



The **Opportunity** Agenda

*Building the National Will
to Expand Opportunity in America*

Legal and Policy Analysis:

*Human Rights in State
Courts 2011*

EXECUTIVE SUMMARY

Acknowledgments

The statements made and views expressed in this report are solely the responsibility of The Opportunity Agenda.

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The Opportunity Agenda was founded in 2004 with the mission of building the national will to expand opportunity in America. Focused on moving hearts, minds, and policy over time, the organization works with social justice groups, leaders, and movements to advance solutions that expand opportunity for everyone. Through active partnerships, The Opportunity Agenda synthesizes and translates research on barriers to opportunity and corresponding solutions; uses communications and media to understand and influence public opinion; and identifies and advocates for policies that improve people's lives. To learn more about The Opportunity Agenda, go to our website at www.opportunityagenda.org.

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Introduction

Since the last version of this report was released, state court litigants in the United States have continued using international human rights law in their arguments. Many of these cases have been met with cursory dismissals from the court, especially in death penalty cases. At the same time, courts have seriously considered some arguments, and occasionally use international law affirmatively as persuasive authority for the interpretation of state constitutions, statutes, and common law.

This updated publication includes cases that have been decided since the last edition, as well as cases that were not included previously.¹ Some highlights include:

- ▶ Before the U.S. Supreme Court found that sentencing a juvenile to life without the possibility of parole for a non-homicide offense constituted cruel and unusual punishment under the Eighth Amendment,² a Florida court used international human rights law to analyze the issues.³ Though it 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.⁴
- ▶ Cases have increasingly referred to Article 36 of the Vienna Convention, which provides the right to communicate with a consular official and to have an official notified promptly of one’s arrest.⁵ In evaluating this argument, courts are divided as to whether the treaty grants individual rights. In a notable 2011 decision, *Commonwealth v. Gautreaux*, the Supreme Judicial Court of Massachusetts held that the VCCR does confer an individual right to consular notification. Further, the Massachusetts court acknowledged that the state falls within the ambit of international law, noting that decisions of the International Court of Justice are entitled to “respectful consideration” by the state court. However, courts have continued to find that such violations have not resulted in sufficient prejudice for defendants to successfully obtain postconviction relief. Despite this result, this trend has expanded the use of international human rights law, as state courts that previously have not analyzed human rights law have begun to look at international human rights treaties based on these appeals. Indeed, the Massachusetts’ court’s treatment of the ICJ decision could be viewed as a sort of Charming Betsy doctrine for the state, establishing the principle that state courts should try to avoid violating the terms of international judgments.
- ▶ Courts have also 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.⁶

1 The research cited in this report is based on a review of caselaw completed in December 2010. This report additionally includes one case from January 2011, *Commonwealth v. Gautreaux*, 458 Mass. 741 (2011), because it is a notable development.

2 See *Graham v. Florida*, 130 S. Ct. 2011 (2010).

3 See *Graham v. State*, 982 So. 2d 43 (Fla. Dist. Ct. App. 2008).

4 *Id.* at 50.

5 See, e.g., *People v. Rocha*, No. F051887, 2008 WL 3413131, at *9 (Cal. Ct. App. Aug. 13, 2008), *rev denied*; *Commonwealth v. Gautreaux*, 458 Mass. 741 (2011).

6 See, e.g., *In re Karla C.*, 186 Cal. App. 4th 1236 (Cal. Ct. App. 2010) (analyzing the Hague Convention’s impact on a decision to award custody in a dependency hearing to a noncustodial parent living in Peru, particularly the court’s ability to enforce its jurisdiction, and remanding for the lower court to clarify that the noncustodial parent in Peru has only temporary custody and collect additional evidence on the ability of the court to enforce its jurisdiction); *Escobar v. Flores*, 183 Cal. App. 4th 737, 746 (Cal. Ct. App. 2010) (using the Hague Convention and cases analyzing the Convention to uphold a lower court’s decision that a nine-year-old was not too young to qualify under the Convention’s clause that an order of return may be refused if “the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views”).

Overview and Recommendations for Legal Advocacy

Human rights are a crucial part of the United States' legal and cultural foundation. The founders of our country declared that we are all created equal and endowed with certain inalienable rights. The United States helped craft the Universal Declaration of Human Rights (UDHR) and the international human rights system after World War II and the horrors of the Holocaust. The notion of human rights has been central to our nation's struggles to achieve equality and justice for all.

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 important constitutional decisions.⁷

The federal courts, however, are in flux when it comes to the consideration of individual rights in general and human rights in particular. Federal constitutional and legislative protections tend not to include economic, social, and cultural rights that are an important part of the international human rights system. State courts, by contrast, often consider such protections and, in interpreting state law, have the independence to recognize a broader panoply of rights. In addition, state courts have authority to interpret international treaties, including human rights treaties.

Recognizing this important and underutilized opportunity, this report details the ways in which state courts have considered and interpreted international human rights law. It is intended for public interest lawyers and state court litigators, and also for state and municipal policymakers interested in integrating compliance with international human rights law into their domestic policies.⁸

⁷ See, e.g., Graham, 130 S. Ct. at 2034 (referring to widespread rejection of sentencing juveniles to life without the possibility of parole across the 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 the 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 the “international understanding” as to affirmative action plans).

⁸ A number of advocates have argued that state courts should look to international and comparative law as they explore the meaning of positive 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 AM. J. COMP. L. 455 (2010); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 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 N.Y.U. REV. L. & SOC. 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 Int'l Standards of Human Decency*, 39 GONZ. L. REV. 421 (2003); 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 WM. & MARY BILL RTS. J. 1 (1993); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001). See also Catherine Albisa & Sharda Sekaran, *Realizing Domestic Social Justice Through International Human Rights: Foreword*, 30 N.Y.U. REV. L. & SOC. 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 L.J. 805, 824–36 (1990).

State courts can draw upon a number of arguments to support their use of international human rights principles in 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.”⁹ The United States has signed and ratified the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and is therefore bound by these treaties.

Implementation of these treaties and their principles is the responsibility of federal, state, and local government.¹⁰ Under the federal system, states are responsible for regulating areas of substantive law, including criminal, family, and social welfare law. The reservations the U.S. Senate issued when it ratified the treaties make clear that states are responsible for implementing international human rights law in these areas.¹¹ Thus, state court incorporation of human rights principles is crucial to ensuring implementation at the state level.

Although the treaties are “non-self-executing”—meaning that they cannot be directly enforced in U.S. courts¹²—they impose concrete obligations on states. Ratified treaties “have a legal status equivalent to enacted federal statutes;”¹³ they prevail over previously enacted federal statutory law (when there is a conflict) and over any inconsistent state or local law.¹⁴

In ratifying the ICCPR, the Senate mandated that its protections go no further than corresponding protections in domestic law.¹⁵ Advocates and scholars have argued that such a reservation frustrates the purpose of the treaty and may be invalid under international law and therefore unenforceable—although the rest of the treaty may be severable and continue to have legal effect.¹⁶ But state courts

9 U.S. CONST. art. VI, cl. 2. The U.S. Supreme Court has 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).

10 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 8, at 361–64.

11 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) (same understanding for International Convention on the Elimination of All Forms of Racial Discrimination); 136 Cong. Rec. S17486, S17486 (1990) (same understanding for Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)).

12 U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781, at S4784 (1992); U.S. reservations, declarations, and understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634-02 (1994); U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (1990). When treaties are non-self-executing, individuals cannot sue for violation of rights recognized under the treaties. See Andrew Solomon and Katherine Brantingham, *When Can an Individual Enforce a Right Set Forth in an International Treaty* American Society of International Law and the International Judicial Academy (2006), http://www.judicialmonitor.org/archive_0706/asilsidebar.html.

13 Davis, *supra* note 8, at 363 (quoting United States, Initial Report to Comm. on Elim. of Racial Discrim., Addendum, UN Doc. CERD/C/351/Add.1, at 50 (Sept. 21, 2000), available at [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/4c02eba071d735f4c1256a1700588ba0/\\$FILE/G0044926.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/4c02eba071d735f4c1256a1700588ba0/$FILE/G0044926.pdf)).

14 United States, Initial Report to Comm. on Elim. of Racial Discrim., Addendum, UN Doc. CERD/C/351/Add.1, at 50 (Sept. 21, 2000).

15 138 Cong. Rec. S4781-01, S4783 (1992) (attaching a reservation to the ICCPR 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”).

16 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 U. CIN. L. REV. 937, 950–51, 967–69 (2003) (arguing that state judges have an independent authority to interpret the underlying treaties and reservations).

routinely invoke Senate reservations to deny individuals' claims under treaties like the ICCPR.¹⁷

Despite such reservations, international and U.S. law requires courts to interpret both state and federal law so that it does not conflict with ratified treaties.¹⁸ And as a signatory to covenants and conventions like the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the Covenant on Rights of the Child (CRC), the United States must “refrain from acts which would defeat the object and purpose of a treaty.”¹⁹ Furthermore, when human rights principles rise to the level of customary international law, meaning they are “practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws”²⁰ (in other words, forming “general and consistent practice followed by states from a sense of legal obligation”²¹), they do not require implementing legislation to be binding in the United States.²² Customary international law is part of federal common law and, as such, it displaces conflicting state laws.²³

Most importantly, 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.²⁴

Some highlights of state court decisions that draw upon international human rights law include:

- ▶ California courts citing the UDHR to support their interpretation of the right to practice one's trade, the right to privacy, the meaning of “physical handicap,” the right to freedom of movement, and the scope of welfare provisions;²⁵

17 See, e.g., *People v. Caballero*, 206 Ill. 2d 65, 103 (Ill. 2002) (reservations to ICCPR); *State v. Phillips*, 74 Ohio St. 3d 72, 103–04 (Ohio 1995) (noting that the U.S. approved the Charter of the Organization of American States with a reservation “that none of its provisions shall be considered as limiting the powers of the several states with respect to any matters recognized under the Constitution as being within the reserved powers of the several states”) (internal citations and quotations omitted); *People v. Cook*, 39 Cal. 4th 566, 620 (Cal. 2006) (reservations to ICCPR); *People v. Brown*, 33 Cal. 4th 382, 403–04 (Cal. 2004) (same). *But see* *Servin v. State*, 117 Nev. 775, 794–95 (Nev. 2001) (Rose, J., concurring) (raising concerns about the validity of a reservation to the ICCPR regarding the execution of juveniles); *Domingues v. State*, 114 Nev. 783, 786–87 (Nev. 1998) (Rose, J., dissenting) (insisting in a juvenile death penalty decision that the defendant's case be remanded to the lower court for a determination of the validity of a Senate reservation to the ICCPR).

18 *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.”). See also Maria Foscarinis, *Realizing Domestic Social Justice Through International Human Rights: Part II: Advocating for the Human Right to Housing: Notes from the United States*, 30 N.Y.U. REV. L. & SOC. CHANGE 447, 478 n.204 (2006).

19 Janet M. Hostetler, *Realizing Domestic Social Justice Through International Human Rights: Part II: Testing Human Rights: The Impact of High-Stakes Tests on English Language Learners' Right to Education in New York City*, 30 N.Y.U. REV. L. & SOC. CHANGE 483, 492–93, 493 n.53 (2006) (citing Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331).

20 BLACK'S LAW DICTIONARY 162 (17th ed. 1996).

21 Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 A.J.I.L. 757, 758 (2001).

22 Foscarinis, *supra* note 18, at 478 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); Restatement (Third) of Foreign Relations Law of the United States 111 (1987)). See also Restatement (Third) of Foreign Relations Law 102(2) (1986).

23 Restatement (Third) of Foreign Relations Law of the United States 111; see also *The Paquete Habana*, 175 U.S. at 700. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

24 See, e.g., *White*, *supra* note 16, at 973 (“State appellate courts, in applying state law, are free to utilize international treaty provisions and international law in making” decisions as to the content of constitutional guarantees).

25 *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); *Am. Nat'l Life Ins. Co. v. Fair Employment & Housing Comm.*, 610 P.2d 436, 442 n.4 (Cal. 1982); *In re White*, 158 Cal. Rptr. 562, 567 n.5 (Cal. Ct. App. 1979); *Boehm v. Superior Court*, 223 Cal. Rptr. 716, 721 (Cal. Ct. App. 1986).

- ▶ A Maryland Supreme Court relying heavily on the Nuremberg Code to find a greater duty toward subjects for researchers conducting non-therapeutic programs;²⁶
- ▶ A Missouri Supreme Court decision citing the International Convention on the Rights of the Child (CRC), among other grounds, in striking down the juvenile death penalty;²⁷
- ▶ The New Hampshire Supreme Court relying on the ICCPR and the ICESCR in its interpretation of parental rights under the state constitution;²⁸
- ▶ New York courts invoking the UDHR in cases involving the rights to work and to strike, a transnational discovery dispute, and the act of state doctrine;²⁹
- ▶ The Oregon Supreme Court looking to the UDHR, ICCPR, and European Convention to interpret the meaning of the state constitution's provision on the treatment of prisoners;³⁰
- ▶ A Pennsylvania trial court reviewing the state's failure to provide a 15-year-old defendant with schooling while in custody in light of the UDHR;³¹
- ▶ The Utah Supreme Court using the ICCPR to help define constitutional standards for the treatment of prisoners;³²
- ▶ Minnesota courts noting that a violation of the Vienna Convention on Consular Relations can be used to determine whether inculpatory statements were given knowingly and voluntarily;³³
- ▶ The West Virginia Supreme Court invoking the UDHR to review the financing scheme for public schools and to define the right to education;³⁴
- ▶ A concurring opinion in a Montana Supreme Court case recognizing that the state's constitution was steeped in a history of human rights declaration 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;³⁵
- ▶ Dissenting Michigan Supreme Court opinions invoking the ICCPR to interpret the meaning of the Michigan constitution's double jeopardy clause and citing the UDHR to interpret the meaning of the establishment clause;³⁶
- ▶ Dissenting and concurring Nevada Supreme Court opinions arguing that customary international law prohibits the execution of minors and invoking the ICCPR to challenge the juvenile death penalty;³⁷ and
- ▶ More than 30 different California Supreme Court cases have addressed international human rights law in the context of death penalty cases since the last report. Defendants in these cases generally have argued that international law prohibits the death penalty because the United

26 Grimes v. Kennedy Krieger Inst., 782 A.2d 807, 835 (Md. 2001).

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

28 State v. Robert H., 393 A.2d 1387, 1389 (N.H. 1978), *overruled in part by* In re Craig T., 800 A.2d 819, 820 (N.H. 2002).

29 Wilson v. Hacker, 101 N.Y.S.2d 461, 472-73 (N.Y. Sup. Ct. 1950); Jamur Prod. Corp. 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. Surrog. Ct. 1979); Beck v. Mfrs. Hanover Trust Co., 481 N.Y.S.2d 211, 215 (N.Y. Sup. Ct. 1984).

30 Sterling v. Cupp, 625 P.2d 123, 131 (Or. 1981); *see also id.* at 131 n.21.

31 Commonwealth v. Sadler, No. Nos. 1214-16, 1979 WL 139269, 3 Phila. Co. Rptr. 316 (Pa. Com. Pl. Dec. 10, 1979), *reversed by* Commonwealth v. Sadler, 301 Pa. Super. 228 (Pa. Super. 1982).

32 Bott v. DeLand, 922 P.2d 732 (Utah 1996), *overruled in part by* Spackman v. Bd. of Educ., 16 P.3d 533 (Utah 2000).

33 State v. Morales-Mulato, 744 N.W.2d 679, 685 (Minn. Ct. App. 2008).

34 Pauley v. Kelly, 255 S.E.2d 859, 864 (W. Va. 1979).

35 Snetsinger v. Montana Univ., 104 P.3d 445 (Mont. 2004) (Nelson, J., concurring).

36 State v. Davis, 695 N.W.2d 45, 54-55 (Mich. 2005) (Kelly, J., dissenting); Sheridan Road Baptist Church v. Michigan, 426 Mich. 462, 516 (Mich. 1986) (Riley, J., dissenting).

37 Servin v. State, 32 P.3d 1277, 1290 (Nev. 2001) (Rose, J., concurring); Domingues v. State, 961 P.2d 1279, 1280 (Nev. 1998) (Rose, J., & Springer, C.J., dissenting).

States is a signatory to a particular treaty or that the death penalty statute itself is contrary to international norms of humanity and decency, and therefore violates the Eighth and Fourteenth Amendments.³⁸ The court continues to reject both of these claims.³⁹

These decisions—described in further detail in the body of this report—use human rights law as persuasive authority in interpreting state constitutions, statutes, and common law.

This report uses the following abbreviations:

- ▶ American Convention: American Convention on Human Rights
- ▶ American Declaration: American Declaration on the Rights and Duties of Man
- ▶ CAT: Convention Against Torture
- ▶ CEDAW: Convention on the Elimination of Discrimination Against Women
- ▶ CERD: International Convention on the Elimination of All Forms of Racial Discrimination
- ▶ CRC: International Convention on the Rights of the Child
- ▶ European Convention: European Convention for the Protection of Human Rights and Fundamental Freedoms
- ▶ Hague Convention: Hague Convention on the Civil Aspects of International Child Abduction
- ▶ ICCPR: International Covenant on Civil and Political Rights
- ▶ ICESCR: International Covenant on Economic, Social, and Cultural Rights
- ▶ UDHR: Universal Declaration of Human Rights
- ▶ UNHRC: United Nations Human Rights Committee
- ▶ VCCR: Vienna Convention on Consular Relations

38 See, e.g., *People v. Hamilton*, 200 P.3d 898, 971 (Cal. 2009); *People v. Bennett*, 199 P.3d 535, 573 (Cal. 2009); *People v. Dykes*, No. S050851, 2009 WL 1651345 at *61 (Cal. June 15, 2009); *People v. Lindberg*, 190 P.3d 664, 704 (Cal. 2008).

39 See *People v. Bennett*, 199 P.3d at 573.

Conclusion

Recommendations for a State Court Human Rights Strategy

This survey of state court cases reveals that courts have most frequently addressed international human rights in death penalty cases, when defendants argue that the ICCPR or customary international law prohibits capital punishment. Other than in the juvenile context, these arguments have proven largely unsuccessful. 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.”⁶⁵³ Scholars have repeatedly argued, “This ‘indirect incorporation’ of international human rights law continues to be a promising approach warranting greater attention and increased use by human rights advocates.”⁶⁵⁴

State court litigators should therefore consider using international human rights standards as interpretive guides for state constitutional and statutory rights whenever strategically possible. Invoking international human rights law as an interpretive guide, while relying on state law for the rule of decision, has several advantages. It insulates decisions from review by the U.S. Supreme Court and makes them more resistant to removal to federal court.⁶⁵⁵ 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 important 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, expanding opportunity for all Americans.

653 Strossen, *supra* note 8, at 824.

654 Richard B. Lillich, *International Human Rights Law in U.S. Courts*, 2 J. TRANSNAT’L L. & POL’Y 1, 19 (1993); see also Martha F. Davis, *Lecture: Int’l Hum. Rts. & U.S. Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417, 428–31 (2000); Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & Soc. Change 359 (2006).

655 See, e.g., Paul Hoffman, *The Application of International Human Rights Law in State Courts: A View from California*, 18 INT’L LAWYER 61 (1984) (“Another advantage of using human rights law as an interpretive device rather than arguing that it is binding on the state court as treaty or customary law is that a California decision which adopts a human rights norm to interpret California law cannot be reviewed by the U.S. Supreme Court; it is insulated from Supreme Court review because there is an ‘independent state ground’ for the decision.”).



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