the common law, institutional configurations of federal legislative and judicial systems, social fact, historical context, and the day-to-day understandings of all participants literate in local culture.\(^{79}\)

A central barrier to legal redemption in the United States is the current court-based interpretations of the Constitution, the current statutory and common law framework, and the limited role that international human rights law takes in the domestic legal system. Against this legal backdrop, the redemptive frame is, as it was for Douglass, likely doomed to short-term failure, particularly at the federal constitutional level. Moreover, short-term failure may bring with it significant long-term costs. Wrongheaded legal strategies can demobilize, enervate, and co-opt social movements and other associations as they seek to effect legal change. The strategy of

\(^{77}\) S. Afr. Const., art. 39(1)(b).

\(^{78}\) For an extensive examination of the role conceptions of courts in Colombia, India, South Africa, the United Kingdom, and the United States, see Young, Constituting Economic and Social Rights, supra note 16, at chs. 5–7. For further comparisons, see Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World (Varun Gauri & Daniel M. Brinks eds., 2008); Exploring Social Rights: Between Theory and Practice, supra note 74, at 172–261 (discussing the legal systems of India, South Africa, Canada, and Israel); Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor? (Roberto Gargarella et al. eds., 2006) (further discussing specific case studies in countries including India, Hungary, Bolivia, and Angola).

litigation, for example, costs time and resources and often disconnects the claims from the claimants themselves. Even other strategies that seek change in law—such as protest, education, or lay organizing—may themselves legitimate an unjust legal system. The literature on such effects, the hollow hope of courts and the myth of rights, is legion. In short, redemption may be misguided, counter-productive, and co-optive. Does a rejectionist frame offer an alternative?

B. Rejecting Law on Grounds of Economic, Social, and Cultural Rights

A rejectionist frame may be contrasted with its redemptive counterpart by accepting rather than challenging the dominance of current, adverse interpretations of law, but using that acceptance as a basis to renounce or reject the authority of law. For Cover, the abolitionist William Lloyd Garrison provides an example of rejection. Garrison’s pro-slavery interpretation of the Constitution was “consistent with the dominant professional methods of their day (and of our day as well).” Garrison used that interpretation as the basis from which to renounce the Constitution and the Union itself. Seeking insularity from the law and from the state, Garrison attempted to mount a perfectionist alternative so that those forced to live under such a “cursed” Constitution could in reality live outside of it. They could renounce any obligation to government under this Constitution and retreat in a manner similar to religious sectarians.

How does rejection fit within the economic, social, and cultural rights frame as a strategy of advocacy and mobilization in the United States? There are in fact multiple strategies. Rejectionism could

80 E.g., GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (presenting the influential thesis that the court-based strategies to generate reform for civil rights, abortion, and women’s rights were failures); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (2d ed. 2004) (presenting an early analysis of how the “myth of rights” can be misleading for political change strategies).
81 Cover, supra note 1, at 36.
82 Id. at 36–37; see also J.M. Balkin, AGREEMENTS WITH HELL AND OTHER OBJECTS OF OUR FAITH, 65 FORDHAM L. REV. 1703, 1708–10 (1997) (contrasting the Garrison idea of the Constitution as “a covenant with death, and an agreement with hell” with Douglass’ account of fidelity to a more just interpretation).
83 Cover, supra note 1, at 35–36.
84 Id. at 36.
oppose the authority of law in general (what we might call anarchist rejectionism) or oppose a particular law. Hence, a rejectionist frame applied to the U.S. Constitution would renounce the legitimacy of current interpretations, or indeed the potential of the text to secure any fundamental material interests of those living under it. Rejectionism could also reject the economic, social, and cultural rights-infringing effects of the statutory or common law, not as a basis for seeking its change, but as a basis for acting outside of it. International law could be similarly opposed or else treated as an alternative to U.S. law.

As a political stance towards international law, a rejectionist frame could reject current, positivist international law—from the authority of the World Trade Organization to the United Nations human rights treaty system—and argue instead for a non-statist cosmopolitan order outside of the nation-state paradigm. Or, depending upon where one is standing, one might apply rejection only to domestic arrangements and call for a bolstering of international law, especially international humanitarian law, for assistance in the transformation of current arrangements.

A softer, less threatening, and non-anarchistic version of this argument is the legal pluralist view, an idea which runs through Cover’s work as well as significant contemporary scholarship on postcolonial, international, and everyday law. If multiple legal orders openly coexist, rejectionist frames are likely to have more appeal, as the aim is not to overthrow the system but to allow conflicting legal systems to coexist. Social movements utilizing this strategy could withdraw into private burden sharing or self-help relations. They may form voluntary collectives or cooperatives and call for “an independent domain of free social life where neither governments nor private markets are sovereign.” They may seek out a vision of transnational politics that transcends the statist boundaries of law but

85 Compare this perspective against Balkin, supra note 82, at 1733–36, which problematizes the fidelity held towards the U.S. Constitution by those seeking constitutional welfare rights.

86 E.g., Brian Z. Tamanaha, A General Jurisprudence of Law and Society (2001) (presenting a framework where law and society center around a pluralist rather than rejectionist approach); Paul Schiff Berman, Global Legal Pluralism, 80 S. Cal. L. Rev. 1155 (2007) (discussing ways in which legal pluralism supports finding solutions in cases where conflict occurs among overlapping legal systems).

maintains its roots in the everyday interaction of marginalized groups, such as immigrants, and across networks of families, churches, and schools.\(^88\) For example, scholars writing about the geography of social relations have described forms of collective association that do not aim for institutional power or the reform of law, but are instead content with building their own “visibility” and “presence.”\(^89\)

Yet this pluralist retreat may accompany a decline in the relevance of the state.\(^90\) Indeed, the strategy risks reinforcing the account of law that has created the material insecurity in the first place—that the state is no longer able to provide security and rights in the contemporary economy.\(^91\) Moreover, such a strategy may be grounded in a willful ignorance of the privileges and immunities that have been established by present-day legal arrangements. And it may be radically opposed to economic, social, and cultural interests. It is therefore incorrect to demarcate rejectionism as immune to co-optation. Indeed, a tendency to delineate radicalism and reformism as a marker of a movement’s attitude to law is misguided. Redemption may be radically transformative or incremental; rejectionism may be transformative at the insular, associational level, but may do nothing to disturb outer legal relations, or it may mount the rallying cry to topple a President.\(^92\)

IV. The Choice of Frame

Social movements often contain both redemptive and rejectionist strands of advocacy. An example is the current Occupy Wall Street movement. The movement has not issued a set of unified demands. Its “horizontal” organizing structure, which seeks input and consensus

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90 Id. at 966.

91 Lobel contrasts several understandings of co-optation, including concerns about resources and energy, framing and fragmentation, lawyering and professionalism, crowding-out effects, institutional limitations, and the legitimation of existing social arrangements. Id. at 948–59.

92 The grassroots movement in Egypt took just 18 days to oust President Hosni Mubarak and end his 30-year reign. See Scott Peterson, Egypt’s Revolution Redefines What’s Possible in the Arab World, Christian Sci. Monitor, Feb. 11, 2011.
from all who are present, privileges participation and inclusion over the unity of frame. The motivations are eclectic, although they tend to be directed to the fairness of the economy and the representativeness of democracy. Typically, the movement has challenged both income inequality and corporate influence in government.

Many of the core organizers of the Occupy movement subscribe to anarchism: “to the eradication of any unjust or illegitimate system. At the very least, that means the eradication of capitalism and the state.” Others have described Occupy Wall Street as a “human rights movement,” and still others as an incipient popular constitutionalist movement with a redemptive agenda (for example, to wrestle the U.S. Constitution back from “the malefactors of great wealth” who benefit disproportionately from current arrangements). It is too early to categorize this movement, suffice to note that the call for a representation of “the 99%,” as opposed to the “1%” who benefit from the global capitalist system may suggest a transnational alliance. Other Occupy movements, from Egypt, Greece, Spain, the United Kingdom, and elsewhere have also sought the common use of public space to express demands about the economy and democracy. If demands for equality and redistribution enter the rights frame, we may well see the adoption of economic, social, and cultural rights talk.

Nonetheless, the choice is contingent on background political and legal arrangements. Redemptive frames for economic, social, and cultural rights in the United States are clearly more challenging than, for example, those in South Africa, where the text of the Constitution gives explicit support for economic, social, and cultural rights and invites an ongoing practice of legal transformation. Equally, rejectionist frames for economic, social, and cultural rights may

93 Interview with “P” cited in Mattathias Schwartz, Pre-Occupied, New Yorker, Nov. 28, 2011, at 8. In the two-month occupation of Wall Street in New York, Schwartz describes the ideologies expressed as ranging “from ‘Daily Show’ liberalism to insurrectionary anarchism.” Id.
97 S. Afr. Const., art. 26 (housing), art. 27 (health care, food, water, and social security), art. 29 (education); see Sandra Liebenberg, Socio-Economic Rights: Adjudication Under a Transformative Constitution xxi, ch. 1 (2010) (providing a commentary on the South African Constitutional Court’s developing jurisprudence on these rights).
appear more apt to Syrians than to Americans where the dangers of co-optation, as well as the overall effectiveness and appeal of rejection, will be different.

I suggest that, for the United States, redemption is a more viable strategy than rejection and that three constraints accompany this choice. The analysis of these constraints serves to orient a series of thought-experiments to be applied to redemptive strategies. First, the redemptive frame should be focused on transformative, rather than solely ameliorative, changes in law. The targets for economic, social, and cultural rights should be the root causes and deep structures underlying poverty and inequality. A rights frame is susceptible to falling into an ameliorative paradigm of the liberal welfare state, which may compromise its effectiveness and increase the dangers and levels of co-optation. Small gains may result in only stigmatizing, particularistic forms of government largess. Such results are particularly vulnerable to political backlashes against rights claimants, because of perceptions of inefficiency or an unfairness of state attention and the “undeserving” status of the poor. Instead, a focus on transformed political and economic relations, which posits a new direction of change to current social, political, and economic institutions, is one that engages an expansionist vision, even if the first steps along the trajectory of transformation may be piecemeal or incremental.

Second, the redemptive frame should acknowledge the possibility of counterclaims in rights discourse, especially those that rely on the invisible background structures of liberal legal systems. Because rights rely on contestable, malleable, and morally laden concepts, they invite counterclaims, especially by dominant groups. Claimants must be aware of the other rights upheld under the same laws that may be the focus of redemption. A counterclaim may also exist by an alternative economic, social, and cultural rights frame. Clean air advocates may line up against the interests of workers in contesting air pollution laws; both may have a theory of the right to health,

98 See generally Nancy Fraser & Axel Honneth, Redistribution or Recognition? A Political-Philosophical Exchange (Joel Golb et al. trans., 2003) (exploring the tensions between paradigms of equal distribution and the struggle for recognition).

through either the air they breathe or the food and medical care they can afford through employment.  

Third, the frame should manage the institutional pull of rights claims towards litigation or courts, at both the national and international levels. As indicated above, courts are allies in very particular (and always contingent) political settings. Hence, a redemptive frame may use the leverage of courts when it is open. And it may acknowledge that courtroom failures may be successful for an ongoing rights strategy. Political advocacy, education, public protest, and mobilization, however, are also part of an economic, social, and cultural rights frame, and may be equally counted as “law talk.”

V. Conclusion

This article has delineated two frames for economic, social, and cultural rights advocacy and mobilization in the United States. These two models of redemption and rejection take different stances towards law, and towards the state, that may be incorporated into rights talk. The redemptive and rejectionist frames react differently to present constitutional, statutory, common, and international law. As each frame refuses to acquiesce to current laws, each also appeals to the dignity or worth of all. In contrast to popular understandings of political strategies, which depict a linear relationship between radicalism and reform, this article suggests that both frames may be incremental or transformative, and may be equally compromised by co-optation. With due awareness given to the inevitability of backlash, counterclaims, and the pull to litigation, the combination of “law talk” and “rights talk” is a useful strategy for the protection of economic, social, and cultural rights in the United States.

100 See, e.g., John M. Broder, Re-election Strategy Is Tied to a Shift on Smog, N.Y. TIMES, Nov. 17, 2011, at A1 (detailing regulatory battles over stronger ozone standards; in opposition, administrators from North Carolina had contended that a “lack of employment, loss of health care, and in some cases, loss of a home, also affect the health of our citizens”).

101 See STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY (Lucie White & Jeremy Perelman eds., 2011) (discussing pragmatic strategies of rights advocacy and litigation in Africa, including those capitalizing on courtroom failure).
The 99% Solution: Human Rights and Economic Justice in the United States

Dorothy Q. Thomas*

Some get the gravy, some get the gristle, some get the marrowbone, and some get nothing though there’s plenty to spare.

— Joni Mitchell¹

Our story always seems to pit the good guys against the bad guys: the founding fathers versus the evil empire, man versus machine, Main Street versus Wall Street, the ninety-nine percent versus the one percent. Nobody, including those of us who struggle to realize human rights in the United States, ever totally believes that we are all in this battle for equality and justice together, that we really are ALL born equal in dignity and rights. It is not just that we appear, for example, to exclude the one percent from the protection of all people’s economic and social rights, but that we do not always include our fellow ninety-nine percenters either. Sometimes we discount even ourselves.

This essay looks at the value of human rights as a frame for economic justice work in the United States. It focuses in particular on the potential of human rights to serve as a unifying platform for such work within a polarized national context that often pits one group against another, whether the rich against the poor or the poor against the rich or people in either of these categories against one another.

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¹ Joni Mitchell, Banquet, on For the Roses (Asylum Records 1974).
It relies on both the idea of economic human rights and its practical application in the United States to exemplify the frame’s unifying value, to identify some of its potential limitations, and to consider how they might best be addressed. It envisions a new, values-based approach to greater economic equality in the United States that emphasizes the common good alongside that of any particular group.

At a very deep level, reframing U.S. economic justice work in human rights terms suggests a shared understanding of who we are as people and challenges the divisions of economic or other status that keep us apart. These divisions are real. They structure our social and political life, but they need not define our worldview. A human rights approach invites us to think of our constituency and our community as all human beings. If we adopt such an inclusive approach, and can communicate it authentically and consistently, the one percent might be persuaded, for example, to see that their interests are better served by allying with the ninety-nine percent than they are by profiting off of it. Such realignment forms a necessary part of any meaningful attempt to combat economic inequality. It is unlikely to occur, however, if advocates for such broad inclusivity appear to denounce the one percent as yet another in a long list of a legitimately despised, dehumanized minorities, of which the ninety-nine percent is, politically if not numerically, also one.

As this is an essay primarily about framing, I am interested in how a human rights approach informs our worldview. I am not suggesting that at present it reflects our political and social reality, or that the divisions between the one and the ninety-nine percent are not relevant. The question is what are we going to do about gross and growing inequality and the various interests that benefit from its production and maintenance? A human rights approach would suggest that if our constituency is all people, our organizing and outreach should attempt to include rather than exclude the one percent. At a minimum this more inclusive definition of who “we” are would have the practical benefit of paving the way for political organizing in sectors we might otherwise have come to discount or even despise.

Although I am a lifelong human rights activist, I will confess that I have never been much good at loving my actual or perceived enemies. In fact, as a human rights professional I was trained primarily to “name and shame” them. Such denunciation has its place; without it we would never have exposed, for example, Goldman Sachs as the
“vampire squid,” or the consequences of the famous “flaw” in Mr. Greenspan’s ideology that led him to trust the financial market to regulate itself. But denunciation alone does not necessarily prompt action. Or, if it does, it does not reliably mobilize the majority of people who may not yet be directly affected by the abuses in question or who may even believe that such practices, albeit abhorrent, serve their interests. I would venture a guess that many such people form part of both the one and the ninety-nine percent. We cannot hope to reach out to those implicated in the status quo in the same breath as we condemn them. A human rights approach, as a worldview rather than a tactic, calls on us to acknowledge that we are the “enemy” and also its target.

Such human solidarity does not imply moral equivalence or erase the reality of inequality, intentional misconduct, or misanthropy. Abusive practices have to be exposed and condemned if the need for change is to be widely seen and understood. The trick in deploying a human rights framework is to denounce economic injustice—and those who perpetrate it—without assigning guilt to an entire class or group or foreclosing the possibility that a given abuser, or pattern of abuse, can change.

To some this approach may seem like just so much Pollyannaish gobbledygook: “we’re all in this together,” “we are the enemy and its target,” “even serial abusers can be redeemed.” Give me a break. With income inequality at an all time high, the notion in the United

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2 Matt Taibbi, *The Great American Bubble Machine*, *Rolling Stone*, July 9–23, 2009, at 52 (“The world’s most powerful investment bank is a great vampire squid wrapped around the face of humanity, relentlessly jamming its blood funnel into anything that smells like money.”).

3 The Financial Crisis and the Role of Federal Regulators: Hearing Before the H. Comm. on Oversight & Gov’t Reform, 112th Cong. 36–37 (2008) (statement of Alan Greenspan, Former Chairman, Federal Reserve Board) (Committee Chair Henry Waxman reminded Greenspan that he had once said, “I do have an ideology. My judgment is that free, competitive markets are by far the unrivaled way to organize economies. We have tried regulation, none meaningfully worked.” When asked if his ideology had led him to do the things he now wished he had not done, Greenspan replied, “I found a flaw in the model I perceived is the critical functioning structure that defines how the world works, so to speak.”).

States of a shared sense of who we are as people can seem, at best, naïve and, at worst, disingenuous. In fact, despite all evidence to the contrary, the number of people in America who think that the country is divided into “haves” and “have-nots” is declining.

In the face of such entrenched inequality and the large scale of American denial that it even exists, adopting a human rights approach to U.S. economic justice work requires a profound degree of moral courage. The conviction that we are all born equal in dignity and rights not only prompts us to denounce abusive practices by extremely powerful actors, but also requires us to examine our own conduct. Are we, for example, constructing barriers between people that do not need to exist and do not reflect our values? The human rights frame encourages us to confront our own as well as others’ biases and offers us a wider scope of possibility for novel forms of political solidarity, grounded in our common humanity, than those that are available within the narrower if more familiar framework of us versus them.

The problem remains, however, that even if we can adopt such an inclusive worldview, our lived reality may not, probably does not, conform to it. As I shop for groceries at the local gourmet grocery in New York City, I am in no way similarly situated to the woman outside the store who asks me for money for food on the way in. Just because I give her money on the way out hardly means that we are all in this together. Our circumstances—our needs, our capacity, our resources, and our opportunities—are very different. With some justification, she might be tempted to write me off as a less deadly version of the Vampire Squid, and I her as just another disadvantaged person looking for a handout. It is hard, in the day-to-day, to see that she and I (or any of us along this continuum of relative privilege) are connected, that our fates are intertwined. In fact, it is hard in the day-to-day to see one another at all.

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7 As Dr. King once put it, “‘[t]rue compassion is more than flinging a coin at a beggar; it is not haphazard and superficial. It comes to see that an edifice which
One of the earliest and most outspoken advocates for the use of human rights in combating economic injustice in the United States is Jaribu Hill, the founder of the Mississippi Workers’ Center for Human Rights.\(^8\) The Center uses human rights as a framework to bring together otherwise isolated workers in different sectors throughout Mississippi to understand the larger political and social forces at work in their individual experiences of racism, sexism, harassment, low pay, and unsafe conditions.\(^9\) Hill once said, “It has to be [seen as] an international human rights struggle. It is not by default that you are poor. It is not because you messed up. It is by design. You are treated this way because of the historical system of slavery and human bondage. If we keep the struggle local, we suffer and don’t know why we suffer.”\(^10\) In practice, the use of human rights to frame economic justice work can help us to see one another and ourselves in a much larger context, and to make connections within and outside our specific groups that allow us to understand and potentially change our reality on a much broader scale.

“Put People First” is the Vermont Workers’ Center’s (VWC) slogan for their new statewide organizing effort.\(^11\) You will notice the VWC did not say put some people first. In the course of the Center’s previous “Healthcare Is a Human Right Campaign,” the organizers found that using human rights made it easier to connect to a wide array of working people across gender, race, class, ethnicity, and other differences.\(^12\) “When we say that health care is a human right and that the government’s responsibility is to provide that for everybody,” said James Haslam, the Center’s director, “we find produces beggars needs restructuring.”

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\(^9\) Id.
that people relate better to that than ‘single payer’ or the ‘public option.’”

The VWC’s earlier campaign culminated in the passage of healthcare legislation grounded in the human rights principles of universality, equity, accountability, transparency, and participation.

The VWC’s proposed new effort builds on their previous success in using a human rights approach and clarifies the distinctive character of this approach by explicitly putting all people in the frame and its expressive “meme.”

I can almost hear the readers of this essay asking what planet, exactly, I am from. This is a good question and not only because this whole human rights way of thinking can feel a bit alien, especially to Americans used to thinking about social justice in exclusively constitutional or civil rights terms. Even if the idea instinctively resonates with us that we are all human and born equal in dignity and rights, it is hard to see how this worldview really has any practical application, except maybe in Vermont. Try selling it in Washington, D.C. As the Human Rights at Home, or HuRAH, campaign is learning, selling it is not easy. In fact it was pretty hard to do in Vermont. To the very end, even as Vermont’s governor signed the healthcare legislation into law, he balked at including any explicit reference to human rights.

Why is that? What is so problematic about the idea of human rights in the United States that even if the piece of legislation you are signing incorporates human rights principles, it cannot make explicit reference to human rights and still become law? I am going to hazard a guess that the governor’s problem with human rights, like that of many federal legislators and much of the U.S. judiciary, does not derive from doubts about their own humanity. Nor, except in the most ideologically extreme cases where human rights are per se deemed a threat to national sovereignty, do the majority of politicians and

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13 McGill, supra note 12, at 461.
15 See McGill, supra note 12, at 464. For a breakdown of the difference between frames and memes, see Movement and Media Research Action Project, Mapping Concepts (2011) (on record with MRAP).
16 For more information on the HuRAH campaign, see Hum. Rts. at Home, http://www.hurahcampaign.org/about/ (last visited Aug. 5, 2012).
17 See McGill, supra note 12, at 463.
judges inevitably see human rights as inherently hostile to American jurisprudence, law, and policy. Such attitudes obviously exist and, to a woeful extent, they dominate contemporary political and legal discourse in the United States. But if you think all the way back to the American Revolution, it is clear that the concept of inalienable rights is not essentially foreign to the U.S. self-conception.

Given the resonance between core American values and human rights, how did human rights get such a bad name in the United States and, if we are thinking about framing our economic justice work in human rights terms, what kind of political baggage comes with this approach? Could it be true that in trying to use human rights to make the case that we are all in this together, we are actually alienating a lot of people whom we would include as potential allies within this very same frame? A lot of ink has already been spilled on the question of whether the explicit use of the term “human rights” is necessary to the effective implementation of a human rights approach.\(^{18}\) For the purposes of this essay, I am less interested in rehearsing that debate, which ultimately comes down to tactics, than I am in reflecting on why the debate arises in the first place.

What is so bad about human rights? I will grant you that as a practicing U.S. human rights activist, I may not be the most neutral person to ask. As an over-fifteen-year advocate for the use of human rights in domestic social and economic justice work, from the human rights of women in prison to how human rights can inform the way non-governmental organizations carry out our work, I have learned a lot about why so many people in the United States, especially people with some degree of power, are uncomfortable with or actively hostile to this framework. This discomfort is especially marked where the practical application of a human rights approach takes the form of judgments, laws, policies, administrative regulations, institutional mandates, or entire advocacy strategies that require meaningful accountability to the vision and the values that it entails.

Opposition to the domestic use of human rights ranges from the pragmatic (human rights raises red flags)\(^{19}\) to the ideological (human

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19  See id. at 25.
Rights threatens American sovereignty). It emanates from both the right (death threats to U.S. judges who cite human rights standards) and the left (denunciation of human rights as diluting more specific claims based on race, class, or other status). At times, the human rights frame seems to be so universally derided in the United States that advocates would have to be total idiots to think of adopting it. “Sell crazy somewhere else,” as Jack Nicholson’s character says in the movie As Good as it Gets, “we’re all stocked up here.”

Such cautionary or dismissive views of human rights across the political spectrum emanate from very distinct points of view. A concern about raising red flags, for example, differs considerably from actually raising them; a worry about diluting specific rights

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21 See Bringing Human Rights Home: A History of Human Rights in the United States 207 (Cynthia Soohoo et al. eds., 2008) (noting that in Spring 2006 Justice Ginsberg revealed that she and then-Justice O’Connor had received death threats following internet criticism of their citation to international sources as a threat to the country and encouraging patriots to take action).


23 As Good As It Gets (TriStar Pictures & Gracie Films 1997).
protections via a broader human rights frame is not the same as a desire to delimit the use of human rights altogether. And a confidence in existing constitutional protections is utterly distinct from a fear of “foreign influences.” All of these and other various points of view about the desirability of using a human rights frame in the United States require attention and debate as part of the country’s internal political process. My concern is that the public space for such debate is circumscribed at the outset by a received wisdom about the inapplicability of human rights to the United States, otherwise known as U.S. exceptionalism.

The construction of an exceptionalist attitude toward human rights by and within the United States has been discussed exhaustively elsewhere.\(^{24}\) I do not intend to detail its historical provenance or varied manifestations here. Instead, I would like to suggest that it is a box out of which U.S. economic justice advocates desperately need to think. Whether we imagine the United States as a “shining city on a hill” that has no need of human rights, or we see human rights abuse as something that happens elsewhere, or we believe our constitutional protections are enough, or we think human rights are more trouble than they are worth, we exist within a conception of our national identity that implicitly or explicitly defines human rights as alien. It is not that Americans do not believe in the idea of inalienable rights.\(^{25}\) It is that the expression of those rights as “human” suggests their legitimacy and even their very existence derives from some source other than (or at least additional to) the authority of the state. This idea accounts for the appeal of human rights worldwide.


\(^{25}\) See Beldon Russonello & Stewart, *Opportunity Agenda, Human Rights in the United States* 3 (Aug. 2007), available at http://opportunityagenda.org/pdfs/HUMAN%20RIGHTS%20REPORT.PDF (report prepared for The Opportunity Agenda examining the opinions of three audiences on human rights in the United States: the public, social justice advocates not currently using the human rights approach, and journalists who regularly cover social issues) (“Americans strongly believe in the concept of human rights and agree that ‘every person has basic rights regardless of whether their government recognizes those rights or not’ (80% agree; 62% strongly).”.

as a constraint on state power; it also accounts for the profound reluctance of states, and not just the United States, to be held to human rights account.

If we continue to think inside this exceptionalist box, if we continue to accept as given a default incommensurability between the idea of the United States and the idea of human rights, if we continue to debate the viability of domesticating human rights within a context that pre-emptively defines them as foreign, we are unlikely to proceed with much zeal or sufficient success. I see this essay, and many of the articles contained in this issue, as a thought experiment in setting the exceptionalist framework aside and beginning again. Let us start instead from the presumption that we are both American (or we live within the United States’ jurisdiction) and human. Our struggle in this new world is not about whether or not we have human rights in the United States. We are human, so we do. If we reframe our work accordingly, we can shed the presumed American supremacy to human rights that conditions the existing national debate about this issue and focus instead on realizing those rights in our specific domestic context.

I recognize that this both-American-and-human thought experiment begs the question of whether or not we can persuade Americans to adopt this worldview in sufficient numbers to change the terms of the national debate. I happen to believe that we can and will engineer this shift, but only if, as advocates of this shift, we undertake it ourselves and explicitly reframe our domestic economic justice work in human rights terms. I want to be very clear that I am not talking about our tactics in this piece; I am talking about our worldview.

The poet T.S. Eliot once wrote that we often understand pain better by examining the experiences of others than we do by reflecting on our own.\(^\text{26}\) As we try to think outside our own exceptionalist box in the United States, we might consider the experience of our former colonial master, England. For purposes of comparison, it is important to note that England has a common rather than constitutional legal system and functions, for human rights purposes, as a member of the Council of Europe rather than in the relatively more unilateral mode of the United States. These differences are important to bear in mind because they have a profound impact both on the conceptualization

\(^{26}\) T.S. Eliot, *Four Quartets* 24 (Harcourt, Brace & World, Inc. 1943).
of human rights in the United Kingdom and on their realization in that context.

To make a very long story short, the United Kingdom adopted the Human Rights Act (HRA) in 1998, and it came into force on October 2, 2000.\textsuperscript{27} The aim of the HRA is to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights (ECHR) by incorporating its key elements into British law.\textsuperscript{28} The United Kingdom’s accomplishment of this complicated feat was an extraordinary development that exceeded the expectations even of those inside and outside government who advocated for it. In the ensuing years, the Act has been used in many different ways to defend the human rights of those within the jurisdiction of the United Kingdom in cases relating to everything from treatment of asylees to standards of care in the National Health Service.\textsuperscript{29} The HRA’s restraint or influence on the expression of state power in the United Kingdom has delivered meaningful remedies to and affirmative changes in the enjoyment of rights of many different types of people in the United Kingdom, including within the public sector itself.\textsuperscript{30} But, the Act’s effect in this regard has not always aligned with the policies of the British government, whether led by the Labour Party or by the current coalition of Conservatives and Liberal Democrats. As a result of its effectiveness, the HRA has come under sustained attack both from the Labour Party, which shepherded it into existence, and by the Conservatives who long opposed it.\textsuperscript{31} A debate about whether to retain, amend, replace, or repeal the Act is ongoing in the United

\textsuperscript{27} Human Rights Act, 1998, c. 42 (Eng.).

\textsuperscript{28} \textit{Id.} For further discussion on the adoption of the HRA and its relationship to the European Convention on Human Rights, see \textsc{Lord Irvine of Lairg}, \textit{A New Constitution—A New Citizenship}, in \textit{Human Rights, Constitutional Law and the Development of the English Legal System: Selected Essays} 103, 109 (2003) (“By incorporating the ECHR we are not taking on a burdensome European regime and moving away from anything naturally British. On the contrary, what we are doing is advancing the traditional British respect for human rights . . . .”).

\textsuperscript{29} \textit{Equality \\& Human Rights Comm’n}, \textit{Human Rights Inquiry} 17–18, 38, 165–70 (2009) (also providing a detailed account of the HRA over the past decade).


\textsuperscript{31} \textit{Id.} at 5, 9.
Kingdom, laying bare the politics of internalizing human rights in a way that might inform our own experiment.\textsuperscript{32}

The most salient argument on the part of U.K. opponents of the Human Rights Act is that human rights are foreign to the laws and customs of the United Kingdom.\textsuperscript{33} This argument is constantly made despite the fact that the ECHR was drafted in large measure by U.K. lawyers relying on the country’s own tradition of rights protection going back to the Magna Carta, and despite the fact that the HRA was intended to give those rights domestic legal expression and remove any misconception that they did not accord with the country’s self-conception.\textsuperscript{34} Still, the “foreignness” of human rights gets thrown about a lot in the United Kingdom, especially in the tabloid press, and just to make the charge stick, opponents of the Act routinely denounce its application to actual foreigners and attempt to alienate people from human rights by suggesting that they benefit terrorists, undocumented immigrants, and other outsiders, not ordinary British citizens.\textsuperscript{35} The HRA has even been referred to as a “villains’ charter.”\textsuperscript{36}

The response of local activists to the attack on the “Britishness” of human rights is instructive for our own approach to this problem and has both conceptual and practical implications. Human rights defenders in the United Kingdom have sought to demonstrate: (1) the degree to which human rights both arose out of and reflect the United Kingdom’s own history and traditions; and (2) the fact that human rights are invoked by many ordinary citizens in the United Kingdom in a wide range of areas including the provision and quality


\textsuperscript{33} See British Inst. of Human Rights, supra note 30, at 15.

\textsuperscript{34} See Lord Irvine of Lairg, supra note 28.

\textsuperscript{35} See, e.g., Benedict Brogan & Paul Waugh, Cameron Will Scrap Human Rights Act in Campaign for UK Bill of Rights, DAILY MAIL (Dec. 8, 2008, 5:59 PM), http://www.dailymail.co.uk/news/article-1092716/Cameron-calls-UK-Bill-Rights-Straw-reveals-plans-overhaul-Human-Rights-Act.html (noting Cameron’s expression that “there were genuine public concerns about the way it [the HRA] is being exploited by criminals and extremists to hide from the law”).

\textsuperscript{36} Andrew Sparrow, Jack Straw Plans to ‘Rebalance’ Human Rights Act, GUARDIAN (Dec. 8, 2008, 5:19 AM), http://www.guardian.co.uk/politics/2008/dec/08/human-rights-act-straw (Labor Secretary of Justice, Jack Straw, who introduced the Act as Home Secretary, “could understand why the act was seen as a ‘villains’ charter’ by its critics.”).
of healthcare, the treatment of caretakers, the living conditions of elderly people, and the privacy rights of people with mental disabilities.\footnote{See \textit{British Inst. of Human Rights}, supra note 30, at 12, 13.} Advocates have worked hard to encourage the growing uptake of human rights with respect to such “ordinary” matters, and a new collaborative funding project, the Thomas Paine Initiative, has just been launched to advance this critical work.\footnote{\textit{Thomas Paine Initiative}, \textit{Global Dialogue}, http://global-dialogue.eu/our-projects/thomas-paine-initiative (last visited Aug. 7, 2012) (declaring the promotion of the fundamental values of the ECHR and increasing public support for and awareness of human rights as some of the central aims of the Initiative).}

Reflecting on the U.K. experience to date, it seems to me that as we reframe our own U.S. work in human rights terms, we are refusing any longer to buy into the idea that our rights come from somewhere other than our humanity or depend on our status. We are refusing, in essence, to be divided from our own birthright as individuals or from our solidarity with one another as human beings. From this perspective, human rights can \textit{never} be foreign; they inhere in us all. Even though the initial legal articulation of human rights—given that they apply equally to everyone everywhere—is transnational in character, the domestic expression of human rights is not an import; it is an enactment.

This shift resonates deeply, at a time of immense economic inequality and shrinking public resources, with the need for economic justice advocates to secure protections against and remedies for rights deprivations in areas like healthcare, education, housing, and employment. Using human rights not only changes how we conceive of and relate to one another, it also fundamentally alters our relationship to the government. The power of rights belongs to us rather than to the state. This is truly a momentous shift. Are we not better off basing our struggle on the assumption that we inherently have these rights and it is only a matter of realizing them, than we are if we continue to debate whether or not these rights, especially economic, social, and cultural rights, actually exist?

For the purposes of our thought experiment, let us assume that we answer this question with a yes. Reframing our economic justice work in human rights terms has a powerful legitimizing effect on our work and those who carry it out and is worth the attendant risks. The question then becomes how does the use of a human rights frame
actually alter not just what we think, but also what we do? Many of the articles in this issue answer that question with respect to specific economic and social issues. With those examples in mind, I wonder if you will conclude, as I do, that the use of human rights affects our work with respect to both specific economic or social justice issues and its conduct overall.

I trust you will agree that the use of a human rights frame affects everything from values to vision, strategies, tactics, methods, and conduct. Using such a frame opens up advocates to argue our cases before U.S. and international bodies; allows us to deploy both external and internal pressure on the government; enables active participation of affected people, armed with the knowledge that they have economic and social rights, to engage with those who would deny them those rights; and establishes a foundation of equality and respect that informs our expectations not only of the government but of one another. In reframing our work in human rights terms we find ourselves on the brink of a movement that has the potential to practice what it preaches. A movement that, in the Vermont Workers’ Center’s terms, is universal, equitable, accountable, and transparent.39

I hasten to add that just because we reframe our struggle in human rights terms, I do not think that people everywhere will spontaneously join together in a unified global movement to end economic inequality, much as I wish that were the case. What I am saying, and what I believe, is that such reframing makes it possible for us to form broader alliances and develop more systemic social and economic change strategies and goals, and to do so in a way that values both our specific experiences and our shared humanity.

Undoubtedly, challenges will arise. One of the main obstacles to domestic human rights work that we face in the United States today, other than the fact that the human rights framework has been politically constructed as alien to U.S. traditions, is that—at least with respect to income inequality—that currently with the most power to maintain or alter the status quo in this regard are not necessarily government actors. Whatever human rights obligation or accountability with respect to economic injustice we ascribe to the government may not sufficiently reach (to put it mildly) the private institutions that are also implicated in the perpetration of economic injustice. So, why go through all this human rights reframing business, 39

if it does not sufficiently help us to hold abusive private actors to account?

I think we have to acknowledge that we are in such a profound global economic crisis in part because, whether governments are obligated to uphold economic and social rights or not, they are distressingly weak when it comes to effectively responding to international market volatility and regulating transnational financial entities.\textsuperscript{40} As the head of the Swiss Central Bank Phillip M. Hildebrandt recently observed, “the capacity of the financial industry to lobby for its short-term interests is far reaching.”\textsuperscript{41} Tell me about it. On June 19, 2012, Jamie Dimon, the CEO of JPMorgan Chase, admitted that his firm had taken undue risk in trading in the credit market (incurring an estimated loss of nearly three billion dollars), but defended JPMorgan’s continued lobbying against the regulations designed to prevent such practices.\textsuperscript{42}

The accountability of private financial entities to human rights is subject matter for another essay. My argument here is that if we see ourselves as having economic and social human rights and our government as accountable to us in those terms, we will be on better footing to push for remedies to economic injustice that originate not just with states but also with private entities under their jurisdiction. We will be on better footing not only because those economic and social rights obligations are codified in human rights law, which surely helps, but also because by framing this struggle as about \textit{all} rather than \textit{some} of us, we may be able to enlist support amongst a much wider range of people than those directly and adversely affected. Within a human rights frame, the “bad guys” may be far

\textsuperscript{40} See Floyd Norris, \textit{The Year Governments Lost Their Credibility}, N.Y. TIMES, Dec. 31, 2011, at B1 (“Within weeks, it became clear that 2011 would be remembered as the year that governments lost their credibility. Markets, which had always assumed that major Western governments would honor their obligations, struggled to learn to adjust to a new world where that was not so certain.”).

\textsuperscript{41} Jack Ewing, \textit{A Fight to Make Banks More Prudent}, N.Y. TIMES, Dec. 21, 2011, at B1. \textit{See also} Amin Malouf, \textit{Disordered World} 56 (George Miller trans., 2011) (arguing that “the global economic system is more and more impervious to control”); Eduardo Porter, \textit{Series of Violations Shakes Public’s Faith in Capitalism}, INT’L HERALD TRIB., July 11, 2012, at 16 (citing recent World Bank reports of “a weakening of corruption controls in the United States since the late 1990s, so that it is falling behind most other developed nations”).

\textsuperscript{42} Jessica Silver-Greenberg et al., \textit{In House, Reception for Dimon Not So Friendly}, N.Y. TIMES, June 20, 2012, at B1.
fewer in number than we suppose, and the “good guys” much more numerous. Unless we move to connect with one another on such a global scale, the scale of our common humanity, the economic injustice engulfing our entire planet seems unlikely to be effectively challenged or reversed.

This statement may seem grandiose, but even if we focus only on our own economic justice work, the human rights frame may allow us to overcome obstacles to its internal character and cohesion. It can allow us to address both the overall problem of economic inequality and that specific aspect of it which affects any particular group. So far, economic justice work with respect to specific populations in the United States has advanced their inclusion in the domestic economy, but it has not been at all effective in checking economic inequality overall.\(^{43}\) Between 2002 and 2006, for example, the top one percent captured nearly three-quarters of the U.S. economy’s growth.\(^{44}\) The inclusiveness of a human rights approach may help us to remedy the broad-based, structural inequality that has to date proved immune to purely civil rights challenges.

To make the kind of systemic economic and political changes that we seek, we need to come together, a lesson we have learned before and forgotten (again and again). As we consider the potential relevance of human rights to our immediate need for greater political and economic solidarity in the United States, we would do well to revisit and reclaim our own progressive American history. At the time of the Poor People’s Campaign in 1968, for example, the Reverend Doctor Martin Luther King, Jr. began to argue for a “shift from the era of civil rights to the era of human rights.”\(^{45}\) He did so in order to broaden the movement’s base and expand its agenda to include the economic and social inequality that, as today’s declining social mobility makes clear,\(^{46}\) affects the country as a whole.\(^{47}\)

\(^{44}\) Id. at SR6.
\(^{45}\) The Poverty Initiative at Union Theological Seminary, supra note 7, at 9.
\(^{46}\) See *Upper Bound: Social Mobility and Inequality*, ECONOMIST, Apr. 17, 2010, at 29 (citing the Pew Economic Mobility Project’s finding that in 2004 men in their thirties earned 12% less than their fathers did at that age).
\(^{47}\) For a discussion of the Poor People’s Campaign and Dr. King’s adoption of human rights, see The Poverty Initiative at Union Theological Seminary, supra note 7.
sCholar Martha Minnow once observed, “[b]eyond our talk of rights we have each other, and the steady burden of learning to live together and apart.”

Using human rights to frame economic justice work in the United States is not only about saying that we are all in this together; it is about acting that way, especially for activists. Consider the words of Gordon Hirabayashi, who died on January 2, 2012, at the age of 93. Mr. Hirabayashi brought a case that eventually went to the Supreme Court in 1943 challenging the federal government’s curfew for and internment of people of Japanese descent, including citizens, living in the United States. In a unanimous decision, Mr. Hirabayashi lost his case. He later made clear, however, that this defeat did not lead him to abandon his belief in his cause or his vision for his country, once saying, “I never look at my case as just my own, or just a Japanese-American case. It is an American case, with principles that affect the fundamental human rights of all Americans.” In 1987, after nearly 40 years of advocacy on behalf of those human rights of all Americans, a federal appeals court in San Francisco finally overturned Mr. Hirabayashi’s unanimous conviction for failing to register for evacuation to an internment camp and for ignoring a curfew.

Nobody ever said reframing U.S. economic justice work in human rights terms was going to be easy or quick, or that challenging American exceptionalism with respect to human rights is not risky or, at a minimum, an exercise in delayed gratification profoundly at odds with the constant pressure for more immediate results. Still, unless we undertake such a thoroughgoing transformation of our country’s and our own worldview, any discrete gains we make in economic equality will always be circumscribed by the fact that they benefit only a certain percentage of us. It is time to reframe our struggle for economic justice in the United States in terms of human rights and remind ourselves and our fellow Americans that the freedom of each and every one of us rests on the equality and dignity of us all.

48 Martha Minnow, Making All the Difference 311 (1990).
50 Id.
51 Id.
52 Id.
53 Id.
Economic and Social Rights in the United States: Implementation Without Ratification

Gillian MacNaughton*
Mariah McGill**

I. Introduction

In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights, which has since become the most widely known pronouncement of human rights around the world.1 At that time, the United States government firmly supported the inclusion of economic and social rights—including the rights to health, education, housing, decent work, and an adequate standard of living—that are enshrined in the Declaration.2 Indeed, the

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2 See Daniel J. Whelan & Jack Donnelly, The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight, 29 Hum. RTS. Q. 908, 911 (2007) (“Other states certainly supported economic and social rights. None, however, did so with more genuine commitment or greater actual impact than the United States and Great Britain, the two leading Western powers.”); Johannes Morsink, The Universal Declaration of Human Rights: Origins, Drafting and Intent 237 (1999) (Eleanor Roosevelt, the delegate for the United States, maintained that all the articles in the UDHR were equally important and priority should not be given to one article over another); UDHR, supra note 1, arts. 23–24 (right to decent work
United States was a member of the U.N. Commission on Human Rights, which was responsible for drafting the document, and the Commission considered economic and social rights essential to the holistic framework of the Declaration. From the initial draft of the then-labeled “International Bill of Human Rights” by John Humphrey, which was based largely upon the constitutions of the members of the United Nations at the time, to the final Declaration adopted on December 10, 1948, the United States supported this holistic human rights framework encompassing a full spectrum of economic, social, cultural, civil, and political rights.

Times changed. Since 1948, the United States has been ambivalent and, at times, hostile to economic and social rights. In 1977, and limitation on working hours), art. 25 (rights to adequate standard of living, including food, clothing, housing, medical care, social services, and social security), art. 26 (right to education).

See MORSINK, supra note 2, at 235 (drafters did not believe that there were two kinds of rights, but rather believed “in the fundamental unity of all human rights”); see also Gillian MacNaughton & Diane F. Frey, Decent Work for All: A Holistic Human Rights Approach, 26 Am. U. Int’l L. Rev. 441, 451–61 (2011) (explaining the holistic human rights approach referenced in the preambles to the UDHR, the International Covenant on Economic, Social, and Cultural Rights, the International Covenant on Civil and Political Rights, as well as several U.N. declarations, including the Declaration on the Right to Development and the Vienna Declaration and Program of Action).

See U.N. Secretariat, Draft Outline of International Bill of Rights, U.N. Doc. E/CN.4/AC.1/3 (June 4, 1947) (cited in MORSINK, supra note 2, at 7, and reprinted in Mary Ann Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights 271–74 (2001); U.N. Comm’n on Human Rights, Drafting Comm., International Bill of Rights: Documented Outline, U.N. Doc. E/CN.4/AC.1/3/Add.1 (June 11, 1947) [hereinafter Documented Outline] (setting out each of the forty-eight articles in Humphrey’s original draft, and following each article, the related provisions in fifty-three national constitutions and six draft proposals collected by the Division of Human Rights of the U.N. Secretariat); MORSINK, supra note 4, at 227 (the Declaration included the main rights then included in the national constitutions around the world).

President Jimmy Carter signed the two international human rights treaties implementing the Declaration—the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)—but transmitted both treaties the next year to the U.S. Senate for advice and consent with substantial “reservations, understandings and declarations.”

The Senate Foreign Relations Committee did not support these treaties, and they remained in the Committee until the 1990s. In 1992, the Senate finally approved the ICCPR, which was then ratified by the Bush administration. The Senate, however, has never approved, and the United States has therefore never ratified, the ICESCR. And it will not likely do so in the near future. While the United States is now renowned for its failure to ratify most of the core internation-


7 Lewis, supra note 5, at 121.


10 See Lewis, supra note 5, at 120–21.
al human rights treaties,11 its reluctance to commit to the ICESCR is particularly strong. According to international human rights law scholar Hope Lewis, the ICESCR remains today “the most controversial human rights treaty for the United States.”12

Having failed to ratify the ICESCR, the United States government has no obligation to report to the Committee on Economic, Social, and Cultural Rights on its progress in implementing these rights.13 Nonetheless, economic and social rights are being implemented in the United States in many ways. Importantly, not all international human rights obligations derive from the international treaties; some obligations arise simply from membership in the United Nations.14 Accordingly, international human rights mecha-

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12 Lewis, supra note 5, at 121.

13 See ICESCR, supra note 6, art. 16 (stating that State Parties to the ICESCR undertake to submit reports to the Economic and Social Council via the U.N. Secretary-General); Econ & Soc. Council Res. 1985/17, 1st Reg. Sess. 1985, Supp. No. 1, U.N. Doc. E/1985/17, para. (a) (May 28, 1985) (stating that the Working Group established by the Economic and Social Council to review reports submitted by States parties to the ICESCR shall be renamed “Committee on Economic, Social and Cultural Rights” (CESCR)).

14 See, e.g., U.N. Charter arts. 55–56 (stating that all members of the U.N. pledge to promote universal respect for and observance of human rights for all); IAN BROWNIE & GUY GOODWIN-GILL, BASIC DOCUMENTS ON HUMAN RIGHTS 23 (Ian Brownlie & Guy S. Goodwin-Gill eds., 5th ed. 2006) (stating that UDHR is not a legally binding instrument but is an authoritative guide
nisms—including the United Nations Human Rights Council and the Special Procedures—investigate the record of the United States on respecting, protecting, and fulfilling the economic and social rights in the Universal Declaration of Human Rights. Additionally, international economic and social rights norms are being implemented at the sub-national level by state, county, and city governments looking to international human rights laws to guide policy-making and programming. Finally, advocates are turning to international economic and social rights in pressing their cases before courts, legislatures, and other governmental entities. Thus, despite the ambivalence of the U.S. government toward these rights, they are being implemented in the United States at the local, state, and even national level.

While several other articles in this volume focus on opportunities for activists to use international economic and social rights in the United States to mobilize people, to analyze policies, and to advocate to the interpretation of the human rights to which the U.N. Charter commits all its members).


16 See infra sections IV and V.

on economic and social issues, among other strategies, this article documents some of the ways in which the governments in the United States have already recognized their legal obligations for international economic and social rights.

Following this introduction, Part II sets out the holistic human rights framework in the International Bill of Human Rights, which recognizes a full panoply of economic, social, cultural, civil, and political rights. Part III addresses the recognition and implementation of economic and social rights in the United States at the national level, specifically examining the record of the United States over the past decade in engaging with the U.N. Charter-based bodies on economic and social rights. Part IV discusses state-level recognition and implementation of economic and social rights, focusing on the Vermont Legislature’s adoption of human rights principles to guide health care reform. Part V discusses city-level recognition and implementation of economic and social rights, focusing on the City of Eugene, Oregon’s decision to become a “Human Rights City” and subsequent actions to realize this goal. The article concludes that, despite the reluctance of the United States to ratify the ICESCR, economic and social rights are being recognized and implemented here and to a greater extent every year.

II. The International Human Rights Framework

The Post-World War II framework for international human rights law begins with the United Nations Charter. Article 1 of the Charter establishes that the purposes of the United Nations are “[t]o main-...


It also illustrates the considerable moral force of the Universal Declaration of Human Rights, if not technically a legally binding instrument. See Brownlie & Goodwin-Gill, supra note 14, at 23 (stating that UDHR is not a legally binding instrument); Glendon, supra note 4, at 236 (“The Declaration’s moral authority has made itself felt in a variety of ways. . . . Its nonbinding principles, carried far and wide by activists and modern communications, have vaulted over the political and legal barriers that impede efforts to establish international enforcement mechanisms.”).
measures to strengthen universal peace.”\textsuperscript{20} Additionally, the Article declares that the United Nations aims “[t]o achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.”\textsuperscript{21} Articles 55 and 56 of the Charter commit all members of the United Nations to promote “higher standards of living, full employment, and conditions of economic and social progress” as well as “universal respect for, and observance of, human rights.”\textsuperscript{22} The Charter is a legally binding instrument that prevails over any conflicting obligations of the U.N. members under any other international agreement.\textsuperscript{23}

Although the Charter does not detail the human rights to which the U.N. members commit themselves, those human rights are spelled out in the Universal Declaration of Human Rights.\textsuperscript{24} The Preamble to the Declaration draws on President Franklin D. Roosevelt’s “Four Freedoms” speech delivered in 1941,\textsuperscript{25} and proclaims “a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want” to be “the highest aspiration of the common people.”\textsuperscript{26} In her book, \textit{A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights}, Mary Ann Glendon asserts, “The Universal Declaration charted a bold new course for human rights by presenting a vision of freedom as linked to social security, balanced by responsibilities, grounded in respect for equal human dignity, and guarded by the rule of law.”\textsuperscript{27}

The Declaration establishes a holistic human rights framework in thirty articles. Article 1 declares that “[a]ll human beings are born free and equal in dignity and rights.”\textsuperscript{28} It also states that “[t]hey are endowed with reason and conscience and should act toward

\textsuperscript{20} U.N. Charter art. 1, paras. 1–2.
\textsuperscript{21} \textit{Id.} art. 1, para. 3.
\textsuperscript{22} \textit{Id.} art. 55; \textit{see id.} art. 56 (all member states pledge to take action to achieve the standards in art. 55).
\textsuperscript{23} \textit{See id.} art. 103.
\textsuperscript{24} \textit{Brownlie & Goodwin-Gill}, supra note 14, at 23.
\textsuperscript{25} Franklin D. Roosevelt, President of the United States, Address to the Congress of the United States (Jan. 6, 1941), in \textit{87 Cong. Rec.} 42, 46–47 (1941) [hereinafter Roosevelt, Four Freedoms] (discussing the “four freedoms”, which were later adopted in the preamble to the UDHR).
\textsuperscript{26} UDHR, \textit{supra} note 1, pmbl.
\textsuperscript{27} \textit{Glendon}, \textit{supra} note 4, at 235.
\textsuperscript{28} UDHR, \textit{supra} note 1, art. 1.
one another in a spirit of brotherhood.” Thus, Article 1, originally proposed by René Cassin, the French delegate to the Commission, encompasses the French ideals of freedom, equality, and brotherhood and links them to dignity and rights. Subsequent articles declare a full range of civil, political, economic, social, and cultural rights drawn from the fifty-three national constitutions and five proposals that the U.N. Secretariat collected in 1947. Article 28 concludes the section on rights, establishing that “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” This Article in particular conveys the holistic framework, in which all the rights proclaimed are equally important to the dignity of the person.

Importantly, the Declaration includes economic and social rights, which were widely supported in the 1940s. For example, in 1947, forty countries recognized a right to free and compulsory education in their constitutions. The inclusion of economic and social rights in the Declaration also reflects the “freedom from want” to which President Roosevelt referred in his “Four Freedoms” speech. Further, it implements Roosevelt’s 1944 proposal of a second Bill of Economic Rights, including: “[t]he right to a useful and remunerative job”; the

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29 Id.
30 Glendon, supra note 4, at 67.
31 See Documented Outline, supra note 4.
32 UDHR, supra note 1, art. 28. Articles 29 and 30 establish duties to the community, limitations on the exercise of rights and rules on interpretation. UDHR, supra note 1, arts. 29–30.
33 Morsink, supra note 2, at 222, 232, 238.
34 Whelan & Donnelly, supra note 2, at 911.
35 See, e.g., Morsink, supra note 2, at 213. Today, the rights to education and health or health care, for example, are recognized in a majority of national constitutions. See Special Rapporteur on the Right to Education, Third Rep. on the Right to Education, paras. 66–67, U.N. Doc. E/CN.4/2001/52 (Jan. 11, 2001) (by Katarina Tomasevski) (stating that the right to education is constitutionally guaranteed in 142 countries); OHCHR, Fact Sheet No. 31, The Right to Health 10 (June 2008), available at http://www.ohchr.org/Documents/Publications/Factsheet31.pdf (stating that the right to health or the right to health care is recognized in at least 115 constitutions and 6 others impose duties on governments in relation to health, health services or health budgets); Eleanor D. Kinney & Brian Alexander Clark, Provisions for Health and Health Care in the Constitutions of the Countries of the World, 37 Cornell Int’l L.J. 285, 287 (2004) (stating that 67.5% of countries have provisions on health or health care).
36 See Roosevelt, Four Freedoms, supra note 25.
right to earn enough to provide adequate food, clothing, and recreation; the right to a “decent home”; the rights “to adequate medical care and the opportunity . . . to enjoy good health”; “the right to a good education”; and the right to protection from economic insecurity in case of “old age, sickness . . . and unemployment.”\(^{37}\) Finally, the Declaration reflects the obligations of the members of the United Nations, as spelled out in the U.N. Charter, to create “conditions of stability and well-being which are necessary for peaceful and friendly relations among nations” by promoting “higher standards of living, full employment, and conditions of economic and social progress.”\(^{38}\)

The Declaration is a political commitment of the U.N. members, and importantly, is understood as the U.N. General Assembly’s authoritative interpretation of the Charter.\(^{39}\) As such, “the Declaration has considerable indirect legal effect, and it is regarded by the Assembly and by some jurists as part of the ‘law of the United Nations.’”\(^{40}\) Additionally, since 1948, the Declaration has been implemented in a series of international human rights treaties, which impose legal obligations upon the national governments that choose to ratify them. The U.N. General Assembly adopted the ICESCR and the ICCPR in 1966, and these treaties currently have 160 and 167 state parties respectively.\(^{41}\) These two treaties, together with the Universal Decla-

\(^{37}\) Franklin D. Roosevelt, President of the United States, Address to the Congress of the United States (Jan. 11, 1944), in 90 Cong. Rec. 54, 57 (1944); see UDHR, supra note 1, art. 23, para. 3 (“the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity”), art. 24 (“the right to rest and leisure”), art. 25, para. 1 (“the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”), art. 26, paras. 1–2 (the right to education “directed to the full development of the human personality”).

\(^{38}\) U.N. Charter art. 55(a).

\(^{39}\) BROWNlie & GOODWIN-Gill, supra note 14, at 23 (stating that although the Declaration is not a legally binding instrument, some of its provisions reflect international customary law or the general principles of law).

\(^{40}\) Id.

ration and Articles 55 and 56 of the U.N. Charter, compose what is commonly called the International Bill of Human Rights.\(^4^2\)

The ICCPR recognizes human rights such as the right to life, the prohibitions against torture and slavery, and the rights to privacy, equality before the courts, freedom of association, freedom of expression, and freedom of religion.\(^4^3\) Most of these rights are also enshrined in the United States Constitution, and the United States has ratified the ICCPR largely limiting the scope of the treaty to the protections already provided in domestic law.\(^4^4\) The ICESCR recognizes human rights such as the rights to decent work, health, education, housing, social security, and an adequate standard of living.\(^4^5\) Few of these rights (if any) are recognized in the United States Constitution, and the United States has not ratified this treaty.\(^4^6\) Additional international human rights treaties address the human rights concerns of specific groups, such as women, children, migrant workers, and people with disabilities, or specific human rights issues, such as racial discrimination or torture.\(^4^7\)

The United Nations has two systems for monitoring progress on the implementation of international human rights in the world: the Charter-based bodies and the treaty-based bodies.\(^4^8\) The Charter-based bodies are created under the U.N. Charter and include the Human Rights Council (replacing the Commission on Human Rights in 2006) and the Special Procedures created by the Council. They include working groups, special rapporteurs, and independent experts with mandates to address specific human rights, countries, or

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42 Henry Shue, Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy 175 n.1 (1st ed. 1980). Shue also includes the Optional Protocols to the ICCPR and the ICESCR in the International Bill of Human Rights. Id.

43 See ICCPR, supra note 6, arts. 6–27.

44 See Alston, Putting ESC Rights Back on the Agenda, supra note 5, at 120 (stating that the more traditional civil and political rights can be traced to the U.S. Constitution and therefore “their importance is almost never challenged in the United States.”).

45 See ICESCR, supra note 6, arts. 6–15.

46 See Alston, Putting ESC Rights Back on the Agenda, supra note 5, at 120 (most economic and social rights have no counterpart in the U.S. Constitution).


groups of people. As a member of the United Nations, the United States government has obligations to implement the economic and social rights guaranteed in the U.N. Charter and set out in the Universal Declaration of Human Rights, and its progress in this regard is monitored by these Charter-based bodies.

The treaty-based bodies monitor the progress that the state parties to the treaties make in implementing the rights in the treaties. Only the countries that have ratified the specific treaty, however, are subject to supervision by the respective committee. The United States is not a party to the ICESCR, and therefore does not report to the Committee on Economic, Social, and Cultural Rights. As a result, the primary international supervision of the United States government for its economic and social rights obligations is via the mechanisms of the Charter-based bodies.

In sum, international economic and social rights are relevant in the United States despite the failure of the United States to ratify the ICESCR. First, the United States has signed the ICESCR and therefore has some obligations for economic and social rights in that treaty. As a signatory, the United States is obliged to refrain from acts that would defeat the object and purpose of a treaty. Additionally, some economic and social rights may be addressed by leveraging these issues under the equality and nondiscrimination provisions of the ICCPR and the ICERD, which the United States has ratified.

50 See Kaufman & Ward, supra note 15, at 263.
51 See id. at 262.
52 See, e.g., ICCPR, supra note 6, art. 40 (stating that parties to the ICCPR undertake to submit reports on measures they have adopted to implement the rights in the ICCPR and on the progress in enjoyment of these rights).
54 See Kaufman, Framing ESC Rights, supra note 18, at 413; see also Alston, Putting ESC Rights Back on the Agenda, supra note 5, at 129 (indicating that when
Further, the U.N. Human Rights Council and the U.N. Special Procedures monitor the obligations of the United States government for economic and social rights arising under the U.N. Charter and the Universal Declaration of Human Rights. Finally, regardless of the position of the federal government, governments at the sub-national level are turning to international human rights frameworks, including economic and social rights, to guide their policy-making and programming. While the U.S. Senate has delayed action on these vitally important rights for decades, other governmental entities in the country are moving forward to implement the vision of a just society founded on respect for the equal dignity of every human being that is enshrined in the holistic framework of the Universal Declaration of Human Rights.

III. National-Level Implementation of Economic and Social Rights

Over the past decade, the Charter-based bodies have had several opportunities to engage with the national government on its record with respect to implementing economic and social rights. The two primary mechanisms for this engagement have been the Universal Periodic Review before the U.N. Human Rights Council and the missions of the special rapporteurs and independent experts. The fact that the United States government has participated in this international supervision of its implementation of economic and social rights itself indicates to some extent that it recognizes that it has some obligations for these rights. While there is still a long way to go to get back to the 1940s and the four freedoms envisioned and enshrined in the Universal Declaration, evidence from the past decade shows that the situation is also a long way from the 1980s when the U.S. government refused to recognize that economic and social rights are “human rights” at all.\(^{55}\)

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A. Universal Periodic Review Before the United Nations Human Rights Council

In 2006, the United Nations General Assembly established the Human Rights Council and mandated that the Council undertake a universal periodic review “of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States.”\(^56\) Pursuant to this mandate, the Council established the Universal Periodic Review mechanism under which all U.N. members must report to the Council every four years on the actions that they have taken to fulfill their human rights obligations arising from the U.N. Charter, the Universal Declaration of Human Rights, and the human rights treaties that they have ratified.\(^57\) Among the principles adopted to guide the Universal Periodic Review is that the procedure should “promote the universality, interdependence, indivisibility and interrelatedness of all human rights.”\(^58\) Accordingly, the Council conducts its review within the holistic human rights framework that includes the full panoply of rights, including economic and social rights.

The United States filed its first report for Universal Periodic Review on August 20, 2010.\(^59\) In preparation for the report, the Obama Administration held consultations with civil society in


\(^{58}\) Id. para. 3(a).

New Orleans, New York City, Albuquerque, El Paso, San Francisco, Berkeley, Detroit, Chicago, Birmingham, and Washington, D.C. Importantly, representatives from the U.S. Departments of Education, Health, Human Services, and Labor, among others, attended these meetings and listened to people express their concerns to the agencies specifically responsible for ensuring their economic and social rights. Sarah Paoletti, senior coordinator of the Universal Periodic Review Project of the United States Human Rights Network, remarked, “These consultations marked the first time the government had gone on the road to hear individuals’ concerns about U.S. human rights obligations and the first time federal agency representatives from both Washington, D.C., and the local or regional offices directly participated in discussion on U.S. human rights obligations.” The consultations are a milestone in the history of human rights in the United States, during which the government has largely conveyed that human rights as relevant only to people in other countries, not to people here in the United States.

Notably, in its report, the United States discusses a full range of rights from the Universal Declaration of Human Rights. The report devotes one of its three sections on specific rights to the area of economic and social rights. This section is composed of ten paragraphs out of the total one hundred paragraphs in the report. It begins with a reference to President Roosevelt’s 1941 “Four Freedoms” speech, specifically mentioning “freedom from want.” This introductory paragraph is followed by one paragraph on education, five paragraphs

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Id. at 270–71.

Id. at 270.

See id. at 270–71 (noting that the participation of government representatives with responsibilities for economic and social rights within the United States was unprecedented as human rights issues are generally the domain of the State Department, which is concerned with the world beyond the United States).

on health, and three paragraphs on housing. Additionally, the section on equality also devotes six paragraphs to discussing equality at work, in housing, and in education. In comparison to the report’s coverage of other rights—two paragraphs on freedom of expression, three on freedom of thought, conscience, and religion, two on freedom of association, and five on political participation—the report indicates no particular preference for civil and political rights over economic and social rights.

The submission of the report was followed by the review before the Human Rights Council in Geneva on November 5, 2010. Human rights scholars and practitioners noted that both the consultations and the report showed “a level of commitment not seen in prior United Nations human rights reviews.” Nonetheless, the report “fell short of its stated promise of serving as ‘a roadmap for our ongoing work within our democratic system to achieve lasting change.’” Despite this positive shift, at the review the government relied largely upon the U.S. Constitution, statutes, and policies, and failed to fully acknowledge the significant gaps between the rights provided in law and the reality on the ground.

Following the November 5th proceeding, the Working Group on the Universal Periodic Review issued a report with 228 recommendations for the United States. On March 8, 2011, the United States filed its response to these recommendations, and then on

68 Id. paras. 67–76.
69 Id. paras. 43–49.
71 See id. paras. 19–21.
72 See id. paras. 22–23.
73 See id. paras. 24–28.
75 Paoletti, supra note 60, at 271.
77 Id. at 271–72.
March 18th, U.S. representatives returned to Geneva to present its position. In the area of economic and social rights, the government accepted a remarkable number of recommendations. Specifically, the government accepted without reservation that it has the following obligations:

- To “promote equal socio-economic as well as education opportunities for all both in law and in fact, regardless of their ethnicity, race, religion, national origin, gender or disability . . .;”
- To take further measures “in the areas of economic and social rights for women and minorities, including providing equal access to decent work and reducing the number of homeless people . . .;”
- To “[c]ontinue its efforts in the domain of access to housing, vital for the realization of several other rights, in order to meet the needs for adequate housing at an affordable price for all segments of the American society . . .;”
- To “[p]ersevere in the strengthening of its aid to development, considered as fundamental, in particular the assistance and relief in case of natural disasters . . ..”

Additionally, the government accepted two other recommendations with some qualification:

- To “[e]nsure the realization of the rights to food and health of all who live in its territory . . .;”
- To “[e]xpand its social protection coverage . . . .”

With respect to the rights to food and health, the government noted that it is not a party to the ICESCR, and accordingly understood the references to these rights to refer to other instruments that

80 Paoletti, supra note 60, at 273.
82 Id. (referring to U.P.R. Working Group Report, supra note 78, para. 92.113).
83 Id. (referring to U.P.R. Working Group Report, supra note 78, para. 92.197).
84 Id. (referring to U.P.R. Working Group Report, supra note 78, para. 92.226).
85 Id. (referring to U.P.R. Working Group Report, supra note 78, para. 92.195).
86 Id. (referring to U.P.R. Working Group Report, supra note 78, para. 92.196).
it has accepted.\textsuperscript{87} It also noted that it understood “that these rights are to be realized progressively.”\textsuperscript{88} With respect to social protection coverage, the government explained that it seeks to improve the safety net that it already provides. Overall, these statements appear to be fairly significant steps forward on economic and social rights—simply because the government recognized that it has obligations for these rights within its own borders. In particular, the government acknowledged that it has an obligation to progressively realize the rights to food and health—and expressed this in terms of “rights.” It also accepted obligations for expanding social protection coverage, meeting the needs for adequate housing, and improving equal access to decent work.

Assistant Secretary Michael Posner of the Bureau of Democracy, Human Rights, and Labor reiterated these commitments on March 24, 2011, at the Annual Meeting of the American Society of International Law. In that speech, Posner stated that “[t]he Obama administration takes a holistic approach to human rights, democracy and development.”\textsuperscript{89} Further, he maintained:

\begin{itemize}
\item We will push back against the fallacy that countries may substitute human rights they like for human rights they dislike, by granting either economic or political rights. To assert that a population is not “ready” for universal rights is to misunderstand the inherent nature of these rights and the basic obligations of government. All Four Freedoms are key to the Obama administration’s approach to human rights, national security and sustainable global prosperity.\textsuperscript{90}
\end{itemize}

By embracing a “holistic approach,” committing to all Four Freedoms, and acknowledging obligations for economic and social rights—including the rights to food and health—the government took significant steps forward.

The government’s new understanding of its obligations for economic and social rights arose in the context of the U.N. Universal Periodic Review under which the record of the United States on implementation of economic and social rights at home was subject to scrutiny. In this sense, the U.N. is monitoring the implementation

\textsuperscript{87} U.S. U.P.R. Response, supra note 79, para. 19 (referring to U.P.R. Working Group Report, supra note 78, para. 92.226).
\textsuperscript{88} Id.
\textsuperscript{89} Posner, supra note 53.
\textsuperscript{90} Id.
of economic and social rights in the United States, and the Universal Periodic Review is providing the opportunity for people in the United States to hold their government accountable for all its human rights obligations under the Universal Declaration of Human Rights. Like the reporting procedure under the ICESCR, the potential effectiveness of the review “clearly lies less in the formal exchange between the Committee [or in this case the Human Rights Council] and the state party and more in the mobilization of domestic political and other forces to participate in monitoring government policies and providing detailed critique . . . of the government’s own assessment of the situation.” 91 Certainly, in this way, the Universal Periodic Review was successful.

B. U.S. Missions of the United Nations Special Procedures 92

The Human Rights Council (and previously the Commission on Human Rights) has also created the Special Procedures to investigate and respond to particular human rights themes and concerns in particular countries. 93 There are currently ten country-specific mandates 94 and thirty-five thematic mandates. 95 Several of the thematic mandates address economic and social rights, including the Special Rapporteurs on the rights to education, health, food, housing, and water, as well as the Independent Expert on extreme poverty. 96

92 This section on the Special Procedures draws upon Gillian MacNaughton, Human Rights Frameworks, Strategies, and Tools for the Poverty Lawyer’s Toolbox, 44 Clearinghouse Rev. 437, 441–43 (2011) [hereinafter MacNaughton, Human Rights Frameworks].
94 See OHCHR, Special Procedures Assumed by the Human Rights Council, Country Mandates (May 1, 2012), http://www.ohchr.org/EN/HRBodies/SP/Pages/Countries.aspx. These are Cambodia, Côte D’Ivoire, Democratic People’s Republic of Korea, Haiti, the Islamic Republic of Iran, Myanmar, the Palestinian territories occupied since 1967, Somalia, Sudan, and the Syrian Arab Republic.
Special Procedures issue annual reports on the status of the enjoyment of the relevant rights globally, consider individual complaints, provide advice to governments, conduct studies on particular countries, and engage in promotional activities to raise awareness about human rights.\textsuperscript{97} Importantly, the Special Procedures must be invited by a state’s government before undertaking a mission to a country to investigate the human rights situation on the ground.\textsuperscript{98}

Over the past decade, a number of thematic Special Procedures with mandates on economic and social rights have undertaken missions to the United States. In 2002, for example, Katarina Tomasevski, the U.N. Special Rapporteur on the Right to Education visited the United States, meeting with stakeholders in the fields of education and human rights in Mississippi, Kansas, New York, and the District of Columbia.\textsuperscript{99} In her U.N. report on the right to education in the United States, Tomasevski concluded, “There is a desperate need for human rights education, as this term tends to be used only with reference to other countries.”\textsuperscript{100} She found that, in the United States, “there is little knowledge of the human right to education, human rights in education or enhancing human rights through education.”\textsuperscript{101} Moreover, she concluded that, “[t]he rule of inverse proportion reigns, and schools and teachers facing the greatest challenge are provided the least support.”\textsuperscript{102}

In 2005, Arjun Sengupta, the Independent Expert on Extreme Poverty undertook a mission to the United States.\textsuperscript{103} In his report, he observed, “Despite the economic wealth of the United States and the efforts of the Government, the poverty rate remains high compared to other rich nations and there is no evidence that the incidence of pov-
erty, and especially extreme poverty, is on the decrease.” Sengupta also concluded that the United States has “no national anti-poverty legislation” but only a limited “patchwork” of laws. Further, he noted that the government had not remedied the “risk of extreme poverty” to vulnerable groups, such as “African Americans, Hispanics, immigrants and women single-headed households.” Important-ly, he concluded that “if the United States adopted a comprehensive national strategy and programmes based on human rights principles it would be possible to reduce poverty and eradicate extreme poverty.”

In 2009, Raquel Rolnick, the Special Rapporteur on the Right to Adequate Housing, undertook a mission to the United States. In her report, she expressed “deep concern about the millions of people living in the United States today who face serious challenges in accessing affordable and adequate housing, issues long faced by the poorest people and today affecting a greater proportion of society.” Rolnick noted that increasing numbers of working families and individuals find themselves living on the streets, in shelters, or in transitional housing with friends and family. In view of the affordable housing crisis, the Special Rapporteur recommended that the government: (1) increase opportunities for dialogue with civil society organizations; (2) put an immediate moratorium on demolition of public housing until one-for-one housing is secured and the right to return is guaranteed to all residents; (3) assign more resources to Section 8 housing vouchers; (4) introduce further measures to prevent foreclosures; and (5) develop constructive alternatives to criminalization of homelessness.

Most recently, Catarina de Albuquerque, the Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation, under-

104 Id. at 2.
105 Id.; id. para. 84.
106 Id. at 2.
107 Id.
109 Id. para. 79.
110 Id.
111 Id. paras. 82, 84, 87, 90, 94–95.
took a mission to the United States in March 2011.\textsuperscript{112} She found that “[t]he United States has aging water and wastewater systems, with decreasing investment in research and development, coupled with an increase in [ ] population.”\textsuperscript{113} Further, she noted that, despite near universal access to water and sanitation in the United States, the poorest and the most marginalized do not enjoy adequate and safe water and sanitation.\textsuperscript{114} Studies in some areas have shown that “water shut-off policies disproportionately impact marginalized persons along race, class and gender.”\textsuperscript{115} Additionally, she noted that the EPA found in its 2010 assessment that “92 per cent of people were served by community water systems that met applicable health-based drinking water standards.”\textsuperscript{116} Among other things, the Special Rapporteur recommended that the United States develop a national water policy and plan of action, as well as make more concerted efforts to reach the poorest segments of the population.\textsuperscript{117}

Like the Universal Periodic Review, visits by the Special Procedures are helpful in raising awareness of human rights among government officials and people affected by the absence of economic and social rights, and in providing a forum to initiate dialogue between the government and civil society on the human rights situation in the country. Further, each visit results in a U.N. report upon which civil society organizations can base further advocacy.\textsuperscript{118} Notably, over the past decade, four Special Procedures on economic and social

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} para. 16.
\item \textit{Id.} paras. 18–19.
\item \textit{Id.} para. 50.
\item \textit{Id.} para. 30.
\item \textit{Id.} para. 88–89.
\end{enumerate}
\end{footnotesize}
rights came on missions to the United States—by invitation of the national government. Just as the government acknowledged its obligations for economic and social rights during the Universal Periodic Review, it has acknowledged these obligations repeatedly by hosting these Special Procedures. Via both mechanisms, the Charter-based bodies are monitoring the implementation of economic and social rights in the United States, and the government is participating in these monitoring processes. There is no doubt that the government could do much more to respect, protect, and fulfill human rights, especially economic and social rights. Nonetheless, the evidence over the last decade indicates that the United States seems to be heading back in the direction of respecting, protecting, and fulfilling the full array of rights set out in the holistic framework of the Universal Declaration of Human Rights.

IV. State-Level Implementation of Economic and Social Rights

A. Human Rights in State Constitutions, Courts, and Legislatures

Implementation of international human rights norms and standards is also possible at the sub-national level. The U.S. Senate has noted that states and localities have a significant role to play in complying with human rights treaty obligations under the United States’ federalist system. Importantly, state constitutions are often more friendly than the Federal Constitution to economic, social, and cultural rights. Most state constitutions assume responsibility for promoting the general welfare of state residents. Further, all state constitutions guarantee a right to public education, and almost one-
third of state constitutions recognize some role for government in promoting and protecting public health.\textsuperscript{123}

State courts also play an important role in the human rights implementation process. Advocates have begun making human rights-based arguments in state courts and are finding state court judges to be increasingly receptive.\textsuperscript{124} The United States Constitution provides that ratified treaties are the “supreme Law of the Land” and are binding on state judges.\textsuperscript{125} Thus, for example, state court judges deciding international child custody disputes must consider both state law and Article 20 of the Hague Convention on the Civil Aspects of International Child abduction in making their decisions.\textsuperscript{126}

State court judges may also turn to human rights treaties for interpretive guidance regardless of whether those treaties have been ratified.\textsuperscript{127} For example, the Missouri Supreme Court cited to the Convention on the Rights of the Child when it struck down the juvenile death penalty, despite the fact that this convention is not binding in the United States.\textsuperscript{128} International human rights treaties can be particularly useful for state jurists as they attempt to analyze the positive rights embedded in state constitutions.\textsuperscript{129} Because the Federal Constitution does not recognize a right to education or the responsibility


\textsuperscript{125} Martha F. Davis, Thinking Globally, Acting Locally: States, Municipalities, and International Human Rights, in BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 258, 276 (Cynthia Soohoo et al. eds., 2008) [hereinafter Davis, Thinking Globally] (citing U.S. Const. art. VI, cl. 2.).

\textsuperscript{126} Serrette, supra note 17, at 239.

\textsuperscript{127} The Opportunity Agenda, supra note 17, at 235 (citing Penny White, Legal, Political, and Ethical Hurdles to Applying International Human Rights Law in the State Courts of the United States (and Arguments for Scaling Them), 71 U. CIN. L. REV. 937, 950–51, 967–69 (2003)).

\textsuperscript{128} Id. at 233 (citing Simmons v. Roper, 112 S.W.3d 397, 411 (Mo. 2003), aff’d, 543 U.S. 551 (2005)).

of government to promote and protect public health, international human rights treaties may be helpful to state jurists as they attempt to define these rights that have no federal analogue.  

The Supreme Court of Appeals of West Virginia, for example, considered the Universal Declaration of Human Rights in its decision to recognize the fundamental right to education.  

State legislatures have also recognized human rights in both foreign and domestic contexts. For example, in the 1970s, many states passed legislation aimed at ending apartheid in South Africa by curtailing private investment in corporations doing business with the regime. Twenty-three states, fourteen counties, and eighty cities enacted divestment legislation, and this local-level activism is widely seen as an important factor in the downfall of the apartheid regime. Further, many states have created human rights commissions that, in addition to ending racial discrimination and promoting equal opportunity, are also working to implement human rights standards at the local level. For example, in 2007, the Washington State Human Rights Commission embarked on a project to address a housing shortage for farm workers in the state. The Commission relied upon human rights principles drawn from the Universal Declaration of Human Rights in addition to the state’s anti-discrimination statute and federal fair housing laws to make its final recommendations.  

State and local agencies also play a valuable role in monitoring the realization of human rights and advancing human rights implementation processes. Indeed, the Vienna Convention on the Law

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130 Id.
131 Pauley v. Kelly, 255 S.E.2d 859, 864 n.5 (W.Va. 1979) (UDHR proclaims “education to be a fundamental right of everyone, at least on this planet”).
132 Davis, Thinking Globally, supra note 125, at 261.
133 See generally, id. In the 1990s, states and cities also attempted to divest in Burma but these efforts were struck down by the United States Supreme Court in Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 373–74 (2000).
134 Kaufman, State and Local Commissions, supra note 121, at 91–92.
135 Id. at 93.
136 Id.
of Treaties recognizes that federal governments may need to delegate some responsibilities for human rights implementation to state and local governments. Specifically, state and local agencies can advance the enjoyment of human rights by educating local communities, using human rights principles in local advocacy work, investigating human rights complaints, and integrating human rights standards into local policy and practice.

These examples demonstrate that U.S. cities and states are involved in implementing human rights in a variety of ways. This article focuses on two examples of human rights implementation at the sub-national level, one by a state legislature and one by a city council.

B. Case Study: The Vermont Legislature Adopts Human Rights Principles

In 2010, the State of Vermont became the first state to use a human rights framework to design a new health care system. Vermont’s human rights-based health care reform efforts began with the Vermont Workers’ Center’s grassroots campaign “Healthcare is a Human Right” that was launched in 2008. The campaign used a human rights framework to mobilize Vermonters to support universal health care and to ensure that human rights principles were incorporated into Vermont health care law. The human rights principles set forth by the campaign were universality, equity, accountability, transparency, and participation. Specifically, the campaign asserted that

138 See id.; see also Vienna Convention on the Law of Treaties, supra note 53, art. 29.
every Vermont resident was entitled to comprehensive, quality health care; that systemic barriers must not prevent people from accessing necessary health care; that the health care system must be transparent in design, efficient in operation, and accountable to the people it serves; and that it was the responsibility of the government to ensure a health care system that satisfies these human rights principles. Vermonters and their legislators found this to be a compelling framework for health care reform.

On May 27, 2010, the Vermont Legislature passed Act 128, incorporating this human rights framework into Vermont’s new health care law. Act 128 created a roadmap for designing and implementing a universal health care system. It also established a health care commission responsible for hiring an independent consultant to design three universal health care plans that each satisfied human rights principles.

Act 128 does not recognize health care as a human right or use the term “human rights.” Nonetheless, it incorporates all five human rights principles promoted by the “Healthcare is a Human Right” campaign. For example, the Act states that it “is the policy of the State of Vermont to ensure universal access to . . . comprehensive, quality health care,” thus recognizing the human rights principle of universality. The Act addresses the principle of equity by stating that “[s]ystemic barriers must not prevent people from accessing healthcare.” By requiring any health care plan to be transparent,
efficient, and accountable to the people, the Act ensures that the principles of transparency and accountability are satisfied. The Act also makes it the responsibility of the state to ensure that Vermonters are able to participate in the design, implementation, and accountability mechanisms of the healthcare system and establishes that it is the government’s responsibility to ensure that the health care system satisfies all these principles.

In 2010, the newly established Vermont Health Care Commission selected Dr. William Hsiao of the Harvard School of Public Health to design the three health care plans. Dr. Hsiao had previously designed Taiwan’s successful single-payer health care system, and he led a team of consultants that included Dr. Jonathan Gruber of MIT, the architect of the Massachusetts health care reform legislation, to design the Vermont reforms. In February 2011, Dr. Hsiao presented three plans for universal health care to the Vermont legislature. The first plan was a government-run single-payer system with a uniform system of payment and a standard benefits package for all Vermonters. The second plan was a “public option” to be administered by the government that would compete with private insurance plans on a health care exchange. The third plan was a public-private single-payer system with a standard benefits package and a uniform payment system. Dr. Hsiao recommended that Vermont adopt the third option.

In the 2011 legislative session, the Vermont Legislature passed Act 48, “An Act Relating to a Universal and Unified Health System”

157 Id. at x.
158 Id. at xi.
159 Id. at xii.
160 Id. at xviii.
that was based in large part upon Dr. Hsiao’s third plan.\textsuperscript{161} It also retained the human rights principles in Act 128.\textsuperscript{162} Act 48 creates a framework for designing and implementing a universal health care system known as Green Mountain Care.\textsuperscript{163} The first step in the implementation process will be the establishment of a health insurance exchange as required under the federal Patient Protection and Affordable Care Act (PPACA) passed by Congress in March 2010.\textsuperscript{164} Under the federal legislation, all states must create health insurance exchanges that will enable consumers to purchase private insurance policies in a transparent marketplace.\textsuperscript{165} Vermonters will begin using this exchange by 2014.\textsuperscript{166}

The second step in the implementation process will be to design the single-payer Green Mountain Care.\textsuperscript{167} Under Act 48, Green Mountain Care must provide “comprehensive, affordable . . . publicly-financed health care coverage for all Vermont residents” as a “public good.”\textsuperscript{168} An independent board is responsible for designing and implementing the plan and is currently working to define the benefits package, create a three-year budget, and determine the financing mechanisms for the new health care system.\textsuperscript{169} In December 2011, the government held a series of public meetings to get feedback from Vermonters on how the new health care system should

\begin{footnotesize}
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\item See Act 48, sec. 1(a), 2011 Vt. Acts & Resolves 239, 240. The language declaring health care to be a “public good” rather than a human right was a compromise reached to avoid a veto of Act 128 by Republican Governor James Douglas in 2010. See McGill, Using Human Rights, supra note 145, at 461.
\end{enumerate}
\end{footnotesize}
be financed. The data from these meetings will be used to develop the new financing system, which will be presented to the Vermont legislature in 2013.

Importantly, the Green Mountain Care Board must comply with Act 48’s human rights principles of universality, equity, transparency, accountability, and participation in the design and implementation of the new system. While many features of Green Mountain Care have not yet been determined, it is clear that human rights principles have already played a key role in the roadmap for health care reform in Vermont. Green Mountain Care will meet the principle of universality by providing “comprehensive, affordable, publicly-financed” health care coverage for all Vermont residents. In order to meet the human rights principle of equity, the system must be both equitable in access and in financing. The Green Mountain Care system will meet the principle of equity in access by providing health care in an “equitable manner” without regard to income, assets, or health status. Act 48 also requires that the Green Mountain Care financing plan be developed consistent with the principles of equity. Further, the Green Mountain Care system will be designed and implemented by an independent board that must report to the Vermont Legislature and the people of Vermont. The independence of the board, along with the requirement that health care financing be transparent, helps to satisfy the transparency and accountability principles. Finally, Act 48 requires that the Green Mountain Care Board pro-


171 Id.


174 Id.


The importance of using human rights principles to guide health care reform was repeatedly demonstrated during the campaign. For example, in the final days before the passage of Act 48, an amendment was added to the bill to exclude undocumented workers from participating in the new health care system.\footnote{Shay Totten, Show Us Your Papers!, Seven Days (May 4, 2011), http://www.7dvt.com/2011/show-us-your-papers.} Campaign organizers reminded Vermonters that human rights are universal and that all people are entitled to health care regardless of immigration status.\footnote{James Haslam, We Are Not Arizona!, Vt. Workers’ Ctr. (Apr. 26, 2011), http://www.workerscenter.org/we_are_not_arizona.} The simplicity and resonance of these human rights principles—already enacted in Act 128 in 2010—enabled the campaign to mobilize Vermonters to pressure the legislature to strip the exclusionary language from the final bill.\footnote{Id.; Anne Galloway, Lawmakers Call for Study of Migrant Worker Health Care, VT Digger (May 3, 2011), http://vtdigger.org/2011/05/03/health-care-conference-committee-hammers-out-details-on-day-one/.}

Nonetheless, there are some concerns regarding whether the Green Mountain Care system will ensure that all Vermonters receive health care as a human right. For example, the universality of Green Mountain Care depends on a waiver and funding from the federal government that have not yet been granted.\footnote{Chris Garofolo, Vt. Lawmakers Push for Health Care Waiver, Brattleboro Reformer (Vt.), Jan. 19, 2011, at 1.} Even if Vermont were to receive the funding and the waiver, it is likely the system would not go into effect until 2017, leaving thousands of Vermonters without health care in the meantime.\footnote{Human Rights Assessment of Act 48, supra note 173, at 1.} Moreover, the fact that Vermonters will be required to purchase private health insurance plans and pay substantial premiums, co-pays, and deductibles during the health insurance exchange phase of the plan does not satisfy the principles of equity in access or financing.\footnote{Id.}

It is not clear when Vermont will be able to implement the universal Green Mountain Care system. The federal legislation allows states to seek waivers from the federal Department of Health and
Human services to operate alternative programs in lieu of the federal health benefit exchange program beginning in the year 2017. Nonetheless, Vermont’s congressional delegation is working toward obtaining a waiver for Vermont by 2014. Once Vermont receives a waiver, the health benefit exchange will be transformed into the universal system of health care. Under Act 48, the universal health care system will go into effect 90 days after Vermont receives the federal waiver.

Despite many challenges, Vermont’s health care reform efforts demonstrate that a human rights framework can be successfully used to craft state-level legislation that promotes the enjoyment of human rights by all. The Vermont example also shows the relevance that international human rights principles may have on state-level law and policy debates regardless of whether the international human rights treaties have been ratified or otherwise recognized at the federal level.

V. Local-Level Implementation of Economic and Social Rights

A. Human Rights Cities

Human rights implementation is also occurring at the municipal level. Dozens of U.S. cities have passed resolutions calling on the United States to ratify the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Other cities have gone further and attempted to implement human rights treaties at the local level. In 2009, the cities of Carrboro and Chapel Hill, North Carolina passed resolutions adopting the Uni-
universal Declaration of Human Rights as guiding principles for city governance.\textsuperscript{191} The same year, the City of Chicago adopted a resolution in support of the United Nations Convention on the Right of the Child (CRC).\textsuperscript{192} The resolution calls upon the city to promote policies and practices that comply with the principles of the CRC.\textsuperscript{193} These resolutions appear to be largely symbolic at the moment. However, they could be used by grassroots advocacy campaigns in the future to press for human rights implementation at the local level.

One of the most well known examples of successful city-level implementation is the CEDAW Ordinance in San Francisco, which was adopted in 1998.\textsuperscript{194} San Francisco’s CEDAW Ordinance obligates all city and county government programs, agencies, and departments to take all necessary measures to prevent all forms of discrimination against all women and girls.\textsuperscript{195} The Ordinance defines discrimination broadly to include policies that have a discriminatory effect on women and girls.\textsuperscript{196} Additionally, the Ordinance requires that all city departments participate in human rights training and that selected city departments undergo a detailed gender analysis to identify discriminatory policies.\textsuperscript{197} To date, a gender analysis of seven city departments has been completed.\textsuperscript{198}

\begin{itemize}
\item \textsuperscript{193} Id. at 9.
\item \textsuperscript{194} Id. at 8, 28.
\item \textsuperscript{195} Id.
\item \textsuperscript{196} Davis, Thinking Globally, supra note 125, at 269.
\item \textsuperscript{197} Id.
\end{itemize}
Each department that has undergone a gender analysis has identified internal policies and practices that have had a discriminatory impact on women and have worked to resolve those issues.\textsuperscript{199} For example, after completing a gender analysis, the Department of Public Works “recognized the need to make specific efforts to recruit women into non-traditional employment positions” within the department.\textsuperscript{200} The gender analysis also made it clear that service delivery decisions often impacted women and men differently.\textsuperscript{201} It revealed, for example, that decisions regarding the number and placement of curb cuts in the sidewalks had a disproportionate impact on women due to the fact that caregivers for the elderly and young children were predominantly women.\textsuperscript{202} An insufficient number of curb cuts made it more difficult for caregivers to navigate city sidewalks while pushing wheel chairs and strollers.\textsuperscript{203} San Francisco’s CEDAW Ordinance demonstrates that local-level human rights implementation can have a positive impact on residents’ quality of life in a variety of unexpected ways.

As enthusiasm for sub-national implementation has grown in the United States, a few municipalities have become part of a human rights movement involving dozens of cities around the globe. The “Human Rights Cities” movement has sprung from the efforts of the People’s Movement for Human Rights Learning, formerly the People’s Decade for Human Rights Education (PDHRE).\textsuperscript{204} The PDHRE asserts that the people of all countries must learn about human rights and human rights frameworks for international human rights laws to be effective.\textsuperscript{205} Once individuals are educated about their human rights, they are better able to assert those rights to make positive change.\textsuperscript{206}

\begin{footnotes}
\item[199] Id. at 5–8.
\item[200] Id. at 5.
\item[201] Id. at 5.
\item[202] Id.
\item[203] Menon, supra note 198, at 5.
\item[205] Marks et al., supra note 204, at 46.
\item[206] See id. at 38.
\end{footnotes}
The PDHRE envisions Human Rights Cities as places where a human rights framework is incorporated into local policies for the purpose of improving the lives of residents.\textsuperscript{207} The process begins with a community-wide dialogue among local residents, activists, policy makers, and local officials for the purpose of educating everyone about human rights.\textsuperscript{208} Through these local dialogues, community members begin to internalize human rights principles and develop a decision-making process that emphasizes transparency, accountability, and equal participation for all.\textsuperscript{209} The educational dialogue culminates in city-wide action plans to implement human rights principles at the local level.\textsuperscript{210} To date, over twenty cities around the world—including three in the United States—have declared themselves to be human rights cities.\textsuperscript{211}

In 2008, Washington, D.C. became the first human rights city in the United States when the city council adopted a human rights city ordinance in celebration of the 60th anniversary of the Universal Declaration of Human Rights.\textsuperscript{212} Since the ordinance was passed, D.C. public schools have begun to incorporate human rights education into the curriculum.\textsuperscript{213} In April 2011, the City of Boston also adopted a resolution declaring itself to be a human rights city.\textsuperscript{214} On September 23, 2011, local activists held a forum to begin to strategize ways to further human rights in Boston.\textsuperscript{215} Perhaps the best example of a human rights city in the United States is the City of Eugene,
which has begun to implement human rights norms and standards at the local level.\textsuperscript{216}

B. Case Study: Eugene, Oregon Becomes a “Human Rights City”

Eugene is a small city with a population of approximately 160,000 people.\textsuperscript{217} Like many cities in the United States, Eugene has had a human rights commission, composed of volunteers appointed by the Eugene City Council, for many years.\textsuperscript{218} Like many “human rights commissions” in the United States, however, the Human Rights Commission in Eugene focused primarily on civil rights, such as eliminating discrimination in employment, housing, and access to city services.\textsuperscript{219}

Because the commission’s work largely focused on civil rights, important economic, social, and cultural rights were left undressed.\textsuperscript{220} Additionally, the focus on intentional discrimination meant that the commission was often reacting to problems rather than working proactively to address issues before they arose.\textsuperscript{221} Further, the ordinance establishing the commission made it difficult for the commission to address policies that had an unintentional discriminatory impact but were not overtly discriminatory.\textsuperscript{222}

\begin{itemize}
\item[\textsuperscript{217}] Id.
\item[\textsuperscript{220}] See History, Hum. RTS. CITY PROJECT, supra note 216.
\item[\textsuperscript{222}] Eugene, Or., Ordinance No. 19732, §2.265 (Nov. 5, 1990), available at http://ceapps.eugene-or.gov/portal/server.pt/gateway/PTARGS_0_0_5848_319_0_43/http%3B/crsrvf02/CMOWebLink/0/doc/368176/Page1.aspx (amending sections 2.013, 2.109, 2.260, 2.265, 2.270, 2.275, 2.280 of the Eugene Code). This
\end{itemize}
To address these issues, in 2007, the commission began exploring ways that it could more fully incorporate international human rights norms and standards into its work and into city government.\textsuperscript{223} The commission launched a “Human Rights City Project” that aimed to: (1) perform research on human rights initiatives in other municipalities; (2) launch a community-wide dialogue on human rights and their relevance to the City of Eugene; and (3) create specific proposals for the city council that would implement human rights at the city level more broadly.\textsuperscript{224} This initiative began when Ken Neubeck, a local resident, read about the San Francisco CEDAW Ordinance.\textsuperscript{225} Neubeck was inspired by this idea and wanted to introduce human rights to Eugene, as well.\textsuperscript{226} He began by inviting WILD, an organization that had played a pivotal role in the San Francisco ordinance, to lead a workshop on human rights implementation at the local level.\textsuperscript{227}

The first major challenge was educating the public and policy makers about international human rights and the benefits that a human rights framework could have on local life.\textsuperscript{228} The commission partnered with local groups to hold a series of events including human rights summits, panel discussions, and workshops, as well as write newspaper articles and participate in radio broadcasts.\textsuperscript{229} The commission’s Human Rights City Sub-Committee also held a series of trainings for commission members, volunteers, and local leaders.\textsuperscript{230} These events gave the commission an opportunity to inform the community about the Universal Declaration of Human Rights and explain how these international human rights principles could positively impact the City of Eugene.\textsuperscript{231}

The city grounded its human rights work on a framework set out in the Declaration.\textsuperscript{232} Although many economic, social, and cultural

\textsuperscript{224} Id.
\textsuperscript{225} U.S. Human Rights Fund, supra note 221, at 95.
\textsuperscript{226} Id.
\textsuperscript{227} Id.
\textsuperscript{228} History, Hum. Rts. City Project, supra note 216.
\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
rights are not recognized in U.S. law, these rights were incorporated into the shared vision of human rights developed by city officials and local residents. The city provided a glossary of human rights definitions on its website and defined human rights as “the basic rights and freedoms to which all humans are entitled . . . such as the right to life and liberty, freedom of expression, and equality before the law; and social, cultural and economic rights, including the rights to participate in culture, the right to food, the right to work and the right to education.”

The community response to the commission’s efforts was quite positive. Indeed, local social justice groups joined the commission to form the Community Coalition for Advancement of Human Rights (CCAHR). The commission and the CCAHR co-sponsored a celebration of the 60th anniversary of the Universal Declaration of Human Rights on December 10, 2008, at which Mayor Kitty Piercy issued an official proclamation declaring Eugene’s commitment to implementing human rights principles at the local level. The Human Rights Commission agreed to sponsor the workshop, and as a result of the workshop and a series of internal discussions, the commission made human rights implementation one of its goals.

In 2009, the city launched the Diversity and Equity Strategic Plan (DESP). The purpose of the DESP was to ensure that human rights and diversity issues were at the forefront of policy discussions across city government. In the introduction to the Plan, City Manager Jon Ruiz wrote that, “diversity and human rights should no longer be viewed as ‘programs’ but as core values integrated into the
very fiber of the organization.” The DESP laid out a detailed five-year plan of action to remove barriers to participation and implement human rights in all city departments. The DESP identified six target areas: leadership; capacity; workforce and work environment; service delivery; communication and engagement; and measurement and accountability. For every target area, the DESP identified a series of “action items” and a detailed plan of action to achieve each goal.

For example, the first action item was to “[e]nsure plan implementation by factoring diversity and human rights issues into city priorities.” The first step to achieving this goal was for each of the six city departments to create its own plan for achieving the DESP goals by the end of the first year. Another action item called on city officials to create a plan to “integrate Human Rights City concepts into city policies and procedures by the end of the second year.”

In order to assess the effectiveness of the various action plans outlined in the DESP, the DESP also required that departments begin using the “Triple-Bottom Line Assessment Tool” (TBL). The TBL measures city policy and procedures based on their impact on social equity, environmental health, and economic prosperity. Social equity is described as “placing priority upon protecting, respecting and fulfilling the full range of universal human rights including civil, political, social, economic and cultural rights.” The TBL goes on to declare the city’s goal of ensuring an “equitable and adequate social system with access to employment, food, housing, [and] clothing . . . .” It asked officials how current or proposed policies and procedures met basic human needs, addressed inequities, and built capacity to advance social equity, among other things.

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241 Id.
242 Id. at 7–29.
243 Id. at 9.
244 City of Eugene, DESP, supra note 239, at 10–24.
245 Id. at 10.
246 Id.
247 Id. at 11.
249 Id.
250 Id. at 2.
251 Id.
252 Id. at 2–4.
vided extensive trainings to officials and city employees on human rights frameworks and how to use the TBL effectively.\textsuperscript{253}

With the Plan and the TBL in place, the city began working to implement human rights at the local level in 2010.\textsuperscript{254} To begin, the city relied on Article 1 of the UDHR.\textsuperscript{255} It states: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”\textsuperscript{256} The city also established a human rights framework to address the means by which it could implement international human rights standards and principles in its operations, including by: (1) “[p]roviding human rights education”; (2) “[b]eing proactive in Human Rights efforts”; (3) “[a]ddressing human rights violations”; (4) “[i]nsuring active public participation”; (5) “[b]eing transparent and open”; and (6) “[b]eing publicly accountable for progress.”\textsuperscript{257}

To implement the framework, The Human Rights and Equity Center, home to the Eugene Human Rights Commission, initiated extensive trainings and human rights events for the Eugene Community.\textsuperscript{258} The Human Rights Commission also created guidelines for city departments to ensure broad public participation.\textsuperscript{259} In line with the goals of broad public participation, the Center also embarked on a “Human Rights Listening Project” in 2011 to explore what local residents thought of the current state of human rights implementation in Eugene and what they wanted the city to focus on.\textsuperscript{260} The Center made a particular effort to reach youth, immigrant communities, and residents who were currently unhoused to explore their opinions and human rights needs.\textsuperscript{261} After completing the listening

\begin{thebibliography}{99}
\item \textsuperscript{253} City of Eugene, Diversity and Equity Strategic Plan: Annual Report Year Two 2 (2011), available at http://www.eugene-or.gov/DocumentCenter/Home/View/517 [hereinafter City of Eugene, DESP Report Year Two].
\item \textsuperscript{255} See Glossary of Terms, supra note 232, at 4.
\item \textsuperscript{256} UDHR, supra note 1, art. 3.
\item \textsuperscript{257} City of Eugene, DESP Report Year Two, supra note 253, at 13.
\item \textsuperscript{258} See id. at 13–14.
\item \textsuperscript{259} See id. at 14.
\item \textsuperscript{261} Id. at 2.
\end{thebibliography}
project, the Center and the Commission made a series of recommendations to the Eugene City Council, including continuing dialogue and education about human rights standards and norms throughout the community and working with community groups, neighborhood associations, and the Sustainability Commission to increase social equity and promote human rights in Eugene.\textsuperscript{262}

One of the most important recommendations made by the Commission was to change the language of the city ordinance that had established the Human Rights Commission to include a broader definition of human rights.\textsuperscript{263} These proposed revisions were approved by the City Council on November 28, 2011.\textsuperscript{264} While the original ordinance had focused on discrimination in employment and housing, as well as civil rights more generally, the new ordinance gives the commission the responsibility for establishing and encouraging programs and policies that “place priority upon protecting, respecting, and fulfilling the full range of universal human rights as enumerated in the [UDHR].”\textsuperscript{265}

Although the ordinance was only recently passed, city departments have already begun to address economic, social, and cultural rights, such as the right to housing, the right to the highest attainable standard of health, and the right to food.\textsuperscript{266} It is too early to

\begin{thebibliography}{99}
\footnotesize

\bibitem{62} Id. at 3–10.
\bibitem{263} Eugene, Or., Ordinance No. 20481, § 2.265 (Nov. 28, 2011), \textit{available at} http://www.eugene-or.gov/DocumentCenter/Home/View/493 (amending sections 2.013, 2.265, 2.270, 2.275, & 2.280 of the Eugene Code). Unlike the previous ordinance, this ordinance recognizes the full range of human rights guaranteed by the Universal Declaration of Human Rights and gives the human rights commission the power to address systemic barriers to achieving these rights.
\bibitem{265} Eugene, Or., Ordinance No. 20481, sec. 2 (Nov. 28, 2011), \textit{available at} http://www.eugene-or.gov/DocumentCenter/Home/View/493 (amending section 2.265(1) of the Eugene Code).
\bibitem{266} Eugene has adopted a number of policies to improve access to public services for Eugene’s homeless residents. See HUGH MASSENGILL & CAROLYN McDERMED, \textit{Project Homeless Connect for Lane County} (2010), \textit{available at} http://www.humanrightscity.com/resources/eugene-human-rights-issues/a-local-eugene-issue--homel.html (details on Project Homeless Connect, a program that provides access to services such as dental, medical, legal, counseling, housing, and assistance with benefits applications for under one roof); U.S. HUMAN RIGHTS FUND, \textit{supra} note 221, at 96 (noting that the Eugene Public Library no longer requires a fixed address to get a library card.
know the impact the expanded human rights ordinance will have on the implementation of economic, social, and cultural rights in the City of Eugene. Nonetheless, Eugene has already come a long way in recognizing the full spectrum of human rights and in attempting to implement them. Rather than asserting that government has no role in ensuring a right to health care or to housing, the city has recognized those rights and is now working on developing means to achieve them for all residents. Admittedly, many economic, social, and cultural rights will be difficult to achieve at the city level. But the fact that Eugene has recognized these rights and is trying whenever possible to achieve them is a significant accomplishment.

Eugene’s success illustrates that the concept of the Human Rights City can have a remarkable impact on local attitudes towards community and human rights. Raquel Wells, the Equity and Human Rights Manager for Eugene, argues that focusing on human rights has created a new space for community conversations: “Diversity for folks here was about pointing out the difference. In a community that is predominantly European American, diversity becomes a narrow and divided framework. The human rights frame seems to be more unifying. It asks, ‘what can we collectively do to make this a better, more responsive place?’”

Eugene also demonstrates how human rights commissions can evolve to tackle human rights issues more broadly. Major cities across the United States have human rights commissions that, despite their name, have tended to focus exclusively on civil rights and particularly on enforcing anti-discrimination laws. Eugene, the Human Rights City, demonstrates how these commissions can be repurposed to address economic, social, and cultural rights as well.

\[\text{http://bit.ly/eugene-4989-1} \text{ (detailing an ordinance recently passed by the Eugene City Council recognizing choice in mental health treatment as a human right); \text{Planning \\& Dev. Dep't, City of Eugene, Food Security Scoping and Resource Plan (2010), available at http://www.eugene-or.gov/DocumentsCenter/Home/View/1087 (outlining the City of Eugene’s recently developed program to study food security issues to ensure that all residents have access to food).}\]

\[\text{Cf. Glossary of Terms, supra note 232 (supporting the fact that Eugene is taking steps to recognize the human rights of people living in its city).}\]

\[\text{U.S. Human Rights Fund, supra note 219, at 96.}\]

\[\text{See Kaufman, State and Local Commissions, supra note 121, at 91.}\]
VI. Conclusion

While the United States was a major proponent of economic and social rights in the 1930s and 1940s, it later denied that economic and social rights were real human rights at all. There is evidence, however, that over the past decade the possibility of a new era for economic and social rights is emerging. In fact, today there are a myriad of modes by which economic and social rights are implemented in the United States. As the United States asserted in August 2010 in its Universal Periodic Review report to the Human Rights Council:

From the UDHR to the ensuing Covenants and beyond, the United States has played a central role in the internationalization of human rights law and institutions. We associate ourselves with the many countries on all continents that are sincerely committed to advancing human rights, and we hope this UPR process will help us to strengthen our own system of human rights protections and encourage others to strengthen their commitments to human rights.

By recommitting to the holistic human rights framework that encompasses all human rights—economic, social, cultural, civil, and political—this administration is taking one step toward fulfilling the commitments the United States government made in the 1940s to people in the United States and around the world. And the Vermont Legislature and City of Eugene cases demonstrate that there is much for sub-national governments to do to embrace this commitment to the International Bill of Rights as well. Thus, despite the failure of the U.S. Senate to approve ratification of the ICESCR, the examples in this article illustrate that governmental entities at the federal, state, and local level already recognize and implement—albeit in nascent stages—international economic and social rights.

270 See Alston, Putting ESC Rights Back on the Agenda, supra note 5, at 121, 134.
Framing Economic, Social, and Cultural Rights at the U.N.

Risa E. Kaufman*

I. Introduction

Domestic social justice advocates understand that economic, social, and cultural rights are inextricable from civil and political rights. Thus, the United States’ failure to ratify core international human rights treaties addressing economic, social, and cultural (ESC) rights has not prevented advocates from engaging the Unit-
ed Nations’ human rights system to frame and promote ESC issues within the United States. Indeed, advocates engage the reporting and review mechanisms for the civil and political rights treaties that the United States has ratified, as well as the more far-reaching U.N. Charter-based mechanisms, to address a broad array of ESC rights concerns. By raising ESC-related issues through the anti-discrimination and equality provisions of ratified treaties and by directly invoking ESC protections through the U.N. Charter-based bodies, advocates illuminate the interrelated nature of rights and raise, on the international stage, domestic human rights concerns related to housing, education, healthcare, and income security, among others.

This essay explores these two U.N.-based advocacy strategies to analyze their impact on framing and promoting ESC rights domestically. Part II examines the strategy whereby advocates leverage the broad definition of discrimination recognized by human rights treaties focusing primarily on civil and political rights to highlight the interrelated nature of rights and address ESC concerns in the United States. Part III examines advocates’ use of U.N. Charter-based mechanisms, particularly the Universal Periodic Review and U.N. Special Procedures, to address ESC-related concerns more directly. Part IV considers the impact and effectiveness of these strategies, recognizing their success and limitations and offering suggestions to deepen their positive effect on promoting ESC rights in the United States.

and purpose of the treaty.”). Specifically, a country that has signed a treaty has an obligation “to refrain from acts which would defeat the object and purpose of a treaty” until it expresses its intention not to become a party. Vienna Convention on the Law of Treaties art. 18, Jan. 27, 1980, 1155 U.N.T.S. 331. While the United States is not a party to the Vienna Convention, it recognizes that many of the Convention’s provisions have become customary international law and has signaled its intention to abide by the principles contained in treaties it has signed. See Vienna Convention on the Law of Treaties, U.S. DEP’T OF STATE, http://www.state.gov/s/l/treaty/faqs/70139.htm (last visited June 9, 2011).

Beyond the scope of this article is an exploration of advocates’ engagement with the Inter-American Human Rights System, which offers complementary protections, to frame and promote ESC rights.

II. Illuminating the Interrelated Nature of Rights Through Treaty-Based Mechanisms

Human rights treaties focusing primarily on civil and political rights offer promising opportunities and tools to address ESC concerns in the United States beyond those offered by domestic anti-discrimination and procedural protections. This section explicates the broad notion of discrimination recognized under the equality and non-discrimination provisions contained in two core civil and political rights treaties ratified by the United States, providing space and opportunities for domestic advocates to underscore the interrelated nature of rights and raise ESC concerns internationally, nationally, and locally.

A. Leveraging a Broad Understanding of Discrimination

A major benefit of the equality and non-discrimination provisions contained in the civil and political rights treaties ratified by the United States is their broad scope. They encompass a wide array of ESC concerns and instances of discrimination not recognized under the United States Constitution that require affirmative measures to remedy and prevent discrimination.

The principles of non-discrimination and equality are cornerstones of the human rights framework. Two provisions within the Universal Declaration of Human Rights (UDHR) provide the basis for these protections. Article 2 of the UDHR states: “Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Significantly, this provision includes property.

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4 This section focuses on the ICCPR and CERD. It should be noted that the United States has ratified the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT], as well, which likewise protects and promotes civil and political rights.
6 Universal Declaration of Human Rights, art. 2, G.A. Res. 217A (III), U.N.
as a prohibited ground of discrimination, which has been recognized as referring to wealth or poverty status.\(^7\) The UDHR also contains an equality provision, Article 7, which states that everyone is entitled to “equal protection of the law.”\(^8\)

Building on the UDHR, the International Covenant on Civil and Political Rights (ICCPR) includes two equality and non-discrimination provisions. Article 2 of the ICCPR requires that states respect and ensure the rights in the Covenant without distinction, on the basis of the same grounds as included in the UDHR.\(^9\) Article 26 of the ICCPR states:

All 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.\(^10\)

The International Covenant on the Elimination of All Forms of Racial Discrimination (CERD) addresses discrimination by protecting against distinctions and exclusions that have the purpose or effect of impairing the enjoyment of human rights or fundamental freedoms.\(^11\) Article 5 of the CERD obligates states parties “to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law . . . .”\(^12\) It goes on to delineate areas in which such discrimination is prohibited, including economic, social, and cultural rights. Specifically, the CERD protects, inter alia:

- The rights to work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration;
- The right to form and join trade unions;

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\(^8\) UDHR, *supra* note 6, art. 7.


\(^10\) *Id.* art. 26.

\(^11\) CERD, *supra* note 3, art. 1, para. 1.

\(^12\) *Id.* art. 5.
• The right to housing;
• The right to public health, medical care, social security, and social services;
• The right to education and training;
• The right to equal participation in cultural activities.\(^{13}\)

The expert committees charged with monitoring compliance and interpreting treaty provisions have read these non-discrimination provisions broadly, recognizing that policies that have disparate impact, but not necessarily discriminatory intent, may violate norms of non-discrimination.\(^{14}\) Specifically, the CERD committee, which monitors compliance with the race treaty and interprets its provisions, has stated that “a distinction is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms.”\(^{15}\) Thus, CERD’s definition includes distributions and exclusions that have an “unjustifiable disparate impact” on the rights and freedoms of specific groups.\(^{16}\)

In interpreting the equality and non-discrimination provisions of Article 26 of the ICCPR, the Human Rights Committee draws on definitions in the CERD and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), defining discrimination as:

Any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.\(^{17}\)

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13 Id.
15 Id.
16 Id.
17 U.N. Human Rights Comm., General Comment No. 18, Non-discrimination, para. 7 (37th Sess., 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 146, U.N. Doc. No. HRI/GEN/1/Rev.6 (May 12, 2003). Gillian MacNaughton suggests that this provision is also a foundation for a positive right to equality that can provide more robust and expansive ESC protections, including a more equal distribution of financing for social protections, including the right to health care. MacNaughton, supra note 7.
Thus, the ICCPR’s equality and non-discrimination provision also covers instances of disparate impact discrimination, extending its protections to many groups who may be disproportionately represented among the poor, including minorities, women, and people with disabilities.

This broad understanding stands in contrast to the U.S. Supreme Court’s interpretation of the Fourteenth Amendment’s Equal Protection Clause, which the Court has read as a narrow protection against intentional discrimination.\(^{18}\) And, while many U.S. laws and regulations appear on their face to offer protection from actions that have discriminatory impact, U.S. Supreme Court jurisprudence has eroded the ability of individuals to enforce these protections.\(^{19}\)

In addition, the anti-discrimination and equality provisions of treaties ratified by the United States require that governments take affirmative measures to remedy discrimination. CERD, for example, requires that states take affirmative measures to eliminate all practices of discrimination by ensuring that all public authorities and public institutions act in conformity with the obligation, and that states review policies and correct or reject laws and regulations that have the effect of creating or perpetuating racial discrimination.\(^{20}\) CERD’s requirement is in contrast to recent U.S. Supreme Court jurisprudence calling into question the ability of the government to affirmatively remedy discrimination.\(^{21}\)

As illustrated in the following section, this broad understanding of and protection against discrimination offers U.S. advocates opportunities to highlight ways in which ESC rights are embedded within civil and political rights and raise a wide array of ESC concerns on the international stage.

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\(^{18}\) Washington v. Davis, 426 U.S. 229, 240 (1976) (holding that “the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose”); Pers. Admin. of Mass. v. Feeney, 442 U.S. 256, 258 (1979) (holding that a plaintiff alleging discrimination in violation of the Equal Protection Clause must prove that the action was “at least in part because of, not merely ‘in spite of,’ its adverse effects upon an identifiable group”).

\(^{19}\) See Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that there is no private right of action for individuals to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act; rather, only intentional acts of discrimination can be the basis of a private law suit).

\(^{20}\) CERD, supra note 3, art. 2, para. 1.

B. Leveraging Opportunities for Engagement

Unable to directly enforce human rights treaties in U.S. courts, human rights advocates nevertheless leverage ICCPR and CERD’s broad approach to equality and non-discrimination to highlight the interrelated and interdependent nature of rights. These advocates draw international, national, and local attention to core ESC concerns. Specifically, by engaging in U.N.-based advocacy through the treaty reporting process, ESC rights advocates take advantage of unique opportunities to engage with international mechanisms and government officials, and push for concrete recommendations around ESC concerns, which can be incorporated into domestic advocacy efforts.

An important obligation that the United States accepts when it ratifies a human rights treaty is periodic reporting to a committee of independent experts. This treaty review process provides civil society actors with an opportunity to document human rights concerns through “shadow reports,” which are submitted to treaty monitoring bodies to supplement the government’s official report and place public pressure on the government to comply with its treaty commitments. In addition, treaty reviews offer advocates opportunities to engage with government officials, particularly through civil society consultations. Advocates can draw upon the concluding observa-


23 See, e.g., ICCPR, supra note 3, art. 40; CERD, supra note 3, art. 9; CAT, supra note 4, art. 19.

tions ultimately issued by the treaty monitoring bodies by submitting observations as persuasive support in administrative and litigation advocacy efforts and by raising general public awareness concerning ESC issues addressed during the course of the review.

Recent examples illustrate this approach. During the 2008 review of the United States for its compliance with the CERD, advocates used the occasion to bring the issue of access to healthcare and racial discrimination to the attention of the CERD Committee. A shadow report filed by a coalition of organizations documented the extent of racial and ethnic health disparities in the United States and the key structural forces underlying the disparities, including residential segregation, access to health insurance and quality care, and the health effects of race-based discrimination. In its Concluding Observations, the CERD Committee noted its concern that a “large number of persons belonging to racial, ethnic and national minorities still remain without health insurance and face numerous obstacles to access to adequate health care and services.” The Committee recommended that the United States:

[A]ddress the persistent health disparities affecting persons belonging to racial, ethnic and national minorities, in particular by eliminating the obstacles that currently prevent or limit their access to adequate health care, such as lack of health insurance, unequal distribution of health care resources, persistent racial discrimination in the provision of health care and poor quality of public health care services.


26 Id. at 13–24.


28 Id.
Similarly, housing advocates submitted a shadow report to the CERD Committee highlighting the epidemic of homelessness and substandard housing in the United States, noting the disproportionate number of African Americans who are homeless and the fact that racial minorities constitute a disproportionate percentage of people living in substandard housing and suffering severe rent burdens. The CERD Committee urged the United States to address these concerns by reducing residential segregation based on race, ethnicity, and national origin. Similarly, noting that a disproportionate number of homeless people in the United States are African American, the Human Rights Committee recommended that the United States bring an end to de facto and “historically generated” racial discrimination.

In the shadow reporting effort surrounding the United States’ 2006 review under the ICCPR, gender advocates raised issues of pay inequity, lack of family support policies, and employment discrimination as a means of highlighting women’s poverty. The Human Rights Committee’s recommendations for the United States included a recommendation that the government provide equality and equal protection for women, particularly in the area of employment.

Advocates have incorporated these observations and recommendations in subsequent advocacy efforts to add authority to their claims. In the litigation context, U.S. advocates recently cited the CERD Committee’s concerns related to disparities in access to healthcare in briefs to the U.S. Supreme Court, supporting federal legislation to reform the U.S. health care system. Two amicus briefs filed by civil and human rights advocates in the Supreme Court litigation concerning the constitutionality of the Patient Protection and Affordable Care Act

31 U.N. Human Rights Comm., supra note 17, para. 3.
cited to the CERD Committee’s Concluding Observations to bolster their assertions that the Act is necessary to promote equal opportunity in the United States and represents an important effort by the United States to abide by its human rights commitments.\textsuperscript{34}

In the non-litigation context, the National Law Center on Homelessness and Poverty submitted a letter in early 2008 to the New Orleans Housing and Human Needs Committee addressing a proposed anti-camping ordinance that would disproportionately affect the homeless. NLCHP drew on the recommendations made by the CERD Committee to lend weight to its argument that the ordinance would have an unfair and disparate impact on displaced African Americans.\textsuperscript{35}

As these examples reflect, through the equality and non-discrimination provisions of core civil and political rights treaties ratified by the United States, advocates are able to raise the profile of ESC concerns and focus international attention on these issues. Moreover, framing ESC issues through the non-discrimination and equality lens has the benefit of showcasing the interrelated and interdependent nature of economic, social, cultural, and political rights,\textsuperscript{36} underscoring that, in order to achieve dignity, equality, and freedom, every person must be able to meet his or her basic needs.


\textsuperscript{35} Letter from the Nat’l Law Ctr. on Homelessness & Poverty et al. to the New Orleans Housing & Human Needs Comm. (Apr. 23, 2008), \textit{available at} \url{http://www.nlchp.org/content/pubs/Letter_to_New_Orleans_Opposing_Anti-camping_Ordinance_April_20081.pdf}

III. Advocates’ Use of United Nations Charter-based Mechanisms

At the U.N. level, advocates are also engaging U.N. Charter-based mechanisms, which monitor countries’ compliance with the full range of rights contained in the UDHR, including ESC rights, to frame and measure more directly the United States’ compliance, notwithstanding its failure to ratify treaties focusing on them specifically. This section explores advocates’ engagement with two such mechanisms: the Universal Periodic Review and Special Procedures.

A. Universal Periodic Review

The Universal Periodic Review (UPR) is a mechanism by which the U.N. Human Rights Council reviews the human rights records of all U.N. member states every four years. A peer-review mechanism created by the U.N. Human Rights Council in 2006, the UPR is intended to provide an opportunity for each country to discuss actions it has taken to fulfill its human rights obligations. The UPR is based on the U.N. Charter, the UDHR, human rights instruments to which the country is a party, and any voluntary pledges and commitments made by countries, including those made when presenting candidacy for the Human Rights Council. In this way, the UPR is intended to “promote the universality, interdependence, indivisibility and interrelatedness of all human rights.”

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37 UDHR, supra note 6, art. 25, para. 1 ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to the security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.").

38 In addition to the treaty-specific monitoring bodies described above, the U.N. human rights system includes bodies created by the U.N. Charter. In particular, the U.N. Human Rights Council is an intergovernmental body comprising forty-seven countries charged with promoting and protecting human rights around the world. It was created in 2006 to replace the U.N. Commission on Human Rights. Among the Council’s monitoring and review mechanisms are the Universal Periodic Review and the appointing of “Special Procedures.” See generally, Background Information on the Human Rights Council, U.N. HUM. RTS. COUNCIL, http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx (last visited June 26, 2012).


40 U.N. Human Rights Council, G.A. Res. 60/251, para. 5(e), U.N. Doc. A/
first UPR took place in November 2010, with remarkable civil society engagement, including the submission of 103 stakeholder reports and involvement in pre- and post-review consultations.\textsuperscript{41} Many of the submissions by civil society addressed core ESC concerns.\textsuperscript{42}

The UPR process required the U.S. government to address ESC issues directly. Noting that the U.S. Constitution does not recognize economic and social rights,\textsuperscript{43} and avoiding acknowledgment of a direct obligation to implement economic and social rights, the United States’ Report, filed in conjunction with its UPR, highlights domestic policy protections and achievements in the areas of education, health, and housing:

[i]n every case, the creation of these protections has reflected a popular sense that the society in which we want to live is one in which each person has the opportunity to live a full and fulfilling life. That begins, but does not end, with the exercise of their human rights.\textsuperscript{44}

In remarks during the review, the United States characterized these domestic policy initiatives as helping to “lay the foundation for the enjoyment of rights.”\textsuperscript{45}

\textsuperscript{41} For a discussion of civil society collaboration and coordination during the United States’ UPR, see Sarah H. Paoletti, \textit{Using the Universal Periodic Review to Advance Human Rights}, 45 Clearinghouse Rev. 268 (2011).


\textsuperscript{44} \textit{Id.}

The United States accepted several ESC-related recommendations resulting from the UPR, including the recommendations that it: promote “equal socio-economic as well as educational opportunities for all both in law and in fact;” ensure “further measures be taken in the areas of economic and social rights for women and minorities;” and address issues in the domain of “access to housing, vital for the realization of several other rights, in order to meet the needs for adequate housing at an affordable price for all segments of the American society.” In accepting the recommendation that the United States ensure the realization of the rights to food and health, the United States noted that it is not a party to the ICESCR, yet recognized that the rights to food and health are contained in other human rights instruments that it has accepted. It noted, too, that the rights are to be realized progressively.

B. U.N. Special Procedures

Special Procedures, another U.N. Charter-based mechanism, are intended to serve as the U.N.’s “eyes and ears” in evaluating and addressing human rights concerns in specific countries or pertaining to particular thematic issues. Special Procedures are either an individual (usually called a Special Rapporteur, Special Representative, or Independent Expert) or a working group with deep subject matter expertise. Each Special Procedure has its own mandate, defined by the resolution that created it. Currently, mandates exist for 33 thematic and 8 country-specific Special Procedures. Thematic mandates cover a broad range of issues, including adequate housing, education,
extreme poverty, and health. Special Procedures base their evaluations on standards drawn from the UDHR and other human rights norms and thus are not limited by a country’s failure to ratify a certain treaty.

In recent years, U.N. experts, including the Special Rapporteur on the right to education, the Independent Expert on the question of human rights and extreme poverty, the Special Rapporteur on the human rights of migrants, the Independent Expert on the human right to water and sanitation, and the Special Rapporteur on the right to adequate housing have all made official visits to the United States. In the course of these visits, U.S. advocates have actively engaged with the experts to address core ESC concerns. Advocates


53 Their core functions include receiving information on specific human rights abuses and sending urgent appeals to governments seeking clarification on the allegations. They also conduct country visits to investigate human rights situations on the ground.


58 Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context, Mission to the United States of America (22 Oct.–8 Nov. 2009), A/HRC/13/20/Add.4 (Feb. 12, 2010) (by Raquel Rolnik) [hereinafter Special Rapporteur on the Right to Adequate Housing].
provide them with information and recommendations, arrange interviews and consultations with victims of human rights violations, and encourage meetings with government officials.59

At the conclusion of their visits, the U.N. experts issue reports detailing achievements and concerns related to ESC rights in the United States. For example, at the conclusion of her 2009 visit to the United States, the Special Rapporteur on the Right to Adequate Housing expressed concern over the growing homeless situation in the United States, the impact of the foreclosure crisis, and the adequacy of subsidized housing.60 The Special Rapporteur on the human right to safe drinking water and sanitation went a step further. Subsequent to issuing her official report after a fact-finding mission to the United States, the Special Rapporteur sent a letter directly to the mayor of Sacramento, California to express concern over city policies that potentially violate the human rights to water and sanitation of people who are homeless.61

IV. Impact

Advocates have achieved notable success through their efforts to engage U.N. mechanisms to frame and promote ESC rights within the United States. Nevertheless, more can be done to realize the full promise offered by the international human rights system. Advocates have been particularly successful using U.N.-based advocacy to mobilize grassroots and civil society more generally around ESC rights issues. For example, in the lead up to the United States’ review by the U.N. Committee on Racial Discrimination, the U.S. Human Rights Network, an alliance of social justice organizations, coordinated a coalition of 400 grassroots and national social justice organizations to draft and submit a 600-page shadow report with chapters addressing ESC concerns, including homelessness, health, education, social security, labor and employment, and the government’s response to

59 Margaret Huang, “Going Global”: Appeals to International and Regional Human Rights Bodies, in Bringing Human Rights Home 235, 241 (Cynthia Soohoo et al. eds. 2009).
60 See Special Rapporteur on the Right to Adequate Housing, supra note 58.
Hurricane Katrina. In addition, the Network organized a delegation of 125 activists to travel to Geneva, Switzerland to observe the U.S. review and lobby the CERD Committee members on their concerns.

Similar civil society mobilization and coordination occurred in the lead up to the United States UPR. Advocacy communities hosted and participated directly in conversations with federal government officials through on-site consultations held in nine cities around the country. At the New York City consultation, for example, advocates discussed issues related to housing, employment and labor, education, and health.

Domestic human rights groups actively coordinate and facilitate visits by U.N. Special Procedures as well. Advocates participate significantly in these visits, arranging civil society consultations and hearings, site visits, and briefing papers on areas of concern in their communities. In conjunction with the visit by the Special Rapporteur on the Right to Adequate Housing, Raquel Rolnik, grassroots advocacy groups created a documentary film, organized site visits and town hall meetings around the country, facilitated meetings with advocates and local public officials, and created a blog reporting on the visit and follow up efforts.


64 See Paoletti, supra note 41.


67 See Mona Tawatao & Colin Bailey, Toward a Human Rights Framework in Homelessness Advocacy: Bringing Clients Face-to-Face with the United Nations, 45 Clearinghouse Rev. 169, 174–75 (2011) (discussing civil society participation in visit with the U.N. Independent Expert on the human right to water and sanitation); Huang, supra note 59, at 241 (discussing civil society participation with independent expert on extreme poverty to focus attention on needs of victims of Hurricane Katrina).

U.N.-based ESC rights advocacy has also been successful in broadening the conversation around ESC rights within the United States, particularly with federal government officials. Housing rights advocates credit their deep involvement with the UPR with “opening the door to discussion [with federal housing officials] about housing as a human right in the United States.”

Recently, advocates have been invited to participate in a roundtable discussion with the State Department about actions it can take on ESC issues at the U.N. Human Rights Council.

Indeed, recent reports and statements by the U.S. government indicate a shift towards openness and acceptance, though limited, of ESC rights in the United States. In a 2012 joint report on the criminalization of homelessness, the U.S. Department of Justice and U.S. Interagency Council on Homelessness note that such policies regarding homelessness may violate both the constitutional and human rights of homeless people. Specifically, the report notes that:

Laws imposing criminal penalties for engaging in necessary life activities when there are no other public options that exist have been found to violate the Eighth Amendment . . . . In addition to violating domestic law, criminalization measures may also violate international human rights law, specifically the Convention Against Torture and the International Covenant on Civil and Political Rights.

In a recent speech to the American Society of International Law, Michael Posner, the Assistant Secretary of State for Democracy, Labor and Human Rights announced that “while the United States is not a party to the [ICESCR], as a signatory, we are committed to not defeating the object and purpose of the treaty.” He proclaimed that “the Obama Administration takes a holistic approach to human rights,” noting that “[t]he United States has taken steps to provide for eco-

70 E-mail from Eric Tars, Dir. of Human Rights & Children’s Rights Programs, Nat’l Law Ctr. on Homelessness & Poverty, to author (Dec. 7, 2011) (on file with author).
72 Posner, Address to the American Society of International Law: The Four Freedoms Turn 70, supra note 1.
nomic, social, and cultural rights, but we understand them in our own way, and, at any given time, we meet them according to our domestic laws." While the speech has been critiqued as offering a constrained and equivocal articulation of ESC rights, it marks a notable shift in the U.S. government’s official articulation and recognition of economic, social, and cultural rights.

Human rights are edging into the U.S. government’s discourse, yet this rhetorical shift also reveals where U.N.-based ESC rights advocacy has fallen short of its promise. There are significant limitations to an advocacy strategy whereby core ESC concerns are framed through the lens of equality and non-discrimination. Namely, such a strategy fails to engage directly with the unique obligations and standards for ESC rights articulated by U.N. human rights treaty bodies.

73 Id.
75 See Alston, supra note 1 (detailing the stance of prior U.S. administrations on ESC rights within the United States).
76 The U.N. Committee on Economic, Social, and Cultural Rights has articulated governments’ responsibility to respect, protect and fulfill economic, social, and cultural rights to mean that states are required to refrain from interfering with the enjoyment of economic and social rights; and take appropriate legislative, administrative, budgetary, judicial and other measures toward the full realization of such rights. U.N. Comm. on Econ., Soc. & Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant), U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter CESCR, General Comment No. 3]. A central concept of ESC treaties is the notion of “progressive realization,” which requires that governments must devote the maximum available resources to ensure progressive realization of all economic, social, and cultural rights as expeditiously and effectively as possible. See G.A. Res. 2200A (XXI), Art. 2(1), A/Res/60/1 (Dec. 16, 1966). The expert committees monitoring treaty implementation have issued a series of general comments and findings that explicate the contents of each of the specific economic, social, and cultural rights, as well. See, e.g., CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), E/C.12/2000/4 (Aug. 11, 2000); CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), E/C.12/1999/5 (May 12, 1999); CESCR, General Comment No. 13: The Right to Education (Art. 13 of the Covenant), E/C.12/1999/10 (Dec. 8, 1999); CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), E/C.12/2002/11 (Jan. 20, 2003); CESCR, General Comment No. 18: The Right to Work (Art. 6 of the Covenant), E/C.12/GC/18 (Feb. 6, 2006); CESCR, General Comment No. 19: The Right to Social Security (Art. 9 of the Covenant), E/C.12/GC/19 (Feb. 4, 2008). The ICESCR contains a non-discrimination provision, as well, obligating states to guarantee the enjoyment of ESC rights without discrimination and to ensure the equal right of men and
and those evolving internationally.\textsuperscript{77} And, as the Posner speech illustrates, even when U.N. Charter-based bodies have “jurisdiction” to monitor the United States’ compliance with ESC protections contained in the UDHR and its other human rights commitments, the United States’ refusal to ratify core ESC rights treaties allows it to avoid direct engagement with explicit standards and obligations related to ESC rights.

Specifically, the core ESC rights treaty, the International Covenant on Economic, Social, and Cultural Rights (ICESCR), requires that states “take steps” to the maximum of their available resources in order to progressively achieve the full realization of economic, social, and cultural rights.\textsuperscript{78} It imposes an obligation to ensure satisfaction of minimum essential levels of all economic, social, and cultural rights.\textsuperscript{79} Although a common critique of ESC rights is that they are non-justiciable and incapable of being enforced,\textsuperscript{80} standards for monitoring and enforcing ESC rights are emerging from nation-

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\textsuperscript{77} See infra note 81.

\textsuperscript{78} The ICESCR states that: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” ICESCR, supra note 1, art. 2, para. 2; see also CRC, supra note 1, art. 4; CRPD, supra note 1, art. 4, para. 2.

\textsuperscript{79} While governments may realize ESC rights progressively, they have an immediate obligation in several respects, including: the immediate obligation of non-discrimination; to “take steps” immediately to ensure that people’s enjoyment of economic and social rights improves over time; and to satisfy certain minimum core obligations, including the right to access to employment, access to minimum essential food, basic shelter housing and sanitation and adequate supply of safe drinking water. CESCR, \textit{General Comment No. 3}, supra note 76, paras. 1, 2, 10. Governments also have an immediate obligation of non-retrogression, which requires that once a particular level of enjoyment of rights has been realized, it should be maintained. See, e.g., \textit{id.} para. 9; \textit{Magdalena Sepulveda, The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights} 129 (2003).

al courts, the treaty body, and regional institutions. Addressing ESC rights concerns through equality and non-discrimination provisions of the ICCPR and CERD circumvents engagement with these emerging standards, as do government officials’ proclamations that the United States addresses ESC concerns by legislative grace, but not as a right.

The challenge for domestic advocates is to translate their advocacy efforts and successes into a more robust understanding and precise articulation of the U.S government’s obligations to protect and promote ESC rights domestically. Advocates can analyze domestic policies put forth by the government as protecting ESC rights in light of the particular standards developed by the treaty bodies, including the Committee on Economic, Social, and Cultural Rights. They should urge the government to set benchmarks and monitor

81 For example, the Constitutional Court of South Africa is developing a socio-economic rights jurisprudence, reviewing claimed violations of the right to housing and health according to a reasonableness standard. In Republic of South Africa & Others v. Grootboom, the Constitutional Court evaluated a government housing program in light of the constitutional right of everyone to have access to adequate housing, concluding that a government program that failed to account for the needs of society’s worst off was unreasonable. Republic of S. Africa & Others v. Grootboom 2001 (46) SA 1 (CC) (S. Afr.), available at www.lrc.co.za/Docs/Judgments/grootboom_cc.pdf; see also Minister for Health v. Treatment Action Campaign 2002 (5) SA 721 (CC) (S. Afr.), available at http://www.saflii.org/za/cases/ZACC/2002/15.html (holding that Government is required “to devise and implement . . . a comprehensive and coordinated programme to realize progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV”); Marius Pieterse, Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience, 26 HUM. RTS. Q. 882 (2004); Eric C. Christiansen, Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court, 38 COLUM. HUM. RTS. L. REV. 321 (2007).

82 The Committee on Economic, Social, and Cultural Rights, for example, interprets the content of treaty provisions through General Comments and Concluding Observations. In addition, the U.N. General Assembly recently adopted the Optional Protocol to the ICESCR, G.A. Res. 63/117, U.N. Doc. A/RES/63/117 (Dec. 10, 2008), which allows the Committee on Economic, Social, and Cultural Rights to receive individual communications and complaints related to economic, social, and cultural rights.

their implementation. In this way, advocates can leverage the growing discourse on ESC rights in the United States and raise awareness of governments’ obligations to take measured, concerted steps to respond to a full range ESC concerns, and thereby affirm and promote the full panoply of universally accepted norms.

V. Conclusion

The United States’ failure to ratify core ESC rights treaties notwithstanding, U.S. advocates are addressing ESC concerns in the United States through the equality and non-discrimination provisions of ratified civil and political rights treaties and engaging U.N. Charter-based bodies, which have a wider purview. These strategies highlight the interdependence and interrelation of economic, social, cultural, civil, and political rights, mobilize grassroots and civil society around ESC issues, and push government officials to recognize and confront ESC concerns. Advocates can leverage the recent attention by U.N. treaty and Charter-based bodies to ESC-related concerns and the Obama Administration’s recent acknowledgement that it is committed to not defeating the object and purpose of the ICESCR by institutionalizing the discourse of ESC rights within the United States and educating policy makers and the public on the substantive content of these rights and governments’ obligations to fulfill them.

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I. Introduction

The United States faces a homelessness crisis of record proportions. Each year, between 1.6 and 3.5 million people experience homelessness, including 1.35 million children.¹ Amid the recent economic downturn and foreclosure crisis, homelessness rates have risen dramatically. In 2010, family homelessness increased by 9%.² Social programs provide little help: only 6% percent of renters—two million low-income families or individuals³—receive some form of housing assistance from the United States’ largest housing assistance pro-

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gram. Furthermore, the waitlists to receive housing assistance are closed in many cities due to a lack of funding and affordable rental homes. A dearth of affordable rental housing coupled with a broken housing assistance system means that millions of families do not have a set place to sleep at night.

The minimal assistance given to low-income people does not result entirely from a lack of federal resources, but rather is partially due to a skewed priority system that disproportionately benefits middle- and upper-income homeowners. As one example, the Internal Revenue Code includes a Mortgage Interest Deduction (MID) that provides homeowners with tax deductions increasing in step with the amount of mortgage interest paid on an owner’s first two properties. The MID effectively provides these homeowners with a subsidy that costs the United States more than $79 billion annually. In contrast, the U.S. budget for all low-income housing programs is only $41 billion.

Despite the lack of housing assistance for those who need it most, the United States has international obligations to safeguard the basic human rights of all its citizens. In 1948, the United States took a leading role in drafting the Universal Declaration of Human Rights, which states that, “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . housing.” The United States has also signed and ratified the International Convention on the Elimination of All Forms

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8 Id.
of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR), which prohibit discrimination in housing and other areas on the basis of race, sex, religion, and other status.\(^1\) The United States has signed, but not ratified, the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides that all States Parties must “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing[,] and housing,” and that States will “take appropriate steps to ensure the realization of this right.”\(^2\)

Under the Obama Administration, the United States has demonstrated a renewed awareness of its human rights commitments in relation to housing. In March 2011, in a response to the UN Human Rights Council’s report regarding human rights in the United States, the United States admitted that the needs of homeless individuals trigger U.S. human rights obligations.\(^3\) Furthermore, a few weeks later, Assistant Secretary of State for Democracy, Human Rights, and Labor Michael Posner stated that the United States would be renewing its commitment to uphold economic, social, and cultural rights.\(^4\) He also emphasized the United States’ commitment to recognizing the human right to housing.\(^5\) Perhaps most significantly, the U.S.


\(^5\) Id.
Interagency Council on Homelessness acknowledged in an April 2012 report that, “In addition to violating domestic law, criminalization [of homelessness] may also violate international human rights law, specifically the Convention Against Torture and the International Covenant on Civil and Political Rights.” To the authors’ knowledge, this admission represents the first time a domestic agency report has ever specifically recognized U.S. practices as potentially violating human rights law.

Recognizing that the United States is bound by human rights obligations is a necessary first step in securing basic economic, social, and cultural rights for U.S. residents. In order to achieve these rights, however, the United States should look to countries that are successfully implementing the human right to housing for guidance. France is one country that has successfully implemented a rights-based approach to housing. In its program, France addresses the seven internationally accepted elements that are needed to realize the right to housing. These seven elements, as codified by the UN, are:

1. Legal security of tenure;
2. Availability of services, materials, facilities, and infrastructure;
3. Affordability;
4. Habitability;
5. Accessibility;
6. Location; and
7. Cultural adequacy.16

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16 UN Comm. on Econ., Soc. & Cultural Rights, General Comment No. 4, The Right to Adequate Housing (Art. 11(1)), para. 8, U.N. Doc. E/1992/23 (Dec. 13, 1991) [hereinafter UN Comm. on Econ., Soc. & Cultural Rights, General Comment No. 4]. The elements are defined as follows:

a. Legal security of tenure. Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure
In a human rights framework, every right creates a correspond-

upon those persons and households currently lacking such protec-
tion, in genuine consultation with affected persons and groups;

b. Availability of services, materials, facilities and infrastructure. An
adequate house must contain certain facilities essential for health,
security, comfort and nutrition. All beneficiaries of the right to
adequate housing should have sustainable access to natural and com-
mon resources, safe drinking water, energy for cooking, heating and
lighting, sanitation and washing facilities, means of food storage,
refuse disposal, site drainage and emergency services;

c. Affordability. Personal or household financial costs associated with
housing should be at such a level that the attainment and satisfac-
tion of other basic needs are not threatened or compromised. Steps
should be taken by States parties to ensure that the percent-
age of housing-related costs is, in general, commensurate with
income levels. States parties should establish housing subsidies for
those unable to obtain affordable housing, as well as forms and lev-
els of housing finance which adequately reflect housing needs. In
accordance with the principle of affordability, tenants should be pro-
tected by appropriate means against unreasonable rent levels or rent
increases. In societies where natural materials constitute the chief
sources of building materials for housing, steps should be taken by
States parties to ensure the availability of such materials;

d. Habitability. Adequate housing must be habitable, in terms of pro-
viding the inhabitants with adequate space and protecting them from
cold, damp, heat, rain, wind or other threats to health, structural
hazards, and disease vectors. The physical safety of occupants must
be guaranteed as well. The Committee encourages States parties to
comprehensively apply the Health Principles of Housing prepared
by WHO which view housing as the environmental factor most fre-
quently associated with conditions for disease in epidemiological
analyses; i.e., inadequate and deficient housing and living condi-
tions are invariably associated with higher mortality and morbidity
rates;

e. Accessibility. Adequate housing must be accessible to those entitled
to it. Disadvantaged groups must be accorded full and sustainable
access to adequate housing resources. Thus, such disadvantaged
troups as the elderly, children, the physically disabled, the termi-
nally ill, HIV-positive individuals, persons with persistent medical
problems, the mentally ill, victims of natural disasters, people living
in disaster-prone areas and other groups should be ensured some
degree of priority consideration in the housing sphere. Both hous-
ing law and policy should take fully into account the special housing
needs of these groups. Within many States parties increasing access
to land by landless or impoverished segments of the society should
constitute a central policy goal. Discernible governmental obliga-
tions need to be developed aiming to substantiate the right of all to
ing duty on the part of the government to respect, protect, and fulfill that right.\textsuperscript{17} Fulfilling the human right to housing does not mean that the government must provide free homes for all its residents. Rather, the government may fulfill this right by encouraging the development of low-cost rental housing, developing housing voucher programs for its low-income residents, creating legal protections for tenants facing eviction, requiring and enforcing the habitability of rental homes, or pursuing myriad other strategies.

Passage of the Enforceable Right to Housing Act (\textit{le Droit au Logement Opposable}, or “DALO”), which was largely the result of a successful grassroots movement in France, strengthened progressive housing measures already in existence while creating the foundation for a holistic housing law framework.\textsuperscript{18} One of DALO’s most impor-
tant provisions is the creation of a legal cause of action for individuals who have been denied the right to housing.\textsuperscript{19} In addition, DALO and subsequent legislation encourage the development of affordable rental homes and public housing through municipal funding and taxation, while prioritizing the involvement of community housing organizations.\textsuperscript{20}

The French model of housing law is particularly compelling to U.S. housing advocates because of the structural parallels between French and U.S. policies and legal systems. While French housing law at first may appear dramatically different from U.S. housing law, a deeper look demonstrates that several elements of France’s successful housing policy are feasible in the United States. Moreover, the movement that produced DALO bears a striking resemblance to the Occupy encampments set up across the country at the time of this article’s conception in late 2011, lending credence to the belief that we could generate the political will for such laws in the United States.

This article seeks to draw parallels between U.S. and French housing law and to illuminate the areas of French housing law that U.S. housing advocates may find informative. Part I provides a brief introduction to the structure of French government and the underpinnings of French housing law. Part II examines the movement that led to the creation of a judicially enforceable right to housing in France and attempts to highlight the key features that made the movement such a success. Part III explores DALO’s procedures for protecting the right to housing. Part IV examines the successes and struggles related to DALO’s implementation. Finally, Part V compares U.S. housing law with French housing law and recommends potential strategies for housing rights advocates in the United States.

II. French Foundations for the Creation of an Enforceable Right to Housing

Any discussion of French housing law must begin with a brief overview of the French system of government and how housing law is situated within that system. In addition, this section provides context to French housing law by highlighting the tension between its two coexisting frameworks: a free-market scheme focused on individ-

\textsuperscript{19} See infra Part III.A.
\textsuperscript{20} See infra Parts III.B, E.
ual property rights and a rights-based scheme focused on providing adequate housing to all French residents.

A. Basic Structure of French Government and Housing Law

Despite the substantive differences between French and U.S. law, the structure of French government is similar to that of U.S. federalism. France is divided into several regions (communes) with broad legal authority. There are approximately 36,860 of these communes in France.\(^{21}\) Each commune is headed by a mayor, elected by members of the local council, who bears responsibility for implementing council decisions and possesses authority to take certain actions on behalf of the commune that have been delegated by the council.\(^{22}\)

Because each commune possesses its own set of regulations governing social housing, French housing law is complex.\(^{23}\) In fact, the trend in recent years has been an expansion of municipal housing authority. From the 1980s to the present, local authorities have consistently received more power and responsibility in regulating housing.\(^{24}\) As a result, dramatic variances have developed in housing policy from commune to commune. Scholar Alan Mallach argues that it is difficult to make any sort of generalization about French housing law because there are literally as many different housing policies as there are communes.\(^{25}\)

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21 Alan Mallach, *Social Inclusion, Fair Share Goals, and Inclusionary Housing, in Inclusionary Housing in International Perspective* 203, 204 (Nico Calavita & Alan Mallach eds., 2010).
23 See Jean-Pierre Schaefer, *Financing Social Housing in France*, *Housing Fin. Int’l*, June 2003, at 27, 27 (stating that, “The decentralisation process initiated in the last twenty years in France is gradually increasing the powers of local authorities in the field of housing, with a finer tuning of regulations and level of subsidies to local markets.”).
24 See id.
B. Free Housing Market, with Safety Net

In addition to a quasi-federalist system, France is also similar to the United States in that it historically has prioritized a free housing market, with an emphasis on promoting urban development rather than providing social housing to all who need it. Following World War II, France devoted itself to urban development, and from the end of the 1950s until the late 1970s, about 2.3 million new housing units were built.

The French government’s focus on increasing individual homeownership provides further evidence of France’s commitment to a free-market housing model. Specifically, a policy was developed in the mid-2000s that gave generous mortgage assistance to potential homeowners. The program was largely successful. From 2000 to 2010, approximately 90,000 French buyers bought property each year, and homeownership rates increased from 41% in 1960 to 56% by 2007. Unfortunately, although opportunities abounded for middle- and upper-income homeowners, the stratification of the housing market meant that quality affordable rental housing remained out of reach for large segments of the French population.

In terms of assistance for tenants, France’s housing assistance program historically was structured around providing individual subsidies to renters. That subsidized housing assistance model remains largely in place today, though on a much larger scale than the United States’ housing assistance program—about 50% of all French ten-

26 See Schaefer, supra note 23 (noting that “the general framework of [French] housing markets is mainly free, thus offering freedom of choice of tenure, type of housing and location.”).


28 Mallach, supra note 21, at 207.

29 Id. at 208.

30 Id.

31 Id. at 209.


33 Schaefer, supra note 23, at 31.
ants receive some sort of individualized rent subsidy, compared to only 6% of renters in the United States. In 2003, the French government supplied more than 10 billion euros in housing subsidies to 5.4 million tenants, averaging approximately 165 euros per month per tenant.

Despite the generous individual rental subsidies, the lack of available units poses a significant problem in France. Particularly in Paris, the rental process is highly competitive, due to a huge demand for a small supply of rental properties. The process by which some landlords choose their tenants illustrates this competition: landlords will invite all potential tenants to see the property at the same time, resulting in hundreds of potential tenants descending on the property at once and competing to rent that particular unit. As scholar Corrine Nativel states, “Like cattle queuing to be slaughtered, prospective tenants are all invited at the same time, bringing their credentials (salary slips, employers’ references, parental financial guarantee, four months’ deposit, and so on), into a tense competitive atmosphere.”

Notwithstanding these challenges, France has prevented homelessness more effectively than the United States and ensured that those who do experience homelessness are able to access housing more quickly. For example, the French government provides a significant amount of temporary housing to homeless individuals; approximately 40% of hostel rooms in Paris are rented by the government as subsidized housing for poor and homeless people. In addition, legal protections are granted to individuals after just five days of squatting, and the only method of evicting these squatters from the property is through the judicial system. From 2005 to 2010, approximately 133,000 or 0.22% of French residents experienced homelessness. By contrast, approximately 1.6 million to 3.5

34 Mallach, supra note 21, at 207.
36 Schaefer, supra note 23, at 31.
37 Nativel, supra note 32, at 164–65.
38 Id. at 165.
39 Id.
40 Id. at 157.
41 Id. at 165.
42 Être sans domicile, avoir des conditions de logement difficiles [Without a Domicile, with Difficult Housing Conditions], Institut national de la statistique et des études économiques [Nat’l Inst. of Statistics & Econ. Studies], http://www.insee.fr/fr/themes/document.asp?ref_id=ip1330 (last visited Nov.
million people (0.5% to 1.1% of the population) experience homelessness each year in the United States.43

C. Housing as a Human Right

While the dominant framework for housing policy consists of support for the free market as described above, France has consistently stated its commitment to housing as a human right in its legislation, constitution, and judicial decisions. The differences in the free market and housing rights paradigms have created tension in French housing law. This section will describe where the rights-based framework is reflected in international and domestic French law, as well as how France’s constitutional court has handled the conflicting frameworks.

1. International Human Rights Basis for the Right to Housing

Like the United States, France is obligated to respect and protect the right to housing vis-à-vis international declarations it has approved and treaties it has ratified.44 In 1948, France played an instrumental role in the UDHR’s adoption.45 The UDHR states that all persons have the right to an adequate standard of living, including housing.46 France also signed and ratified the ICESCR, which came into force in 1973 and recognizes the right to an adequate standard

3, 2011) [hereinafter Without a Domicile, NAT’L INST. OF STATISTICS & ECON. STUDIES].
44 Given that France is a monist state, ratified international treaties trump French domestic laws. See 1958 Const. art. 55.
46 See UDHR, supra note 9, art. 25(1) (providing that, “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”).
of living, including housing.47 Other relevant treaties by which France is bound include the ICCPR48 and the ICERD.49

France’s regional treaty obligations also encompass the human right to housing. The European Union’s Revised Social Charter of 199650 devotes a complete article to the right to housing, requiring parties to undertake measures that promote access to housing of an adequate standard, prevent homelessness, and ensure that housing is affordable for low-income individuals.51 In addition, the Charter of Fundamental Rights of the European Union,52 which was passed

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47 See ICESCR, supra note 11, art. 11(1) (stating that, “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”).

48 See ICCPR, supra note 10, art. 2(1) (providing that, “Each State Party to the present Covenant 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, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

49 See ICERD, supra note 10, art. 5 (stating that, “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . . (e) Economic, social and cultural rights, in particular: . . . (iii) The right to housing . . . .”).


51 ESC, supra note 50, art. 31 (providing that, “With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: 1. to promote access to housing of an adequate standard; 2. to prevent and reduce homelessness with a view to its gradual elimination; [and] 3. to make the price of housing accessible to those without adequate resources.”).

in 2000, reaffirms the human right to housing. As detailed below, a complaint filed pursuant to the Charter of Fundamental Rights was instrumental in securing the enforceable right to housing in France.

2. Domestic Legislative Basis for the Right to Housing

In addition to its international agreements, France has indicated a commitment to housing as a human right domestically. Several housing laws enacted prior to DALO stated that a right to housing existed, including the Quilliot Act of June 22, 1982, the Mermaz Act of July 6, 1989, and the Besson Act of May 31, 1990. The right to housing embodied in these acts, however, was often criticized for lack of enforceability.

53 See Charter of Fundamental Rights, supra note 52 (stating that, “In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.”).


57 See Kyra Olds, The Role of Courts in Making the Right to Housing a Reality Throughout Europe: Lessons from France and the Netherlands, 28 Wis. Int'l L.J. 170, 188–89
The actual mechanisms for obtaining social housing assistance are through France’s social housing network and various subsidized rent programs. France’s social housing system largely consists of the habitations à loyer modéré (“HLM”). The HLM is a government-regulated network of more than 300 local government offices and 340 private housing companies that develop and administer social housing. The rental cost of each unit is controlled by the national government, and the units are only available to households whose income falls below a set limit. Each year, HLM members manage more than four million French properties and build approximately 40,000 new properties. In total, HLM landlords own 17% of all French housing and 40% of the rental housing. Roughly half of these units are owned by private nonprofit social housing companies, while the other half are owned by public agencies. Additionally, a limited number of private owners, independent of the HLM, have contracted with the government to provide their units for public housing. In exchange for renting to the government, owners receive government assistance in developing their properties. This scheme will be discussed further in Part III.

Finally, as mentioned above, France has a subsidy program in place for tenants who need assistance with rent. While the structure of the program is not perfect because of the shortage of rental properties, it is significant that nearly half of all French tenants receive some form of individualized rent subsidy.

3. Constitutional and Jurisprudential Basis for the Right to Housing

The conflict between free-market ideals and the right to housing is perhaps most clearly illuminated by decisions of the Conseil constitutionnel (“Constitutional Council”). The Constitutional Council is

(2010).

58 See Schaefer, supra note 23, at 29.
59 Id.
60 Id.
61 Id.
62 Mallach, supra note 21, at 207.
63 Id.
64 See Loison-Leruste & Quilgars, supra note 27, at 80–81.
65 Id.
66 Mallach, supra note 21, at 207.
a quasi-judicial body that reviews proposed legislation about which there is a question of conformity with the Constitution to ensure its constitutionality prior to implementation.67 Decisions by the Constitutional Council are binding and cannot be appealed.68

The constitutional law principle most relevant to the right to housing is the distinction between rights granting a freedom to act and rights giving access to basic social benefits.69 The former are droits-libertés, or rights requiring no affirmative act by the government (such as the individual right to property).70 The latter, droits-créances, are social principles that require the government to act (such as the individual right to housing).71 Historically, as a doctrinal matter, droits-libertés trumped droits-créances, which essentially meant that if legislation fulfilled social principles but infringed upon droits-libertés, the Constitutional Council would find the legislation unconstitutional.72

In 1971, the Constitutional Council held that all rights found in the French Constitution, including both droits-libertés and droits-créances, should have equal constitutional value.73 This decision allowed Parliament to pass legislation that addressed social principles even if the legislation limited a droit-liberté.74 For example, in 1998, a statute was presented to the Constitutional Council that, in part, allowed the government to request and temporarily seize private property that had been vacant for more than eighteen months.75 The taking of private property contemplated by that section of the statute was justified

68 Id. at 100.
70 Id.
71 Id.
72 See id. at 270.
73 See id. at 269–70; see also Conseil constitutionnel [CC] [Constitutional Court] decision No. 71-44DC, July 16, 1971, J.O. 7114.
74 See Pech, supra note 69, at 271 (noting that Parliament can pass legislation to vindicate social rights even if it has the effect of restricting the exercise of competing fundamental rights, but that “the Constitutional Council does not allow for these limitations to substantially affect [the latter’s] exercise.”).
75 Conseil constitutionnel [CC] [Constitutional Court] decision No. 98-403DC, July 29, 1998, J.O. 11710 [hereinafter Constitutional Court decision No. 98-403DC].
as necessary based on the public interest in relieving the housing crisis. The Constitutional Council upheld the statute, holding that the droit-creance of adequate housing constitutionally limited the droit-liberté of the right to property.

In its 1998 decision, the Constitutional Council arguably eliminated the idea of absolute droits-libertés in favor of a balancing test similar to rational basis, intermediate scrutiny, or strict scrutiny under U.S. constitutional law. The French decision can be seen as symbolic of the balance between the importance of free-market individualism and the realization of social rights. It is important to note, however, that these decisions by the Constitutional Council did not create a justiciable right to social and economic rights as embodied in France’s Constitution. Rather, the decision simply allows the legislature to pass socially progressive laws that in some cases infringe on individual liberty rights. As a result, legislation is still needed to create a cause of action for violations of specific social rights under domestic French law.

The above-described combination of international, statutory, and constitutional obligations and programs laid the groundwork for a right to housing, but came far from achieving it. Despite the progressive decision by the Constitutional Council in 1971, the trajectory of French housing law prior to 2007 seemed to be trending toward an individualistic, free-market approach to housing. Parliament’s decision in 2005 to flatly reject a law extremely similar to DALO that would have created an enforceable right to housing provides evidence of the lack of commitment at that time to housing as a human right.

This is arguably where we stand today in the United States—various policies are in place, but they are inadequately funded, unsuccessfully implemented, and devoid of a legal basis for compelling action. The following section details how these conditions were changed in France, a process that can provide guidance for U.S. housing advocates seeking similar gains.

76 Id. A 1995 decision by the Constitutional Council was the first to hold that the right to decent housing is an objective rising to constitutional significance. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 94-359DC, Jan. 19, 1995, J.O. 1166. That decision rested upon two constitutional bases: the principle of human dignity and the state’s duty to ensure the conditions for a decent existence. Id.

77 See Constitutional Court decision No. 98-403DC, supra note 75.

III. The Grassroots Movement Toward DALO

Advocates’ ability to turn a 2005 defeat into a 2007 victory (i.e., the passage of DALO) was the direct result of a brilliantly organized grassroots movement that took over the French media for most of 2006–07, complemented by a successful international legal strategy. The grassroots movement, which consisted of homeless individuals, housing advocacy organizations, celebrities, students, and other French residents, forced housing issues and homelessness into the national spotlight and succeeded in completely overhauling French housing policy.

A. Grassroots Advocacy and Les Enfants de Don Quichotte

There were two catalyzing events that sparked the 2005–07 grassroots housing movement in France. The first event occurred on August 26, 2005, when a converted six-floor temporary housing building in Paris caught fire, killing seventeen people and injuring thirty. Then, in August 2006, 700 people were brutally evicted by police from an abandoned building that they had occupied since 2003. The media extensively covered both events, and the public was outraged and started to mobilize. Celebrities, activists, and other individuals came together in solidarity with homeless persons, leading demonstrations and hunger strikes in protest of their situation.

Following these two events, activist Augustin Legrand founded Les Enfants de Don Quichotte (“the Children of Don Quixote”), which began to coordinate the activists and structure a cohesive campaign for an enforceable right to housing. The Children of Don Quixote

79 See id. at 188–89.
80 See id. at 187 & n.3.
81 Nativel, supra note 32, at 162.
82 See id.; Loison, supra note 78, at 188.
83 Nativel, supra note 32, at 162.
focused primarily on raising homelessness issues in the media and mobilizing large groups of individuals for protests.\textsuperscript{85}

The Children of Don Quixote began its biggest and most visible campaign in the winter of 2006–07.\textsuperscript{86} In a telling preview of the strategies later employed by the Occupy movement in the United States, the group set up nearly 200 red tents along the popular Canal Saint Martin in Paris both to provide protection for homeless persons from the winter weather and to draw attention to homelessness in Paris.\textsuperscript{87} The media extensively covered the event, and the campaign’s visibility instantly skyrocketed.\textsuperscript{88} Within days, the public joined the demonstrations and began sleeping outside in solidarity with homeless individuals.\textsuperscript{89} The movement quickly spread to other towns and cities in France, including Marseilles, Bordeaux, Lyons, Toulouse, Strasbourg, and Nice.\textsuperscript{90}

In October 2006, with media attention surrounding housing issues growing, the \textit{Jeudi Noir} (“Black Thursday”) also began mobilizing young professionals and students around the lack of rental housing in France.\textsuperscript{91} Their slogan, “fight with confetti for a regulation of the property market,” reflected their organizing tactics.\textsuperscript{92} As mentioned above, many Parisian landlords would require prospective tenants to go through an intensely competitive process in order to acquire a rental spot. Black Thursday took over these gatherings,

\textsuperscript{85} \textit{The Children of Don Quixote in Brief}, \textit{The Children of Don Quixote}, supra note 84.

\textsuperscript{86} Id.

\textsuperscript{87} Loison, supra note 78, at 188; \textit{The Children of Don Quixote in Brief}, \textit{The Children of Don Quixote}, supra note 84; see generally \textit{How to Occupy}, http://howtooccupy.org/ (last visited Dec. 20, 2011).


\textsuperscript{89} Loison, supra note 78, at 188; see also \textit{The Children of Don Quixote in Brief}, \textit{The Children of Don Quixote}, supra note 84.

\textsuperscript{90} Loison, supra note 78, at 189; see also \textit{Des “Don Quichotte” en Province} [Of “Don Quixote” in Province], L’\textit{Express} (Dec. 29, 2006, 1:52 PM), http://www.lexpress.fr/actualite/societe/des-don-quichotte-en-province_462046.html.

\textsuperscript{91} See Nativel, supra note 32, at 164–65.

\textsuperscript{92} Id. at 164.
bringing champagne, DJs, and cameras to video record the landlord’s reaction to their protest.\footnote{Id. at 165.}

Additionally, the Black Thursday began to organize squatting takeovers.\footnote{Id.} Under French law, legal protections for squatters attach after five days of squatting, so the Black Thursday organized groups to discretely occupy buildings for five days.\footnote{Id.} Many individuals were unsuccessful at avoiding detection and were summarily evicted; yet for those squatters who were successful, the owners of the buildings were forced to go through the court system in order to evict them, which often took months.\footnote{Id.} These protests added to the momentum of the housing campaign and helped to ensure another continued source of media coverage.

B. International Legal Advocacy for the Right to Housing

The pressure on the government further intensified in November 2006, when la Fédération Européenne d’Associations Nationales Travaillant avec les Sans-Abri ("FEANTSA," or the European Federation of National Organizations Working with the Homeless) filed a complaint with the European Committee of Social Rights, asking it to find that France had violated Article 31, the right to housing, under the Revised Social Charter.\footnote{European Fed’n of Nat’l Orgs. Working with the Homeless v. France, Complaint No. 39/2006, para. 17 (Eur. Comm. of Soc. Rights, Dec. 5, 2007), available at http://www.escr-net.org/sites/default/files/FEANTSA_v_France_decision_on_the_merits_0.pdf [hereinafter FEANTSA].} FEANTSA alleged that, despite progressive housing laws, France had not adequately worked to reduce its homeless population, that the construction of social housing was not adequate for the number of individuals who needed it, and that France had no coordinated mechanism for allocating social housing or preventing discrimination in access to housing.\footnote{Id.} FEANTSA also contended that a significant number of individuals did not have access to sanitary housing and faced serious health risks due to these conditions.\footnote{Id. paras. 68–69.}

In response, the French government argued that Article 31 of the Charter only required France to “take measures” to provide the
right to housing, but not necessarily to achieve “results.” The government argued that the policies in place under French law in 2006 were adequate to protect the right to housing. The Committee disagreed with the government, finding that France failed to uphold Article 31 of the Charter and noting the dysfunction in local control of French housing regulation. The Committee found that more than one million people lived in substandard conditions and identified a serious lack of national commitment to protecting the right to housing. Furthermore, the Committee observed that the local methods of dealing with housing varied tremendously, and that those methods failed to consistently meet adequate standards. The Committee also highlighted that, in 2006, there was a significant lack of legal redress for tenants who were living in substandard conditions, because often tenants were not aware of their rights or were too intimidated to file suit against their landlord.

Ultimately, the simultaneous Children of Don Quixote and Black Thursday campaigns, the FEANTSA complaint, and the impending 2007 French presidential election put so much pressure on the French government that it could no longer ignore the issue. In December 2006, the French government engaged directly with the Children of Don Quixote to develop legislation enshrining an enforceable right to housing. Discussions began between the organization and the government, and approximately two weeks later, the government announced the introduction of DALO, which created a judicial-

100 Id. para. 18.
101 See id.
102 Id. para. 79. Impressively, DALO was passed before the Committee came out with a decision on the complaint. However, the filing of the complaint, and the results, were vitally important in that they created government impetus to move forward and adopt DALO. See Council of Eur. Comm. of Ministers, Resolution on Collective Complaint No. 39/2006 by the European Federation of National Organisations Working with the Homeless (FEANTSA) Against France, CM/ResChS(2008)8 (2008), available at https://wcd.coe.int/ViewDoc.jsp?id=1318085&Site=CM&BackColorInternet=C3C3C3&BackColorIntrane	t=EDB021&BackColorLogged=F5D383.
103 FEANTSA, supra note 97, para. 78.
104 Id. para. 79.
105 Id. para. 80.
106 See Loison, supra note 78, at 189.
ly enforceable right to housing. The bill passed unanimously on March 6, 2007.

IV. DALO’s Structure and its Implementation

DALO is patterned after similar legislation in Scotland providing for a fundamental right to housing. While building upon the array of French housing policies already in place, DALO marked a shift to a holistic, enforceable model intended to ensure universal enjoyment of the human right to housing, including emergency shelter. DALO—along with its subsequent amendments and the above-described housing laws enacted prior to 2007—addresses all seven elements that the UN Committee on Economic, Social and Cultural Rights identifies as necessary for realizing the human right to housing: security of tenure; availability of services, materials, facilities, and infrastructure; affordability; accessibility; habitability; location; and cultural adequacy. Most importantly, DALO creates a legal cause of action for individuals who have been denied the right to housing, thereby helping to ensure security of tenure and accessibility. DALO also contains measures that buttress preexisting programs encouraging the local creation of public housing, which improves

107 Id.
108 DALO, supra note 18.
111 UN Comm. on Econ., Soc. & Cultural Rights, General Comment No. 4, supra note 16.
112 See DALO, supra note 18, art. 1, art. 9.
affordability, habitability, and location. Therefore, Housing legislation subsequently enacted to expand and amend parts of DALO, including the 2009 Act on Mobilization for Housing and the Fight Against Exclusion, further strives to achieve these elements.

Because DALO and successive French legislation are so expansive, an analysis of French housing law in full is beyond the scope of this article. Instead, the remainder of this section will demonstrate how French law helps to satisfy a few of the elements of the right to housing—primarily legal security of tenure, accessibility, and affordability—while highlighting the major features of the law that can be referenced by housing advocates in the United States. In particular, the following subsections examine the creation of a legal cause of action, the holistic approach embodied by DALO and its progeny, the support contemplated for municipalities in achieving their social housing objectives, and the prioritization of housing advocacy organizations in implementing the right to housing.

A. A Legal Cause of Action

Arguably the most important element of DALO is its creation of a legal cause of action for a broad range of individuals. Unlike the narrow group of American residents who are eligible (but not entitled) to receive housing assistance under U.S. law, French law extends eligibility both to people who are homeless and to those living in uninhabitable locations, and then provides legal entitlement to benefits, addressing issues of legal security of tenure, accessibility, habitability, and affordability. Qualifying individuals include:

- People with priority housing needs, defined as those who, in good faith:
  - Are without housing or shelter;
  - Are threatened with eviction and have no other housing access;
  - Are housed temporarily in a facility or transitional housing;

113 See id. art. 11, art. 20, art. 21, art. 22.
114 See Mobilization for Housing Act, supra note 18. This law was further amended by the Law 2010-1657 of December 29, 2010 on Finances for 2011. See supra note 18 and accompanying text.
- Are housed in premises unfit for habitation or otherwise unhealthy or dangerous;
- Are housed in overcrowded or clearly substandard facilities;
- Have a disability;
- Are the guardian of at least one minor child; or
- Have at least one dependent with a disability.  

- Starting January 1, 2012, people who have applied for social housing, have been waiting for an “abnormally long” amount of time, and have not been offered housing.  

If the above qualifications are met, an individual may file a petition with a local housing mediation committee. The mediation committee evaluates petitions to determine whether a particular individual has priority status and whether he or she qualifies for emergency housing. There are no statutory criteria for determining whether an individual has an emergency housing need; each determination is made on a case-by-case basis.

If the mediation committee decides that the applicant qualifies for emergency housing, his or her case is referred to the department’s prefect. The prefect must find suitable social housing for the applicant within a time period determined by the mediation committee, generally between three and six months. The prefect may choose from designated HLM properties or privately owned government-

116 DALO, supra note 18, art. 7.
117 Loison, supra note 78, at 190; Loison-Leruste & Quilgars, supra note 27, at 85; see also DALO, supra note 18, art. 9.
118 In each French commune, there is a mediation committee. DALO, supra note 18, art. 7. The committee is composed of state representatives, county and municipal representatives, representatives of social housing organizations, and people from tenants’ rights organizations. Id. The committee is similar to an administrative tribunal in the U.S. legal system and may be aided by a housing assistance organization. See id.; Mobilization for Housing Act, supra note 18, art. 75.
119 DALO, supra note 18, art. 7.
121 See Loison-Leruste & Quilgars, supra note 27, at 85–86.
contracted properties. If the applicant refuses offered housing, he or she automatically gives up his or her right to housing.

If a person with an emergency housing need does not receive it within the time period determined by the mediation committee, the individual may appeal to an administrative court. Before January 1, 2012, the only appealable cases were those that were initially deemed “priority” by the mediation committee. Starting January 1, 2012, however, any petitioner may appeal the mediation committee’s decision. Remedies at the administrative level include requiring the prefect to house the petitioner in a certain location or imposing a fine on the government, which is paid to a regional urban development fund.

B. Encouragement of Social Housing Development

The channeling of penalty monies into urban development funds is only one example of how DALO promotes improvement of urban and social housing. In combination with the housing laws that pre- and post-dated it, DALO aims to boost housing in both the public and private spheres in several additional ways. These measures have been instrumental in increasing housing accessibility for low-income tenants.

The main method of encouraging social housing development is through municipal funding and taxation. Importantly, laws in place prior to DALO provide federal funding for municipalities that create social housing, with an emphasis on the use of funds to help people facing “particular social difficulties.” Under DALO, however, municipalities that fail to meet social and emergency housing quotas must pay a special levy. For most municipalities, DALO requires that 20% of all primary residential properties be social housing. Emergency housing quotas vary based on the population of the city. In cities with more than 50,000 inhabitants, there must be at least

122 See id. at 86.
123 Id.
124 Id.
125 Id.
126 Id.
127 DALO, supra note 18, art. 9.
129 DALO, supra note 18, art. 2, art. 11.
130 See id. art. 11.
one emergency accommodation for every 2,000 people.\textsuperscript{131} Municipalities with more than 100,000 inhabitants must have one emergency accommodation for every 1,000 people.\textsuperscript{132} A penalty tax is imposed on municipalities that do not comply with these requirements.\textsuperscript{133} In addition to addressing affordability issues, these policies address location and availability of services, materials, and infrastructure by ensuring affordable housing is available in every jurisdiction.

The ability to achieve DALO’s affordable housing goals is also strengthened by a preexisting program that encourages private owners to contribute to the social housing pool.\textsuperscript{134} Under this mechanism, the government leases a piece of property from a particular owner, and the lease agreement stipulates the maximum rent that may be charged for the unit in order to ensure affordability for potential tenants.\textsuperscript{135} If the owner chooses to lease his or her property to the government for nine years or longer, the government will help defray the cost of improvements to the property, thereby increasing its habitability.\textsuperscript{136}

C. A Holistic Approach to Housing Policy

The legal framework for French housing policy created by DALO and its progeny addresses other elements of the human right to housing that are often not covered by U.S. housing policy, including availability of services, location, and cultural adequacy. For example, a provision adopted as part of the Mobilization for Housing Act requires that specific social services be provided inside emergency shelters to physically or mentally ill homeless people.\textsuperscript{137} In addition to basic shelter, the government must provide an immediate medical and psychological evaluation, food, and allowances for personal hygiene.\textsuperscript{138}

\textsuperscript{131} Id. art. 2.
\textsuperscript{132} Id.
\textsuperscript{133} Id. Importantly, Article 69 of the Mobilization for Housing Act subsequently limited the scope of a municipality’s obligations surrounding emergency housing quotas. See High Comm. on Hous. for Disadvantaged People, 15th Annual Report, supra note 110.
\textsuperscript{135} Id.
\textsuperscript{136} See id.
\textsuperscript{137} Mobilization for Housing Act, supra note 18, art. 73.
\textsuperscript{138} Id.
DALO and its subsequent amendments also focus on improving housing location by ensuring that low-income tenants live in neighborhoods that are not isolated. Toward that end, the Mobilization for Housing Act created a neighborhood revitalization program that targets areas with large percentages of substandard housing. The program works to improve homes, increase social services in the community, and encourage economic growth and commercial activity. By requiring both the improvement of homes and the expansion of social services, the program helps to ensure that new tenants and individuals receiving social housing will have adequate access to state services. Between 2009 and 2016, the program will create 60,000 new private properties and 25,000 new social housing units. A report of the program’s progress is reviewed annually by Parliament.

Notably, certain housing provisions in place prior to DALO complement the latter’s goals by seeking to increase neighborhood diversification, which also results in improved housing locations. Every three years, each municipality must prepare a report for the national government detailing the levels of social diversity within its neighborhoods. These reports are made public, and Parliament reviews a summary report of municipalities’ compliance with diversity and other social housing objectives on a three-year basis.

D. Support for Municipalities that Fail to Meet DALO’s Standards

While DALO imposes demanding standards upon local governments, French housing law in place prior to DALO is structured to provide assistance to cities that are unable to meet social housing requirements. For each municipality that has failed to meet its social housing quotas over a given three-year period, a committee is created to review the challenges that the municipality encountered. That committee is comprised of a representative from the national govern-

139 Id. art. 25.
140 Id.
141 Id.
142 See id.
143 Id.
144 Id.
146 Id.
147 Id. art. L. 302-9-1-1.
ment, the mayor of the municipality, social housing representatives, and members from organizations focused on housing for disadvantaged persons. The committee bears responsibility for developing a report that explains the reasons for the municipality’s failure to achieve its social housing objectives, proposes relevant solutions, and identifies potential opportunities for increasing social housing.

Furthermore, amendments to DALO recognize that the rigid structure of the required programs may not suit every region in France. For example, a provision contained in the Mobilization for Housing Act allows cities to modify or tailor their own social housing programs, as long as they fulfill the basic legal requirements.

E. Participation of Grassroots Organizations and Housing Nonprofits

Finally, one of the most unique aspects of DALO is its utilization of community organizations in nearly every aspect of the law. Some examples include:

- The mediation committee, which includes representatives from social housing organizations and tenants’ rights groups;
- The Monitoring Committee, which oversees DALO’s implementation and includes a vast number of representatives from community and housing organizations;
- The committees tasked with reviewing municipalities that fail to meet social housing requirements, which include members of local housing advocacy organizations; and

148 Id.
149 Id.
150 See Mobilization for Housing Act, supra note 18, art. 28.
151 DALO, supra note 18, art. 7.
152 Id. art. 13. The Monitoring Committee will be discussed in greater depth in Part IVA.
153 Code de la construction et de l’habitation [Building and Housing Code] art. L. 302-9-1-1. As discussed in Part III.D, the law providing for these review committees preceded DALO; however, the role and importance of these committees arguably is heightened in light of the new requirements imposed by DALO.
The ability for homeless people to receive assistance from government-approved housing organizations during the petitioning process.\textsuperscript{154}

Allowing nonprofits and other advocacy groups to play a significant role has the dual benefit of increasing the likelihood that housing policy will be tailored to community needs and taking pressure off the government when it comes to developing housing policy.

V. DALO’s Implementation and Its Challenges

As described above, DALO and its subsequent amendments were intended to create a justiciable right to housing while also improving social housing and social services. Of course, the implementation of any legislation that requires sweeping nationwide change is likely to face practical obstacles.

Fortunately, DALO’s drafters expected that the law would be difficult to implement and established a Monitoring Committee to evaluate the execution of and progress under the new law. This section will examine DALO’s monitoring mechanisms and some of the practical difficulties that DALO has faced during its implementation, including a shortage of social housing and a complicated petition process.

A. DALO’s Monitoring Committee and Report Results

The idea for the creation of a Monitoring Committee was advanced by \textit{Le Haut Comité pour le Logement des Personnes Défavorisées} (the “High Committee on Housing for Disadvantaged People”).\textsuperscript{155} The High Committee on Housing for Disadvantaged People suggested that DALO include a Monitoring Committee to evaluate DALO’s implementation and offer proposals for any necessary changes.\textsuperscript{156} The Monitoring Committee was indeed created and remains the major body overseeing DALO’s implementation.

The Monitoring Committee’s mission is to propose additional measures that implement the right to housing.\textsuperscript{157} The committee

\textsuperscript{154} DALO, supra note 18, art. 7, art. 9.
\textsuperscript{155} See id. art. 13.
\textsuperscript{156} Loison-Leruste & Quilgars, supra note 27, at 86.
\textsuperscript{157} \textit{Le comité de suivi} [The Monitoring Committee], \textit{Haut comité pour le logement des personnes défavorisées} [High Comm. on Hous. for
is headed by the president of the High Committee on Housing for Disadvantaged People and consists of a diverse group of members, including national agency representatives, local authorities, social and private landlords, nonprofit housing organizations, and homeless advocacy groups.\textsuperscript{158} It prepares a yearly report for the President, the Prime Minister, and Parliament.\textsuperscript{159}

In its 2008 report to the government (one year after DALO’s passage), the Monitoring Committee found that DALO was somewhat slow in its implementation. The number of petitions expected to be filed ranged from 80,000 to 100,000, but only 50,600 petitions were actually filed.\textsuperscript{160} Of those petitions, 3,374 complainants were granted housing.\textsuperscript{161} Additionally, the Monitoring Committee found a significant regional difference in the rates of housing requests filed. The Ile-de-France region, including Paris and its suburbs, accounted for the majority of housing applications, and Paris alone accounted for approximately one quarter of all applications.\textsuperscript{162} In other areas, however, there were very low numbers of applications submitted; in more than half the regions, fewer than sixty applications were submitted.\textsuperscript{163}

By the end of December 2010, the Monitoring Committee reported that 179,884 petitions had been filed in France.\textsuperscript{164} Of these, 57,651 petitions were granted,\textsuperscript{165} with 29,543 applicants actually offered housing. Ultimately, 22,420 applicants were successfully permanently housed.\textsuperscript{166} In 2010, there were still significant geographic

\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Loison-Leruste & Quilgars, supra note 27, at 91; Olds, supra note 57, at 191.
\textsuperscript{161} France: Implementation of DALO Reaches Next Step, EUR. FED’N OF NAT’L ORGS. WORKING WITH THE HOMELESS (Dec. 19, 2008), http://www.feantsa.org/code/en/pg.asp?Page=7&pk_id_news=2442 (last visited Nov. 3, 2011). It is unknown whether the remaining complainants were denied by the state or if they were simply ineligible for the program.
\textsuperscript{163} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
differences, with some regions receiving no petitions and Paris receiving approximately 1,000 petitions per month.\textsuperscript{167}

While these numbers demonstrate that a significant amount of housing has been provided to people in need, DALO still has large strides to make. In a 2009 report, the Monitoring Committee pointed out that the number of persons eligible for housing was approximately 600,000.\textsuperscript{168}

B. Challenges to Implementation

1. \textit{Limited Housing Supply}

The biggest challenge to the successful implementation of DALO (and a parallel challenge for any proposed U.S. policy) is the limited availability of social housing units. The drafters of DALO realized that housing supply would pose a problem and included provisions for encouraging the development of social housing, as discussed above. Unfortunately, however, constructing more affordable rental homes and public housing is an expensive and long-term task. The Monitoring Committee has found that the housing budget must increase substantially in order to have enough properties to satisfy DALO’s requirements.\textsuperscript{169} Based on current predictions, an estimated 500,000 new housing units must be built each year in order to ensure the right to housing to all who petition and qualify.\textsuperscript{170}

2. \textit{Lack of Knowledge about DALO}

Another problem with DALO’s implementation is the relatively low number of petitions that have been submitted.\textsuperscript{171} One reason for these low numbers is likely individual lack of knowledge about DALO.\textsuperscript{172} DALO contains no specific requirements for advertising of

\textsuperscript{167} \textit{Id.}


\textsuperscript{169} Loison-Leruste & Quilgars, \textit{supra} note 27, at 86.


\textsuperscript{171} Loison-Leruste & Quilgars, \textit{supra} note 27, at 91.

\textsuperscript{172} \textit{Id.}
the law, and thus the information-spreading process has been limited.\textsuperscript{173} Furthermore, not all government agencies were briefed on the law, and there was little outreach to housing advocacy and other nonprofit organizations.\textsuperscript{174} The nonprofit group \textit{Fondation Abbé Pierre} (“Abbé Pierre Foundation”) partnered with \textit{Secours Catholique} (“Catholic Rescue”) and attempted public outreach independently, sponsoring a bus that traveled throughout France to supply information about DALO.\textsuperscript{175}

Additionally, the petition process is procedurally complex. Although the central government is in charge of DALO’s implementation, requirements for housing petitions vary locally.\textsuperscript{176} Moreover, DALO allows only pre-approved nonprofit organizations to assist individuals with filing petitions.\textsuperscript{177} The government has taken few measures to encourage organizations to become approved, and as a result, few have.\textsuperscript{178} This lack of local assistance combined with a complex procedure has not encouraged petition filing.

3. \textit{Broad Structural Challenges}

A nearly inevitable obstacle in carrying out national legislation is the disparity between national requirements and local community need. As discussed, the obligation to safeguard the right to housing under DALO lies with the central government.\textsuperscript{179} The implementation of DALO, however, largely depends on local entities and small, low-rent housing operators.\textsuperscript{180} Under this scheme, the local entities actually responsible for providing housing are not under a court-enforced mandate to do so.\textsuperscript{181} On the other hand, while the central government is bound by housing obligations, it simply does not have

\begin{footnotesize}
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\item \textsuperscript{173} \textit{Id.} at 92.
\item \textsuperscript{174} \textit{Id}.
\item \textsuperscript{175} \textit{Id}.
\item \textsuperscript{176} \textit{See id}.
\item \textsuperscript{177} DALO, \textit{supra} note 18, art. 7, art. 9.
\item \textsuperscript{178} \textit{See Loison-Leruste & Quilgars, supra} note 27, at 92.
\item \textsuperscript{179} \textit{Id.} at 93.
\item \textsuperscript{180} \textit{See id.}
\item \textsuperscript{181} \textit{See id.} (citing \textit{Fondation Abbé Pierre [Abbé Pierre Found.], Rapport annuel sur le mal-logement en France [Annual Report on Inadequate Housing in France]} (2009)).
\end{enumerate}
\end{footnotesize}
the power to guarantee that housing is provided to all who require it.\textsuperscript{182}

This disparity between obligation and execution has created several obstacles to DALO’s implementation.\textsuperscript{183} In response to these difficulties, however, amendments to DALO have attempted to prioritize local need. As discussed above, a 2009 amendment was passed to allow cities more flexibility in their social housing programs.\textsuperscript{184} Additionally, the incorporation of community voices helps to address local needs.\textsuperscript{185}

VI. Lessons for U.S. Advocates

France’s success in creating and implementing a comprehensive, enforceable right-to-housing scheme serves as an inspiration to housing advocates here in the United States. Although the United States may be years away from that ultimate goal, several useful elements of French law can guide housing advocates in moving toward an enforceable right to housing. This section attempts to draw parallels between French and U.S. housing law and identify areas where U.S. law could be expanded to come closer to ensuring that all persons enjoy the human right to housing. It first gives a brief overview of a few relevant basic similarities and differences between French and U.S. policy. Secondly, it examines mechanisms in the United States that parallel France’s legal cause of action. Thirdly, this section evaluates current affordable renting policies in the United States and identifies methods of expanding the affordable rental housing market in an effort to secure the human right to housing for all. This section concludes with lessons from the grassroots movements in France that helped create the political will for DALO, as well as a discussion of promising counterparts in the United States.

A priority of this section is to encourage advocates to use human rights language and frameworks when pushing for U.S. housing reform. As discussed above, the success of DALO’s passage was

\textsuperscript{182} Id. (citing Fondation Abbé Pierre [Abbé Pierre Found.], Rapport annuel sur le mal-logement en France [Annual Report on Inadequate Housing in France] (2009)).


\textsuperscript{184} See Mobilization for Housing Act, supra note 18, art. 28.

\textsuperscript{185} See supra Part III.E.
helped by France’s longstanding and explicit commitment to housing as a human right in its constitution and its legislation. Historically, the United States rarely has referenced human rights treaties and principles in its legislation, though recent statements from the Department of Housing & Urban Development (HUD) are promising.\textsuperscript{186} Therefore, for purposes of current and future advocacy in the United States, using a human rights framework in pushing for reforms of housing policy will be particularly important.

A. Basic Comparison Between U.S. and French Housing Policy

Before delving into substantive U.S. law, some basic similarities and differences between U.S. and French policy should be drawn. First, like in France, the United States aspires to two oft-competing goals: encouraging economic growth and ensuring that decent, affordable housing is available to all. For the past eighty years, U.S. housing policy has made strides in both areas, but increasingly has prioritized the promotion of homeownership over ensuring the availability of affordable rental accommodations.\textsuperscript{187} Again, a primary example is the $79 billion spent annually on the MID, which disproportionately benefits upper- and middle-income individuals, while only $41 billion is spent annually on housing assistance programs for low-income individuals—the latter amount not even half its historical high in 1978 before the Reagan Administration.\textsuperscript{188}

Secondly, the United States is structurally similar to France. Like in France, the U.S. government enacts sweeping housing policies that quasi-independent states and municipalities are responsible for car-

\textsuperscript{186} For example, the 1949 federal Housing Act stated a goal of suitable housing arrangements for all Americans, but the goal was never transferred into a right. Housing Act of 1949, Pub. L. No. 81-171, § 2, 63 Stat. 413 (1949). For recent developments in U.S. approaches to housing as a human right, see NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, “SIMPLY UNACCEPTABLE,” supra note 3.

\textsuperscript{187} See Danilo Pelletiere, Balanced Housing Policy: Owning and Renting in U.S. Housing Policy, in 2011 ADVOCATES’ GUIDE TO HOUSING & COMMUNITY DEVELOPMENT POLICY, supra note 7, at 21 [hereinafter Pelletiere, Balanced Housing Policy].

rying out. The major difference between these two schemes is that under French law the central government can actually be held responsible for failing to carry out the law. In the United States, there is often no recourse for individuals who receive no help from the government, even though they qualify for housing assistance under U.S. law.

There are also several differences relative to housing law between the United States and France. First, France and the European Union have demonstrated a commitment to human rights—including a rights-based approach to essential social services—that the United States has not. Even before the legal right to housing was enshrined in France, approximately 50% of French tenants received some level of government housing subsidy. By comparison, the United States gives rental subsidies to only 6% of tenants. While the United States has a rhetorical commitment to affordability, its policies often work counter to that goal in a way that would be prevented if housing were viewed as a basic right.

Finally, in terms of demographics, France has a much smaller and more homogenous population than the United States. As of January 1, 2011, France had slightly more than 63 million inhabitants. In France, it is illegal to collect data on race or ethnicity, but it is estimated that approximately 8% of French residents are not ethnically French. By comparison, the United States has more than 300 million inhabitants, over 35% of which are people of color. Given the United States’ historical denial of housing rights to many minori-

189 See Loison-Leruste & Quilgars, supra note 27, at 93.
190 Mallach, supra note 21, at 207.
193 Id.
ties—including a pattern of legal residential segregation within living memory and the effective segregation and continuing disadvantage that minorities face in the housing market today—the impact of these demographic realities cannot be overlooked.  

B. The Legal Cause of Action: Public Housing Assistance Programs

Keeping these similarities and differences in mind, the following sections identify areas where U.S. housing policy could benefit from lessons in French housing policy, and the ways in which the latter could be used in economically viable ways to help realize the human right to housing for all persons in the United States.

The most similar mechanism to a legal cause of action for lack of housing in the United States is through public housing assistance programs. While creating no affirmative right to public housing, statutory language and judicial decisions have established certain due process rights for those receiving federally subsidized housing. Some due process protections adhere in the private market, including the eviction process for renters and the foreclosure process for homeowners. However, the lack of an affirmative, enforceable right to housing continues to enable a chronic shortfall in the availability of affordable units. While these housing assistance programs are a good first step in providing the human right to housing, there are significant shortcomings with the U.S. system, including limited eli-

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gibility for housing assistance, limited recourse for individuals who qualify but do not receive housing assistance, and a demand for housing assistance that far exceeds the supply. This section explores these shortcomings, along with French principles that could be incorporated into existing public housing schemes to address them.

1. **Broaden Housing Assistance Qualifications**

One step toward expanding the human right to housing would be for the United States to adopt France’s policy of allowing a broad range of individuals to qualify for housing assistance. Under U.S. law, two different definitions of homelessness currently exist. The first is a historically very narrow statutory definition used by HUD and other federal agencies, which used to require individuals to essentially be residing in a shelter or on the streets in order to receive housing assistance.\(^{196}\) This definition was expanded with the 2009 reauthorization of the McKinney-Vento Homeless Assistance Act (McKinney-Vento Act) to include, under some circumstances, individuals living doubled up or in motels.\(^{197}\) The second definition is used by the Department of Education (DOE) for youth, and it more broadly includes individuals who are sleeping doubled up or in motels due to a lack of other accommodations.\(^{198}\)

Promisingly, in December 2011, HUD issued final regulations that expand the definition of homelessness and allow more individuals to be eligible for housing assistance through HUD programs.\(^{199}\) The regulations retain parts of the statutory definition but now include some doubled up individuals, individuals in hotels and motels, and individuals in temporary housing.\(^{200}\) Additionally, the definition now encompasses individuals if they face imminent eviction from their primary nighttime residence within fourteen days of applying for temporary housing and have no alternative housing, children covered under the DOE definition of homelessness, and some individuals fleeing from domestic violence.\(^{201}\)

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198 Id. § 11434a(2).
201 Id.
While these developments are certainly on the right track, they still fall short of the French definition of homelessness in several respects. First, unlike French law, HUD’s definition does not address one major element that the UN Committee on Economic, Social and Cultural Rights has identified as necessary for the right to housing: habitability.\textsuperscript{202} The regulation fails to mention a minimum standard of housing for individuals, thus giving virtually no remedy for individuals living in dilapidated or dangerous homes. Secondly, HUD’s definition does not include individuals who have qualified for permanent or temporary housing but have not received such housing for an extended period of time, nor does it offer them any means of redress. Including a mechanism for these individuals to obtain relief is particularly important due to the extensive waiting lists for housing applicants, as discussed below. Finally, even with the 2009 amendments to the McKinney-Vento Act and the 2011 HUD regulations, the definition is complex and piecemeal insofar as it denies benefits to several categories of needy individuals, including those who are facing eviction and might otherwise be permitted to stay in existing housing.

2. \textit{Mechanisms for Obtaining Housing Assistance}

In the United States, the mechanisms for obtaining housing assistance vary greatly depending on geography and individual qualifications. There are, however, several federal programs in place that provide relatively uniform methods for obtaining housing assistance.

The Housing Choice Voucher Program (also known as Section 8 tenant-based assistance) is the federal government’s largest housing assistance program for low-income individuals.\textsuperscript{203} In addition to the Housing Choice Voucher Program, numerous other rental subsidy programs exist, including public housing; project-based Section 8 assistance; and smaller, targeted programs for the disabled, elderly, and rural populations.\textsuperscript{204} These initiatives provide an essential safety net for many people, but all face the same problems as the Hous-

\textsuperscript{202} \textit{See} UN Comm. on Econ., Soc. & Cultural Rights, General Comment No. 4, \textit{supra} note 16.  
\textsuperscript{203} \textit{Nat’l Law Ctr. on Homelessness & Poverty}, “Simply Unacceptable,” \textit{supra} note 3.  
ing Choice Voucher Program: insufficient support and inadequate funding. Because France’s model focuses on rental assistance in the private market as its main method of promoting affordability for renters, this article does as well.

While the basic structure of the Housing Choice Voucher Program has some elements in common with the French system, housing aid provided in France dwarfs that provided in the U.S. Nearly 44% of French tenants, or about 5.05 million people, received some sort of housing assistance in 2010.205 In the United States, only 6% of renters, or two million low-income families, obtain assistance from the Housing Choice Voucher Program.206 The first lesson we should learn from the French is that by committing adequate funding to large-scale measures that address affordable housing needs, the United States could reduce its homelessness rate from the one percent it is today to the less than one percent experienced in France.207

Schematically, the Housing Choice Voucher Program is administered by local housing assistance providers that receive federal funding.208 The Housing Choice Voucher Program is similar to France’s rental subsidy program in that it gives vouchers to individuals who meet specific qualifications. In general, U.S. program recipients must use 30% of their income for housing costs, with the remaining housing costs paid by the voucher.209 Individuals must submit a written application to their local housing authority that contains information such as household income; employer and bank information; and supporting documentation, including birth certificates and tax returns, if


207 See Nat’l Alliance to End Homelessness, supra note 1; U.S. & World Population Clocks, U.S. Census Bureau, supra note 43; Without a Domicile, Nat’l Inst. of Statistics & Econ. Studies, supra note 42.


209 Id.
required by the local housing authority. After receiving and evaluating an individual’s application, the housing authority must provide written notification as to whether that applicant qualifies for housing assistance or not. If the individual qualifies, he or she will be placed on a waiting list, which is often exorbitantly long. If the individual does not qualify, he or she must be notified in writing and may request an informal hearing. Like with the French system, if the individual is offered housing, he or she must accept the offer or forgo receiving assistance at all.

One major problem with the voucher program is that the demand for housing assistance far exceeds the supply. In an effort to target families with the greatest housing need, HUD guidelines state that some individuals may be prioritized on that basis. Unlike DALO’s clear definition of which individuals should be classified as priority, under the Quality Housing and Work Responsibility Act of 1998, local authorities are tasked with setting guidelines establishing which individuals qualify as having a priority need for public housing. As a result, priority guidelines vary greatly from state to state. In California, for example, veterans and active duty service members automatically receive priority at every step of the housing assistance process, whereas in New York City they receive no such preference.


211 Id.


214 Id. Housing Choice Vouchers expire if not used within the initial time period specified by the housing authority, which may not be less than sixty calendar days, plus any extensions granted to a particular applicant. See 24 C.F.R. § 982.303(a)–(b).


217 See How to Apply, Housing Authority of the County of Riverside, http://www.harivco.org/Program/HowtoApply/tabid/69/Default.aspx (last visited Aug. 20, 2012) [hereinafter How to Apply, Housing Authority of the County of Riverside]; Section 8 Priority Codes, N.Y. City Housing
Unfortunately, many states and counties have closed off all waitlists for housing unless an individual satisfies their criteria for “priority,” and even those households must wait multiple years to receive any sort of help. For example, in the county of Riverside, California, veterans and individuals who are over seventy-five years of age are the only groups that may be placed on the waitlist for the Housing Choice Voucher Program.\textsuperscript{218} Furthermore, even if an individual qualifies as priority and is placed on the waitlist, there are approximately 40,000 families already on the waitlist, with a wait time of more than one year.\textsuperscript{219} Thus, in Riverside, the lack of social housing available makes any “priority” label virtually meaningless.

Unlike under French law, U.S. residents who qualify for housing assistance but do not receive it have no recourse against the government. While it is unlikely that in the near future the United States will create or recognize a legal cause of action for failure to provide housing assistance, the French experience shows that such a mechanism can exist without radically undermining the broader free-market system. Moreover, the United States could take several alternative steps to ensure that more people with priority housing needs receive assistance. Such measures might include increasing the number of low-income housing units by revitalizing surplus property for use as affordable or transitional housing, reforming the structure of the MID, and incorporating community voices and housing advocates into the housing assistance process. The following subsections discuss these potential reforms.

3. \textit{Expansion and Creation of Social Housing: Vacant Properties and Title V of the McKinney-Vento Act}

As has been discussed, a shortage of social housing exists in both France and the United States. In order to create more public housing, including shelters, temporary housing units, and social housing units, U.S. advocates should encourage streamlining of the process set forth

\textsuperscript{218} \textit{How to Apply}, \textit{Housing Authority of the County of Riverside}, supra note 217.

\textsuperscript{219} \textit{Affordable Units}, \textit{Housing Authority of the County of Riverside}, http://www.harivco.org/Program/AffordableUnits/tabid/74/Default.aspx (last visited Nov. 10, 2011).
under Title V of the McKinney-Vento Act (Title V). 220 Like the 1998 French law discussed above, which allows the government to identify abandoned property for development into social housing, Title V requires federal agencies to identify any unused, excess, or surplus property that could be converted into housing for homeless individuals. 221 The availability of unused federal property must be announced by HUD in the Federal Register on a quarterly basis. 222 Interested groups, including states, municipalities, and homeless organizations, have sixty days to submit a notice of interest in the property. 223 After their initial notification, the organizations have ninety days to fill out an extensive application to be filed with the Department of Health and Human Services that explains their proposed use of the land. 224 If the application is approved, the General Services Administration works with the organization to close the deal. 225 The properties must be given to the applicants “promptly.” 226 The buildings must be dedicated to assisting homeless persons, although they can be used to provide a range of services, including shelter, meals, counseling, and job training. 227

Title V largely has been a success. Since 1989, approximately 500 pieces of federal property have been transferred to homeless service providers, and 2.4 million homeless people receive some sort of benefit from the program every year. 228 Furthermore, like France’s commitment to involving local and non-governmental organizations (NGOs) in its national housing policy, Title V is one example of the United States prioritizing local and community needs in working to end homelessness.

The program, however, is not perfect. Several reforms could be made in order to streamline the process and ensure that homeless

221 Id. § 11411(a).
222 Id. § 11411(c)(1)(A)−(B).
223 See id. § 11411(d)(1)−(2).
224 See id. § 11411(e)(2).
227 45 C.F.R. § 12a.9(e)(2)(i).
service providers who need property are able to access it. First, as mentioned, homeless service providers have ninety days after submitting a notice of interest in the property to apply for that property. The application requires that the organization—generally a nonprofit with limited resources—explain in great detail the proposed program, including sources of funding, modifications to be made to the property, environmental impact, land use compliance, and historic preservation information.\textsuperscript{229} In many cases, nonprofits do not have the resources available to develop a detailed project proposal in just ninety days. Furthermore, the application process is cumbersome and confusing, which may lead to applications being rejected due to incompleteness or incorrect submission.\textsuperscript{230}

Secondly, at present all federal property must go through the Title V process, including properties that would clearly not be suitable for homeless service providers. Examples include properties that are inaccessible due to national security, contaminated properties, and property inside military facilities.\textsuperscript{231} Requiring these properties to go through the Title V process is cumbersome, expensive, and unnecessary. The United States should reform this element of Title V so that only potentially suitable properties are required to go through the Title V process.

In addition to using vacant federal properties under Title V, advocates should encourage state and local vacant property disposition. The Neighborhood Stabilization Program (NSP) is one initiative in place that provides funding for states and municipal governments to use in the rehabilitation of vacant, foreclosed, and abandoned property.\textsuperscript{232} The program was authorized and funded by the Housing and Economic Recovery Act, which was passed on July 30, 2008.\textsuperscript{233} The NSP has gone through three separate funding rounds and has distributed a total of nearly $7 billion to states and municipalities.\textsuperscript{234}

\textsuperscript{229} 45 C.F.R. § 12a.9(b). Demonstration of local zoning compliance is not mandated, at least where an applicant seeks a lease or permit for a given property. \textit{Id.} § 12a.9(b)(10).


\textsuperscript{231} Foscarinis Statement, supra note 228, at 70.

\textsuperscript{232} Amanda Sheldon Roberts, \textit{Neighborhood Stabilization Program}, in 2011 \textit{Advocates' Guide to Housing & Community Development Policy}, \textit{supra} note 7, at 156.

\textsuperscript{233} \textit{Id.}

\textsuperscript{234} \textit{Id.}
This funding can be used for purchasing and rehabilitating foreclosed homes, demolishing damaged structures, or redeveloping demolished or vacant properties. At least 25% of the funds must be used to assist households with an area median income of 50% or less.

While the NSP is an excellent start to alleviating the housing crisis, the program must be expanded and improved to maximize its effectiveness. Like France, the United States should encourage or require nonprofits to be involved. Fortunately, HUD has officially partnered with a nonprofit organization, the National Community Stabilization Trust, to help communities reclaim their neighborhoods by providing tools for local housing providers to turn foreclosed properties into properties that can be used as affordable rental and purchased homes for families. Advocates should insist on being part of the NSP process and should encourage its growth and development.

Lastly, on the topic of vacant properties, a vast new stock of foreclosed real estate owned (REO) properties now threatens to blight many neighborhoods across the country. Even as the number of homeless families skyrockets, the number of family-less homes does too. The federal government (through Fannie Mae and Freddie Mac) owns 92,000 of these properties and should use them creatively to meet affordable housing needs. As of this writing, the Obama Administration is debating what to do with these properties. A human rights approach would dictate that, in making these decisions:

- A significant percentage, if not all, of the properties should be made affordable to extremely low-income individuals and families, including homeless persons;

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235 Id.
236 Id. at 156–57.
• The disposition of these properties should preserve existing tenancies and prevent displacement of those currently living in REO rental properties;

• The program must ensure that new property owners have the resources necessary to rehabilitate, maintain, and operate the housing, through initiatives like France’s that offer government funding in exchange for a commitment to participate in low-income rental programs; and

• The program should be participatory and work with existing community groups and resources.\(^{240}\)

C. Basic Structural Reforms to Existing Policies Using a Human Rights Framework: The MID

Another potential area for reform is through the MID. As mentioned above, the MID offers significant tax deductions to middle- and high-income homeowners, costing the United States more than $79 billion annually.\(^{241}\) The MID gives homeowners tax deductions equal to the amount of interest they pay for mortgages on their homes.\(^{242}\) If owners have enough income and deductions, their taxable income and taxes owed can be greatly reduced. Currently, interest on up to $1 million in mortgages on first and second homes may be deducted, plus up to $100,000 in home equity loans.\(^{243}\) Because of this structure, the MID provides the biggest rewards for the wealthiest individuals.\(^{244}\) In 2009, approximately thirty-five million taxpayers benefitted from the MID—a number representing approximately 68% of all mortgaged homeowners, but only 22% of taxpayers.\(^{245}\)

The MID is framed as encouraging homeownership for all, but it arguably gives meaningful benefits only to middle- and upper-income individuals.\(^{246}\) Increasing homeownership is an important goal in the United States, but it should be done in a way that proportionately

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\(^{240}\) See REO Comments, *supra* note 238, at 4–7.

\(^{241}\) Pelletiere, *Mortgage Interest Deduction*, *supra* note 7, at 147. By contrast, the United States spends in total approximately $41 billion on all housing programs for low-income renters. *Id.*

\(^{242}\) *Id.* at 145.

\(^{243}\) *Id.*

\(^{244}\) *Id.*

\(^{245}\) *Id.* at 146.

\(^{246}\) *Id.* at 145.
benefits low-income individuals. The MID could be restructured so as to ensure that low-income individuals have the ability to secure homes, without requiring the government to increase spending. Specifically, the MID should be reformed to limit the qualifying mortgage interest amount to less than $1 million.\footnote{See id. Pelletiere notes that, “[O]ne expert panel after the next, from the Obama administration’s President’s National Commission on Fiscal Responsibility and Reform to the George W. Bush administration’s President’s Advisory Panel on Federal Tax Reform to the nonpartisan Congressional Budget Office, have recommended reforming the policy to reduce the amount of the mortgage and the rate of the deduction.” Id. at 147.} The Obama Administration has also suggested capping the deductions of the households with the highest incomes.\footnote{Id. at 145.} The savings from both these reforms should then be redirected to Housing Choice Vouchers or other methods to ensure that families who most need housing assistance are able to obtain it.

Another cost-saving reform that would encourage homeownership among lower-income groups is the use of tax credits instead of tax deductions. Researcher Danilo Pelletiere of the National Low Income Housing Coalition suggests that the MID should be converted into a 20% tax credit that would be given to the first $500,000 borrowed for a mortgage on a principal residence.\footnote{Id. at 147.} Using such tax credits instead of tax deductions would lead to an annual $31.6 billion increase in U.S. revenue, while also lowering taxes for most households with incomes below $75,000.\footnote{Id.} That additional revenue could also be redirected toward expanding Housing Choice Voucher Program subsidies or public housing accommodations.

D. A Holistic Approach to Housing Policy

France has established a highly participatory housing policy model, enabling those with the most involvement in implementing DALO to be part of the decision-making process. From the Monitoring Committee to the local mediation committees ruling on assistance cases, NGOs play a significant role in overseeing DALO’s implementation and developing strategies to address shortcomings.\footnote{See supra Part III.E.} In a similar vein, the Continuum of Care (CoC) is a HUD planning process for homelessness assistance grants that was codified in the
Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009. The CoC paradigm bears some resemblance to the participatory nature of the French model, and it offers a potential outlet for creating change.

The CoC model was conceived in 1994 at the administrative level, and it required community stakeholders to develop a uniform planning process in order to receive HUD funding. Currently, CoCs must create yearly plans for addressing homelessness in their communities. Generally, local government agencies or large nonprofits organize CoCs. The organizers must do a full analysis of homelessness in their community, which involves determining how many people lack adequate housing, what services are available to homeless individuals, what services are missing, and the priority needs of the community. The CoC must submit the proposal to HUD, and McKinney-Vento funding is awarded to a select number of CoCs. Recently, CoCs have been required to coordinate with other local organizations and advocates in developing ten-year plans to end homelessness in their communities. These plans are intended to identify and link the ways in which the community will use McKinney-Vento funding, as well as other HUD-provided financial support (e.g., Section 8 funding, Community Development Block Grant funding, etc.).

The CoC paradigm incorporates several positive elements that reflect human rights law. First, it is an example of a U.S. program on homelessness operating with the explicit objective of ending homelessness. This goal is useful because it requires states and localities to create realistic programs that, if effective, would end homelessness in that community in a given number of years. The CoC is one illustration of a U.S. program that has shifted from operating strictly within a free-market framework into a more holistic, human rights-based framework.

253 Id.
254 Id.
255 Id.
256 Id.
257 See id.
258 Id.
259 Id.
Secondly, the CoC is one of the only government programs where local housing advocates are in leadership positions and can make a difference in increasing federal funding specifically for housing and services for homeless individuals. This key CoC feature is similar to France’s practice of encouraging community organizations to be deeply involved in the shaping and implementation of housing policy. Advocates should encourage expansion of the CoC initiative to involve nonprofit and NGO constituents in leadership positions and at higher decision-making levels, as is the case with the participatory local and national committees overseeing DALO.

E. Increase Affordable Rental Housing

Because social housing programs generally are not profitable ventures, securing and expanding such initiatives continues to be a long-term struggle. While pushing for expansion is important, another method of ensuring access to housing for low-income individuals is by improving the affordable rental market. Unlike public housing assistance, investing in affordable housing units can ultimately be profitable for private investors and states. In this section, we will identify strategies to increase affordable rental housing in the United States, including encouraging for- and nonprofit companies to invest in affordable housing, prompting states and municipalities to develop inclusionary zoning laws, and obtaining funding for the National Housing Trust Fund (NHTF).

1. Solicit Support from Private Funders

Like the French scheme, which offers tax benefits to companies that invest in social housing, the Low Income Housing Tax Credit (LIHTC) program provides tax credits for the construction, rehabilitation, and preservation of affordable rental housing as a means of incentivizing private investment for that purpose. Housing tax credits are given to qualifying housing developers, who sell the tax credits to investors. In return for their purchase of tax credits, investors receive an equity stake in the development and lowered tax liability over a ten-year period, beginning when the units become

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260 See id.
261 Peter Lawrence, Low Income Housing Tax Credit, in 2011 Advocates’ Guide to Housing & Community Development Policy, supra note 7, at 133.
262 Id.
occupied. Developers receive money for the tax credit purchases, thereby reducing their borrowing obligations. As a result of lower debt, developers can rent the property at a lower rate.

LIHTCs are distributed to states, which allocate the credits on a competitive basis. Each state agency must develop a plan that explains how the tax credits will be used. Priority is given to projects that assist the lowest-income families and that are designed to keep the housing affordable for the longest period of time. LIHTCs can be used for a range of housing projects, including construction, rehabilitation, special needs housing, and multifamily or single-family housing. The credits are open to both nonprofit and for-profit developers, but at least 10% of the credits must go toward nonprofits.

Some states have had great success encouraging private companies to invest in building affordable rental units through the LIHTC program. Massachusetts, for example, has successfully enticed several large corporations to invest in affordable rental housing units. Despite the economic recession, Massachusetts doubled its rental housing lending from $218 million in Fiscal Year (FY) 2010 to $445.5 million in FY 2011 through several different programs that encourage the development of rental housing.

Investors in Massachusetts include Google, Inc., Sherwin-Williams, Berkshire Hathaway, and Apple. Google recently invested

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264 How Do Housing Tax Credits Work?, U.S. Dep’t of Housing & Urban Dev., supra note 263.

265 Lawrence, supra note 261.


267 Id.

268 Id.

269 Lawrence, supra note 261.

270 Id.


$28 million in affordable housing in Allston, Massachusetts.\textsuperscript{273} While obviously not a housing developer, Google has been enticed to invest by low-income tax credits. Greg Vasil, CEO of the Greater Boston Real Estate Board, states that the tax credit system is a “win-win” for companies and communities, with companies at times receiving one dollar of tax credit for $0.77 of investment.\textsuperscript{274} Vasil also argues that affordable rental housing could never be available without the tax credits, because the cost of building the property would simply be too high to charge lower rent.\textsuperscript{275}

2. Secure Funding for the Housing Trust Funds

Another strategy for increasing affordable rental housing is through housing trust funds such as the NHTF, which was established in 2008.\textsuperscript{276} The purpose of the NHTF is to “increase and preserve the supply of rental housing for extremely low and very low income families, including homeless families, and to increase homeownership for extremely low and very low income families.”\textsuperscript{277} Within ten years, the NHTF seeks to accomplish this goal by providing grants for the construction or maintenance of 1.5 million rental properties that are affordable for very low-income households.\textsuperscript{278} The size of the block grant provided to a particular state depends on the number of low-income households and the number of available low-cost rental properties.\textsuperscript{279} The minimum grant size is $3 million.\textsuperscript{280}

Currently, the program receives no funding. The bill establishing the NHTF called for the initiative to be funded by Fannie Mae and Freddie Mac, but contributions were suspended when Fannie Mae and Freddie Mac were nationalized by the government.\textsuperscript{281} Despite urging from advocates, President Obama’s September 2011 jobs cre-

\begin{enumerate}
\item \textit{Id.}\textsuperscript{273}
\item \textit{Id.}\textsuperscript{275}
\item Ed Gramlich & Linda Couch, National Housing Trust Fund, in 2011 Advocates’ Guide to Housing & Community Development Policy, \textit{supra} note 7, at 6.\textsuperscript{276}
\item \textit{Id.}\textsuperscript{277}
\item \textit{Id.}\textsuperscript{278}
\item \textit{Id.} at 7.\textsuperscript{279}
\item \textit{Id.}\textsuperscript{280}
\item \textit{Id.} at 6.\textsuperscript{281}
\end{enumerate}
ation plan did not include funding for the NHTF. At present, the NHTF lacks a clear funding source.

Apart from the NHTF, there are also forty state housing trust funds, as well as more than 625 municipal or county housing trust funds, that dedicate nearly $1 billion collectively to addressing low-income housing needs. In general, housing trust funds reflect the beginnings of a rights-based approach by “systemically shift[ing] affordable housing funding from annual budget allocations to the commitment of dedicated public revenue.” However, until these dedicated funding streams are adequate to meet the need, they still fall short of fulfilling the right to housing.

A long-term goal for advocates should follow along the lines of France’s enforcement system for achieving social housing objectives. At both the federal and local levels, periodic assessments should determine if the funds devoted to affordable housing are adequate to meet the needs of the community. Where needs are not being met, penalties should be imposed and the additional revenue directed to the trust funds.

3. Increasing Neighborhood Diversification

U.S. housing policy should also address affordable housing location by encouraging neighborhood diversification. France uses two strategies for increasing diversity within communities. First, France has adopted extensive zoning laws that require specific areas to have minimum numbers of affordable rental or social housing. Secondly, French communes must prepare reports for Parliament on social diversity within neighborhoods.

Local governments in the United States already have had success in implementing zoning laws that require developers to create minimum numbers of affordable rental housing units. For example, a Santa Fe, New Mexico ordinance requires that any major development project (i.e., one involving twenty-five or more parcels for

284 Id.
285 See supra Parts III.B, D.
286 See Mallach, supra note 21, at 206.
287 See Loison, supra note 78, at 196.
sale) consist of at least 30% affordable rental housing. When such a housing unit is sold in ten years, the developer and the county will split the difference between the price paid by the developer and the resale price. Developers may pay a fee to the county if they wish to waive the ordinance.

That Santa Fe zoning ordinance was recently challenged in court. On appeal, the Tenth Circuit found that a facial challenge to the ordinance was not ripe under the Takings Clause, and that the ordinance’s property restrictions did not amount to physical per se takings. The Supreme Court denied certiorari on October 3, 2011. In light of the favorable decision by the Tenth Circuit, advocates should encourage localities to develop inclusionary zoning laws in an effort to foster neighborhood diversification.

F. Grassroots Organizing for Change

A final important lesson that U.S. advocates should learn from the French path to creating an enforceable right to housing is that change must be spurred along by grassroots organizing. Without the commitment of a dedicated movement, French housing law likely would still operate under a model similar to that in the United States. As the recent Occupy and Take Back the Land (TBTL) movements have shown, committed advocates entrenching themselves in highly visible public areas, taking over public spaces and vacant properties much as the Children of Don Quixote and Black Thursday did in France, can concentrate public attention on issues of income and housing inequality.

Beginning as a protest against government and corporate corruption, the U.S. Occupy movement has generated much attention regarding issues of economic and social inequalities. Each particular Occupy movement has taken on various themes, and some protests have been focused on inadequate housing, homelessness,
and extreme poverty. In Eugene, Oregon, for example, protestors have been quite successful in generating both media and political attention surrounding the issue of homelessness.

Occupy Eugene began as a broad protest, but as homeless individuals joined the camp, and city officials began to threaten eviction actions similar to those usually directed at those experiencing homelessness, the movement adopted a specific focus on the issue of inadequate housing and shelter space. In campaigning to keep the camp open for themselves, the Occupy Eugene protesters also successfully linked their own orderly departure to a long-term solution to homelessness in Eugene, compelling the city council to address both. While extending the camping ban exemption for the Occupiers, the city also devoted more than $300,000 of new funding to provide basic services for homeless people. Additionally, the Eugene City Council unanimously passed amendments to the city code granting the Eugene Human Rights Commission a mandate to support and promote the full range of human rights within the UDHR and approved the Commission’s work plan with an objective targeted toward addressing homelessness. Following the dissolution of the camp in early 2012, the city convened the Opportunity Eugene Task Force, which developed a series of recommendations, including the recognition of housing as a basic human right. These develop-


296 Press Release, Occupy Eugene, supra note 295.


ments will enable Eugene’s future efforts around homelessness to be conducted fully within the human rights context.

For years the TBTL movement in the United States has been organizing visible takeovers of public spaces and eviction defenses, as well as private takeovers of housing for use by individual families.\textsuperscript{299} TBTL’s first organizing principle is that housing is a human right, and local action groups work to implement that principle through direct action-oriented campaigns.\textsuperscript{300} Like the Black Thursday in France, TBTL has escalated its public actions, and in conjunction with the Occupy movement, it has generated a large amount of national and local media coverage. On December 6, 2011, TBTL organized a coordinated series of takeovers and defenses across the country, resulting in individual victories for foreclosed families and broader media attention.\textsuperscript{301} While TBTL has some legal and policy advocates working with the movement, more are needed to create the sort of squatters-rights laws and long-term policy change necessary.

As with the red tents in Paris and Black Thursday’s individual takeovers, the collective demonstrations exhibited through the Occupy and Take Back the Land movements have secured both short- and long-term victories for the right to housing in the United States. By coordinating these public efforts with legal and policy advocacy for a new approach to housing as a human right in the United States, we can help push our country to follow in France’s footsteps toward an enforceable right to housing.

VII. Conclusion: Using France’s Model and Human Rights Frameworks for Future Advocacy

People may look around today and say that we are decades away from an enforceable right to housing in the United States, and that may be true. In the 1920s, we were a long way from integrated hous-
ing and education. However, people had already begun organizing, on streets, in the courtrooms, and in the legislatures. It took twenty years to get them to *Brown v. Board of Education*, another twenty to get the Civil Rights Acts, and we are still working through implementation. But a cultural shift in consciousness occurred, and the majority of Americans now see the days of slavery and Jim Crow as an unfortunate chapter in America’s history.

Moving from an individualistic housing system that overlooks low-income people toward a housing system that guarantees an enforceable human right to housing for all is a challenging and long-term task. Yet we see seeds of a cultural shift being sown in the Occupy protests and the TBTL takeovers. These are the sit-ins and the marches of the new right-to-housing movement. And we see the beginnings of the political response in HUD’s acknowledgement that housing is a human rights obligation, as well as the Eugene City Council’s commitment of additional funding and direction of its Human Rights Commission to examine long-term solutions to homelessness.

With countries like France providing a model for what can be done, government officials cannot claim that creating an enforceable right to housing in the United States is impracticable. And with the public attention generated by the Occupy and TBTL movements, the broader consciousness of a human rights approach to housing is growing. By looking to France for guidance on what is possible and how to make it happen, advocates can advance the cause for housing as a human right here in the United States so that one day the idea that we would allow our fellow citizens to be homeless will be as unthinkable as segregation is today.
Human Rights Frames in Grassroots Organizing: CADRE\(^1\) and the Effort to Stop School Pushout

*Alexandra Bonazoli*

I. Introduction

The United States Department of Education reported that, during the 2008–09 school year, an estimated 4.1% of students enrolled in a public or private high school dropped out of school.\(^2\) The dropout rates for Latino and African American students were considerably higher at 6% and 6.6%, respectively.\(^3\) These statistics reflect dropouts among the entire K–12 population, and several years of attrition at these levels cumulatively impact the rate of high school graduation. The estimated four-year high school completion rate for enrolled freshmen during the 2008–09 school year was only 75.5%.\(^4\)

The trends of high dropout rates and low high school completion are symptoms of a wider phenomenon known as the “School-to-Prison Pipeline.”\(^5\) The School-to-Prison Pipeline represents the intersection of numerous school policies that channel students away from

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\(^{1}\) Community Asset Development Redefining Education (CADRE), a grassroots parents organization focused on addressing the problem of school pushout, was represented in a panel discussion as part of the Program on Human Rights and the Global Economy’s 2011 Institute, “Framing Economic, Social and Cultural Rights for Advocacy and Mobilization: Towards a Strategic Agenda in the United States.”


\(^{3}\) Id.


education and towards the juvenile and criminal justice systems. Misbehaving and under-performing students become less likely to spend time in the classroom and more likely to find themselves swept up in the criminal justice system due to zero-tolerance, exclusionary discipline policies; high-stakes testing regimes that impose pressure on schools, implicitly or explicitly encouraging low-performing students to leave; and the encroachment of law enforcement officers into schools.

This crisis in education can be viewed from a number of angles. The American Civil Liberties Union highlights it as one of the major civil rights violations currently facing the United States. Increasingly, advocacy groups also envision the School-to-Prison Pipeline, including its component problems of ineffective discipline policies and school dropout, as a human rights issue. Local advocacy and grassroots groups across the country have turned to human rights frameworks to address challenges and injustices, drawing support and motivation from international treaties that create legal obligations and a “vision of good governance” protecting a wide range of fundamental rights.

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7 Kim et al., supra note 5, at 1–3.


11 For examples of groups organizing under a human rights framework, see notes 121–24, infra. Notably, international human rights treaties and conventions recognize a much broader range of fundamental and inalienable rights and freedoms than those deemed “fundamental” in the U.S. legal context. For purposes of international law, fundamental rights include not only the rights to life, liberty, and private family life, but also the rights to other necessities such as decent work and a standard of living adequate for health and well-being. See Universal Declaration of Human Rights, pmbl., art. 3, art. 12, art.
One organization that has taken this approach toward the issue of school dropout is Community Asset Development Redefining Education (CADRE), a membership-based group of African American and Latino parents and caregivers working in South Los Angeles to address concerns that the public schools were failing to meet the needs of low-income, minority students.\(^\text{12}\) CADRE uses an international human rights framework to draw attention to the ways in which school district policies fail to protect the basic human rights of students and parents, working to “win new policies and challenge existing ones as part of a movement towards educational and racial justice.”\(^\text{13}\)

CADRE began its work in 2001, when the group first sought to assess barriers to parent involvement in education.\(^\text{14}\) The expe-
rience organizing around that issue led CADRE to focus on other areas where the education system failed students, specifically schools’ heavy reliance on punitive discipline measures and high dropout rates.\(^\text{15}\) Through door-to-door canvassing, parent-led research, media campaigns, and lobbying, CADRE and its allies brought about the implementation of a new foundational discipline policy in the Los Angeles Unified School District (LAUSD) in 2007.\(^\text{16}\) This policy, based on a model of discipline and behavioral interventions known as School-Wide Positive Behavior Support (SWPBS), helped to realize CADRE’s hopes for change in the school system as articulated using a human rights frame.\(^\text{17}\)

This article treats each of these elements in turn. Part II introduces the School-to-Prison Pipeline and related problems currently facing American education. Part III explains the basics of social movement frames, one of the key tools in constructing successful movements for change. Part IV explores the international human rights master frame that CADRE adopted as the basis for assessing conditions in schools and motivating efforts for policy change. Finally, Part V presents an account of CADRE’s human rights-based organization on educational issues as a case study illustrating the use of the human rights frame in a local context.

II. The Facts: Dropout and the School-to-Prison Pipeline

A. A National Problem

A 2010 report by the Advancement Project, a civil rights, law, and policy think tank, indicates that, nationwide, fewer than seven out of ten high school students reach graduation.\(^\text{18}\) This low rate of high school completion results in part from yearly dropout rates of 3 to 4%.\(^\text{19}\) High school attrition disproportionately affects students

\(^{15}\) See CADRE et al., Redefining Dignity in Our Schools, supra note 13.

\(^{16}\) Id.

\(^{17}\) See id. at 14–18.

\(^{18}\) Advancement Project, supra note 4. But see Stillwell et al., supra note 2 (finding that, during the 2008–09 school year, the nationwide average high school completion rate was 75.5%).

\(^{19}\) Stillwell et al., supra note 2, at 18.
of color, with barely half of enrolled African American, Latino, and Native American students reaching graduation.\textsuperscript{20}

This dropout trend has been linked to inappropriate discipline methods and pressure imposed on schools by high-stakes testing.\textsuperscript{21} These two factors are recognized elements of a broader pattern of channeling students into the criminal justice system, known as the School-to-Prison Pipeline.\textsuperscript{22} The School-to-Prison Pipeline begins when children are denied sufficient educational services, thereby setting them up for failure.\textsuperscript{23} Inadequate educational settings characterized by “[o]vercrowded classrooms, racially and socioeconomically isolated environments, a lack of effective teachers and school leaders, and insufficient funding for ‘extras’ such as counselors, special education services, and even textbooks” decrease students’ level of engagement and influence their decision to leave school prior to graduation.\textsuperscript{24}

This problem of inadequate or misallocated resources is exacerbated by zero-tolerance discipline policies that emphasize exclusionary punishments.\textsuperscript{25} Exclusionary discipline measures, such as suspension, expulsion, and transfers to other schools, are often not punishments of last resort reserved for the most serious infractions.\textsuperscript{26} Rather, suspension is one of the most widely used disciplinary measures, sometimes favored by teachers and administrators as an initial intervention.\textsuperscript{27} Other policies and pressures may exacerbate

\textsuperscript{20} \textit{Advancement Project}, supra note 4; \textit{see also} \textit{Stillwell et al.}, supra note 2, at 16 (depicting disproportionately high dropout rates among African American, Latino, and Native American high school students).

\textsuperscript{21} \textit{Kim et al.}, supra note 5, at 1–3; \textit{Advancement Project}, supra note 4; \textit{CADRE et al.}, \textit{Redefining Dignity in Our Schools}, supra note 13, at 12; \textit{What Is the School-to-Prison Pipeline?}, \textit{Am. Civ. Liberties Union}, supra note 6.

\textsuperscript{22} \textit{Kim et al.}, supra note 5, at 1–4; \textit{Advancement Project}, supra note 4; \textit{CADRE et al.}, \textit{Redefining Dignity in Our Schools}, supra note 13, at 11; \textit{What Is the School-to-Prison Pipeline?}, \textit{Am. Civ. Liberties Union}, supra note 6.

\textsuperscript{23} \textit{Kim et al.}, supra note 5, at 1.

\textsuperscript{24} \textit{Id.}; \textit{see also} \textit{What Is the School-to-Prison Pipeline?}, \textit{Am. Civ. Liberties Union}, supra note 6.

\textsuperscript{25} \textit{Kim et al.}, supra note 5, at 2–3; \textit{What Is the School-to-Prison Pipeline?}, \textit{Am. Civ. Liberties Union}, supra note 6.

\textsuperscript{26} \textit{CADRE et al.}, \textit{Redefining Dignity in Our Schools}, supra note 13, at 12; \textit{see also} \textit{Kim et al.}, supra note 5, at 2.

\textsuperscript{27} \textit{CADRE et al.}, \textit{Redefining Dignity in Our Schools}, supra note 13, at 12.
the removal of students from classrooms, such as high-stakes testing programs that create incentives for schools to remove low-performing students in order to boost their testing statistics.\textsuperscript{28} Despite schools’ reliance on these exclusionary measures, there is little indication that they prevent students from misbehaving or that they improve academic outcomes or school safety.\textsuperscript{29}

Instead of addressing the underlying causes of problematic classroom behavior in high-risk students through long-term solutions, exclusionary discipline policies have multiple counterproductive effects on a student’s behavior and educational wellbeing.\textsuperscript{30} First, these policies do nothing to constructively teach positive behavior or supportively correct negative behavior.\textsuperscript{31} Secondly, exclusion may often “escalate misbehavior by removing the child from a structured environment, which gives the child increased time and opportunity to get into trouble.”\textsuperscript{32} Lastly, removing children from classrooms severely disrupts the learning process.\textsuperscript{33} While suspended, students miss out on class instruction and often fail to receive assignments or tests, causing them to fall farther and farther behind their peers as exclusion-based punishments accumulate.\textsuperscript{34}

\textsuperscript{28} Kim et al., supra note 5, at 1; see also NAACP Legal Def. & Educ. Fund, Dismantling the School-to-Prison Pipeline 5 (2005), available at http://www.naacpldf.org/files/publications/Dismantling_the_School-to_Prison_Pipeline.pdf [hereinafter NAACP Legal Def. & Educ. Fund] (explaining some of the factors that lead schools to remove students who may negatively impact the school’s test scores).

\textsuperscript{29} CADRE et al., Redefining Dignity in Our Schools, supra note 13, at 12; see also Matt Cregor & Damon Hewitt, Dismantling the School-to-Prison Pipeline: A Survey from the Field, 20 Poverty & Race 5, 5 (2011) (discussing the documented harms of exclusionary school discipline).

\textsuperscript{30} See NAACP Legal Def. & Educ. Fund, supra note 28, at 3–6 (discussing the long-term consequences for students of schools’ overreliance on punitive disciplinary measures); see also Advancement Project, supra note 4, at 3–7 (providing an overview of the School-to-Prison Pipeline phenomenon and the factors that contribute to it).

\textsuperscript{31} NAACP Legal Def. & Educ. Fund, supra note 28, at 3.

\textsuperscript{32} Kim et al., supra note 5, at 3; see also Cregor & Hewitt, supra note 29; NAACP Legal Def. & Educ. Fund, supra note 28, at 3; What Is the School-to-Prison Pipeline?, Am. Civ. Liberties Union, supra note 6.

\textsuperscript{33} Kim et al., supra note 5, at 3; see also What Is the School-to-Prison Pipeline?, Am. Civ. Liberties Union, supra note 6.

\textsuperscript{34} See CADRE et al., Redefining Dignity in Our Schools, supra note 13, at 13; What Is the School-to-Prison Pipeline?, Am. Civ. Liberties Union, supra note 6.
The consequences of exclusionary school policies disproportionately fall on low-income students, students of color, and students with disabilities. In particular, low-income students and students of color are “disproportionately targeted for suspension, [ ] often receive more severe and punitive consequences[,] and [ ] their punishments tend to be delivered in a more unprofessional manner” than the punishments applied to high-income or white students. Studies have shown that African American students are more likely than their white peers to be suspended or expelled for the same type of conduct. The disparate impact of school disciplinary policies on students of color has increased over the past three decades, with the percentage of African American students in public schools who were suspended during the course of a school year rising from 6% in 1973 to 15% in 2006.

Simultaneously exacerbating the problem of exclusion is a growing trend of juvenile and criminal justice systems moving into schools as schools use law enforcement tactics and officers to enforce their internal rules. The result is “a growing number of youth [ ] being arrested and processed through courts for misconduct at school.” All of the above-described elements together perpetuate the School-to-Prison Pipeline, which channels students away from productive educational environments and towards the juvenile justice system. Frequently, the School-to-Prison Pipeline ends in detention or incar-

35 Kim et al., supra note 5, at 2 (discussing impacts on students of color and students with disabilities); Cregor & Hewitt, supra note 29 (same); CADRE et al., Redefining Dignity in Our Schools, supra note 13, at 12 (discussing impacts on students of color and low-income students).
36 CADRE et al., Redefining Dignity in Our Schools, supra note 13, at 12; see also Russell J. Skiba, Ind. Educ. Policy Ctr., Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice 11 (2000) (noting that more severe punitive measures are often directed against poorer students, with such discipline sometimes being meted out in a “less-than-professional manner”).
37 Kim et al., supra note 5, at 2; see also Cregor & Hewitt, supra note 29 (noting that African American students are three times as likely to be suspended as white students, and that Latino students are 1.5 times as likely to be suspended as their white peers).
38 Kim et al., supra note 5, at 2.
39 Id. at 3.
40 Id.
ceration and permanent disruption of the student’s education in the traditional school system.\textsuperscript{41}

B. Local Impacts in South Los Angeles

The crisis of the School-to-Prison Pipeline and the visible issue of school dropout is a pressing problem in South Los Angeles, part of the LAUSD. At one point, the LAUSD had one of the highest dropout rates in the country.\textsuperscript{42} Only 48% of the minority students enrolled in Los Angeles high schools in 1998 graduated four years later.\textsuperscript{43} Recently, the LAUSD has been reporting improved graduation rates, with an estimated 77% high school completion rate for the 2009–10 school year.\textsuperscript{44} However, the LAUSD remains “highly reliant on exclusionary punishments, which disproportionally affect students of color.”\textsuperscript{45} During the 2005–06 school year, students of color accounted for more than 90% of suspensions, and the suspension rate for African American students was about twice their enrollment rate.\textsuperscript{46}

Working in the school district and community, CADRE noted that “everyday South L.A. is losing a fraction of its most precious resource—our African American and Latino children and youth—to the juvenile justice system or the ranks of students who disappear through truancy and dropouts.”\textsuperscript{47} Finding ample evidence that the education system was not serving the needs of children in the community, CADRE determined that a change in policy was needed.\textsuperscript{48}

\begin{thebibliography}{9}
\bibitem{41} Id.; see also Cregor & Hewitt, \textit{supra} note 29, at 5–6; \textit{What Is the School-to-Prison Pipeline?}, Am. Civ. Liberties Union, \textit{supra} note 5.
\bibitem{42} CADRE \textit{et al.}, \textit{Redefining Dignity in Our Schools}, \textit{supra} note 13, at 12.
\bibitem{44} \textit{Statewide Graduation Rates: 2009–10}, Cal. Dept of Educ., http://dq.cde.ca.gov/dataquest/CompletionRate/comprate1.asp?cChoice=StGradRate&cYear=2009-10&level=State (last visited Aug. 7, 2012). The completion percentage of 77.3% reflects high school graduations in all of Los Angeles County, not South Los Angeles in particular.
\bibitem{45} CADRE \textit{et al.}, \textit{Redefining Dignity in Our Schools}, \textit{supra} note 13, at 12.
\bibitem{46} Id.
\bibitem{47} CADRE & Justice Matters Inst., \textit{supra} note 14, at 14.
\bibitem{48} See id. at 14, 19–26.
\end{thebibliography}
III. Framing

A. What is Framing?

“A frame is a thought organizer, highlighting certain events and facts as important and rendering others invisible.”49 This succinct definition, offered by Charlotte Ryan and William Gamson in their article *The Art of Reframing Political Debates*, distills the complicated field of framing to its most salient feature: lenses that focus and articulate a particular view or interpretation.50 Frame theory posits that frames exist on many levels, from basic issue frames that assist in understanding daily actions and communications51 to collective action frames that help build and mobilize social movements.52 Articulating these frames is a central aspect of successful campaigns, social movements, and collective actions.53

Collective action frames are agentic or action-oriented, purposefully established to “inspire and legitimate the activities and campaigns of a social movement organization (SMO)”54 by articulating challenges to dominant views and frames.55 Designed to mobilize and compel action, collective action frames are the result of intentional processes whereby:

movement adherents negotiate a shared understanding of some problematic condition or situation they define as in need of change, make attributions regarding who or what is to blame, articulate an alternative set of arrangements, and urge others to act in concert to affect change.56

These tasks encompass a number of actions and interactions that together construct an SMO’s frame.57

50 See id. at 14.
53 Ryan & Gamson, supra note 49.
54 Benford & Snow, supra note 52.
55 Snow, supra note 51, at 385.
56 Benford & Snow, *Framing Processes*, supra note 52, at 615.
57 See id. at 615–18 (describing the core tasks that go into the construction of a frame).
Another element of frames and framing processes, known as participatory communication, involves audiences and participants. Ryan and Gamson note that placing too much emphasis on the message of a movement “reduces framing strategy to a matter of pitching metaphors for electoral campaigns and policy debates, looking for the right hot-button language to trigger a one-shot response.” While that model may work in the short-term, it “doesn’t help those engaged in reframing political debates to sustain collective efforts over time and in the face of formidable obstacles.” Participatory communication presents an alternative, treating “citizens as collective actors—groups of people . . . who are capable . . . of carrying out collaborative, sustained reframing efforts that may involve intense conflict,” rather than as passive voices relaying opinions to ultimate decision makers. The participatory communication model enables those directly affected by injustices to engage in sustainable efforts for change by facilitating discussions and interactions that inspire new generations of leaders and participants.

B. How Framing Works: Core Framing Tasks

Framing theory defines three “core framing tasks,” the principal undertakings involved in constructing collective action frames. These are: diagnostic framing (involving “problem identification and attributions”); prognostic framing (articulating a proposed solution and strategy to address the problem); and motivational framing (“provid[ing] a ‘call to arms,’” or motivating engagement in a collective action solution). Remembering that each task involves distinct steps and challenges reinforces the important concept that frames

58 See Ryan & Gamson, supra note 49, at 15.
59 Id.
60 Id.
61 Id.
62 Id. at 15–16. This model is inspired in significant part by the work of Paulo Freire, particularly the concept that those directly affected by inequalities of power have the right to intervene in the established order on their own behalf and to work for change. See id. at 15–16.
63 Benford & Snow, Framing Processes, supra note 52, at 615–17.
64 Id. at 615.
65 Id. at 616.
66 Id. at 617.
within an SMO are not static but are often actively altered, redirected, and recreated during the entire framing and mobilization process.67

In the area of diagnostic framing, which involves focusing in on a target issue, studies have centered on the development of injustice frames, “call[ing] attention to the ways in which movements identify the ‘victims’ of a given injustice.”68 This diagnostic effort has also taken the form of attributional framing, which proceeds from the perspective that “directed action is contingent on identification of the source(s) of causality, [or] blame.”69 For example, in examining the mobilization of support for the Food and Drug Administration’s regulation of tobacco, one study highlighted attributional framing actions that drew attention to the inadequacy of existing laws regulating the sale of tobacco to minors and identified the tobacco industry as culpable for specifically targeting young people as potential new consumers.70 Other variations on attributional frames include boundary frames and adversarial frames, which seek to “delineate the boundaries between ‘good’ and ‘evil’ and construct movement protagonists and antagonists.”71

Prognostic framing addresses the “question of what is to be done.”72 In addition to articulating a solution, prognostic framing seeks to map out a strategy for effectively implementing that solution.73 Scholarship in this area has explored the limits on prognostic

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67 See id. at 614, 623–30. Benford and Snow first note that framing is an active, evolving process. Id. at 614. The authors go on to discuss how frames are developed and directed to advance the goals of an SMO, including through discursive acts of tying ideas and events together to form compelling justifications for action, and through efforts to contest alternative interpretations and frames put forth by opposition or counter movements. Id. at 623–27. Elements such as cultural resonance and political opportunities, which delimit an SMO’s capacity to mobilize or develop, are also examined. Id. at 628–30. The discussion of these processes illustrates that frames cannot simply be constructed at the start of a movement. Rather, as a collective undertaking moves forward, frames must be continually adjusted to keep up with the needs of movement participants; respond to the demands of outside observers and antagonists; and take advantage of, or protect against, the existing political and cultural atmosphere.

68 Id. at 615.
69 Id. at 616.
71 Benford & Snow, Framing Processes, supra note 52, at 616.
72 Id.
73 Id.
frames, or the factors that may constrain the range of solutions that could be articulated.74 Some studies have suggested a corresponding link between a movement’s diagnostic and prognostic frames, indicating that the identification of a certain set of problems and causes tends to control the sort of solutions and strategies that an SMO will adopt.75 Other limits on prognostic frames stem from the wider context in which a movement occurs, including the political atmosphere and interactions among SMOs.76 Prognostic framing sometimes can be examined most clearly through a comparison of two movements addressing the same set of problems. For example, a 1996 study

74 See, e.g., John H. Evans, Multi-Organizational Fields and Social Movement Organization Frame Content: The Religious Pro-Choice Movement, 67 SOC. INQUIRY 451 (1997) (discussing the limitations of political atmosphere on SMO actions); Jürgen Gerhards & Dieter Rucht, Mesomobilization: Organizing and Framing in Two Protest Campaigns in West Germany, 98 AM. J. SOC. 555 (1992) (discussing, in the context of mobilizations against the International Monetary Fund (IMF), World Bank, and American hegemony in West Germany, the ways in which the various problems and causal agents identified and solutions proposed could be used to expand or restrict the frame and improve motivational capacity of the movement); Sidney Tarrow, National Politics and Collective Action: Recent Theory and Research in Western Europe and the United States, 14 ANN. REV. SOC. 421, 422, 429 (1988) (arguing that the dynamics of collective action are best understood in the context of the political process, with collective actions being constrained by factors of “political opportunity” (e.g., openness or closure of the polity or the degree of stability among current political alliances)).

75 See Gerhards & Rucht, supra note 74, at 579–82. Gerhards and Rucht put forth a description of the reverse nature of diagnostic and prognostic framing tasks. Id. at 582. A broader or more generalized diagnostic frame will allow for a wider range of demands (or more far-reaching demands) that feasibly can be advanced in pursuit of a solution. See id. A narrower diagnostic frame, on the other hand, likely will generate a more finite set of specific demands. See id. In the case of two campaigns that used master frames to mobilize anti-Reagan and anti-IMF sentiment, respectively, more far-reaching demands could be drawn from the imperialism frame used in the latter, which argued that none of the targeted problems could be addressed without first changing the entire world economic order. Id. By contrast, the hegemonic power frame used in the anti-Reagan campaign created the space for more specific demands, such as disarmament and a halt to American interventionist policies. Id. Although, in the context of this particular study, Gerhards and Rucht criticize both frames for putting forth vague solutions, they hypothesize that the closer a frame comes to offering a solution, the greater the mobilization capacity of that frame will be when it comes time to take action. Id.

76 See Hank Johnston & John A. Noakes, Frames of Protest: A Roadmap to a Perspective, in FRAMES OF PROTEST 1, 20–23 (Hank Johnston & John A. Noakes eds., 2005); Benford & Snow, Framing Processes, supra note 52, at 617–18; Evans, supra note 74, at 452–54; Tarrow, supra note 74, at 427–33.
of the U.S. anti-death penalty movement highlighted differences in the solutions proposed by two of the movement’s principal factions: “abolitionists,” who focused on bringing about the abolition of capital punishment, and “litigators,” who focused on efforts to save lives on a client-by-client basis.  

Motivational framing, the final core task, involves development of the agency element of social movements that motivates participant action. A key aspect of this task is determining the appropriate “vocabularies of motive,” or the rationales for collective action. For example, the U.S. nuclear disarmament movement employed four general vocabularies in its efforts: severity, urgency, efficacy, and propriety or duty. These vocabularies “provided adherents with compelling accounts for engaging in collective action and for sustaining their participation.”

C. Master Frames

Social movements differ widely in their development and implementation of frames. One important variable factor that can make the difference in the success of a frame is its interpretive scope and influence. Generally, the collective action frames that SMOs use have limited application to a particular group, movement, or grievance. However, some frames are much broader in scope, with resonance for multiple groups or issues. These frames constitute “master frames”

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78 Benford & Snow, Framing Processes, supra note 52, at 617.
79 See id. at 617–18.
80 Robert Benford, “You Could be the Hundredth Monkey”: Collective Action Frames and Vocabularies of Motive Within the Nuclear Disarmament Movement, 34 Soc. Q. 195, 201–08 (1993). The vocabularies relied on by the nuclear disarmament movement captured particular elements important to the campaign: severity (i.e., “the immensity of the nuclear dangers”); urgency (i.e., “the urgent necessity to rapidly achieve a nuclear free world”); efficacy (i.e., “the power of the new awareness and [the participants’] role in the unfolding drama”); and propriety/duty (i.e., that “[the participants’] awareness is needed in saving the world from nuclear war”). Id. at 196. Strung together, these four vocabularies (or rationales) generated the motivation for individual and collective action. Id.
81 Benford & Snow, Framing Processes, supra note 52, at 617.
82 Id. at 618–19.
83 Id. at 618.
84 Id.
and are recognized for being “broad in interpretive scope, inclusivity, flexibility, and cultural resonance.”\(^{85}\) Master frames can be applied to a wide range of groups and problems, are adaptable, and hold meaning in multiple cultural and temporal contexts.\(^{86}\) While most frames function as “finely tuned theories” for a particular movement or narrow group of movements, master frames operate on the level of paradigms insofar as they generate multiple variations of action that all embody their particular worldview.\(^{87}\) Only a few collective action frames are sufficiently broad and inclusive in scope to warrant the master frame designation, including rights frames, injustice frames, and democracy frames.\(^{88}\)

There is a degree of variance in scope among master frames, with some master frames allowing greater room for mobilizing constituents than others.\(^{89}\) For example, Rita Noonan illustrated the difference in the flexibility of master frames in the case of anti-government mobilization in Chile, where the leftist master frame of the 1950s and 1960s did not accommodate feminism, thereby curtailing the effective mobilization of women.\(^{90}\) However, after the repression of the leftist movement, the development of a broader “return to democracy” master frame in the 1980s made possible the inclusion of feminist and other movement-specific frames.\(^{91}\)

IV. Human Rights as a Master Frame

A. Component Parts of the Human Rights Frame

The international human rights frame can be described as a framework derived from international human rights documents and obligations—a paradigm focused on naming, addressing, and pre-

\(^{85}\) Id. at 619.


\(^{88}\) Benford & Snow, Framing Processes, supra note 52, at 619.

\(^{89}\) Snow, supra note 51, at 390.

\(^{90}\) See Rita K. Noonan, Women Against the State: Political Opportunities and Collective Action Frames in Chile’s Transition to Democracy, 10 Soc. Forum 81, 98–104 (1995).

\(^{91}\) Id. at 99, 102; see also Benford & Snow, Framing Processes, supra note 52, at 619.
venting human rights violations. The human rights frame operates with sufficient breadth, flexibility, and resonance to work as a master frame, supporting activism for a wide variety of movements.

In 1945, the United Nations member states adopted the United Nations Charter, which established a commitment to “universal respect for, and observance of, human rights and fundamental freedoms for all.” These rights and freedoms were not detailed in the Charter, but were set out in the Universal Declaration of Human Rights (UDHR) in 1948. The UDHR articulates a commitment by the 193 current U.N. member states to promote respect for the enumerated rights within their territories, and to work to secure the universal recognition and observance of those rights. The thirty articles of the UDHR lay out an extensive complement of rights, including full equality in dignity and rights among all people, as well as protections of political, economic, civil, social, and cultural rights. However, the UDHR is not a binding treaty and stands instead as a


93 See Benford & Snow, Master Frames, supra note 87, at 138, 140–41; Benford & Snow, Framing Processes, supra note 52, at 619. For examples of movements and organizations that have successfully adopted a human rights frame to advance their objectives, see notes 121–24, infra.

94 U.N. Charter art. 55(c).

95 See UDHR, supra note 11, pmbl.


97 UDHR, supra note 11, pmbl.

98 See id. art. 1 (asserting that, “All human beings are born free and equal in dignity and rights.”); art. 7 (providing that, “All are equal before the law and are entitled without any discrimination to equal protection of the law.”); art. 18 (stating that everyone has “the right to freedom of thought, conscience[,] and religion”); art. 21, para. 1 (stating that everyone has “the right to take part in the government of his country, directly or through freely chosen representatives”); art. 23, para. 1 (establishing that everyone has “the right to work, to free choice of employment, to just and favourable conditions of work[,] and to protection against unemployment”); art. 27, para. 1 (providing that everyone has “the right freely to participate in the cultural life of the community”).
“proclamation of basic rights and fundamental freedoms, bearing the moral force of universal agreement.” After a common standard was articulated in the UDHR, legal obligations to uphold and respect the rights set out therein were created through international treaties.

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are the two primary human rights treaties that, along with the UDHR, make up the International Bill of Human Rights. Today, the majority of nations have obligations pursuant to these treaties, with 167 countries currently party to the ICCPR and 160 countries party to the ICESCR. The ICCPR recognizes rights such as the fundamental right to life, the right to freedom from cruel and unusual punishment or slavery, the right to equality before the law, and the right to political participation. The ICESCR recognizes rights such as the rights to decent work, education, health, an adequate standard of living, and participation in cultural life. Both treaties assert the universality of human

100 See id.
106 See ICCPR, supra note 101, art. 6, para. 1.
107 Id. art. 7, art. 8.
108 Id. art. 26.
109 Id. art. 25.
110 See ICESCR, supra note 102, art. 6, art. 7.
111 Id. art. 13, para. 1.
112 Id. art. 12, para. 1.
113 Id. art. 11, para. 1.
114 Id. art. 15, para. 1.
rights and recognize the interdependence of those rights, with the ICCPR noting that:

the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social[,] and cultural rights.\footnote{(ICCPR)}

Importantly, other international agreements enumerate rights for particular groups of people, such as women\footnote{(Convention on the Elimination of All Forms of Discrimination Against Women)} or children,\footnote{(Convention on the Rights of the Child)} or address particular human rights violations, such as racial discrimination\footnote{(International Convention on the Elimination of All Forms of Racial Discrimination)} or torture.\footnote{(Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)}

B. Value and Utility of the Human Rights Frame

There are several elements of the human rights frame that facilitate its broad applicability and resonance, as well as its utility and value in motivating the pursuit of change. First, the international human rights frame allows a large number of groups to identify with its assertions and utilize its problem-solving approaches.\footnote{(Krista Johnson)} Conventions and treaties relating to a large number of social issues and targeted groups resonate with many different sorts of movements, including local advocacy efforts across the country.\footnote{(Maryland Legal Aid Bureau (MLAB)) The international human rights framework has also been used successfully at other levels of organization, including state and national. One example is the Maryland Legal Aid Bureau (MLAB), which formally articulates human rights as the guiding principle for its work—a result of a dynamic strategic planning process that engaged MLAB attorneys and clients in determining how the organization could best serve its client population. Martha F. Davis, Law, Issue Frames and Social Movements: Three Case Studies, 14 U. Pa. J.L. & Soc. Change}
the Vermont Workers’ Center organized an extensive and successful “Healthcare is a Human Right” campaign, which derived support from the UDHR’s right to health in pursuing a universal healthcare model covering all Vermonters. The Coalition of Immokalee Workers and the United Workers of Baltimore have engaged in campaigns to bring human rights obligations to bear against exploitative corporations, advocating for fair wages and safe working conditions. Mossvile Environmental Action Now organized in pursuit of environmental justice, pressing the U.S. to honor human rights obligations in its environmental policy and filing a petition with the Inter-American Commission on Human Rights of the Organization of American States.

363, 371–73 (2011). Another model is provided by the National Law Center on Homelessness and Poverty (NLCHP), a public interest law firm focused on impact litigation and advocacy across the country and in national forums that works to put pressure on U.S. actors to adhere to human rights norms and obligations. Id. at 373–75.


124 Michele Roberts, Mossville, Louisiana: A Community’s Fight for the Human Right to a Healthy Environment, 45 CLEARINGHOUSE REV. 257, 257 (2011); see also Martha F. Davis et al., Claiming Our Role as Human Rights Lawyers: How a Human Rights Framework Can Advance Our Advocacy, 45 CLEARINGHOUSE REV. 177, 178–79, 183–84 (2011) (recounting the experience of Monique Harden of Advocates for Environmental Rights, which represented the Mossville community); FORD FOUND., CLOSE TO HOME: CASE STUDIES OF HUMAN RIGHTS WORK IN
As Gillian MacNaughton describes in her article Human Rights Frameworks, Strategies, and Tools for the Poverty Lawyer’s Toolbox, human rights frames have significant practical implications for advocacy.\(^\text{125}\) For instance, human rights frames have the capacity to “lend moral and legal legitimacy to policy-making.”\(^\text{126}\) Human rights are rooted in international obligations that a majority of governments are legally bound to uphold.\(^\text{127}\) The moral weight of these established universal principles and the legitimate expectation that governments will uphold their international obligations lend persuasive force to lobbying and advocacy efforts that demand the focused protection of certain human rights.\(^\text{128}\)

A second utility of the human rights approach for advocates is its provision of a “common framework to guide policy-making and practice in all divisions of the government, thereby bringing coherence to government action.”\(^\text{129}\) A frequent challenge to implementing change at any level is getting new policies to work in coordination with existing programs, or to work across multiple divisions of government.\(^\text{130}\) Human rights frames create a foundation upon which multiple sectors of government can work cohesively towards the same goals.\(^\text{131}\)

Finally, human rights principles and human rights frames “generally improve the effectiveness of policy-making and implementation.”\(^\text{132}\) Human rights frames require government transparency, meaningful public participation in decision-making, and government accountability, all of which support the successful implementation of new

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\(^{125}\) MacNaughton, supra note 92, at 448.

\(^{126}\) Id.

\(^{127}\) See id. at 438–43 (discussing sources of international human rights law, obligations binding on states parties to international treaties and conventions, and international monitoring and compliance mechanisms).

\(^{128}\) Id. at 448.

\(^{129}\) Id.

\(^{130}\) See id.

\(^{131}\) Id.

\(^{132}\) Id.
policy. These utilities for advocacy are relevant to any movement focused on changing unjust policies, which is why the international human rights frame possesses such broad applicability.

V. Community Asset Development Redefining Education: A Case Study

A. Introduction to CADRE

CADRE is a membership-based grassroots organization of African American and Latino parents and caregivers in South Los Angeles who have organized to address school pushout and barriers to parental involvement in education. The realization that no organization then existed to specifically address the challenges that South Los Angeles parents faced in advocating for their children and that the Los Angeles public schools were not serving the needs of students in the community motivated the parents of CADRE to take action. Although CADRE now operates under a framework that views target issues as human rights violations, the organization underwent several developments with respect to its work and focus areas before utilizing this framework to achieve its most significant successes.

CADRE’s efforts to tackle the problems that parents faced in dealing with the local public schools and ensuring that their children received a quality education began with a “year-long door-to-door and school-front canvassing effort to identify the core issue facing parent engagement” with the Los Angeles schools. In the early stages of its work, CADRE spoke with more than 4,000 parents whose children attended public school in the LAUSD, particularly in South Los Angeles, and began to build a grassroots network. CADRE identified the core obstacle to parent involvement as “the lack of respect for and response to South LA parents when they advocated for their

133 Id.
134 About, CADRE, supra note 12.
135 CADRE & JUSTICE MATTERS INST., supra note 14, at 11, 13.
137 CADRE ET AL., REDEFINING DIGNITY IN OUR SCHOOLS, supra note 13.
138 Accomplishments, CADRE, supra note 136; see also History and Vision, CADRE, supra note 14.
children, often resulting in a feeling of being dismissed, disrespected, and excluded from their children’s educational process.”

CADRE’s next steps involved using Participatory Action Research (PAR) to explore the issue more deeply and identify specific policy changes that would help promote parent engagement. PAR “is a practice in which the distinction between the researcher and the researched is challenged as participants are afforded the opportunity to take an active role in addressing issues that affect themselves, their families, and their communities.” The PAR process “engages community members in generating the research questions, analysis, understanding, and conclusions.” Typically conducted in historically oppressed communities, PAR efforts are designed to address simultaneously the immediate concerns of the community and the underlying causes of oppression and to incorporate research, education, and action by allowing all participants to take on the roles of researchers, teachers, students, and actors. CADRE’s PAR work and its results were detailed in a 2004 report that articulated the organization’s vision of improved parent-school relationships in South Los Angeles, with an emphasis on improving parents’ engagement in their children’s education and discipline.

139 CADRE et al., Redefining Dignity in Our Schools, supra note 13.
140 Id.
142 CADRE et al., Redefining Dignity in Our Schools, supra note 13, at 19. See also Peter Reason & Hilary Bradbury, Introduction, in The SAGE Handbook of Action Research: Participative Inquiry and Practice 1, 4 (Peter Reason & Hilary Bradbury eds., 2d ed. 2008) (explaining general characteristics of PAR and noting that PAR “brings[s] together action and reflection, theory and practice, in participation with others, in the pursuit of practical solutions to issues of pressing concern to people, and more generally the flourishing of individual persons and their communities”). See generally Brydon-Miller, supra note 141 (giving a brief explanation of PAR’s theoretical underpinnings, as well as a summary of its basic tenets and methods).
143 See Brydon-Miller, supra note 141, at 661.
144 See generally CADRE & Justice Matters Inst., supra note 14, at 8–9, 20–25. This report focuses on the three values that CADRE felt most needed to be reinforced in the parent-school relationship in South Los Angeles: cultural inclusion, engagement, and accountability. Id. at 8–9. All three values draw attention to the importance of parents’ knowledge about their children’s needs; support parents’ involvement in their children’s education; and promote equality between parents and schools in decision-making, particularly with regard to discipline.
A foundational observation of this PAR work was the fact that “everyday South L.A. is losing a fraction of its most precious resource—our African American and Latino children and youth—to the juvenile justice system or the ranks of students who disappear through truancy and dropouts.”  

Having begun by concentrating on parent engagement in education and discipline, CADRE redirected its efforts toward the issues surrounding low graduation rates. Yet, the organization remained focused on parent involvement in “prevention, intervention, and discipline decisions” as a crucial factor in addressing this problem. Coinciding with the shift in target issue and the focus on bringing the values of cultural inclusion, engagement, and accountability into LAUSD policy, CADRE adopted a human rights frame for its advocacy. That frame enabled CADRE to identify the injustices it took on as human rights violations and articulate solutions that addressed those violations as such. The ability to engage in the active processes of refocusing and re-diagnosing the target and frame—as CADRE did—likely explains the greater success of some movements in comparison to others.

145 Id. at 14.
146 See CADRE et al., Redefining Dignity in Our Schools, supra note 13.
147 Id.
148 See CADRE & Justice Matters Inst., supra note 14, at 8–9, 20–25; CADRE et al., Redefining Dignity in Our Schools, supra note 13; Organizing, CADRE, supra note 13.
149 See CADRE et al., Redefining Dignity in Our Schools, supra note 13; Organizing, CADRE, supra note 13; see also MacNaughton, supra note 92.
150 See Benford & Snow, Framing Processes, supra note 52, at 624–25 (highlighting strategic processes used by SMO framers to deliberately redirect a frame or add new meaning to an old frame in order to achieve a specific purpose, such as drawing in new supporters or invoking a new approach to an issue); id. at 628 (summarizing that “collective action frames are not static, reified entities but are continuously being constituted, contested, reproduced, transformed, and/or replaced during the course of social movement activity. Hence, framing is a dynamic, ongoing process.”); id. at 632 (suggesting that steps taken in forming strong, well-targeted frames and carrying out framing processes impact SMO goal achievement).
B. CADRE and the Framing Tasks

1. Core Framing: Diagnosis and Prognosis

CADRE’s effort to refocus on the issue of low graduation rates in conjunction with school discipline provides an illustration of the core framing tasks discussed in Part III. First, in an act of diagnostic framing, CADRE chose to articulate its new focus as a student “pushout” crisis, rather than a “dropout” crisis.\(^ {151}\) Explorations of low high school graduation rates have frequently focused on student characteristics, such as a student’s social and academic background, as a primary factor leading to eventual dropout.\(^ {152}\) This approach to identifying the causes of dropout “frame[s] dropping out as a function of student background and behavior,” and implies “that students themselves are at fault for taking such unwise actions” as deciding to leave school or not committing sufficiently to succeeding in school.\(^ {153}\) The parents of CADRE saw the school completion issue slightly differently, realizing that:

poorly funded and under-resourced American schools are effectively pushing out underperforming and struggling students rather than taking the time and resources to deal appropriately with their academic and social-emotional needs. Dropping out is . . . only “the last twist in a downwards spiral” that often begins with severe and inadequate discipline policies that unnecessarily criminalize even trivial misbehavior and fail to provide much-needed support and interventions for students in crisis.\(^ {154}\)

Put another way, “[a] ‘drop out’ is often a student who was gradually pushed out years earlier.”\(^ {155}\)

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151 CADRE et al., *Redefining Dignity in Our Schools*, supra note 13, at 1.


153 Id. at 354. For an example of theories of school dropout that focus on student characteristics and choices, see Sarah Battin-Pearson et al., *Predictors of Early High School Dropout: A Test of Five Theories*, 92 J. EDUC. PSYCHOL. 568 (2000).


155 *Our Point of View*, CADRE, supra note 5; see also Elizabeth Sullivan, Nat’l Econ. & Soc. Rights Initiative, Deprived of Dignity: Degrad ing Treatment and Abusive Discipline in New York City & Los Angeles Public Schools 25 (Catherine Albisa et al. eds., 2007), avail-
This exercise of articulating a name for CADRE’s target issue constituted the development of an attributional diagnostic frame.\textsuperscript{156} By describing the issue as “pushout,” CADRE reaffirmed its view that the culpability rested with school district policies that were failing to address students’ educational needs.\textsuperscript{157} The attributional frame chosen can impact future advocacy significantly, since the focus of problem-solving energies may differ depending on where responsibility for the problem is placed.\textsuperscript{158} By choosing to frame the issue as “pushout,” CADRE highlighted the need to involve a broad array of stakeholders—including parents, students, teachers, schools, and education policy makers—in addressing the problem of low graduation rates.

\textit{able at} \url{http://www.nesri.org/sites/default/files/deprived_of_dignity_07.pdf} (describing the pushout model, where excessive discipline and failure to provide adequate support services contribute over time to “increasing alienation and destructive behavior,” ultimately leading to the student’s self-removal from school).

\textsuperscript{156} Because this article focuses primarily on collective action framing, framing low high school graduation rates as attributable to “pushout” is discussed as an exercise in diagnostic framing. It could also be considered an example of issue framing, a less agentic process that focuses on providing “alternative definitions, constructions, or depictions” of problems. Thomas E. Nelson & Zoe M. Oxley, \textit{Issue Framing Effects on Belief Importance and Opinion}, 61 J. Pol. 1040, 1041 (1999). A familiar example involves framing the issue of affirmative action as “remedial action,” “reverse discrimination,” or “an unfair advantage.” \textit{Id.} While issue frames can certainly influence the way individuals think about a given issue, they are not designed to be catalysts of broad, collective specific action in the same way as collective action frames. \textit{See} Benford & Snow, \textit{Framing Processes}, \textit{supra} note 52, at 614; Davis, \textit{supra} note 121, at 365–66. Due to CADRE’s focus on developing advocacy, and this article’s goal of describing that process, the framing of the target issue as “pushout” is discussed primarily as a diagnostic frame that represents the starting point for a collective action movement.

\textsuperscript{157} \textit{See Our Point of View}, CADRE, \textit{supra} note 5.

\textsuperscript{158} \textit{See} Benford & Snow, \textit{Framing Processes}, \textit{supra} note 52, at 616 (noting that, “Since social movements seek to remedy or alter some problematic situation or issue, it follows that directed action is contingent on identification of the source(s) of causality, blame, and/or culpable agents.”); Gerhards & Rucht, \textit{supra} note 74, at 581–82 (postulating that, “if the causes for the identified problem can [ ] be defined in a frame and, at the same time, these causes can be related to concrete persons, then this increases the mobilization capacity of a frame.”).
2. Participatory Communication

As noted in Part III, social movements depend on sustained participation of movement constituents, requiring that people interacting with the movement be viewed as actors and not as an audience.\(^{159}\) CADRE exemplifies this principle in its efforts to promote parent engagement and school accountability. As a grassroots, membership-based organization, CADRE is led by individuals from the very population that the entity seeks to serve: African American and Latino parents and caregivers in South Los Angeles.\(^{160}\) Under this model, the groups who have been the victims of systemic power imbalances have the right to work for change on their own behalf, and the parents of CADRE, having experienced and documented violations of their and their children’s human rights, are able to seek redress through implementation of school policies that support children and welcome parent input into the process.\(^{161}\)

CADRE’s use of parent canvassing and PAR also demonstrates the incorporation of participatory communication. These research methods aim to draw members of CADRE’s constituent group in and enable them to shape the process and direction of the movement, a key tenet of the participatory communication model.\(^{162}\) The short-term goals suggested in the 2004 report of PAR findings were all based on information gathered from constituents, as were the long-term solutions that CADRE later advocated for and brought to fruition.\(^{163}\)

\(^{159}\) See Ryan & Gamson, supra note 49, at 15–16. But see Benford & Snow, Framing Processes, supra note 52, at 630 (discussing the interactions between activists and target audiences and how such interactions inform alterations to frames).

\(^{160}\) About, CADRE, supra note 12.

\(^{161}\) See generally CADRE et al., Redefining Dignity in Our Schools, supra note 13, at iv (describing CADRE’s membership-based character and some of the ways that the organization channels parent experiences into action); CADRE & Justice Matters Inst., supra note 14, at 2, 7–8 (same). See also Ryan & Gamson, supra note 49, at 15–16 (explaining the theory behind participatory communication and the importance of constituent involvement in building and shaping movements and advocacy efforts).

\(^{162}\) See CADRE et al., Redefining Dignity in Our Schools, supra note 13, at 19; CADRE & Justice Matters Inst., supra note 14, at 7–9, 18; Ryan & Gamson, supra note 49, at 15–16.

\(^{163}\) See generally CADRE & Justice Matters Inst., supra note 14, at 18–25 (describing the participatory research process undertaken by CADRE, the resulting perspectives on the values missing from parent experiences with the school system, and the expectations for short-term changes to address
C. Integrating CADRE’s Work with the Human Rights Master Frame

1. Defining Human Rights Violations

CADRE adopted a human rights framework for its organizing efforts in 2005, at about the same time that it refocused to address the pushout crisis.\(^{164}\) Specifically, the organization embraced “international human rights standards as the basis by which [it] analyze[d] conditions in [local] schools and communities.”\(^{165}\) CADRE selected this framework “precisely because [international human rights definitions] raise the bar of what we demand from our public education system and reflect more closely what parents expect from schools.”\(^{166}\)

CADRE focuses on three human rights principles in its advocacy: students’ right to dignity, students’ right to a quality education, and parents’ right to participation.\(^{167}\) CADRE explains the practical expectations drawn from these rights as follows:

that [ ] children will be treated with dignity and respect in the educational process and discover their self-worth (right to dignity); that schools will not unnecessarily remove [ ] children from the educational process (right to quality education); and that parents share in decision-making and can hold schools accountable (right to participation).\(^{168}\)

These rights derive from international conventions, in particular the Convention on the Rights of the Child (CRC) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).\(^{169}\) CADRE identified these principles as focal points based on the experiences and concerns of the organization’s participants and the community it supports.\(^{170}\)

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\(^{164}\) CADRE et al., Redefining Dignity in our Schools, supra note 13, at 1–2.

\(^{165}\) Organizing, CADRE, supra note 13.

\(^{166}\) Id.

\(^{167}\) Id.; see also CADRE et al., Redefining Dignity in our Schools, supra note 13, at 13.

\(^{168}\) Organizing, CADRE, supra note 13.

\(^{169}\) See CRC, supra note 117, art. 2, art. 28, art. 29; ICERD, supra note 118, art. 5.

\(^{170}\) See CADRE et al., Redefining Dignity in our Schools, supra note 13, at 10.
The CRC—ratified by 193 countries, although not the U.S.\textsuperscript{171}—calls for states to recognize children’s right to an education in a supportive and non-discriminatory environment, where discipline is administered in accordance with the child’s human dignity, attendance is encouraged, and exclusion is diminished.\textsuperscript{172} The ICERD has been ratified by the U.S.,\textsuperscript{173} and the agreement provides that states shall “undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone . . . in the enjoyment of . . . [t]he right to education and training.”\textsuperscript{174} Through its canvassing and PAR efforts, CADRE uncovered that the LAUSD had violated the rights embodied in these documents in its dealings with parents and families and in its approach to discipline.\textsuperscript{175}

A large number of the students and parents that CADRE surveyed reported feeling that students were mistreated during the suspension process through name-calling, hostility from school officials, and excessive physical force.\textsuperscript{176} Additionally, “[a]mong students who dropped out of high school, 23% said that the way in which they were treated by the school was one of the reasons that they left.”\textsuperscript{177} CADRE views these as violations of a student’s right to dignity.\textsuperscript{178} CADRE’s research also revealed violations of a student’s right to quality education due to “frequent out-of-class removals . . . [during which students] received no academic work or instructional support. Students also missed out on assignments and tests while they were suspended and fell behind.”\textsuperscript{179} Rather than ensuring access to a quality education, the LAUSD erected barriers in the form of discipline policies that kept students out of classrooms.\textsuperscript{180} Lastly, CADRE documented stories of parents who had been denied their right to

\begin{footnotes}
\item\textsuperscript{172} CRC, supra note 117, art. 2, art. 28, art. 29.
\item\textsuperscript{174} ICERD, supra note 118, art. 5.
\item\textsuperscript{175} CADRE et al., Redefining Dignity in Our Schools, supra note 13, at 10, 13.
\item\textsuperscript{176} Id. at 13.
\item\textsuperscript{177} Id.
\item\textsuperscript{178} Id.
\item\textsuperscript{179} Id.
\item\textsuperscript{180} See id.
\end{footnotes}
participate in significant decisions about their child’s education.\footnote{Id.} In particular, “schools did not notify parents about a child’s suspension from school and the right to appeal. Parents also had a hard time setting up conferences with teachers to discuss behavioral and other important issues.”\footnote{Id.}

2. \textit{Intersections of the Frame and Goals}

Much of the utility that the human rights frame holds for CADRE’s organizing efforts, and for other local and grassroots organizations’ activities, comes from the frame’s capacity to embrace and promote the outcomes sought. Human rights standards depict more fully the type of educational experience that the parents of CADRE desire for their children, and the nature of the responsibilities that they demand of schools and families alike.\footnote{See Organizing, CADRE, supra note 13.} According to CADRE:

\begin{quote}
The integration of human rights has led to a clearer vision of the type of parent power CADRE is working towards – parents who are able to protect and promote children’s dignity, opportunity to learn, and self-determination, by being at decision-making and policy-making tables and having the tools to monitor accountability in policy implementation.\footnote{Id.}
\end{quote}

Thus, for these parents, articulating their grievances in terms of human rights injustices highlighted areas of focus and helped generate solutions.\footnote{See id.; see also Gerhards and Rucht, supra note 76, at 582 (observing that the way in which a problem is diagnosed has implications for the solutions pursued).}

The broader themes of the human rights framework similarly support the guiding principles of CADRE’s advocacy strategy. The organization’s PAR-based 2004 report articulated a vision of school-parent partnership built on the values of cultural inclusion, engagement, and accountability, all three of which are buttressed by the human rights framework.\footnote{CADRE & Justice Matters Inst., supra note 14, at 8–9, 20–25.} First, the UDHR emphasizes the promotion of cultural understanding through learning and the importance of free participation in the cultural life of the communi-
ty.\textsuperscript{187} CADRE observes that schools that emphasize cultural learning and understanding as important institutional values are more likely to “see parents as knowledgeable and having important insights to contribute,” because teachers and administrators are more aware of cultural assets and less influenced by negative stereotypes.\textsuperscript{188} Further, public engagement in decision-making and the accountability of government and leadership both represent key pillars of the human rights framework,\textsuperscript{189} which support CADRE’s goals of bringing parents to decision-making tables and involving them in monitoring the implementation of discipline policies.\textsuperscript{190} CADRE believes that schools that respect these three principles are better able to engage with students’ parents and with surrounding communities to find meaningful and effective ways to address student needs.\textsuperscript{191}

D. Generating Solutions

CADRE’s adoption of the international human rights framework provides a strong example of how chosen frameworks affect the course of core framing tasks by delimiting possible solutions and courses of action, as well as motivating movement participants.\textsuperscript{192} By adopting a human rights perspective on the rights to dignity, a quality education, and participation, CADRE cemented its conception of what a positive outcome would look like—an environment in which students are supported and drawn into classrooms, rather than excluded, with parents fully present at the decision- and policy-making tables.\textsuperscript{193}

CADRE itself notes that the adoption of a human rights framework has led to a “clearer vision of the type of parent power CADRE is working towards,” and of the type of education and support that parents should expect from schools.\textsuperscript{194} These factors were at play when, in 2006, CADRE decided to support adoption of SWPBS as “an important first step towards reversing the high discipline rates that were deepening racial inequities for African American and Latino
students.” SWPBS is an approach to education and student behavior that emphasizes the teaching and reinforcement of appropriate behaviors, moving away from a reliance on punitive and exclusionary discipline. The SWPBS theory is “built on the assumption that behavioral expectations defined, supported, and implemented by the entire school community help to establish a common culture where all students are held to the same behavioral standards.” SWPBS does not require one behavioral model, but rather advances a collection of strategies and interventions. Some of these strategies include modeling or role-playing appropriate behavior in a variety of situations (e.g., in the classroom, in the cafeteria, on the playground); addressing the root causes of misbehavior and minimizing triggers of such misbehavior; involving parents early on when behavioral concerns arise; and developing consequences for misbehavior that are age-appropriate and proportional to the conduct being addressed. Whatever the particular methods adopted, the principal elements of an SWPBS system are: consistent teaching and reinforcement of behavioral expectations, clear and consistent consequences for misbehavior, observation of student behavior in all school settings, and use of data to make decisions about students’ educational and support needs.

The choice of SWPBS as one element in the solution to the parent engagement and school pushout problems makes sense within the human rights framework. SWPBS addresses all the elements of the rights violations that CADRE targets by creating space for parents in the decision-making process and ensuring a move away from the punitive discipline measures that perpetuate the pushout cri-

195 CADRE et al., Redefining Dignity in our Schools, supra note 13.
196 Id. at 15.
198 CADRE et al., Redefining Dignity in our Schools, supra note 13, at 15.
199 Advancement Project, supra note 4, at 35; CADRE et al., Redefining Dignity in our Schools, supra note 13, at 15–16.
200 Vincent & Tobin, supra note 197; see also Morgan Chitiyo et al., An Assessment of the Evidence-Base for School-Wide Positive Behavior Support, 35 EDUC. & TREATMENT OF CHILD. 1, 2 (2012); George Sugai & Robert R. Horner, A Promising Approach for Expanding and Sustaining School-Wide Positive Behavior Support, 35 SCH. PSYCHOL. REV. 245, 246–49.
Given the interdependent nature of human rights, with each right only fully achievable alongside the others, the choice of a solution that enables this simultaneous advancement of different rights is a logical result of using a human rights frame.

In pushing for the adoption of an SWPBS policy in the LAUSD, CADRE conducted media campaigns; worked with allies across the country to build awareness; and met with the LAUSD Board of Education, the Superintendent, and the United Teachers of Los Angeles in order to build widespread support for the initiative. CADRE’s efforts in this regard paid off when, in 2007, the Board of Education unanimously approved SWPBS as the basis for the LAUSD’s discipline policy.

CADRE continues to use PAR and on-site investigation of LAUSD schools to monitor the implementation of SWPBS and to document its effects on classroom behavior and educational outcomes, a continued application of the important human rights frame principles of transparency and accountability. A 2010 report containing the results of this ongoing study suggests that, while SWPBS has made significant strides in reducing schools’ overall reliance on punitive and exclusionary discipline measures, much work remains to be done.

201 See Sugai & Horner, supra note 200, at 248 (connecting schools’ successful adoption of SWPBS to the promotion of positive relations between the school staff, students, and parents and the use of both school- and community-wide efforts to enforce positive behaviors); id. at 254 (describing how parent engagement can be increased by involving parents in the application of SWPBS strategies at home); Vincent & Tobin, supra note 197 (proposing SWPBS as an alternative to reduce student misbehavior and the need for exclusionary discipline that leads to pushout).

202 See CADRE et al., Redefining Dignity in our Schools, supra note 13, at 1; What Are Human Rights?, Office of the U.N. High Comm’r for Human Rights, supra note 11.

203 CADRE et al., Redefining Dignity in our Schools, supra note 13.


205 CADRE et al., Redefining Dignity in our Schools, supra note 13, at 3; see also MacNaughton, supra note 92, at 448 (highlighting the importance of government transparency, participatory processes, and accountability in achieving human rights aims).
in addressing the disproportionate burden of disciplinary action on African American students and students with disabilities.\textsuperscript{206}

**VI. Conclusion**

Frame theory proposes that frames heavily influence outcomes and successes, and that the frames employed to diagnose and name a problem will affect the range of options available for designing and implementing solutions.\textsuperscript{207} Frames have the capacity to focus attention, drive groups toward solutions, motivate and coordinate collective action, and engage communities in shaping their own futures.\textsuperscript{208} The international human rights frame has the potential to be especially powerful.

Such processes are clearly played out in CADRE’s advocacy work. Facing the localized challenges of the national problem of school pushout, as well as the experience of South Los Angeles parents being unable to properly engage with schools, CADRE adopted the human rights master frame to support and define its advocacy efforts.\textsuperscript{209} This had numerous positive implications for CADRE’s work. By viewing the difficulties that parents faced as human rights violations, CADRE successfully articulated a solution that simultaneously addressed the three identified problems of inappropriate discipline, pushout, and lack of parent engagement.\textsuperscript{210} When these problems were framed as violations of a human right (i.e., the right to dignity, quality education, or equal participation), they could be addressed together through interdependent, human rights-based solutions.\textsuperscript{211} The principles of transparency, engagement in decision-making, and accountability inherent in the human rights frame supported the inclusion of parent monitoring and involvement in every step of SWPBS implementa-

\begin{itemize}
\item \textsuperscript{206} CADRE \textit{et al.}, \textit{Redefining Dignity in our Schools}, supra note 13, at 5.
\item \textsuperscript{207} Benford & Snow, \textit{Framing Processes}, supra note 52, at 616; see also Gerhards & Rucht, \textit{supra} note 74, at 579–82 (describing how, in the context of two international campaigns, the manner in which problems were conceptualized and attributed to a particular cause shaped the types of demands for change that mobilizers sought).
\item \textsuperscript{208} See Benford & Snow, \textit{Framing Processes}, \textit{supra} note 52; Ryan & Gamson, \textit{supra} note 49.
\item \textsuperscript{209} CADRE \textit{et al.}, \textit{Redefining Dignity in our Schools}, \textit{supra} note 13; \textit{Organizing}, CADRE, \textit{supra} note 13.
\item \textsuperscript{210} CADRE \textit{et al.}, \textit{Redefining Dignity in our Schools}, \textit{supra} note 13, at 13.
\item \textsuperscript{211} \textit{Id.} at 1; see also \textit{What Are Human Rights?}, Office of the U.N. High Comm’r for Human Rights, \textit{supra} note 11.
\end{itemize}
Lastly, the general benefits for policy advocacy conveyed by the human rights frame—in particular, moral and legal legitimacy—helped to sustain CADRE’s advocacy efforts and achieve successful reforms.\textsuperscript{213}

\textsuperscript{212} See CADRE et al., \textit{Redefining Dignity in our Schools}, supra note 13, at 14, 19 (explaining parent involvement in monitoring); MacNaughton, \textit{supra} note 92, at 448 (highlighting the need for transparency in pursuing human rights-based outcomes).

\textsuperscript{213} See CADRE et al., \textit{Redefining Dignity in our Schools}, \textit{supra} note 13, at 13–18 (discussing the central features of LAUSD’s adopted SWPBS policy, as well as the responsibilities of school administrators, teachers and other staff, the district, parents, and students under the plan); MacNaughton, \textit{supra} note 92, at 448 (describing how a human rights frame heightens legitimacy of advocates’ goals for purposes of realizing policy change).
Legal Services Fraud in Immigrant Communities and the U Visa’s Potential to Help Victimized Communities Help Themselves

Margaret Serrano*

If the government is serious about putting the scam artists out of business, then it should more explicitly make use of existing law to protect the victims of these crimes . . . .¹

— Legal Aid Foundation of Los Angeles

I. Introduction

On the day she learned that her dreams of attaining legal status would never come true, Martine, a Haitian immigrant, was coming up on her fifteenth anniversary of working and living in the United States.² That day, in August 2011, she discovered that her dealings over a decade ago with a church reverend and self-declared immigration expert would mark her forever.

Martine had sought the reverend’s advice using the only criteria she knew. She did not know a lot of English and had not been to school a lot. So she relied on community ties to find help for her immigration problem, believing a friend’s recommendation and the reverend’s position in the church made him a trustworthy choice.

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Unfortunately, the so-called assistance that the reverend sold her was to fabricate an account of Martine’s non-existent fears of persecution and to file it with the government in an asylum application, without ever explaining to her what he was doing. In reply to Martine’s questions, he would simply reassure her that he took this approach “all the time,” and his methods “always worked.”

At her asylum hearing, unsurprisingly, Martine’s testimony bore no resemblance to what the reverend had written on her application, and the Immigration Judge (I.J.) found her asylum claim frivolous. Martine didn’t really understand what this meant and went on with her life, figuring she would just try again later to obtain legal status when the laws changed or when one of her children was old enough to sponsor her.

Because the reverend never explained to her the meaning of what had happened in court that day, it was not until Martine spoke with a new lawyer five years later that she discovered that the I.J.’s ruling on her asylum claim had made her permanently ineligible to receive any benefits under the Immigration and Nationality Act (INA).

The fraudulent acts of one immigration services provider—who had either no real knowledge of immigration law, or who understood the law but was just looking for the easiest way to make a fast buck—permanently frustrated Martine’s life plans. She has no path to live or work legally in the United States. She also cannot return to Haiti, as her family’s home was destroyed in the 2010 earthquake, which left her family homeless.

When asked if she would consider reporting the reverend to authorities, however, Martine hesitated. She is afraid of interacting with authorities due to her lack of legal status. She fears that the reverend will harm her and her children if he learns she went to the police.

This story repeats itself every day in immigrant communities all across the country. This article outlines the scope of the problem of immigration services fraud and its threat to human rights here in the United States. It explores possibilities for using the U visa, a nonimmigrant visa for crime victims, as a tool to fight immigration services fraud. As part of this exploration, it will examine pending attempts to utilize this mechanism, roadblocks in the path to its success, and recommendations to improve its chances for viability in the future.
II. Immigration Services Fraud—The Scope of the Problem

A. Immigration Services Fraud as a Human Rights Issue and Its Impact on Immigrant Communities

Immigration services fraud affects an individual’s right to due process, a fundamental human right that applies to United States citizens and non-citizens alike. Fraudulent legal representation all too often amounts to constitutionally ineffective legal representation. Courts have recognized, even in an immigration context, that “ineffective assistance of counsel . . . is a denial of due process under the Fifth Amendment,” if the ineffective assistance renders the proceeding “so fundamentally unfair that the alien was prevented from reasonably representing the case.”

Even when fraudulent legal representation does not rise to the level of ineffective assistance of counsel, it always affects the universal “right to an effective remedy by the competent national tribunals” for the defense of the “rights granted [to every individual] . . . by . . . law.” Fraudulent legal representation also robs victims of their right to counsel, a basic building block of due process. The Supreme Court has noted that of all the rights protected by the Constitution, “the right to be represented by counsel is by far the most pervasive, for it affects [the] ability to assert any other rights [one] may have.”

3 The founders’ “belief was—our constitutional principles are—that no person of any faith, rich or poor, high or low, native or foreigner . . . can have his life, liberty, or property taken ‘without due process of law.’” Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 218 (1953) (Black, J., dissenting).

4 Yamataya v. Fisher, 189 U.S. 86 (1903) (no alien may be deported without a hearing that meets constitutional due process standards, including representation by a lawyer); see also Harisiades v. Shaughnessy, 342 U.S. 524, 604 (1952) (Douglas, J., dissenting) (“An alien . . . is . . . secure in the personal guarantees every resident has . . . guarantees of liberty and livelihood are the essence of freedom, which this country, from the beginning, has offered the people of all lands. If those rights . . . have constitutional protections, I think the more important one—the right to remain here—has a like dignity.”); Restatement (Third) of Foreign Relations Law § 722 (1) (1987) (“An alien in the United States is entitled to the guarantees of the United States Constitution other than those expressly reserved for citizens.”).

5 Hernandez v. Mukasey, 524 F.3d 1014, 1017 (9th Cir. 2008).


In a human rights context, immigration services fraud is a particularly pernicious variety of fraud in that its perpetrators repeatedly take advantage of the cultural vulnerabilities of low-income, low-education-level immigrant groups. Perpetrators exact large sums of money and provide dangerously low quality services in return. “These criminal operations prey on the desperation” of victims of “very limited means and an unsophisticated understanding of the U.S. immigration legal system,” explains Michael Almonte, Fragomen Fellow to the City Bar Justice Center in New York.\(^8\)

Perpetrators of immigration services fraud “are completely aware that their victims lack the specific knowledge necessary to contest any of the advice they are given, and [that victims] would sign any and all documentation that is presented to them[,] as long as they receive the proper assurances from individuals that they believe are experts in the field.”\(^9\) To make matters worse, dishonest practitioners know that most of their victims will “never be able to discover the truth about their abusive schemes until it [is] too late” and they find themselves “thrown into removal proceedings.”\(^10\)

According to the Office of the New York State Attorney General, which created a special Immigration Services Fraud division within its Civil Rights Bureau a few years ago, there are five distinct but overlapping categories of immigration services fraud:\(^11\)

1. The misrepresentation of legal credentials;
2. The unauthorized practice of law (UPL),\(^12\) where an individual holds himself out as capable of providing

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\(^8\) E-mail from Michael Almonte, Fragomen Fellow, N.Y. City Bar Justice Ctr. (Aug. 12, 2011) (on file with author). Almonte is actively involved in pro bono immigrant outreach efforts in areas with rampant immigration services fraud in New York.

\(^9\) Id.

\(^10\) Id.


\(^12\) Many states have unlicensed practice of law (UPL) statutes, such as the following one, which serve as tools against immigration services fraud:

It shall be unlawful . . . to practice or appear as an attorney-at-law . . . or to hold himself out to the public as being entitled to practice law . . . or to assume, use, or advertise the title of lawyer, or . . . equivalent terms in any language, in such manner as to convey the impression that he is a legal practitioner of law or . . . without having first been
immigration law services, despite lacking the necessary credentials to do so;\textsuperscript{13}

3. False, and otherwise illegal, promises to expedite immigration processes, usually by a person purporting to have a special relationship with government employees who can expedite applications in exchange for a fee;\textsuperscript{14}

4. Misinformation fraud, where a service provider knowingly provides misleading or completely false information to immigrants regarding their chances at legalization;\textsuperscript{15}

5. Immigration affinity fraud, where a perpetrator targets clients of his or her own ethnic group, gaining and abusing immigrants’ trust by playing on community ties.\textsuperscript{16}

duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath.

N.Y. JUD. LAW § 478 (Consol. 2011); see also Emily A. Unger, Solving Immigration Consultant Fraud Through Expanded Federal Accreditation, 29 L. & INEQ. 425, 437 & n.125 (2011).

\textsuperscript{13} Common Forms of Immigration Fraud, supra note 11. The law is very specific about who is allowed to represent an immigrant in proceedings or petitions, and who is not. See 8 C.F.R. § 103.2(3) (2011) (“petitioner may be represented by an attorney . . . or by an accredited representative as defined in § 292.1(a)(4) of this chapter.”). The only persons legally authorized to represent an immigrant are attorneys, law students under the supervision of an attorney, board accredited representatives, or “reputable individuals”—the latter only by special request of the immigrant and only if such individual receives no “direct or indirect remuneration” for this service. 8 C.F.R. § 292.1 (2011).

\textsuperscript{14} Common Forms of Immigration Fraud, supra note 11. This form of fraud is effective with the many immigrants who hail from countries plagued by rampant corruption, in which a bribe in return for government action is common. See, e.g., Zachary J. Lee, Wrestling with Mexican Criminal Procedure: How Law Schools in the United States and Mexico Can Team Up to Rebuild Mexico’s Criminal Trial, 33 HOUS. J. INT’L L. 53, 56, 63 (2010) (“Public knowledge of the widespread use of bribes has cultivated a general distrust in Mexico's criminal justice system.” In Mexico “[t]he presumption of guilt is applied almost exclusively to poor defendants. Those who can afford it . . . [have a] ‘get-out-of-jail-free card.’”).

\textsuperscript{15} When misinformation fraud happens, the defrauded client may not discover that he or she has been victimized until he or she receives notice of ineligibility from the government, usually months, or even years, later. Common Forms of Immigration Fraud, supra note 11.

\textsuperscript{16} Id.
In addition to understanding these common forms of immigration services fraud, it is important to be aware of one of the most common specimens of fraudulent immigration services providers running rampant in U.S. immigrant communities today: the fraudulent notario. Many unscrupulous notaries public in the United States attract clients for legal services by holding themselves out as notarios, which in Latin American civil law systems are an elevated class of lawyers who have passed a selective governmental review process, and who are, in those countries, authorized to provide many legal functions. In the United States, these individuals represent themselves to immigrant communities as qualified to offer legal advice or services concerning immigration or other matters of law, even though they lack authorization and a law degree.

The American Bar Association reports that it is common for notarios to victimize immigrants throughout the country by asserting falsehoods, including: being an attorney or legal assistant; having authorization to represent immigrants before immigration courts; being qualified to assist in preparing legal paperwork, such as wills and corporate documents; holding a court license; or serving in the same capacity as a notario in the immigrants’ home countries.

The “severe implications” for the immigrants who fall prey to these notarios can include: missed deadlines in legal proceedings; the submission of incorrect, incomplete, or falsified forms to the government; squandered opportunities to gain immigration status; unnecessary deportation; and even civil or criminal liability for

19 Id.
20 Id.
21 See, e.g., In re Applicant [Information Redacted by Agency], 2010 WL 6526851, at *1 (Immigration & Naturalization Servs., July 7, 2010) (immigrant did not file application “during the initial . . . period because his notario did not file the paperwork he thought was prepared and filed.”).
22 See, e.g., Hernandez, 524 F.3d at 1016 (fraudulent notario told petitioners it was unnecessary to “call witnesses, provide expert testimony, or submit documents in support of their application for suspension of deportation”).
making false statements to authorities. In addition to endangering immigrants’ legal status, these notarios routinely cheat low-income communities out of tens of thousands of dollars.

B. Immigration Services Fraud is Making Policy Agendas at the Local, State, and National Levels

Due to the devastation of vulnerable immigrant communities, immigration services fraud has recently drawn increased attention from policy makers at the local, state, and national levels. The New York State Attorney General’s Civil Rights Bureau, for example, rates immigration services fraud as “an issue of national importance, affecting large segments of communities” and has launched an initiative against the problem that has involved several legal actions against fraudulent services providers.

As part of this initiative, the N.Y. Attorney General has been investigating numerous “individuals and companies who target immigrant communities with false promises of residency and citizenship or provide services without having the legal authority to do so,” settling many of their cases with agreements that “permanently bar” the perpetrators “from operating immigration-related businesses,” and requiring them to “collectively pay $118,000 in monetary relief.” The N.Y. Attorney General brought one Queens County woman to court for cheating immigrants out of more than $250,000, following an investigation involving more than 80 immigration services organizations.

At the municipal level, policy responses include a New York City Department of Consumer Affairs initiative, which has inspected over 280 immigration service providers, issuing 134 violations and collecting $288,268 in fines. The City itself has amended its Administrative Code sections on immigration services providers, motivated by legislative findings that:

against him in absentia, after a fraudulent notario had told him not to appear at the hearing, because he would “take care” of it for him).

24 About Notario Fraud, supra note 18.
25 Id.
26 Common Forms of Immigration Fraud, supra note 11.
27 Id.
28 Id.
persons who assist individuals with immigration matters have a significant impact on the ability of their clients to live and work within the United States[,] and to establish and maintain stable families and business relationships. Given the size of New York City’s immigrant community, providers of immigration assistance services have a significant impact on cultural, social and economic life in this city.\(^{30}\)

At the national level, U.S. Citizenship and Immigration Services (USCIS), the Department of Homeland Security (DHS), the Department of Justice (DOJ), and the Federal Trade Commission (FTC) recently began a campaign to alert communities to the dangers of the incompetent or false notarios.\(^{31}\) In June 2011, these agencies announced their commitment to “educate immigrants about these scams,” and to inform them “about the legal immigration process and where to find legitimate legal advice and representation.”\(^{32}\) As part of this joint agency initiative, the FTC has specifically dedicated a portion of its consumer fraud database to facilitate law enforcement agencies’ investigations of immigration services scams.\(^{33}\)

Given policy makers’ extensive efforts and expenditures directed at suppressing immigration services fraud, it seems only logical that government would wish victims of this fraudulent activity to report it to the police and to cooperate in prosecutions. Reporting occurs all too infrequently, however, because the victims are necessarily immigrants with dubious legal status who are fearful of contact with authorities.\(^{34}\)

A legal mechanism designed to overcome this obstacle to enforcement already exists. In 2000, Congress created the U visa (with final enacting regulations in 2007) specifically to foment coop-
eration between immigrant crime victims and law enforcement by offering the protection of legal status, rather than potential deportation, as a reward for working with police.\(^{35}\) So far, this mechanism has never been successfully extended to victims of immigration services fraud, although logic begs its application.

### III. A Potential Tool Against Legal Services Fraud in the Advocates’ Toolbox: The U Visa

#### A. An Overview of the U Visa: A Legal Incentive to Encourage Undocumented Immigrants to Report and Aid in the Prosecution of Crimes

Congress created the U visa to incentivize undocumented immigrants to report and assist in the prosecution of crimes committed in the United States. It offers a path to legal residence in order to assuage immigrants’ deportation fears, which typically arise from any interaction with law enforcement.\(^{36}\) The Director of USCIS has stated that the U visa is meant “to help curtail criminal activity, protect victims, and encourage them to fully participate in proceedings that will aid in bringing perpetrators to justice.”\(^{37}\)

Not just any immigrant who calls the police may obtain this visa, of course. The immigrant only attains eligibility if certain statutorily specified crimes were committed against him or her, if a law enforcement agency will certify that the immigrant provided assistance in the investigation or prosecution of the crime, and if the immigrant suffered substantial physical or mental abuse as a result of the crime.\(^{38}\) To determine if abuse rises to the level of “substantial,” courts examine factors including “the nature of the injury suffered,” “the severity

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35. Id. at 129–30.
of the perpetrator’s conduct,” and the severity, duration, and permanence of the harm suffered.\(^{39}\) Courts will also look at a series of acts in the aggregate, as these may “constitute substantial physical or mental abuse even where no single act alone rises to that level.”\(^{40}\) This aggregation can be important when the qualifying criminal activity consists of many smaller harmful acts over time rather than one discrete act.

In 2000, when Congress developed the legislation that resulted in the creation of the U visa, however, it was not focused on the general reduction of crime in immigrant communities. Rather, Congress was acting to amend loopholes in another piece of legislation, the 1994 Violence Against Women Act (VAWA), originally enacted as a “respon[se] to domestic violence.”\(^{41}\) With regard to the relationship between immigration and domestic violence, when Congress passed VAWA in 1994, it formally noted a “disproportionately high number of foreign-born battered women” among domestic violence victims, whose vulnerability is often exacerbated by immigration laws, particularly when the abuser uses the victim’s lack of status as a tool to control her.\(^{42}\) The 1994 VAWA legislation provided a way out of this predicament, but only for immigrant domestic violence victims who were legally married to their abusers and, even then, only if the abusers were U.S. citizens.\(^{43}\)

In the six years after VAWA’s initial passage, pressure by “women’s and domestic violence advocacy organizations” mounted, causing Congress to recognize the need to extend VAWA’s protections to victims who were not legally married to their abusers, or whose abusers were not U.S. citizens.\(^{44}\) This advocacy motivated Congress’ 2000 legislative efforts, including the creation of the U visa.\(^{45}\) That year, Congress passed the Victims of Trafficking and Violence Protection

\(^{40}\) Id.
\(^{42}\) Id. at 457.
\(^{43}\) Id.
\(^{44}\) Id. (“In 2000, during the 106th Congress, VAWA was reauthorized, providing for the establishment of a legal assistance program for victims of domestic abuse and addressing circumstances that were not covered under VAWA 1994.”).
\(^{45}\) Id.
Act (VTVPA), which updated VAWA and created the U visa.\textsuperscript{46} The Act created a path to legal immigration status for immigrant victims of an array of crimes which are frequently perpetrated against immigrants.\textsuperscript{47}

Given the legislative history behind the development of the U visa, it is unsurprising that all of the criminal activity that qualifies a victim for the visa falls within the realm of (or often occurs in conjunction with) domestic violence, crimes frequently directed at women, or classic forms of criminal violence. The criminal activities that qualify an immigrant victim for a U visa are as follows:

[R]ape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.\textsuperscript{48}

It is important to note, however, that the law does not actually include any requirements that the qualifying criminal activity be committed in the context of violence against women or domestic violence, or that it include any actual violence at all; it only requires that one of the listed criminal activities be committed in some form.\textsuperscript{49}

While Congress clearly contemplated the U visa’s use as a tool to suppress domestic violence, general violent crime, and violence against women, it appears not to have considered the law as a tool against immigration services fraud. In accounts of the legislative history of the law and in legislative findings, nowhere does there appear any mention of immigration services fraud as a problem that might be addressed through the U visa.

Even if, hypothetically, some members of Congress considered the possibility that the U visa could protect victims and encourage reporting of immigration services fraud—and no information suggests that they did—Congress obviously did not purposefully adopt


\textsuperscript{48} VTVPA § 1513.

\textsuperscript{49} Id.
an intent to combat immigration services fraud through the U visa. Indeed, if Congress had acted under this intent, it would have tailored the list of qualifying crimes to cover the many criminal activities that immigration services fraud encompasses more comprehensively, as other immigration services fraud legislation has done.\(^{50}\) The fact that Congress never envisioned the use of the U visa to fight immigration services fraud, however, does not mean that the U visa cannot or should not be put to this purpose.

B. Why the U Visa Is an Appropriate Tool for Combating Immigration Services Fraud

The use of the U visa to fight immigration services fraud fits with the spirit of that law, given that the comments to its regulations specifically state that “[t]he list of qualifying crimes [for U visas] represents the myriad types of behavior . . . [or] crimes of which vulnerable immigrants are often targeted as victims.”\(^{51}\) Immigration services fraud and the criminal activities that comprise it always target immigrants and thus should be on this list.

One Ninth Circuit judge seemed to appreciate the merits of this idea.\(^{52}\) In a case in which her court denied an immigrant’s primary request, without further comment or analysis, this judge suggested that the immigrant “may be eligible for a U visa because of the fraud of [the] notario who filed the papers requesting [her] asylum.”\(^{53}\) Immigrant advocates are now exploring which of the enumerated U visa qualifying criminal activity categories best cover the acts that fraudulent immigration practitioners perpetrate against their victims. The best fit seems to lie in the categories of witness tampering, obstruction of justice, perjury, or the solicitation of any of these crimes.\(^{54}\)

Examples of activities that fraudulent legal services providers often engage in that could equate to criminal conduct in these three

\(^{50}\) See, e.g., N.Y. City Admin. Code § 20-771 (West 2010) (legislation that exhaustively addresses the elements of immigration services fraud). For an overview of all of the criminal activity that immigration services fraud may include, see supra Part II (A).


\(^{52}\) Acosta v. Keisler, 258 Fed. App’x 80, 81 (9th Cir. 2007) (Fletcher, J., specially concurring).

\(^{53}\) Id.

\(^{54}\) For a decision that briefly discusses the possibility of a U visa based on perjury, see In re Tavares, 2010 WL 4035424 (B.I.A. Sep. 17, 2010) (unpublished decision).
categories include, for example, inducing an immigrant to submit false information to the government (possible solicitation of perjury) or filing false information with the government on the immigrant’s behalf without his or her knowledge (possible perjury). Section 1621 of Title 18 of the United States Code defines perjury:

> Whoever—(1) having taken an oath... that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or (2) in any declaration, certificate, verification, or statement under penalty of perjury... willfully subscribes as true any material matter which he does not believe to be true... is guilty of perjury. ...\(^{55}\)

Thus, a fraudulent immigration services provider who convinces an applicant to invent information, which is then signed as a sworn statement, solicits perjury. Similarly, a provider who knowingly attests to false information commits perjury. Additionally, a non-lawyer pretending to be a lawyer (also committing the crime of unauthorized practice of law) may commit perjury on many occasions, such as when he signs any document swearing that he is authorized to represent the immigrant.\(^{56}\)

Alternatively, it is possible that a fraudulent immigration services provider could, in some cases, be prosecuted under the witness tampering crime category. Witness tampering occurs when a person “knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to... (1) influence, delay, or prevent the testimony of any person in an official proceeding.”\(^{57}\)

It is common for fraudulent immigration services providers to “corruptly persuade” or “engage in misleading conduct” in order to influence an official proceeding. The N.Y. Attorney General’s third category of common immigration services fraud practices is the use of false promises to expedite immigration proceedings.\(^{58}\) It occurs, for example, when a provider collects a bribe from a client, purportedly

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56 For an example of a form on which this would occur, see USCIS, G-28 Notice of Entry of Appearance as Attorney or Accredited Representative (2011), available at http://www.uscis.gov/files/form/g-28.pdf.
58 Common Forms of Immigration Fraud, supra note 11.
to be given to an immigration employee, in order to obtain special treatment for the client’s case.\textsuperscript{59} Witness tampering also occurs in the N.Y. Attorney General’s fourth category of common immigration services fraud, that of misinformation fraud.\textsuperscript{60} It takes place, for example, when a provider tells a client to invent a false story of persecution and files this information in an asylum claim.\textsuperscript{61}

C. Current Attempts to Use the U Visa as a Tool Against Immigration Services Fraud

The perjury or solicitation of perjury category appeared to apply in a test case argued recently by the New York City Bar Immigrant Women and Children Project. In that case, a service provider knowingly filed false and misleading immigration papers on behalf of a client, leading to extremely negative personal consequences for the immigrant.\textsuperscript{62} USCIS denied the visa despite the immigrant’s seemingly model fulfillment of U visa requirements: he was an active church and community volunteer who suffered the severe harm of deportation proceedings, divorce, a family member’s suicide attempt, and health problems after falling prey to a notario whom he subsequently helped put behind bars.\textsuperscript{63} The case was appealed but no decision was available in July 2012.

Safe Horizon Immigration Law Project and Catholic Charities of Newark are also filing or contemplating the use of U visas to protect immigrants who cooperate with authorities to stop legal services fraud.\textsuperscript{64} Safe Horizon Immigration Law Project had a notario fraud U

\begin{footnotesize}
\begin{enumerate}
    \item[59] Id.
    \item[60] Id.; see supra Part I (the case of M.R.).
    \item[61] This author has learned of such practices by fraudulent immigration services providers in her own immigration practice and as a student intern, although the names of those involved may not be disclosed for confidentiality reasons.
    \item[62] Interview with Vanessa Merton, Faculty Supervisor, John Jay Legal Servs. Immigration Justice Clinic, Pace Law School, in White Plains, N.Y. (May 13, 2011) (notes on file with author) (referencing Posting of Suzanne Tomatore, Director, N.Y. City Bar Immigrant Women & Children Project, to NYC VAWA Advocates Yahoo Group (Mar. 8, 2011); E-mail from Michael Almonte, Fragomen Fellow, City Bar Justice Ctr., to Vanessa Merton, Faculty Supervisor, John Jay Legal Servs. Immigration Justice Clinic, Pace Law School (Mar. 23, 2011, 10:16)).
    \item[63] See Interview with Merton, supra note 62 (referencing Posting of Suzanne Tomatore, Director, N.Y. City Bar Immigrant Women & Children Project, to NYC VAWA Advocates Yahoo Group (Mar. 8, 2011)).
    \item[64] E-mail from Lynn Neugebauer, Supervising Attorney, Safe Horizon Immigration Law Project (Aug. 12, 2011) (on file with author); E-mail from Suzanne
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visa case before USCIS. Catholic Charities of Newark has lobbied the N.Y. Attorney General to sign a U visa certification relating to a case in which a fraudulent notario was shut down. In this case, however the N.Y. Attorney General explained that it did not wish to sign U visa certifications related to “purely civil investigations,” although Catholic Charities explained to the office that this is not technically a barrier under the law as long as some criminal activity was uncovered.

The Study Group on Immigrant Representation recently held a panel entitled “Rooting Out Fraud, Improving the Quality of Representation,” in which a diverse group of prominent immigration practitioners and law enforcement personnel expressed their hope and belief that it may soon become possible for immigrant victims of legal services fraud to obtain U visas. Among the speakers were: Michael Patrick, a partner at the leading immigration law firm Fragomen, Del Rey, Bernsen & Loewy; Daisy Mejia of the Immigration Affairs Program at the N.Y. District Attorney’s Office (an office which has reportedly already issued U visa certifications for legal services fraud cases); and Janet Sabel, Executive Deputy Attorney General for Social Justice, N.Y. State (reportedly open to issuing such certifications in the future).

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65 E-mail from Neugebauer, supra note 64.
66 Posting of Chen, supra note 64.
67 Id. For an example of a civil case in which a judge decided to issue U visa certification for defendants’ criminal action against plaintiffs, see Garcia, 2008 WL 1774584, at *4.
70 Id.
IV. Roadblocks That Have Kept Immigration Services Fraud Victims from Obtaining U Visas Thus Far

In the face of the compelling reasons for combating immigration legal services fraud through the U visa, the United States government is still not yet approving any U visa cases for this purpose. Socio-political reasons and technical legal justifications may help explain this failure.

A. Socio-Political Obstacles to Awarding U Visas to Immigration Services Fraud Victims

Researchers at University of California at Berkeley have developed a macro-level theory that provides a possible explanation for why U visas have not been awarded to immigration services fraud victims. The researchers undertook a large-scale analysis of U.S. immigration policy, correlating the different existing forms of immigration relief with immigrant archetypes and stereotypes prevalent in U.S. social discourse. They noted that, throughout U.S. history, immigration policy has been animated by “persistent concerns of excessive immigration” balanced with a desire to prolong “the existence of a large number of employed illegal aliens . . . virtually defenseless against any abuse [or] exploitation . . . [to which] business organizations may wish to subject them.” Given this juxtaposition of social goals, U.S. visa programs have always been “implemented in a manner that conforms” visa awards “to acceptable narratives of [which] immigrants . . . are deserving of a legal status.”

“Good immigrants”—those seen as deserving of visas—are those who entered the country legally, learned English, work to support their families, obey the law and assist law enforcement, or fall under certain categories of sympathetic victimhood. The “bad,” undeserving immigrants, as per popular stereotypes, entered illegally for personal, pecuniary gain, take jobs from U.S. citizens, refuse

71 Hipolito, supra note 34, at 164–71.
72 Id.
73 Id. at 164.
75 Id. at 164–65.
76 Hipolito, supra note 34, at 166–69.
to learn English, commit crimes, and drain welfare and other social services.\textsuperscript{77}

These archetypes are reflected throughout the Immigration and Nationality Act.\textsuperscript{78} In keeping with this theme, asylum, VAWA relief, and T visas are granted to “good immigrants” who fit into the narrative of sympathetic victimhood (they are victimized by malevolent foreign powers, abusive spouses, and criminals) and S visas are granted to “good immigrants” who help U.S. law enforcement by becoming witnesses and informers.\textsuperscript{79} Overall, the Berkeley scholars conclude that “visa programs receive acceptance and endorsement” only when they “narrowly define[] the categories of immigrants considered deserving.”\textsuperscript{80}

Under this framework, it makes sense for U visas to be awarded to victims of domestic violence crimes, crimes against women, and classic violent crime, all of which fits the narrative of sympathetic victimhood. A victim of immigration services fraud is less sympathetic. Using the “bad immigrant”/”good immigrant” “binary framework of inclusion and exclusion” set out by the Berkeley scholars,\textsuperscript{81} the victim of immigration services fraud may not qualify as a “good immigrant.” He or she often becomes a victim due to his or her own “bad” actions—entering the country illegally, committing other acts to fall into illegal status, and possessing a low level of education—that caused him or her to need immigration advice in the first place.

The current treatment of immigration services fraud victims who apply for U visas seems to be analogous to that of U visa applicants that fall victim to criminal traffickers during attempts to enter the U.S. illegally and are thus often held ineligible for U visa status.\textsuperscript{82} The two

\textsuperscript{77} Id. at 166.
\textsuperscript{78} See, e.g., INA, 8 U.S.C. § 1438(b) (2006) (“No person shall be naturalized under . . . this section unless he is . . . a person of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States . . . .”); INA, 8 U.S.C. § 1182 (2011) (outlining the criteria for who is an inadmissible alien); INA, 8 U.S.C § 1101(f) (2011) (“No person shall be regarded as . . . a person of good moral character who . . . is . . . a habitual drunkard; . . . one whose income is derived principally from illegal gambling activities . . . .”).
\textsuperscript{79} Hipolito, \textit{supra} note 34, at 169–71.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 169.
\textsuperscript{82} See United States v. Biao, No. 98cr2812-BTM, 2011 WL 607087, at *1 (S.D. Cal. Feb. 11, 2011) (immigrants were among 150 people “found below decks of a fishing vessel by United States Coast Guard,” and “because they presumably
groups do not deserve the same treatment, however, given that the trafficking victims fall prey to criminal acts during an attempt to initiate an illegal stay in the United States, while immigration services fraud victims fall prey to crime during efforts to end their illegal status and comply with the law.

On a sociological level, the Berkeley theory offers a possible explanation for why the U.S. immigration system has not yet awarded a U visa to a victim of immigration services fraud. Quite simply, the victim of immigration services fraud is not yet perceived as a “good” or “deserving” victim under popular immigrant archetypes. Change may be necessary before the U.S. immigration system is ready to award him or her a visa.

B. Legal Pretext for Not Awarding U Visas to Immigration Services Fraud Victims

On a technical level, there is a legal justification that may be raised for not awarding U visa status to immigration services fraud victims. That is, immigration law does offer some other avenues of recourse for these victims. In one Ninth Circuit case, for example, a notario victim requested a stay of his order of removal in order to seek U visa relief. The judge opined that two better alternative remedies existed, in lieu of U visa relief. First, he noted that fraudulent representation can support a claim of ineffective assistance of counsel, which could allow for order of removal reopening. Second, “deceptive action by a notary posing as an attorney” that leads to late filing may allow for the time period for filing a motion to be “equitably tolled.”

These alternative remedies, however, do not provide reliable avenues of relief for victims of immigration services fraud. In many cases, immigration services fraud victims are unable to obtain any kind of relief for the damages caused to their legal status by their advisors’ fraud. One judge remarked, “[t]he respondent’s lack of education and alleged receipt of poor advice from a notario do not

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83 Castillo v. Gonzales, 235 Fed. App’x 540 (9th Cir. 2007).
84 Id. at 540–41.
85 Id. at 540 (citing Lopez v. INS, 184 F.3d 1097, 1100 (9th Cir. 1999)).
86 Id. at 541 (citing Varela v. INS, 204 F.3d 1237, 1239 (9th Cir. 2000)).
establish an exceptional situation that warrants reopening of his removal proceedings.”

Other victims are denied ineffective assistance of counsel claims because “[i]nasmuch as the respondent does not claim that the notario upon whom he relied represented himself as otherwise, there can be no deficient performance of counsel without counsel.”

While some immigration services fraud victims are lucky enough to find a remedy, on a societal level the lack of a predictable form of relief is problematic. Under the current applications of the law, even when immigration services fraud victims do find recourse, they are only able to do so after a long, complicated, and uncertain legal process. In order for widespread reporting of immigration services fraud to occur, however, immigrant communities need stronger assurances that their efforts to work with authorities will be met with legal protection, not deportation. They need a simple, straightforward, and regularly applied remedy, such as U visa relief, in order to be able to safely work with authorities to stamp out immigration services fraud.

C. Further Obstacles to Obtaining U Visas for Immigration Services Fraud Victims: Obtaining Law Enforcement Certification

When asked to comment on the concept of U visas for immigration services fraud victims, one seasoned public interest immigration services lawyer, who has worked on countless U visa cases in the course of his career, voiced what seems to be the common concern of practitioners in his field: “[T]hat sounds great,” he said, “but what I really want to know is how to get law enforcement to sign off on it.”

Unfortunately, for practitioners seeking U visas for clients, case law has interpreted the language of the U visa statute to leave the decision of whether to sign the I-918 B certification completely within the discretion of law enforcement agencies.

88 In re Meno-Herrera, 2009 WL 888469, at *2; see also In re Valencia-De Centeno, A077 665 986, 2008 WL 4420123, at *2 (B.I.A. Sept. 22, 2008) (alien could not “bring a claim of ineffective assistance due to the actions of a non-attorney immigration consultant . . . . [R]espondent did not allege in her declaration that she believed the two notaries were immigration attorneys . . . .”).
89 Interview with Robert Cisneros, Attorney, Empire Justice Center, in N.Y. (Aug. 17, 2011) (notes on file with author); see also Part III (C) supra.
In a 2010 case in which the Fifth Circuit tackled this issue, plaintiff sought a writ of habeas corpus to compel law enforcement agencies to issue him U visa certification, after he had provided them with valuable information in a case in which he and his brother were victims of trafficking (this was also a case of unsympathetic victimhood, under the Berkeley framework, given that plaintiff only became involved with the traffickers as a result of his attempt to enter the United States). The plaintiff also requested that the judge enjoin the Department of Homeland Security, Immigration and Customs Enforcement, and the United States government from telling local law enforcement agencies that they were not required to issue U visa certification. The judge roundly rejected these requests, holding that a law enforcement agency’s decision to issue U visa certification is always discretionary, never mandatory.

In explaining the rationale behind its decision, the court analyzed the statutory section outlining the U visa’s certification requirement:

> [t]he petition filed by an alien under 1101(a)(15)(U)(i) . . . shall contain a certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other . . . authority . . . . This certification shall state that the alien ‘has been helpful, is being helpful, or is likely to be helpful’ in the investigation or prosecution of criminal activity described in section 1101(a)(15)(U(iii) of this title.

“All language” in this section of the statute, the court reasoned, “is directed toward the applicant of the visa,” and therefore could not possibly be a mandate to law enforcement. “Whether or not an alien has been ‘helpful’ is not an objective determination,” ruled the court, and thus the decision to issue U visa certification must be left to law enforcement’s subjective discretion.

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90 Ordonez Orosco v. Napolitano, 598 F.3d 222, 224 (5th Cir. 2010).
91 Id. at 224.
92 Id. at 227.
93 Id. at 226–27 (quoting INA, 8 U.S.C. § 1184(p)(1) (2009)).
94 Id. at 226.
95 Ordonez Orosco, 598 F.3d at 226–27. Similarly, the Eleventh Circuit has refused to compel law enforcement agencies to issue certifications, holding that “[w]hen an agency refuses to act, it generally does not exercise its coercive power [as opposed to discretionary power] over an individual’s liberty or property rights, and thus does not infringe on areas that courts are often called upon to protect.” Bejarano v. Dept. of Homeland Sec., 300 Fed. App’x 651, 653 (2008) (citing Heckler v. Chaney, 470 U.S. 821, 832 (1985)).
Given that no legal action exists to force a law enforcement agency to certify, the only way that immigrant advocates can influence law enforcement agencies’ certifications is through educational efforts.\textsuperscript{96} Although it is common practice for immigrant advocates to conduct law enforcement outreach and training on U visa certification,\textsuperscript{97} more could be done to help increase the number of agencies willing to sign U visa certifications for immigration services fraud victims.\textsuperscript{98} The unnecessary refusal of law enforcement agencies to sign U visa certification documents remains a significant barrier to pursuing these visas for many otherwise eligible clients.\textsuperscript{99} It is a barrier that, likely, can only be broken down by changing law enforcement’s perceptions of victims of immigration services fraud from “undeserving” victims in a predicament due to their own “bad” actions to sympathetic, “deserving” victims.\textsuperscript{100} This change will only start to happen as larger numbers of immigrant advocates and government agencies publicize the stories of these fraud victims and garner increased public support for this cause.\textsuperscript{101}

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\textsuperscript{96} Note that the U visa statute also allows immigrants to petition judges to issue certification directly (but not to compel law enforcement to do so). INA, 8 U.S.C. 1101(a) (15) (U) (2011). This route is lengthier, more complicated, and more time-consuming that requires very competent legal advice. For an example of a case in which a judge directly issued U visa certification, see \textit{Garcia}, 2008 WL 1774584.
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\textsuperscript{98} For examples of agencies that have already signed such certifications or have expressed willingness to do so, see supra Part III (C).
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\textsuperscript{99} See, e.g., Part IV (A) \textit{supra}. Law enforcement’s refusal to sign certification is a barrier to many potential U visa cases. Interviews with Linda Bennett-Rodriguez, Daniel Villena & Robert Cisneros, Attorneys, Empire Justice Center, in N.Y. (Aug. 17, 2011) (notes on file with author).
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\textsuperscript{100} See Part IV (A) \textit{supra} for analysis of U.S. immigration policy, as per “good immigrant”/”bad immigrant” archetypes in U.S. socio-political narrative.
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\textsuperscript{101} See Part III (C) \textit{supra} for examples of recent government initiatives that are working to gain more public support for this issue.
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D. A Theoretical Barrier to Awarding U Visas for Immigration Services Fraud Victims: Proving Qualifying Harm for Victims of Non-Violent Criminal Activity

Another major impediment to applications of the U visa as a tool to combat immigration services fraud is the generalized lack of success that all non-violent crime victims experience in obtaining this status. The statute makes explicit allowance for qualification through “substantial . . . mental abuse” in addition to physical abuse and includes criminal activity categories that cover non-violent criminal activity: domestic violence, involuntary servitude, blackmail, extortion, witness tampering, obstruction of justice, and perjury.102

Although the U visa law facially allows the issuance of U visas for non-violent criminal activity, extensive case law searches have uncovered no accounts of successful applications based on entirely non-violent qualifying criminal activity, in which no form of “physical abuse” was suffered by the victim-applicant. Interviews with practitioners possessing extensive U visa casework experience confirm this result.103

One of the reasons for this predicament, again, is that law enforcement agencies seem to refuse to issue certification when a victim has suffered no physical harm, unilaterally judging such victims undeserving of immigration benefits,104 a decision that, under current law, remains within their complete discretion.105 For example, law enforcement agencies that routinely sign U visa certifications will almost always do so for domestic violence victims who have been punched, hit, or hospitalized,106 but have not signed for victims who “only” suffer repeated criminal violations of orders of protection.107

On a hopeful note, the Department of Labor (DOL) recently released protocols for U visa certification for victims of qualifying

103 Interviews with Daniel Villena, Robert Cisneros & Linda Bennet, Attorneys, Empire Justice Center, in N.Y. (Aug. 2011) (notes on file with author). Of course, these interviews are only a minute sample of practitioners around the country who work with U visas, but research has uncovered no survey data available on this topic at this time.
104 Id.
105 Ordonez Orosco, 598 F.3d, at 222, 226–27.
106 Interviews with Daniel Villena, Robert Cisneros & Linda Bennet, supra note 103.
107 Id.
criminal activity within employment law investigations.\textsuperscript{108} The five categories for which the DOL plans to certify are: (1) involuntary servitude; (2) peonage; (3) trafficking; (4) obstruction of justice; and (4) witness tampering.\textsuperscript{109} While all of these categories encompass some violent criminal activities, the last two categories also include some forms of non-violent crime. This arrangement hints at a possible trend toward certification for victims who have suffered “substantial . . . mental abuse”\textsuperscript{110} but not physical harm. This evolution is particularly likely in light of the DOL’s statement that it would certify “as related to” investigations involving “minimum wage and overtime rights,”\textsuperscript{111} employment law violations that are not usually executed with violence.

In one employment violation case, immigrants succeeded in obtaining U visa certification directly from a district court judge after the court determined employers had made them the victims of “involuntary servitude” by threatening them with eviction and deportation if the immigrants did not continue working without pay.\textsuperscript{112} Although there was no act of physical violence against the victims, the court nevertheless noted that it certified the U visa not just due to the “mental abuse” the immigrants had suffered, but also because of the “physical distress” they suffered from “lack of nourishment” from having to “find food in the trash” while working without pay.\textsuperscript{113} Importantly, the court specified that it understood the term “physical or mental abuse” as “not commensurate with ‘battery or physical violence.’”\textsuperscript{114}

If immigration authorities and local law enforcement authorities throughout the country follow an unofficial policy of denying U visa protection to victims of non-violent crimes, it could be a significant roadblock to the application of U visas to immigration legal services fraud. Hopefully, however, skillful immigrant advocates around the country will continue to apply for U visa relief for immigration ser-


\textsuperscript{109} Id.


\textsuperscript{111} DOL, Press Release, \textit{supra} note 108.

\textsuperscript{112} \textit{Garcia}, 2008 WL 1774584, at *1–3.

\textsuperscript{113} Id. at *4.

\textsuperscript{114} Id. at *1, *3.
vices fraud victims, to tell and retell these victims’ compelling stories, and to garner the support necessary to reverse this unofficial policy and apply U visa law as it could and should be applied.

V. Recommendations to Improve the Chances of Success in Using the U Visa to Fight Immigration Services Fraud in the Future

There are two major elements that could improve the chances of success for U visa applicants who are victims of immigration services fraud. First, law enforcement agencies must begin to sign more U visa certifications based on immigrants’ assistance in investigations of fraudulent immigration law practitioners. Michael Almonte, Fragomen Fellow, predicts that this may increasingly happen as these agencies come to further “understand the concepts behind” the U visa “and how it aides [sic] them in their overall efforts to combat criminal activities like [unauthorized practice of immigration law].”

Second, advocates should lobby the Department of Homeland Security to issue clarifying regulations to make it clear that U visa applications from eligible immigration services fraud victims should be approved as part of their ongoing initiative against immigration services fraud. As the Legal Aid Foundation of Los Angeles sees it, “the current immigration system makes it easier for scam artists to continue” preying on immigrant communities, since it “deport[s] the very people who need protection and could serve as witnesses to put [them] out of business.” If, as its other policy initiatives suggest, “the government is serious about putting [fraudulent immigrant service providers] out of business, then it should more explicitly make use of existing law to protect the victims of these crimes.” Over time, this could contribute greatly to reducing immigration services fraud and protect vulnerable communities across the country.

115 E-mail from Michael Almonte, supra note 8.
116 See Part II (B) supra.
117 Legal Aid Found. of L.A., supra note 1.
118 Id.