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HUMAN RIGHTS

A NEW (AND OLD) WAY TO SECURE JUSTICE

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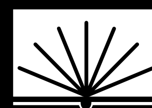

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An Overview and Recommendations for Legal Advocacy

By The Opportunity Agenda

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Human rights are a crucial part of the United States' legal and cultural foundation. We are, the founders of our country declared, all created equal and endowed with certain inalienable rights. The notion of human rights has been central to our nation's struggles to achieve equality and justice for all. The United States helped craft the Universal Declaration of Human Rights and the international human rights system in response to World War II and the horrors of the Holocaust. Yet, despite that legacy, international human rights laws have not played a major role in legal efforts to pursue fundamental rights, justice, and equality in the United States. That trend has begun to change over the last decade as more and more legal advocates have begun to incorporate human rights arguments into their work and as the U.S. Supreme Court, in particular, has increasingly cited human rights law as persuasive authority for constitutional decisions.[1]

The federal courts, however, are in flux in the consideration of individual rights in general and human rights in particular. Federal constitutional and legislative pro-

[1]See, e.g., *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (referring to widespread rejection of sentencing juveniles to life without possibility of parole across world); *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005); *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003) (considering whether practices have "been accepted as an integral part of human freedom in many other countries" or "rejected elsewhere" in construing constitutional concepts of privacy and due process); *Grutter v. Bollinger*, 539 U.S. 306, 342–43 (2003) (Ginsburg, J., concurring) (citing United Nations conventions and "international understanding" as to affirmative action plans).

tections tend not to include economic, social, and cultural rights that are part of the international human rights system. State courts, by contrast, more often consider such protections and, in interpreting state law, have the independence to recognize a broader panoply of rights. State courts have authority to interpret international treaties. Recognizing these underutilized opportunities, The Opportunity Agenda highlights ways in which state courts have considered and interpreted international human rights law.[2]

Human Rights Arguments in State Courts

State courts can draw upon a number of arguments to support their use of international human rights principles in their decision making. Under Article VI, Section 2, of the U.S. Constitution, treaties are the "supreme Law of the Land," binding on the "Judges in every State."[3] The United States has signed and ratified the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and is therefore bound by these treaties.

Implementation of these treaties and their principles is the responsibility of state, as well as federal, government.[4] Under the federal system, states are responsible for regulating areas of substantive law, including criminal, family, and social welfare law. The U.S. Senate's reservations when it ratified the treaties make clear that states are responsible for implementing international human rights law in these areas.[5] Although the treaties are "non-self-executing"—meaning that they cannot be directly enforced in U.S. courts—they impose concrete obligations on states.[6]

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[2]A number of advocates argue that state courts should look to international law as they explore the meaning of human rights under state constitutions, statutes, and common law (see, e.g., Paul R. Dubinsky, *International Law in the Legal System of the United States*, 58 American Journal of Comparative Law 455 (2010); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 Yale Law Journal 1564, 1628, n.300 (May 2006) (citing Martha F. Davis, *Realizing Domestic Social Justice Through International Human Rights: Part 1: The Spirit of Our Times: State Constitutions and International Human Rights*, 30 New York University Review of Law and Social Change 359 (2006)); Robert Doughten, *Filling Everyone's Bowl: A Call to Affirm a Positive Right to Minimum Welfare Guarantees and Shelter in State Constitutions to Satisfy International Standards of Human Decency*, 39 Gonzaga Law Review 421 (2003–2004); Bert B. Lockwood et al., *Litigating State Constitutional Rights to Happiness and Safety: A Strategy for Ensuring the Provision of Basic Needs to the Poor*, 2 William and Mary Bill of Rights Journal 1 (1993); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 University of Pennsylvania Law Review 245 (2001); see also Catherine Albisa & Sharda Sekaran, *Realizing Domestic Social Justice Through International Human Rights: Foreword*, 30 New York University Review of Law and Social Change 351 (2006); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 Hastings Law Journal 805, 824–36 (1990)).

[3]U.S. Const. art. VI, cl. 2. The U.S. Supreme Court noted that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction" (*The Paquete Habana*, 175 U.S. 677, 700 (1900)).

[4]Because of the United States' federal system, "when the United States assents to a treaty or other international agreement … implementation [must] occur [at] the state as well as the federal level. If states fail to implement international treaty provisions that address areas traditionally reserved to them, the United States cannot, as a practical matter, achieve compliance with the treaty provisions to which it is party" (Davis, *supra* note 2, at 361–64).

[5]Senate ratification of major treaties has been accompanied by the following understanding: "That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant" (*id.* at 363, citing 138 Cong. Rec. 8068, 8071 (1992) (understanding for International Covenant on Civil and Political Rights); 140 Cong. Rec. 14326, 14326 (1994) (understanding for International Convention on Elimination of All Forms of Racial Discrimination); 136 Cong. Rec. S17486, S17486 (1990) (understanding for Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment)).

[6]U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781, S4784 (1992); U.S. Reservations, Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634 (1994); U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 136 Cong. Rec. S17486 (1990). When treaties are non-self-executing, individuals may not sue for violation of rights recognized under the treaties (see Andrew Solomon & Katherine Brantingham, *When Can an Individual Enforce a Right Set Forth in an International Treaty?*, International Judicial Monitor, July 2006, http://bit.ly/qJtiKV.

Ratified treaties "have a legal status equivalent to enacted federal statutes."[7] Once ratified, treaties prevail over previously enacted conflicting federal statutes and inconsistent state law.[8] However, in ratifying the International Covenant on Civil and Political Rights, the Senate mandated that its protections go no further than corresponding protections in domestic law.[9] Advocates and scholars have argued that such a reservation frustrates the purpose of the treaty and may be invalid under international law.[10] Nevertheless, state courts routinely invoke Senate reservations to deny individuals' claims under treaties.[11]

Courts can look to international human rights treaties for interpretive guidance, whether or not the treaties are signed, ratified, or considered customary international law. Specifically courts can turn to international human rights law to help clarify the meaning of vague or unsettled domestic law. Even if human rights principles are not directly binding, they can influence courts as they define and explain statutory provisions, and as they give meaning to domestic constitutional rights. Courts have looked to unratified as well as ratified treaties for this purpose.[12]

As discussed further in The Opportunity Agenda's full report on human rights in the state courts, a number of decisions have used international law as persuasive authority for the interpretation of state constitutions, statutes, and common law.[13] These are some highlights of state-court decisions that draw upon international human rights law:

- A Florida court used international human rights law to analyze sentencing juvenile offenders to life in prison without the possibility of parole.[14] Although the decision referred to both international treaties and "international pressure to change our existing legal system" as the defendant's strongest argument, the court declined to create a *per se* ban on the punishment for juveniles.[15]
- Courts have used human rights law, in particular the Hague Convention on Civil Aspects of International Child Abduction, to analyze both procedural and substantive rights in the family law context.[16]
- California courts have cited the Universal Declaration of Human Rights to support their interpretation of the right to practice one's trade, the right

[7]Davis, *supra* note 2, at 363 (quoting United States, Initial Report to Committee on Elimination of Racial Discrimination, Addendum, U.N. Doc. CERD/C/351/Add.1, at 50 (Sept. 21, 2000), http://1.usa.gov/qORHm3).

[8]United States, Initial Report to Committee on Elimination of Racial Discrimination, Addendum, U.N. Doc. CERD/C/351/Add.1, at 50 (Sept. 21, 2000).

[9]138 Cong. Rec. S4781, S4783 (1992) (attaching a reservation to International Convention on Civil and Political Rights and stating "that the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States").

[10]See, e.g., 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 University of Cincinnati Law Review 937, 950–51, 967–69 (2003) (arguing that state judges have independent authority to interpret underlying treaties and reservations).

[11]See, e.g., *People v. Caballero*, 206 Ill. 2d 65, 103 (Ill. 2002); *State v. Phillips*, 656 N.E. 2d 643, 671 (Ohio 1995); *People v. Cook*, 39 Cal. 4th 566, 620 (Cal. 2006). But see *Servin v. State*, 117 Nev. 775, 794–95 (Nev. 2001) (Rose, J., concurring) (raising concerns about validity of reservation to International Covenant on Civil and Political Rights regarding execution of juveniles); *Domingues v. State*, 114 Nev. 783, 786–87 (Nev. 1998) (Rose, J., dissenting) (juvenile death penalty decision insisting that defendant's case be remanded to lower court for determination of validity of Senate reservation to International Covenant on Civil and Political Rights).

[12]See, e.g., White, *supra* note 10, at 973 ("State appellate courts, in applying state law, are free to utilize international treaty provisions and customary international law in making" decisions as to content of constitutional guarantees).

[13]The Opportunity Agenda, Legal and Policy Analysis: Human Rights in State Courts 2011, (Aug. 2011), http://bit.ly/pSk0uF.

[14]See *Graham v. State*, 982 So. 2d 43 (Fla. Dist. Ct. App. 2008), reversed by *Graham v. Florida*, 130 S. Ct. 2011 (2010).

[15]*Id*. at 50.

[16]See, e.g., *In re Karla C.*, 113 Cal. Rptr. 3d 163 (Cal. Ct. App. 2010); *Escobar v. Flores*, 107 Cal. Rptr. 3d 596, 602 (Cal. Ct. App. 2010).

to privacy, the meaning of "physical handicap," the right to freedom of movement, and the scope of welfare provisions.[17]

- The Maryland Supreme Court relied heavily on the Nuremberg Code to find a greater duty toward subjects for researchers conducting nontherapeutic programs.[18]
- The Missouri Supreme Court cited the International Convention on the Rights of the Child in striking down the juvenile death penalty.[19]
- New York courts invoked the Universal Declaration of Human Rights in cases involving the rights to work and to strike, a transnational discovery dispute, and the act of state doctrine.[20]
- The Oregon Supreme Court looked to the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights, and the European Convention to interpret the meaning of the state constitution's provision on the treatment of prisoners.[21]
- The West Virginia Supreme Court invoked the Universal Declaration of Human Rights to review the financing scheme for public schools and to define the right to education.[22]
- A Montana Supreme Court concurring opinion in support of a ruling that a state university's denial of health coverage to same-sex partners was not rationally related to a legitimate government interest recognized that the state's constitution was steeped in a history of human rights.[23]

Recommendations for a State-Court Human Rights Strategy

The survey of state-court cases reveals that courts have most frequently addressed international human rights in death penalty cases, when defendants argue that the International Convention on Civil and Political Rights or customary international law prohibits capital punishment. Other than in the juvenile context, these arguments have proven largely unsuccessful.[24] Courts either have accepted U.S. Senate reservations to human rights treaties uncritically or, in some instances, have simply refused to adjudicate human rights defenses. A more promising area for the development of international human rights jurisprudence is in civil lawsuits. As the survey shows, some state courts have started to look to human rights principles to help define state constitutional or statutory guarantees, and there are openings for further development of the law in this manner.

As one scholar noted, while courts have proven "reluctant to view themselves as bound directly by international human rights principles on substantive issues, they are much more willing to invoke such principles—whether embodied in treaties or in other manifestations of customary international law—to guide the interpretation of domestic legal norms."[25] Scholars have repeatedly argued, "This 'indirect incorporation' of international human

[17]*Bixby v. Pierno*, 481 P.2d 242, 251 n.9, 253 n.12 (Cal. 1971); *Santa Barbara v. Adamson*, 610 P.2d 436, 440 n.2 (Cal. 1980); *American National Life Insurance Company v. Fair Employment & Housing Commission*, 32 Cal. 3d 603, 608 n.4 (Cal. 1982); *In re White*, 158 Cal. Rptr. 562, 567 n.5 (Cal. Ct. App. 1979); *Boehm v. Superior Court of Merced County*, 223 Cal. Rptr. 716, 721 (Cal. Ct. App. 1986).

[18]*Grimes v. Kennedy Krieger Institute*, 782 A.2d 807, 835 (Md. 2001).

[19]*Simmons v. Roper*, 112 S.W.3d 397, 411 (Mo. 2003), aff'd, 543 U.S. 551 (2005).

[20]*Wilson v. Hacker*, 101 N.Y.S.2d 461, 472–73 (N.Y. Sup. Ct. 1950); *Jamur Productions Corporations v. Quill*, 273 N.Y.S.2d 348, 356 (N.Y. Sup. Ct. 1966); *In re Estate of Vilensky*, 424 N.Y.S.2d 821 (N.Y. Sur. Ct. 1979); *Beck v. Manufacturers Hanover Trust Company*, 481 N.Y.S.2d 211, 215 (N.Y. Sup. Ct. 1984).

[21]*Sterling v. Cupp*, 625 P.2d 123, 131 (Or. 1981).

[22]*Pauley v. Kelly*, 255 S.E.2d 859, 864 (W. Va. 1979).

[23]*Snetsinger v. Montana University System*, 104 P.3d 445 (Mont. 2004) (Nelson, J., concurring).

[24]See, e.g., *People v. Bennett*, 199 P.3d 535, 573 (Cal. 2009).

[25]Strossen, *supra* note 2, at 824.

rights law continues to be a promising approach warranting greater attention and increased use by human rights advocates."[26]

When strategically possible, state-court litigators should therefore consider using international human rights standards as interpretive guides for state constitutional and statutory rights. Invoking international human rights law as an interpretive guide, while relying on state law for the rule of decision, has several advantages. Reliance on state law insulates decisions from review by the U.S. Supreme Court and makes them more resistant to removal to federal court.[27] State courts can thus safely develop their own jurisprudence of international human rights without the possibility that federal courts will intervene and frustrate the project altogether. An "indirect incorporation" approach also allows state courts to circumnavigate the self-execution doctrine and reservations to treaties that otherwise may limit treaties' impact. These limitations are less relevant when state courts are not asked to apply treaties as governing law.

Moreover, the development of a jurisprudence in which human rights law plays a subsidiary but interpretive role may encourage state courts, which have limited familiarity with such law, to examine international sources of obligation more frequently. As state courts become more familiar with international human rights law, they may prove more willing to adjudicate a violation of international human rights law standing alone, without having to rely on analogous standards in state law for the rules of decision. And over time, as international human rights principles become more integrated into state law, courts will define rights more broadly and will hold government accountable for enforcing those rights, thereby expanding opportunity for all Americans.

[26]Richard B. Lillich, *International Human Rights Law in U.S. Courts*, 2 Journal of Transnational Law and Policy 1, 19 (1993); see also Martha F. Davis, *Lecture: International Human Rights and U.S. Law: Predictions of a Courtwatcher*, 64 Albany Law Review 417, 428–31 (2000); Martha F. Davis, *Realizing Domestic Social Justice Through International Human Rights: Part I: The Spirit of Our Times: State Constitutions and International Human Rights*, 30 New York University Review of Law and Social Change 359 (2006).

[27]See, e.g., Paul Hoffman, *The Application of International Human Rights Law in State Courts: A View from California*, 18 International Lawyer 61 (1984).

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